O/a 11-5 & 5

SUPREME COURT OF FLORIDA

THE CELOTEX CORPORATION :

Petitioner, :

vs. : CASE NO. 66,383

LEONARD H. PICKETT, SR., and LINDA N. PICKETT, his wife, :

Respondent. :

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

REPLY BRIEF ON THE MERITS OF APPELLANT THE CELOTEX CORPORATION

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ISSUE PRESENTED

WHETHER PUNITIVE DAMAGES SHOULD BE AWARDED AGAINST CELOTEX AS A STATUTORY SUCCESSOR CORPORATION FOR A PREDECESSOR'S ACTIONS.

SUMMARY OF ARGUMENT

Plaintiff's brief misapplies Florida merger cases which have never addressed the liability of a successor corporation for punitive damages. Plaintiff and Amicus also misstate the corporate history by which the original Philip Carey was acquired by Celotex since it was not solely through mergers, but also involved a sale of assets. Plaintiff grossly mischaracterizes the record by suggesting the jury was permitted to consider if Celotex had a sufficient identity to be held liable for Philip Carey's actions, when the verdict required the entry of punitive damages against Celotex if the jury found Philip Carey guilty of wrongdoing.

Finally, Plaintiff and Amicus' discussions of out-of-state decisions not only rely on this inaccurate version of the corporate history, but ignore the posture of this case (a jury trial when Plaintiff had the burden of proof) as contrasted with cases denying Celotex's motions for summary judgment.

ARGUMENT

PUNITIVE DAMAGES SHOULD NOT BE AWARDED AGAINST CELOTEX AS A STATUTORY SUCCESSOR CORPORATION FOR A PREDECESSOR'S ACTIONS.

A. The punitive damage award against Celotex contravenes the purpose of such damages in Florida.

The entire beginning of Plaintiff's brief consists of Plaintiff repeatedly stating that since Celotex merged with Panacon (Philip Carey), it should be responsible for all of Philip Carey's liabilities. (Pl.Br. 15-29). 1/ Plaintiff repeatedly cites merger cases which never address the punitive damage question and asks this Court without analysis to hold that there should be no difference between normal liabilities and punitive damage liability. This is the same mistake that the First District made and the apparent reason this Court accepted the First District's decision as being in conflict with its prior decisions. Quite simply, the Plaintiff continues to urge misapplication of prior case law regarding mergers to punitive damage liabilities - a subject not previously addressed by this Court.

Contrary to Plaintiffs' suggestion, this Court's recent decision in Winn-Dixie Stores, Inc. v. Robinson, _____ So.2d _____ (Fla. 1983)(10 FLW 338) does not mitigate the

1/ Celotex uses the references set forth at page 1 of its initial brief, with the additions that its initial brief is designated "Celotex Br." and Plaintiff's brief is designated "Pl. Br."

application of Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981) to this case. In Winn-Dixie, this Court affirmed the jury finding that the company itself was directly liable for punitive damages. Although the specific basis for direct liability is not stated, the facts in the opinion note that the plaintiff was charged with theft, a charge which was subsequently dropped, and that Winn-Dixie was found guilty by the jury of malicious prosecution and false imprisonment. Furthermore, the underlying Fourth District opinion indicates that Winn-Dixie had promulgated corporate procedures for dealing with shoplifters. 2/ Thus, while punitive damages may be awarded against a company whose policies and actions pursuant to those policies have resulted in outrageous conduct (Winn-Dixie) or whose managing agent has committed a tort warranting punitive damages (Bankers Multiple Line Insurance Co. v. Farish, 464 So.2d 530 (Fla. 1985)), there is still a requirement of some fault which foreseeably contributes to the plaintiff's injury in cases where neither the company nor its management directly participate in the wrong. Mercury Motors, supra. Again, Plaintiff can show no fault on the part of Celotex that contributed

2/ As this Court's opinion suggests and the Fourth District opinion below confirms, there was apparently no suggestion made by Winn-Dixie that it should not be held directly liable for punitive damages, or any attempt to distinguish itself from its employees. Thus, it apparently faced the same problem with having not raised the Mercury Motors issue below that was presented in Dorsey v. Honda Motor Co., 670 F.2d 21 (5th Cir. 1982), cert. denied, 459 US 880 (1982).

contributed in any way to his injury and there is no way in which awarding punitive damages against Celotex equates liability with fault. See, Insurance Company of North American v. Pasakarnis, 451 So.2d 447, 452 (Fla. 1984).

Celotex stands by its analysis that holding it liable for punitive damages is analogous to insuring Philip Carey for its own wrongful conduct (Celotex Br. 16). Plaintiff's "response" to this point and throughout his brief ignores the corporate history of Philip Carey by continuing to assume that the original, "old" Philip Carey evolved into Panacon and then Celotex purely through a series of corporate mergers. However, this is simply not the case. After Glen Alden purchased the old Philip Carey in 1967 and merged it into Glen Alden, Glen Alden chartered another company, whose name was changed to "Philip Carey." It was this "new" Philip Carey to which Glen Alden transferred assets and liabilities. It was this new Philip Carey that then merged with Briggs to become Panacon, which later merged with Celotex. In re Related Asbestos Cases, 566 F.Supp. 818 (N.D. Calif. 1983). Thus, any liabilities (compensatory or punitive) which Plaintiff asserts against the old Philip Carey by virtue of its relationship with Dr. Mancuso were not transferred to the Celotex corporation purely through a series of mergers, but through at least one transfer of assets and liabilities. Thus, to hold that the new Philip Carey could assume punitive damage liabilities which were then

transferred through mergers to Panacon and Celotex is identical to saying that Celotex could insure the old Philip Carey for punitive damages. Even assuming arguendo that such an assumption of liabilities could extend to punitive damage liability as between old Philip Carey and Celotex, Plaintiff can cite no authority suggesting that such an assumption should inure to the benefit of third parties so as to enable them to sue Celotex directly for punitive damages.

Plaintiff's apparent recognition of the impropriety of not even allowing the jury to consider whether Celotex should be liable for the acts of Philip Carey, as distinguished from responsibility on its own behalf, is evidenced by Plaintiff's incredible assertion for the first time in this Court that the jury was given the opportunity to render a verdict on Celotex' behalf if it found a lack of substantial identity of Celotex with Philip Carey. Whether the evidence adduced as to Philip Carey would be sufficient to support punitive damages against Philip Carey is not the issue in this Court. Yet, Plaintiff spends pages in his statement of facts citing what he asserts was the egregious conduct of Philip Carey and then suggesting that "the jury had every opportunity to consider whether Celotex had presented sufficient mitigating evidence to avoid punitive damages." (Pl. Br. 12). However, Plaintiff's suggestion that the jury had the option of not awarding punitive damages against Celotex once it found

Philip Carey guilty of conduct warranting punitive damages is simply false. The Plaintiff's jury verdict form used by the trial judge guaranteed that once Philip Carey was found to have acted so as to warrant punitive damages, the jury was then required to answer a question which simply asked the amount of punitive damages to be assessed against Celotex (Celotex Br. 5, R. 588). Quite simply, once the jury determined Philip Carey's conduct warranted punitive damages, they were required to fix an amount to be awarded against Celotex. The jury was not asked to consider if Celotex had sufficient identity with Philip Carey to be liable for punitive damages or had continued the wrongful conduct of Philip Carey.

Plaintiff's belated suggestion that the standard jury instructions (stating that punitive damages are awarded in the jury's discretion) would have allowed them to award "zero" once they had determined Plaintiff was entitled to punitive damages is nonsense. Had the jury determined Plaintiff was entitled to punitive damages against Celotex under special verdict 8(a), then to have awarded no punitive damages under 8(b) would have been inconsistent and would have required a reversal. 3/ Incredibly, Plaintiff's entire

3/ See, e.g. Gonzalez v. Westinghouse Electric Corporation, 463 So.2d 1229 (Fla. 4th DCA 1985)(zero verdict on husband's derivative claim inconsistent with main verdict); Raffa v. Dania Bank, 372 So.2d 1173 (Fla. 4th DCA 1979)(verdict awarding no compensatory damages and $25,000 punitive damages reversed as inconsistent).

argument rests on a series of cases awarding zero damages which he recognizes were reversed as erroneous (Pl. Br. 38-39). It is ludicrous for Plaintiff to suggest that the jury considered Celotex's liability because it did not enter an inconsistent verdict. 4/

By contrast, Celotex's requested verdict form would have included the question of Celotex's liability which was assumed in the verdict form's first question. That is, Celotex proposed three questions instead of two. The first question would have determined if Philip Carey's conduct warranted punitive damages. The second question asked if Celotex was a continuation of Philip Carey to the extent that punitive damages were warranted as a punishment to Celotex and as a deterrent to others. The third question asked for

4/ Plaintiff's jury argument flounders even further when one examines the individual bases on which it is built. For example, Plaintiff selectively quotes a statement that "the directors came" and suggests the Philip Carey directors became directors of Celotex (Pl. 5, T. 3285, line 16). That witness testified unequivocally that both the officers and directors changed drastically upon Celotex's acquisition of Panacon (T. 3286, lines 4-6). Furthermore, as Plaintiff well knows from the affidavit of Celotex's current secretary submitted in this case and from Related Asbestos Cases, none of the directors of Panacon became directors of Celotex after the merger of Panacon into Celotex - Celotex continued to operate with its former board of directors and officers. (Celotex 7, SR. 45). Plaintiff's concern over the impropriety of the punitive damage award is further evidenced by his attempt to justify it as additional compensatory damages (Pl. Br. 4), and mentioning cancer even though the evidence demonstrated Plaintiff had no cancer.

the amount of punitive damages against Philip Carey (SR. 60, ¶14-16). Contrary to Plaintiff's suggestion (Pl. Br. 13), there is nothing confusing about Celotex's verdict form regarding this punitive damages point. Finally, the argument (Pl. Br. 13) that Celotex in closing argument urged the jury not to impose punitive damages on the grounds that it would be unfair to Celotex overlooks the fact that closing arguments in this case were given before the trial court announced which verdict form it would use (see closing arguments at T. 4378-4529, verdict form conference at T. 4554-4573). Consequently, any suggestion that under Plaintiff's verdict form the jury considered Celotex's liability for punitive damages on any basis other than that it was automatic if it found Philip Carey liable is a gross mischaracterization of the record in this case.

Ironically, Plaintiff flip-flops between arguing that a successor corporation by merger must always be liable for punitive damages and stating that "it is for the jury to decide, as a matter of the exercise of its discretion, whether the defendant has presented sufficient mitigating evidence (change management and practices, etc.) . . . ." (Pl. Br. 31). Of course, in the instant case, by virtue of Plaintiff's verdict form, the jury was not given the opportunity to evaluate any differences between Celotex and Philip Carey. It is seriously misleading for Plaintiff to suggest that after having found Philip Carey guilty of

intentional conduct it could have entered a zero punitive damage award against Celotex on the verdict form "as it did for Celotex's co-defendant", when Plaintiff knows full well that the reason zero damages were awarded against the co-defendant is because the jury answered the first half of the question as to liability for punitive damages in the negative as to this co-defendant. (Pl. Br. 31-32).

Plaintiff's suggestion that punitive damages against a successor by merger serve some public policy by requiring acquiring corporations to closely examine alleged wrongdoers is specious for two reasons. First, Plaintiff himself has pointed out numerous other methods in which the same result of transferring assets and eliminating the existence of the old corporation could be achieved with impunity by the acquiring corporation (Pl.Br. 21-26). Second, in the instant case, Plaintiff introduced no evidence in the trial court suggesting that Celotex should have become aware of the alleged wrongdoing when it acquired Panacon in 1972. Quite simply, the undisputed facts of Celotex's arm's length purchase of Panacon dispel any suggestion in the instant case about one corporation setting up another corporation and merging them to avoid punitive damage liability. Such an attempt to defraud creditors would obviously be addressed by a perfunctory piercing of the corporate veil, but it is just as obvious that such an argument has no applicability in this case.

B. The well-reasoned authority from other jurisdictions is persuasive that Celotex should not be held liable for punitive damages.

Plaintiff's and Amicus' recitation of out-of-state decisions misses the mark for several reasons. First, the recent cases they cite, Krull v. Celotex Corporation, No. 83-C-9635, (N.D. Ill. filed May 31, 1985), Wall v. Owens-Corning Fiberglas Corporation, 602 F.Supp. 252 (N.D. Tex. 1985), and Sheppard v. A.C. & S. Company, Inc., 484 At.2d 521 (Del. Super. 1984) are all cases which simply deny Celotex's motions for summary judgment on punitive damages based on its status as a successor by merger. At most, these cases stand for the proposition that Celotex had not met its burden of eliminating the existence of any genuine fact as to its potential punitive liability. They clearly do not stand for the proposition that a plaintiff is entitled to withstand a motion for directed verdict at trial when the burden of proof has shifted to the plaintiff, and they most certainly cannot be read to hold that Celotex is automatically liable as a matter of law for punitive damages for the torts of Philip Carey, as would be necessary to support the position of the Plaintiff in this case. Unlike those cases and Hanlon v. Johns-Manville Sales Corporation, 599 F.Supp. 376 (N.D. Iowa 1984), in the instant case, punitive damages were not considered in a summary judgment context, but at trial where

it was Plaintiff's burden to prove his entitlement to punitive damages. Celotex reiterates the argument in its initial brief that Plaintiff's proof fell far short of establishing sufficient identity between Philip Carey and Celotex to even present this issue to the jury. But assuming arguendo Plaintiff presented enough evidence to avoid a directed verdict, it is clear that the jury was never permitted to consider the sufficient identity question. 5/

Furthermore, neither Krull, Wall, nor Sheppard correctly states the corporate history in that all omit the fact that old Philip Carey did not become a part of Celotex solely through a series of mergers. Thus, these cases and Amicus commit the same error the First District did in erroneously and incompletely describing the corporate history of Philip Carey and Celotex. By contrast, Related Asbestos Cases correctly described this history, which included a transfer of assets and liabilities from Glen Alden to the new Philip Carey.

Perhaps even more telling is the fact that Wall does not even mention Related Asbestos Cases, whereas Krull merely mentions it without elaboration, as does the Amicus in this

5/ Although continuing to ignore the significance of the holding, Plaintiff and now Amicus cite Martin v. Johns-Manville Corporation, 469 At.2d 655 (Pa. Super 1983), which recognizes that there should be no punitive damages against Celotex unless Plaintiff can prove a sufficient identity with Philip Carey. See Celotex Br. 21-22.

case. Plaintiff's effort (Pl. Br. 34-35) to distinguish Related Asbestos Cases is not persuasive. As Celotex noted, there is no significant difference between California and Florida law on this point of punitive damages (Celotex Br. 19-20). Plaintiff's suggestion that he submitted evidence of Pechstein's and Kreig's "direct involvement" in management decisions regarding asbestos is absurd since he introduced no evidence into the record showing that either of these men had any management or decision making responsibility; and, as Related Asbestos notes, it is clear that Pechstein did not, since he was merely an assistant secretary and never a member of the board of directors of old Philip Carey. Related Asbestos Cases, at 824.

CONCLUSION

For the foregoing reasons, the final judgment as to punitive damages entered by the trial court should be reversed, with directions to enter final judgment for Celotex

on Plaintiff's claim for punitive damages or, alternatively, to remand for a new trial on liability for punitive damages.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to WAYNE HOGAN, ESQ., 804 Blackstone Building, Jacksonville, Florida 32202, by United States Mail this 30th day of July, 1984.

Attorney

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