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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

FIBREBOARD CORPORATION,

Petitioner,

vs.

SAMUEL KERNESS and
BLANCHE KERNESS, his wife,

Respondents.

Case No: 79,165

District Court of Appeal
3rd District - No. 91-894

ACADEMY OF FLORIDA TRIAL LAWYERS' AMICUS CURIAE BRIEF SUPPORTING POSITION OF RESPONDENTS

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PRELIMINARY STATEMENT

The Academy of Florida Trial Lawyers files this Brief of Amicus Curiae in support of Respondents Samuel Kerness and Blanche Kerness.

Respondent Kerness is referred to as Respondent or Kerness.

Petitioner Fibreboard Corporation is referred to as Fibreboard or Petitioner.

All emphasis in quoted material is supplied unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae accepts the Statement of the Case and Facts as set forth in Respondents' Response Brief.

ISSUES ON APPEAL

I. WHETHER THE LOWER COURT RULING PROPERLY AND LOGICALLY CONSTRUED AND APPLIED THE FLORIDA LAW GOVERNING LONG-ARM JURISDICTION.

II. WHETHER FEDERAL AND FLORIDA CONSTITUTIONAL REQUIREMENTS OF DUE PROCESS ARE SATISFIED WHEN LONG-ARM JURISDICTION IS ASSERTED OVER FIBREBOARD UNDER THE STATUTE IN EFFECT AS OF THE DATE THE CAUSE OF ACTION ACCRUED.

SUMMARY OF THE ARGUMENT

The Third District Court of Appeals decision was in accordance with Florida law and policy, Petitioner is subject to Florida jurisdiction under Fla.Stat. 48.193 (1984) as amended. Long-Arm jurisdiction in asbestos litigation must be determined as of the time the cause of action accrued. As such, the statute in effect as of the date of accrual, Fla.Stat. 48.193 (1984), applies. For purposes of asbestos litigation the time the cause of action accrues is at the time the injury is diagnosed. This analysis is consistent with the terms of the statute, is fair to the Petitioner as it is in the jurisdiction and is capable of maintaining a full defense, and further conforms to several significant policy considerations including this courts interest in protecting the citizenry of Florida.

The Third District Court of Appeals decision meets the due process requirements of the Florida and Federal Constitution as Petitioner at the time the injury was discovered did business in Florida, and traditional notions of fair play and substantial justice are not offended by holding Respondent liable for its past acts by applying Fla.Stat. 48.193 (1984) as amended. The time to determine long-arm jurisdiction is at the time the cause of action accrued not at the time the product was manufactured and distributed. Amicus Curiae requests that this court in order to provide fairness to the victims of asbestos related diseases, align traditional principles of tort law to medical realities and provide access to our courts, and extend Florida Statute 48.193 (1984) as

amended to the full limits of long-arm jurisdiction and due process.

ARGUMENT

I. THE LOWER COURT RULING PROPERLY AND LOGICALLY CONSTRUED AND APPLIED FLORIDA LAW GOVERNING LONG-ARM JURISDICTION.

The Academy of Florida Trial Lawyers' (the "Academy") contends that the Third District Court of Appeals ruling subjecting Fibreboard to inpersonam jurisdiction under Fla.Stat., 48.193 (1984) as amended was in accordance with Florida Law and public policy. The applicable long-arm statute is the statute in effect as of the date the cause of action accrues. In the case at bar, the applicable statute is §48.193 (1984) as amended. The Academy disputes Fibreboard's assertion that the ruling of the lower court was induced by a "confusion of logic and language appearing in the decision cited by the Third District Court of Appeals in its opinion." ("Initial Brief at page 5"). Fibreboard's assertion attempts to superimpose Fibreboard's limited application and construction of Florida long-arm jurisdiction over the Third District Court of Appeals decision and further attempts to create by supposition and by the application of inverse logic an impractical, unfair and unjust result as applied to asbestos litigation.

The Third District Court opinion relies on and applies the Florida general rule of law that Florida Long Arm Statutes are not to be applied to causes of action which accrue prior to the date the amendments or additions to the Florida Long-Arm Statute §48.193 (1984) became effective. American Motors Corp. vs. Abrahantes, 474 So.2d 271, (Fla. 3d DCA 1985). MacMillan-Bloedel vs. Canada, 391 So.2d 749, (Fla. 5th DCA 1980), Young v. Altenhaus, 472 So.2d 1152

(Fla. 1985). American Motors relies on the long established precedent in Florida that Statutes are to be applied prospectively to causes of action that accrue after its effective date. The logical extension and progression of American Motors is that causes of action that accrue subsequent to the enactment of Section 48.193 (1984) can predicate long-arm jurisdiction on said Statute.

Of particular importance, therefore, is the issue of when does a cause of action accrue for the negligent manufacturing and distribution of asbestos. This issue has been answered by this court in Celotex v. Meehan, 523 So.2d 141 (Fla. 1988) wherein this Court ruled that the last act necessary to establish asbestos liability was the discovery in Florida of the injury. Wildenberg v. Eagle-Picher Ind., Inc., 645 F.Supp. 29 (S.D.Fla. 1986). Also see Dilardebo v. Keene Corporation, 431 So.2d 620 (Fla. 3d DCA 1983). The Meehan decision regarding the discovery of injury as the last act necessary for liability, is the only logical rule given the medical uncertainties involved in asbestos litigation. The Academy is of the position as recognized by this court in Meehan that a cause of action for asbestos injury must be found to accrue at the time of the diagnosis of said injury. First, the latency period for asbestos related diseases may extend over many years. Second, the actual inhalation of the fibers is difficult to pinpoint both in terms of time and location. Further, the determination of the manufacture and distribution of the asbestos product as applied to the victim is difficult. Finally, since asbestos related diseases develop over a period of many years the

disease is incapable of being diagnosed upon initial contact with the asbestos fibre. As such to determine that the cause of action accrued prior to diagnosis would bar the majority of victims from seeking legal redress through the courts for their asbestos related injuries. Meehan at 145.

Both the Florida Legislature and Florida Courts have an express policy for its long arm statutes to reach as far as the federal constitution permits. Delray Beach Aviation Corp. vs. Mooney Air Craft, Inc., C.A., 332 F.2d 135 (1964) cert. denied 85 S.Ct. 262, 379 U.S. 915 (1964). Finding that the cause of action accrues as of the time of diagnosis of asbestos related diseases further serves this "Long-Arm" policy and allows the Courts of this State to better protect its citizenry. The asbestos industry, including Petitioner, should not be heard to complain of this "Long-Arm" policy as it created the underlying evil that has brought forward this issue today. By finding that an asbestos cause of action accrues as of the time of diagnosis such that Fla.Stat. 48.193 (1984) as amended applies, this Court will be fulfilling its continuing responsibility to its citizenry to modernize judicial principles of tort law so as to insure that the law remains both fair and realistic as society and technology changes. Conley v. Boyle Drug Company, 570 So.2d 275 (Fla. 1990).

Despite the prevailing legal precedent and policy grounds to support the Third District Court of Appeals decision, Petitioner begs this Court to adopt the limited ruling in Conley v. Boyle Drug Company, supra that the applicable Long-Arm Statute is to be

determined as of the time the product was manufactured and distributed. The Academy submits that to adopt the holding of Conley to the facts of this case would be unfair as to the realities of asbestos related diseases and would extend Conley beyond the decisions intent. Conley in itself stands for the proposition that this Court must be prepared to modernize Florida Law to deal with the realities of modern industry and medicine. The Meehan and Dilardebo decisions finding that the cause of action for asbestos litigation accrues as of the time of discovery distinguishes Conley from the case at bar as it delineates the time of injury as the time of diagnosis. To apply Conley in its strictest terms to asbestos litigation creates a misapplication of Florida's Long-Arm Statute, Fla.Stat. 48.193(1)(f)(2) (1984). Fla.Stat.48.193(1)(f)(2) (1984) as amended establishes long-arm jurisdiction over a defendant "at or about the time of the injury". As such, the court must look at the time of the injury, in asbestos related diseases, the time of the injury is the time of diagnosis. Meehan at 145 and Dilardebo at 622. If at the time of diagnosis of the asbestos injury, Fibreboard was manufacturing and distributing products in Florida, then Fibreboard is subject to the long-arm jurisdiction of Florida Courts. Such a result is the only reasonable application of Fla. Stat. 48.193(1)(F)(2)(1984) in light of the medical realities of asbestos related diseases previously addressed.

In consideration of the foregoing, the Third District Court of Appeals decision in the case at bar was a proper and logical

analysis of the case law and statutes interpreting and applying Fla.Stat., 48.193 (1984). The long-arm statute in effect when the cause of action accrues is the law of Florida. Asbestos actions accrue at the time of injury as such no retroactive application as alleged by Fibreboard results. The Academy submits that for this Court to adopt Fibreboard's theory of application of Florida's Long-Arm Statute would create an unfair precedent as applied to the medical reality of asbestos related diseases, would be unfair to the victims of asbestos related diseases, and would allow the creator and purveyor of this evil to avoid responsibility for its actions.

II. THE FEDERAL AND FLORIDA CONSTITUTIONAL REQUIREMENTS OF DUE PROCESS ARE SATISFIED WHEN LONG-ARM JURSIDICTION IS ASSERTED OVER FIBREBOARD UNDER THE STATUTE IN EFFECT AS OF THE DATE THE CAUSE OF ACTION ACCRUED.

Fibreboard claims that it will be denied due process if jurisdiction is asserted over it by applying the long-arm statute in effect at the time the injury in diagnosed. Ultimately, such a claim falls short of the mark as in the final analysis Fibreboard is afforded a full and unconditional opportunity to contest jurisdiction and to fully defend the lawsuit. As discussed earlier, the Florida Legislature and Florida Courts have expressly indicated their desire to have long-arm statues to reach as far as the federal constitution permits. Delray Beach at 137 and 138. In exercising jurisdiction over a foreign corporation the Courts must take into account general fairness to the corporation to satisfy the due process requirements of the United States Constitution,

Amendments V and XIV. White vs. Pepsico, Inc., 568 So.2d 886 (Fla. 1990), Perkins vs. Banquet Consolidated Mining Co., 342 U.S. 437, 72 S.Ct. 413 (1952). The Florida Long-Arm Statutes are only limited by their terms and the due process requirement that a person or entity have certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Becham vs. Holburn, 330 So.2d 101 (Fla. 1976). Accordingly, the Florida Constitutional due process requirements under Article 1, subsection 9, are satisfied provided the Federal Constitutional requirements under Article 5 and 11 are met.

In the case at bar, the issue before the court is whether subjecting Fibreboard to long-arm jurisdiction based on the time the cause of action accrued offends traditional notions of fair play and substantial justice. International Shoe Co. vs. Washington, 326 U.S. 310 66 S.Ct. 154 (1945). In Florida, causes of action for asbestos accrue at the time the injury is discovered. Meehan at 145. Dilardebo vs. Keene Corporation, 431 So.2d 620, 622 (Fla. 3d DCA 1983). The Academy asserts that traditional notions of fair play and substantial justice are not offended by asserting jurisdiction over Fibreboard under Fla.Stat. 48.193 (1984) as amended even if it did not do business in Florida at the time the product was distributed and manufactured, but was doing business in Florida at the time the cause of action accrued.

At the time Fibreboard commenced doing business in Florida, it was foreseeable that it could be held liable in Florida for its

pre-existing distribution of the asbestos. Rosa v. Sils, 493 So.2d 1137 (Fla. 4th DCA 1986). Hanson v. Deckla, 357 U.S. 235, 78. S.Ct. 1228, (1958). By doing business in Florida, Fibreboard submitted itself to the jurisdiction of the Florida Courts for its acts at that time as well as future acts. In doing business in Florida, Fibreboard's conduct and connection with Florida are such that Fibreboard should reasonably have anticipating having to defend itself and its products before Florida Courts. Aetna Life and Casualty vs. Thermo Disc, Inc., 488 So.2d 83, 88 (Fla. 1st DCA 1980). The product itself is transitory in nature once it was put in the stream of commerce by Fibreboard. There was a substantial likelihood that the product would be transported to Florida in human lungs and subsequently cause injury. Fibreboard reasonably could expect to be held responsible in this jurisdiction to those who are diagnosed in Florida as having an asbestos related disease.

Furthermore, jurisdiction is appropriate over Fibreboard and due process is satisfied by using the long-arm statute in effect when the cause of action accrues when the other factors delineated by the United States Supreme Court are applied. Worldwide Volkswagen Corp. vs. Woodsen, 444 U.S. 286, 100 S.Ct. 559 (1980). First, there is no burden on Fibreboard to defend in Florida inasmuch as it does business in the State of Florida. Second, Florida has an interest in adjudicating a dispute because both parties are situated in Florida and the Florida legislature specifically broadened the long-arm statute 48.193 (1984) dropping the connexity requirement. Respondents' have an interest in

obtaining convenient and effective relief which can only take place in Florida inasmuch as Respondents' now reside in Florida. By litigating this issue in Florida, the judicial system's interest in obtaining the most efficient resolution of the controversy will occur. Finally the public has an interest in litigating this issue in Florida to right the wrongs caused by asbestos, protecting the injured citizenry who suffer from asbestos related diseases, and permitting freedom of movement into this jurisdiction.

Asbestos related diseases, its human fall out, and its medical realities, justify this Court applying the limits of long arm jursidiction and due process. To do otherwise, would call into question an equally important constitutional mandate granting the citizenry of this state access to courts. Florida Constitution, Article I, Section 21. The purpose of Article 1, Section 21, was to give vitality to the maximum that for every wrong there is a remedy. Holland for Use and Benefit of Williams vs. Mayers, 19 So.2d 709 (1944). Application of the Statute as Petitioner suggests would bar the victims from the courts of this State if the manufacturer was not conducting a parallel business activity in Florida when it distributed the product. The result of such an application is that any future asbestos victim would be subject to the cat and mouse game of proving and fixing the date of manufacture and distribution of the product at the time the manufacturer did business in Florida in the case at bar some 30 years past. Such a test is subject to abuse and manipulation by manufacturers. The Academy urges this court that the only fair

long-arm jursidiction test is to subject the manufacturer to the long-arm jursidiction of Florida Courts under the long-arm statute in effect when the cause of action accrues, being in the case of asbestos litigation, at the time the injury is diagnosed.

CONCLUSION

Based on the foregoing, the Academy requests that this Court affirm the decision of the Third District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response Brief was served by mail this 20 day of March, 1992, on, David M. Lipman, Esquire, 5901 S.W. 74th Street, Suite 304, Miami, Florida 33143, Counsel for Respondent, Blaire & Cole, P.A., Suite 550, 2801 Ponce de Leon Blvd., Coral Gables, Florida 33134 and Louise H. McMurray, P.A., Suite 226, 11430 North Kendall Drive, Miami, Florida 33176, Counsel for Petitioner.

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