IN THE FLORIDA SUPREME COURT

CASE NO. 79,165

FIBREBOARD CORPORATION,

Petitioner,

vs.

SAMUEL KERNESS AND BLANCHE KERNESS,

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THIRD DISTRICT COURT OF APPEAL OF FLORIDA

ANSWER BRIEF ON THE MERITS

DAVID M. LIPMAN

DAVID M. LIPMAN, P.A.

5901 S.W. 74 Street
Suite 304
Miami, Florida 33143-5186
(305) 662-2600

ATTORNEYS FOR RESPONDENTS
SAMUEL AND BLANCHE KERNESS

TABLE OF CONTENTS

Table of Contents
(continued)

TABLE OF CITATIONS

Table of Citations
(continued)

Table of Citations
(continued)

STATEMENT OF THE CASE AND FACTS

Areas of disagreement or omission which merit supplement of Petitioner's Statement of the Case and Facts are set forth:

1. Mr. Kerness worked as a painter in Brooklyn, New York, from 1943 to 1962, during which time he was exposed to and inhaled asbestos fibers from various manufacturers, including Fibreboard Corporation. Fibreboard Corporation sold asbestos products in the state of Florida as early as 1942, during the same time period as Mr. Kerness's asbestos exposure to Fibreboard's products out of state. Fibreboard's Florida sales of asbestos-containing products were identical to those products in New York which resulted in Mr. Kerness' exposure and injury.[1/]

2. In September, 1989, Mr. Kerness, then a Florida resident, was diagnosed in Florida with an asbestos-related disease or injury (¶2, Pg. 2, Complaint).

1/ The evidence presented to the trial court consisted of sworn testimony in the form of depositions. See, Plaintiffs' Response to Defendant Fibreboard Corporation's Motion to Dismiss for Lack of Personal Jurisdiction, Exhibit 2, Deposition of Walter Heape, Pgs. 33-35; Exhibit 3, Deposition of Robert Barsh, Pgs. 75-76, reflecting shipment of Fibreboard's asbestos-containing products to the St. John's Shipyard in Jacksonville, Florida.

This evidence established the distribution and usage of Fibreboard's asbestos products in Florida during the same time period that Mr. Kerness worked with these materials in New York. See, Fibreboard v. Kerness, 590 So.2d 501, 501 n. 2 (Fla. 3rd DCA 1991) ("Plaintiffs provided the trial court with depositions that showed that Fibreboard products were utilized in Florida during the years of 1944-46."). These factual matters were not rebutted by Fibreboard in the proceedings below. See, e.g., Elmex Corp. v. Atlanta Federal Savings and Loan Assoc., 325 So.2d 58 (1st DCA 1976) (setting forth procedure for use of affidavit and other evidence in demonstrating and contesting jurisdiction); Trawick, Fla. Prac. and Proc., §8-16.1 (1990 Edition).

3. Kerness has properly pled Fibreboard's amenability to suit in Florida under either present post-1984 amended 48.193 (long-arm statute in affect when cause of action accrued in 1989) or 48.181 (long-arm statute in affect prior to 1962 when asbestos-containing products were manufactured or distributed):

> Plaintiffs allege that the Defendants have, during the period of 1943, and through and including the present, and at all times material to this cause of action, maintained sufficient contact with the State of Florida to subject them to the jurisdiction of this Court pursuant to Florida Statute 48.181 and/or 48.193,
>
> ¶4, Pg. 4, Complaint[2/]

SUMMARY OF ARGUMENT

This appeal requires this Court to determine: (1) which long-arm statute applies in asbestos cases, the statute in effect when the cause of action accrued, 48.193, or the statute in effect when the asbestos-containing product was manufactured or distributed, 48.181; (2) if 48.181 applies, interpretation of "connexity" in light of recent pronouncements of this Court should then be made; (3) finally, if amended 48.193 applies, the Court may then resolve Fibreboard's constitutional challenge to that present long-arm statute.

The present long-arm statute, §48.193, in effect in 1989 at the time that this cause of action arose, and the prior

---

2/ Respondents have properly alleged jurisdiction under either long-arm statute. Venetian Salami v. Parthenais, 554 So.2d 499, 502 (1989) ("Initially, the plaintiff may seek to obtain jurisdiction over a nonresident defendant by pleading the basis for service in the language of the statute without pleading the supporting facts." [emphasis added] [citations omitted]). See, infra, Pgs. 21-23.

statute, §48.181, which was in effect at the time of Fibreboard's manufacture and distribution of its asbestos products, differ in that "connexity" between the injury and a defendant's in-state activities was required by §48.181 and by §48.193 prior to its amendment in 1984, but is no longer required by §48.193 since the 1984 amendment.

A. This Court should follow the Third District Court's decision below which held that in the unique setting of asbestos litigation involving a long latency period of occupational disease, the cause of action accrues upon diagnosis and the long-arm statute in effect at that time governs a defendant's amenability to suit. Fibreboard is unquestionably subject to Florida's personal jurisdiction under amended §48.193, which was in effect in 1989 when Mr. Kerness was diagnosed as suffering from asbestosis.

The very language of §48.193(1)(f) instructs this Court to examine the nonresident defendant's contacts with the state at the time of injury rather than at the time of the wrongful act. In so doing, causes of action accruing after enactment of the statute, such as in this case, fall within the reach of 48.193(1)(f) and do not constitute a retroactive application.

Further, this Court should decline to extend Conley v. Boyle Drug Co., 570 So.2d 275 (Fla. 1990), to the context of asbestos products liability litigation. Conley held that in a DES case predicated upon market share liability the applicable long-arm statute is the one in effect at the time of the manufacture of the DES. The legal analysis of Conley should be limited to

market share products liability cases, which this case is not. This conforms with Conley as this Court recognized the "inherent differences between asbestos products and the drug DES." Conley, supra, 570 So.2d at 280 n. 6.

B. Alternatively, even if this court extends Conley and finds that §48.181 is the applicable long-arm statute--the long-arm statute in effect at the time of the manufacture and distribution of Fibreboard's asbestos products rather than the long-arm statute in effect at the time of Mr. Kerness's diagnosis--§48.181's connexity requirement is not a bar to personal jurisdiction over Fibreboard as determined by this Court in Davis v. Pyrofax Gas Corp., 492 So.2d 1044 (Fla. 1986). The connexity analysis in Davis, addressing §48.193 prior to its amendment in 1984, is equally applicable to a §48.181 case such as this because the courts in Florida have interpreted the connexity requirement under either statute identically and interchangeably. In interpreting the requirement of connexity, this Court resolved in Davis that if a defendant's business activities in Florida parallel its out of state activities, a plaintiff injured in Florida by a product "purchased" out of state may sue that defendant in Florida.

Fibreboard sold asbestos-containing products in Florida during the time that Mr. Kerness was exposed to these identical products in New York. Mr. Kerness carried those asbestos fibers to Florida embedded in his lungs, and was injured in Florida where he was diagnosed with an asbestos-related illness. Since

Fibreboard's parallel business activity has been satisfied in this case, the §48.181 connexity requirement has been achieved.

C. Asserting jurisdiction over Fibreboard under present 48.193 which requires no connexity between the cause of action and Petitioner's in-state activities is constitutionally sound and consistent with the goals of Florida's Legislature in enacting and amending §48.193 as well as judicial decisions of the courts of Florida and the United States Supreme Court.

ARGUMENT

WHEN ASBESTOS-RELATED DISEASE IS DIAGNOSED IN FLORIDA, A NONRESIDENT ASBESTOS MANUFACTURER WHICH SOLD ITS PRODUCTS IN FLORIDA DURING THE TIME OF PLAINTIFF'S EXPOSURE IS AMENABLE TO SUIT IN FLORIDA EVEN THOUGH THE EXPOSURE OCCURRED OUTSIDE THE STATE

A. THE APPLICABLE LONG-ARM STATUTE IN AN ASBESTOS CASE IS THE ONE IN EFFECT AT THE TIME THE CAUSE OF ACTION ACCRUES

1. THE VERY LANGUAGE OF FLORIDA LONG-ARM STATUTE §48.193(1)(f)(2) MANDATES THAT A COURT ASSESS A NONRESIDENT DEFENDANT'S CONTACTS IN THIS STATE AT THE TIME OF INJURY

a. A BRIEF HISTORY OF THE RELEVANT FLORIDA LONG-ARM STATUTES

Over the last twenty-five years, the Florida Legislature has given its residents a greater opportunity to obtain jurisdiction over nonresident defendants in the Florida courts. Section 48.181, Fla. Stat., was the vehicle to obtain long-arm jurisdiction over a nonresident defendant prior to 1970. This

section is still in existence today. However, in 1970 the legislature enacted section 48.182, Fla. Stat., which provided for jurisdiction in the special circumstance of a nonresident defendant committing a wrongful act outside of the state which caused injury within the state.[3/] Section 48.182 remained operative only for a three-year period until it was repealed by the legislature in 1973. At that time, §48.193 and §48.194 were enacted.

Two features of §48.182 are significant to an understanding of the issues before this Court. First, §48.182 provided for service of process on nonresidents in the same manner as under §48.181--by appointment of Florida's Secretary of State as an agent of the nonresident corporation to whom all process could be served.[4/] Second, applicability of §48.182 "[c]enters around the date of the wrongful act" committed by the

---

3/ The preamble to 48.182 indicates the legislature's concern that the expanding volume of interstate and international commerce transacted in Florida had greatly increased the possibility that Florida residents or visitors would be injured in this state by wrongful acts committed out of state. The legislature intended that the courts of this state should have personal jurisdiction over nonresidents who derive substantial revenue from such interstate commerce. Laws of Florida 1970, c.70-90, preamble.

4/ This fictitious agency relationship established initially under 48.181 was adopted by reference in 48.182.

48.181 provides in relevant part that an acceptance by nonresidents of the privilege to conduct business in the State of Florida "constitutes an appointment by the persons and foreign corporations of the Secretary of State of the state as their agent..."

nonresident.[5/] AB CTC v. Morejon, 324 So.2d 625, 627 (Fla. 1975).

These two factors--(1) existence of a statutorily-created agency relationship between the Secretary of State and the nonresident, and (2) the focus on the date of the wrongful act--prohibited a retroactive application of §48.182 to wrongful acts that occurred prior to the statute's enactment in 1970. See, AB CTC, supra, 324 So.2d at 627; Gordon v. John Deere Company, 264 So.2d 419 (Fla. 1972). Retroactive application of §48.182 would unfairly result in the imposition of an agency relationship on the nonresident defendant that was not in existence at the time of the wrongful act; and moreover, it would run counter to the plain language and meaning of the statute which focuses upon the nonresident's expectations at the

---

5/ The very language of 48.182 provides:

> Service on nonresidents committing a wrongful act outside the state which causes injury within the state. - Any nonresident person, firm, or corporation who in person or through an agent commits a wrongful act outside the state which causes injury, loss, or damage to persons or property within this state may be personally served in any action or proceeding against the nonresident arising from any such act in the same manner as a nonresident who in person or through an agent has committed a wrongful act within the state. If a nonresident expects or should reasonably expect the act to have consequences in this state, or any other state or nation and derives substantial revenue from interstate or international commerce he may be served; provided that, if such nonresident is deceased, his executor or administrator shall be subject to personal service in the same manner as a nonresident; provided further that this section shall not apply to a cause of action for defamation of character arising from the act. (emphasis added)

time of the wrongful act itself. Section 48.182 effectively places the nonresident defendant "on notice" prior to the commission of a wrongful act. Under the statute a nonresident defendant "expects or should reasonably expect the act to have consequences in this state." Id.

As previously noted, in 1973, the legislature repealed §48.182 and enacted sections 48.193 and 48.194. The goal of §48.182--securing jurisdiction over a nonresident defendant who commits a wrongful act outside of Florida which caused injury within the state--was incorporated into the newly-enacted statutes, but with substantial changes. One difference is that §48.194 allows for service of process directly on the nonresident defendant; there is no statutorily-created agency relationship. The major difference of the statute for purposes of resolving this case, however, is embodied in the very language of §48.193(1)(f).[6/] The time of injury rather than the time of the wrongful act is the event that triggers the application of

---

6/ Section 48.193 Fla. Stat. (1984) provides in pertinent part:

> (1)(f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of injury, either:
>
> 1. The defendant was engaged in solicitation or service activities within this state; or
>
> 2. Products, materials, or things processed, serviced or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.

(footnote continued to next page)

48.193(1)(f). With the enactment of §48.193(1)(f), the legislature shifted the focus of the long-arm statute. Instead of looking to the time of the wrongful act, this new statute mandates looking to the time of injury for purposes of evaluating the nonresident defendant's conduct within Florida. The legislature, as under §48.182, could have instructed the courts of this state to look to the defendant's contact with Florida at the time of the alleged wrongful act. However, they explicitly changed the wording in 48.193(1)(f) to correlate a nonresident's business contact within Florida to the time a cause of action accrues--"at the time of the injury." Id.

b. APPLYING §48.193(1)(f) IN THIS CASE DOES NOT REQUIRE RETROACTIVE APPLICATION AS ARGUED BY FIBREBOARD

Fibreboard relies upon four decisions of this Court for the principle that retroactive application of a long-arm statute is

---

(footnote 6 continued)

> (2) A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity. (emphasis supplied)

The 1984 amendments to §48.193 once again were designed to expand the in personam jurisdiction of the courts of Florida. The preamble to 48.193 indicates this goal:

> An act relating to civil actions; amending §§48.081, 48;.181, 48.193, F.S.; expanding the in personam jurisdiction of the courts of Florida, providing for service of process on corporation and on nonresidents; providing an effective date. (emphasis added)

The 1984 amended version of 48.193 eliminated connexity. See, supra, 48.193(2).

contrary to Florida law.[7/] Pgs. 4-18, Fibreboard's Initial Brief. Of the three cases rendered prior to this Court's 1990 Conley decision, two (AB CTC and John Deere) clearly involve §48.182, and the other (Public Gas) does so indirectly by referring to §48.193's statutory predecessor. For the reasons elaborated, 48.182 is a very different statute from 48.193 and this Court was correct to deny retroactive application of 48.182 based on the language of the statute. Simply, 48.182 contains the following language: "if a nonresident expects or should reasonably expect the act to have consequences in this state..." These expectations center on time of the wrongful act. Since 48.182 was enacted in 1970 and designed to operate thereafter, in cases where the wrongful act occurred prior to 1970, a defendant could not possibly anticipate being "haled into court" under a statute that did not even exist at the time the wrongful act occurred.

In contrast, the very language of 48.193(1)(f) instructs the Court to examine the nonresident defendant's contacts with the state at the time of injury rather than at the time of the wrongful act. In so doing, causes of action occurring after enactment of the statute fall within the reach of the statute and do not constitute a retroactive application. A retroactive

---

7/ Defendants cite: Gordon v. John Deere, 264 So.2d 419 (Fla. 1972) (prohibiting retroactive application of 48.182); AB CTC v. Morejon, 324 So.2d 625 (Fla. 1975) (same); Public Gas Co. v. Weatherhead Co., 409 So.2d 1026 (Fla. 1982) (no jurisdiction where product was made well before effective date of statutory predecessor to §48.193); Conley v. Boyle Drug Co., 570 So.2d 275 (Fla. 1990) (no retroactive application under 48.182 or 48.193).

application of §48.193(1)(f) would take place if the time of injury (i.e., accrual of the cause of action) occurred prior to the date of enactment--July 1, 1973. Kerness's time of injury occurred in 1989, sixteen years after 48.183(1)(f) was enacted and five years after the amendment to 48.183(2) took place which eliminated the connexity requirement. Thus no retroactive application of the statute is called into play in this case.

Fibreboard miscontrues the meaning of 48.193 when they argue that "application of the statute as to acts committed before the Plaintiff's last exposure in 1962, would be unconstitutionally retroactive and prohibited by Gordon." Pg. 23, Fibreboard Initial Brief. A statute is not made retroactive merely because it may rely on antecedent facts for its operation. Cox v. Hart, 260 U.S. 427, 435 (1922). Further, the Gordon case that Fibreboard cites is this Court's seminal case prohibiting retroactive application of 48.182 which focused upon the time of the act in assessing defendant's contact with the forum rather than a 48.193 case focusing upon the time of injury. Supra, Pgs. 6-10.

In a case addressing application of a long-arm statute to antecedent facts, the Supreme Court found that application of a California long-arm statute was constitutionally sound and not precluded by the fact that an insurance contract on which jurisdiction was based was entered into prior to the enactment of the long-arm statute. McGee v. International Life Insurance Co., 355 U.S. 220, 224 (1957). The reasoning of McGee in holding that jurisdiction was proper, was that the statute neither enlarged nor impaired the defendant insurance company's

substantive rights or obligations. The Court stated that the statute:

> did nothing more than to provide petitioner with a California forum to enforce whatever substantive rights she might have against respondent.
>
> McGee, supra, 355 U.S. at 224

In this case, application of §48.193 neither enlarges nor impairs any vested rights of Fibreboard. Here, the substantive rights and obligations of the parties arise out of the tortfeasor-victim relationship. This relationship, as in McGee, was initiated prior to the enactment of the long-arm statute. Plaintiff's injury, however, accrued during the current operation of §48.193, and jurisdiction over Defendant Fibreboard falls precisely within the terms of the statute. See, Cox v. Hart, 260 U.S. at 435 ("No reason is perceived why the words [of the statute] employed should not be given their natural application."). Under the plain and literal terms of §48.193(1)(f), Respondents are entitled to a Florida forum to enforce their rights.

2. THIS COURT SHOULD DECLINE TO EXTEND CONLEY V. BOYLE PREDICATED ON MARKET SHARE LIABILITY TO ASBESTOS PRODUCTS LIABILITY ACTION. THE APPLICABLE LONG-ARM STATUTE IN ASBESTOS CASES IS THE ONE IN EFFECT AT THE TIME THE CAUSE OF ACTION ACCRUES RATHER THAN THE LONG-ARM STATUTE IN EFFECT WHEN THE ASBESTOS-CONTAINING PRODUCTS WERE MANUFACTURED OR DISTRIBUTED.

In Conley v. Boyle Drug Co., 570 So.2d 275, 287-288 (Fla. 1990), this Court considered which long-arm statute to apply in

another type of long latency period liability cases, involving injury by the drug DES. In that context it was recognized:

> the date of the alleged negligent manufacture and distribution of DES, rather than the date of ingestion, which must be looked to in determining both the proper method of service and whether the [foreign defendants] were subject to the jurisdiction of the courts of this state.
>
> Conley, supra, 570 So.2d at 288

Fibreboard argues that Conley controls asbestos cases as well, and that therefore §48.181 requiring connexity applies to this case because it was the statute in effect at the time of the manufacture and distribution of the asbestos products.

Fibreboard's argument fails to address the unique nature of asbestos-related injury and the body of case law which distinguishes it from other types of personal injury. Indeed, this Court itself noted that asbestos cases are distinguishable from the DES case it decided in Conley in discussing the "market share" theory of liability:

> Our rejection of the market share theory in Celotex was also based on the "inherent differences between asbestos products and the drug DES." Celotex Corp. v. Copeland, 472 So.2d 533, 537 (Fla. 1985).
>
> Conley, supra, 570 So.2d at 280 n. 6[8/]

8/ See also, Walter v. Armstrong World Industries, Inc., 679 F.Supp. 1094 (S.D. Fla. 1988) (special considerations in asbestos cases for statute of limitations purposes); Copeland v. Celotex Corp., 447 So.2d 908, 912 (Fla. 3rd DCA 1984), rev'd on other grds Celotex Corp. v. Copeland, 471 So.2d 533, 537-39 (Fla. 1985) (discussing insidious nature of asbestos-related disease and the difficulty in ascertaining a time and place of injury).

Conley's holding applying the long-arm statute in effect at the time of manufacturing or distribution has been rejected in asbestos cases by both the Third District below and by a federal court in Florida.[9/]

Having predicated liability on a unique market share theory for DES manufacturers in Conley, it would only be logical in that instance to preclude jurisdiction over a defendant who was not in the market when the offending drug was manufactured. A critical difference between DES in Conley and the Fibreboard asbestos products at issue in this case is that the unfortunate victim of DES had no way to identify the manufacturer of the product which caused the injury. This Court adopted the market share liability doctrine for plaintiffs' benefit , and balanced

---

9/ The late Judge Spellman declined to extend Conley to asbestos cases unless this Court does so, refusing to discard a long line of decisions holding that the applicable long-arm statute in asbestos cases is the one in effect at the time the cause of action accrues. Geisinger v. Fibreboard Corp., Case No. 90-0872-CIV-SPELLMAN (S.D. Fla. April 2, 1991) (attached as Appendix D to Answer Brief of Kerness in Third District) (citing In Re: Asbestos Litigation, 679 F.Supp. 1096 (S.D. Fla. 1988); Wildenberg v. Eagle-Picher Industries, Inc., 645 F.Supp. 29 (S.D. Fla. 1986); Margolin v. Armstrong World Industries, Inc., Case No. 87-0227 (S.D. Fla. May 25, 1988)). Thus, in Geisinger v. Fibreboard, Judge Spellman applied §48.193 and found that personal jurisdiction existed over Fibreboard, without resorting to a connexity analysis.

Judge Moreno has reached a contrary result in Glasser v. Fibreboard, No. 90-1980-CIV-MORENO (S.D. Fla.), on appeal, No. 91-5517 (11th Cir.) (Order of June 3, 1991) (applying Conley to require application of long-arm statute at time of manufacturing or distribution).

By Order of March 10, 1992, the Eleventh Circuit has held in abeyance resolution of the Glasser appeal "[p]ending a decision of the Supreme Court of Florida in the case of Fibreboard Corp. v. Kerness, No. 79,165."

that by excluding defendants who were not in the market that could have produced the product.[10/]

In this case, different considerations exist. Mr. and Mrs. Kerness have not sought to impose liability against Fibreboard under a market share theory. It is alleged and can be proven that Mr. Kerness was exposed to Fibreboard's products which were sold not only in Brooklyn where he was exposed, but also simultaneously in Florida. Thus, the application of a long-arm statute at the time of manufacturing which was recognized in Conley should be inapplicable in an asbestos case with an identifiable defendant in which the cause of action accrues at the time of diagnosis, not at the time of manufacture of the products.[11/]

B. ALTERNATIVELY, EVEN IF CONLEY DOES REQUIRE THE APPLICATION OF THE PRIOR LONG-ARM STATUTE IN EFFECT AT THE TIME THE ASBESTOS-CONTAINING PRODUCTS WERE MANUFACTURED OR DISTRIBUTED, THE CONNEXITY REQUIREMENT OF 48.181 IS SATISFIED SINCE FIBREBOARD'S BUSINESS ACTIVITIES IN FLORIDA PARALLEL ITS OUT OF STATE ACTIVITIES WHICH CAUSED PLAINTIFF'S ILLNESS

This Court in Davis v. Pyrofax Gas Corp., 492 So.2d 1044 (Fla. 1986), rejected a restrictive analysis of connexity

---

10/ Market share liability has been expressly rejected by this Court in asbestos injury cases where, as in this case, identification of an asbestos product can be made. Celotex Corp. v. Copeland, 471 So.2d 533, 537-539 (Fla. 1985).

11/ It is well-established, and recognized by this Court, that the cause of action accrues in an asbestos-related injury upon

(footnote continued to next page)

adopted by several Florida appellate courts with regard to pre-1984 §48.193.[12/] In the event that this Court extends Conley v. Boyle Drug Co., beyond the market share context, interpretation of the connexity requirement of §48.181 must be made.[13/]

(footnote 11 continued)

the diagnosis of an asbestos-related disease. Celotex v. Meehan, 523 So.2d 141, 145 (Fla. 1987); Eagle-Picher Industries v. Cox, 481 So.2d 517, 527-28 (Fla. 3rd DCA 1986). Using the date of diagnosis, the applicable statute in this case would be §48.193(2), in effect in 1989. As discussed, the current §48.193 long-arm statute does not require connexity.

12/ The First and Fifth District Courts of Appeal had taken a restrictive approach to connexity requiring that a plaintiff be injured by the actual defective product that the defendant corporation introduced into Florida commerce, not simply by a similar product brought to Florida by plaintiff himself. Nicolet, Inc. v. Benton, 467 So.2d 2046 (Fla. 1st DCA 1985) (requiring Florida-based exposure in asbestos cases); General Tire and Rubber Co. v. Hickory Springs Mfg. Co., 388 So.2d 264 (Fla. 5th DCA 1980). Fibreboard continues to rely upon Nicolet. See, Pg. 11, Initial Brief on the Merits.

This restrictive interpretation of connexity has been squarely rejected by the more recent Florida Supreme Court decision in Davis v. Pyrofax Gas Corp., 492 So.2d 1044 (Fla. 1986). See, infra, Pg. 20, n. 15.

13/ Both parties apparently agree that when this Court accepts jurisdiction, it should resolve all questions in order to achieve the most complete resolution of this appeal and is not limited to the actual question certified by the appellate court below. See, Pg. 6, Fibreboard's Initial Brief on the Merits; Id., Pgs. 18-22 (raising constitutional argument not raised in the certified question posed by the Third District); Zirin v. Pfizer Co., 128 So.2d 594, 596-597 (Fla. 1981) ("It is not the question of great public interest in a decision that we are concerned with but the decision that passes upon such a question.") (emphasis in original); Reed v. State, 470 So.2d 1382, 1383 (Fla. 1985) (scope of review encompasses the decision of the court below, not, merely on the certified question); Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1983) ("Once an appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case.").

Resolution of the connexity issue would serve to achieve a full determination of the issues raised in this case.

1. THE CONNEXITY HOLDING IN DAVIS ADDRESSING PRE-AMENDED §48.193 IS EQUALLY APPLICABLE TO THIS §48.181 CASE

Central to our position is that the connexity requirement of pre-amended §48.193 interpreted in Davis is interchangeable and identical to §48.181. The basis for this conclusion--that connexity under pre-amended §48.193 and §48.181 is the same--is severalfold.

First, Florida appellate courts have recognized that the connexity requirement under the pre-amended §48.193 is the same standard as §48.181. Indeed, the judicial interpretation of what is required is proving connexity under pre-amended §48.193 is identical to the connexity requirement embedded within the §48.181 statute.

The Third District in Kravitz v. Gebrueder Pletscher Druck-Gasswaremfabrik, 442 So.2d 985, 987 n.2 (Fla. 3d DCA 1983) in judicially defining pre-amended §48.193 (1)(f)(2) stated:

> "Connexity" refers to the requirement that the cause of action arise out of a transaction or operation connected with or incidental to the activities of the foreign corporation in Florida. (emphasis added) (citation omitted)

The previous long-arm statute, §48.181(1), in effect prior to July 1, 1970 provided the identical standard defining connexity:

> The acceptance by any person or persons, individually or associated together as a copartnership or any other form or type of association, who are residents of any other state or country, and all foreign corporations, and any person who is a resi-

> dent of the state and who subsequently becomes a nonresident of the state or conceals his whereabouts, of the privilege extended by law to nonresidents and others to operate, conduct, engage in, or carry on a business or business venture in the state, or to have an office or agency in the state, constitutes an appointment by the persons and foreign corporations of the Secretary of State of the state as their agent on whom all process in any action or proceeding against them, or any of them, arising out of any transaction or operation connected with or incidental to the business or business venture may be served. The acceptance of this privilege is signification of the agreement of the persons and foreign corporations that the process against them which is so served is of the same validity as if served personally on the persons or foreign corporations. (emphasis added)

Second, courts have interpreted §48.181 and pre-amended §48.193 interchangeably. American Motors Corp. v. Abrahantes, 474 So.2d 271, 273 (Fla. 3d DCA 1985) ("Prior to the 1984 amendments, both §§48.181 and 48.193 required that there be a "connexity" between the cause of action and defendant corporation's activities in Florida." (citations omitted) (emphasis supplied)); Utility Trailer Mfg. Co. v. Cornett, 526 So.2d 1064, 1066 (Fla. 1st DCA 1988) ("prior to the amendment of §48.193... for long-arm jurisdiction to attach under either that enactment or §48.181, it was necessary that there be connexity...") (emphasis supplied); Bloom v. A.H. Pond Co., Inc., 519 F. Supp. 1162, 1168 n.3 (S.D. Fla. 1981) ("since [48.193] is not materially different from [48.181] with respect to jurisdiction based upon business contacts with the state, the restrictive Florida approach is equally applicable no matter which jurisdictional basis is invoked." (citation omitted) (emphasis added); White v. Pepsico, 568 So.2d 886, 889 n.4 (Fla. 1990) (defining connexity

and citing cases interchangeably involving both §48.181 and pre-amended §48.193).

2. CONNEXITY UNDER DAVIS IS SATISFIED IF A DEFENDANT'S BUSINESS ACTIVITY IN FLORIDA PARALLELED ITS OUT OF STATE ACTIVITIES THAT LED TO A PLAINTIFF'S INJURY IN FLORIDA

In Davis, this Court ruled that if a defendant's business activities in Florida paralleled its out of state activities that led to a plaintiff's injury in Florida, connexity is satisfied and thus jurisdiction is achieved. Davis, supra, 492 So.2d at 1046.[14/]

The Court in Davis rejected a restrictive analysis of connexity adopted by several appellate courts with regard to §48.193 (pre-1984 amendment and therefore containing the identical connexity requirement as §48.181). Instead, the Court held essentially that if a defendant's business activities in Florida paralleled its out of state activities that led to a plaintiff's injury in Florida, a Florida court has jurisdiction over a subsequent suit:

14/ The Eleventh Circuit certified the following question to this Court in Davis v. Pyrofax Gas Corp., 753 F.2d 928, 930 (11th Cir. 1985):

> Prior to the April 25, 1984 revision of Florida's long-arm statute, was a nonresident manufacturer or or wholesaler of a product subject to the jurisdiction of the Florida courts where (1) the manufacturer or wholesaler engages in business activities in Florida, and (2) the product was purchased in another state and brought into Florida by the purchaser, and (3) the product caused injury to the purchaser in Florida?

This Court answered the question in the affirmative.

> We do not read the statute as requiring that the specific item purchased by the plaintiff elsewhere and brought by him into Florida be brought in through the ordinary course of commerce. We find that the connection requirement is satisfied by the defendants' business activities in Florida. If a defendant has a relationship with Florida such that it is amenable to suit in Florida by a person who purchased its product in Florida, there is no logical reason to prohibit a plaintiff who purchased the same product elsewhere and was injured by it in Florida from maintaining an action in Florida. A manufacturer or wholesaler that avails itself of the privilege of conducting solicitation activities and promoting or distributing its product line within the State of Florida should be amenable to a suit in Florida by one whose injury is occasioned by the use in Florida of the corporation's product purchased out of the state. (emphasis added)
>
> Davis, supra, 492 So.2d at 1046[15/]

In this case, the three elements of the question certified by the Eleventh Circuit in Davis are satisfied: (1) Defendant was engaged in asbestos-related business activities in Florida during Mr. Kerness's exposure years; (2) part of the defendant's product--inhaled asbestos fibers--were brought into Florida in Mr. Kerness's lungs; and (3) the asbestos fibers injured Mr. Kerness in Florida because no injury occurred until he developed an asbestos-related injury or disease in the state. Therefore, the assertion of personal jurisdiction over Fibreboard is within the confines of the long-arm statute and connexity as viewed by this Court.

15/ This Court recognized a direct conflict between the District Courts of Appeals on the restrictive interpretation of connexity. In Davis, the Court specifically agreed with the district court's analysis in Kravitz thereby rejecting the analysis and restrictive holding in General Tire & Rubber Co. v. Hickory Springs Mfg. Co., 388 So.2d 264 (Fla. 5th DCA 1980). See, Davis, supra, 492 So.2d at 1045.

See also, Shoei Safety Helmet Corp. v. Conlee, 409 So.2d 39 (Fla. 4th DCA 1981)[16/]; Kravitz v. Gebrueder Pletscher Druck-Gasswaremfabrik, supra, 442 So.2d at 987 (applying the Shoei rational to pre-amendment §48.193(1)(f)(2) Fla. Stat. (1981)).

C. ASSERTING PERSONAL JURISDICTION OVER FIBREBOARD UNDER PRESENT AMENDED 48.193 WHICH DOES NOT REQUIRE CONNEXITY IS NOT ONLY CONSISTENT WITH FLORIDA FLORIDA STATUTES AND JUDICIAL INTERPRETATIONS BUT IS CONSTITUTIONALLY PROPER

A. This Court in Venetian Salami Co. v. Parthenais, 554 So.2d 499 (Fla. 1989), resolved that in order to obtain jurisdiction over a nonresident defendant, the claimant must fulfill two requirements. First, plaintiff must allege

---

16/ In Shoei, the plaintiff sued the manufacturer of a defective motorcycle helmet. The particular helmet had been sold to an Ohio distributor, then sent to a Florida retailer which sold it to the plaintiff. The manufacturer also sold similar helmets directly to Florida distributors. The Court found sufficient connexity even though the manufacturer had not sold that helmet in Florida.

> [W]e do not believe that Section 48.181 was intended to permit a manufacturer to promote and sell its products in Florida and be subject to the jurisdiction of Florida courts only when it sells directly to a Florida enterprise and be immune from jurisdiction merely because it sold the particular allegedly defective product to a foreign corporation who in turn sold it to a Florida retailer.
>
> Shoei, supra, 409 So.2d at 41 n. 4

In the present case, Fibreboard's products distributed outside of Florida injured Mr. Kerness in Florida. The fact that Fibreboard sold identical products in Florida at the same time Mr. Kerness was exposed subjects Fibreboard to suit in Florida under the Shoei rationale as contemplated by Davis.

sufficient facts to comply with the requirements of the applicable Florida long-arm statute. Second, jurisdiction must satisfy federal due process concerns of "minimum contacts" under the Fifth and Fourteenth Amendments to the U.S. Constitution. Venetian, supra, 554 So.2d at 502. If the complaint brings an action within the scope of one of Florida's long-arm statutes, and alleges "minimum contacts," then the plaintiff meets both elements of the two-step test.[17/] These allegations may then be contested by the defendant only through a specific procedure outlined in Venetian:

> Initially, the plaintiff may seek to obtain jurisdiction over a nonresident defendant by pleading the basis for service in the language of the statute without pleading the supporting facts. * * * By itself, the filing of a motion to dismiss on grounds of lack of jurisdiction over the person does nothing more than raise the legal sufficiency of the pleadings. * * * A defendant wishing to contest the allegations of the complaint concerning jurisdiction or to raise a contention of minimum contacts must file affidavits in support of his position. The burden is then placed upon the plaintiff to prove by affidavit the basis upon which jurisdiction may be obtained. (emphasis added) (citations omitted)
>
> Venetian, supra, 554 So.2d at 502

17/ The Complaint provided:

> Plaintiffs allege that the Defendants have, during the period of 1943, and through and including the present, and at all times material to this cause of action, maintained sufficient contact with the State of Florida to subject them to the jurisdiction of this Court pursuant to Florida Statute 48.181 and/or 48.193.
>
> ¶4, Pg. 4, Complaint

While Fibreboard's motion to dismiss for lack of jurisdiction contests the allegations of Kerness's Complaint, Pg. 18, n. 11, Fibreboard's Initial Brief, this merely "raise[s] the legal sufficiency of the pleadings." Venetian, supra. No affidavits were filed in support of their position in the proceedings below. Thus, Fibreboard has failed to comply with the proper procedure for challenging a complaint as set forth in Venetian. Fibreboard argues that "minimum contacts" requirements are not satisfied in this case and that they were not involved in purposeful activity in the State of Florida, Pgs. 21-22, Fibreboard's Initial Brief. However, these arguments are not properly before this Court. Affidavits should have been filed in the trial court in support of these contentions, offering Plaintiffs an opportunity to respond with counter-affidavits. Venetian, supra, 554 So.2d at 502. These issues of fact can generally be resolved by the trial court based on affidavits alone, however, should the affidavits appear irreconcilable, "the trial court will have to hold a limited evidentiary hearing in order to determine the jurisdiction issue." Id. at 503.[18/]

B. Had affidavits been filed, the trial court could have examined the constitutional challenge to the long-arm statute now raised by Fibreboard. There are two major concerns in any case where jurisdiction is sought over a nonresident defendant. First, that "minimum contacts" exist between the nonresident

---

18/ In Venetian, affidavits had been filed by both parties. This Court found them to be irreconcilable and remanded the jurisdictional issue to the trial court with directions to hold an evidentiary hearing.

defendant and the forum. Second, any assertion of jurisdiction must comply with "traditional notions of fair play and substantial justice." International Shoe Co. v. State of Washington, 326 U.S. 310, 316 (1945).

The Supreme Court reiterated in Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985), its long standing holding that, "the foreseeability that is critical to due process analysis...is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there" (citation omitted). Fibreboard contends here that there is insufficient connection between the cause of action and their alleged in-state activities, rendering Kerness's claim of in personam jurisdiction over the nonresident defendant unconstitutional. Pgs. 20-23, Fibreboard Initial Brief. However, in Perkins v. Benquet Consolidated Mining Co., 342 U.S. 437, 446 (1952), the Supreme Court faced a similar issue from an Ohio court where a cause of action did not arise from the nonresident's in forum activities.[19/]

> The instant case takes us one step further to a proceeding in personam to enforce a cause of action not arising out of the corporation's activities in the state of the forum... [W]e find no requirement of federal due process that either prohibits Ohio from opening its courts to the cause of action here

---

19/ As previously set forth, supra, Pg. 8, n. 6, amended 48.193(2) eliminates the previous connexity requirement. 48.193(2) provides:

> (2) A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity. (emphasis supplied)

> presented or compels Ohio to do so. (emphasis in original)

In Perkins, the Court allowed the state courts to determine whether the defendant had sufficient contact with the forum, despite the fact that the cause of action did not arise from the defendant's activities in the forum. On remand the Ohio courts upheld jurisdiction. Perkins, 107 N.E.2d 203 (1952).

More recently the Supreme Court has reasserted the principle articulated in Perkins stating:

> [W]hen the cause of action does not arise out of or relate to the foreign corporation's activities in the forum state, due process is not offended by a State's subjecting the corporation to its in personam jurisdiction when there are sufficient contacts between the State and the foreign corporation.
>
> Helicopteros Nacionales de Columbia v. Hall, 466 U.S. 408, 80 L.Ed.2d 404, 411 (1984) (emphasis added)[20/]

20/ Fibreboard cites Justice Scalia's most recent opinion in Burnham v. Superior Court of Cal., 495 U.S. 604, 109 L.Ed.2d 631 (1990), Pg. 21, Fibreboard Initial Brief, arguing that the Supreme Court has permitted assertion of jurisdiction over nonresident defendants "only with respect to suits arising out of the absent defendant's contact with the state." This would seem to run counter to the proposition expressed in Perkins and Helicopteros.

However, Fibreboard fails to inform this Court of Justice Scalia's qualification of this statement, namely, that it applies only to natural persons and not corporations. A footnote points out that a different application of due process is required in ascertaining jurisdiction over corporations, such as Fibreboard, and notes that corporations "have never fitted comfortably in a jurisdictional regimen based primarily upon de facto power over the defendant's person." Burnham, supra, 101 L.Ed.2d at 639, n. 1.

Without the benefit of competing affidavits it is difficult for a court to assess the constitutional challenge raised by Fibreboard. However, based on the allegations in the complaint which must be accepted as true in the context of a motion to dismiss, see, Orlando Sports Stadium, Inc. v. State ex rel Powell, 262 So.2d 881 (Fla. 1972), the defendants availed themselves of the benefits of conducting business in the State of Florida,[21/] and therefore should have anticipated being "haled into court" in this state. The Third District's assertion of jurisdiction over Fibreboard complies with both the Florida long-arm statutes as well as federal due process concerns.

CONCLUSION

For the reasons set forth in this Brief, the decision of the Third District Court of Appeal should be affirmed.

Respectfully submitted,

DAVID M. LIPMAN

DAVID M. LIPMAN, P.A.

5901 S.W. 74 Street
Suite 304
Miami, Florida 33143-5186
(305) 662-2600

Fla. Bar No. 280054

ATTORNEYS FOR RESPONDENTS
SAMUEL AND BLANCHE KERNESS

DATED: 20 March, 1992

21/ The Complaint alleges that Defendants maintained sufficient contact with Florida from 1943 through the present. ¶4, Pg. 4, Complaint.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief on the Merits has been mailed to the following counsel of record this 20th day of March, 1992:

Louise H. McMurray, P.A.
Suite 226
11430 North Kendall Drive
Miami, Florida 33176

Susan J. Cole, Esq.
BLAIRE & COLE
2801 Ponce de Leon Boulevard
Suite 550
Coral Gables, Florida 33134

DAVID M. LIPMAN