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CLERK, SUPREME COURT

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IN THE FLORIDA SUPREME COURT

CASE NO. 79,165

FIBREBOARD CORPORATION,

Petitioner,

vs.

SAMUEL KERNESS and BLANCHE KERNESS, his wife,

Respondents.

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

INITIAL BRIEF ON THE MERITS

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*No appendix
Requested
3642*

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I.

STATEMENT OF THE CASE AND FACTS

This is a petition for discretionary review of a decision of the Third District Court of Appeal which certified as of great public concern the following question:

In an asbestos case, is the applicable long-arm statute that which was in effect when the plaintiff's cause of action accrued, or that which was in effect when the asbestos-containing products were manufactured and/or distributed?

The panel decision in which the foregoing question was certified affirmed the trial court's denial of a motion to dismiss for lack of jurisdiction for a cause of action arising out of business transacted in another state prior to 1962. The facts of the case are as follows:

Plaintiffs, DANIEL KERNESS and BLANCHE KERNESS, his wife, (hereafter the Kernesses), filed suit against fourteen corporations, claiming damages for an asbestos-related disease allegedly contracted after several different periods of occupational exposure as a painter in New York. R.3.¹ All exposure ended in 1962. R.6.

The Kernesses alleged that petitioner Fibreboard manufactured or distributed asbestos-containing products to which Mr. Kerness was exposed in Brooklyn between 1943 and

¹ References to the record below are indicated "R.#." Unless otherwise indicated, all emphasis is added.

1945. R.6,17,20-22.² Fibreboard is a Delaware corporation with its principal place of business in California. R.4. Fibreboard moved to dismiss for lack of personal jurisdiction on the grounds that, even if Fibreboard were doing business in Florida (which it denies), the only pre-1962 long-arm statute alleged to support jurisdiction, Section 48.181, Fla.Stat., creates jurisdiction only for causes of action arising out of in-state business. No such connexity was pleaded.

Plaintiffs argued in response that Fibreboard had previously done business in Florida, and had sold asbestos-containing products in Florida. Such "facts" were not alleged in the complaint but were based on discovery from other proceedings: a three-page deposition excerpt of Walter Heape; a two-page deposition excerpt of Robert Barsh; and invoices purportedly showing shipments of products to a shipyard in Jacksonville, Florida. R.49-58. The deposition testimony was limited to the naming of products purportedly containing asbestos which the deponents claimed to have used in Duval County, Florida. R.51,55. The invoices represent shipment of products of another company not associated with this proceeding, Armstrong Cork. R. 57-58.

² Allegations to date, place, and exposure to specific products were made by attaching answers to standard interrogatories to the complaint.

Judge Fuller denied the motion. R.46. An interlocutory appeal to the Third District Court of Appeal ensued. That court recognized that section 48.181, Fla.Stat. "required that a plaintiff demonstrate that the cause of action arose from doing business in Florida, or that the cause of action has some other connection to a specified act committed in Florida". R.82. Nevertheless, the district court affirmed denial of the motion on the basis that the action "accrued" after the effective date of Section 48.193 Fla.Stat. (1989), so that statute may be applied to create jurisdiction over Fibreboard. The court further reasoned:

It is clear that section 48.193, Florida Statutes, cannot be applied retroactively to extend jurisdiction over a foreign corporation. Conley v. Boyle Drug Co., 570 So.2d 275, 288 (Fla. 1990); Public Gas Co. v. Weatherhead, 409 So.2d 1026 (Fla. 1982). However, such retroactive application does not occur when a cause of action accrues after the effective date of section 48.193. See, American Motors Corp. v. Abrahantes, 474 So.2d 271, 274 (Fla.3d.DCA 1985) (long-arm statute to be applied is one in existence at time cause of action accrued); Utility Trailer Manuf. Co. v. Corrett (sic), 526 So.2d 1064 (Fla.1st.DCA) (same), rev.denied, 534 So.2d 398 (Fla. 1988). Federal courts have also consistently applied this theory in Florida asbestos cases. See, e.g., Geisinger v. Fibreboard Corp., No.90-0872 (S.D. Fla.) (order dated Apr. 1, 1991); Citron v. Armstrong World Indus., No.89-1375 (S.D.Fla.) (order dated July 30, 1990); In Re.: Asbestos Litigation, 679 F.Supp. 1096 (S.D. Fla. 1988).

An action accrues when an injury is or should have been discovered. Celotex Corp. v. Meehan, 523 So.2d 141, 145 (Fla. 1988). Kerness's asbestos-related disease was

diagnosed in 1989 after the effective date of Section 48.193, and connexity is not required. Accordingly, the trial court has jurisdiction over Fibreboard even though Kerness's illness was allegedly caused by Fibreboard's products used in New York.

Appellant claims that Conley, supra, is dispositive of the issue in this case. We disagree and certify this question to the Supreme Court as one of great public concern: In an asbestos case, is the applicable long-arm statute that which was in effect when the plaintiff's cause of action accrued, or that which was in effect when the asbestos-containing products were manufactured and/or distributed?
Affirmed.

³
R. 83-84. Fibreboard timely filed a notice to invoke discretionary jurisdiction under Rule 9.030 (a) (2) (A) (v), Fla.R.App.P.

II.

SUMMARY OF ARGUMENT

The opinion of the Third District conflicts with this Court's decisions in Conley, supra; Gordon v. John Deere Co., 264 So.2d 419 (Fla. 1972); Public Gas Co., supra; and AB CTC v. Morejon, 324 So.2d 625 (Fla. 1975). It fails to apply the rule announced in those cases, that the long-arm statute in effect at the time of an alleged wrongful act governs the assertion of jurisdiction over nonresident defendants. This ruling is also in conflict with First and Fourth District Court of Appeal decisions

³
Petitioner does not concede that the cause of action accrued in 1989.

applying this Court's rule that the date of alleged wrongful act governs the applicability of long-arm statutes.

Instead, it applies a new rule apparently fashioned solely for application in asbestos cases, that the issue of long-arm jurisdiction in asbestos cases will be governed by the statute in effect when the plaintiff claims disease is diagnosed.⁴ Fibreboard submits the ruling has been induced by a confusion of logic and language appearing in the decisions cited by the Third District in its opinion. Although some correctly dismissed complaints for lack of personal jurisdiction where the cause of action had accrued before the effective date of the long-arm statute, the Third District improperly created a converse rule in the instant case: that a long-arm statute may be applied to causes of action accruing after its effective date, without regard to whether the wrongful act giving rise to the injury occurred prior thereto.

In fashioning this converse rule, and ignoring controlling Supreme Court decisions, the Third District exceeded its constitutional authority. It should have applied the rule articulated by this Court, and certified

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It should be noted that in light of *Eagle-Picher Industries, Inc. v. Cox*, 481 So.2d 517 (Fla.3rd.DCA 1985) (plaintiff suing for damages for contracting asbestosis not barred from later suit for cancer), the Third District might apply different statutes to the same defendant if a plaintiff sued for asbestosis, then later for cancer.

the question based upon its perception that a different rule should obtain in what it calls "asbestos cases".

Finally, the instant decision raises grave doubts about the constitutionality of 48.193. Due process requires a similar threshold of some "connexity" between the cause of action alleged and a putative nonresident defendant's activities in the forum state. To the extent that section 48.193 would be construed by this decision to create jurisdiction where the cause of action alleged is totally unrelated to any alleged in-state activities, the constitutionality of that statute is impaired. Second, this court has stated that long-arm statutes create new remedies; they may thus not be applied to wrongful acts that occurred before their passage. Appellate courts have determined that ruling otherwise would create "grave doubts" about constitutionality of long-arm statutes. The decision of the Third District thus runs afoul of the Florida and the United States Constitutions.

III.

ISSUES ON APPEAL

Fibreboard respectfully submits that when this Court accepts jurisdiction, it may resolve all questions in order to achieve the most complete resolution of the cause. Two issues are therefore submitted on this petition for discretionary review. If acknowledgement is given to the existence of this Court's pre-Conley cases on choice of

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long-arm statute, the question certified by the Third District may also be posed in the alternative phrasing suggested:

I. IN AN ASBESTOS CASE, IS THE APPLICABLE LONG-ARM STATUTE THAT WHICH WAS IN EFFECT WHEN THE PLAINTIFF'S CAUSE OF ACTION ACCRUED OR THAT WHICH WAS IN EFFECT WHEN THE ASBESTOS-CONTAINING PRODUCTS WERE MANUFACTURED AND/OR DISTRIBUTED?

OR:

I. SHOULD THE RULE GOVERNING APPLICABILITY OF LONG-ARM STATUTES THAT WAS ARTICULATED IN AB CTC, GORDON, PUBLIC GAS, AND CONLEY BE ABANDONED AND A NEW RULE CREATED FOR USE ONLY IN "ASBESTOS CASES", SO AS TO EXPAND THE ASSERTION OF JURISDICTION OVER DEFENDANTS CHARGED PECULIARLY WITH NEGLIGENCE RELATED TO ASBESTOS-CONTAINING PRODUCTS?

and:

II. MAY 48.193 CONSTITUTIONALLY CREATE SPECIFIC JURISDICTION IN THE ABSENCE OF ANY ALLEGATIONS OF LITIGATION-RELATED MINIMUM CONTACTS?

IV

ARGUMENT

For the reasons that follow Fibreboard respectfully submits that the certified question should be answered by directing that the applicable long-arm statute is that which was in effect at the time of the wrongful act alleged, that is the alleged negligent manufacture and/or distribution. Additionally, personal jurisdiction may not constitutionally be asserted over a nonresident defendant for a cause of action alleged to be unrelated to any in-state activities.

A. THE APPLICABLE LONG-ARM STATUTE IS THAT IN EFFECT AT THE TIME OF THE WRONGFUL ACT ALLEGED; NO SPECIAL RULE GOVERNING PERSONAL JURISDICTION SHOULD BE ADOPTED FOR DEFENDANTS CHARGED

WITH NEGLIGENCE IN THE SALE, DISTRIBUTION, OR HANDLING OF
ASBESTOS-CONTAINING PRODUCTS. - Point I.

This court has repeatedly articulated the rule that the long-arm statute which governs jurisdiction over nonresident defendants is that which is in effect at the time the alleged wrongful act is committed.

In Gordon, supra, a complaint claiming damages for injuries received in an accident occurring on July 19, 1965, was filed in July of 1969, and sought to apply Section 48.182 (1970). The district court granted a motion to quash service under 48.182. It explained that

...an amended statute could not be considered procedural and could not operate retrospectively when there was no pre-existing remedy, either because there was no previous method of service provided, or because the method of service differed.... F.S. Section 48.182, F.S.A... does not operate in furtherance of a pre-existing remedy, but rather operates to create a new remedy. Thus it falls within the proscription against retrospective operation.

Gordon v. John Deere Co., 320 F.Supp. 293, 295 (N.D.Fla. 1972). It thereupon certified to this court the question:

Whether or not Florida Statutes, Section 48.182 (1970), applies retroactively to allow service under its provisions as to an alleged wrongful act committed prior to enactment of the Statute.

Id. This Court ruled that the applicable statute was that in effect at the time of the wrongful act alleged. It approved the district court's reasoning, and noted that the district decision had been followed in Robert E. Marx, Inc. v. Scarney, 253 So.2d 722 (Fla.3rd.DCA 1971). See, also,

Tako v. Mayer Rothkopf Ind., Inc., 388 So.2d 1092

(Fla.3rd.DCA 1980).

In AB CTC, supra, a defective product was sold before 1970, injury occurred in 1971, and the long-arm statute relied upon took effect in 1970. Morejon's contention was that "Since the statute became effective in 1970 and the injury occurred in 1971... the statute was not being applied retroactively in violation of this court's decision in Gordon v. John Deere, Co.," 324 So.2d at 628.

This court disagreed:

In Gordon v. John Deere Co., supra, this court held that Fla.Stat. Sec. 48.182, enacted in 1970 and having an effective date of July 1, 1970, could not be applied retroactively to allow service under its provisions as to an alleged wrongful act committed prior to the enactment of the statute.

* * *

Since the breach of warranty occurs when tender of delivery is made, and since the tender of delivery of the washing machine occurred prior to the enactment of the statute and prior to its effective date, the use of Sec. 48.182 to obtain jurisdiction over the petitioner would be retroactive, in violation of this Court's holding in Gordon v. John Deere Co., supra.

324 So.2d at 627-628. Nevertheless this Court specifically noted that even though the wrongful act in a breach of contract action occurs at tender of delivery of defective goods, accrual of the cause of action must await plaintiff's discovery of the breach. 324 So.2d at 628.

In Public Gas Co., supra, a district court of appeal determined that 48.182 was not available in an action

for injuries arising from an allegedly defective product that had been manufactured prior to the statute's effective date. This Court affirmed.⁵

In Conley, this type of "accrual" argument was explicitly addressed again. The deleterious substance there involved, DES, only causes injury years after its use, in the daughters of its users. If special considerations relating to such delay should move the court to relax the choice of long-arm statute rules, this Court had the opportunity to do so in that case. Conley urged that the court should rule that 48.193 may be applied when the cause of action "accrued" (injury occurred) after the statute's effective date.

This Court acknowledged, in discussing the issue presented by the petition for review, that such concerns are given some accommodation in determining the applicability of a statute of repose. Nevertheless, this Court reaffirmed on the cross-petition for review that neither 48.193 nor its predecessor 48.182 may be applied retroactively as to an alleged wrongful act committed prior to enactment of the statute, stating:

This court has consistently held that neither section 48.193 nor its predecessor 48.182,

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This decision does not address the "accrual" argument, presumably because it was not raised again. However, the case fits the same chronology of enactment of a long-arm statute before date of injury.

which became effective in 1970, can be applied retroactively to allow service under its provisions as to an alleged wrongful act committed prior to the enactment of the statute.

570 So.2d at 288.

In the instant case, the alleged wrongful acts occurred prior to amendment of 48.193 in 1984, its enactment in 1973, or its predecessor's enactment in 1970.⁶ The instant decision fails to adhere to the decisions of this Court, for the complaint brings the case squarely within these rulings. The decision also ignores, and conflicts with, decisions of the First, Fourth, and Fifth Districts applying the rule as articulated by this Court. Hunter v Challenge Machinery Co., 481 So.2d 986 (Fla.5th.DCA 1986), rev.denied, 491 So.2d 279 (Fla. 1986) (48.193 inapplicable, washing machine manufactured in 1957); Peabody v. International Corp. v. Wylain, Inc., 467 So.2d 481 (Fla.5th.DCA 1985) (48.193 inapplicable, defective part manufactured in 1966, injury in 1977); Nicolet v. Benton, 467 So.2d 1046 (Fla.1st.DCA 1985); Astra v. Colt Industries Operating Corp., 452 So.2d 1031 (Fla.4th.DCA 1984) (48.193 inapplicable, gun manufactured and sold in 1960's); Griffis v. J. C. Penney Company, 333 So.2d 503 (Fla.1st.DCA 1976) (48.193

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The Kernesses alleged jurisdiction under 48.193 or 48.181. They did not assert applicability of 48.182. The provisions of that statute are thus not relevant to the instant decision.

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inapplicable, fondue pot sold 1972, injury 6 months after effective date of statute).

Instead, the Third District relies upon five decisions, two decisions of other district courts and three federal trial court rulings, for the proposition that a long-arm statute in effect at the time of injury, or "accrual" of the cause of action, may govern the assertion of personal jurisdiction over nonresident defendants.

However, the two Florida appellate decisions relied upon, American Motors and Utility Trailer, do not address whether the long-arm statute in effect when the alleged wrongful act occurred should govern, rather than the statute in effect when the injury occurred. The Third District implicitly acknowledges this by use of the signal "See".

In American Motors, a Jeep CJ-5 was involved in an accident in 1981. The injured passenger filed suit in 1983, dismissed, then refiled in 1984, seeking to base personal jurisdiction on the expanded 48.193 that took effect mid-1984. Judge Jorgenson opined that 48.193 cannot be applied to causes of action that "accrued" before its effective date. That would be retroactive application and would raise "grave doubts" about the statute's constitutionality under the state and federal constitutions. 474 So.2d. at 273, 274, note 6. Utility Trailer involved a worker's injury caused by a fall from a bumper of a trailer unit in 1982. The complaint was filed after the effective date of 48.193 (1984). Dismissal

was affirmed because application of the statute would be retroactive. The court relied upon the American Motors rule that 48.193 can not apply to causes of action "accruing" before its effective date, and reiterated concern that any other rule would raise "grave doubt" about constitutionality of the statute. 526 So.2d at 1068.

American Motors and Utility Trailer achieve a correct result. Causes of action accruing before the effective date of a long-arm statute are clearly predicated on wrongful acts that occurred prior to that date. The Kernesses and the Third District wrongly posit a proposition derived by converting and obverting this correct proposition - that if the cause of action "accrued" after the effective date of the long-arm statute, the statute may be properly applied without regard to when the wrongful acts alleged as giving rise to the cause of action occurred, i.e., that application of the statute is not retroactive.⁷

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The American Motors rule, a correct universal negative proposition is: no cause of action accruing before the effective date of a long-arm statute is subject to that statute, or "No S is P" in logician's shorthand. The invalid "contrapositive" of that statement is "No non-P is non-S," or, no cause of action not subject to a long-arm statute is a cause of action not accruing before the statute's effective date. Logicians recognize that the contrapositive of a universal negative is invalid. Case-law also demonstrates the invalidity of this contrapositive, for the existence of just one case not falling within the statement disproves its validity. One such case is AB CTC. It presented a cause of action not subject to 48.182, yet it
(Footnote Continued)

The three federal trial decisions demonstrate a similar logical confusion. Judge Nesbitt's decisions in In Re: Asbestos Litigation, 679 F.Supp 1096 (S.D.Fla 1988), and Citron v. Armstrong World Industries, No. 89-1375 (S.D.Fla.) (July 30, 1990), are pre-Conley. They rely upon Judge Paine's language in Wildenberg v. Eagle-Picher Ind., Inc., 645 F.Supp. 29 (S.D.Fla. 1986) which shows the same faulty logic. In Wildenberg, Judge Paine suggested that the date of accrual is dispositive by stating that 48.193 applies to causes of action accruing after its effective date. Judge Paine has since articulated and applied the correct rule in Granius v. Armstrong World Ind., Inc., 87-6589 (S.D.Fla. April 11, 1989) (Paine, J.).

Judge Spellman, author of Geisinger v. Fibreboard Corp., No. 90-0872 (S.D.Fla.) (April 1, 1991) earlier applied the correct rule in Rogers v. Firestone Tire and Rubber Co., 599 F.Supp. 676 (S.D.Fla. 1984) (long-arm statute may not be retroactively applied to wrongful act that occurred prior to its passage).

(Footnote Continued)

was a cause of action that did not accrue before the effective date of 48.182. In fact, Conley and Public Gas also involved causes of action not accruing before the statutes' effective dates.

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In addition, discussion in In Re.: Asbestos Litigation indicates that arguments centered on the date of accrual as though it were a foregone conclusion that that was dispositive. Apparently no argument was made that appropriate inquiry was into the date of the wrongful act, instead.

Parenthetically, despite the Third District's gratuitous observation below that the federal courts "consistently" apply the rule it articulates, numerous federal decisions applying this court's rule as stated in AB CTC and progeny were identified by both parties in their briefs. E.g., Answer Brief at 6, n.6, citing, Glasser v. Amchem Products, Inc., 11th. Circuit Case No. 91-5517; Goodwin v. Armstrong World Ind., 89-2529 (S.D.Fla. March 25, 1991) (Moreno, J.); Dwyer v. Armstrong World Ind., 90-1758 (S.D.Fla. May 31, 1991) (Moreno, J.); Shaff v. Armstrong World Industries, Inc., 87-6577 (S.D.Fla. January 6, 1988) (Gonzalez, J.); Blenner v. Armstrong World Industries, Inc., 88-1086 (S.D.Fla. July 27, 1989) (Ryskamp, J.).

This court, though, has already addressed the potentially invalid proposition that might be derived by predicating a rule fixing applicability of long-arm statutes on accrual of a cause of action rather than occurrence of the alleged wrongful act. It has done so explicitly in AB CTC and Conley, and implicitly in Public Gas.

In rejecting Fibreboard's argument that Conley was dispositive, the Third District Court of Appeal apparently

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In further support of this review, trial counsel for Fibreboard has been advised that one case now pending on appeal of dismissal for lack of jurisdiction is to be held in abeyance pending the decision of this court in this case. Piel v. Armstrong World Industries, Inc., Case No. 91-5526, United States Court of Appeals, Eleventh Circuit.

considered that Conley announced a new rule distinguishing occurrence of a wrongful act from accrual of a cause of action and making the wrongful act's date pertinent to choice of long-arm statute only in DES cases. The district court does not acknowledge the pre-Conley decisions of this Court on which Fibreboard relied. ¹⁰ Fibreboard is at a loss to explain how the Third District might have distinguished those cases. Because the correct rule has been reiterated by this court, and because the state and federal constitutions preclude retroactive application of 48.193 to an alleged wrongful act that took place prior to its enactment, the decision of the Third District should be reversed. Article I, Section 10, Fla.Const.; American Motors, supra; Utility Trailer, supra.

The phrasing of the certified question may alternatively suggest that there should be a distinct rule regarding choice of long-arm statute which would apply only in asbestos cases. If the decision reversing the lower court's dismissal is intended to effect such a new rule, though, the Third District has exceeded its constitutional authority. A district court does not have authority under the Florida constitution to adopt such a new rule. Article V, Section 4, Fla.Const. (1968). It may only apply those rules previously

10

AB CTC and Gordon are not mentioned. Neither are the cases of other district courts of appeal listed supra, at 11. AB CTC was a Third District decision quashed by this Court.

enunciated by this court. United States Steel Corp. v. Save Sand Key, Inc., 303 So.2d 9 (Fla. 1974). The certified question would then gain even greater import, for it would present the corollary proposition that any time a lower court perceives any uniqueness in the type of negligence alleged or in the form of injury suffered, settled rules regarding choice of applicable jurisdiction statutes may be changed. Cf., Gilliam v. Stewart, 291 So.2d 593, 594 (Fla. 1974), overruled, Champion v. Gray, 478 So.2d 17 (Fla. 1985) (the "greater" question presented by certification was the overruling of supreme court decisions by appellate court). Such a proposition not only renders the law of personal jurisdiction uncertain and unpredictable, but suggests a tolerance for applications that are constitutionally offensive. Such applications could be impermissibly retroactive and justifiably provoke objection on equal protection grounds.

Indeed, there is no basis for distinguishing defendants like Fibreboard in cases involving "asbestos" from those responding to allegations of negligence in Conley. Yet, the effect of the Third District decision is to create more expansive choices of law so as to reach nonresident defendants in "asbestos cases" who are not otherwise within the reach of the courts of this state. To that extent, even the legislative prerogative is encroached.

It is for these reasons that Fibreboard assumes that the Third District has read Conley as announcing a new case

applicable only in DES litigation and has overlooked earlier cases applying the same rule.

The certified question should be answered by reaffirming that the applicable long-arm statute is that in effect at the time of the alleged wrongful act, as contrasted with the time of injury or "accrual" of the cause of action. The alternatively phrased issue should be resolved by ruling that special rules governing applicability of long-arm statutes should not be created for "asbestos" cases.

B. 48.193 MAY NOT CONSTITUTIONALLY BE READ SO AS TO SUPPORT SPECIFIC JURISDICTION OVER A NONRESIDENT DEFENDANT IN THE ABSENCE OF ANY ALLEGATIONS OF LITIGATION-RELATED MINIMUM CONTACTS - Point II.

The Kernesses have made two arguments to support their proposition that jurisdiction may be asserted over Fibreboard without offending the due process clause of the United States Constitution, Amendments V and XIV. One is that some connexity is provided by the unpleaded purported use of Fibreboard products in Florida. The other argument is that 48.193, Fla.Stat. (1984) abandons all connexity and that this abandonment is constitutional in light of the nature of "asbestos" claims.

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The complaint contains the improper conclusory allegation that all defendants "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 and/or transacted substantial revenue-producing business in the state of

(Footnote Continued)

Fibreboard submits that it need not address the first argument, since the "evidence" of use of products in Florida was unpleaded and the ruling of the lower court concerned only the purely legal issue regarding choice of long-arm statute.¹²

With regard to the second argument, the Kernesses mistake the limitations of the due process clause. Florida's early long-arm statutes required more contacts than the due process clause. Youngblood v. Citrus Associates of New York Cotton Exchange, Inc., 276 So.2d 505, 507-508 (Fla.4th.DCA 1973), cert.denied, 285 So.2d 26 (Fla. 1973). The current long-arm statute is more expansive and appears to be coextensive with the due process clause in

(Footnote Continued)

Florida to subject them to the jurisdiction of this court...." R. 81. Fibreboard has denied the allegations of the complaint, and evidentiary issues relating to such allegations were not reached. The motion addressed only the well-pleaded allegations of the complaint, and challenged the sufficiency of those allegations to provide a basis for the exercise of long-arm jurisdiction where all sale, distribution, use of, and exposure to Fibreboard products took place outside Florida before 1962. Thus, potential due process objections based upon evidence of lack of contacts have not been ripe.

This conclusory allegation cannot provide the constitutional (as well as statutory) requirement of a connection between the cause of action and in state activities. Public Gas, supra.

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The "proofs" did not support such "facts", and because the challenge to sufficiency of the complaint does not require submission of proofs, such evidentiary issues were premature. See, Golf Car systems-Pennsylvania, Inc. v. Golf Car systems, Inc. 470 So.2d 79 (Fla.2nd.DCA 1985).

some of its provisions. Nevertheless, some form of "connexity" is mandated by the Fifth and Fourteenth Amendments when the states seek to exercise "specific" jurisdiction over nonresident defendants, i.e., that jurisdiction predicated upon commission of specific acts rather than upon physical presence within the state at the time process is personally served.¹³ This constitutional "connexity" is a common thread in the Supreme Court's due process cases. It is apparent in International Shoe Co. v. Washington, where the Court states:

... it has been generally recognized that the casual presence of the corporate agent or even his conduct of a single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the Corporation to comport with due process.

326 U.S. 310, 317, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

13

Justice Blackmun has defined general jurisdiction as "when a state exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum" and specific jurisdiction as "when a state exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum." Helicopteros Nacionales, infra, 466 US 408, 414, n.8,9.

Justice Scalia has recently discussed the law by which states "may dispense with in-forum personal service on non-resident defendants" in Burnham v. Superior Court of California, 495 U.S. 604, 110 S.Ct. 2105, 2114, 109 L.Ed.2d 631 (1990). He characterizes assertion of jurisdiction over absent defendants as "deviations" from rules of jurisdiction based upon physical presence in the state, and clarifies that the Supreme Court has permitted such "only with respect to suits arising out of the absent defendant's contact with the state". Id., 110 S.Ct. at 2110. He explains that it is the "litigation-related" minimum contacts "that provide a constitutionally sound basis for jurisdiction". Id. See, also, Helicopteros Nacionales de Colombia, S.A., v. Hall, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed. 2d 404 (1984) (multiple contacts with Texas insufficient to comport with due process where cause of action not related to those contacts).

There are no allegations of purposeful activity of Fibreboard in Florida at the time of the wrongful acts alleged. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed. 2d 490 (1980). It cannot be said that any similarly-situated nonresident could have reasonably anticipated answering to litigation in Florida in 1942-1945 when the alleged wrongful acts occurred, for there were no long-arm statutes purporting to reach wrongful acts outside Florida unconnected with business activities in Florida. Where there was no "clear notice" of amenability to

suit in Florida, as is required by due process, there was no corresponding opportunity to "alleviate the risk of burdensome litigation" or "sever connection with Florida." Id.

The sole connection alleged is that the Kernesses are now living in Florida. But the "unilateral activity of those who claim some relationship with a nonresident defendant can not satisfy the requirement of contact with the forum state." Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). Construction of the long-arm statute to provide a basis of jurisdiction on allegations which are totally lacking constitutionally cognizable connexity, would thus offend due process.

Finally, the courts of this state have previously determined that retroactive application of a long-arm statutes would raise grave doubts about their constitutionality. Article I, Section 10, Fla.Const. (1968); American Motors, supra; Utility Trailer, supra. Retroactive application of 48.193, Fla.Stat. (1984) should therefore be prohibited.

V.

CONCLUSION

The court should respond to the certified question by again distinguishing the wrongful act which gives rise to a cause of action from the action's accrual, which may not occur until injury is suffered. The Court should reiterate that the applicable long-arm statute is that in effect when the alleged wrongful act is committed. Such a response to the certified

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question would render any further examination of the effect of application of section 48.193, Fla.Stat., in a case lacking any allegations of litigation-related minimum contacts, unnecessary.

In the event that this court is inclined to approve the Third District Court's reasoning that Conley and its progenitors are not dispositive and that section 48.193, Fla.Stat. may apply, then the court should address the grave doubts such a decision would raise about the constitutionality of that statute. Where applicability of this long-arm statute is based upon its abandonment of all connexity, and the complaint alleges that there is no connection between the cause of action and the nonresident's purported in-state activities, section 48.193 may not be constitutionally construed to support the assertion of jurisdiction over the nonresident. Moreover, application of the statute as to acts committed before the Plaintiff's last exposure in 1962, would be unconstitutionally retroactive and prohibited by Gordon. Finally, creation of a special rule applicable only in "asbestos" cases would deny Fibreboard equal protection.

In all events, then, the decision of the Third District Court of Appeal should be reversed, with directions that the complaint be dismissed for failure to set forth a basis for the assertion of personal jurisdiction over Fibreboard Corporation.

VI.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief on the Merits was served by mail this 3rd. day of March, 1992, on: David Lipman, Esq.,

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