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IN THE SUPREME COURT OF FLORIDA

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

REPLY BRIEF ON THE MERITS

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TABLE OF CITATIONS

CASES:

Case	Page
AB CTC v. Morejon, 324 So.2d 625 (Fla. 1975)	4,19
Alexander v. Circus Circus Enterprises, Inc., 939 F.2d 847 (9th.Cir. 1991)	18
Asahi Metal Ind. Co. v. Superior Court of California, 480 U.S. 102, 94 L.Ed.2d 92, 107 S.Ct. 1026 (1987)	17,18
Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985)	5,8
Burnham v. Superior Court of California, 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990)	15,16,17
Celotex Corp. v. Meehan, 523 So.2d 141 (Fla. 1988)	3,19
Conley v. Boyle Drug, 570 So.2d 275 (Fla. 1990)	4,5,10,19,21
Cox v. Hart, 260 U.S. 427 (1922)	6
Davis v. Pyrofax Gas Corp., 492 So.2d 1044 (Fla. 1986)	10-12
Firestone Steel Products Company of Canada v. Snell, 423 So.2d 979 (Fla.3rd.DCA 1982)	13
Glasser v. Amchem Products, Inc., 11th. Circuit Case No. 91-5517	2
Golf Car Systems - Pennsylvania, Inc. v. Golf Car Systems, Inc., 470 So.2d 79 (Fla.2nd. DCA 1985)	14
Gordon v. John Deere Co., 264 So.2d 419 (Fla. 1972)	4,5,8,19,22
Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)	6

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Heberle v. P.R.O. Liquidating Co.,
186 So.2d 280 (Fla.1st.DCA 1966) 4,8

Helicopteros Nacionales de Colombia, S.A. v. Hall,
466 U.S. 408, 104 S.Ct. 1868,
80 L.Ed. 2d 404 (1984) 15,16

International Shoe v. Washington,
326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) 6,14

Madara v. Hall,
916 F.2d 1510, (11th.Cir. 1990) 8

McGee v. International Life Insurance Co.,
355 U.S. 220 (1957) 8,9

Perkins v. Benquet Consolidated Mining Co.,
342 U.S. 437 (1952) 16

Public Gas Company v. Weatherhead,
409 So.2d 1026 (Fla. 1982) 7,14,19

Shoei Safety Helmet Corp. v. Conlee,
409 So.2d 39 (Fla.4th.DCA 1981),
cert.dismissed, 421 So.2d 518 (Fla. 1982) 12

Sinatra v. National Enquirer,
854 F.2d 1191 (9th.Cir. 1988) 20

Wilson v. Humphreys (Cayman), Ltd.,
916 F.2d 1239 (7th.Cir. 1990) 17

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286, 100 S.Ct. 559,
52 L.Ed. 2d 492 (1980) 8

Wynn v. Aetna Life Insurance Co.,
400 So.2d 144 (Fla.1st.DCA 1981) 13

Venetian Salami Co. v. Parthenais,
554 So.2d 499 (Fla. 1989) 14

OTHER AUTHORITIES:

Section 47.16 (1951) 4

Section 48.02, Fla.Stat. (1941) 4

LAW OFFICES OF LOUISE H. McMURRAY, P. A.
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Section 48.181, Fla.Stat.	5,10-12,21
Section 48.182, Fla.Stat.	4-7,10
Section 48.193, Fla.Stat.	4-7,10-14, 17,18,21,22
Section 48.194, Fla.Stat.	5
Rule 1.050, Fla.R.Civ.P.	14

LAW OFFICES OF LOUISE H. McMURRAY, P. A.
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STATEMENT OF THE CASE AND FACTS

Respondents disagree with Fibreboard's Statement of the Case in three areas. First, they aver Fibreboard made sales in Florida of the identical products to which Mr. Kerness was exposed as early as 1942. The amicus amplifies that statement to conclude that Fibreboard is doing business in Florida now. However, the Kernesses agree that the motion to dismiss was directed to the sufficiency of the jurisdictional allegations, which do not contain any allegations of simultaneous sales, and which Fibreboard contends establish that the cause of action did not arise out of any purported in-state activities. Answer Brief, at 23. Reliance on tendered discovery from other proceedings is therefore untenable. Moreover, contrary to the amicus brief which argues exclusively that jurisdiction is proper because Fibreboard "does business" in Florida now, the Kernesses conceded for the sake of the motion below that Fibreboard does not do business in the state now, and ceased all production of all asbestos products by 1972. Supplemental Record on Appeal, at 3.

Nevertheless, in an abundance of caution, Fibreboard is constrained to correct the assertion of "identical sales". To support that assertion below, the Kernesses filed three exhibits. R.47-58; Answer Brief at 1,

n.1 (Fla.3rd.DCA Case No. 91-894).[1] Mr. Lipman has elsewhere acknowledged that invoices appearing at R.57-58 are not Fibreboard's, but are invoices of Armstrong Cork. In a similar proceeding against Fibreboard Mr. Lipman withdrew a brief containing that exhibit[2] and substituted one deleting all reference to it. The Kernesses do not specifically cite it now, but the assertion that Fibreboard made "identical sales" here can only be derived from it. Such a conclusory assertion based on an irrelevant exhibit should not be tolerated.

The other two exhibits show only that two people claim to have used Fibreboard products in north Florida,[3] as the Third District observed at footnote 2. They do not establish or attempt to establish where sales of those purported products took place. Neither do they establish how the product ended up in Florida at all. Additionally, neither the trial court nor the Third District made evidentiary determinations regarding tendered discovery. The exhibits are as Fibreboard described - premature, not

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[1] Fibreboard accurately described those tendered exhibits in its initial brief, at page 2.

[2] See Answer Brief, page 14, n.9. Glasser v. Amchem Products, Inc., 11th. Circuit Case No.91-5517.

[3] See discussion infra at 18.

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considered, and not dispositive. Thus no facts regarding "distribution" or "usage" were "established."

Fibreboard agrees that the complaint alleges diagnosis of disease in 1989.[4]

The Kerness' third "correction" assumes answers to issues raised here. It is not a foregone conclusion that the complaint has "properly pled ... amenability to suit in Florida". The complaint makes only conclusory allegations of "sufficient" contacts; it does not allege jurisdiction in the language of either statute; and specific allegations of exposure in New York in 1943-1945 demonstrate that there can be no connection between the cause of action and any purported in-state activities.

ARGUMENT

For the reasons stated in the initial brief and below, Fibreboard respectfully submits that the Third District decision should be reversed and the complaint dismissed.

REPLY TO KERNESS ANSWER BRIEF

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[4] For statute of limitation purposes the cause of action arose in New York. If date of accrual were dispositive, New York law should be applied to determine that date. New York has the significant relationship with the cause of action. Celotex Corp. v. Meehan, 523 So.2d 141, 146 (Fla. 1988). The cause of action may have accrued there at last exposure in 1945 regardless of discovery. Id.

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The Kerness'argument begins with a history of long-arm statutes that re-interprets two cases on which Fibreboard relies, and which this court cited in Conley v. Boyle Drug Co., 570 So.2d 275 (Fla. 1990): AB CTC v. Morejon, 324 So.2d 625 (Fla. 1975) and Gordon v. John Deere Co., 264 So.2d 419 (Fla. 1972). They argue that the rule against retroactive application of long-arm statutes found in those cases is limited to Section 48.182 because that statute creates an agency relationship between nonresidents and the secretary of state for service of process, and "focuses" on the date of the wrongful act. They contrast these features with 48.193(1)(f), which does not create such an agency and which they say "focuses" on the time of injury.

However, this Court in Gordon approved the district court's reasoning in refusing to apply 48.182 retroactively, that 48.182 created a new remedy and method of service, not just a new "relationship". See, also, Heberle v. P.R.O. Liquidating Co, 186 So.2d 280 (Fla. 1st.DCA 1966)(implied consent of Section 48.02, Fla.Stat. (1941) does not extend to different method of service found in Section 47.16 (1951)).[5] AB CTC reaffirmed the Gordon

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[5] Heberle also appears dispositive as to specific allegations of exposure to Fibreboard products in 1942 to 1945 made in attachments to the complaint. It is only in (Footnote Continued)

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rule, specifically declining to abrogate it where injury occurred after the effective date of the long-arm statute. Conley acknowledges a continuation of that rule, not establishment of a new rule.[6]

Moreover, the "focus" discussed by the Kernesses appears only in provisos that incorporate a due process limitation in each statute. 48.182 is limited by an "expectation" standard for due process:

> If a nonresident expects or should reasonably expect the act to have consequences in this state ... he may be served....

This language reflects the test for foreseeability of suit in a foreign forum quoted at page 24 of the Kerness brief:

> 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.

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985).[7]

(Footnote Continued)
general allegations in the complaint that Kerness claims exposure up to 1962, and that forms the basis of the reliance on 48.181.

[6] 48.182, quoted by the Kernesses, permitted personal service within the state. 48.193 and 48.194 create jurisdiction over certain acts and provide for extraterritorial service.

[7] The Kernesses wrongly suggest foreseeability is not required by due process but only by 48.182. Additionally, since Fibreboard ceased production of asbestos-containing products by 1972, the Kerness' conclusion is absurd: Fibreboard could not be sued here in 1971 because it was not foreseeable, but could be sued here after 1984 when "identical sales" were unforeseeable and impossible.

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The 48.193(f) two-part proviso, though, enunciates a business contacts standard:

> ... if, at or about the time of the injury, either:
> 1. The defendant was engaged in solicitation or service activities within this state; or
> 2. Products ... manufactured by the defendant ... were used or consumed within this state.

This is similar to "doing business" standards articulated by other courts:

> The Supreme Court of Washington was of the opinion that the regular and systematic solicitation of orders in the state ... resulting in a continuous flow of ...product into the state, was sufficient to constitute doing business in the state ...

International Shoe Co. v. State of Washington, 326 U.S. 310, 314 (1945). A requisite level of solicitation and resulting sales may support a finding of "purposeful activity" directed to the forum state. Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).

However, a proviso is distinct from the substantive provision of a statute. The Supreme Court describes its function this way:

> The office of a proviso is well understood. It is to except something from the operative effect, or to qualify or restrain the generality, of the substantive enactment to which it is attached.

Cox v. Hart, 260 U.S. 427 (1922).

The "time of injury" in 48.193 is thus not an "event" that triggers application of the statute, any more than foreseeability "triggers" application of 48.182. In

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both statutes, the "event" that triggers long-arm jurisdiction is stated almost identically:

> Any nonresident ... who commits a wrongful act outside the state which causes injury, ... within this state may be personally served. 48.182, Fla.Stat.
>
> * * *
>
> (1) Any person ... submits himself to the jurisdiction of the courts of this state for
>
> * * *
>
> (f) Causing injury ... within this state arising out of an act or omission ... outside this state. 48.193(1)(f), Fla.Stat.

Finally, this Court has rejected any such distinction between 48.182 and 48.193. Although the Kernesses suggest that Public Gas Company v. Weatherhead Company, 409 So.2d 1026, 1027 (Fla. 1982), did not "involve" 48.193 because it referred to its predecessor, the opinion states quite unmistakably that, "Personal service was attempted on Weatherhead in Cleveland, Ohio, under section 48.193(1)(f)(2), Fla.Stat. (1979)." Id. In Public Gas this Court specifically ruled that that statute could not be applied retroactively because "the product ... was made and distributed in the 1950's, well before the 1970 effective date of the original statutory predecessor (48.182) of section 48.193." Public Gas is dispositive here, for "the product... was made and distributed in the 1940's, well before the 1970 effective date of the original statutory predecessor of section 48.193."

Finally, the Kernesses argue that application of 48.193 does not "enlarge or impair any vested rights of

Fibreboard," yet they acknowledge that the parties' rights and obligations arose out of a relationship initiated prior to enactment of the statute. But creation of a "new remedy" does affect vested rights of a pre-existent relationship with fixed rights and obligations. The Kernesses, for example, agree that they could not have sued Fibreboard even in 1970. The rights involved are protected by the state and federal constitutions. They include the right to "clear notice" of amenability to suit; the right to anticipate forums in which one might be sued; and the right to be able to adjust one's dealing with a state in such a way as to "sever connection" with a potential forum. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 479, 487 (1985). World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed. 2d 490 (1980). Cf., Heberle, supra, 186 So.2d. at 283. As the Kernesses state at page 10 "... 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." See, also, Madara v. Hall, 916 F.2d 1510,1516 (11th. Cir. 1990)(due process requires "fair warning" that activity may subject nonresident to jurisdiction, and that cause of action be related to activity in the forum).

The Kernesses rely upon McGee v. International Life Insurance Co., 355 U.S. 220 (1957) for the proposition that, at least under federal due process standards, a

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long-arm statute may be retroactively applied. However, Fibreboard submits that the Kernesses misconceive McGee. Franklin, at all times a California resident, bought a life insurance contract from an Arizona company. International Life Insurance Company, a Texas company, subsequently assumed the insurance obligations of the Arizona company and mailed a reinsurance offer to Franklin to continue the old policy. He accepted, continued paying premiums, and died in California. International refused to pay the benefits. McGee, the beneficiary, obtained a California judgment and attempted to enforce it in Texas. The Texas courts refused to give it full faith and credit, finding that the extraterritorial service of process was void. The Supreme Court held that due process was satisfied by the fact that "the suit was based on a contract which had substantial connection with that State." 355 U.S. at 223. International additionally argued that enactment of the exterritorial service of process law after renewal of the contract by International impaired the obligations of the contract. The Supreme Court disagreed, holding that it did not enlarge or impair the contractual rights and obligations of the parties.

Thus, it is clear that the parties had an ongoing contractual relationship and that the contract had a substantial connection with California. Additionally, it is clear that the "wrongful act" in McGee did not occur prior

to the effective date of the long-arm statute. The wrongful act was the denial of benefits under the policy. McGee is simply inapposite. It does not diminish the correctness of this court's rulings that a long-arm statute may not constitutionally be applied as to a wrongful act committed prior to the effective date of the statute.

Following the first argument, appellees argue that Conley v. Boyle Drug, 570 So.2d 275 (Fla. 1990), should not be "extended". Appellees argue that Conley's jurisdictional ruling was integral to the ruling on market-share liability, a "balance" to the adoption of that form of liability. But the issue of jurisdiction was separately decided as the subject of a cross-petition. There was no long-standing rule that a long-arm statute in effect when a cause of action accrues governs jurisdiction over nonresident defendants, as the Kernesses suggest in arguing that Conley adopted a "new" rule. Conley rejects just such an argument:

> This Court has consistently held that neither section 48.193 nor its predecessor section 48.182, 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. Conley's cause of action "accrued" after the effective date of 48.193.

Appellees next argue that if 48.181 does apply, "connexity" is provided by the unpleaded "identical sales", under the rule announced in Davis v. Pyrofax Gas Corp., 492

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So.2d 1044 (Fla. 1986). This argument rests upon the legal proposition that any "connexity" required by either statute is identical.

However, all "connexity" requirements are not identical. The precise connection required between a cause of action and nonresident business activities is spelled out by each statute. The wording of 48.181 creates jurisdiction only for nonresidents operating a business in the state, and only when the cause of action arises "out of any transaction or operation connected with or incidental to the business".

By contrast, 48.193, Fla.Stat. (1979), creates jurisdiction for causes of action arising from any of its specific enumerated acts, including:

> (f) Causes injury ... within this state arising out of an act or omission outside of this state by the defendant, provided that at the time of the injury either:
>
> * * *
>
> 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, and the use or consumption resulted in the injury.

The Davis decision construed proviso 2: must an injurious item used in the state also be purchased here to satisfy the requirement of use "in the ordinary course of commerce" and thus render its manufacturer or seller amenable to suit?

Section 48.181 lacks that proviso as well as jurisdiction-creating language of part (f). It does not

create jurisdiction over nonresidents for wrongful acts committed outside the state that cause injury inside the state. Attempting to equate the proviso of subpart 2 to the connexity requirement of 48.181 overlooks the essential expansion of jurisdiction provided by 48.193(1)(f).

The second flaw in this argument is that Davis has no application to a case where there is no use or consumption in Florida of the product allegedly causing injury. 48.193(1)(f)(2) permitted jurisdiction only where a product is "used or consumed within this state ... and the use or consumption resulted in the injury."[8]

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[8] Shoei Safety Helmet Corp. v. Conlee, 409 So.2d 39 (Fla.4th.DCA 1981), cert.dismissed, 421 So.2d 518 (Fla. 1982), may be an anomaly. It addressed 48.181, Fla.Stat. (1973) and 48.193, permitting assertion of jurisdiction over a nonresident promoting sales in Florida even though the particular product was sold outside Florida. In 1973, 48.181 made sales to a distributor who sells in Florida conclusive evidence of doing business in Florida. That language does not appear in earlier versions of the statute. Shoei also appears to mix language from cases construing 48.193 with language from cases construing 48.181. The Fourth District apparently considered that solicitation and promotion of sales in Florida, coupled with sales to a distributor outside Florida with intent to resell in Florida, satisfies the connexity requirement of 48.181. Fibreboard submits that reference to 48.181 may be mistaken, or that the court may have confused a "doing business" requirement with a "connexity" requirement.

Nevertheless, Shoei is inapposite: the product was used in Florida; there were allegations of simultaneous promotion and identical sales in Florida; and the statute permitted consideration of such. In any event, Fibreboard submits that the conclusive presumption of 48.181 (1973) is constitutionally infirm to the extent that it dispenses with due process requirements of litigation-related contacts.

The final flaw is that this case lacks any allegation of simultaneous sale of identical products. Firestone Steel Products Co. of Canada v. Snell, 423 So.2d 979 (Fla.3rd.DCA 1982) (no allegation that nonresident operated business in Florida and cause of action arose therefrom); Wynn v. Aetna Life Ins. Co., 400 So.2d 144 (Fla.1st.DCA 1981) (failure to allege basis for jurisdiction voids service of process).[9] It is conceded that at the time of diagnosis of disease, identical sales were impossible and Fibreboard did not do business in Florida.

As to the issue of constitutionality, the Kernesses argue that they have fulfilled pleading requirements for obtaining jurisdiction over a nonresident and that Fibreboard has not properly raised the issue. They are wrong for four reasons: the complaint does not meet pleading requirements for either statute; it does not allege sufficient minimum contacts; affidavits are not required to contest the sufficiency of the complaint; and the Kernesses

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[9] If the complaint alleged "parallel business activities" in the language of a statutory subsection it might, without its attachments, state a basis for jurisdiction. If this court agrees that conclusory allegations of "sufficient" contacts support jurisdiction under 48.193, and that statute applies, then the issue remains whether attachments and specific admissions made for purposes of the ruling below negate a connection between the cause of action and in-state activities and render process unconstitutional.

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themselves raised constitutionality of jurisdiction as an issue of sufficiency of the complaint.

First, the Kernesses have not pleaded a basis for service in the "language of the statute," as is required by Rule 1.050, Fla.R.Civ.P. There is no allegation tracking 48.193(f)(1) or (f)(2), on which the Kernesses rely. Venetian Salami Co. v. Parthenais, 554 So.2d 499, 502 (Fla. 1989).

Secondly, the allegation that all defendants maintained "sufficient" contact to "support jurisdiction under either statute" is the kind of conclusory allegation condemned as insufficient in Public Gas, supra.

Thirdly, a challenge to the sufficiency of the complaint does not require submission of proofs. Golf Car Systems-Pennsylvania, Inc. v. Golf Car Systems, Inc.,[10] 470 So.2d 79 (Fla.2nd.DCA 1985).

Fourthly, the Kernesses injected the issue as it is presented, by opposing the motion to dismiss on the grounds that application of 48.193 is permitted by International Shoe Co. v. State of Washington, 326 U.S. 310 (1945). Supplemental Record, at 7. In response to the initial brief filed below, the Kernesses again argued that

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[10] A finding that the complaint states a basis for a constitutional exercise of jurisdiction does not preclude a contest as to proofs of the allegations. The facts were not tried or determined.

due process supports long-arm jurisdiction over Fibreboard. The instant issues are distinct from an evidentiary issue of lack of minimum contacts which a defendant may pursue after a determination of the sufficiency of the complaint. They are purely legal: do due process requirements of the state and federal constitutions require that the cause of action be connected with in-state activities when the nonresident is not served personally within the state and prohibit retroactive application of long-arm statutes? Fibreboard submits that the answer is yes.

The Kernesses next argue that assertion of jurisdiction over a nonresident is permissible without a connection between in-state activities and the cause of action. They wrongly rely upon a footnote in Burnham v. Superior Court of California, 495 U.S. 604, 110 S.Ct. 2105, 2110, 109 L.Ed.2d 631 (1990), for a rule that litigation-related minimum contacts are only required for individuals, and not for corporations.

However, the Supreme Court recognizes two classes of defendants - those who are physically present and those who are absent. Burnham, supra, 110 S.Ct. at 2116. It is physical "presence" of a nonresident corporation that has eluded definitive rule and prompted dictum relied upon by the Kernesses. Justice Scalia's footnote acknowledges dictum in Helicopteros, infra, cited by the Kernesses, that suggests that due process may not preclude jurisdiction for

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causes of action unconnected with corporate in-state activities when sufficient contacts with the forum exist. This appears to pose the possibility of assertion of "general" jurisidiction over a nonresident corporation. But Justice Scalia points out that in _Helicopteros_, regular service of process was made on the company president within the forum. _Helicopteros Nacionales de Columbia v. Hall_, 466 U.S. 408, 80 L.Ed.2d 404, 411 (1984). _Burnham_, _supra_, at 2110, n.1. _Perkins v. Benquet Consolidated Mining Co._, 342 U.S. 437 (1952), also cited by the Kernesses because of language suggesting assertion of general jurisdiction over a nonresident, also involved service of process within the state. Thus a corporate "physical presence" is tied to the CEO's physical presence within the state while acting in his agency capacity for the fictitious entity. Here, there is no agent in the state, no service within the state, and no allegation of "presence" to support general jurisdiction. This case is limited to an attempt to assert specific jurisdiction.

It is a fact that _Burnham_ does run counter to the inferences the Kernesses make from _Perkins_ and _Helicopteros_. It is by no means clear that an assertion of "general" jurisdiction over foreign corporations remains possible. Even when a corporation registers to do business in the state, the assertion of jurisdiction must rest upon something more than presence of the registered agent. _Cf._,

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Wilson v. Humphreys (Cayman), Ltd., 916 F.2d 1239, 1245 (7th.Cir. 1990)(corporation registered in forum not necessarily amenable to general jurisdiction without showing of continuous and systematic activity).

The Burnham decision states that it expresses no view on whether general jurisdiction, i.e., jurisdiction over unrelated causes of action, remains permissible where there are "continuous and systematic" contacts. This case need not address that issue, either, for the Kernesses rely upon specific "single act" jurisdiction provided by 48.193(1)(f), there is no allegation of "continuous and systematic" activity in Florida, and the Kernesses agree that Fibreboard does not do business in Florida.[11]

Finally, the mere fact that products reached Florida, allegedly in the "stream of commerce", without allegations of purposeful activity directed to Florida does not support specific jurisdiction. Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 94 L.Ed.2d 92, 107 S.Ct. 1026 (1987). Single-act jurisdiction, as is created by 48.193(1)(f), may not constitutionally abandon all connexity according to Justice O'Connor in Asahi:

> The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the

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[11] Fibreboard maintained a registered office from 1972 to 1982 solely for the purpose of receiving process. In 1982 it "severed connection" with Florida.

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> forum State. Additional conduct ... may indicate an intent or purpose to serve the market in the forum State .... But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

480 U.S. at 112, 94 L.Ed.2d at 104. See, also, Alexander v. Circus Circus Enterprises, Inc., 939 F.2d 847, 850 (9th.Cir. 1991)(specific jurisdiction requires a connection between the cause of action and in-state activity).[12]

In the light of these standards, there simply are no allegations of any contact that would constitutionally support jurisdiction over Fibreboard.

REPLY TO AMICUS BRIEF

The amicus brief appears to devote itself to two arguments: because of the long latency period for asbestos diseases to manifest their presence, the diagnosis of disease should trigger the applicable long-arm statute, just as it does the applicable statute of limitations;[13] and, the

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[12] The Kernesses seem to argue that 48.193(1)(g) qualifies the single-act jurisdiction. However, it appears to define "presence" so as to confer general jurisdiction. In any event, the Kernesses do not base jurisdiction on that subsection, though it suffers the same constitutional infirmity on these pleadings.

[13] The Kernesses argue that the "unique setting" of "asbestos litigation" should support a special rule but they do not spell out the circumstances of the "uniqueness". By referring to a long latency period, it appears that their (Footnote Continued)

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assertion of jurisdiction over Fibreboard is constitutionally permissible because Fibreboard is doing business in Florida.[14]

In response to the first argument, Fibreboard submits that this court in Conley had opportunity to create unique choice of law rules for jurisdiction in long-latency cases but properly chose not to do so. The prior rulings of Gordon, AB CTC, and Public Gas support the Conley decision on long-arm jurisdiction, as do state and federal due process and equal protection prohibitions against retroactive application of long-arm statutes and unequal treatment of litigants. The purported "distinction" between Conley and this case, argued at page 8 of the amicus brief, is illusory. The argument made there is that a cause of action accrues in "asbestos litigation" at the time of discovery. However, the standard of manifestation of injury was applied in Conley. 570 So.2d at 288.

In response to the second argument, Fibreboard submits the amicus has misperceived the posture of the case. There is concession of record that Fibreboard does not do

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(Footnote Continued)
argument centers upon that circumstance and thus mirrors the amicus argument.

[14] The amicus brief mistakenly characterizes the cause of action as negligent manufacture. But the only cause of action pleaded is negligent failure to warn. It also mischaracterizes this court's decision in Celotex Corp. v. Meehan. But see, n.4, supra.

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business in Florida. The amicus argument that minimum contacts exist, that there is no "unfairness" to Fibreboard because Fibreboard is "present" in Florida, that Fibreboard could "reasonably expect" to be sued in Florida because it does business here, and that this state has an interest in the controversy because both litigants are present in the state, are all gutted by that fact.[15]

Finally, contrary to the amicus brief's assertions that denial of jurisdiction in Florida would "bar" the Kernesses' claim and permit manufacturers to "avoid responsibility", there is no indication that the forum where exposure occurred is unavailable to the Kernesses. Indeed, although the amicus argues that persons like the Kernesses would have to play a "cat and mouse" game if required to prove in-state activities to support jurisdiction in Florida, suit in the forum where exposure occurred may well render such "games" less necessary. Moreover, suit in New York may prove to be advantageous to the Kernesses, for if Mr. Kerness were in fact injuriously exposed to Fibreboard

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[15] The amicus brief seems to reach the third prong of the due process test of specific jurisdiction: is there purposeful availment of the privilege of conducting activities in the forum; does the cause of action arise out of those activities; is the exercise of jurisdiction reasonable? Sinatra v. National Enquirer, 854 F.2d 1191, 1195 (9th. Cir. 1988). Fibreboard contests only the first two prongs. Nevertheless, if the third is reached, the amicus rationale fails because of its reliance on false facts of "doing business" and "presence".

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products in Brooklyn, proof of that exposure may be facilitated by trial in a jurisdiction where liability witnesses and records are located.

For all other points raised by the amicus, Fibreboard relies upon its initial brief and argument submitted in reply to the Kernesses.

CONCLUSION

Petitioner respectfully submits that the court should: again distinguish the wrongful act which gives rise to a cause of action from the action's accrual; reiterate that the applicable long-arm statute is that in effect when the alleged wrongful act is committed; and, reaffirm that 48.181 requires that the cause of action must arise out of alleged in-state activities. This answer to the certified question compels reversal and dismissal, and would render examination of the effect of application of section 48.193 to a case lacking litigation-related minimum contacts unnecessary.

In the event this court is inclined to approve the Third District's reasoning that Conley and its progenitors are not dispositive and that section 48.193 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 a purported abandonment of all connexity, and the complaint alleges that there is no connection between the cause of

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action and any in-state activities, section 48.193 may not be constitutionally construed to support the assertion of jurisdiction. 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, 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 jurisdiction over Fibreboard Corporation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief was served by mail this 29th. day of April, 1992, on: David Lipman, Esq., DAVID LIPMAN, P.A., 5901 S.W. 74 Street, Suite 304, Miami, Florida 33143; Andre R. Perron, Esq., BLALOCK, LANDERS, WALTERS & VOGLER, P.A., 802 11th. Street West, Bradenton, Florida 34205.

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