ORIGINAL

IN THE SUPREME COURT OF FLORIDA

GRADY CARTER AND MILDRED CARTER,

Petitioners,

vs.

BROWN & WILLIAMSON TOBACCO CORPORATION, as successor by merger to THE AMERICAN TOBACCO COMPANY,

Respondent.

CASE NO. 94, 797
FIRST DCA CASE NO. 96-4831

ON PETITION FOR DISCRETIONARY REVIEW OF
A DECISION OF THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

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Statement Certifying Style and Size of Type Used in Preparing Brief

The undersigned certifies that 14 point Times Roman type has been utilized in the preparation of this brief.

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STATEMENT OF THE CASE AND OF THE FACTS[1]

This products liability action was filed on February 10, 1995, by Grady and Mildred Carter, and resulted in a jury verdict in their favor, which was appealed to the First District Court of Appeal by Brown & Williamson Tobacco Corporation (B&W), as successor by merger to the American Tobacco Company. In its verdict, the jury determined that the four year statute of limitations did not bar the Carters' action (Appendix 3). In its decision filed June 22, 1998 (Appendix 1) the First District reversed the jury's verdict and remanded for dismissal, concluding that the action was barred as a matter of law by the statute of limitations. The Carters filed a timely Motion for Rehearing, Clarification and for Rehearing En Banc in the First District (Appendix 4). The Motion for Rehearing was denied by decision filed by the First District on December 31, 1998 (Appendix 2). Timely Notice to Invoke Discretionary Jurisdiction was filed by the Carters on January 29, 1999 (Appendix 5).

The timetable of events from which the properly charged jury concluded that the statute of limitations did not bar the cause of action is as follows: Mr. Carter coughed and spit up blood on January 29, 1991. He immediately made an appointment with Dr. Decker for February 4, 1991. Concerned that something was "bad wrong with me" he looked at a medical book and found two things that would result in spitting up blood: lung cancer and tuberculosis. As of that date, Mr. Carter quit smoking. Although not noted in the First District's decision, Mr. Carter testified at trial that he had been exposed to tuberculosis at work (Appendix 6).

On February 4, 1991, Dr. Decker took chest x-rays and told Mr. Carter he

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[1]Except as specifically noted in this statement, the progress of the case below and the facts recited are taken from the decision of the First District Court of Appeal filed June 22, 1998, contained in the Appendix, item 1.

observed an abnormality on his lung which could indicate several things, including cancer or tuberculosis. He referred him to a pulmonary specialist, Dr. Yergin, and told him he needed to see him immediately. Mr. Carter saw Dr. Yergin the next day, February 5, 1991.

When Dr. Yergin saw Mr. Carter on February 5, 1991, he reviewed the x-ray, and observed a large left upper lobe mass lesion which he indicated on his report of that visit was highly suggestive of a neoplasm, i.e. lung tumor. However, he did not know what the nodule was on that day, and while suggestive of a neoplasm, it could have been tuberculosis or a slowly resolving pneumonia. Although not noted by the First District, no evidence was presented at trial that either tuberculosis or pneumonia are caused by cigarette smoking. Because cancer cannot be reliably differentiated from other ailments by chest x-ray alone, Dr. Yergin testified that it would not have been correct to tell Mr. Carter on February 5 that he had lung cancer, and *he, in fact, did not tell Mr. Carter on that date that he had lung cancer* (Appendix 8 at pp 44-45). Several additional tests were necessary to make an accurate diagnosis, including a bronchoscopy, in which a tissue sample is obtained and tested.

Dr. Yergin's chart of February 5 reflects his impressions: left upper lobe nodule, COPD, chronic bronchitis, cigarette abuse of approximately 65 "pack years," history of nephrolithiasis, previous history of ulcer disease, status post pneumothorax 1958 (Appendix 7). Although not noted by the First District in its decision, no testimony was elicited at trial that Dr. Yergin discussed any of these impressions or the cause of same with Mr. Carter before February 10, 1991, with the exception of the left upper lobe nodule, which was discussed to the extent indicated above. At trial, neither Dr. Yergin nor Mr. Carter were asked *when* it was that Mr. Carter was informed about the impressions of bronchitis or COPD (Appendix 8).

On February 12, 1991, Dr. Yergin performed the additional tests on Mr. Carter, including the bronchoscopy. The bronchoscopy pathology report showed Mr. Carter had lung cancer. Dr. Yergin told Mr. Carter he had lung cancer on February 14, 1991. Mr. Carter testified that prior to February 14, 1991, he did not know for sure what the problem was.

Under these facts, the First District concluded:

> We conclude that the evidence shows beyond dispute that Grady Carter knew or should have known, before February 10, 1991, that his lungs were injured, and he was on notice that the injury was probably caused by smoking. Therefore, by the time he filed suit on February 10, 1995, the four year statute of limitations had run. Neither absolute knowledge nor medical confirmation is required for a cause of action to accrue. (Appendix 1).

SUMMARY OF ARGUMENT

In this case, the First District Court of Appeal reweighed and reevaluated evidence on the statute of limitations issue considered by the jury and substituted its judgment for that of the jury, notwithstanding the existence of competent evidence to support the jury's verdict, which appears within the First District's decision and in the record. Moreover, the First District's decision sets a new, impossible standard for a plaintiff to survive a defense based on the statute of limitations; namely, that the mere existence of a *possibility* of a claim, even if the claimant could not have maintained the claim in court at that time, begins the running of the statute of limitations as a matter of law, *regardless* of the testimony of the treating physician and of the claimant, and *regardless* of the factfinders' conclusions as to the knowledge of the claimant and his opportunity to be informed of the cause of action. Since most non-sudden injuries carry with them the mere possibility of a claim, the First District's decision changes settled law in products liability cases.

This court has jurisdiction to review the decision of the First District pursuant to Article V, Section 3(b)(3), Florida Constitution, because the First District's reevaluation of the evidence considered by the jury conflicts with and is contrary to voluminous authority finding this practice outside the scope of appellate review. Helman v. Seaboard Coast Line R. Co., 349 So. 2d 1187 (Fla. 1977).

In reevaluating the evidence, the First District concluded that unconfirmed, alternative diagnoses communicated to Grady Carter on February 5, 1991, that he suffered from either non-cigarette related pneumonia or tuberculosis, or from cigarette-related lung cancer, started the running of the four year products liability statute of limitations, as a matter of law, and precluded the jury from determining that the limitations period did not begin to run until necessary tests to confirm the proper diagnosis were performed and communicated to Mr. Carter on February 14, 1991, and/or that it did not begin to run until Mr. Carter had reason to suspect B&W's product, Lucky Strike cigarettes.

The First District also concluded that the jury was required to find that Mr. Carter knew he suffered from cigarette-related bronchitis and chronic obstructive pulmonary disease on February 5, 1991, based on impressions noted in his physician's chart on that date, even though no evidence was presented that these impressions and their cause were communicated to him prior to February 10, 1991, as at trial neither he nor his physician were asked when Mr. Carter was informed of these impressions.

The First District's conclusions are in conflict with the decisions of this court in Celotex Corp. v. Copeland, 471 So. 2d 533 (Fla. 1985) and of the Third District Court of Appeal in Copeland v. Armstrong Cork. Co., 477 So. 2d 922 (Fla. 3rd DCA 1984) and Colon v. Celotex Corp., 465 So. 2d 1332 (Fla. 3rd DCA 1985), quashed on

other grounds, Celotex Corp. v. Meehan, 523 So. 2d 141 (Fla. 1988). These decisions hold that whether the product-related disease has sufficiently manifested itself to the plaintiff to begin the running of the statute of limitations is a jury question, and that a jury *reasonably can conclude* that the moment of sufficient manifestation is not reached until a confirming diagnosis of a product-related disease is communicated to the plaintiff.

The First District's conclusions also are in conflict with the decisions of the Third District Court of Appeal in Brown v. Armstrong World Industries, Inc., 441 So. 2d 1098 (Fla. 3rd DCA 1983) and Szabo v. Ashland Oil Company, 448 So. 2d 549 (Fla. 3rd DCA 1984). These decisions hold that the statute of limitations does not begin to run *until the Plaintiff knows, or in the exercise of reasonable diligence should know, that he has a cause of action against the Defendant*, and that a jury reasonably can determine that he does not have such knowledge unless his physician has established to a reasonable medical certainty a cause and effect relationship between the product and the plaintiff's injury and has communicated this to him.

We do *not* contend that the law *required* the jury to find that the statute had not run until the confirming diagnosis was made. We do contend that under the cited decisions the jury was permitted to so find. The First District's decision to the contrary creates conflict with the cited decisions and demonstrates that this Court has jurisdiction to review this case and resolve the conflict.

ARGUMENT

THIS COURT HAS JURISDICTION PURSUANT TO ARTICLE V, §3(b)(3), FLORIDA CONSTITUTION, BECAUSE THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OF THE THIRD DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW

In Helman v. Seaboard Coast Line R. Co., 349 So. 2d 1187 (Fla. 1977), this court found it appropriate to exercise its discretionary jurisdiction under Article V, §3(b)(3), Florida Constitution, to review a decision of the Fourth District Court of Appeal, because the District Court had reweighed and reevaluated evidence considered by the jury, contrary to the voluminous established precedent of Florida finding this practice outside the scope of appellate review. This Court emphasized three incontrovertible premises of law which the District Court violated, giving rise to this Court's conflict jurisdiction: that it is not the function of an appellate court to reevaluate the evidence and substitute its judgment for that of the jury; that if there is any competent evidence to support a verdict, that verdict must be sustained regardless of the District Court's opinion; and that factual findings of the jury must be sustained unless reasonable men could not differ in their determination. Id. pg. 1189.

Both the evidence recited by the First District in its decision sought to be reviewed and that contained in the record below, demonstrate that the First District did not adhere to these incontrovertible premises of law when it reviewed the jury's verdict on the statute of limitations, such that its decision conflicts with settled Florida precedent and provides a basis for exercise by this Court of its review jurisdiction.

Based on the evidence presented at trial, the jury rendered its verdict that the four year statute of limitations did not bar the Carters' action (Appendix 3). As noted by the District Court in its decision, Mr. Carter testified that prior to February 14, 1991 he did not know for sure what caused him to cough up blood on January 29, 1991 (Appendix 1). He feared he might have lung cancer, but since he had been exposed to tuberculosis at work, he also believed this non-cigarette related disease

might be the cause of his problem (Appendix 6). Prior to February 10, 1991 (four years before the filing of this action on February 10, 1995) the most he knew was that from his chest x-ray taken February 4, 1991, his doctors were concerned that he could have lung cancer, or that he could have tuberculosis or pneumonia. However, more tests were needed by his doctors to determine the proper diagnosis. (Appendix 1) There was no evidence presented to the jury that prior to February 10, 1991, Mr. Carter was informed by his doctors that he suffered from cigarette-related bronchitis or COPD. The only evidence presented in this regard was that these conditions, as well as several others, were noted as "impressions" on his physician's chart of February 5, 1991. (Appendix 7;8) It was not until February 14, 1991, that Mr. Carter was informed that he suffered from lung cancer, based on the results of the additional tests performed on February 12, 1991. (Appendix 1)

In Celotex Corp. v. Copeland, 471 So. 2d 533, 539 (Fla. 1985), this Court affirmed the decision and reasoning of the Third District Court of Appeal in Copeland v. Armstrong Cork Co., 447 So. 2d 922 (Fla. 3rd DCA 1984), that whether the product-related disease has sufficiently manifested itself to the Plaintiff to begin the running of the statute of limitations is a jury question, and that a jury *reasonably can conclude* that the moment of sufficient manifestation is not reached until a confirming diagnosis of a product-related disease is communicated to the Plaintiff. As stated by the Third District:

> Admittedly, there is no magic moment when this point in time arrives as we often deal here with inherently debatable questions about which reasonable people may differ. For that reason, these matters are generally treated as fact questions for a jury to resolve, and therefore inappropriate for resolution on a summary judgment or directed verdict.
>
> Id., 447 So. 2d at pg. 926.

In Copeland v. Armstrong Cork Co., at pages 927-928 of its decision, the Third District discussed at length the evidence presented in that case both supporting and contradicting whether the product-related disease had sufficiently manifested itself to the Plaintiff more than four years before he filed his action. The Court noted that on the conflicting evidence, a jury reasonably could have concluded either way: "We certainly agree that a jury could reasonably so conclude, but we cannot agree that a jury could not reasonably fail to do so." Id. at page 927-928. Thus, the Court concluded, contrary to the First District, that a reasonable jury could select the date that the Plaintiff was informed of the diagnosis of the product-related disease as the date that the statute of limitations began to run. Id. pg. 927. Here, as in Copeland, the evidence that Mr. Carter quit smoking when he spit up blood and that he feared lung cancer, among other diseases, did not as a matter of law require the jury to find that limitations began running. Instead, the jury was entitled to select the date he was informed of the diagnosis of the product-related disease.

Similarly, in Colon v. Celotex Corp, 465 So. 2d 1332 (Fla. 3rd DCA 1985), quashed on other grounds, Celotex Corp. v. Meehan, 523 So. 2d 144 (Fla. 1988), the question was whether the discovery of a cause of action occurred on June 25, 1979, in which case the claim would be time-barred, or on June 28, 1979, when commencement of the action would have been timely. There was evidence that Plaintiff had been told by his doctor on June 25 that he had a product-related disease. However, there also was evidence that this was only a preliminary diagnosis, and that it was customary practice not to make a final diagnosis until after review of test results, which occurred on June 28 and was communicated to the Plaintiff on that date. The Third District stated that the material issue to be decided was whether Plaintiff, based solely on that tentative diagnosis, knew or should have known on

June 25 that he had a cause of action against the defendants. Id. at page 1334. Relying on the rationale of this Court's decision in Ash v. Stella, 457 So. 2d 1377 (Fla. 1984), the Third District held that the preliminary diagnosis did not start the running of the statute of limitations *as a matter of law*, such that the trier of fact *could* (but was not required to) select the date of the confirming diagnosis as the date on which Plaintiff first knew of his cause of action.

To the same effect are the Third District's decisions in Brown v. Armstrong World Industries, Inc., 441 So. 2d 1098 (Fla. 3rd DCA 1983) and Szabo v. Ashland Oil Company, 448 So. 2d 549 (Fla. 3rd DCA 1984). These decisions hold that the statute of limitations does not begin to run until the *Plaintiff knows or in the exercise of reasonable diligence, should have known that he has a cause of action against the defendant*, and that a jury reasonably *can* determine that the Plaintiff does not have such knowledge unless his physician has established to a reasonable medical certainty a cause and effect relationship between the Plaintiff's injury and the product and has communicated this to him. Thus, under these cases, for a person to know that he has a "cause of action", he must understand that his injury has been caused by the product in question.

The conclusions of the First District in this case are in conflict with the principles of law announced in the cases cited above. The First District concluded that the jury was compelled to find that the product-related injury was sufficiently manifest to Mr. Carter to start limitations running as of the preliminary, alternative diagnoses communicated to him on February 5, 1991, and based on impressions noted by Dr. Yergin in his chart on that day, which the evidence does not show were communicated to him on that day or prior to February 10, 1991. The cited cases squarely hold that a jury reasonably can conclude otherwise, in the face of an

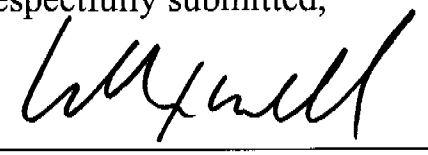
uncertain diagnosis, and reasonably can find that limitations does not begin to run until the confirming diagnosis is communicated to the Plaintiff. The conflict between the cited cases and the decision of the First District on the limitations issue demonstrates that this Court has jurisdiction to review this case and resolve the conflict.

This Court is respectfully urged to exercise its discretion and entertain the case on the merits if it finds it does have jurisdiction because of the importance to our civil justice system that a jury be the ultimate finder of fact, without interference from the courts, except in those rare cases where the jury clearly has ignored the evidence. The First District's decision erodes this principle and thus has created precedent that should be reviewed by this Court.

CONCLUSION

Petitioners respectfully request that the Court accept jurisdiction and order briefs on the merits.

Respectfully submitted,



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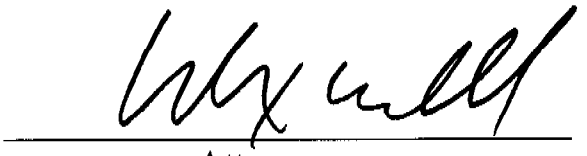
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petitioner's Brief on Jurisdiction has been furnished to: Robert P. Smith, Post Office Box 6526, Tallahassee, Florida 32314; J.W. Prichard, Jr., 501 West Bay Street, Jacksonville, Florida 32202; and Thomas E. Bezanson, 30 Rockefeller Plaza, New York, New York, 10112, attorneys for Brown & Williamson Tobacco Company, by U.S. Mail this 8th day of February, 1999.



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