IN THE SUPREME COURT OF FLORIDA

GRADY CARTER and MILDRED CARTER,	)	
Petitioners,	)	Case No. 94,797
vs.	)	First DCA No. 96-4831
BROWN & WILLIAMSON TOBACCO CO., as successor by merger to The American Tobacco Co.,	)	
Respondent.	)	

On petition to review a decision of
the District Court of Appeal, First District

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

The Carters seek Art V § 3(b)(3) review of *Brown & Williamson Tobacco Co. v. Carter,* 723 So.2d 833 (Fla. 1st DCA 1998) (copy appended), for asserted express and direct conflict with decisions of this Court and the Third District.

The unanimous First District panel found five errors, four of them reversible, in the circuit court money judgment for the Carters on claims that Mr. Carter's lung diseases including Chronic Obstructive Pulmonary Disease (COPD) and lung cancer were caused by smoking Lucky Strike cigarettes. The First District reversed the judgment and ordered the action dismissed as "barred by the statute of limitations because the initial complaint was filed more than four years after Grady Carter knew or should have known, with the exercise of due diligence, that he had a smoking related disease," 723 So.2d at 834. So ruling, the court did not reach the subsumed issue of whether, also on the limitations issue, the trial judge erred in not charging the jury on the principle of *Univ. of Miami v. Borgorff, infra,* that a patient is deemed to know the contents of his accessible medical records.

The Carters' jurisdictional brief pp. 1-5 asks the Court to look behind the First District's recital of the facts, 723 So.2d at 834-36, and to search through 72 appended pages of trial transcript and exhibits (Apps. 6, 7, 8), for testimony (actually, for "no testimony," Brief p. 2), that creates direct and express conflict between the First District and other courts. We object to this tactic and suggest that, given its implications, the Court need consider this case no further, and should deny review.

"The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict." *Reaves v. State*, 485 So.2d 829, 830 (Fla. 1986). The Court is "limited to the facts which appear on the face of the opinion." *Hardee v. State*, 534 So.2d 706, 708 (Fla. 1988), citing *White Constr. Co. v. Dupont*, 455 So.2d 1026 (Fla. 1984).

The facts on which the District Court acted, stated plainly at pp. 834-36 of the Opinion, may be summarized as follows:

- Grady Carter, age 66, smoked cigarettes regularly for 44 years before he quit cold on January 29, 1991, after he coughed up blood, read about lung cancer and TB in his medical book ("something was bad wrong with me"), and made a fast trip to his doctor, who ordered an X-Ray on February 4 and an appointment with Dr. Yergin, a lung specialist, on February 5;

- Conferring with Carter on February 5, Dr. Yergin interpreted the February 4 X-Ray, already in hand, as "highly suggestive of a neoplasm," or cancer, but could not rule out TB or pneumonia on X-Ray evidence and clinical examination alone;

- Dr. Yergin did, however, positively diagnose Carter, upon that February 5 examination and consultation, as suffering from Chronic Obstructive Pulmonary Disease (COPD) and chronic bronchitis due to "cigarette abuse of approximately 65 'pack years'" (Dr. Yergin's term), in addition to the apparent neoplasm; and he wrote those positive diagnoses in the patient's record;

- None of Carter's symptoms and ailments were ever

diagnosed as even "probably" let alone certainly caused by something other than smoking; his COPD and chronic bronchitis diagnoses of February 5 were never revised, even after cancer was confirmed through biopsy analysis on February 14;

- On February 10, 1995, Carter filed suit for all his smoking-related lung injuries, including those firmly diagnosed February 5, 1991, and the cancer that Dr. Yergin diagnosed as "highly suggestive" on February 5 and confirmed on February 14.

On these facts, the District Court found "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," *Id.* at 836, lt. col.; "the initial complaint was filed more than four years after Grady Carter knew or should have known, with the exercise of due diligence, that he had a smoking related disease," *Id.* at 834, rt. col.; and, while a limitations defense "is generally a fact question for the jury, we conclude that the facts of this case unquestionably show that the accumulated effects of smoking manifested themselves to Grady Carter more than four years before he filed this lawsuit, and that reversal is required on this issue." 723 So.2d at 836, rt. col.

In these holdings the First District relied on and quoted from (at 836) *University of Miami v. Bogorff*, 598 So.2d 1000 (Fla. 1991) ("knowledge of dramatic change in condition and possible involvement of medical malpractice sufficient for accrual of cause of action," 723 So.2d at 836), and *Copeland v. Armstrong Cork Co.*,

447 So.2d 922, 926 (Fla. 3d DCA 1984), *aff'd in part Celotex Corp. v. Copeland*, 471 So.2d 533 (Fla. 1985):

> "Where ... the claimed injury in a products liability action is a so-called 'creeping disease,' ... acquired over a period of years as a result of exposure to injurious substances, ... the courts have held that the action accrues for purposes of the statute of limitations '"only when the accumulated effects of the deleterious substance manifest themselves [to the claimant],"' [citation omitted] 'in a way which supplies some evidence of causal relationship to the manufactured product ....' [citation omitted] ... At that point, it is said that the facts giving rise to the cause of action either [a] are actually known by the claimant, or [b] should have been known to the claimant with the exercise of due diligence."

SUMMARY OF THE ARGUMENT

There is no express and direct conflict with *Helman*; Petitioners simply claim that the First District erred. There is no such conflict with decisions such as *Copeland* and *Armstrong*, requiring a correct diagnosis equally firm with a prior incorrect diagnosis, to begin the statute; there is no reason to apply this exception where, as in Carter's case, there was no prior incorrect diagnosis. There is no conflict with *Brown* or *Szabo*, where the limitations period could not run due to lack of information linking plaintiff's condition to the products in question. Here, both Carter and his doctors immediately linked Carter's evident lung injury with his years of smoking cigarettes.

There is simply no conflict on which to find jurisdiction.

ARGUMENT

1. No conflict with Helman v. Seaboard (Fla. 1987)

The Carters contend in effect that appellate review cannot affect a jury verdict on a limitations defense, which is to say

such verdicts are unconstrained by law. But the decision relied on for conflict jurisdiction, *Helman v. Seaboard Coast Line R. Co.*, 349 So.2d 1187 (Fla. 1987), stands for no such rule, and if juries were omniscient on limitations issues, *Univ. of Miami v. Bogorff*, 583 So.2d 1000 (Fla. 1991), could not have been decided.

Petitioners do not claim that the First District uttered or followed a standard of review conflicting with *Helman*; they claim only that the First District, applying an apparently correct standard, decided the case erroneously. Such a contention does not serve for jurisdictional entry to this Court; and, if this Court were unaccountably disposed to enlarge its § 3(b)(3) jurisdiction, so to review district court decisions deemed suspect given a jury's verdict, this case would be a most unlikely vehicle, for it cannot even be assumed, Petitioners to the contrary notwithstanding (Brief p. 1), that this was a "properly charged jury."

In *Helman,* where the issue was proximate cause, the Court's jurisdictional finding (two Justices dissenting) was grounded in the district court of appeal actually stating impermissible reasons "on the face of its opinion" for disagreeing with the verdict. 349 So.2d at 1189. There is no comparably vulnerable statement in this First District Opinion by three veteran judges, all former circuit judges (Barfield, Joanos and Larry G. Smith).

Petitioners' assertion of direct and express conflict with *Helman* is all the more attenuated by Petitioners' effort to display that conflict by means of trial transcripts that Petitioners say contain "no testimony" (Brief p. 2) that Dr. Yergin told Carter on

February 5 what Yergin wrote in Carter's record that day - namely, that the February 4 X-Ray showed a tumor "highly suggestive of a neoplasm" and that Carter had Chronic Obstructive Pulmonary Disease due to "cigarette abuse."

These assertions, which we dispute factually, would be irrelevant even in a merits brief. Even if a jury were disposed to overlook the medical record of February 5, sympathizing that Carter didn't want to know and Yergin had as yet no surgical necessity to tell Carter all that he wrote in the record, the First District was not at liberty to disregard this Court's holding in *Univ. of Miami v. Bogorff*, 583 So.2d 1000, 1004 (Fla. 1991). Under that decision, Carter is deemed to have known what Dr. Yergin felt professionally bound to write in Carter's medical record on February 5:

> "The Borgorffs were aware not only of a dramatic change in Adam's condition, but also of the possible involvement of methotrexate. Such knowledge is sufficient for accrual of their cause of action. **Furthermore, because knowledge of the contents of accessible medical records is imputed, the Borgorffs had constructive knowledge of medical opinion that the drug may have contributed to the injury in 1977.** In either event, the Bogorffs had sufficient knowledge, actual or imputed, to commence the limitation period more than four years prior to filing their complaint in December 1982." Emph. added.

The law could not be otherwise.

2. No conflict with Celotex v. Copeland (Fla. 1985); nor with Copeland v. Armstrong (Fla. 3d DCA 1984); nor with Colon v. Celotex (Fla. 3d DCA 1985)

This Court in *Celotex Corp. v. Copeland*, 471 So.2d 533 (Fla. 1985), approved *Copeland v. Armstrong Cork Co.*, 447 So.2d 922 (Fla. 3d DCA 1984), which held that Copeland's asbestosis claim did not accrue in 1972, when he fell ill with what doctors mistakenly

"diagnosed as emphysema and pneumonia unrelated to the job," 447 So.2d at 927, *see also* 471 So.2d at 539. Rather, the court held, the claim accrued six years later, in 1978, when the incorrect diagnosis was supplanted by a correct diagnosis of asbestosis.

These decisions do not stand for a general proposition that a final and definitive diagnosis is essential to accrue a cause of action for product injury. On the contrary, limitations caselaw crafted this exceptional requirement for the exceptional case, in which the patient was diverted from earlier litigation by an incorrect diagnosis. That Copeland's illness was firmly but erroneously diagnosed as "emphysema and pneumonia unrelated to the job," the First District held, "distinguishes [Carter's] case from *Copeland*," 723 So.2d at 836, for Grady Carter was *never* given an incorrect firm diagnosis (of TB or pneumonia or whatever); and his patent lung injury was *never* "diagnosed as unrelated to smoking":

> "The underlined portion of the above discussion distinguishes this case from *Copeland*. While appellees assert the record shows other possible causes of his spitting up blood were pneumonia and tuberculosis, at no time was Grady Carter's condition diagnosed as unrelated to smoking. Grady stopped smoking on January 29, 1991, after coughing up blood, and on February 4, 1991, was told of an abnormality on his lung and further told he needed to see Dr. Yergin immediately."

Since the exception did not apply, the First District cited and followed the mainline rule of *Univ. of Miami v. Bogorff*, *supra*: "Neither absolute knowledge nor medical confirmation is required for a cause of action to accrue." 723 So.2d at 836.

The line of correcting-diagnosis cases including *Copeland* also includes medical malpractice cases in which, for reasons stated in

Ash v. Stella, 457 So.2d 1377, 1379 (Fla. 1984), a patient's cause of action for negligent misdiagnosis does not accrue until that misdiagnosis is corrected by a later diagnosis which renders the former a likely explanation for the patient's continuing symptoms. Then only is the patient put on notice of the earlier malpractice, accruing the cause of action. But, when a patient like Carter is given a correct and firm but partial diagnosis of a smoking injury, and is not misinformed in any detail, the law accrues the cause of action and does not delay until all injuries are finally documented in all respects.

Petitioners also rely for conflict jurisdiction on *Colon v. Celotex Corp.*, 465 So.2d 1332 (Fla. 3d DCA 1985). While *Colon,* in applying a Tennessee statute of limitations, transported the *Ash v. Stella* holding into the asbestosis liability realm, and apparently did so without an earlier misdiagnosis of Colon's asbestosis, the *Colon* decision has little value as precedent beyond its unique facts. The Third District was at pains not to foreclose Colon's claim under Tennessee's severe one-year statute, and in fact was held in error for attempting to use the Tennessee statute at all, *Celotex Corp. v. Meehan*, 523 So.2d 141, 147 (Fla. 1988).

Colon's holding was quite narrow, that Tennessee's one-year statute did not run "*based solely on that tentative diagnosis*" of asbestosis (italics by the court). Carter's claim is not barred "based solely" on any "tentative diagnosis"; it is barred by a comprehensive record of revelations to Carter and his doctors on January 29 and February 4 and 5, far surpassing *Colon*'s record.

3. No conflict with Brown v. Armstrong (3d DCA 1983); nor with Szabo v. Ashland Oil (3d DCA 1984)

No conflict can be generated through *Brown v. Armstrong World Industries, Inc.*, 441 So.2d 1098, 1099 (Fla. 3d DCA 1983), and *Szabo v. Ashland Oil Co.*, 448 So.2d 549, 550-51 (Fla. 3d DCA 1984).

Elbert Brown's action was deemed timely filed in 1979 even though he had heard the term "asbestosis" and had been affected before 1975, 441 So.2d at 1099, because there was "no showing ... that any physician could have established ... prior to 1979" that there was a "cause and effect relationship" between asbestos and Brown's disability, and he himself was not so informed "by any physician until 1979." *Ibid.*

Thus, when the Third District said it was not clear that Brown should have known in 1975 that "he had a cause of action against product manufacturers for injuries caused by exposure to asbestos," 441 So.2d 1098, 1099, the Third District was simply saying there was a genuine dispute over whether Brown's suspicions of cause-and-effect, detailed in the dissent, were medically verifiable as early as 1975. The brief *Per Curiam* opinion gives no indication of intending to pronounce, as new limitations doctrine, that the statute does not run until a potential plaintiff gets medical or medico-legal advice endorsing an entire "cause of action."

And, when the court said in *Szabo v. Ashland Oil Co.*, 448 at 550-51, that there was a genuine issue "when plaintiff knew or reasonably should have known that he had a cause of action against the named defendants," the court was referring to *any* plaintiff's inability before 1977 to make a case of solvent poisoning.

Although it was "'74 or '75" when Sandor Szabo fell ill due to solvent exposure at work, 448 So.2d at 550, "it was in 1977 that medical science first established a causal relationship between the use of [chemical solvents] and [peripheral polyneutritis]." *Ibid.*

Grady Carter suffered no paucity of personal knowledge and medical advice, four years and several days before his filing on February 10, 1995, that he had sustained lung injury likely due to smoking. Carter himself deduced cause-and-effect when he coughed up bloody sputum on January 29 and promptly quit smoking. And on February 5 Dr. Yergin confirmed Carter's causal knowledge by describing Carter's lung injury as due to "cigarette abuse of approximately 65 'pack years'," 723 So.2d at 835. Given the nature of Carter's lung injuries and the cause to which they were attributed, it is plain that the causal association verified on February 5, 1991, was verifiable long before that date.

Whereas in *Brown* and *Szabo*, years elapsed between the onset of illness and the emergence of a medically supportable causal connection, Carter's injury and its likely cause were fully manifest to Carter and his doctors, by February 5, 1991. The law then granted Carter and his counselors four full years to flesh out the case, but granted no further license for even one more day.

4. Conclusion

There is no Art V § 3(b)(3) conflict in the First District Opinion. This Court has no jurisdiction, and should deny review.

Respectfully submitted,

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