

IN THE SUPREME COURT OF FLORIDA

THE CELOTEX CORPORATION, :
Petitioner, :
vs. : CASE NO. 66,937
CARMELLA MEEHAN, :
Respondent. :

FILED
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ON CERTIFICATION FROM THE THIRD DISTRICT
COURT OF APPEAL AS CONTAINING A QUESTION
OF GREAT PUBLIC IMPORTANCE

PETITIONER THE CELOTEX CORPORATION'S
REPLY BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

Plaintiff's argument relies on decisions having nothing to do with latent injuries and then ignores significant differences in trying to apply the principles of those cases. Plaintiff ignores that the Florida borrowing statute does not ask when a plaintiff discovers his injury - it looks to if a cause of action arose in another state.

Plaintiff's reliance on out-of-state latent disease cases ignores differences in statutory language, and that those decisions emphasized the importance of significant relationships. Plaintiff actually admits the propriety of such an analysis, but then misapplies the factors to the facts of this case.

Plaintiff advocates a resident-only exception which has no basis in the borrowing statute and presents insurmountable practical and constitutional problems. Contrary to Plaintiff's position, there is no present constitutional problem with the statute and to adopt Plaintiff's view of access to courts would open the floodgates to countless numbers and types of suits.

ARGUMENT

AN ACTION WHICH COULD NOT BE MAINTAINED BY REASON OF LIMITATIONS IN THE STATE IN WHICH THE ALLEGEDLY WRONGFUL CONDUCT OCCURRED BECAUSE THAT STATE DOES NOT RECOGNIZE POSTPONEMENT OF ACCRUAL UNTIL DISCOVERY, CANNOT BE MAINTAINED IN FLORIDA EVEN THOUGH FLORIDA POSTPONES ACCRUAL UNTIL DISCOVERY.

Plaintiff's argument in support of her "last act" analysis misconprehends both the legal analysis and the underlying facts of the cases it relies on. Plaintiff's argument begins by citing Florida cases dealing with when an injury accrues for the purpose of applying a Florida statute of limitations (Meehan Br. 9). The relevant inquiry for Florida's borrowing statute is where an action arises.

Plaintiff makes the general statement that a tort which has its origin in one state and resulting injury in another state "is deemed to 'arise' in the state where the injury - the last event necessary for liability - occurs." Id. Plaintiff has simply misconprehended the import of these cases, none of which are latent disease cases. In each of the cases cited by Plaintiff, there was a negligent act in one state, such as an architect's negligent design of a roof 1/ or negligent chemical formulation, 2/ which then

1/ K-Mart Corp. v. Midcon Realty Group of Conn., 489 F. Supp. 813, 815 (D.Conn. 1980).

2/ Patch v. Stanley Works (Stanley Chemical Co. Division), 448 F.2d 483, 492 (2d Cir. 1971).

resulted in the impact of that wrongful act occurring in another state, such as the roof collapsing or from the chemicals causing an explosion. Thus, those courts held that the acts arose where the negligent act had its impact. This was also the holding in two admiralty cases cited by Plaintiff, that the action arises not where the wrongful had its inception, but where the impact of the act produced an injury. 3/

Plaintiff next engages in a semantic argument as to when Mr. Meehan suffered an "injury." Celotex's position that injury from asbestos exposure begins upon exposure is further supported by a case decided by the Eleventh Circuit after Celotex's initial brief. In Commercial Union Insurance Co. v. Sepco Corp., 765 F.2d 1543, 1546 (11th Cir. 1985) the court was construing the insurance policy of an asbestos product manufacturer, and concluded:

Because such inhalation can occur only upon exposure to asbestos, and because it is impossible practically to determine the point at which the fibers actually imbed themselves in the victim's lungs, to equate exposure to asbestos with "bodily injury" caused by the inhalation of the asbestos is the superior interpretation of the contract provisions. (Emphasis added)

3/ Todd Shipyards Corp. v. Turbine Serv., Inc., 467 F. Supp. 1257, 1285 (E.D. La. 1978); McCall v. Susquehanna Electric Co., 278 F. Supp. 209 (D.Md. 1968). Plaintiff's other two cases were defamation cases holding the action arose not where the statement was made, but where the injured person suffered a loss. The somewhat unique situation of a defamation case was recognized in Celotex's initial brief at p.11, noting that under a significant relationship's test, domicile at the time of "impact" might be a more important factor with regard to such injuries.

While Celotex agrees that bodily injury continues after exposure, 4/ this opinion reiterates that injury commences with exposure.

Plaintiff's explanation for its interrogatory answers is simply not persuasive since those interrogatories do state on their face that the injury occurred in the 1940's in New York. The answers to further interrogatories do not vary that testimony, but merely state that those injuries did not manifest themselves until years later. Plaintiff's concern is understandable, but it simply misses the controlling factor under the borrowing statute.

Florida's borrowing statute does not speak of where an injury manifested itself or first became noticeable. In fact, it does not speak of injury at all, but when the "cause of action arose in another state." Section 95.10, Florida Statutes (1979). In this case, New York law does not require an injury or discovery of the injury. The cause of action clearly arose in New York where the Plaintiff was exposed to the products. It is a mere fortuity that he ended up in another state when the disease manifested itself or when he was diagnosed, and that in no way changes where the cause of action arose. As Judge Schwartz suggested at oral argument and in his opinion, Plaintiff's redress lies with the New York legislature.

4/ And indeed Celotex insists that injury continues after exposure for the purpose of triggering "bodily injury" coverage under such insurance policies.

Plaintiff misstates Celotex's view by claiming that each Petitioner asked this Court to disregard Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972). (Meehan Br. 14). Rather, Celotex noted that Colhoun did not deal with a latent injury and noted that under the law of the state where Mr. Meehan was exposed, New York, the last act necessary to establish liability occurred in New York. As noted, this is consistent with the Restatement (2d) Conflict of Law's position (Celotex Br. 9). What Celotex actually urged is that the better rule would be to reconsider Colhoun in light of this Court's adoption of the significant relationships test for deciding conflicts questions. Before revisiting that issue, it should be noted that Plaintiff's emphasis on the Colhoun language regarding the contract cause of action adds nothing to the analysis (Meehan Br. 15). As Colhoun plainly states, the contract was completed with the purchase of the ticket in Florida. Therefore, the contract count arose in Florida and there was no need to look to Tennessee law. It was immaterial where the plaintiff learned of his contract action - since discovery was not relevant to where it arose.

Plaintiff's reliance on an excerpt from a law review article cited in Colhoun is similarly misplaced, since it is clear even from Plaintiff's excerpt of the article that the article was not considering a latent type injury, but was

merely distinguishing between where a product is manufactured (where the negligence occurred) and where the plaintiff encounters the defendant's negligence (or is exposed to the defendant's product). 5/

Plaintiff's citation of Beasley v. Fairchild Hiller Corporation, 401 F.2d 593 (5th Cir. 1968) is curious. In that diversity action, the court was applying Florida's borrowing statute to a helicopter crash in Louisiana. The Fifth Circuit held that although the general rule of law is that the law of the forum will characterize the nature of the cause of action for conflicts of law purposes, the court stated: "We must look to the Louisiana law to determine whether this count could have been maintained in Louisiana courts on the date it was filed in Florida." Id. at 596. Obviously, applying this analysis in the instant case would mean that the Plaintiff's action is barred since it could not have been maintained in New York on the date it was filed in Florida.

Plaintiff cites three out of state cases in an attempt to argue they support her view, but they simply do not.

5/ Plaintiff's attempt to distinguish Meehan from Marano v. The Celotex Corporation, 433 So.2d 592 (Fla. 3d DCA 1983), review denied, 438 So.2d 833 (Fla. 1983) must fail. In Marano there is no suggestion in the opinion that the case turned on any argument that the plaintiff had begun to manifest his disease while still in New York. Indeed, the plaintiff in Marano, represented by the same counsel as Plaintiff here, wrote a brief which mirrors the brief here and (because Meehan was briefed first in the Third District, although the decision in Marano was issued first) noted that Marano would be controlled by Meehan.

Elmer v. Owens-Illinois, Inc., 673 S.W.2d 434 (Mo. 1984) considered a Missouri statute which was worded in terms of where a cause of action "originated" which the court stated had been defined as meaning "accrued" in previous cases (not "arisen" as Florida's statute reads). More instructive is that the court's opinion went on to consider the appropriate substantive law to be applied under a Restatement (2d) of Conflicts § 145 analysis. The court concluded that since the employee had been primarily employed by Missouri employers, that Missouri law would apply since his injury was "intimately and inextricably" involved with his employment. Id. at 437. This is consistent with the analysis Celotex has urged under the significant relationships test where the most important factor would be where each plaintiff was exposed to the defendants' products - which is of course, inextricably involved with his place of employment.

Parrish v. B.F. Goodrich Co., 395 MI.271, 235 N.W.2d 570 (1975), similarly involved a borrowing statute worded in terms of a cause of action "accruing" in another state. Plaintiff's argument that a cause of action does not accrue "until all elements of the cause of action are present" does not resolve the question in Plaintiff's favor, since all elements of the cause of action under the New York law were present in New York before Mr. Meehan left that state.

Aside from the fact that Mack Trucks, Inc. v. Bendix-Westinghouse Automobile Air Brake Co., 372 F.2d 18 (3d

Cir. 1966), cert. denied, 387 U.S.930 (1967) is so factually dissimilar as an indemnification action as to make it meaningless in resolving the borrowing statute issue in an asbestos case, the distinction which Plaintiff seeks to relegate to a footnote is more telling. (Meehan Br. 20). As Plaintiff notes, the Third Circuit in a subsequent case opined that when one borrows a foreign jurisdiction's statute of limitations that the forum also borrows jurisdiction's law on when the statute begins to run. McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657 (3rd Cir. 1980), cert. denied, 449 U.S.976 (1981). However, nothing in McKenna supports Plaintiff's "which comes first" assumption as applied to an asbestos, delayed manifestation situation. Namely, if one looks at New York law and when a cause of action arose (and accrued) under New York law, it is clearly barred since there was no need to wait for the additional discovery element Plaintiff argues should be added by the fortuity of Mr. Meehan's migration to Florida.

Plaintiff must admit that her suggestion that Florida adopt an exception to the borrowing statute for Florida residents finds no support in Florida case or statutory law. Indeed, the practical questions this would pose (who is a resident or how long must one be here before he would be termed a resident) combined with the obvious constitutional problems (the privileges and immunity clause) 6/ are obvious

6/ See, e.g., Scott v. Gunter, 447 So.2d 272 (Fla. 1st DCA 1983).

reasons why not one of the nine Third District judges accepted Plaintiff's invitation to carve such a judicial exception. Plaintiff simply urges too myopic a view in asserting that Mr. Meehan cannot be charged with forum shopping. The problem is, rather, that Plaintiff urges this Court to adopt a view that would invite forum shopping from countless others.

Perhaps the most surprising aspect of Plaintiff's residence argument in this matter is that Plaintiff seeks to rely on Illinois case law. However, with respect to the question of where a cause of action arises, Illinois case law actually supports Celotex's view that it should be determined by examining the most significant relationships. In Mitchell v. United Asbestos Corporation, 100 Ill.App.3d 485, 55 Ill.Dec. 375, 426 N.E.2d 350 (1981), the court examined whether or not Illinois' borrowing statute should apply in an asbestos case. The Illinois statute, like Florida's, is worded in terms of where a cause of action arises. The court concluded that since nearly one-half of decedent's employment took place in Illinois, including the final days the decedent worked, and Illinois had the most significant relationship to the occurrence, that the action arose in Illinois. Id. at 360. In discussing the importance of the "place of injury" in the § 145 Restatement analysis, the court concluded that "in the instant case, decedent's injury

was the result of years of employment in both Missouri and Illinois." Id. at 359. Thus, the Illinois court agreed with the analysis of Celotex in applying the most significant relationship test, that the place where the injury occurred is where the decedent was exposed to the asbestos - not some fortuitous location where the disease may have manifested itself in later years. 7/

Plaintiff does not strenuously argue against applying the significant relationships test, and in fact recognizes a trend toward applying this choice of law analysis to statutes of limitations (Meehan Br. 25). However, Plaintiff's attempt to apply this analysis misses the mark. As to the first and major factor of the place where the injury occurred, Plaintiff continues to misdirect her focus on where the injury manifested. As the Illinois court recognized, as Celotex's initial brief at pp. 10-11 noted, and as common sense dictates, the place where the injury occurred for the purposes of determining significant relationships is the place where the plaintiff was exposed to the allegedly injurious products of the defendants. It is not a later place where, by a mere fortuity, the injury manifests.

As Celotex noted in its analysis, the second factor, (the place where the conduct allegedly causing the injury occurred) was ultimately at the job sites where the failures

7/ See also, Nutty v. Universal Engineering Corp., 564 F. Supp. 1459, 1464 (S.D. Ill. 1983).

to warn transpired. However, going one step further back, to where the products were actually manufactured, would still not involve Florida. Plaintiff's counsel is familiar with the corporate history of Celotex and indeed, it was referenced in Celotex's initial brief. The products of Celotex's predecessor to which Mr. Meehan was allegedly exposed had absolutely no connection with Florida, but were manufactured by an Ohio corporation, the Philip Carey Manufacturing Corporation (see, Celotex Br. 12 and case cited therein). Thus, there is no suggestion that Florida has any connection with the conduct causing the injury.

As to the third factor of domicile or residence, Plaintiff assumes without authority that the domicile at the time of suit is the important factor. The interpretation urged by Celotex for the purposes of determining a significant relationship to a state to whose law is to be applied, is to look to the domicile at the time of the exposure (Celotex Br. 11-12). See Reich v. Purrell, 67 Cal. 2d 551, 432 P.2d 727, 730 (1967) (domicile at time of accident is the relevant domicile, since "if the choice of law were made to turn on events happening after the accident, forum shopping would be encouraged.") Again, since the asbestos defendants' domiciles varied (although none at that time have been identified as Florida residents), and Mr. Meehan was a New York resident, this factor cuts, if at all, for New York.

Finally, as to the place where the relationship is centered, Plaintiff admits that this location is also New York.

Plaintiff's final argument is that borrowing the New York statute of limitations would result in a denial of access to the courts in violation of the Florida Constitution. However, to adopt this rationale would lead to absurd results. Every plaintiff from New York or another state which did not have precisely the same type of discovery statute of limitations and governing case law as Florida's could move to Florida long after his disease had manifested and bring an action here claiming that otherwise he would be denied access to the courts. It is difficult to imagine a rule that would more encourage forum shopping. Furthermore, such a specious access to courts argument would not be limited to statute of limitations cases. Would-be foreign plaintiffs who suffered injuries not compensable to the same extent they would be in Florida could move here and argue that to borrow the other state's law to bar their claim would deny them access to the courts. Florida could truly become the litigation capital of the country.

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