IN THE SUPREME COURT OF FLORIDA

APPEAL NO. 66, 937

THE CELOTEX CORPORATION, ET AL,

Petitioners.

Versus

CARMELLA MEEHAN, as Personal Representative of the Estate of Charles Meehan, Deceased

Respondent.

PETITION FOR DISCRETIONARY REVIEW OF A DECISION CERTIFIED BY THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT AS A QUESTION OF GREAT PUBLIC IMPORTANCE

SUPPLEMENTAL BRIEF ON THE MERITS OF RESPONDENT CARMELLA MEEHAN

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SUMMARY OF ARGUMENT

Respondent Carmella Meehan directs the Court's attention to State of New York S. 9391, ch. 682, §4 and the case of Piccirelli v. Johns-Manville Sales Corp., ___ A.D. 2d ___, 513 N.Y.S. 2d 469 (App. Div. 1987), under which Respondent's claim based on her decedent's death is not barred by the New York statute of limitations. Since Respondent's claim is not barred by New York law, the Florida borrowing statute, Fla.Stat. §95.10 (1979), has no possible application, and the issue of where Respondent's claim arose need not be decided. This Court should therefore decline to answer the certified question at issue in this proceeding.

ARGUMENT

The issue presented in this proceeding is whether the Florida borrowing statute, Fla.Stat. §95.10 (1979), requires the application of the New York statute of limitations in a latent injury case in which the decedent was exposed to the defendants' asbestos-containing products in New York but developed injury and died in Florida. Respondent Carmella Meehan continues to contend that her cause of action for wrongful death "arose" in Florida within the meaning to the Florida borrowing statute, and thus that the New York statute of limitations does not apply. Respondent would additionally show this Court, however, that due to a recent change in the law of New York, the New York statute of limitations does not bar this cause of action. See N.Y. Civ.Prac.Law §214-c (McKinney Supp. 1987), submitted to this Court as supplemental authority on or about July 8, 1986 and cited as "State of New York S. 9391 §§1-6"); Piccirelli v. Johns Manville Sales Corp., ___ A.D.2d ___, 513 N.Y.S.2d 469 (App.Div. 1987), submitted to this Court as supplemental authority on or about August 3, 1987. Since the laws of the State of New York do not "forbid the maintenance of the action because of lapse of time," (Fla.Stat. §95.10(1979)), the borrowing statute, by its terms, cannot apply to bar this cause of action. Thus, this Court should decline to answer the certified question posed by the Third District Court of Appeal, because the question is moot. Board of Trustees of Internal Improvement Fund v. Stevens, 495

So.2d 167, 168 (Fla. 1986); Payne v. Broward County, 461 So.2d 63, 65 (Fla. 1984).

The question certified by the Third District Court of Appeal assumes that the state in which the allegedly wrongful conduct occurred "does not recognize postponement of accrual until discovery." Meehan v. The Celotex Corp., 466 So.2d 1100, 107 (Fla. 3rd DCA 1985), rev. granted, No.66,937 (Fla. April 29, 1985). At the time that the issue was initially briefed in this Court, that assumption was accurate. In June of 1986, however, the New York Legislature changed the statute of limitations applicable to latent injury cases such as the case at bar. Under current New York law, a claim such as Respondent's accrues "on the date of discovery of the injury by the plaintiff or on the date when through the exercise of reasonable diligence the injury should have been discovered, whichever is earlier." N.Y.Civ.Prac.Law §214-c (McKinney Supp. 1987) (effective July 30, 1986). More importantly, the New York Legislature further provided that claims such as Respondent's that had been barred under the old New York limitations provision were revived and actionable if commenced within one year of the effective date of the Act. State of New York S. 9391, ch. 682, §4 (hereinafter cited as "ch. 682, §4"). In Piccirelli v. Johns-Manville Sales Corp., supra, a New York court held that an action was "commenced" within the meaning of ch.682 §4, because it was pending in a court with appellate jurisdiction at the time that the Act became effective. 513 N.Y.S.2d at 470. Similarly, the instant claim was

pending in this Court following the effective date of the Act. Thus, under New York law, the instant claim may not be barred by the New York statute of limitations.

As this Court itself has recently noted, "[a]n appellate court is generally required to apply the law in effect at the time of its decision." Cantor v. Davis, 489 So.2d 18,20 (Fla. 1986). This Court is therefore obligated to apply the applicable New York limitations and revival provisions in order to determine whether this action is barred under New York law. The recent legislation and caselaw leave no doubt that this action may be maintained under New York law.

Respondent continues to urge that the certified question posed by the District Court of Appeal should be answered in the affirmative, particularly in light of the adoption of the "significant relationships test" by this Court in Bates v. Cook, Inc., 12 F.L.W. 396 (Fla. July 16, 1987) (supplied to this Court as supplemental authority on August 3, 1987). See Answer Brief on the Merits of Respondent Carmella Meehan at 24-33. Even if the certified question is answered in the negative, however, this case is not barred by the Florida borrowing statute, because it is not barred under New York law. Since the question posed by the District Court of Appeal is moot, this Court should decline to answer the certified question, and should remand the case to the Third District Court of Appeal with instructions to remand the case to the trial court for further proceedings.

CONCLUSION

Based on the foregoing, and on the arguments advanced in Respondent's Answer Brief on the Merits filed on or about July 30, 1985, Respondent respectfully prays that the Court decline to answer the certified question posed by the Third District Court of Appeal as moot, or, in the alternative, to affirm the decision of the District Court of Appeal, and in any event to remand the case to the District Court with instructions to remand the case to the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to the following on this the 6th day of August, 1987.

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