IN THE SUPREME COURT OF FLORIDA

THE CELOTEX CORPORATION, :

Petitioner, :

vs. : CASE NO. 66,938

JEAN NANCE, :

Respondent. :

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

PETITIONER THE CELOTEX CORPORATION'S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Petitioner, The Celotex Corporation, the Defendant in the trial court and Appellee in the District Court of Appeal is referred to as "Celotex".

The Respondent, Jean Nance, is referred to as "Plaintiff", the capacity she occupied in the trial court. Plaintiff is the personal representative of E. T. Nance, her late husband, who is referred to as "Mr. Nance".

References to the record on appeal as indexed in the Third District Court of Appeal are designated by the prefix "R" (the index to the record the District Court of Appeal will be forwarding to this Court was not available at the time of the preparation of this brief, but Celotex assumes the initial numbering shall be consistent with that used below). References to the Appendix hereto are designated by the prefix "A".

STATEMENT OF THE CASE

Mr. Nance commenced this action for personal injury in the Circuit Court in Dade County in 1980 and Plaintiff was substituted as a party plaintiff after his death (A 1). The trial court entered final summary judgment in 1981 on the grounds that Plaintiff's claim was barred by the Virginia statute of limitations, as borrowed under §95.10, Florida Statutes (R 795-800, A 3).

Plaintiff appealed to the District Court of Appeal for the Third District which heard the case en banc with the rehearing in Meehan v. Celotex Corporation, 466 So. 2d 1100 (Fla. 3d DCA 1985) (A 3). Relying on the revised Meehan panel opinion as the opinion of the Third District by virtue of a 4-4 tie on the merits, the Third District also reversed the judgment in Nance

Upon suggestion of Celotex, the Third District en banc certified the case to this Court as containing a question of great public importance (A 4). The Third District certified the same question to this Court in Celotex v. Meehan, Fla. S.Ct. Case No. 66,937. This Court docketed these cases and established the briefing schedule under its orders of April 30, 1985. The Meehan decision was also relied on in a case presenting the "other side of the coin." That case is pending before this Court on a petition for dicretionary review in Celotex Corporation v. Colon, Fla. S.Ct. Case No. 66,939.

STATEMENT OF THE FACTS

The facts are succinctly summarized in the panel's revised opinion at A 1. Mr. Nance was allegedly exposed to asbestos products in Virginia between 1940 and 1945. Mr. Nance was diagnosed as having asbestos related diseases (asbestosis and mesothelioma) in May, 1976 and filed suit in Florida in April, 1980.

The trial court entered summary judgment for Celotex and the other Defendants on the basis of the Virginia statute of limitations, as applied by virtue of the Florida Borrowing Statute, §95.10, Florida Statutes (1979). The Virginia statute of limitations provides a two year time limit for bringing such a cause of action, and Virginia does not have the same rule tolling the limitations period pending discovery which Florida has. See Locke v. Johns-Manville Corporation, 275 S.E.2d 900, 905-906 (Va. 1981).

As argued before the Third District, this case originally presented two issues. The first issue has been certified to this Court, regarding the applicability of Florida's Borrowing Statute. The second issue was whether Plaintiff as a survivor could bring a wrongful death action if the decedent had allowed the personal injury statute of limitations to run during his lifetime. That is, whether the language of §768.19, Florida Statutes (1979) (the Wrongful Death Act) meant what it said in limiting a survivor's action to those instances where the person injured could have maintained

an action and recovered damages "if death had not ensued." This question has been resolved by this Court's approval of the decision in Hudson v. Keene Corporation, 445 So.2d 1151 (Fla. 1st DCA 1984), approved _____ So.2d ____ (Fla. S.Ct. Case No. 65,155, April 25, 1985). In its opinion in Nance the Third District followed the First District opinion in Hudson.

CERTIFIED QUESTION

MAY 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, NONETHELESS BE MAINTAINED IN FLORIDA BECAUSE FLORIDA POSTPONES ACCRUAL UNTIL DISCOVERY?

SUMMARY OF THE ARGUMENT

Celotex adopts its arguments made in the Meehan brief filed with this Court, and urges that the judgment in its favor be affirmed since Virginia is clearly the state with the most significant relationships and as Plaintiff has admitted, the claim is barred under Virginia law.

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.

To avoid repetition, Celotex shall not re-argue the points already made in its initial brief before this Court in Meehan. Celotex adopts its brief in Meehan, and adopts the initial brief of Owens Corning Fiberglass Corporation in Nance. The cases arise from similar factual circumstances, are presented on the same certified question, and the same arguments are generally applicable. Just prior to the filing of this action in the Dade Circuit Court, the Supreme Court of Virginia construed its two year personal injury statute as not running from the last exposure, but from the "time Plaintiff was hurt". Locke v. Johns-Manville Corporation, 275 S.E.2d 900 (Va. 1981). The court emphasized that it was not articulating a "discovery rule", stating that that would be a matter for the legislature. Id. at 905-906. The court was also clear that it was not holding that the limitation period would not begin to run until diagnosis. Id. at 905. As the Plaintiff in Nance recognized, in her supplemental Third District brief at p. 4, n.3, since the diagnosis in this case was made in 1976 and the action not filed until 1980, "Mr. Nance's personal injury action is still barred in Virginia." That is, under any scenario, as Plaintiff

conceded in the Third District, Plaintiff's action is barred if Virginia law applies. Celotex urges that, for the reasons set forth in the Meehan brief, that Virginia law applies since the exposure occurred in Virginia and Virginia clearly has the most significant relationships under Bishop v. Florida Specialty Paint Co., 389 So. 2d 999 (Fla. 1980) 1/.

1/ The alleged wrong and the conduct causing it occurred in Virginia. Virginia was Mr. Nance's domicile at the time of exposure, and was the state where the relationship between Mr. Nance and the manufacturers was centered.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the Third District decision should be reversed and the judgment entered in favor of Celotex affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing and the brief in Meehan have been furnished to all counsel on the attached Service List by United States Mail, this 7th day of June, 1985.

Attorney