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 REPLY BRIEF ON THE MERITS

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SUMMARY OF THE ARGUMENT

Plaintiff's answer brief begins by erroneously assuming that if Plaintiff's action had been brought in Virginia, that Virginia law would determine Plaintiff's cause of action not only accrued after the Plaintiff moved to Florida, but also arose in Florida. This is incorrect because Virginia does not have an applicable borrowing statute and if this cause of action were brought in Virginia, Virginia would apply its own law and bar this cause of action.

Plaintiff's brief confuses the concepts of where a cause of action arises with when that cause of action accrues. Plaintiff's "last act" analysis would lead to absurd results with the statute of limitation being borrowed based on the fortuity of where a plaintiff happened to be at the time he discovered his injury.

Finally, Plaintiff suggests a residency exception which has no basis in the statute and poses significant practical and constitutional problems.

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.

Celotex adopts the response of Owens-Corning Fiberglass to the procedural posturing appearing at the outset of Plaintiff's brief. 1/ Plaintiff's substantive argument that Virginia law would hold the cause of action arose in Florida is incorrect. Locke v. Johns-Manville Corporation, 275 S.E.2d 900 (Va. 1981) relies on a Virginia statute which provides that a cause of action does not accrue until the

1/ Not surprisingly, Plaintiff relegates her argument regarding the propriety of the Third District's certification in Meehan v. Celotex, 466 So.2d 1100 (Fla. 3d DCA 1985) to a footnote (an issue the plaintiff in Meehan did not even raise). Celotex agrees with Owens-Corning's observation that a new opinion was issued in Meehan. In the panel's own words, the panel opinion was "withdrawn" and a revised opined "substituted therefor." Id. at 1101. The substituted opinion differed substantially from the initial opinion, deleting half of argument regarding Pledger v. Burnup & Sims, Inc., 432 So.2d 1323 (Fla. 4th DCA 1983), review denied 446 So.2d 99 (Fla. 1984), and adding a large section on the meaning of "arise" and "accrue". See initial panel opinion at 8 FLW 2728. Further, on rehearing of the en banc per curiam opinion, the Third District clarified that the "panel opinion" which was adopted as the court's opinion was the revised opinion. Id. at 1107. Finally, Plaintiff overlooks the fact that the Third District did certify the question, which it was free to do on its own and the Petitioners filed with this Court within 30 days thereafter.

Celotex also adopts Owens-Corning's argument that this case is properly before this Court on a question of great public importance. The commonality of this case and Meehan is further demonstrated by this Plaintiff's adoption of the Meehan plaintiff's brief (Nance Br. p. 8, n. 2).

date of an injury to a person. 2/ Neither Locke nor that statute address Virginia's view of where a cause of action arises for the purposes of determining which state statute of limitations applies. Virginia does not have a borrowing statute for personal injuries 3/, and treats the statute of limitation as a procedural matter governed by the law of the forum (unless it is part of a statutory newly created right which is being sued upon) See §8.01-228, et seq. Vir. Code; Sherley v. Lotz, 200 Va. 173, 104 S.E.2d 795 (1958). Therefore if this case had been brought in Virginia, Virginia would apply its own statute (and not borrow Florida's) and Plaintiff's cause of action would be barred in Virginia under the Virginia statute of limitations (which Plaintiff admits at p. 11). Consequently, Plaintiff's statement that Virginia law would hold the cause of action "did not arise in Virginia" is wrong (Nance Br. 11). Plaintiff has cited no Virginia cases addressing when a cause of action arises, because Virginia's law does not require considering that question.

2/ Subsequently, Virginia has amended its statutes to provide that for asbestos exposure actions the limitation period commences upon communication of the diagnosis. §8.01-249(4) Vir. Code (1985 Supp.). Of course, this was not in effect at the time of Plaintiff's action, and even if it had been, would not alter the result since Plaintiff filed this suit over two years after diagnosis.

3/ §8.01-247 Vir. Code provides no action on a contract which is governed by the law of another state may be maintained if it is barred by the state's laws or Virginia's.

Plaintiff's next argument is that the statute of limitations is procedural, rather than substantive, so that the substantial relationships test should not apply. 4/ Plaintiff relies primarily on the decision in Pledger v. Burnup & Sims, Inc., supra. However, as Celotex noted in its initial brief in Meehan, and as Judge Schwartz noted in his dissent in Meehan, the Pledger case, while rejecting a significant relationships analysis as applied to the statute of limitations, does not support the result of the panel opinion below (the result Plaintiff seeks to uphold here). As Judge Schwartz noted, Pledger's emphasis on the law of the state where the wrong occurred certainly does not call for the application of Florida law in this case. Meehan, supra at 1106.

Plaintiff does not dispute Celotex's analysis in its initial brief that if the significant relationships test were to be applied, Virginia would clearly be the state with the most significant relationships whose statute of limitations would then apply.

4/ Interestingly, Plaintiff at the outset of her argument at p.8, n.2 adopts the arguments of the Plaintiff in Meehan. Meehan's brief at p.25 noted a "decided trend in the law" to recognize that the statute of limitations should be treated as substantive, and concluded that "thus, a 'significant contacts' approach to the statute of limitations issue raised by the borrowing statute in this case would provide a fair and reasonable method for determining where a cause of action 'arose' for purposes of the statute." (Pl. Meehan Br. 33).

Plaintiff next spends several pages arguing that her cause of action should be deemed to "arise" in Florida because it "accrued" in Florida. Co-petitioner Owens-Corning has already noted the absence of any support for Plaintiff's argument that discovery is an element of the cause of action. Moreover, Plaintiff continually mixes the temporal concept of when a cause of action accrues, with the geographical concept of where it arises. 5/

Plaintiff's discussion ends with a "simple example" illustrating the "fallacy" in the Defendants' analysis. Plaintiff poses a situation where a manufacturer makes a defective product in one state and then ships it to Florida where it malfunctions, killing a Florida resident. Contrary to Plaintiff's characterization of Defendants' view, Celotex believes that the cause of action would not arise in the other state in such a situation, but would arise in Florida because that is where the injured party was exposed to and injured by the wrongful act of the Defendant. Had the injured plaintiff in the example then travelled to a third state and obtained medical care, or died in a fourth state sometime later, under Plaintiff's analysis the third or fourth state's statute of limitations would then be borrowed

5/ As Celotex noted in its initial Meehan brief at p.14 and Judge Schwartz's noted, to the extent Florida courts have not always distinguished between the words "arise" and "accrue", there has never been a need to do so since those courts were not addressing the issues presented in the instant case.

for an action brought in Florida. This obviously would lead to absurd results in that a state's limitation period would govern a case even though the plaintiff ended up in that state for medical treatment by a mere fortuity, and the state had absolutely no connection with the initial negligence or the actual exposure of the plaintiff to that negligence. This precise situation has arisen in the asbestos context where Florida plaintiffs exposed in Florida received out of state medical diagnoses in a state with a shorter statute of limitations. See, Celotex Meehan Br. 12, 15, and cases discussed therein.

Plaintiff's simple example in fact illustrates Plaintiff's erroneous view of the meaning of "arose" for the purposes of the borrowing statute, and further demonstrates why a significant relationships analysis should be applied to the borrowing statute to avoid such absurd results.

Plaintiff's final suggestion that this Court carve a judicial exception in the borrowing statute for Florida "residents" found no takers among the nine judges of the Third District who heard this matter en banc with Meehan. The invitation to such judicial legislation not only poses serious practical problems (how long one must live in Florida before being deemed a resident), but could also presents serious constitutional problems (the privileges and immunities clause). 6/

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

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 has been furnished by United States Mail to all counsel listed on the attached Service List, this 9th of September, 1985.

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