IN THE SUPREME COURT OF FLORIDA

APPEAL NO. 66,939

THE CELOTEX CORPORATION,)

Petitioner.)

Versus)

LOUIS KEY COLON AND JEANNETTE M. COLON,)

Respondents.

ANSWER BRIEF ON THE MERITS OF RESPONDENTS LOUIS KEY COLON AND JEANNETTE M. COLON

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STATEMENT OF THE CASE

On June 26, 1980, Plaintiff LOUIS KEY COLON filed his Original Complaint against all Defendants. (R.1-8). Plaintiff filed an Amended Complaint against the same Defendants on March 26, 1981 (R.192-211) and January 8, 1982 which, for purposes of this appeal, contain substantially the same allegations as those contained in the Original Complaint. In his Amended Complaint, Plaintiff alleges that he was exposed to and injured by asbestos products manufactured, sold and distributed by the various Defendants; that his being exposed to said products caused him to develop the disease process of asbestosis and to become permanently and totally disabled; that Defendants failed to warn the Plaintiff that being exposed to asbestos products created a grave health risk; that Defendants' failure to so warn was the proximate cause of the Plaintiff's injuries; and that Defendants are liable to Plaintiff under theories of strict liability, failure to warn, implied warranty and negligence. (R.1-8, 192-211).

On February 7, 1984, Circuit Court Judge Harold R. Vann filed an Order Granting Final Summary Judgment against all Defendants on the basis of the Tennessee statute of limitations pursuant to the Florida borrowing statute. (R.1369).

On March 19, 1985 the District Court of Appeals of Florida for the Third District reversed the trial court grant of summary judgment. Colon v. Celotex Corp., 465 So.2d 1332 (Fla.3d DCA 1985). Relying on Meehan v. The Celotex Corp., 466 So.2d 1100 (Fla.3d DCA 1985) it held that the Tennessee statute of limita-

tions was controlling of this case by application of the Florida borrowing statute, but that a genuine issue of fact existed as to whether this cause was timely filed under the one year Tennessee limitations period.

This Court accepted jurisdiction of this case by order of January 10, 1986 and consolidated it with the case of The Celotex Corp. v. Meehan (Case No. 66,937) for oral argument.

STATEMENT OF THE FACTS

LOUIS COLON was exposed to asbestos-containing products during his career as an installer and dismantler of asbestos insulation products in the State of Florida from 1957 to 1980. (R.1044-1056). He alleges in his Complaint that he was exposed to and injured by asbestos products manufactured, sold and distributed by the various Defendants, that said products caused him to develop the disease process of asbestosis which resulted in and directly caused him to become permanently and totally disabled; and that Defendants are liable to him under various theories of strict liability, failure to warn, implied warranty and negligence. (R.1-8, 192-211).

In 1957, Mr. and Mrs. Colon moved to Florida where LOUIS COLON worked with asbestos-containing products until 1980. (R.1044-1056). In June of 1979, LOUIS COLON discovered that he was suffering from an asbestos-related disease. (R.1371). Accordingly, he filed this lawsuit on June 26, 1980. (R.108).

Mr. Colon travelled to Tennessee and visited Dr. William Swann, who ultimately diagnosed his asbestos-related disease. According to the sworn affidavit of Dr. Swann, Mr. Colon was seen for chest examination on June 25, 1979. (R.1271-1273; A.1-2). Dr. Swann formulated his diagnosis of asbestosis and wrote a written report to that effect on June 29, 1979. Id. Mr. Colon erroneously stated in his Answers to Interrogatories that he was diagnosed with asbestosis by Dr. Swann on June 25 1979. (R.463) This misstatement was clarified and later explained by

Plaintiff's Amended Interrogatory Answer, his own affidavit, and the affidavit of Dr. Swann. (R.1266-1273; A.1-7). Contrary to the statement of facts submitted to this Court by The Celotex Corporation, at no time during the full two days of questioning by the Defendants, did Mr. Colon ever testify "unequivocally that he had learned that he had asbestosis not from **reading** the reports sent by Dr. Swann, but in an oral conversation with Dr. Swann at the time of his physical examination." See Celotex Br. at 5-6. Not having been asked, Mr. Colon never testified as to where, when, or in what manner he was informed of Dr. Swann's diagnosis.

SUMMARY OF ARGUMENT

LOUIS COLON adopts the arguments submitted in the Answer Brief on the Merits in the Meehan case (Appeal No. 66,937) regarding the inapplicability of the Florida borrowing statute to Florida's resident-plaintiffs. Further, he urges that if the borrowing statute is held to be relevant in this case (1) his cause of action "arose" in Florida, necessitating application of the Florida statute of limitations and (2) this interpretation of the borrowing statute is consistent with the intended purpose of the statute and with the "significant interest" analysis applicable to other choice of law questions.

Should this Court determine that the Tennessee statute of limitation is controlling in this case through application of the Florida borrowing statute, LOUIS COLON asserts that summary judgment is precluded in this case where a genuine issue of material fact exists as to when the plaintiff discovered the existence of his asbestos-related disease. Celotex was not able to establish, as a matter of law, that Mr. Colon learned of his diagnosis of asbestosis prior to June 28, 1979. Moreover, even if such a diagnosis was made on June 25, 1979, under the rule of Ash v. Stella, 457 So.2d 1377 (Fla. 1984), it must be viewed as a tentative diagnosis because the tests confirming asbestosis were not made available to Plaintiff's doctor until June 28, 1979. This Court must recognize, as a matter of good legal and common-sense that a plaintiff seeking medical attention for an undiagnosed condition cannot be imputed with sophisticated medical knowledge not yet known to his doctor.

ARGUMENT

I. THE FLORIDA BORROWING STATUTE HAS NO APPLICATION TO THIS CASE.

A. Plaintiff's Cause of Action Arose in Florida

LOUIS COLON was exposed to asbestos products while working in the State of Florida. (R.1044-1056). He became sick from an asbestos-related disease in Florida, and was informed of his diagnosis of asbestosis in Florida. (R.1271-1273). Accordingly, he filed suit in this State where he has resided for over 25 years. (R.1-8). Nevertheless, the trial court applied the Florida Borrowing Statute, §95.10 FLA.STAT. (1979) and determined that this cause of action was time barred under the one year Tennessee statute of limitations. (R.1671). Judge Vann appeared to reason that under Meehan v. Celotex Corporation, 466 So.2d 110 (Fla.3d DCA 1983), the "last act necessary to establish liability" in this case was the plaintiff's appointment with a doctor in Tennessee. The trial judge then concluded that because LOUIS COLON travelled to Tennessee to visit a doctor, his claim arose in Tennessee triggering application of the Florida borrowing statute.

In reversing the trial court judgment, the Third District Court of Appeals held that under the Meehan interpretation of the Florida borrowing statute the Tennessee statute of limitations was controlling in this case. It concluded, however, that it could not be determined as a matter of law that this cause was time-barred under the one year statute of limitations of the

State of Tennessee. Thus, it reversed the trial court's grant of summary judgment. Colon v. Celotex Corp., 465 So.2d 1332 (Fla.3d DCA 1985).

Plaintiff vigorously objects to the application of the Florida borrowing statute in this case. Clearly, LOUIS COLON became sick from asbestos while living in Florida. Further, he maintains that he discovered the etiology of his disease while living in Florida. He has resided in this state from the time he was exposed to asbestos products to the present day. The mere fact that he travelled to Tennessee to visit a doctor who later diagnosed his asbestos disease does not change the fact that the last act necessary to establish liability in this case - his knowledge of his injury - occurred in Florida. (R.1271-1273). Mr. Colon was a resident of this state and was in Florida when he was put on notice of an invasion of a legal right. See, City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954). Clearly, therefore, his cause of action arose in Florida, rendering the Florida borrowing statute inapplicable in this case. See Meehan, supra; Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972).

B. Application of the Florida Borrowing Statute in this Case is Inconsistent with the Intended Purpose of the Statute.

Borrowing statutes are designed to discourage forum shopping. Ester, Borrowing Statutes of Limitation and Conflict of Law, 15 U.FLA.L.REV. 33, 40 (1962). Of course, forum shopping is not generally considered a problem when the plaintiff is a

resident of the forum. Indeed, a borrowing statute may work a substantial hardship to a resident who seeks to enforce his claim in the courts of his residency, but who suffers the misfortune of becoming injured while away from home. In response to this injustice, several states include in the borrowing statute itself an exception for forum resident-plaintiffs. See e.g., United States Fidelity and Guaranty Co. v. Smith, 46 N.Y.2d 498, 387 N.E.2d 604, 414 N.Y.S.2d 672 (N.Y. 1979) (New York borrowing statute inapplicable to New York resident); Allen v. Greyhound Lines, Inc., 583 P.2d 613 615 (Utah 1978) (Utah borrowing statute inapplicable to Utah residents); and Idaho Code §5-239 (1979). For a list of borrowing statutes containing similar exceptions, see Ester, 15 U.FLA.L.REV. at 80-81. In addition, at least one state's judiciary has carved an exception for forum state litigants into its borrowing statute. The court in Coan v. Cessna Aircraft, 53 Ill.2d 526, 293 N.E.2d 588 (Ill. 1973), ruled that the Illinois borrowing statute "was intended to apply only to cases involving nonresident parties." 293 N.E.2d at 590. In this way, the Illinois Supreme Court acted to guaranty residents of that state who file their claims in the courts of the state in which they reside the full protection of the laws of Illinois, both substantive and procedural.

Admittedly, the Florida borrowing statute is silent as to an exception for resident-plaintiffs. Nevertheless, this Court will ensure that residents availing themselves of the Florida courts receive the full protection of the laws of this state by refusing

to adhere to the Florida borrowing statute in a case such as this where it clearly has no application. Indeed, any rule to the contrary would only encourage forum shopping - the very problem borrowing statutes are designed to discourage. Under the Third District's analysis, a potential plaintiff suffering from a latent disease could extend the limitations period applicable to his case by traveling to a state with a favorable statute to receive a doctor's diagnosis. The irony of this result is self-evident. The statute of limitations of the state in which the doctor resides is irrelevant to the plaintiff's right to seek judicial recourse. The relevant inquiry is where the plaintiff resides at the time he discovers his injury - that is, his residency when the cause of action arises. It is for this very reason that borrowing statutes are often determined to be inapplicable where the plaintiff is a resident of the forum state. Smith, supra; Allen, supra; Coan, supra. Such a rule should justly be adopted by this Supreme Court.

Under no contortion of facts of this case can LOUIS COLON be charged with forum shopping. Application of the borrowing statute under these circumstances would not serve the statute's intended purpose, but instead, would violate the policies and interests of the State of Florida.

C. Application of the Florida Borrowing Statute to this Case is Inconsistent with Florida Policy as Determined Under this State's "Significant Interest" Analysis in Choice of Law Questions.

Not only does the Florida borrowing statute have no application to this case under plain notions of justice and the traditional place of injury rule but it is also inconsistent with this State's adoption of the "significant interest" analysis for choice of law questions. In Bishop v. Florida Specialty Paint Company, 389 So.2d 999 (Fla. 1980), this Court rejected the traditional lex loci delicti rule for resolution of choice of law problems in tort actions in favor of the "significant relationships" test advocated by the Restatement (Second) of Conflict of Laws.

A full discussion of Sections 145 and 146 of the Restatement (Second) is set forth in pages 24-33 of Respondent's Answer Brief submitted in the companion case of Celotex Corporation v. Meehan (Appeal No. 66,937). That discussion is fully applicable to the instant case and is incorporated by reference in this brief. Plaintiff would only stress that the contacts in this case are even stronger than those presented by the Meehan case. Indeed, in this case every inquiry set forth in §145 of the Restatement (Second) has its location in Florida. Under the significant contacts analysis there is no rationale whatsoever for looking to Tennessee law.

II. SUMMARY JUDGMENT IS PROHIBITED IN THIS CASE WHERE A GENUINE ISSUE OF FACT EXISTS.

Should this Court determine that the Florida borrowing statute is applicable to this case, and that the statute of limitations of Tennessee is controlling, it must conclude nevertheless that summary judgment is procluded in this case where there exists a genuine issue of material fact. Tennessee, like the State of Florida, employs the discovery rule in determining when the statute of limitations begins to run. McCroskey v. Bryant Air Conditioning Co., 524 S.W.2d 487 (Tenn. 1975); Teeters v. Currey, 518 S.W.2d 512 (Tenn. 1974); Sullivant v. Americana Homes, Inc., 605 S.W.2d 246 (Tenn.Ct.Ap. 1980); Gilbert v. Jones, 523 S.W.2d 211 (Tenn.Ct.App. 1974). And, like the Florida courts, the Tennessee courts have determined that proper construction of the discovery rule necessitates preservation of factual issues for determination by the jury. Id., C.f. Celotex Corp. v. Copeland, 471 So.2d 533 (Fla. 1985); Brown v. Armstrong World Industries, 441 So.2d 1098 (Fla.3d DCA 1983) rev. denied, 451 So.2d 850 (Fla. 1984).

A. The Date of Diagnosis

The record in the case at hand clearly indicates the existence of a genuine issue of material fact as to when, in fact, LOUIS COLON discovered the existence of his asbestos-related disease. This lawsuit was filed on June 26, 1980. (R.1271-1273; A.1-2). According to the sworn affidavit of Dr. William Swann, Mr. Colon was seen for chest examination on June

25, 1979. (Supp.R. 1-3). Dr. Swann formulated his diagnosis of asbestosis and wrote a written report to that effect on June 28, 1979. Id. Thus, based on the diagnosing doctor's testimony, Mr. Colon could not have known in fact, that he suffered from an asbestos-related disease prior to June 28, 1979. His case was therefore properly filed under the one year statute of limitations applicable to the citizens of Tennessee.

While the Plaintiff maintains that he could not possibly have learned that he was suffering from asbestosis until his doctor formulated and then divulged the diagnosis, the Celotex Corporation contends that Mr. Colon knew of his condition, as a matter of law, even before his own doctor: on June 25, 1979, the date of Mr. Colon's physical examination. Relying on Ellison v. Anderson, 74 So.2d 680 (Fla. 1954), and cases following it, Celotex asserts that Florida courts will not permit a party "to alter a position taken in previous admissions, affidavits, depositions or interrogatories." Celotex Br. at 18. The actual language of the Ellison case is as follows: "[A] party when met by a Motion for Summary Judgment should not be permitted by his own affidavit, or by that of another, to baldly repudiate his previous deposition so as to create a jury issue, especially when no attempt is made to excuse or explain the discrepancy." Id. at 681. Plaintiff would urge this Court first, that any discrepancy which may exist in Mr. Colon's testimony has been grossly overstated by Celotex and more importantly, that Plaintiff has provided a credible explanation for any such

inconsistency.

A complete review of the record before this Court reveals but one pertinent discrepancy in all of Plaintiff's testimony: In Plaintiff's Answer to Interrogatory No. 35 Propounded by Celotex in April, 1981, Mr. Colon erroneously stated that he had been diagnosed with asbestosis by Dr. Swann on June 25, 1979. (R.463). This statement is admittedly at odds with Plaintiff's Amended Interrogatory Answer, his own Affidavit, and the Affidavit of Dr. Swan, all filed with the trial court on January 20, 1984 in response to Defendant's Motion for Summary Judgment. (R.1266-1273).

At no time during two full days of questioning by the Defendants did Mr. Colon ever testify as stated by Celotex "unequivocally that he had learned that he had asbestosis not from reading the reports sent by Dr. Swann, but in an oral conversastion with Dr. Swann at the time of his physical examination." Celotex Br. at 5-6. Rather, Celotex combed through Plaintiff's deposition testimony only to salvage particles of conversation such as the following:

> Q. What did he tell you?
>
> A. He told me that I had asbestosis and I sure better stop smoking.

(Plaintiff's Depo. 343). Indeed, the ambiguous bits and pieces of Mr. Colon's testimony collected by Celotex prove nothing more than that it was Dr. Swann who informed Mr. Colon of his asbestos-related disease.

The Defendants failed to ask the Plaintiff whether Dr. Swann

informed him of his diagnosis while Mr. Colon was still in the doctor's office in Tennessee or whether Mr. Colon was told of his condition on a later date in a letter. Not having been asked, Mr. Colon did not describe where, when, or in what manner he was informed of Dr. Swann's diagnosis. Certainly Celotex cannot now imbue either Defendants' questions or Mr. Colon's answers to them with a degree of precision that was manifestly lacking during the deposition. Rather, any ambiguity must be resolved in Mr. Colon's favor:

> It is axiomatic in summary judgment proceedings that all evidence before the court must be viewed in the light most favorable to the nonmoving party and the court should on motion for summary judgment indulge all proper and reasonable inferences in that party's favor.

Buntin v. Carter, 234 So.2d 131 (Fla.4th DCA 1970). See also, Holl v. Talcott, 191 So.2d 40 (Fla. 1966). Moreover, it is an established rule of law in Florida that where "a deposition and affidavit of a party appear to be in conflict, and if it is possible that both the deposition and affidavit are true, then any reasonable inference must be resolved in favor of the party defending against the motion." Buntin, 234 So.2d at 132.

Furthermore, Mr. Colon's Affidavit is entirely consistent with that of Dr. Swann's. (R.1272-1273). In his Affidavit, Dr. Swann testified that he conducted a physical examination of Mr. Colon on June 25, 1979, but that he did not formulate his diagnosis of asbestosis in Mr. Colon until June 28, 1979. Id. In addition, Dr. Swann further explained that this procedure was consistent with his customary practice of waiting to diagnose an

occupational disease until he has had an opportunity to review the test results necessary to formulate a diagnosis. Thus, Dr. Swann testified that he "would not have formulated [his] opinion of the diagnosis of asbestos in Mr. Colon until [he] had reviewed these tests and dictated the medical report on June 28, 1979." Id.

Finally, Plaintiff has provided a credible explanation for the single existing discrepancy in all his testimony: that between his original answer to Celotex' Interrogatory No. 35 and his later amended answer, his own Affidavit, and the Affidavit of Dr. Swann. It is undisputed in Florida that a party may alter his previous testimony where an attempt is made to excuse or explain the discrepancy. Ellison, 74 So.2d at 681; see also Willage v. Law Offices of Wallace and Breslow, 415 So.2d 767 (Fla.3d DCA 1982); Borders v. Liberty Apartment Corp., 407 So.2d 232 (Fla.3d DCA 1981); Croft v. C.G. York, 244 So.2d 161 (Fla.1st DCA 1971); cert. denied, 246 So.2d 787 (Fla. 1971); C.f. Szabo v. Ashland Oil Co., 448 So.2d 549 (Fla.3d DCA 1984) (in chemical injury case, material issue of fact exists where doctor's affidavit explains worker's erroneous statement in deposition as to when plaintiff learned of the relationship between his disease process and exposure to chemicals at work place). Plaintiff stated clearly in his Affidavit that his review of Dr. Swann's Affidavit refreshed his memory with respect to the date he received a diagnosis of asbestosis from Dr. Swann. (R.1266-1267). He further explained that his review of Dr. Swann's Affidavit caused

him to remember that Dr. Swann discussed the nature of asbestos disease with his during his office visit but that Dr. Swann did not inform him of the results of his physical examination until a written report was mailed to him on June 28, 1979.

LOUIS COLON'S explanation in his Affidavit for the change in his answer to Defendants' Interrogatory No. 35 is sound and plausible. While Dr. Swann might be quite likely during an office visit to advise an insulation worker to stop smoking or to explain to him the hazards of asbestos exposure, it would seem absolutely incredible that a doctor would diagnose any disease in his patient before reviewing the test results necessary to make a diagnosis. Celotex certainly has not proven this to be the case. Where, as here, a credible explanation by the affiant is given as to the reason for the discrepancy between testimony, the affidavit and testimony raise a genuine issue of material fact for the jury. Willage, supra; Ellison, supra; Borders, supra; and Croft, supra. Plaintiff maintains and the bulk of the evidence supports that he did not learn of his asbestos-related disease until sometime after June 28, 1979. His lawsuit was filed on June 26, 1980, within one year of the time he discovered he was suffering from asbestosis. Even under Tennessee's one year statute of limitations, then, this case was timely filed.

B. The Tentative Diagnosis

In reviewing the facts of this case, the Third District Court of Appeals adopted an alternative view of the facts. It concluded that if LOUIS COLON was diagnosed with asbestosis on

June 25, 1979, any such diagnosis was tentative, and thus, under the rule of Ash v. Stella, 457 So.2d 1377 (Fla. 1984), did not trigger the running of the statute. Colon v. Celotex Corp., 465 So.2d 1332, 1334 (Fla.3d DCA 1985). It concluded therefore that the evidence adduced was not conclusive as to a material fact issue, "i.e. whether plaintiff, based solely on that tentative diagnosis, knew or should have known on June 25, 1979, that he had a cause of action against the defendants." Id. at 1334 (emphasis in original).

The Ash opinion is highly instructive in a case such as this involving the diagnosis of a disease process. For Ash clearly articulates the common-sense understanding that a plaintiff seeking medical attention for an undiagnosed condition cannot be imputed with sophisticated medical knowledge not yet known to his doctor. Mr. Colon, as Mrs. Stella in the Ash case, suffers from a disease process that cannot be identified without the careful review of laboratory test results not available to the doctor on the date of the patient's office visit. Thus, this Court's reasoning in the Ash is equally applicable here:

> The trial judge concluded that Cynthia Stella knew or should have known of Dr. Ash's allegedly improper diagnosis on March 23, 1977, when she received a proper diagnosis. However, the diagnosis on which the court based its decision was inargueably a preliminary diagnosis. Tests to confirm that diagnosis were not performed until March 29. The final results of those tests were not available until March 30. We do not believe that, as a matter of law, a tentative diagnosis, however proper it may turn out to be in hind-sight, starts the clock on an action for medical malpractice arising out of negligent failure to properly diagnose.

Ash v. Stella, 457 So.2d at 1379.

Clearly, the Ash case was a medical malpractice action. This factual distinction, however, has no bearing on the applicability of the rule in Ash to the case at hand. While the Celotex Corporation would ask this Court to neatly divide medical malpractice and occupational disease cases into independently functioning legal systems, see Brief of Celotex, pp.13-18, such a distinction makes no legal sense. In both contexts, the factual inquiry is identical and so too is be the legal test. In each instance the relevant inquiry is the **knowledge** of the plaintiff. As this Court stated in the seminal case of City of Miami v. Brooks, 70 So.2d 306, 309 (Fla. 1954):

> In other words, the statute attaches when there has been notice of an invasion of the legal right of the plaintiff or he has been put on notice of his right to a cause of action.

It is curious that Celotex should so vigorously strain to distinguish the two contexts in which the discovery rule unquestionably applies. While it is quick to point out the factual distinction that Universal Engineering Corp. v. Perez, 451 So.2d 463 (Fla. 1984) is an occupational disease case, and Ash v. Stella, supra, is a medical malpractice case, it fails to recognize that in Perez this Court looks to City of Miami v. Brooks, supra, a medical malpractice case, to formulate its rule of law.

The decisions in Perez and Ash, of course, are completely compatible. The only distinction between the cases is the factual inquiry necessitated by application of the discovery rule. In each case this Court was called upon to apply the discovery

rule to a cause of action founded on the development of a latent disease process. The inquiry was different, however, due to the factual record presented. In Perez, the plaintiffs "acknowledge[d] their illnesses were manifest in 1972, but allege that the cause of illness was not determined til a later, unspecified, date." Perez, 451 So.2d at 468. Thus, this Court remanded the case for a factual finding of when the cause of action accrued. It concluded, "[W]e are ignorant of when the appellees knew or should have known that their disease was occupational in origin. With that knowledge, the date of the accrual of the cause of action in determinable. . . " Id. at 468.

In the Ash case, as in the present one, the factual inquiry is much more narrow. In Ash the question presented concerned when **actual knowledge** can be imputed to the plaintiff as a matter of law. In that context, this Court concluded that the plaintiff cannot be imputed with knowledge of her medical condition not yet known to her own doctors. It held, "[W]e do not believe that, as a matter of law, a tentative diagnosis, however proper it may turn out to be in hindsight, starts the clock on an action for medical malpractice arising out of negligent failure to properly diagnose." Ash v. Stella, 457 So.2d at 1379.

LOUIS COLON maintains that he was not diagnosed with asbestosis on June 25, 1977 in his doctor's office. However, should this Court reason, as did the Third District, that the Plaintiff "might very well have been told by his doctor on June 25, 1979, that he had asbestosis," Colon, supra at 1334, then it

must also conclude, like the Third District, that "the diagnosis was only a **preliminary** one and did not necessarily start the running of the statute of limitations as a matter of law." Id. (emphasis supplied). The controlling precedent of Ash is inescapable. A plaintiff cannot be imputed with actual medical knowledge, as a matter of law, when that knowledge is not yet known to his diagnosing doctor.

CONCLUSION

Wherefore, based upon the arguments and citations of authority contained herein, Respondent respectfully prays that this Court affirm the reversal of summary judgment granted by the trial court and remand this case for trial by jury.

Respectfully submitted,

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