O/G 4-7-86

IN THE SUPREME COURT OF FLORIDA

By _____ Chief Deputy Clerk

THE CELOTEX CORPORATION,	:	
Defendant/Petitioner,	:	
vs.	:	CASE NO. 66,939
LOUIS KEY COLON and JEANNETTE M. COLON,	:	
Plaintiff/Respondent.	:	

INITIAL BRIEF ON THE MERITS OF PETITIONER THE CELOTEX CORPORATION

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PRELIMINARY STATEMENT

The Respondents, who were plaintiffs below, are referred to as "Plaintiff" (and the discussion herein focuses on the primary Plaintiff, Mr. Colon, since his wife's claim is derivative).

Petitioner, the Celotex Corporation, a defendant below, is referred to as "Celotex".

References to the record on appeal are designated by the prefix "R", except that references to the transcript of the hearing before the trial court on the summary judgment from which this appeal was initially taken are designated by the prefix "Tr" (R 1672-1742).

The Plaintiff's deposition in this case, which was considered during the summary judgment hearing (Tr-5) is referenced by "Pl. Depo.", and the relevant portions are included in the appendix to this brief and designated by the prefix "A".

STATEMENT OF THE CASE AND FACTS

This case presents the "other side of the coin" of two cases presently pending before the Court, The Celotex Corporation v. Meehan, S.Ct. Case No. 66,937 and The Celotex Corporation v. Nance, S.Ct. Case No. 66,938. In Meehan and Nance, the plaintiffs were exposed to asbestos products while working in other states and moved to Florida where their alleged asbestos-related diseases manifested and were diagnosed. By contrast, Plaintiff in the instant case worked with asbestos in Florida, but then traveled to Tennessee for his examination by a doctor where his alleged asbestos-related condition was diagnosed.

These two types of cases focus the inquiry on how Florida's borrowing statute will be applied to delayed manifestation injuries. By virtue of the en banc split in the Third District, the panel opinion in Meehan became the law of the district, holding that the injury arose for purposes of the borrowing statute at the location where Plaintiff discovered he had the injury. Thus, in both Meehan and Nance this "last act" analysis ignored the significant relationships between the Plaintiff's exposure and the location where the cause of action arose, and in Meehan also engrafted an additional element (discovery) onto the cause of action, which element would not have been recognized in the state where the action otherwise would have arisen (New York). Consequently, consistent with its position in Meehan

and Nance, Celotex urges that in the instant case the Plaintiff's cause of action should be determined to have arisen in Florida since it had the most significant contacts. (For the purposes of this appeal, Celotex agrees such a holding would require reversal of the summary judgment on the grounds that Florida's four-year statute of limitation applied rather than Tennessee's one-year statute).

Should this Court determine that Celotex's view of the borrowing statute is correct, then Celotex would request that the Third District opinion in the instant case be affirmed on that ground, but that this Court also explicitly note the seriously incorrect application of one of its precedents regarding medical diagnoses, instead of the customary occupational disease standard.

Plaintiff alleged that he was exposed to asbestos containing products while installing and dismantling those products in Florida from 1957 to 1980 (R 1044-1056; Colon v. Celotex Corporation, 465 So.2d 1332, 1333 (Fla. 3d DCA 1985). In sworn interrogatory answers and repeatedly in his deposition, Plaintiff stated that he was told that he had asbestosis during his June 25, 1979 examination visit to Dr. Swann in Tennessee. Plaintiff answered interrogatories propounded by Celotex in April, 1981 by stating in response to interrogatory no. 35 that he had been diagnosed with asbestos on 6/25/79 (R 463). In Plaintiff's October 14, 1983 and December 2, 1983 depositions, he testified that Dr. Swann

had told him he had asbestosis at the time of the physical exam taken in Tennessee (on June 25, 1979). (Pl.Depo. 75-76, 324, 343; A 3-4, 6, 7).

Celotex sought summary judgment on the ground that Plaintiff's cause of action had arisen when he was diagnosed as having asbestosis and informed of that diagnosis on June 25, 1979. Since Plaintiff's cause of action was filed in Florida over one year later, it was barred by virtue of Tennessee's one-year statute of limitations, as applied through Florida's borrowing statute (under the Meehan panel analysis) (R 1141-1143).

On January 20, 1984 - three days prior to the hearing on Celotex's motion for summary judgment-Plaintiff filed his own affidavit, an affidavit of Dr. Swann and amended answer to Celotex's interrogatory no. 35 (R 1266-1273).

Dr. Swann's affidavit did not specifically state that he had not told Plaintiff that he had asbestosis at the time of his examination on June 25, 1979. The affidavit stated that it was the doctor's "customary practice" not to make a diagnosis until after the exam and that "in keeping with my customary practice, I would not have formulated my opinion of the diagnosis of asbestosis in Mr. Colon until I had reviewed these tests and dictated the medical report on June 28, 1979." (R 1272-1273). Plaintiff attempted to amend his answers to his interrogatories of two and a half years

earlier by stating that he had not been diagnosed on June 25, 1979, but instead on June 28, 1979 (R 1269).

Most important, Plaintiff's own affidavit stated that based on his review of Dr. Swann's affidavit, Plaintiff was altering his sworn answer to interrogatory no. 35 and his deposition testimony. The affidavit stated in pertinent part:

> 4. ...My review of Dr. Swann's affidavit has also refreshed my recollection with respect to all statements made in this affidavit. At the time of answering the defendants' interrogatories and the taking of my deposition in this case, I had not consulted with Dr. Swann with respect to his date of diagnosis of my condition.
>
> 5. I received Dr. Swann's medical report of June 28, 1979 diagnosing my condition of asbestosis sometime after the report date. Upon receipt of Dr. Swann's report I learned for the first time that I have asbestosis.
>
> 6. During my physical examination conducted by Dr. Swann on June 25, 1979, he advised me to stop smoking because I was an insulator. At that time, I also learned for the first time that asbestos might be harmful and that the effects of asbestos exposure might be cumulative.
>
> 7. During my physical examination conducted by Dr. Swann on June 25, 1979, he did not tell me that I had asbestosis. At that time, Dr. Swann indicated that he would have to review my pulmonary function test results, chest x-rays and the results of my physical examination before he could render an opinion as to my medical condition.

(R 1266-1267).

Contrary to Plaintiff's last minute affidavit, Plaintiff had testified 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:

Q. What did he tell you?

A. He told me that I had asbestosis and I sure better stop smoking.

(Pl.Depo. 343, A 7). 1/

Q. You said you went for a physical in '79?

A. Huh?

Q. You said you went for a physical in 1979?

A. Yes.

Q. Who did you go to then?

A. Dr. Swann in Tennessee.

Q. And he was the one who told you--What did he tell you?

A. It's a pulmonary clinic on black and white lung. You have a copy that--of that examination, I'm sure.

Q. Yes, sir, we do. What did he tell you?

A. He told me I had asbestosis.

Q. Did you ask him what asbestosis was?

A. Yes.

Q. You'd never heard of asbestosis until that time?

A. I never--I don't say I haven't heard of asbestosis. Of course I've heard of it. I'm an asbestos worker. But if you're asking me did I believe it was going to kill me or something like that, I was going to develop it, no. I don't think so. I heard rumors.

1/ In his deposition, Plaintiff also testified "Well, I have quit smoking before this, but as far as the record is concerned, I stopped smoking after I went up to Tennessee, when I found out I had asbestosis of the lung." (Pl.Depo. 324, A 6).

Q. But it wasn't until 1979 when Dr. Swann told you you had asbestosis that you thought it might be harmful to you?

A. No.

Q. Is that correct?

A. No, no, that's not true. I--had bronchial trouble which I guess the doctor has been treating for over 20 years, but I never thought that would be the problem, but I kept having it. That's the reason I left up North and came down South originally to Miami, because I kept getting colds and flu and it would settle into my chest. I seemed to be prone to this...

(Pl.Depo. 75-76, A 3-4).

Thus, it was clear at the summary judgment hearing that Plaintiff's affidavit filed three days earlier did not seek to explain any ambiguity in his sworn interrogatories and deposition testimony, but simply sought to contradict it outright. Even the affidavit itself states that Dr. Swann told Plaintiff to stop smoking and specifically discussed the potentially harmful effects of asbestos, despite Plaintiff's claim that he was not told he had asbestosis. Plaintiff offered no explanation as to how he could testify in deposition that his asbestosis condition was orally "told" to him, and subsequently recall that he was not told in an oral conversation, but learned it from reading a written report. Plaintiff's affidavit admits he was orally told to stop smoking on his June 25, 1979 visit to Dr. Swann, but does not explain Plaintiff's deposition in which he twice referenced

the instruction to stop smoking as occurring with his being informed of his asbestosis condition.

In the trial court, Judge Vann, being bound by the Meehan panel's application of the Florida borrowing statute, found that the cause of action arose in Tennessee, and further refused to allow Plaintiff to contradict his previous testimony as described above. Consequently, he entered final summary judgment on the basis of the one-year Tennessee statute of limitations pursuant to the Florida borrowing statute (Section 95.10)(R 1369). Plaintiff appealed to the Third District Court of Appeal (R 1669).

In the Third District, both Celotex and Plaintiff argued against the Meehan panel opinion's application of the Florida borrowing statute. However, Celotex argued that if the Meehan panel opinion was to be the law, then Plaintiff must not be permitted to contradict his earlier sworn testimony three days before the scheduled summary judgment in an attempt to avoid the entry of same. Plaintiff, of course, argued to the contrary.

In its opinion, the Third District recognized that it was bound by the panel decision in Meehan as to the application of the Florida borrowing statute. Colon, supra at 1333. The Third District's opinion in Colon notes the Plaintiff's prior sworn statements that he learned he was suffering from asbestos on the date he visited his doctor. Id. at 1333, 1334 (e.g., "plaintiff may very well have been told by his

doctor on June 25, 1970, that he had asbestosis"). However, the court held that the case did not turn on whether Plaintiff could refute his earlier testimony, but on whether any statements made by the doctor on June 25, 1979 were a preliminary diagnosis, as contrasted with a final written diagnosis on June 28, 1979. The court concluded that Plaintiff's earlier statements "were not conclusive as to a material factual issue, i.e. namely 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 by the court). Thus, the Third District remanded for further consistent proceedings, presumably a jury trial in which the jury would determine if the Plaintiff knew or should have known on June 25, 1979 (or some earlier date) that he had a cause of action against the defendants.

The Third District reached its result by applying the rationale of this Court's opinion in Ash v. Stella, 457 So.2d 1377 (Fla. 1984), which addressed the question of conflicting medical diagnoses in an action against a physician for an alleged initial incorrect diagnosis. Celotex petitioned this Court for discretionary review on the basis that this application of Ash v. Stella misapplied the law from that unique medical malpractice situation to an occupational disease case which should be governed by this Court's holding in Universal Engineering Corp. v. Perez, 451 So.2d 463 (Fla. 1984). This Court accepted jurisdiction.

ISSUES ON APPEAL

I. WHETHER FLORIDA'S BORROWING STATUTE FOR LIMITATIONS PERIODS SHOULD BE APPLIED IN LATENT DISEASE CASES BASED ON THE PLAINTIFF'S SIGNIFICANT RELATIONSHIPS, OR THE FORTUITY OF WHERE HIS DISEASE MANIFESTS ITSELF OR IS DIAGNOSED.

II. WHETHER ASH v. STELLA'S HOLDING THAT THE LIMITATIONS PERIOD IN A MEDICAL MALPRACTICE ACTION FOR AN INCORRECT DIAGNOSIS DOES NOT COMMENCE UNTIL THE CORRECT PRELIMINARY DIAGNOSIS IS CONFIRMED SHOULD APPLY TO LATENT OCCUPATIONAL DISEASE CASES, OR WHETHER THEY SHOULD BE GOVERNED BY UNIVERSAL ENGINEERING CORP. v. PEREZ.

III. WHETHER A PLAINTIFF SHOULD BE PERMITTED TO CONTRADICT HIS SWORN INTERROGATORY ANSWERS AND DEPOSITION TESTIMONY ON THE EVE OF SUMMARY JUDGMENT IN ORDER TO AVOID SUMMARY JUDGMENT.

SUMMARY OF THE ARGUMENT

Celotex adopts its arguments in Meehan and Nance that Florida's statute for borrowing statutes of limitations from other states where causes of action have arisen should be based on which forum has the most significant relationships (through exposure and residence at the time of exposure), rather than the fortuity of where an individual happens to be located when he manifests a latent disease or is diagnosed.

While such a holding (urged by both Celotex and the Plaintiff in the instant case) would require the reversal of the summary judgment entered by the trial court on the authority of Meehan, Celotex requests that this Court clarify that the standards it set forth in Perez are to apply to occupational disease cases, rather than Ash v. Stella which establishes a unique triggering for the statute of limitations in medical malpractice misdiagnosis cases.

In the event this Court reverses Meehan (and thus the summary judgment in this case as well) Celotex's third point need not be reached. In that final point, Celotex argues that this Court should continue the established Florida case law that a party is not permitted to alter his prior sworn testimony on the eve of summary judgment in an effort to avoid the entry of an adverse summary judgment.

ARGUMENT

I. FLORIDA'S BORROWING STATUTE FOR LIMITATIONS PERIODS SHOULD BE APPLIED IN LATENT DISEASE CASES BASED ON THE PLAINTIFF'S SIGNIFICANT RELATIONSHIPS, AND NOT THE FORTUITY OF WHERE HIS DISEASE MANIFESTS ITSELF OR IS DIAGNOSED.

Celotex will not reiterate the arguments made before this Court in its briefs in Meehan and Nance. In sum, Celotex has urged that the Meehan panel opinion construing the Florida borrowing statute and the subsequent Nance opinion following it be reversed, so that Florida's borrowing statute does not apply based on the fortuity of where a latent injury manifests itself or is diagnosed. In the event this Court declines to follow the Meehan panel opinion (and thus adopts a view of the borrowing statute consistent with Celotex's argument), then Celotex urges that the summary judgment entered by the trial court below in this case be set aside on the same grounds, and further requests that this Court correct the misapplication of Ash v. Stella in the Third District opinion. 2/

Counsel for Plaintiff in the instant case is quite familiar with the arguments in Meehan, since counsel for Plaintiff herein represents the Plaintiff in Meehan as well.

2/ Celotex recognizes that it would be possible for this Court to reverse Meehan on the grounds that the panel opinion engrafted an additional element onto the New York statute of limitations (discovery), while continuing to adhere to a "last act" analysis (thereby affirming the summary judgment in the instant case on the ground that the "last act" occurred in Tennessee). However, Celotex urges that Meehan be reversed on "both grounds", and consequently, that the summary judgment in the instant case be reversed.

Indeed, Plaintiff's counsel in Meehan, as in the instant case when in the Third District, argued for a significant relationships analysis in applying the borrowing statute (consistent with Celotex's view). Celotex agrees with the Plaintiff's counsel in the instant case that a Florida worker who resided and was exposed to asbestos in Florida has the most significant relationship with the state, regardless of where his disease manifests or is diagnosed. By contrast, as indicated in the Meehan briefs, Celotex believes that the Meehan plaintiff whose sole exposure to asbestos took place in New York and who resided there at the relevant time and had his relationship with asbestos centered there the entire period he was exposed has the most significant relationships with New York, and not with Florida, the state which by fortuity he moved to before manifestation and before diagnosis.

II. ASH v. STELLA'S HOLDING THAT THE LIMITATIONS PERIOD IN A MEDICAL MALPRACTICE ACTION FOR AN INCORRECT DIAGNOSIS DOES NOT COMMENCE UNTIL THE CORRECT PRELIMINARY DIAGNOSIS IS CONFIRMED SHOULD NOT APPLY TO LATENT OCCUPATIONAL DISEASE CASES, WHICH SHOULD BE GOVERNED BY UNIVERSAL ENGINEERING CORP. v. PEREZ.

The Third District's opinion in Colon analogized Dr. Swann's June 25, 1979 diagnosis with the preliminary diagnosis in this Court's opinion in Ash v. Stella. However, in Ash v. Stella, this Court went to great length in discussing the fact that "the ideology of malignancy is not

well enough understood, even by medical researchers, that the Court should impute sophisticated medical analysis to a lay person struggling to cope with the fact of malignancy." Id. at 1379. In Ash the plaintiff's wife had allegedly received an improper diagnosis for which that physician was being sued. The question was whether the statute of limitations ran from a subsequent preliminary diagnosis or the time the tests confirmed that preliminary diagnosis a week later. This Court held that such tentative diagnosis, even though it may turn out to be proper, did not commence the statute of limitations on an action for medical malpractice arising out of negligent failure to properly diagnose (in the first place). Id. at 1379. Thus, this Court was in Ash was speaking to the narrow factual circumstance of an initial improper diagnosis, followed by a tentative proper diagnosis, subsequently confirmed.

By contrast, in this asbestos case there is no contention in the instant that Plaintiff was ever improperly diagnosed. Plaintiff's initial testimony was that he was told he had asbestosis during his June 25, 1979 visit with the doctor. The Third District found that, even though this may have been true, that preliminary diagnosis was not confirmed until the written report three days later. The Third District overlooked the fact that it is not necessary to have a conclusive (or even a preliminary) diagnosis to commence the statute of limitations running on a latent occupational

disease case. Rather, that standard is set forth in this Court's recent opinion in Universal Engineering Corp. v. Perez.

In Perez this Court stated that for occupational injuries, "the statute of limitations begins to run from the time the employee knows or should have known that the disease was occupational in origin, even though diagnosis of the exact cause has not yet been made." Id. at 468. This Court cited extensively from its previous opinions that the triggering of the statute of limitations occurs when the disease is manifested and its nature as an occupational disease is fairly discoverable. Id. Thus, in many cases, the jury (and in some cases the court based on undisputed testimony) will be entitled to determine that a plaintiff suffering from an asbestos-related disease knew or should have known that exposure to asbestos products had caused the disease prior to receiving any diagnosis. Clearly, the danger of asbestos exposure and the symptoms that individuals suffering from asbestosis manifest have now been well publicized so that, for example, individuals with serious breathing problems and an occupational history of repeated exposure to asbestos containing products should be put on notice that their manifested disease may be occupational in nature. The purpose of the statute of limitations is to allow such individuals, once presented with such knowledge, to be able to confirm if they indeed have such a disease and

determine against whom they are to bring suit as the responsible parties. Florida's four year statute of limitations gives ample time in which to bring such causes of action after manifestation and the occupational nature of the disease are or should be known. 3/ There is simply no reason to strain to apply the rationale of Ash which is unique to the misdiagnosis medical malpractice situation.

In the instant case, there was no prior conflicting diagnosis of Plaintiff's condition. This case should be controlled by Perez where this Court reiterated that the statute of limitations begins to run for an occupational disease when the disease is manifested and its nature as an occupational disease if fairly discoverable. Perez at 468, (emphasis by the Court) (A19). In the instant case, Plaintiff's disease had admittedly manifested itself and he was visiting a doctor for a diagnosis. Clearly, on June 25, 1979, the date of Plaintiff's physical examination, the fact that he had an asbestos disease was discoverable. Indeed, there is not even the shadow of a factual dispute on the point because all of the facts on which the formal diagnosis was subsequently made were in fact gathered on that date. Under Perez that necessarily started the statute running. It is immaterial that the doctor did not analyze his tests or the information until several days later. Indeed, if such a

3/ The statute of limitation allows plaintiffs to conclude their investigation and file their cases while at the same time protecting defendants from delays in the unexpected enforcement of stale claims, as recognized by this Court in Nardone v. Reynolds, 333 So.2d 25, 36 (Fla. 1976).

delay in analysis were to delay the commencement of the statute of limitations, then the statute would be delayed indefinitely if a doctor simply put test data in the file and did not make a "final" diagnosis. Plaintiff knew he had worked with asbestos and gave that history to the doctor, and was told he had asbestosis on the day of his visit. Again, the facts giving rise to the cause of action were unquestionably discoverable on the date of the examination and that commenced the running of the statute of limitations under Perez.

Based on the above, Celotex urges that the Third District opinion in Colon be quashed, (along with the Meehan panel opinion) and the summary judgment in this case be reversed on the ground that Florida's borrowing statute does not apply where the Plaintiff's exposure to asbestos and residence during exposure was in Florida. Celotex also requests that in quashing the Third District opinion, this Court reiterate that Universal Engineering Corp. v. Perez sets forth the standard to be applied to occupational disease cases, rather than Ash v. Stella. In the event Colon is disposed of on these grounds, it is not necessary to consider the issue of whether the Plaintiff in Colon should have been permitted to alter his prior sworn testimony. In such a situation, it would not be necessary to consider the next portion of this brief, but in the event it may be relevant, Celotex includes

its argument on the altering of testimony, which is essentially the argument made below in the Third District.

III. PLAINTIFF SHOULD NOT BE PERMITTED TO CONTRADICT HIS SWORN INTERROGATORY ANSWERS AND DEPOSITION TESTIMONY ON THE EVE OF SUMMARY JUDGMENT IN ORDER TO AVOID SUMMARY JUDGMENT.

Florida courts have long recognized that "a party opposing a motion for summary judgment will not be permitted to alter the position of his previous pleadings, admissions, affidavits, depositions or testimony in order to defeat a summary judgment." Home Loan Company, Inc. of Boston v. Sloane Company of Sarasota, 240 So.2d 526 (Fla. 2d DCA 1970); see also, Ellison v. Anderson, 74 So.2d 680 (Fla. 1954) (plaintiff can't baldly repudiate previous deposition); Elison v. Goodman, 395 So.2d 1201 (Fla. 3d DCA 1981); Inman v. Club on SailBoat Key, Inc., 342 So.2d 1069 (Fla. 3d DCA 1977); Kramer v. Landau, 113 So.2d 756 (Fla. 3d DCA 1959); Southern California Funding, Inc. v. Hutto, 438 So.2d 426 (Fla. 1st DCA 1983), review denied, 449 So.2d 265 (Fla. 1984); McKean v. Kloeppel Hotels, Inc., 171 So.2d 552 (Fla. 1st DCA 1965).

Plaintiff's sworn deposition answers and interrogatories stated that he was informed that he had asbestosis during his examination by Dr. Swann in Tennessee on June 25, 1979. Plaintiff's own affidavit filed in the trial court recognized that this had been his prior testimony and he sought to alter

it at the trial court level through his affidavit and that of Dr. Swann (and filing an amended interrogatory answer) (R 1266-1273).

Plaintiff simply cannot do this. The instant case is similar to the holding in Kramer v. Landau, supra, which rejected the plaintiff's attempt to refute her prior testimony by using the affidavit of another driver. Therein, the plaintiff had testified by deposition and affidavit that the defendant's car (plaintiff's host-driver) had been struck by another vehicle which had run a stop sign. When the defendant moved for summary judgment, the plaintiff submitted an affidavit of the other driver which stated that that other driver had not run the stop sign. The court affirmed the trial court's rejection of the subsequent affidavit and entry of summary judgment for the defendant.

Moreover, Dr. Swann's affidavit does not even specifically state that he did not tell Plaintiff of his diagnosis of asbestosis on June 25, 1979. Rather, that affidavit states that it is the doctor's "customary practice" not to make a diagnosis at the time of the physical examination and not to advise the patient that he has any disease until subsequently evaluating tests and the physical exam findings. The doctor then simply states that based on his general customary practice, he would not have formulated his opinion of diagnosing asbestosis in the Plaintiff until June 28, 1979. Quite simply, this type of generalized belief

based on customary practice without a specific recollection as to what Dr. Swann did or did not tell Plaintiff is insufficient to contradict Plaintiff's express testimony at several points as to when he was diagnosed as having asbestosis.

Celotex recognizes that there are situations in which a party or an expert may be permitted to advance a credible explanation for prior testimony. Thus, expert witnesses have been permitted to explain their prior testimony where they had subsequently made a more detailed study or referred to additional matters in forming a subsequent opinion. Willage v. Law Offices of Wallace & Breslow, 415 So.2d 767 (Fla. 3d DCA 1982) (expert subsequently reviewed affidavit as to reasons why a particular witness had not been called); Croft v. C.G York, 244 So.2d 161 (Fla. 1st DCA 1971), cert. denied, 246 So.2d 787 (Fla. 1971). And a party has been permitted to explain that he considered a question he had answered negatively regarding whether he and a woman had discussed marriage as being a follow-up question to whether he and the woman had discussed getting formally married. Borders v. Liberty Apartment Corporation, 407 So.2d 232 (Fla. 3d DCA 1981), review denied, 417 So.2d 330 (Fla. 1982). However, Plaintiff's pre-summary judgment affidavit recognizes his testimony was clear and he does not suggest that he did not understand the questions.

Celotex pointed out the credible explanation exception before the trial court (Tr. 15). Plaintiff failed to suggest one. His only response was that Dr. Swann's affidavit "refreshed his recollection" (Tr. 17). If such a refreshing of recollection is all that is needed to "explain" an outright reversal of testimony as in the instant case, the above cited Florida case law must be rewritten. Additionally, it is not only a question of whether Plaintiff was told on June 25, 1979 or a later date. Plaintiff's affidavit attempts to change not only the date, but to change his statements that he was told, to one that he read his diagnosis. Plaintiff's affidavit is nothing more than a clear repudiation of his prior sworn testimony, made on the eve of summary judgment. Thus, it is no different than the plaintiff changing his mind about an important date in Elison v. Goodman, supra; or the plaintiff changing her testimony regarding whether the bus driver had tried to avoid the accident in Ellison v. Anderson, supra; or the plaintiff attempting to change her testimony as to by whom she was employed in Inman, supra; or the plaintiff attempting to change her testimony as to when she became aware of the water on which she slipped on the dance floor in McKean, supra. Indeed, Plaintiff's 180 degree change in testimony presents an a fortiori case for summary judgment when compared with Hutto. There, the plaintiff attempted to change prior deposition testimony that he could not remember what

representations had been made to him, to say he remembered certain representations had not been made. The trial court - as in Hutto - was "eminently correct in refusing to regard this affidavit as creating a genuine issue of fact." 438 So.2d at 429.

Judge Vann was entirely justified in not allowing Plaintiff's pre-summary judgment affidavit to alter his prior testimony, especially since the affidavit admits that he was advised to stop smoking during the visit and that the harmful aspects of asbestos were specifically discussed with Dr. Swann during that visit. To admit that these matters were discussed with Plaintiff, but then to claim that he was not told that he might have asbestosis exceeds the limits of credibility. Judge Vann properly rejected this affidavit as not providing any explanation as to Plaintiff's earlier testimony, much less a credible explanation. The Third District's opinion suggests it also did not accept Plaintiff's alteration attempt ("While plaintiff may very well have been told by his doctor on June 25, 1979, that he had asbestosis,...) Colon, supra at 1334.

CONCLUSION

For the reasons set forth above, Celotex urges that the summary judgment entered against Plaintiff be set aside if this Court concludes that the summary judgments in Meehan and Nance must be affirmed because Florida's borrowing statute

will look to the most substantial relationships to determine which statute of limitation applies (and will not engraft additional elements). In the event that Meehan is not altered in this respect, then Celotex respectfully submits that the summary judgment entered against Plaintiff is correct, since Plaintiff may not be permitted to alter his prior sworn testimony by an inconclusive affidavit which lacks credibility, submitted on the eve of the summary judgment hearing. Finally, Celotex requests that this Court reiterate that Perez sets forth the standard for commencing the limitations period in occupational disease cases, and not Ash v. Stella which is limited to misdiagnosis medical malpractice cases.

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 27th day of January, 1986.

Attorney