IN THE SUPREME COURT OF FLORIDA

THE CELOTEX CORPORATION,

Defendant/Petitioner,

vs. : CASE NO. 66,939

LOUIS KEY COLON and JEANNETT M. COLON,

Plaintiff/Respondent.

JURISDICTIONAL BRIEF OF PETITIONER THE CELOTEX CORPORATION

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STATEMENT OF THE CASE AND FACTS

Plaintiff appealed to the Third District Court of Appeal from a summary judgment holding that his personal injury claim was barred by Tennessee's one-year statute of limitations (A 1). Plaintiff worked for 23 years in Florida installing and removing asbestos products manufactured by various defendants (A 1). On June 25, 1979, Plaintiff visited a Tennessee doctor who diagnosed his bronchial problem as asbestosis. (A 1). Plaintiff commenced this action in Florida on June 26, 1980 (A 2).

In contrast to Florida's four-year statute of limitations under §95.11, Florida Statutes (1983), a plaintiff whose tort action arises under Tennessee law has one year from the date of discovery in which to commence his action (A 2). In sworn interrogatories and deposition testimony, Plaintiff had stated that he had learned he had asbestosis on the date he visited the doctor - thus, more than one year before he filed his suit in Florida (A 2). Just prior to the summary judgment hearing, Plaintiff submitted an affidavit stating that he did not learn of the doctor's diagnosis until receiving the written report dated June 28, 1979, and submitted an affidavit by his doctor to the same effect (A 2).

The trial court, following case law holding that Plaintiff could not alter his sworn testimony to avoid summary judgment, found that Plaintiff's cause was barred by the borrowing of Tennessee's one-year statute of limitations,

relying on the Third District's initial panel opinion in Meehan v. The Celotex Corporation, No. 82-122 (Fla. 3d DCA Nov. 15, 1983)(8 FLW 2728). The Meehan panel opinion, affirmed after rehearing en banc by virtue of a 4-4 split of the en banc Third District, held that the question of which limitation statute applies is answered by determining where the last act necessary to liability occurred, without regard to whether that state, if other than the forum state, had any substantial interest in the subject matter of the litigation. Meehan v. The Celotex Corporation, No. 82-122 (Fla. 3d DCA Feb. 5, 1985) (10 FLW 333) (A 2, 6-9). The panel in Colon recognized this rule as binding upon it and thus held that the Tennessee one-year statute applied (A 2).

However, the Colon panel then went on to hold that the conflict between plaintiff's sworn statements and subsequent affidavits was not the determining factor, but that the case was controlled by this Court's recent decision of Ash v. Stella, 457 So.2d 1377 (Fla. 1984). (A 3). The Third District held that the rationale of Ash applied to Plaintiff's diagnosis. That is, the panel analogized the second preliminary diagnosis in Ash, following an incorrect initial medical diagnosis, to Plaintiff's preliminary diagnosis of asbestosis on June 25, 1979.

Celotex's Motion for Rehearing was denied and Celotex filed its notice to invoke this Court's discretionary review pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv). (A 5).

JURISDICTIONAL ISSUES

I. WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL CONFLICTS WITH THE DECISIONS OF:

A. Ash v. Stella, 457 So.2d 1377 (Fla. 1984)

B. Universal Engineering Corp. v. Perez, 451 So.2d 463 (Fla. 1984)

II. WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETION TO ACCEPT JURISDICTION OF THIS CASE.

SUMMARY OF THE ARGUMENT

Petitioner Celotex urges this Court to accept jurisdiction on the grounds that the Third District panel's ruling in Colon misapplies this Court's holding in Ash v. Stella. In Colon, the Third District applied the test for commencement of the running of the statute of limitations which had been formulated for a medical malpractice case in which the alleged malpractice consisted of an earlier, erroneous diagnosis. In Plaintiff's case there was no erroneous diagnosis, but only a preliminary diagnosis that was subsequently confirmed three days later. Thus, Plaintiff's case should be controlled by this Court's decision regarding the statute of limitations for occupational disease, as set forth in Universal Engineering Corp. v. Perez, 451 So.2d 463 (Fla. 1984), that the limitation period for such diseases commences when the disease has manifested and its nature as an occupational disease is fairly discoverable.

Celotex urges this Court to accept jurisdiction, not only to reaffirm that Perez sets forth the standard for commencement of the statute of limitations in occupational disease cases, but also because Colon explicitly relies on Meehan which has been accepted by this Court for review after having been certified by the Third District as containing a question of great public importance. Celotex Corp. v. Meehan, Case No. 66,937.

ARGUMENT

I. THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL CONFLICTS WITH THE DECISIONS OF:

A. Ash v. Stella, 457 So.2d 1377 (Fla. 1984) (A 11-13).

B. Universal Engineering Corp. v. Perez, 451 So.2d 451 So.2d 463 (Fla. 1984) (A 14-20).

The Third District misapplied this Court's holding in Ash v. Stella, supra, while citing but failing to apply this Court's recent opinion regarding occupational diseases, Universal Engineering Corp. v. Perez, supra. In Ash, the tort was an alleged failure to properly diagnose a malignancy. Thus, at the time the plaintiff in Ash received the second preliminary diagnosis, he was simply presented with two conflicting opinions and was entitled to wait until the tests confirmed the second diagnosis and the fact of malignancy. Ash at 1379 (emphasis by the Court) (A 13).

By contrast, in the instant case, there was no prior conflicting diagnosis of Plaintiff's condition. This case must 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 is fairly discoverable. Perez at 468, (emphasis by the Court) (A 19). 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 this 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 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.

The panel's failure to properly apply Perez is further evidenced by its citation of Brown v. Armstrong World Industries, 441 So.2d 1098 (Fla. 3d DCA 1983), review denied, 451 So.2d 847 (Fla. 1984); review denied, 451 So.2d 850 (Fla. 1984). In Brown, the Third District relied upon its previous opinion on occupational diseases, which was later refined by this Court's controlling opinion in Perez.

II. THIS COURT SHOULD EXERCISE ITS DISCRETION TO ACCEPT JURISDICTION OF THIS CASE.

The Third District en banc in Meehan and in the related case of Nance v. Johns-Manville Sales Corp., No. 81-382 (Fla. 3d DCA Feb. 12, 1985) certified as a question of great public importance the operation of Florida's Borrowing Statute. This Court has accepted the question, and will determine whether the applicable statute of limitations depends solely on where the last act occurs 1/, or on which state has the most significant contacts, 2/ and whether Florida may postpone accrual of the action until discovery where the state where the wrongful conduct occurred does not postpone accrual until discovery.

Since Florida and Tennessee both postpone accrual until discovery, the later issue is not presented in this case. However, as the panel recognized in deciding this case, Meehan applies directly with regard to the selection of the statute of limitations. Indeed, this case presents the flip side from Meehan and Nance since in those cases plaintiffs with their most significant contacts out of Florida (the alleged wrongful conduct and exposure to asbestos) subsequently moved to Florida, while in the instant case, Plaintiff's most significant contacts (exposure) were in Florida.

1/ Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972).

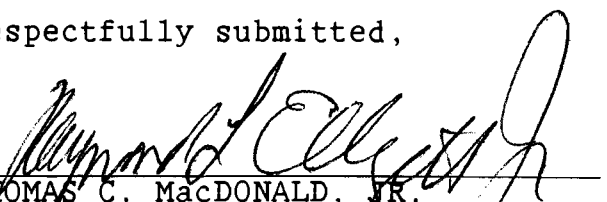
2/ Bishop v. Florida Specialty Paint Co., 389 So.2d 999 (Fla. 1980).

Thus, it is apparent that under either view of the borrowing statute, some plaintiffs will ultimately be foreclosed from seeking recovery. (Obviously, this Plaintiff's particular situation of a difference in diagnosis dates will not be the determining factor in the majority of cases). A definitive rule is needed. This Court has recognized the importance of maintaining harmony by its ruling that even citation PCA's can be reviewed if the cited decision is pending before this Court. Jollie v. State, 405 So.2d 418 (Fla. 1981). For these reasons Celotex urges this Court to accept jurisdiction of this case so that the decision reached in Meehan and Nance may be applied to this case.

CONCLUSION

Based on the foregoing arguments and authorities, the Petitioner Celotex respectfully requests this Court to take jurisdiction of this matter in light of the conflict of the Third District's opinion with the decisions of this Court.

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 of record on the attached Service List, this 3rd day of May, 1985.

Attorney

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