IN THE SUPREME COURT OF FLORIDA

APPEAL NO. 66,939

THE CELOTEX CORPORATION

Defendant/Petitioner,

versus

LOUIS KEY COLON AND JEANNETT M. COLON,

Plaintiff/Respondent

RESPONDENTS' ANSWER TO JURISDICTIONAL BRIEF OF PETITIONER THE CELOTEX CORPORATION

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STATEMENT OF THE CASE AND FACTS

Louis Key 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) Respondent, Louis Key Colon, 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, 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.1-8)

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 application of the Florida Borrowing Statute. (R.1369) This Order was reversed by the Third District Court of Appeals on March 18, 1985. (A-1) The Third District held that although the Tennessee statute of limitations may be applicable to this case, a genuine issue of material fact exists as to when Louis Colon knew or should have known of his asbestos-related

disease. Thus, the Panel concluded, the grant of summary judgment on limitations grounds was in error. (A-1) In so holding, the Third District relied directly on the precedent of this Court as set forth in Universal Engineering Corp. v. Perez, 451 So.2d 463 (Fla. 1984) and Ash v. Stella, 457 So.2d 1377 (Fla. 1984.

ISSUES

ISSUE NO. 1:

The decision of the Third District Court of Appeals is based on the finding of a genuine issue of material fact as to when the Plaintiff knew or should have known of the existence of his asbestos-related disease and does not warrant review by this Supreme Court.

ISSUE NO. 2:

The decision of the Third District Court of Appeals is founded on Supreme Court precedent and does not conflict with Florida law.

SUMMARY OF ARGUMENT

Supreme Court review of this case is unwarranted. The decision of the Third District Court of Appeals turned in full upon a finding that Summary Judgment was improper in this case because a genuine issue of material fact exists as to when the Plaintiff knew or should have known of his asbestos disease. Thus a fact issue, for determination by a jury, not a legal issue, for determination by this Court is presented.

Moreover, in reaching its decision, the Third District relied directly on the precedent of this supreme Court as set forth in Universal Engineering Corp. v. Perez, 451 So.2d 463 (Fla. 1984) and Ash v. Stella, 457 So.2d 1377 (Fla. 1984). The test of Perez was directly applied in determining when the Plaintiff "knew or should have known the occupational origin of the disease upon which the lawsuit is based." Colon, Slip Opinion at p.2 (A-1). The direction of Ash was followed in interpreting the facts presented by this case. To wit, the effect of a tentative diagnosis on the running of the statute of limitations in a latent disease case. Id.

Finally, because the result of this case remains unchanged regardless of whether the Florida Borrowing Statute is applied, there is no reason to adopt jurisdiction over this case pending a decision in Meehan v. The Celotex Corp., No. 82-122 (Fla.3d DCA, April 9, 1985).

I. The Decision Of The Third District Court Of Appeals Is Based On The Finding Of A Genuine Issue Of Material Fact As To When The Plaintiff Knew Or Should Have Known Of The Existence Of His Asbestos Related Disease And Does Not Warrant Review By This Supreme Court.

The Third District Court of Appeals reversed the summary judgment order of the trial court in this cause upon a finding that the facts of this case revealed a genuine issue of material fact as to when the Plaintiff, Louis Colon, knew or should have known that he suffered from the asbestos related disease of asbestosis. Colon, Slip Opinion at p. 3-4. (A-1) The Third District held that it could not be concluded, as a matter of law, that the statute of limitations began to run in this case when the plaintiff received a tentative, unsubstantiated diagnosis of asbestosis.

> The earlier statements made by the plaintiff in which he admitted that he was informed by this doctor on June 25, 1979, that he had asbestosis, then, were not conclusive as to a material factual 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. (emphasis in original).

The existence of such a factual issue precludes summary judgment in this case as a matter of black letter law. E.g. Holl v. Talcott, 191 So.2d 40 (Fla. 1966). For, where reasonable minds could differ, all reasonable inferences are to be drawn in favor of the party opposing summary judgment. Id., Brown v. Armstrong World Industries, 441 So.2d 1098 (Fla.3d DCA 1983), rev. denied, 451 So.2d 847 (Fla.), rev. denied, 451 So.2d 850 (Fla. 1984) (application of statute of limitations in asbestos

litigation).

Review by this Supreme Court cannot be justified in this case. The existence of a fact issue, as identified by the Third District, is clearly evident - although reasonable minds could differ as to the conclusion to be drawn from the facts presented. Thus, this case presents a fact issue, to be tried to a jury; not a legal issue, for determination by this Supreme Court.

II. The Decision Of The Third District Court Of Appeals Is Founded On Supreme Court Precedent And Does Not Conflict With Florida Law.

Petitioner's attempt to urge this Supreme Court to exercise its jurisdiction in this case based on alleged conflict with existing law is merely an effort to confuse the issue on appeal. The Third District applied the legal test announced by this Court in Universal Engineering Corp. v. Perez, 451 So.2d 463 (Fla. 1984) to the facts of this case. Colon, Slip Opinion at p.2. (A-1). To wit, the appellate court set out to determine when the plaintiff "knew or reasonably should have known the occupational origin of the disease upon which the lawsuit is based." Id. Accordingly, in interpreting the facts of this case, the Third District went on to apply the precedent set forth in Ash v. Stella, 457 So.2d 1377 (Fla. 1984). The questions presented by the facts in Ash is analytically identical to that presented in this case - the effect of a tentative, unconfirmed diagnosis on the running of the statute of limitations in a latent injury case.

Apparently, Petitioner would have the Florida courts ignore

the Ash decision, and confine it solely to the facts presented therein. Such a position can hardly be adopted by this Court. The Colon case does not conflict with Ash and Perez, but specifically applies the law of Florida as developed by those cases. Although the Petitioner is dissatisfied with the suit in Colon, the decision of the court cannot be blamed on the misapplication of Florida law.

Petitioner's final suggestion that Supreme Court review should be granted in this case because it invokes the operation of the Florida Borrowing Statute which is certified for review by this Court in Meehan v. The Celotex Corporation No. 82-122 (Fla. 3d DCA, April 9, 1985) (10 FLW 904) is without merit. The application of the Florida Borrowing Statute to the facts of the present case is inconsequential in its effect. The result of this case remains unchanged regardless of whether the borrowing statute is applied. In this case, the Third District found that even if, under the Florida Borrowing Statute, the Tennessee one year statute of limitations was controling, the plaintiff's cause of action was not barred as a matter of law because of the existence of a genuine issue of material fact. Clearly, then, the claim would be equally protected from summary procedure under Florida's four-year limitation period. Brown, supra. Thus, the decision in Meehan will in no way effect the result in this case. The issue presented herein is equally dependent on a finding of a material issue of fact whether presented under Tennessee or Florida law. In grave contrast, as recognized by the Petitioner,

the result in Meehan may be wholly dependent on the determination of which state's statute of limitation applies. Brief of Petitioner, p.7. Because a decision in Meehan will have no effect on the result in this case, discretionary review herein should be denied.

CONCLUSION

Wherefore, based on the arguments and citation of authority contained herein, Respondent respectfully prays that this Court decline discretionary jurisdiction over the opinion rendered below. Because the decision of the Third District Court of Appeals is based solely on the finding of an issue of fact and reveals no conflict with the existing law of State of Florida, discretionary review is improper. The cause should be allowed to proceed to trial without further delay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing Answer to Jurisdictional Brief has been mailed to all counsel of record herein on this the 17 day of May, 1985.

JANE N. SAGINAW