O/A 4-7-86

IN THE SUPREME COURT OF FLORIDA

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

REPLY BRIEF ON THE MERITS OF PETITIONER THE CELOTEX CORPORATION

Of Counsel:

JAMES W. KYNES
The Celotex Corporation
Post Office Box 22601
Tampa, Florida 33622

THOMAS C. MacDONALD, JR.
CHARLES P. SCHROPP
RAYMOND T. ELLIGETT, JR.
SHACKLEFORD, FARRIOR, STALLINGS & EVANS, Professional Association
Post Office Box 3324
Tampa, Florida 33601
(813) 273-5000
ATTORNEYS FOR PETITIONER

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SUMMARY OF THE ARGUMENT

While Plaintiff essentially agrees with Celotex's position that a significant relationships test should be the basis for the borrowing statute, he misses the mark on several of his more tangential arguments which simply find no support in the Florida law, such as a residency exception to the borrowing statute.

Plaintiff fails to appreciate the significant distinction between a preliminary and confirming diagnosis in an occupational disease case, and the unique situation of a suit based on a prior incorrect medical diagnosis which was the subject of Ash v. Stella, 457 So.2d 1377 (Fla. 1984).

Finally, while the issue of Plaintiff's ability to contradict his earlier testimony to avoid a summary judgment need not be reached if the Court agrees with Celotex's view of the borrowing statute, Plaintiff's claims that he was explaining or clarifying his testimony simply do not stand in the face of what are obviously contradictions.

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.

Although Plaintiff adopts his counsel's brief in Celotex Corporation v. Meehan, (S.Ct. No. 66,937), which essentially agrees that a significant relationships test should be applied (Colon Br.10), Plaintiff's argument begins by claiming that his cause of action "arose" in Florida since that is where he "received" his diagnosis. Of course, this argument presumes that the Plaintiff will be permitted to alter his testimony in contradiction to the long established case law discussed under Point III of Celotex's initial brief.

If this Court agrees that a significant relationships test (or some other similar test as proposed by co-Petitioners in Meehan or Nance) should govern the borrowing statute, then Celotex agrees that Plaintiff's cause of action arose in Florida. It did not arise in Florida because of the fortuity of where he received his diagnosis or where he was diagnosed. It arose in Florida because he had his most significant relationships here: Florida is where he was injured since it is where he was exposed to asbestos; Florida was the place of his residence at the time of his

exposure; and, the relationship between the parties was centered in Florida. Conversely, Mr. Meehan's claim arose in New York, since that is where his relationship was centered, rather than in whatever state he happened to move to before diagnosis (in his case, Florida).

Plaintiff's argument (at Colon Br.7-9) that this Court should recognize some sort of legislative exception from the borrowing statute for Florida residents was not embraced by any of the nine Third District Judges sitting en banc in Meehan when Plaintiff's counsel urged such a view. Such a sound rejection is not surprising in light of the complete absence of Florida case or statutory law for such an exception, and in light of the obvious practical problems (how long must one live in Florida before he is a resident) and serious constitutional problems (including the privileges and immunities clause). 1/ Plaintiff simply urges too myopic a view by claiming that he cannot be charged with forum shopping, since it ignores countless other cases that could make Florida the asbestos litigation capital of the country.

Finally, as suggested above, Celotex agrees with plaintiff's argument (at Colon Br.10) that Plaintiff's case presents an "even stronger" case than Meehan for finding Plaintiff's significant relationships are with Florida. This is an understatement, since as discussed in the Meehan brief,

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

Meehan presents no basis for finding a significant relationship in Florida other than the pure fortuity of where the Plaintiff happened to be residing when his injury manifested and was diagnosed.

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.

Plaintiff's argument (at Colon Br.16-20) essentially ignores the significant differences between a medical malpractice case based on an initial incorrect diagnosis and an occupational disease case as discussed in Celotex's initial brief. Plaintiff also misdirects the focus by emphasizing the question of actual knowledge. Plaintiff's cause of action commences when he actually knew or should have known that his condition is occupational in origin. Universal Engineering Corp. v. Perez, 451 So.2d 463, 468 (Fla. 1984). A diagnosis, even a preliminary diagnosis, is simply not required and there will unquestionably be cases where the jury (or the court as a matter of law in some undisputed factual situations) will be able to determine that the Plaintiff should have known of the occupational nature of his condition prior to an actual diagnosis - preliminary or final.

Here it is undisputed that Plaintiff was seeing Dr. Swann because his symptoms had manifested. Plaintiff admits that during his consultation, Dr. Swann told him that asbestos may be harmful and Plaintiff knew that he had worked with asbestos. 2/ These facts triggered the statute of limitations running because the Plaintiff should have known that his disease was occupational in nature, at latest during his examination by Dr. Swann on June 25, 1979.

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.

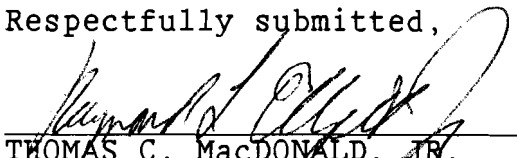
Despite Plaintiff's attempts to characterize his change in testimony as an explanation or a clarification, it was plainly an outright contradiction. During his deposition, the Plaintiff stated that Dr. Swann "told" him to stop smoking and that he had asbestosis. Even Plaintiff's last minute affidavit says that during his visit the doctor "advised" him to stop smoking and that asbestos was harmful. It is simply incredible for Plaintiff to assert that in his deposition he did not mean that the doctor had told him he had asbestosis in a conversation, but rather he meant that he had written him in a later letter. Judge Vann and the Third District did not find this explanation credible and, should this Court need to consider this issue, it should not either.

2/ And unless Plaintiff is allowed to alter his testimony, he was also told at that time that he had asbestosis.

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 set 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,



THOMAS C. MacDONALD, JR.
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Of Counsel:

JAMES W. KYNES
The Celotex Corporation
Post Office Box 22601
Tampa, Florida 33622

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 28th day of February, 1986.

Attorney

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