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IN THE SUPREME COURT OF FLORIDA

THE CELOTEX CORPORATION, :

Petitioner, :

vs. : CASE NO. 66,937

CARMELLA MEEHAN, :

Respondent. :

ON CERTIFICATION FROM THE THIRD DISTRICT
COURT OF APPEAL AS CONTAINING A QUESTION
OF GREAT PUBLIC IMPORTANCE

PETITIONER THE CELOTEX CORPORATION'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, The Celotex Corporation, the Defendant in the trial court and Appellee in the District Court of Appeal is referred to as "Celotex".

The Respondent, Carmella Meehan, is referred to as "Plaintiff", the capacity she occupied in the trial court. Plaintiff is the personal representative of Charles Meehan, her late husband, who is referred to as "Mr. Meehan".

References to the record on appeal as indexed in the Third District Court of Appeal are designated by the prefix "R" (the record index which the District Court of Appeal will be forwarding to this Court was not available at the time of the preparation of this brief, but Celotex assumes the initial numbering shall be consistent with that used below). References to the Appendix hereto are designated by the prefix "A".

STATEMENT OF THE CASE

Plaintiff commenced this action for the wrongful death of her husband in the Circuit Court in Dade County in 1979 (R 1). The trial court entered final summary judgment in 1981 on the grounds that Plaintiff's claim was barred by the New York statute of limitations, as borrowed under §95.10, Florida Statutes (R 1130-1131).

Plaintiff appealed to the District Court of Appeal for the Third District which issued its original panel opinion reversing the summary judgment on November 15, 1983 (A 2). The case was then reheard en banc upon Celotex's motion that the panel's opinion conflicted with the decision in Marano v. Celotex Corporation, 433 So.2d 592 (Fla. 3d DCA), petition for review denied, 438 So.2d 833 (Fla. 1983).

On rehearing en banc, the panel opinion as revised was adopted as the opinion of the Third District by virtue of a 4-4-1 tie on the merits (Judge Hubbart dissented as to reviewing the case en banc and thus did not take a position on the merits)(A 1-9).

Upon suggestion of Celotex, the Third District en banc unanimously certified the case to this Court as containing a question of great public importance (A 8). The Third District certified the same question to this Court in Celotex v. Nance, Fla. S.Ct. Case No. 66,938 (3d DCA opinion at 466 So.2d 1113). This Court docketed these cases under

its orders of April 30, 1985. The Meehan decision under review has also been expressly relied on in a case presenting the "other side of the coin" of the Meehan situation. The case is currently pending before this Court on a petition for dicretionary review in Celotex Corporation v. Colon, Fla. S.Ct. Case No. 66,939.

STATEMENT OF THE FACTS

The facts are succinctly summarized in the panel's revised opinion at A 1. Mr. Meehan was allegedly exposed to asbestos products in New York between 1942 and 1945. He and the Plaintiff moved to Florida in 1969. Eight years later Mr. Meehan was first diagnosed as having asbestos-related diseases (asbestosis and mesothelioma). He died in 1978 and the following year Plaintiff instituted this action in Florida.

The trial court entered summary judgment for Celotex and the other Defendants on the basis of the New York statute of limitations, as applied by virtue of the Florida Borrowing Statute, §95.10, Florida Statutes (1979). The New York statute of limitations provides a three year time limit for bringing such a cause of action, and the time limit is not tolled pending discovery. See Marano, supra.

As argued before the Third District, this case originally presented two issues. The first issue is that which has been certified to this Court regarding the applicability of Florida's Borrowing Statute. The second issue was whether Plaintiff as a survivor could bring a wrongful death action if the decedent had allowed the personal injury statute of limitations to run during his lifetime. That is, whether the language of §768.19, Florida Statutes (1979) (the Wrongful Death Act) meant what it said in limiting a survivor's action to those instances where the person injured could have

maintained an action and recovered damages "if death had not ensued." This question has been resolved by this Court's approval of the decision in Hudson v. Keene Corporation, 445 So.2d 1151 (Fla. 1st DCA 1984), approved _____ So.2d ____ (Fla. S.Ct. Case No. 65,155, April 25, 1985). In its opinion in Nance, the Third District followed the First District's opinion in Hudson.

CERTIFIED QUESTION

MAY AN ACTION WHICH COULD NOT BE MAINTAINED BY REASON OF LIMITATIONS IN THE STATE IN WHICH THE ALLEGEDLY WRONGFUL CONDUCT OCCURRED BECAUSE THAT STATE DOES NOT RECOGNIZE POSTPONEMENT OF ACCRUAL UNTIL DISCOVERY, NONETHELESS BE MAINTAINED IN FLORIDA BECAUSE FLORIDA POSTPONES ACCRUAL UNTIL DISCOVERY?

SUMMARY OF THE ARGUMENT

Although Celotex is the Petitioner, this case arrives before this Court from an *en banc* rehearing of the Third District in which the Court was evenly divided on the merits of the issue presented. In fact, in *Marano* a panel had reached the opposite result and this Court declined to review *Marano* as being in conflict with its prior decisions. Celotex urges that the opinion authored by Chief Judge Schwartz in *Meehan* correctly analyzes the applicability of Florida's Borrowing Statute and the purpose behind it. In sum, the state in which the alleged exposure occurred is the state to which the Court should look to determine when the cause of action "arises".

As Judge Schwartz recognized, that evaluation invokes a choice of law determination. Under this Court's most recent ruling, that choice should turn on the law of the state with the most significant relationships to the occurrence and the parties. The state with the most significant relationships here is obviously the state where the injured party was exposed to asbestos. That is the place where the conduct causing the injury occurred as well as where the injury itself occurred, even though it may not have manifested until later in another jurisdiction.

ARGUMENT

AN ACTION WHICH COULD NOT BE MAINTAINED BY REASON OF LIMITATIONS IN THE STATE IN WHICH THE ALLEGEDLY WRONGFUL CONDUCT OCCURRED BECAUSE THAT STATE DOES NOT RECOGNIZE POSTPONEMENT OF ACCRUAL UNTIL DISCOVERY, CANNOT BE MAINTAINED IN FLORIDA EVEN THOUGH FLORIDA POSTPONES ACCRUAL UNTIL DISCOVERY.

Florida's Borrowing Statute, §95.10, Florida Statutes (1979) provides:

> "When the cause of action arose in another state or territory of the United States, or in a foreign country, and its law forbids maintenance of the action because of lapse of time, no action shall be maintained in this state."

The panel in Meehan determined in essence that the Florida Borrowing Statute did not apply because the case did not "arise" in New York, since the last act necessary to establish liability under Florida law did not occur until the plaintiff knew or should have known of an invasion of his legal rights. (A 3). In essence, the panel opinion engrafted the Florida discovery rule onto the New York statute of limitations, which does not provide for such a tolling, but provides that the cause of action arises upon exposure. Plaintiff recognizes that, under New York law, the action is time barred (see Plaintiff's Supplemental Third District Brief, p. 3).

The panel decision and Judge Schwartz' opinion in Meehan recognized, at their respective note 1's, that "there is respectable support" that a borrowing statute should not give

a cause of action greater life in the forum jurisdiction than it would have had in the state whose substantive law is to be applied. In addition to the authorities cited by them, Restatement (Second) Conflict of Laws §142, comment f at p. 397 (1971), observes that "in applying the statutes of limitations of the state referred to in its borrowing statute, the forum will apply such local law rules of the foreign state . . . which bear upon the question [of] whether the foreign statutory period has run."

The Meehan panel viewed itself as bound to the contrary result by its interpretation of Colhoun v. Greyhound Lines, Inc., 265 So. 2d 18, 21 (Fla. 1972), which provides that "a cause of action sounding in tort arises in the jurisdiction where the last act necessary to establish liability occurred." This reading of Colhoun as applied to the instant case is incorrect, and Colhoun must be considered in light of this Court's subsequent decision in Bishop v. Florida Specialty Paint Co., 389 So. 2d at 999 (Fla. 1980) (A 10-13).

First, Colhoun did not deal with a latent injury, but a bus accident which occurred in Tennessee. Thus, clearly no cause of action arose anywhere until the accident occurred in Tennessee. By contrast, under New York law, Mr. Meehan's cause of action arose in New York in 1945 upon his exposure and that was where "the last act necessary to establish liability occurred".

Second, the view that one should look to the jurisdiction where the exposure or injury occurred to determine when the cause of action arises not only makes sense, but is consistent with this Court's recent pronouncement in Bishop v. Florida Specialty Paint Co., 389 So. 2d 999 (Fla. 1980). In Bishop this Court adopted §145 and §146 of the Restatement (Second) Conflict of Laws (1971), holding the rights and liabilities with respect to an issue in court are determined by the local law of the state which has the most significant relationships to the occurrence and the parties.

It cannot be disputed that in the instant case, as in Marano, New York has the most significant relationship to the injury. As this Court observed in Bishop, and is indicated by the Restatement, "the state where the injury occurred would, under most circumstances, be the decisive consideration in determining the applicable choice of law." In asbestos cases, the "place of injury" rule calls for application of the law of the state in which the exposure occurred, here, New York. Numerous medical texts and cases recognize that tissue injuries from asbestos begin to occur almost immediately upon inhalation, even though they may not manifest for years. See, e.g., Insurance Company of North America v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1218 (6th Cir. 1980), rhg, 657 F.2d 814, cert. denied 454 U.S. 1109, 102 S.Ct. 686, 70 L.Ed. 2d 650 (1981). Any other rule would obviously be an invitation to forum shopping and a

purely fortuitous choice of law depending on where a plaintiff had happened to move. The three other factors outlined in the Restatement also require applying New York law. It was New York where the conduct allegedly causing the injury occurred (alleged exposure to products and lack of warnings). Asbestos containing products were shipped to New York (and other locations) from throughout the country, but it is only upon a plaintiff's exposure to products (e.g. without adequate warnings at the exposure sites) that any alleged wrong occurs. The third factor, the relationship between the parties, was centered in New York, at Mr. Meehan's jobsite.

The fourth factor, the domicile of the parties, is of questionable importance in asbestos cases where numerous defendants from throughout the country are sued. The Restatement comments indicate that the relative importance of domicile will vary with the nature of the interest affected. Restatement (Second) Conflict of Laws §145 at p. 420. Thus, for injuries to reputation or privacy, domicile may be an important factor, but it is obviously lacking in asbestos injury cases. Furthermore, Plaintiff's supplemental brief in the Third District assumed that the key time for examining domicile was at the time of litigation. (p. 20) However, it would be difficult to imagine anything that would more encourage forum shopping or a fortuitous application of

choice of law rules. Rather, the relevant time frame for considering domicile should be at the time of the injury. At the time of Mr. Meehan's injury, he was domiciled in New York and Celotex had no connection with the asbestos products being manufactured by the Philip Carey Manufacturing Corporation, an Ohio corporation whose successor Celotex subsequently purchased. 1/ Therefore, if domicile is to be considered at all in this case, it favors New York and not Florida, in which neither Plaintiff nor the manufacturer were domiciled.

While in Nance, Meehan or Marano a rule which looks only to where the "last element" of the cause of action as defined under Florida law occurred may permit a plaintiff to proceed with an action which would be otherwise barred, in other cases the application of the same rule will arbitrarily deprive plaintiffs of that right. For example, in a situation where a lifetime Florida resident was exposed to asbestos while working in Florida, but was not diagnosed as having any asbestos-related disease until he visited New York or some other state whose cause of action accrues at exposure, that individual's action would be barred under the panel's opinion. In fact, several asbestos plaintiffs have suffered summary judgments under these circumstances by trial court applications of the panel opinion in Meehan. Although

1/ See In re Related Asbestos Cases, 566 F.Supp. 818, 820 (N.D. Calif. 1983).

in these cases the plaintiffs' most significant contacts and exposure were in Florida, they were diagnosed in a foreign state which had a shorter statute of limitations. These summary judgments were subsequently set aside on rehearing pending an appellate resolution of the borrowing statute issue (A 14-15).

Both the Meehan panel opinion and Judge Schwartz' opinion relied on Pledger v. Burnup & Sims. Inc., 432 So. 2d 1323 (Fla. 4th DCA 1983), review denied, 446 So.2d 99 (Fla. 1984), in which the Fourth District examined Florida's borrowing statute and the Colhoun line of cases in light of the significant relationships opinion in Bishop. While the Pledger court declined to extend the rationale of Bishop to the statute of limitations on the grounds that it considered the statute procedural, 2/ Pledger does not, as pointed by Judge Schwartz in his dissenting opinion, support the result of the panel opinion below. According to Pledger, the key factor in applying § 95.10 is to effectuate the purpose of

2/ The Pledger court observed that it had not been provided any further guidance by the Florida Legislature on this issue, which it noted may either have assumed that this significant relationships analysis would apply to the borrowing statute, or might have assumed that, since Bishop dealt with substantive rights and liabilities, it would not apply to the borrowing statute which the court described as procedural. The Fourth District opted for the latter choice and held that the Restatement (Second) §145 adopted in Bishop referred to rights and liabilities, and not to remedies. Therefore, it declined to apply a significant relationships test. This Court is now presented with the opportunity to speak definitively as to whether the Bishop significant relationships test applies.

statutes of limitations, including borrowing statutes, which that court found was to provide defendants against whom a cause of action had accrued in a foreign state the benefit of the foreign statute of limitations if it were shorter than Florida's. In this case, it is undisputed that Mr. Meehan's cause of action against these defendants accrued, and expired, in New York literally decades ago. Thus, under either Bishop or Pledger, Plaintiff's claim is clearly barred by the Florida borrowing statute. The analysis of the Meehan panel opinion is not only inconsistent with both rationales but represents an open invitation for foreign plaintiffs to forum shop in Florida. 3/

Both the Meehan panel opinion and Judge Schwartz' opinion discuss the difference between when a cause of action "arises" under Section 95.10 and when it "accrues". Celotex adopts the argument of Owens Corning Fiberglass Corporation in its initial brief before this court in Nance. Celotex would only add Judge Schwartz' observation that, to the extent these terms have not always been distinguished in previous opinions, none of those opinions have presented the issue in this case where the law of two states defines

3/ Indeed, Plaintiff's counsel includes a section entitled "Forum Shopping" in his book on asbestos, and recommends that counsel for New York claimants "should determne whether jurisdiction will lie in another state." F. Baron, Handling Occupational Disease Cases, §4.1 at p. 37 (1981)

differently what the "last act" is. The analyses of Judge Schwartz and Owens Corning are consistent with the purposes of the borrowing statute and the significant relationships test adopted by this Court in Bishop.

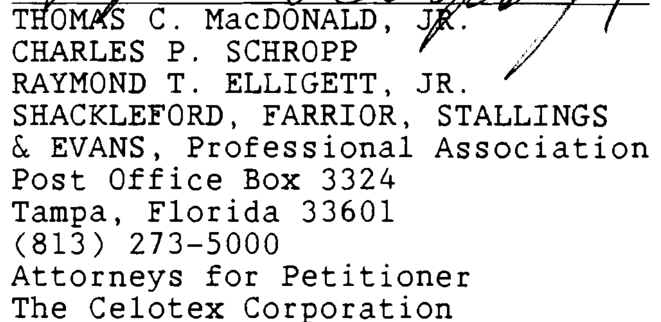
Quite simply, the personal injury actions here had already arisen in New York before Mr. Meehan moved to Florida and brought suit. Thus it was barred by the foreign statute of limitations. Since New York does not recognize a discovery standard and the Plaintiff's action was barred in New York, it is improper to look to Florida law to engraft an additional element to the statute of limitations being borrowed. That element simply does not exist in New York and should not be used to revive a cause of action already barred there. The contrary result would mean that anyone with an asbestos-related disease whose action was barred by the statute of limitations could move to Florida and reach the jury simply by claiming that he did not "know" for sure that he had an asbestos-related disease until after he arrived in Florida. This would be the effect of the recent decision in Colon v. Celotex Corporation, 465 So.2d 1332 (Fla. 3d DCA 1985), petition for discretionary review pending as Fla.S.Ct. Case No. 66,939, which held that even a preliminary diagnosis of asbestosis does not commence the statute of limitations running, but that the plaintiff may wait until he receives a final diagnosis. If this were to be the law, any potential plaintiff in a state with no discovery rule or a shorter

statute of limitations could bring his action at an indeterminable future date by waiting to receive his final diagnosis in Florida.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the Meehan panel opinion should be reversed and the judgment entered in favor of Celotex affirmed.

Respectfully submitted,



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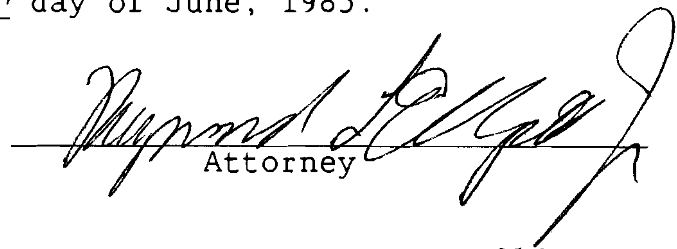
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to all counsel on the attached Service List by United States Mail, this 7th day of June, 1985.



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