

O/a 4-7-86

IN THE SUPREME COURT OF FLORIDA

THE CELOTEX CORPORATION,

Petitioner,

vs.

CARMELLA MEEHAN,

Respondent.

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SEP 10 1987

CLERK OF COURT

STATE OF FLORIDA

Tallahassee, Florida

CASE NO. 66,937

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

SUPPLEMENTAL BRIEF OF PETITIONERS  
THE CELOTEX CORPORATION, EAGLE-PICHER  
INDUSTRIES, INC. AND GAF CORPORATION

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## SUMMARY OF THE ARGUMENT

Petitioners respond to the supplemental brief of Plaintiff Meehan by observing that there are significant constitutional issues surrounding the "revival" provisions of the New York statute. This and other issues relating to the applicability of the New York statute would be better addressed in an action brought by the Plaintiff in New York pursuant to the statute. Plaintiff's argument that the fortuity of where a disease develops or is diagnosed is the most significant relationship for choice of law purposes also militates in favor of this Court addressing if this assertion is correct or, if as Petitioner contends, the most significant relationships should instead be where a plaintiff was exposed to the disease and where the relationship between the parties was centered.

## ARGUMENT

THE REVIEW OF THIS CASE IS NOT MOOT AND IT SHOULD BE DECIDED IN ACCORDANCE WITH THE BRIEFS FILED HEREIN AND THIS COURT'S DECISION IN BATES V. COOK, INC., 509 So.2d 1112 (Fla. 1987).

Respondent Meehan suggests in her brief that the certified question in this case has become moot by virtue of New York's amendment of NY CPLR 214-c; L.1986, Ch.682, §4, which purports to allow a one-year period for asbestos claims previously barred by the statute of limitations to be filed in New York. There are several reasons why this Court should continue to consider this case and to quash the panel opinion of the District Court of Appeal.

Meehan's suggestion that this Court need not decide this case in light of the new New York statute ignores significant constitutional issues. As pointed out in Petitioners' response to the motion for leave to file a supplemental brief, the constitutionality of this revival aspect of the New York statute is just beginning to be litigated in the New York court system (with respect to DES cases; it will no doubt also be litigated extensively for asbestos cases). It remains to be seen how the New York Court of Appeals will ultimately determine this constitutional question, but it is clear that in Florida such a "revival" would not be permitted. Florida follows the general rule that the legislature has the power to increase the statute of limitations period as long as the change is made before the

cause of action is extinguished under the pre-existing statute of limitations. See Corbett v. General Engineering & Machinery Co., 160 Fla. 879, 37 So.2d 161 (1948); Home Insurance Company v. Advanced Machine Company, 500 So.2d 664, 667 n.5 (Fla. 1st DCA 1986)(citing Corbett for proposition that extension of the statute of limitations does not revive an already extinguished action); Patterson v. Soddors, 167 So.2d 789, 790 (Fla. 2d DCA 1964)(the legislature may increase the period of time necessary to constitute a limitation when the cause of action has not yet been barred under pre-existing law).

Respondents' suggestion of mootness is explicitly predicated on the assumption that the action is not barred under New York law. Petitioners respectfully submit that this Court should not be required to predict how New York will ultimately rule on the constitutionality of its revival statute, or to determine whether Florida should allow a lawsuit to be brought here under a New York statute when it would clearly not be maintainable under an identical Florida change in legislation, as the remand urged by Respondents would require. This, of course, is not simply a situation where New York extended its statute of limitations, but a case where it actually has revived admittedly extinguished claims. In light of the Florida law noted above, if New York ultimately upholds the revival period, a remand here would also mean a determination as to whether the New York revival

statute contravened a policy of Florida so that it would not be followed. See, e.g., Brown & Root, Inc. v. Ring Power Corporation, 450 So.2d 1245, 1247 (Fla. 5th DCA 1984).

These problems need not be addressed in light of the explicit wording of the New York statute, which allows new causes of action to be brought there. Plaintiff Meehan's motion and brief do not assert that this Florida action represents her only chance of recovery and her knowledgeable counsel (which filed a notice of supplemental authority of the amended New York statute over a year ago in July, 1986) have no doubt commenced a claim for her in New York. Petitioners invite Meehan to inform the Court if she has not commenced a New York action. Thus, in the event this Court affirms the original judgment entered by the trial court in this case, the Plaintiff will be free to pursue her remedy in a New York lawsuit, as specifically contemplated by the New York statute, and to have New York address the various issues presented by its revival statute.

Plaintiff's citation of Piccirelli v. Johns-Manville Sales Corp., \_\_\_\_ A.D.2d \_\_\_\_, 513 N.Y.S. 2d 469 (1987), does not address the constitutional issue and merely holds that where a cause of action was pending in New York, the Plaintiff there did not need to file a new cause of action. There are several differences between Piccirelli and the instant case. First, Piccirelli was a case pending in New York and applying the New York "revival" statute so that

another New York case did not need to be filed. Also, it is apparent that there had been no final judgment entered at the time (Piccirelli was on appeal from a motion denying the defendant's motion for summary judgment).

Plaintiff Meehan's assertion that an appellate court generally applies the law in effect at the time of its decision really adds nothing to this analysis. Cases also recognize the principle that one of the exceptions to this "general" rule is where there has been a new law which alters a substantive right. State v. Lavazzoli, 434 So.2d 321, 323 (Fla. 1983). This Court recently recognized in Bates v. Cook, supra, that the statute of limitations should be treated as other issues of substantive law. Thus, this analysis simply leads back to a determination as to whether defendants who, prior to the New York revival statute, were protected from suit in Florida by the statute of limitations, and whose protection could not be removed under Florida law, can now be subjected to a lawsuit pursuant to the New York revival statute (and the attendant questions of not only constitutionality, but as to where the statute purports to authorize such litigation).

Bates v. Cook answers the primary legal question in this appeal and now only need be applied to quash the District Court opinion. Plaintiff's continued insistence in her supplemental brief that Florida has the most significant

relationships emphasizes the need to determine that issue in this case. Obviously, these statute of limitations questions arising out of New York cases will continue to arise in Florida 1/ (and the one year revival period will not be an issue in such future cases).

Bishop v. Florida Specialty Paint Co., 389 So.2d 999 (Fla. 1980), recognizes four factors used in applying the test, the first and foremost being where the injury occurred. That location is where a plaintiff was exposed and the deleterious effects of asbestos began to affect him almost immediately. It is not the fortuitous location where a plaintiff happens to move prior to being diagnosed for a disease, or where that diagnosis takes place. The other factors also favor New York, where the relationship of the parties was centered, and where the individual resided (at the time of exposure which is clearly the relevant time, all as discussed in Celotex's reply brief at pp 10-12).

Since this case scenario will obviously be recurring it is appropriate to establish a rule of law to apply in such future cases. See Holly v. Auld, 450 So.2d 217, 218 n.1 (Fla. 1984)(declining to dismiss case before the Court on certified question even though case had settled since "it is

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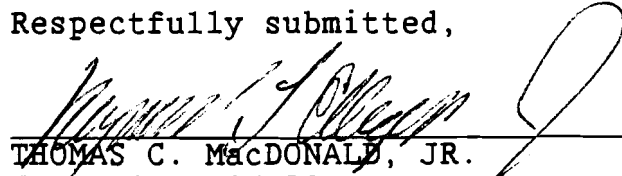
1/ For example, see Marano v. The Celotex Corporation, 433 So.2d 593 (Fla. 3d DCA 1983), review denied, 438 So.2d 833 (Fla. 1983)(considering applicability of New York statute of limitations to another asbestos plaintiff).

well settled that mootness does not destroy an appellate court's jurisdiction, however, when the questions raised are of great public importance or are likely to recur.")

CONCLUSION


Based on the foregoing, Petitioners respectfully submit that the issue on appeal before the Court should be decided on the basis of the briefs as filed and this Court's decision in Bates v. Cook, and that the panel opinion of the District Court of Appeal be quashed. The constitutionality and applicability of the New York revival statute may be addressed in Plaintiff's separate New York action.

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to all counsel on attached list, this 14th day of September, 1987,

  
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