IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,937

THE CELOTEX CORPORATION, et al.,

Petitioners,

v.

CARMELLA MEEHAN, as Personal Representative of the Estate of Charles Meehan,

Respondent.

PETITION FOR DISCRETIONARY REVIEW
OF A DECISION CERTIFIED BY THE
DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT
AS A QUESTION OF GREAT PUBLIC IMPORTANCE

INITIAL BRIEF ON THE MERITS OF PETITIONER GAF CORPORATION

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STATEMENT OF THE CASE

This case is before the Court on a certified question from the District Court of Appeal, Third District (App. 1). The question asks for the correct interpretation of Florida's Borrowing Statute, which provides:

> 95.10 Causes of action arising out of the State -- When the cause of action arose in another state or territory of the United States, or in a foreign country, and its laws forbid the maintenance of the action because of lapse of time, no action shall be maintained in this state.

Section 95.10, Fla. Stat. (1979).

This case and its parallel, Nance v. Johns-Manville Sales Corp., 466 So.2d 1113, 1115 (Fla. 3d DCA), rev. granted, No. 66,938 (Fla. April 29, 1985) ("Nance") (App. 10), involve the application of Florida's Borrowing Statute to asbestos cases which arose out of the state and which would have been barred under the foreign state's statute of limitations.

The Dade County Circuit Court on August 27, 1981 granted Final Summary Judgment in favor of all Defendants (the "Summary Judgment") on the ground that all claims were time barred by Florida's Borrowing Statute (R. 1130).[1/] Plaintiff's motion for rehearing filed September 4, 1981 (R. 1211) was denied December 28, 1982 (R. 1331-33).

1/ Citations to the Record on Appeal shall be indicated parenthetically by the letter "R." followed by the page number, e.g., (R. 100). Citations to the Appendix are indicated parenthetically by "App." followed by the page number, e.g., (App. 10). In advance of receipt of the actual Record Index, the docket from the court file at the Third District was used as the basis for page references.

On appeal, the Third District issued its Original Opinion on November 15, 1983, Meehan v. The Celotex Corporation, ___ So.2d ___, 8 F.L.W. 2728 (Fla. 3rd DCA (1983), withdrawn, 466 So.2d 1100, 1101 (Fla. 3d DCA Feb. 5, 1985) (App. 14), reversing the Summary Judgment because it felt there was nothing in the record to indicate whether Meehan knew or should have known of the existence of his cause of action more than four years prior to the institution of this suit, and remanding for further proceedings. 8 F.L.W. at 2728. In its Original Opinion the Third District distinguished Marano v. The Celotex Corp., 433 So.2d 592 (Fla. 3d DCA), rev. denied, 438 So.2d 833 (Fla. 1983), which had upheld an application of Section 95.10 to bar a comparable asbestos claim, finding "no error in the trial court's awarding the defendants a summary judgment and applying the Florida Borrowing Statute of Limitations to an injury alleged to have arisen in a foreign state which would be barred in said foreign jurisdiction by the applicable local statute of limitations." Id. at 592-593 (footnote omitted).

On rehearing en banc, the Third District issued a Revised Opinion February 5, 1985, holding to the Original Opinion but specifically overruling Marano, 466 So.2d at 1103. There was, on rehearing, a 4-4 tie on the merits; and the Revised Opinion stood as the decision of the court. 466 So.2d at 1104, 1105 (Hubbart and Schwartz, JJ., dissenting).

The Third District majority rejected the Summary Judgment, basing its analysis of Florida's Borrowing Statute upon a comparison of the "last act rule" in Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972) ("a cause of action arises when the last act necessary to establish liability occurs") and the definition of "accrue" in Section 95.031(1), Florida Statutes (1975): "A cause of action accrues when the last element constituting the cause of action occurs."

> Thus, to ascertain the meaning of the phrase "where the last act necessary to establish liability occurred" - that is, where the cause of action arose - we may properly look to the meaning of its equivalent, "when the last element constituting the cause of action occurs" - that is, when the cause of action accrued. It being clear that "the accrual [of a cause of action] must coincide with the aggrieved party's discovery or duty to discover the act constituting an invasion of his legal rights," a cause of action in tort arises when the plaintiff knew or should have known of the existence of the cause of action or the invasion of his legal rights.

466 So.2d at 1102 (citations and footnotes omitted).

Judge Schwartz, dissenting, disagreed:

> In short, by mechanically, but wholly inappropriately, transposing statutory expressions from settings in which their use was immaterial to another, vastly different one, the court has succeeded in applying a Florida statute of limitations concept, dealing with the accrual of a cause of action, so as to breathe life into a foreign cause of action which has long been moribund under the statute of limitations of the state where the tort was

> committed. But section 95.10 makes the New York, not the Florida, statute of limitations determinative.

466 So.2d at 1107 (emphasis in original).

On Motion for Clarification and Certification the court certified the correct interpretation of Florida's Borrowing Statute to this Court, 466 So.2d 1107 (Hubbart, J., concurring in part, dissenting in part):

> 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?

Meehan v. The Celotex Corp., 466 So.2d 1100, 1107 (Fla. 3d DCA), rev. granted, No. 66,937 (Fla. April 29, 1985). (A. 1) The Third District certified the identical question to this Court in Nance, after deciding Nance upon its analysis in this case.

STATEMENT OF THE FACTS

As this case is on appeal from the Summary Judgment, the facts are stated in the light most favorable to the Plaintiff.

Respondent Carmella Meehan ("Meehan" or "Plaintiff") is the widow and personal representative of the Estate of Charles Francis Meehan ("Mr. Meehan") and was the Plaintiff below. Petitioners, including GAF Corporation ("GAF"), allegedly manufactured the asbestos-containing

products to which Mr. Meehan was exposed, and were Defendants in Plaintiff's original Complaint.

Mr. Meehan was born on May 9, 1909 in Brooklyn, New York (R. 443), where he lived and worked until 1969, when he and his wife moved to Florida (R. 443). From 1942 through 1944 Mr. Meehan worked at the Brooklyn Navy Yard as a pipefitter (R. 292), where he was exposed to asbestos products. Mr. Meehan's only exposure to such products occurred in New York from 1942 through 1944 (R. 292, 336). Mr. Meehan contracted asbestosis and mesothelioma as a result of this exposure, and such exposure was the proximate cause of his death in 1978 at the age of 70 (R. 215, 520). This action was not brought until July 31, 1979 (R. 1-8).

It is undisputed that the injury on which Plaintiff's claim is based occurred from 1942 through 1944 when Mr. Meehan was working in the Brooklyn Navy Yard. In her sworn answers to interrogatories of The Celotex Corporation, Plaintiff responded:

> For the purposes of this action, on what date do you contend the decedent was injured as a result of [the Defendant's] conduct? (Emphasis supplied).
>
> ANSWER: 1942 through 1944.

(R. 336; A. 17).

Under the New York statute of limitations Mr. Meehan's cause of action expired in 1947. See N.Y. Civ. Prac. Law § 214(5) (McKinney 1981). New York, unlike Florida, does not postpone until discovery the commencement

of the running of the statute of limitations. Steinhardt v. Johns-Manville Corp., infra.

GAF is a Delaware corporation whose principal place of business is in New Jersey. The acts of GAF of which Meehan complains arise from the alleged delivery of asbestos-containing products into New York over thirty years ago.

SUMMARY OF ARGUMENT

Florida's Borrowing Statute bars a plaintiff who is injured by exposure to asbestos-containing products in one state from maintaining an action in Florida when his claim is time-barred in the state where the wrongful acts and injury occurred. The claim which once existed and was barred cannot be revived in Florida.

Discovery is not an element of a cause of action; it need not be pleaded or alleged. The Third District's analysis of the "last act" rule in Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972) was erroneous. A cause of action clearly can exist prior to its discovery by a plaintiff.

The Legislature clearly intended consideration of the place where a cause of action "arose" to govern operation of the Borrowing Statute, not the time when a cause of action "accrued." To hold that a plaintiff whose claim was barred in a non-discovery rule state can "discover" his cause of action in this state for the purpose of filing his

out-of-state claim here would directly contravene the legislative policies underlying the adoption of the Borrowing Statute.

Because under New York law Mr. Meehan's claim for personal injuries is barred, there is no claim either for personal injuries or for wrongful death cognizable by the courts of this state.

ARGUMENT

The certified question in effect asks whether a person injured by exposure to asbestos-containing products in one state, whose claim arose and has expired in that state because of the running of time, can move to Florida and maintain a "second" claim based upon discovery of his injury in Florida. In other words, whether Florida's "discovery rule" can be construed so as to revive a barred claim.

I. FLORIDA'S BORROWING STATUTE BARRED MR. MEEHAN FROM MAINTAINING A CLAIM IN FLORIDA BECAUSE HIS CLAIM AROSE IN NEW YORK UPON EXPOSURE TO ASBESTOS FROM 1942 TO 1944 AND WAS BARRED BY NEW YORK'S STATUTE OF LIMITATIONS IN 1947

Florida's Borrowing Statute bars an action in Florida which "arose" in another state and is barred by that state's limitations law. The Statute sets forth a simple two step process:

1. Did a cause of action arise in another state?

2. Does that state's limitations law bar the action?

If the answers to these questions are "yes", then no action may be maintained in Florida. The application of the statute to Mr. Meehan therefore should be as follows:

Q. Did Mr. Meehan's cause of action arise in another state?

A. Yes. Mr. Meehan worked in the Brooklyn Navy Yard where he inhaled asbestos fibers which became imbedded in his lungs and the original injury to his body occurred. There is no evidence (nor any allegation) that he was exposed to any of Defendants' asbestos products outside of New York, and Plaintiff admits Mr. Meehan's injury occurred in New York. (A. 17). Mr. Meehan could have maintained an action on this tort in New York. Steinhardt v. Johns-Manville Corp., 78 A.D. 2d 577, 432 N.Y.S.2d 422 (N.Y. 4th Dept. 1980), aff'd, 54 N.Y. 2d 1008, 446 N.Y.S.2d 244 430 N.E.2d 1297 (N.Y. 1981), cert. denied and app. dismissed, sub. nom., Rosenberg v. Johns-Manville Sales Corp., 456 U.S. 967, 102 S.Ct. 2226, 72 L.Ed.2d 840 (1982) (App. 19) confirmed New York law as holding that injury occurs and the New York statute of limitations begins to run upon exposure to and inhalation of asbestos fibers. There thus is no genuine issue as to the fact that Mr. Meehan's cause of action for an asbestos injury arose in New York when he was exposed to and inhaled asbestos fibers in that state from 1942 through 1944.

Q. Does New York's limitations law bar Meehan's action in New York?

A. Yes. Mr. Meehan's last exposure to asbestos was in 1944. The trial court correctly held (R. 1130) and Steinhardt confirms that New York's three-year statute of limitations would bar Meehan's action in New York. The statute provides:

> The following actions must be commenced within three years:
>
> * * *
>
> 5. an action to recover damages for a personal injury . . .

N.Y. Civ. Prac. Law § 214(5) (McKinney 1981). New York, unlike Florida, does not recognize a "discovery rule".

Because the answers to the two questions are "yes", Meehan's action is barred by the Borrowing Statute in Florida. Mr. Meehan had a cause of action in New York in 1944; New York law barred Mr. Meehan's claim in 1947; and the Borrowing Statute therefore bars Meehan's claim in Florida.

II. MEEHAN CANNOT MAINTAIN A CLAIM IN FLORIDA BECAUSE DISCOVERY OF INJURY IN FLORIDA CANNOT CREATE A "SECOND" CAUSE OF ACTION

Under New York law Mr. Meehan had a "New York" cause of action upon his exposure to and inhalation of asbestos fibers. This cause of action was barred in 1947.

The Third District attempted to establish a "Florida" claim for Meehan which is not barred by New York

law.[2/] There is no precedent for such a "second" cause of action, which is contrary to basic principles of law. The injury -- the impact -- was in New York. The causation was in New York. The tort, therefore, was in New York. There was then a "New York" cause of action and only a New York cause of action.

The Third District's "second" cause of action was based on its conclusion in Meehan that "a cause of action in tort arises when the plaintiff knew or should have known of the existence of the cause of action or the invasion of his legal rights." 466 So.2d at 1102. The court thus treated discovery of the cause of action as one of its elements. That is not the law in Florida. "Discovery" is a facet of the statute of limitations (when it starts running), not an element of a tort cause of action. Florida does not require a plaintiff to plead "discovery" of his injury or his cause of action -- discovery is not and never has been an element of a cause of action. A "second" cause of action simply does not "arise" upon "discovery" of injury in Florida.

The operation of a statute of limitations is an affirmative defense which the defendant must plead, or it is waived. Plaintiff may then seek to avoid the defense by a reply. Proctor v. Schomberg, 63 So.2d 68, 71 (Fla. 1953)

2/ Of course if there were a "Florida" cause of action, Florida's Borrowing Statute would simply be inapplicable, since that Statute applies to causes of action which arose in a foreign state. But there is no "Florida" cause of action, only a "New York" cause of action. The Third District so recognized in invoking the Borrowing Statute in the first place.

(patient need not plead fraudulent concealment of dentist's negligent treatment until statute of limitations was pleaded as an affirmative defense); Young v. Williamson, 169 So.2d 856, 857 (Fla. 2d DCA 1964) (client was under no duty to negative possible application of statute of limitation in action on negligent title opinion preparation until defendant attorney pleaded the statute as affirmative defense). See Hammonds v. Buckeye Cellulose Corp., 285 So.2d 7, 11 (Fla. 1973) ("A complaint need only state facts sufficient to indicate that a cause of action exists and need not anticipate affirmative defenses."); Glass v. Camera, 369 So.2d 625, 628 (Fla. 1st DCA 1979) (discussing which party has the burden of showing waiver or tolling of statute of limitations after the statute of limitations is raised by defendant as affirmative defense).

Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972) is simply inappropriate and the Third District's reliance thereon was simply error. In fact, Colhoun stands for the reverse proposition, that all components of the tort took place in New York and that New York law should have been applied. Colhoun held that "a cause of action sounding in tort arises in the jurisdiction where the last act necessary to establish liability occurred." Id. at 21. Colhoun was injured in Tennessee when the Greyhound bus she was traveling on became involved in an accident. Colhoun held

the borrowing statute barred the tort cause of action because it arose and was barred in Tennessee where the accident occurred, but the borrowing statute was inapplicable to her contract claim because the contract was completed and therefore the claim arose in Florida. Id. The last act rule in Colhoun focuses attention on the "last act necessary to establish liability" -- discovery was not an issue.

In its analysis below, the Third District compared Colhoun's last act rule with the definition of "accrue" in Section 95.031(1), Florida Statutes (1975): "A cause of action accrues when the last element constituting the cause of action occurs":

> Thus, to ascertain the meaning of the phrase "where the last act necessary to establish liability occurred" - that is, where the cause of action arose - we may properly look to the meaning of its equivalent, "when the last element constituting the cause of action occurs" - that is, when the cause of action accrued. It being clear that "the accrual [of a cause of action] must coincide with the aggrieved party's discovery or duty to discover the act constituting an invasion of his legal rights," a cause of action in tort arises when the plaintiff knew or should have known of the existence of the cause of action or the invasion of his legal rights.

466 So.2d at 1102 (citations and footnotes omitted).

The discovery rule, however, modifies or affects the computation of time for limitations purposes. The cases adopting it deal with the term "accrued" in Section 95.031. That section provides that the limitations period begins to run "from the time the cause of action accrues," which is

defined as "when the last element constituting the cause of action occurs." "Accrual" of a cause of action as applied for purposes of computation of time, however, clearly involves considerations wholly different from those which apply in determining the place the cause of action arose for Borrowing Statute purposes. The majority of the Third District, however, failed to recognize this distinction in its analysis.

Some courts interpreting the discovery rule have correctly acknowledged this exception to or modification of the statutory use of the word "accrue." As this Court stated in Creviston v. General Motors Corp., 225 So.2d 331, 333 (Fla. 1969):

> We reach [the] conclusion [that the statute of limitations begins to run from the time Petitioner first discovered, or reasonably should have discovered the defect constituting the breach of warranty] because an arbitrary determination that a cause of action accrues and the statute runs on a products liability injury from the date of sale appears illogical with respect to a latently defective product where the defect is not known and cannot be known at the time of sale.

This distinction is furthered by comparing City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954) with Cristiani v. City of Sarasota, 65 So.2d 878 (Fla. 1953). In Brooks this Court applied the discovery rule to postpone the running of the statute of limitations when plaintiff's injury from an overdose of x-rays was not apparent until five years later. The Court stated that "the statute attaches when there has

been notice of an invasion of the legal right of the plaintiff or he has been put on notice of his cause of action." 70 So.2d at 309 (emphasis added). Because Brooks did not realize the x-ray treatment of her foot was negligently performed, her statute of limitations was tolled by the discovery rule until she had notice of the negligent act, through manifestation of symptoms. In Cristiani, the plaintiff had notice of the negligent driving of the truck at the time of the accident. The statute was not tolled and plaintiff could not maintain an action to recover for blindness which occurred eighteen months after the accident and after the statute had run. 65 So.2d at 878-879. Though in both cases the event upon which the statute began to run was called "accrual," in Brooks "accrual" was upon discovery of the consequences of the act, while in Cristiani accrual was at the time of the act. In Brooks a cause of action existed of which the plaintiff was unaware, and "accrual" was postponed for limitations purposes by the discovery rule.

Downing v. Vaine, 228 So.2d 622 (Fla. 1st DCA 1969) analyzed the applicability of the discovery rule to attorney malpractice actions, and also recognized the arising of a cause of action prior to its accrual for limitations purposes. In discussing "accrual" of plaintiff's cause of action, the court stated: [The plaintiff] had no knowledge of the fact that a cause of action [already] had

accrued in his favor against his attorney until his action . . . was dismissed and he was so notified . . . ." Id. at 627 (emphasis added).

The Legislature also has modified its use of the word "accrue" to accommodate the statutory discovery rule for medical malpractice actions. The earlier statute, Section 95.11(6), Florida Statutes (1973), formerly provided: "the cause of action in such cases [shall] not . . . be deemed to have accrued until the plaintiff discovers, or through use of reasonable care should have discovered, the injury." (Emphasis added). See Johnson v. Mullee, 385 So.2d 1038 (Fla. 1st DCA 1980), rev. denied, 392 So.2d 1377 (Fla. 1981). Effective January 1, 1975 the Legislature amended its limitations statute for professional (including medical) malpractice actions, Section 95.11(4)(a). The Legislature omitted "accrued" from that section and instead simply provided "that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. Section 95.11(4)(a), Fla. Stat. (1974 Supp.)[3/] See also Section 95.11(3)(c), Fla. Stat. (1983), which avoids use of the term "accrual" in the context of latent defects in improvements to real property.

"Accrue", therefore, is not a term which describes the existence of a cause of action, but rather the event

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3/ The Legislature has since added a separate section for medical malpractice, Section 95.11(4) (b) Fla. Stat. (1975), which similarly omits reference to "accrual".

upon which the statute of limitations begins to run. In cases involving the discovery rule, this is discovery or notice of an invasion of legal rights -- neither of which is the "last element constituting the cause of action."

Because discovery of a cause of action is not "the last element constituting the cause of action," and therefore is not "the last act necessary to establish liability," it is neither relevant nor determinative under the Borrowing Statute of the place where a cause of action arose.

III. COMPUTING THE TIME WHEN A CAUSE OF ACTION ACCRUES UNDER FLORIDA'S LIMITATIONS LAW IS IRRELEVANT TO DETERMINING THE PLACE WHERE A CAUSE OF ACTION AROSE UNDER THE BORROWING STATUTE

Under fundamental principles of statutory construction, the Legislature clearly intended consideration of the place a cause of action "arose" to govern operation of the Borrowing Statute, not the time a cause of action "accrued."

In construing the Borrowing Statute, this Court is required to ascertain and give effect to the intention of the Legislature as expressed in the statute. Tampa v. Thatcher Glass Corp., 445 So.2d 578, 579 (Fla. 1984). The Legislature is presumed to know the meaning of words and to have expressed its intent by the use of the words found in the statute. Thayer v. State, 335 So.2d 815, 817 (Fla. 1976). It must be presumed that the Legislature had some

purpose in using particular language in a legislative act. Stein v. Biscayne Kennel Club, 145 Fla. 306, 199 So. 364, 365 (Fla. 1941).

In adopting Sections 95.031 and 95.10,[4/] the Legislature distinguished between the events which control the operation of the two sections. The Legislature specifically used and defined "accrue" in Section 95.031. It used the different term "arose" in the Borrowing Statute, four sections later in Chapter 95. The Legislature must have intended to describe a different consideration in Section 95.10 than the event it was articulating in Section 95.031.

Brown v. Case, 80 Fla. 703, 86 So. 684, 685 (Fla. 1920) construed the intent of Florida's Borrowing Statute as follows:

> It is clear that the Legislature intended to give a [defendant] against whom a cause of action accrued in another state or territory, or in a foreign country, the benefit of statutes of limitations of those jurisdictions if they were shorter than that of this state.

The Borrowing Statute prevents forum shopping and protects prospective defendants who come into this state by allowing

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4/ While referring to these enactments by their current codifications, the Legislature similarly used the terms "accrue" and "arisen" in the enactments of these statutes in Chapter 1869, Laws of Florida (1872) when the borrowing statute was amended to substitute "arisen" for "originated." The 1872 version of the borrowing statute was: "When the cause of action has arisen in another State or Territory of the United States, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, no action thereon shall be maintained against him in this State." § 18, Ch. 1869, Laws of Fla. (1872). (App. 25).

them to rely on the same limitations period as the state from whence they came.

A statute should not be interpreted in a way which would impair, pervert, nullify, or defeat the object of the statute. Becker v. Amos, 105 Fla. 231, 141 So. 136, 140 (Fla. 1932) (court rejected proposed construction of statute that "would defeat the only useful purpose the statute was intended to serve"); Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693, 695 (Fla. 1918) ("courts will never, if avoidable, adopt a construction of a statute which will lead to an absurdity or make it ineffective").

This Court should reject a construction of the Borrowing Statute which negates these policies, and which creates the possibility that many thousands of time-barred asbestos claims from other states can be revived in Florida's courts, under a theory which enables later "discovery" of a cause of action to avoid the limitations laws of the states where the cause of action arose.

Pledger v. Burnup & Sims, Inc., 432 So.2d 1323 (Fla. 4th DCA 1983) analyzed whether a cause of action for defamatory statements in New York could be brought in Florida even though the claim would be barred under New York's statute of limitations. The court concluded under the significant relationships test that Florida had "the most significant contacts with the issue presented" by the defamation count, id. at 1330, but held the claim was barred under the borrowing statute by the applicable New York

statute of limitations. Id. at 1331. Citing Brown v. Case for the intent, and Beasley v. Fairchild Hiller Corp., 401 F.2d 593, 595 (5th Cir. 1968) for the clarity[5/] of Section 95.10, the court declined to "'give a strained construction to evade the effect' of the statute in the absence of [further] statement of legislative will or a ruling by our Supreme Court." Id. at 1330-31. Here, as in Pledger, the Defendants' wrongful acts and Mr. Meehan's injury occurred in another state, the cause of action arose and is barred in another state, and therefore the claim is barred by Florida's Borrowing Statute.

According to Pledger, the significant relationships test adopted by this Court in Bishop v. Florida Specialty Paint Co., 389 So.2d 999 (Fla. 1980) is not relevant to the determination of the place the "cause of action arose" under Section 95.10. In Bishop, this Court recognized that "happenstance" is often the reason events related to a cause of action occur in any particular jurisdiction. Id. at 1000. Discovery of a cause of action in a particular

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5/ "We are convinced that the clarity of [Section 95.10] and the certainty of its command simply left no room for litigation." In Fairchild a pilot's action in Florida against a California helicopter manufacturer for personal injuries sustained from a helicopter crash in Louisiana was held barred under Florida's borrowing statute. The action was commenced in Florida after the one-year statute of limitations had run in Louisiana, where the tortious act occurred. 401 F.2d at 594-96. The pilot claimed a defect in the helicopter was not discovered until another similar helicopter had crashed and he reviewed the Civil Aeronautics Board report on the crash. Id. at 595. The court applied the Louisiana discovery rule and determined that the pilot had sufficient information at the time of the crash, which if pursued would have led to the true conditions. Id. at 597. Neither Florida's limitations period nor its discovery rule were considered.

jurisdiction can be as much a "happenstance" as the airplane crash in Bishop. Moreover, the potential manipulation of discovery is as much a problem as the fortuitousness of discovery. "Discovery" should not be allowed to distort the clear language and intent of the borrowing statute -- which applies the law of the foreign state whether or not it has a discovery rule.

In Mugge v. Warnell Lumber & Veneer Co., 58 Fla. 318, 50 So. 645, 646 (Fla. 1909) this Court stated the following principle:

> Where words may import different meanings, they should have the meaning and effect designed to be given them, as appears by a fair consideration of the whole context.

Section 95.031, entitled "Computation of Time[,]" addresses considerations involving time, in determining when the limitations period begins to run. The Borrowing Statute, entitled "Causes of action arising out of the state[,]" addresses considerations involving place, in determining where the cause of action arose and which state's limitations law therefore will be applied. By engrafting the "discovery rule" on Section 95.10, the Third District erroneously confuses issues of time with those of place, out of context with a Borrowing Statute which is concerned only with where the cause of action arose, not when.

The Initial Brief of co-petitioner Owens Corning Fiberglas Corporation ("Owens Corning") analyzes the distinction between where a cause of action arises for Borrowing

Statute purposes and when a cause of action accrues for statute of limitations purposes, and suggests that venue is analogous to the former. GAF agrees that this Court can properly look to venue to interpret where a cause of action "arose," because the Florida Legislature has used that term in the Florida venue statutes since 1860,[6] only 12 years prior to the 1872 amendment of the Borrowing Statute to include the phrase, "when the cause of action has arisen. . . ."[7] Goldstein v. Acme Concrete Corporation, 103 So.2d 202, 204 (Fla. 1958), followed the rule of statutory construction that where the Legislature uses similar words or phrases in different legislative enactments courts will "assume that in both chapters they intended certain exact words or exact phrases to mean the same thing. In a broad sense the chapters are in pari materia and should, to

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6/ In 1860 the Florida Legislature enacted Section 12, Chapter 1096, as follows:

> Sec. 12. Be it further enacted, That causes of action, of whatever kind, provided they be by and against the same parties and in the same rights, may be joined in the same suit; but this shall not extend to replevin or ejectment; and when two or more of the causes of action so joined are local, and arise in different counties, the venue may be laid in either of such counties; but the Court or Judge shall have power to prevent the trial of different causes of action together, if such trial would be inexpedient, and in such case such Court or Judge may order separate records to be made up, and separate trials to be had.

(emphasis added). This law is presently codified in pertinent part at Section 47.041, Fla. Stat. (1983).

7/ See n.4, supra.

the extent that an understanding of one may aid in the interpretation of the other, be read and considered together."[8/]

Gaboury v. Flagler Hospital, Inc., 316 So.2d 642 (Fla. 4th DCA 1975), reviewed an order granting a change of venue in an action for wrongful death based upon negligent diagnosis and treatment. The court held venue was lacking where the death occurred, and was properly changed to the situs of the allegedly negligent acts of the defendants and their places of residence and business. The court distinguished between the use of the words "arise" and "accrue", and recognized the difference between ascertaining the place relevant to an action for venue purposes and the time relevant to an action for limitations purposes:

> In determining the proper forum in which to bring suit under the general statute fixing venue where the cause of action "arose", or "accrued", the "injury occurred", et cetera, the differences are often of importance, but generally within the meaning of statutes of this kind, a cause of action is said to arise at the place where the act creating the right to bring an action occurred, and when a tort is complete in a particular county, the cause of action is deemed to have accrued there so as to fix venue, notwithstanding that the plaintiff may have suffered damages, and even his greatest damage, in another county.

8/ Goldstein involved a determination of whether defendant "was a sub-contractor and not a third party against whom an independent action could be maintained under the Workmen's Compensation Act." The court looked to the definition of "materialman" under the mechanics' lien statute and concluded that definition was "a clear indication that Acme is not a 'subcontractor' in the legislative plan. . . ." 103 So.2d at 204-205.

> Indeed, from the standpoint of limitations of actions, which deals with the element of time, the cause of action is said to have "accrued" upon the death of the decedent. This does not fix the place where the action "accrued" which is the material aspect of venue. To hold otherwise, and to place such a restricted meaning upon the word of art "accrued" would, in many cases, such as when the death occurred out of state, deprive the plaintiff of an election of forum within which to file the cause of action, under the general venue statute.

Id. at 644-45 (citations omitted) (emphasis in original). The general rule for venue statutes, therefore, is that a cause of action is said to arise at the place where the act creating the right to bring the action occurred or where the tort is complete.

There is no authority for creating a hybrid limitations period which adds Florida's "discovery" rule to the New York limitations statute. Mr. Meehan's claim therefore was properly barred. As Mr. Meehan's claim was barred, Meehan has no claim for wrongful death cognizable by the courts of this state. Variety Children's Hospital v. Perkins, 445 So.2d 1010, 1012 (Fla. 1983) (Where no right of action exists at the time of death, no wrongful death cause of action survived the decedent.). Hudson v. Keene Corp., 445 So.2d 1151 (Fla. 1st DCA 1984) (In wrongful death action based upon asbestos exposure, when statute of limitations ran prior to decedent's death no action for wrongful death on that basis survived.).

CONCLUSION

The certified question must be answered in the negative. A cause of action, though discovered in Florida, is not maintainable if the limitations statute in the state where the cause of action arose bars the action. The opinion of the Third District Court of Appeal should be quashed and this Court should remand with instructions that the trial court's order of final summary judgment for the Defendants be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief on the Merits of Petitioner GAF Corporation was served by mail this 17th day of June, 1985, upon the persons listed on the attached Service List.

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Celotex Corporation v. Carmella Meehan
Case No. 66,937

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