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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.	)

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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

REPLY BRIEF ON THE MERITS OF PETITIONER GAF CORPORATION

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ARGUMENT

I. FLORIDA'S BORROWING STATUTE IS APPLICABLE.

A. Existence Of A Cause Of Action Does Not Always Coincide With Discovery Of A Cause Of Action.

Respondent Carmella Meehan ("Meehan") contends at pages 6 through 17 of her Answer Brief[1/] that Mr. Meehan's cause of action arose in Florida, not in New York. Mr. Meehan was exposed to and inhaled asbestos fibers in New York from 1942 to 1944. Meehan argues that Mr. Meehan's injury did not occur, and therefore no cause of action existed, until Mr. Meehan discovered the cancer caused by the asbestos, which manifested itself by the onset of symptoms in Florida in 1977.

A cause of action can exist, however, prior to discovery of the cause of action. It is undisputed that the tortious impact -- the harmful insult to Mr. Meehan's body caused by exposure to asbestos fibers, occurred in New York. It also is undisputed that under New York law the injury occurred and the cause of action arose upon exposure to and inhalation of asbestos fibers. 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 appeal dismissed sub nom., Rosenberg v. Johns-Manville Sales Corp., 456 U.S. 967 (1982). In New York, which has no "discovery rule" for cases of this type, the limitations period began to run no later than 1944, when the exposure caused the initial injury and the

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1/ Citations to GAF Corporation's Initial Brief will be indicated by "GAF Initial Br.", followed by the page number. Citations to Carmella Meehan's Answer Brief will be indicated parenthetically by "A.Br.", followed by the page number, e.g., (A.Br. 10).

cause of action arose. Under New York law, it was irrelevant Mr. Meehan may not have discovered his injury until many years later, when he lived in Florida.

There would be no need for a "discovery rule" if a cause of action never existed until the injury it caused was first discovered. Florida's discovery rule is designed to mitigate against the harshness of allowing a statute of limitations to run on a cause of action of which the plaintiff is unaware. City of Miami v. Brooks, 70 So.2d 306, 309 (Fla. 1954) ("To hold otherwise . . . would indeed be a harsh rule and prevent relief to any injured party who was without notice during the statutory period of any negligent act that might cause injury."). It presupposes, however, that a cause of action previously existed. The discovery rule tolls the running of the limitations period until the plaintiff knows or should have known he suffered an injury. In Celotex Corp. v. Copeland, 471 So.2d 533, 539 (Fla. 1985), this Court reviewed the effect of the discovery rule on a plaintiff whose condition was diagnosed as asbestosis, and approved the Third District Court of Appeal's finding that "the action accrues [for purposes of the statute of limitations] when the accumulated effects of the substance manifest themselves in a way which supplies some evidence of the causal relationship to the manufactured product." Id.

In both Florida and New York, there can be only one action for personal injuries resulting from wrongful acts of defendants, even though the more substantial consequences may not occur until a later date. Cristiani v. City of Sarasota, 65

So.2d 878 (Fla. 1953); see also Mims v. Reid, 98 So.2d 498, 501 (Fla. 1957) (Court adopted rule against splitting of actions and approved majority view that "[a]ll damages sustained or accruing to one as a result of a single wrongful act must be claimed or recovered in one action or not at all.") Damage or injuries discovered years later from particular tortious conduct do not create a new cause of action. Schmidt v. Merchants Despatch Transportation Co., 270 N.Y. 287, 200 N.E. 824 (1936). Schwartz v. Heyden Newport Chemical Corp., 12 N.Y.2d 212, 237 N.Y.S.2d 714, 188 N.E.2d 142, cert. denied, 374 U.S. 808 (1963) (the cause of action is complete when the invasion of the body by injury takes place "independently of any actual pecuniary damage.")

Florida's Borrowing Statute directs Florida's courts to apply the "laws" of New York, including those which might toll the running of New York's limitations period, to determine the viability of Mr. Meehan's claim. Holderness v. Hamilton Fire Ins. Co., 54 F.Supp. 145, 146 (S.D. Fla. 1944) (All applicable foreign laws are borrowed, including "not only the statutory law, but also the 'law' established by judicial decision."); Courtlandt Corp. v. Whitmer, 121 So.2d 57, 58 (Fla. 2d DCA 1960) (whether a promissee's action on a note was barred under Florida's Borrowing Statute was determined by France's limitations law, which would have run "only if French law makes no provision for events which interrupt the statute, or if making a provision, no interrupting events exist."); see Ester, Borrowing Statutes of Limitation and Conflict of Laws, 15 U.Fla.L.Rev. 33, 62 (1962) ("The courts have consistently held that the forum should look to the law of the

appropriate foreign jurisdiction to determine whether the borrowed statutory period has been tolled or extended. . . .").

In Duke v. Housen, 589 P.2d 334 (Wyo.), cert. denied, 444 U.S. 863 (1979), cited by Meehan (also discussed infra, Section III), the Wyoming Supreme Court considered the effect of Wyoming's discovery rule on a cause of action which it found arose in New York based upon exposure in New York to gonorrhea. That court stated:

> Thus, in applying a "borrowed" statute, we must consider not only the borrowed limitation of action statute itself, but also any applicable tolling or other statutes as well as pertinent court cases. In effect, plaintiff's cause must be viewed as if filed in the state where under the laws of that state a cause of action accrued.

Id. at 345 (emphasis added). The Wyoming Supreme Court concluded it could not apply Wyoming's discovery rule to the cause of action which arose in New York: "It is not our choice; we must accept the law of the jurisdiction where the cause arose." Id. at 346.

New York's laws do not toll the running of its statute of limitations pending discovery. Florida's Borrowing Statute borrows all of New York's limitations law, not just some of it. Mr. Meehan's discovery of his injury in Florida cannot breath new life into his cause of action, which had been barred by New York's statute of limitations for almost 30 years by the time it was discovered.

B. Meehan Misinterprets The Cases Cited From Other Jurisdictions.

The cases Meehan cites from other jurisdictions do not support her interpretation of the Borrowing Statute. In Elmore

v. Owens-Illinois, Inc., 673 S.W.2d 434 (Mo. 1984), the Missouri Supreme Court applied Missouri's statute of limitations because Elmore's condition was diagnosed in Missouri and not in Kentucky, where he was domiciled. The Elmore court, however, was not faced with the issue present in this case, as both Missouri and Kentucky had a "discovery rule". See Louisville Trust Co. v. Johns-Manville Products Corp., 580 S.W.2d 497 (Ky. 1979). And, unlike this case, Elmore's employers were located in Missouri, he worked in Missouri, and Missouri was where he was exposed to asbestos. The Missouri court found these factors particularly relevant, stating:

> Mr. Elmore's injury was intimately and inextricably involved with his employment.
>
> * * *
>
> [Missouri] was the place where Plaintiff Arthur Elmore and defendant Owens-Illinois came in contact through the product Kaylo.

673 S.W.2d at 437.

Parish v. B.F. Goodrich Co., 395 Mich. 271, 235 N.W.2d 570 (1975), also fails to support Meehan's position. In Parish, the Michigan Supreme Court held that the cause of action was barred under Michigan's borrowing statute because the action arose in Ohio, where the automobile accident and injuries occurred, not in Michigan, where the plaintiffs resided or the automobile's tires were purchased. The Parish court, while considering the equitable nature of the discovery rule, refused to give a strained construction to Uniform Commercial Code breach of warranty provisions, which would have tolled the applicable statute of limitations pending discovery of the breach of warranty at the time of the accident to give Parish a cause of action in Michigan. Id. at 575. The Michigan court considered the legislative choice in

adopting the borrowing statute and not treating residents any differently than non-residents, and held that Parish's claim for personal injuries for borrowing statute purposes accrued when and where injury and damage were suffered. Id. at 571.

Finally, Meehan cites Mack Trucks, Inc. v. Bendix-Westinghouse Automotive Air Brake Co., 372 F.2d 18 (3d Cir. 1966), cert. denied, 387 U.S. 930 (1967), in support of her conclusion that "it is clear that a forum must apply its own law to interpret its borrowing statute." That case involved an action by a truck manufacturer in Pennsylvania, for indemnification against a supplier to it of a component part. The truck manufacturer had been sued and paid a judgment in Florida as a result of an accident there which had been caused by the defective part. The Federal Court of Appeals analyzed Pennsylvania's borrowing statute to determine whether the cause of action for indemnification arose in Florida or in Pennsylvania, where the part had been manufactured, purchased, delivered and installed in the truck. The court cited Pennsylvania law for the rule that "the cause of action arises [upon] the occurrence of the final significant event necessary to make the claim suable," 372 F.2d at 20. It then looked to opinions from a number of other jurisdictions and determined that the "final significant event" in that indemnification case occurred in Florida, where the cause of action arose when the truck manufacturer satisfied the judgment against it. Unlike this case, there was no indication the laws of Florida, where the cause of action arose, were any different.

McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657 (3d Cir.), cert. denied, 449 U.S. 976 (1980), a latent injury case

involving the use of oral contraceptives resulting in a stroke, rejected the simplistic application of Mack Trucks proffered by Meehan. The McKenna court again analyzed Pennsylvania's borrowing statute to determine where the cause of action arose and therefore what state's limitations period applied. After the court concluded that under Pennsylvania's borrowing statute the cause arose in Ohio, it analyzed how Ohio's two year statute of limitations was to operate. The Court of Appeals rejected a proffer that Mack Trucks stood for the proposition that the law of Pennsylvania, as the forum state, should control, because "Mack Trucks relied not only on Pennsylvania cases but also on cases from other jurisdictions." 622 F.2d at 660. Further, because the McKenna court was confronted with a latent injury, which the Mack Trucks court did not address, the Mack Trucks rule also was rejected because there was no suggestion in Mack Trucks that Florida, where the cause arose, would have commenced the running of its statute of limitations at a time different from when Pennsylvania, the forum, would have. 622 F.2d at 660. The federal court in Pennsylvania then concluded that under the law of Ohio, Ohio's courts would apply a discovery rule and the action was not barred by Ohio's statute. Clearly, the law of the forum did not control the issue.

Meehan's cases, therefore, do not support her position. They supply no authority on the basis of which this Court should ignore the New York law which the Borrowing Statute mandates be applied.

II. MEEHAN'S PUBLIC POLICY ARGUMENTS ARE INAPPOSITE -- FLORIDA'S PUBLIC POLICY IS DECLARED BY THE BORROWING STATUTE, WHICH MANDATES APPLICATION OF NEW YORK'S STATUTE OF LIMITATIONS.

Meehan contends her interpretation of Florida's Borrowing Statute will not conflict with public policy because borrowing statutes are designed to discourage forum shopping, and the facts of this case show no intent to forum shop. A construction of the statute which seeks to avoid its clear import, however, ignores the very public policy manifested by the statute.

When the Legislature adopted Florida's Borrowing Statute, it declared the public policy of this state to be that when a cause of action arose in another state, Florida's courts are to apply the "laws" of that state to determine the viability of the cause of action. Meehan's suggestion that Florida's discovery rule be engrafted upon the laws of New York directly contravenes that policy. Simply because the public policy against forum shopping is not violated does not justify interpretation of the statute in a way which still effectively disregards the laws of the foreign state which are supposed to be "borrowed".

Borrowing statutes were enacted primarily so defendants could rely upon the shorter limitations period in a state where the cause of action arose, without being subjected to a longer limitations period when they moved to another jurisdiction. See Brown v. Case, 80 Fla. 703, 86 So.2d 684, 685 (Fla. 1920); GAF Initial Br., 17-19. Their application is not limited to cases where the plaintiff's intent to forum shop is evident.

Respondent's public policy arguments related to residency are irrelevant. The Borrowing Statute does not distinguish

between resident and non-resident plaintiffs, only between causes of action which arose in foreign jurisdictions, as opposed to Florida.

III. NEITHER CHOICE OF LAW NOR SIGNIFICANT INTEREST ANALYSES ARE APPROPRIATE -- FLORIDA'S BORROWING STATUTE CLEARLY STATES WHEN TO APPLY ANOTHER STATE'S LAWS.

The significant interests analysis for a choice of law determination under Bishop v. Florida Specialty Paint Co., 389 So.2d 999 (Fla. 1980), (A. Br. 24-33), is simply not relevant to borrowing statute analyses. The Legislature has already determined which law should be applied -- the law of the jurisdiction where the cause of action arose. No other criteria are necessary to this decision. To infuse the significant relationships test into this decision ignores the plain language of the Borrowing Statute, the simplicity of its operation, and its intent. In effect, Florida's interests in applying the law of a foreign jurisdiction were declared paramount when the Borrowing Statute was enacted in its current form.

Meehan suggests use of the "significant contacts" analysis would eliminate confusion, citing Duke v. Housen, 589 P.2d 334, as an example of what results when this analysis is not applied. Duke involved a plaintiff who was exposed to gonorrhea in five states and discovered in the sixth that she had the disease. The Wyoming Supreme Court held the state of the last exposure, New York, was the state where her injury occurred and where her cause of action arose, under Wyoming's borrowing statute, specifically rejecting the application of conflicts of law principles:

> Any conflict has been erased by the legislature by enactment of the "borrowing" statute fixing the statute of limitations of this state to be the same as that of the jurisdiction in which the cause of action arose.

Id. at 342. The Wyoming Supreme Court also rejected application of Wyoming's own discovery rule, declaring: "It is not our choice; we must accept the law of the jurisdiction where the cause arose." Id. at 346.

Meehan contends this Court should accept every argument which the Supreme Court of Wyoming rejected in Duke v. Housen. This Court is bound, however, as was the Wyoming Supreme Court, by the legislative directives found in the Borrowing Statute, notwithstanding other considerations.

In Wyatt v. United Airlines, Inc., 638 P.2d 812 (Colo. Ct. App. 1981), (A. Br. 32), the Colorado Court of Appeals also rejected the application of the significant relationships test, because its legislature had adopted a borrowing statute. The Wyatt court noted that Restatement (Second) of Conflict of Laws, Section 6, provides: "A court, subject to constitutional restrictions, will follow the statutory directive of its own state on choice of law", i.e., the borrowing statute. Id. at 813. Meehan's suggestion that the Restatement approach provides this Court with flexibility (A. Br. 33), therefore, is simply erroneous.[2/]

2/ Whether states besides New York or Florida recognize that a cause of action accrues at the date of a doctor's diagnosis (A. Br. 28-29) is irrelevant to the issues before this Court, and none of the tort cases cited by Meehan involving choice of law issues (A. Br. 29-30) involved application of Florida's Borrowing Statute.

Two of the four cases which Meehan suggests adopt "significant interest" analysis to resolve statutory interpretation questions under a state's borrowing statute didn't even involve borrowing statutes.

(Footnote Continued)

IV. APPLICATION OF THE BORROWING STATUTE DOES NOT UNCONSTITUTIONALLY DENY MEEHAN ACCESS TO FLORIDA COURTS WHEN A PRIOR RIGHT OF ACCESS TO NEW YORK COURTS IS TIME-BARRED UNDER NEW YORK LAW.

Meehan finally claims application of the Borrowing Statute would "abolish" her cause of action in violation of Article I, Section 21 of the Florida Constitution (the "Access Clause"), which provides:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

However, Meehan's reliance on the Access Clause and the cases cited in her Answer Brief is misplaced. First, the Access Clause has no relevance in this case. Mr. Meehan previously had a right of access to New York courts, and need not be given a second chance in Florida courts. Second, the cases cited by Meehan all involve causes of action which arose in Florida, and thus did not involve the Borrowing Statute. Third, the decisions relied upon by Meehan which hold statutes unconstitutional under the Access Clause do so only because the persons seeking Florida court access never would have had a cause of action redressable in any judicial forum under the applicable statutes, unlike Mr. Meehan, who formerly had a cause of action in New York courts.

Footnote 2 Continued:

(A. Br. 32) (Ellis v. Great Southwestern Corp., 646 F.2d 1099 (5th Cir. 1981); Myers v. Cessna Aircraft Corp., 275 Or. 501, 553 P.2d 355 (Or. 1976)). The third, Icelandic Airlines, Inc. v. Canadair, Ltd., 104 Misc.2d 239, 428 N.Y.S.2d 393 (N.Y.Sup.Ct. 1980), (A. Br. 22), involved choice of law analysis to determine which state's substantive law should be applied -- straight borrowing statute analysis was used to determine which state's statute of limitations applied. In the fourth, Mitchell v. United Asbestos Corp., 100 Ill. App. 3d 485, 426 N.E.2d 350 (Ill. App. Ct. 1981), after the court used interest analysis to determine that Illinois substantive law applied, it decided it would be "inconsistent" to conclude the cause arose outside of Illinois because the decedent worked in both Illinois and Missouri for many years, and the place of injury was unclear.

Meehan relies on decisions which held certain Florida statutes of limitations violated the Access Clause because the statutes, as applied, totally abolished Florida rights of action before such rights ever arose. Diamond v. E.R. Squibb and Sons, Inc., 397 So.2d 671 (Fla. 1981); Overland Construction Co. v. Sirmons, 369 So.2d 572 (Fla. 1979); see, Vilardebo v. Keene Corp., 431 So.2d 620 (Fla. 3d DCA), appeal dismissed, 438 So.2d 831 (Fla. 1983). These cases are not relevant here, because Mr. Meehan's cause of action arose in New York, could have been asserted in New York courts for three years, and was lost only by passage of time.

Overland reviewed the constitutionality of a ban on all lawsuits involving real property improvements twelve years beyond the date the owner took possession of the improvement. This Court held the statute violated the Access Clause as applied to Mr. Sirmons, whose injury occurred in a building more than twelve years after the owner took possession, because:

> Sirmons' cause of action was already barred by the twelve years limitation when it first accrued -- that is, when his injuries occurred. No judicial forum would ever have been available to Sirmons if the twelve year prohibitory portion of the statute were given effect.

369 So.2d at 575 (emphasis added).

In this case, however, Mr. Meehan's exposure to asbestos in New York constituted a compensable injury under New York law, which permitted three years to sue after the injury.

Diamond v. E.R. Squibb and Sons, Inc., based on the "binding precedent" of Overland, held that a statute requiring all products liability actions to be commenced within twelve

years after delivery of the product to its original purchaser violated the Access Clause, as applied to a girl injured by a drug which had been administered to the girl's mother during pregnancy some 22 years earlier. Overland controlled because the Florida right of action of the girl and her parents "was barred [by the statute] before it ever existed." 397 So.2d at 672.

Both Overland and Diamond assumed Florida's legal definition of what creates a cause of action controlled. See also, Vilardebo v. Keene Corp., 431 So.2d at 622, cited by Meehan, but involving a plaintiff who was exposed to asbestos in Florida. Thus, the issues of where the cause of action arose and which law applied were never before the Court in any of these cases, none of which involved the Borrowing Statute.

Mr. Meehan had three years to bring suit before his cause of action was extinguished in New York. His action was precluded because the limitation deadline had passed, not because the Borrowing Statute, in itself, somehow "abolishes" a right still in existence. Cf. Kluger v. White, 281 So.2d 1 (Fla. 1973) (Holding a statute which abolished a traditional right of action in tort violated the Access Clause).

To decide whether application of the Borrowing Statute and New York limitations period is constitutional, "the court may determine, under the facts of the case, whether or not the party was afforded a reasonable time in which to act before being barred under the applicable statute." Cates v. Graham, 427 So.2d 290, 291 (Fla. 3d DCA 1983), approved, 451 So.2d 475 (Fla. 1984). Under Florida law, three years provides a more than adequate

opportunity to bring suit. See, Cates v. Graham, 451 So.2d at 477 (holding five-month period to bring suit is constitutional and such "time constraints" do not constitute denial of access to courts); Bauld v. J.A. Jones Construction Co., 357 So.2d 401, 403 (Fla. 1978) ("The one-year savings period provided for here is a reasonable time."). Mr. Meehan thus had sufficient time to bring suit to satisfy the Access Clause.

The Borrowing Statute weeds out actions barred by other states, so as not to clog Florida courts with previously lifeless, newly resuscitated actions which did not arise within the state. This function is entirely consistent with the Access Clause, which opens Florida courts to litigants with causes of action recognized in this state.

CONCLUSION

The certified question must be answered in the negative, and this Court should take the action requested at the conclusion of GAF's Initial Brief.

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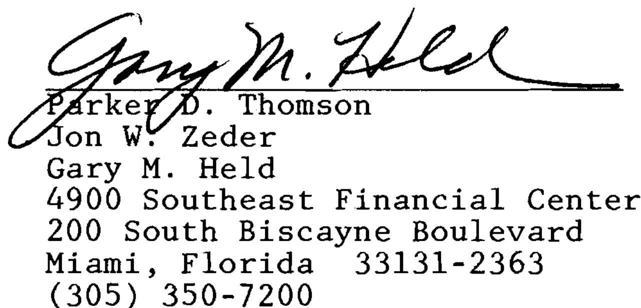

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I HEREBY CERTIFY that a true copy of the foregoing Reply Brief on the Merits of Petitioner GAF Corporation was served by mail this 13th day of September, 1985 upon the following:

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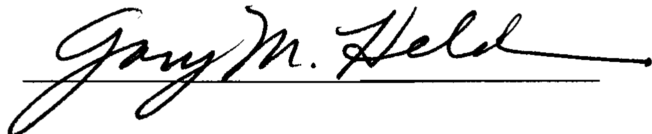

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