IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,938

THE CELOTEX CORPORATION, etc., et al.,

Petitioners,

v.

JEAN NANCE, as personal representative of the Estate of E.S. Nance, deceased,

Respondent.

Petition for Discretionary Review of Decision Certified by Third District Court of Appeal as a Question of Great Public Importance

BRIEF OF RESPONDENT

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INTRODUCTION

Plaintiff/Respondent JEAN NANCE, as personal representative of the Estate of E.S. Nance, will be referred to as she stands before this Court, as she stood before the trial court and as NANCE. The decedent will be referred to as Mr. Nance. Defendants/Petitioners will be referred to as they stood before the trial court and by name. Plaintiff/Respondent in the companion case no. 66,937, CARMELLA MEEHAN will be referred to by name.

The briefs of the parties will be referred to by the name of the respondent and the name of the petitioner, e.g., Meehan/Celotex brief means the brief filed by Celotex in the Meehan certiorari proceeding.

"R" refers to portions of the record on appeal.

STATEMENT OF THE CASE AND FACTS

Defendants have sought an answer to a certified question which arose in two decisions of the Third District Court of Appeal. The Third District held that: (1) Florida law determines the meaning of the word "arose" in the Florida borrowing statute; (2) a cause of action "arises" under Florida law when the last act occurs which is when the plaintiff discovers an invasion of his legal rights; and (3) there were questions of fact concerning when Mr. Nance and Mr. Meehan discovered their claims.

Mr. Nance was exposed to asbestos in Virginia between 1940 and 1945. (R. 795). He developed asbestosis and mesothelioma. The diseases were diagnosed in Florida in May 1976. Mr. Nance filed a personal injury action in Florida in April 1980. He died here in August 1980. (T. 795). The complaint was amended to be a wrongful death action. (R. 795-96).

The trial court applied Fla.Stat. § 95.10, found the personal injury cause of action arose in Virginia and held it was barred by the applicable Virginia statute of limitation. The court concluded that NANCE had no Florida wrongful death claim.

This Court has consolidated this case with MEEHAN's. Both cases are wrongful death actions filed pursuant to the Florida Wrongful Death Act, Fla.Stat. § 768.16 et seq. Both cases were filed within two years of the death. Summary judgment was entered against both plaintiffs on the ground that another jurisdiction's statute of limitation barred the underlying personal injury actions under the Florida borrowing statute, Fla.Stat. §

95.10. In Meehan v. The Celotex Corp., 466 So.2d 1100 (Fla. 3d DCA 1985), the Third District held that the borrowing statute, Fla.Stat. § 95.10, should be interpreted in accordance with Florida law and Florida law holds that a cause of action arises where the plaintiff discovers, or should discover, an invasion of his legal rights. The court concluded that there was a question of fact as to whether the underlying personal injury action arose in New York, where it was barred, or in Florida, where it was not. It reversed the summary judgment. In Nance v. Johns Manville Sales Corp., 466 So.2d 1113 (Fla. 3d DCA 1985), the Third District followed Meehan and held that the cause of action arises where the plaintiff discovers an invasion of his rights. The court then held the record was insufficient to determine where discovery was made. It reversed the summary judgment and remanded for the trial court to determine whether Mr. Nance discovered his claim in Virginia or in Florida and, regardless of where he discovered it, whether it was barred in that jurisdiction.[1/]

1/ Mr. Nance's deposition was taken before he died, but it was never transcribed. If the issue remains where the cause of action for personal injury was discovered, then Defendants failed to meet their burden on summary judgment because the record does not conclusively demonstrate the absence of a factual question on that issue. Moore v. Morris, ___ So.2d ___ (Fla. 1985), 10 FLW 336, 337("The law is well settled in Florida that a party moving for summary judgment must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary judgment is sought"). The record shows that the personal injury action was filed within four years of the date the diseases were diagnosed. See Vilardebo v. Keene Corp., 431 So.2d 620 (Fla. 3d DCA), app. dismissed, 438 So.2d 831 (Fla. 1983).

The issue which the certified question states is common to both cases is the application of the borrowing statute to a personal injury action where the wrong occurred in another state, but the injury was discovered in Florida. However, the answer in each case is not necessarily the same. Meehan was exposed in New York. New York law unequivocally holds that the cause of action arises on exposure. Therefore the issue raised by the certified question is squarely presented in Meehan. Mr. Nance was exposed in Virginia. Virginia, unlike New York, adopted a discovery rule in 1981. Mr. Nance discovered his injury in Florida. Therefore under either Virginia law or Florida law, the cause of action arose in Florida.

QUESTION CERTIFIED

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 THE DISCOVERY.

SUMMARY OF ARGUMENT

The question certified to this Court in itself dictates the response. The question presumes that Virginia "does not recognize postponement of accrual until discovery" and it presumes that the action would be barred if Virginia law determined where the cause of action arose. That presumption is correct in the companion case of Meehan v. The Celotex Corp., where the exposure occurred in New York. However that presumption is incorrect here where the exposure occurred in Virginia. Virginia has adopted a rule which delays the time at which the cause of action arises. There is evidence in this record that Mr. Nance's injury did not manifest itself until he was in Florida. Therefore under both Virginia law and Florida law, the cause of action arose in Florida. The Florida borrowing statute does not apply. This Court should not exercise its jurisdiction to determine an issue which is not necessary to resolution of this case.

If this Court determines that resolution of the certified question is appropriate, this Court should conclude that an action may be maintained in Florida where the cause of action arose in Florida because the injury was discovered here. Florida law applies the statute of limitation of the state in which the cause of action arises. Fla.Stat. § 95.10. The determination of where a cause of action arises should be made under Florida law because it involves interpretation of a procedural statute which is traditionally interpreted under the law of the forum. Florida law holds that the statute of limitation commences when the tort is

complete and the tort is complete when, and where, the injury caused by the wrong is discovered. Moore v. Morris, ___ So.2d ____ (Fla. 1985), 10 FLW 336; Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972). Under established principles of Florida law, Mr. Nance's claim arose in Florida because he discovered his injury here. His personal injury action was timely filed within four years of discovery. The trial court erred in entering summary judgment on his wife's wrongful death action where the personal injury action was not barred.

ARGUMENT[2/]

I. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DETERMINE THAT IT DOES NOT HAVE JURISIDICTION TO RESOLVE THE CERTIFIED QUESTION IN THIS CASE.

This Court should exercise its discretion and deny jurisdiction in this case. The Third District has a certified a question in two cases. Although the facts of Meehan present the issue, Petitioners who sought review in Meehan did not do so in a timely fashion.[3/] And the certified question will not resolve Nance.

2/ In addition to the arguments presented here, NANCE adopts and incorporates the arguments presented by Carmella Meehan in case no. 66,937.

3/ When the Third District issued its original panel opinion in Meehan, Defendants timely moved for rehearing and for rehearing en banc. The court granted rehearing en banc. However, there was no majority and therefore the panel opinion, as revised, remained as the opinion of the court. 466 So.2d at 1103-04; Fla.R. App.P. 9.331(a)("In the event of a tie vote, the panel decision of the district court shall stand as the decision of the court"). The Third District issued that opinion on rehearing en banc on Feb. 5, 1985. Defendants filed a second motion for rehearing and a motion for certification within 15 days of the rehearing opinion. They did not file for review in this Court until April 25, more than 30 days after the order on rehearing en banc. The petition for review in this Court is not timely because the second motion for rehearing was not authorized and did not toll the time for seeking review. Fla.R.App.P. 9.020(g)(defining rendition as including the time for ruling on an "authorized" motion for rehearing); Fla.R.App.P. 9.330(b)("A party shall not file more than one such motion [for rehearing] with respect to a particular decision"). See generally State v. Kilpatrick, 420 So.2d 868 (Fla. 1982)(filing of unauthorized motion for rehearing did not toll time for seeking review in Supreme Court); Merchants Nat'l Bank v. Grunthal, 39 Fla. 388, 22 So. 685 (1897)("[A] second application for the rehearing of a cause in this court by the same party, and upon the same grounds as a former application that has been considered and denied, is not permissible, and cannot properly be entertained"). Cf. Dade Federal Savings & Loan Ass'n, 403 So.2d 995, 999 (Fla. 1st DCA 1981)(in response to argument that second motion for rehearing not permissible, court held that (footnote continued)

The certified question itself answers whether this Court should review this case. The Third District asked whether an action which was barred in another state "because that state does not recognize postponement of accrual until discovery" could be maintained in Florida. The question has nothing to do with this case. Mr. Nance was injured in Virginia. Virginia adopted a rule in 1981 which delayed the time at which a cause of action arose. Locke v. Johns-Manville Corp., 275 S.E.2d 900 (Va. 1981). Under Locke, the statute of limitations does not commence until the plaintiff's injury manifests itself. The record in this case shows that Mr. Nance's injury manifested itself in 1976 in Florida.[4/] Therefore, under Virginia law, the cause of action arose in Florida.[5/]

Defendants claim that Locke did not adopt a discovery rule. They also claim that even under Locke, Nance's personal injury

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second motion could be entertained because court wrote new opinion on rehearing which "change[d] the entire basis for our previous ruling" and therefore constituted a new opinion subject to a second rehearing).

4/ Defendants do not deny this. Both GAF and OWENS CORNING in effect admit that if Locke applies here, the cause of action arose in Florida because they admit that the disease was first diagnosed when Mr. Nance was already living in Florida. Nance/Owens Corning's brief at 13-14 (statute of limitation begins to run from date of injury; "arguably, in the instant case, the Virginia statute of limitations would not begin to run until diagnosis . . ."). The 1976 date governs because this is an appeal from a summary judgment. But see Nance/GAF's brief at 8-9 (Mr. Nance's claim accrued when he was injured, no later than 1975).

5/ This result differs from the result in Meehan where the New York courts did not recognize a discovery rule and therefore presented a clear difference in result between the application of Florida law and the application of the law of another state.

action would have been barred. Defendants' claims should be rejected because they incorrectly interpret Locke and because the issue of whether Mr. Nance's personal injury action is barred in Virginia is irrelevant. The only question is whether Virginia law, like Florida law, would conclude that this cause of action arose when the plaintiff was in Florida. See argument I, supra.

In Locke, the plaintiff developed cancer years after his last exposure to asbestos. The court held that the cancer was the injury which gave rise to his cause of action. Mere exposure or wrongful act, did not give rise to the cause of action because no injury occurred then and therefore no cause of action accrued. The court based this conclusion on its initial finding that the statute of limitations could not run on a cause of action which had not yet accrued and a cause of action does not accrue until all its elements, including injury, are present.

> We construe the statutory word "injury" to mean positive, physical or mental hurt to the claimant, not legal wrong to him in the broad sense that his legally protected interests have been invaded. Thus, the running of the time is tied to the fact of harm to the plaintiff, without which no cause of action would come into existence; it is not keyed to the date of the wrongful act, another ingredient of a personal injury cause of action.

275 S.E.2d at 904. The court reviewed the medical evidence and found that no injury arose at the time the plaintiff was exposed to asbestos: "Simply put, legally and medically there was no injury upon inhalation of defendants' asbestos fibers." Id. at 905. The court held that there was a question of fact as to when

the statute of limitation ran on the plaintiff's personal injury action.

> [W]e hold the plaintiff's injury was not sustained and the cause of action did not accrue in 1972 or before . . . . We further hold the cause of action accrued and the statute of limitations began to run from the time plaintiff was hurt. The "time plaintiff was hurt" is to be established from available competent evidence, . . . that pinpoints the precise date of injury with a reasonable degree of medical certainty.
>
> Under the scant evidence in this case, the foregoing point in time would coincide with either the November 1977 date when plaintiff first experienced impairment of lung function or the date of the May 1978 X-ray when a lung abnormality was noted.
>
> * * *
>
> Here, . . . there was no injury at the time of the wrongful act. A disease like this cancer must first exist before it is capable of causing injury. To hold otherwise would result in the inequity of barring the mesothelioma plaintiff's cause of action before he sustains injury.

Id. at 905, 906.

No Petitioner addresses the issue of whether Virginia law would find that the claim arose in Florida. All Petitioners ignore it. They simply argue that application of Virginia law means that the personal injury action was untimely under Virginia law. That point is true but irrelevant since application of Virginia law simply means the cause of action did not arise in Virginia. E.g., Nance/Celotex's brief at 7-8; Nance/Owens Corning's brief at 13-14; Nance/GAF's brief at 8-9.

In sum, under Virginia law or Florida law, Mr. Nance's cause

of action for personal injury arose in Florida. The certified question is premised on the assumption that the cause of action arose in the foreign state and was barred in that state. That premise is inapplicable to NANCE. This Court should not decide a case where the question certified does not present an actual controversy, and will not resolve the cause before it. This Court is not bound by the Third District's statement that this question is of great public importance. This Court should exercise its discretion, determine the certified question is not of great public importance and deny review. Compare Bailey v. Hough, 441 So.2d 614 (Fla. 1983)(court looked to whether actual conflict existed, although district court certified conflict); Davis v. Mandau, 410 So.2d 915 (Fla. 1982); Petrik v. New Hampshire Ins. Co., 400 So.2d 8 (Fla. 1981)(court would not review certified question where affected party did not seek review).

II. THE THIRD DISTRICT CORRECTLY INTERPRETED FLA.STAT. § 95.10 IN ACCORDANCE WITH FLORIDA LAW AND HELD THAT A CAUSE OF ACTION IN TORT ARISES IN THE STATE WHERE PLAINTIFF KNEW OR SHOULD HAVE KNOWN OF AN INVASION OF HIS LEGAL RIGHTS.

If this Court determines that it will exercise jurisdiction and review this case, this Court should answer the certified question in the affirmative and hold that NANCE may maintain her wrongful death action in Florida. The certified question in this case is no more than a restatement of the Florida borrowing statute, Fla.Stat. § 95.10. That statute states:

> When the cause of action arose in another state or territory of the United States, or in

> a foreign country, its law forbids maintenance of the action because of lapse of time, no action shall be maintained in this state.

To answer the certified question, this Court has to determine: (1) whether Florida law, or the law of a foreign state, determines the meaning of "arose" as used in the Florida statute; (2) if Florida law applies, whether "arose" means discovery of the injury caused by negligence or merely occurrence of injury, as Defendants claim; and (3) if foreign law applies, whether "arose" means discovery of injury or simply the wrongful act.[6/]

a. Statute of Limitations Choice of Law: Procedural or Substantive?

The initial question is the choice of law in interpreting the Florida borrowing statute, Fla.Stat. § 95.10. Meehan, 466 So.2d at 1101; Meehan/Celotex's brief at 10.[7/] The Third Dis-

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6/ This brief does not address the arguments presented by amicus National Gypsum. The premise of National Gypsum's brief is that this Court's decision in Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972) is wrong; a cause of action does not arise where the last act occurs. National Gypsum's brief at 1-2, 4, 21. National Gypsum ignores Fla.Stat. § 95.031 in its zeal. No party has raised this issue at any point during the five years that the Nance case has been pending. And the narrow focus of this attack by a party who really has no interest in this litigation seriously impairs the credibility of its arguments. Colhoun is not the only decision to fall under National Gypsum's knife. Decisions from other courts which do not "comport" with National Gypsum's concept of what the law should be suffer a similar fate. E.g., National Gypsum's brief at 39-40, criticizing Mitchell v. United Asbestos Corp., 426 N.E.2d 350 (Ill.Ct.App. 1981). National Gypsum wants this Court to rewrite a substantial body of law in Florida and throughout the country and to rewrite two Florida statutes. Its position should be summarily rejected.

7/ Not all Defendants agree. Some Defendants such as GAF ignore the choice of law issue and simply apply the law of the foreign jurisdiction. Nance/GAF's brief at 7; Meehan/GAF's brief at 7-
(footnote continued)

trict held in Meehan that this issue was procedural, or remedial, and therefore interpretation of the Florida statute was governed by Florida law, the law of the forum. It rejected Defendants' proffered application of the substantial contacts test in Bishop v. Florida Specialty Paint Co., 389 So.2d 999 (Fla. 1980).

> It is clear that the borrowing statute is triggered only upon a finding that the cause of action arose in another state. Because Florida's borrowing statute is considered to be purely procedural, Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972); Pledger v. Burnup & Sims, Inc., 432 So.2d 1323 (Fla. 4th DCA 1983), rev. denied 446 So.2d 99 (Fla. 1984), the determination of where a "cause of action arose" is made in accordance with the law of the forum state, (here Florida), Colhoun, 265 So.2d 18; Pledger, 432 So.2d 1323, see Farris & Co. v. William Schluderberg, T.J. Kurdle Co., 141 Fla. 462, 193 So. 429 (1940), rather than New York, the state apparently deemed by the trial court to have the most significant relationship to the occurrence and to the parties.

466 So.2d at 1101-02. The court adopted the Fourth District's decision in Pledger v. Burnup & Sims, Inc., 432 So.2d 1323 (Fla. 4th DCA 1983).[8/] Pledger held that Bishop applies only to choice of law on the substance of a claim. Fla.Stat. § 95.10 governs

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9. OWENS CORNING also ignores the issue. But for the most part, it assumes that Florida law applies by citing Florida decisions concerning statutory interpretation and the meaning of the word "accrue". Nance/Owens Corning's brief at 6-7, 10-11.

8/ National Gypsum also argues that the substantial contacts test is the wrong rule to apply to a borrowing statute. National Gypsum's brief at 36. NANCE agrees with and adopts that basic position. However she reaches the opposite conclusion because NANCE, unlike National Gypsum, accepts the continued vitality of this Court's decision in Colhoun, that the "last act" determines "when" and "where" a cause of action arises.

the procedural issue of statutes of limitation.

> The language of Section 95.10 is as clear today as it was in 1968 or in 1872. We have no indication that the legislative intent has changed. The language of Restatement (Second) § 145, as adopted in Bishop, clearly refers to rights and liabilities, not to remedies. That is, Bishop determines which state's substantive law will apply, notwithstanding where the cause of action accrued. We decline to "give a strained construction to evade the effect" of the statute in the absence of a statement of legislative will or a ruling by our Supreme Court.

432 So.2d at 1331. Compare Burroughs Corp. v. Suntogs of Miami, Inc., ____ So.2d ____ (Fla. 1985), 10 FLW 370, 371 ("[W]e do not consider the protections offered by a statute of limitations to be fundamental to a legal system").

The Pledger analysis is correct. This Court, like the courts throughout the country, has consistently treated statutes of limitation as remedial. See, e.g., Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972); Van Deren v. Lory, 87 Fla. 422, 100 So. 794 (1924). See generally 10 Fla.Jur.2d Conflict of Laws § 47 (statutes of limitation are traditionally considered procedural matters and therefore the limitation law of the forum applies). A forum applies its own statute of limitation to a claim, unless a compelling reason exists not to do so. It therefore follows that the forum state should also apply its own analysis of the statute of limitation.[9/]

9/ This Court should therefore reject the argument that the Restatement mandates a different result. Meehan/Celotex's brief at 9, quoting Restatement (Second) Conflict of Laws § 142, comment (footnote continued)

This Court should adopt the decision in Pledger, as followed by Meehan. The statute of limitation choice of law issue is procedural. It is not affected by the substantial contacts test adopted in Bishop. Florida law determines where the personal injury action arose for purposes of the statute of limitation.[10/]

b. Where Did the Personal Injury Cause of Action Arise: Place of Wrong or Place of Discovery of Injury?

The Third District held in Meehan and Nance that the cause of action arises where the last act necessary to establish liability occurred.

> Under the thus applicable Florida law, a cause of action in tort "arises in the jurisdiction where the last act necessary to establish liability occurred." Colhoun v. Greyhound Lines, Inc., 265 So.2d at 21.

Meehan, 466 So.2d at 1102. See also Nance, 466 So.2d at 1115. See generally Fla.Stat. § 95.031(1)("A cause of action accrues when the last element constituting the cause of action occurs"). It further held that discovery of the injury was the last element of the cause of action.

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f. That comment rather vaguely refers to the use of the foreign state's rules "which bear upon the question [of] whether the foreign statutory period has run". That does not necessarily mean that the foreign state's law should be used in determining the meaning of the word "arose" in the forum state's statute. Rather, it is just as logical to conclude that the forum state should simply use the foreign state's law after the forum state determines, pursuant to its own law, where the cause of action arose.

10/ If this Court rejects Pledger and determines that Virginia law governs, this Court should still determine that the cause of action here arose in Florida and, therefore, that the Florida four year statute of limitation applies, for the reasons stated in argument I, supra.

> Although it is plausibly argued by the defendants that we must distinguish between where a cause of action arises (said by them to be the place where the claim originates) and when the cause of action accrues (said by them to be the time when the statute of limitations begins to run) and that discovery of the existence of a cause of action is relevant only to the latter inquiry, our examination of Florida case law discloses that no such distinction has ever been made and that, to the contrary, the terms "arise" and "arose" have consistently been used interchangeably with the terms "accrue" and "accrued". [footnote and numerous citations omitted]. Indeed, in the face of this case law, assumed to be known by the legislature, [citations omitted], the legislature, in 1975, revised Chapter 95, including Section 95.10, and not only made no effort to distinguish between these terms, but instead reinforced their equation by defining accrue as occurring "when the last element constituting the cause of action occurs", § 95.031(1), Fla.Stat. (1975), a definition which is substantially the same as the definition of arise . . . found in Colhoun. 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, [citations omitted], 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. [footnotes omitted].

466 So.2d at 1102.

Defendants claim here, as they claimed in the Third District, that a personal injury cause of action arises where the first injury occurs, i.e., where the plaintiff was exposed to as-

bestos. They state that Mr. Nance's cause of action for personal injury arose in Virginia and is governed by the Virginia statute of limitation because he was exposed to asbestos in Virginia and it first "injured" his lungs there. They claim that discovery is not an element of the cause of action and therefore the place of discovery does not determine where the cause of action "arose". This argument must be rejected because, as the Third District correctly held, its underlying premise ("[t]he plaintiff's subjective awareness of the claim is not an element of the cause of action," Nance/Owens Corning's brief at 9), is contrary to Florida law. See Meehan/GAF's brief at 12-14; Nance/Owens Corning's brief at 10; Nance/GAF's brief at 15. The courts of this state have consistently held that discovery is an element of the cause of action. They have consistently held that a cause of action accrues or arises when the injury is discovered. And it would be illogical to conclude that the answer to "where" a cause of action arises differs from the answer to "when". Therefore, for the reasons stated by the Third District in Meehan and the following additional reasons, this Court should find that a cause of action arises "where" and "when" a plaintiff discovers the negligence or the injury caused by the negligence.

This Court has already determined "where" a cause of action arises. A cause of action sounding in tort arises in the jurisdiction where the last act necessary to establish liability occurred. Colhoun v. Greyhound Lines, Inc., 265 So.2d 18, 20 (Fla. 1972). See also Westerman v. Sears, Roebuck & Co., 577 F.2d 873,

878 (5th Cir. 1978)(Florida resident who died in Texas had cause of action under Texas wrongful death act where death occurred and cause of action accrued in Texas). Defendants claim that Colhoun is factually distinguishable. But the Florida decisions which determine "when" a cause of action arises are consistent with the result in Colhoun.

Where a person is exposed to a dangerous condition, but does not suffer injury until a later date, his cause of action does not arise, or accrue, until the injury is discovered or death occurs. Moore v. Morris, ____ So.2d ____ (Fla. 1985), 10 FLW 336 (although parents knew baby suffered injury at birth, statute of limitation did not begin to run until the parents knew or should have known that injury was caused by negligence); Nardone v. Reynolds, 333 So.2d 25, 32 (Fla. 1976); City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954); Lipshaw v. Pinosky, Pinosky, P.A., 442 So.2d 992, 993-94 (Fla. 3d DCA 1984)("Plainly, this action accrued when . . . the medical misdiagnosis sued upon was actually discovered . . ."); Lewis v. Associated Medical Institutions, Inc., 345 So.2d 852 (Fla. 3d DCA 1977). See also St. Francis Hospital v. Thompson, 31 So.2d 710 (Fla. 1947); Walker v. Beech Aircraft Corp., 320 So.2d 418 (Fla. 3d DCA 1975); Fletcher v. Dozier, 314 So.2d 241 (Fla. 1st DCA 1975). Cf. 22 Am.Jur.2d Death § 277 at 798 ("Numerous decisions support the rule that the question whether a cause of action exists must be determined by the law of the place of fatal injury").

In Lewis, the plaintiff was exposed to hepatitis through a

blood transfusion. He contracted hepatitis at a later date. A certain statute applied to causes of action which arose after its effective date. The exposure occurred before the effective date; the injury occurred after that time. The Third District concluded that the cause of action only arose at the the time of injury, not at the time of exposure.

> The Supreme Court of Florida determined . . . that the material date in determining the applicability of the above-quoted section . . . is the time the "cause of action arose." Plaintiff's argument that the proper date for the applicability of the statute should be the time of the commission of the tortious act, [citations omitted] is, therefore, without effect. In the recent case of AB CTC v. Morejon, 324 So.2d 625 (Fla.1975), the Supreme Court of Florida held that the cause of action does not accrue until the breach of warranty in the form of a defective product is, or should be, discovered.

345 So.2d at 853-54.[11/]

In St. Francis Hospital, this Court also addressed this question. The issue raised was whether the statute of limitation began to run at the time the wrongful act occurred or at the time of the death. The court concluded that it began to run on the date of death because that the time when the cause of action accrued. The death was the last element of the cause of action.

Plaintiff/Appellee's cause of action is depen-

11/ This decision is simply an example of Judge Pearson's remark in Meehan that the Florida courts have used the terms "arise" and "accrue" interchangeably. 466 So.2d at 1102. See also Overland Constr. Co., Inc. v. Sirmons, 369 So.2d 572, 574, n.10 & 575 (Fla. 1979)(court speaks interchangeably of when a right of action "arises" and when a cause of action "accrues").

> dent on death and it is our conclusion that it was the intent of Section 95.11, F.S.A., to limit that commencement of the action from the time of the accrual of the plaintiff's cause and plaintiff's cause accrued on death. . . . Plaintiff's cause of action did not accrue by reason of the wrongful act alone. It took a wrongful act and death to give plaintiff a cause. The statute of limitations commenced to run upon death.

31 So.2d at 711.

Defendants propose that there should be a different meaning accorded to the word "arise" when looking to the issue of "where" a claim arises, as opposed to "when". They claim that the plain meaning of the word "arise" is different from the word "accrue". Defendants rely heavily on the decisions which interpret the venue statutes.[12/] Nance/Owens Corning's brief at 10-11; Meehan/Celotex's brief at 14-15; Meehan/GAF's brief at 20-23, citing Gaboury v. Flagler Hospital, Inc., 316 So.2d 642 (Fla. 4th DCA 1975). This Court should find that the venue decisions are inapplicable in interpreting the borrowing statute. At the least, the analysis of decisions such as Gaboury is contrary to St. Francis Hospital.

In Gaboury, a woman became ill while driving through the state. She sought treatment from the defendant doctor at the defendant hospital and was released. She drove to another county

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12/ Defendants also rely on "squibs" of definitions found in 4 Words and Phrases, Arise at 19-24. Nance/Owens Corning's brief at 8. And the "squibs" on which Defendants rely are definitions of "accrue" and "arise" from other states. It is unnecessary to look to the law of other states, however, in determining the law of this state and this legislature.

where she died. The plaintiff filed a wrongful death action in the county where the woman died. The trial court transferred the case to tthe county where the woman was originally treated. The court determined that the cause of action accrued in that county because that was "the place where the act creating the right to bring an action occurred." 316 So.2d at 644. It distinguished St. Francis Hospital on the ground that this Court had determined "when" in the context of a statute of limitation and the Gaboury court was determining "where" in the venue context.

Gaboury itself speaks of a cause of action accruing "when a tort is complete". But as the Third District pointed out in Meehan, and in Lipshaw v. Pinosky, supra, a tort is complete when the plaintiff knew or should have known of his cause of action or an invasion of his legal rights. The Third District correctly harmonized Gaboury and its progeny with Meehan. Gaboury held that "when a tort is complete in a particular county, the cause of action is deemed to have accrued there so as to fix venue". Meehan, 466 So.2d at 1103, n.4, quoting Gaboury, 316 So.2d at 644. But,

> "a tort is complete" only when the plaintiff knew or should have known of his right to a cause of action or an invasion of his legal right. City of Miami v. Brooks, 70 So.2d 306 (Fla.1954).

466 So.2d at 1103, n.4. In Gaboury, the tort was complete in the county in which the malpractice occurred, rather than the county where the plaintiff died, because that was where the plaintiff's personal injury action became complete. A different result en-

sues here. The Third District correctly rejected Defendants' reliance on the venue cases in determining when and where a cause of action arises for statute of limitation purposes.

A simple example illustrates the fallacy in Defendants' analysis. According to Defendants' interpretation of the word "arose", a cause of action arises in the jurisdiction where the wrongful act occurred. Therefore if a manufacturer makes a defective product in another state, ships it to Florida and it blows up here, killing a Florida resident, the cause of action for wrongful death "arose"in the other state and is governed by that state's wrongful death act and statute of limitations. Obviously that result was not intended by the legislature when it drafted § 95.10. Compare Fla.Stat. § 48.193(f) (Florida court has jurisdiction over nonresident manufacturer where product manufactured out of state and injury caused in state).

In response, Defendants posit another example. They claim that a party who obtains a diagnosis while visiting another state will be bound to that state's statute of limitation because the plaintiff "discovers" his injury in the other state, even if that state has no interest in the cause of action. Nance/Celotex's brief at 12-13. That is not the result NANCE proposes. The issue is the plaintiff's state of residence at the time of discovery, not the state of a temporary visit. This analysis maintains a realistic and concrete relationship between the injured party and the law of the state of discovery.

This Court should affirm the Third District's conclusions in

Nance and Meehan that a cause of action for personal injury in a products liability action arises where, and when, the plaintiff discovers or should have discovered his cause of action. Mr. Nance timely filed his personal injury action within four years of the time he discovered his personal injury claim in Florida. His personal representative therefore had a valid cause of action for wrongful death in Florida.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court to affirm the decision of the Third District Court of Appeal.

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