orig.

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,938

THE CELOTEX CORPORATION, et al.,

Petitioners,

v.

JEAN NANCE, as Personal Representative of the Estate of E. S. Nance,

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

> 95.10 Cause 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, Meehan v. The Celotex Corp., 466 So.2d 1100, 1107 (Fla. 3d DCA), rev. granted, No. 66,937 (Fla. April 29, 1985) ("Meehan"), 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 January 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. 795-800).[1/] Plaintiff's motion for rehearing filed January 27, 1981 (R. 778-782) was denied (R. 786-787).

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.

The Third District Court of Appeal, after an en banc rehearing, reversed the Summary Judgment and remanded for further proceedings. 466 So.2d at 1115. On Motion for Rehearing, the court certified the identical question to this Court as it did in Meehan, infra p. 4. Id. at 1115.

The Third District issued its Original Opinion in Meehan on November 15, 1983, Meehan v. The Celotex Corporation, ___ So.2d ___, 8 F.L.W. 2728 (Fla. 3d DCA 1983), withdrawn, 466 So.2d 1100 (Fla. 3d DCA Feb. 5, 1985), reversing the summary judgment because 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 his suit, and remanded 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 in which it overruled 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 in Meehan 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 in Meehan 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?

See Nance v. Johns-Manville Sales Corp., 466 So.2d 1113, 1115 (Fla. 3d DCA) rev. granted, No. 66,938 (Fla. April 29, 1985) (App. 1).

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 Jean Nance ("Nance" or "Plaintiff") is the widow and personal representative of the Estate of E.S. Nance ("Mr. Nance"). Petitioners, including GAF Corporation ("GAF"), allegedly manufactured the asbestos-containing products to which Mr. Nance was exposed, and were Defendants in Mr. Nance's original Complaint.

Mr. Nance's only exposure to asbestos was while he worked in Norfolk Navy Yard, Portsmouth, Virginia between the years 1940 and 1945. (App. 9). The record does not indicate when Mr. and Mrs. Nance moved to Florida. In November, 1975 Mr. Nance started experiencing pains and difficulty in breathing (App. 6) and in May, 1976 was diagnosed as having asbestosis and mesothelioma. (App. 7-8) He commenced an action for personal injury on March 28, 1980, but passed away on August 19, 1980. Jean Nance as personal representative of her husband's estate was substituted as Plaintiff and on September 10, 1980 filed the second amended complaint for wrongful death.

GAF is a Delaware corporation whose principal place of business is in New Jersey. The acts of GAF of which Nance complains arise from the alleged delivery of asbestos-containing products into Virginia 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 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 Virginia law Mr. Nance'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. NANCE FROM MAINTAINING A CLAIM IN FLORIDA BECAUSE HIS CLAIM AROSE IN VIRGINIA UPON EXPOSURE TO ASBESTOS FROM 1940 TO 1945 AND WAS BARRED BY VIRGINIA'S STATUTE OF LIMITATIONS

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. Nance therefore should be as follows:

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

A. Yes. Mr. Nance worked in the Norfolk Navy Yard where he inhaled asbestos fibers which became imbedded in his lungs and caused the original injury to his body. There is no evidence (nor any allegation) that he was exposed to any of Defendants' asbestos products outside of Virginia. Mr. Nance could have maintained an action on this tort in Virginia. There is no genuine issue as to the fact that Mr. Nance had a tort cause of action in Virginia from his exposure to and inhalation of asbestos fibers from 1940 through 1945.

Q. Does Virginia's limitations laws bar Nance's action in Virginia?

A. Yes. The trial court correctly held that Virginia's two-year statute of limitations would bar Nance's action in Virginia. The statutes provide:

> Unless otherwise provided by Statute, every action for personal injuries, whatever the theory of recovery . . . shall be brought within two years next after the cause of action shall have accrued.

Va. Code § 8.01-243(A) (1977 Supp.).

> In every action for which a limitation period is prescribed, the cause of action will be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person, . . . and not when the resulting damage is discovered. . . .

Va. Code § 8.01-230 (1977 Supp.).

Locke v. Johns-Manville Corp., 221 Va. 951, 275 S.E.2d 900, 905-906 (Va. 1981) holds that a plaintiff's cause of action for injuries resulting from exposure to asbestos will accrue and the statute of limitations begins to run when the injury occurs, such date to be established with a reasonable degree of medical certainty. The Virginia Supreme Court specifically rejected adopting a "discovery rule", which it said "must be accomplished by the General Assembly." 275 S.E.2d at 905. Even assuming, arguendo, that this interpretation of Virginia's limitations law applies to Nance, her claim would still be barred under the Virginia limitations statutes. Mr. Nance's cause of action

accrued for limitations purposes when the asbestos fibers injured his lungs, which under Locke would have occurred no later than his experiencing pains in November, 1975. Id. at 905. Under the two-year Virginia limitations period, therefore, Mr. Nance's claim was already barred when it was filed in March, 1980.

Because the answers to the above two questions are "yes", Nance's action is barred under the Borrowing Statute in Florida. Mr. Nance had a cause of action in Virginia; Virginia law bars Mr. Nance's claim; and the Borrowing Statute therefore bars Nance's claim in Florida.

To avoid unnecessary duplication of argument for review by this Court, GAF Corporation adopts its brief in The Celotex Corporation v. Meehan, No. 66,937. The argument in all respects except as otherwise set forth herein applies to Nance as fully as it does to Meehan.

There is no authority for creating a hybrid limitations period which adds Florida's "discovery" rule to the Virginia limitations statute. Mr. Nance's claim therefore was properly barred. As Mr. Nance's claim was barred, Nance 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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The Celotex Corporation v. Jean Nance
Case No. 66,938

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