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, THIRD DISTRICT OF FLORIDA AS A QUESTION OF GREAT PUBLIC IMPORTANCE

MAIN BRIEF ON THE MERITS OF PETITIONER, OWENS CORNING FIBERGLAS CORPORATION

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INTRODUCTION

This brief is filed on behalf of petitioner, Owens Corning Fiberglas Corporation ("Owens Corning"), a defendant in the trial court, and an appellee in the District Court of Appeal, Third District. In this brief, the respondent (appellant in the district court and plaintiff in the trial court), Jean Nance, will be referred to as "Nance", the decedent, E.S. Nance, as "Mr. Nance", and the petitioners will be referred to collectively as the defendants. The designation "R." will be used to refer to the record on appeal. References to the appendix to this brief (which contains the district court opinion and certification) will be designated "A."

STATEMENT OF THE CASE AND FACTS

Mr. Nance, the decedent, was allegedly exposed to asbestos while working in a shipyard in Virginia from 1940 to 1945 (A. 2; R. 284-290). The only known exposure of Mr. Nance to asbestos occurred during the period while he was employed at the Norfolk Shipyard at Portsmouth, Virginia (R. 89). The complaint, as amended, alleged that Mr. Nance's exposure to asbestos caused him to develop asbestos-related illnesses, which ultimately resulted in his death in Florida (R. 11-12, 287). The symptoms of the diseases began in November, 1975, and in May, 1976 Mr. Nance was diagnosed as having asbestosis and mesothelioma (R. 205, 206, 216; A. 2).

The original complaint in this case was filed in April, 1980, by E.S. and Jean Nance, against twenty-two corporate defendants, including Owens Corning (R. 1-8). On August 19, 1980, Mr. Nance died (R. 283), and a second amended complaint was filed shortly thereafter by Nance, as personal representative of the estate of Mr. Nance. While based upon the same facts and circumstances as the original and amended complaints (R. 9-15), this complaint asserted a cause of action for wrongful death.

A motion filed by The Celotex Corporation for summary judgment on statute of limitations grounds was joined in by all defendants[1/] (R 795). In the final summary judgment which

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1/ It should be noted that at least five defendants, including Owens Corning, filed motions to dismiss or for summary (cont'd)

formed the basis of the appeal to the district court, the trial court recited the following undisputed facts:

> 1. That the only exposure to the Plaintiff's decedent to asbestos containing products occurred in Portsmouth, Virginia in the years 1940 through 1945.
>
> 2. That the original complaint in the above-styled cause was filed April 16, 1980, as a personal injury action...
>
> 3. That Plaintiff's decedent died in Florida, on August 19, 1980.
>
> 4. That the Second Amended Complaint was filed in the above-captioned cause on September 10, 1980... [R. 793].

The trial court reached the following conclusion based on the foregoing facts:

> By reason of Florida Statute 95.10, Mr. Nance's personal injury action was barred by the applicable Virginia statute of limitations and that no Florida wrongful death claim exists [R. 794].

Nance took the position on appeal that it was irrelevant whether the personal injury action was barred because the wrongful death claim was an independent cause of action and that action was timely brought within two years of Mr. Nance's death. On that point, the district court determined that a wrongful death action is derivative of the injured person's right

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judgments, with supporting affidavits, on the ground that they had not manufactured, sold, mined, or distributed any asbestos materials during the years in which Mr. Nance was exposed (R. 318-329, 461-465, 466-474, 653-655, 734-737). These motions were never argued, and remained pending at the time the trial court granted the final summary judgment, on limitations grounds.

while living to recover for personal injury, citing Variety Children's Hospital v. Perkins, 445 So.2d 1010 (Fla. 1983).

Before the three judge district court panel assigned to the case issued an opinion, the court placed the case in an en banc posture on its own motion "in order to arrive at a resolution consistent with that in the case of Meehan v. Celotex Corp., No. 82-122 (Fla. 3d DCA Feb. 5th 1985), which reached en banc status on motion of a party." (A. 1, n. 1).

The district court interpreted Florida's borrowing statute, section 95.10, which provides:

> 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.

The district court determined that a cause of action in tort "arises in the jurisdiction where the last act necessary to establish liability occurs," citing Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972), and that in cases such as the present one "this last act occurs when the plaintiff knew or should have known of his right of action." (A. 3). The court held:

> If the plaintiff knew or should have known of his right to a cause of action in Florida, then the Florida limitations provision applies; if in Virginia, then section 95.10 operates and the Virginia statute governs.
>
> Because the record does not conclusively demonstrate whether this last act occurred in Florida or in Virginia, the trial court erred

> in finding as a matter of law that the Virginia statute of limitations governed. Summary judgment was therefore improperly entered. [A. 3].

QUESTION CERTIFIED

Upon motion for rehearing, the district court certified the following question to this Court:

> 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? [A. 7].

SUMMARY OF ARGUMENT

Although a cause of action may arise where the last act necessary to establish liability occurred, the "last act" is not discovery of the cause of action. The district court has determined that discovery is an element of the cause of action. It is not. In many cases, the place where the cause of action is discovered is mere happenstance, bearing no relationship to the place of injury.

There is a distinction, overlooked by the district court, between where a cause of action arose and when it accrued. The concept of "where" a cause of action arose is analogous to the question of proper venue. Under Florida venue cases, venue is proper where the wrongful conduct occurred, not where the damage was incurred.

Borrowing statutes exist for the purpose of discouraging forum shopping. A rule which results in a cause of action "arising" for purposes of the borrowing statute in the jurisdiction where the cause of action was discovered will promote rather than discourage forum shopping.

ARGUMENT

THE TRIAL COURT WAS CORRECT IN FINDING THAT MR. NANCE'S PERSONAL INJURY ACTION AROSE IN VIRGINIA, AND THAT PURSUANT TO SECTION 95.10 FLORIDA STATUTE, AND THE APPLICABLE VIRGINIA STATUTE OF LIMITATIONS, THE PERSONAL INJURY ACTION WAS BARRED.

The district court in this case and in Meehan v. The Celotex Corporation[2/] held that the law of Florida controls the determination of whether "a cause of action arose in another state." The district court determined that a cause of action in tort arises in the jurisdiction where the last act necessary to establish liability occurred, and that the "last act necessary to establish liability ... occurs when the plaintiff knew or should have known of his right to a cause of action or an invasion of his legal right."

The authority cited for the proposition that a cause of action in tort arises in the jurisdiction where the "last act necessary to establish liability" occurred is Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972). The

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2/ Also certified by the district court.

circumstances involved in Colhoun differ substantially from the circumstances present in Meehan and in this case. In Colhoun, a bus accident occurred in Tennessee. The cause of action obviously arose where the accident occurred. Colhoun did not involve the kind of injury involved in this case - exposure to asbestos - and this Court in Colhoun did not hold that discovery of the cause of action is the "last act necessary to establish liability."

Prior to the decision in Meehan and in this case, a panel of the district court decided that, under Colhoun, if the asbestos-related injury arose in another state, the borrowing statute controls. Marano v. The Celotex Corporation, 433 So.2d 592 (Fla. 3d DCA 1983). The facts of Marano are nearly identical to the facts of Meehan and of this case. The Marano plaintiff "incurred an asbestos injury in either New York or New Jersey between the years 1943 to 1945, but, did not discover it until 1975." 433 So.2d at 592-93. The result in Marano was correct, in view of the clear language of Section 95.10. Nevertheless, the holding of Marano was receded from in Meehan.

The statute utilizes the phrase "when the cause of action arose in another state"; a basic rule of statutory construction is that words of common usage should be construed in their plain and ordinary sense. Carson v. Miller, 370 So.2d 10 (Fla. 1979); Tatzel v. State, 356 So.2d 787 (Fla. 1978). The word "arose" should thus be interpreted according to its plain

and ordinary meaning. Black's Law Dictionary (Rev. 4th ed. at p. 138) defines "arise" as follows:

> To spring up, originate, to come into being or notice, to become operative, sensible, visible, or audible; to present itself.

The term "accrue" is distinguished. That term means "to result, to add, to acquire, to receive, to benefit." Id. See also, 4 Words and Phrases, "Arise" at p. 19-24, in which the vast majority of the cited cases define arise as above; that is, to "spring up", "originate", "emanate", "stem". For example:

> Cause of action "arises" at time when and place where act is unlawfully omitted or committed. State ex rel. Birnamwood Oil Co. v. Shaughnessy, 10 N.W. 2d 292, 295, 243 Wis. 306 [4 Words and Phrases at 21].

> The terms "arise" and "accrue" are not synonymous; the former being used in the sense to "begin, mount, appear, happen, proceed from, exist," and the latter signifying "result, add, acquire, receive, benefit." A cause of action "arises" when the obligation was created which gave rise to a right of action as such right "accrued" thereon. Roques v. Continental Casualty Co., 135 So. 51, 52, 17 La.App. 465. [Id. at 20].

The decision in this case overlooked the distinction between (1) where a cause of action arises, and (2) when a cause of action accrues, the former being the place where the claim originated and the latter being the time when the statute of limitations begins to run. The district court opinion incorrectly equates where the cause of action arose (the relevant inquiry under section 95.10) with when the plaintiff knew or

should have known of his cause of action, which relates to the time when the statute of limitations commences to run.

There is no doubt that in determining when a plaintiff may bring suit, and when a plaintiff is barred by the statute of limitations, the relevant inquiry is when the cause of action accrued. Under Florida law, the cause of action accrues for statute of limitations purposes when the plaintiff discovers or should have discovered the cause of action. However, the time when and the place where the plaintiff discovers the cause of action is not relevant to the inquiry of where the cause of action arose. The plaintiff's subjective awareness of the claim is not an element of the cause of action. Yet the district court opinion elevates knowledge to that status.3/

A plaintiff could conceivably discover that he has a claim while on vacation in a state, or even a country, with which the plaintiff has no relationship other than the fact that it is the place where he chose to vacation. This example demonstrates the fundamental error in the district court's analysis that "discovery" is an essential element of a cause of action in tort. That assumption enabled the court to conclude that a cause of action arises in the jurisdiction where the "last act

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3/ In most cases, of course, the plaintiff will have knowledge of the claim prior to suit being brought. But that is not necessarily so. For example, a member of a class may not know he has a claim, but that does not mean that an element of his cause of action is lacking. His claim may still be asserted by the class representative.

necessary to establish liability" occurred, which must, under the district court's reasoning, be "discovery" of the cause of action.

As a practical matter, a complaint will normally be filed only after the cause of action is discovered. It is this very practical consideration which resulted in the rule adopted in this state that the statute of limitations does not begin to run until the cause of action is, or in the exercise of reasonable care should be, discovered. Discovery is not, however, an element of the cause of action. It need not be alleged; it need not be proved; a defendant is not entitled to judgment if he can show that the plaintiff has not yet discovered the cause of action.

Because the issue here is where the cause of action arose, cases involving venue are analogous. For venue purposes, a cause of action in tort arises at the place where the act creating the right to bring the action occurred. Straske v. McGillicuddy, 388 So.2d 1334, 1336 (Fla. 2d DCA 1980).

In Gaboury v. Flagler Hospital, Inc., 316 So.2d 642 (Fla. 4th DCA 1975), the court held that venue was proper in St. Johns County where the alleged acts of medical malpractice occurred, rather than in Orange County, where the patient died. Even though the cause of action was for wrongful death, it was not the death that was relevant in determining where the cause of action arose or accrued.

> [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. 56 Am.Jur., Venue, §34 (1947). (emphasis in original) [316 So.2d at 644].

The court in Gaboury also distinguished between when a cause of action accrued for statute of limitations purposes and where the cause of action arose for venue purposes.

> 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. (citation omitted). This does not fix the place where the action "accrued" which is the material aspect of venue. (emphasis in original) [316 So.2d at 644-45].

See also, Hammond v. Potito, 197 So.2d 40 (Fla. 2d DCA 1967) (venue in malicious prosecution action is where the cause of action arose--the county where the acts of defendants occurred, not the county in which plaintiff was arrested).

This Court should determine that a cause of action arises where the alleged wrongful acts or conduct of the defendant took place (here, in Virginia). The cause of action originates at that point.

In similar cases from other jurisdictions, the rule has been followed that the cause of action arose where the injury occurred, not where the plaintiff discovered the cause of action. In Caron v. United States, 410 F.Supp. 378 (D. R.I.

1975), aff'd, 548 F.2d 366 (1st Cir. 1976), the injurious conduct occurred in Michigan. Several years later, when the plaintiff was residing in Rhode Island, the plaintiff discovered the causal connection between her physical condition and the negligence that had been committed years earlier in Michigan (injections of excessive doses of typhoid innoculation causing convulsions which resulted in brain damage). The court in Rhode Island, based on interpretations of the Federal Tort Claims Act, applied the statute of limitations of Michigan.

Similarly, in Duke v. Housen, 589 P.2d 334 (Wyo. 1979), the Wyoming court, applying that state's borrowing statute, determined that the cause of action arose in New York because that is where the wrongful conduct and injury occurred (sexual intercourse resulting in infecting plaintiff with gonorrhea), without regard to where plaintiff happened to be when she discovered her cause of action.

Most states have adopted borrowing statutes in one form or another. The purpose is to promote uniformity of limitations periods and to discourage forum shopping. Miller v. Stauffer Chemical Co., 99 Idaho 299, 581 P.2d 345, 348 (1978); Jones v. Greyhound Bus Lines, 341 N.Y.S.2d 159, 161 (Sup. Ct. 1973). The Florida borrowing statute comes into play only when the cause of action is barred in the state where it arose, but is not barred in Florida; where the Florida statute of limitations has run, the cause of action is barred and the borrowing statute is not considered. Brown v. Case, 80 Fla. 703, 86 So. 684 (1920).

A rule which determines that a cause of action "arises" where the cause of action is discovered will not discourage forum shopping--the contrary will be accomplished. Such a result is not consistent with the rationale underlying the borrowing statutes. These principles are consistent with the premise that defendants have the right to expect that once a cause of action is extinguished by the running of the statute of limitations, it will not later be revived. Buckner v. GAF Corp., 495 F.Supp. 351 (E.D. Tenn. 1979).

This point was cogently set forth by Judge Schwartz in his dissent in Meehan as follows:

> 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.

It is clear that under Virginia law, Mr. Nance's personal injury action was barred prior to the filing of the instant action.

In Locke v. Johns-Manville Corporation, 221 Va. 951, 275 S.E.2d 900 (1981), the Supreme Court of Virginia clarified the interpretation of the Virginia statute of limitations. The Virginia court ruled that the statute of limitations begins to run from the date of injury, or damage, rather than the date of the last exposure to asbestos. Therefore, in Locke and arguably

in the instant case, the Virginia statute of limitations would not begin to run until diagnosis of the disease or until manifestation of symptoms.

Prior to the Locke case, the Virginia statutes of limitations were interpreted to commence to run at the time of the wrongful conduct. Thus, if Nance's personal injury cause of action arose in Virginia, that cause of action would have been extinguished in 1947, two years after Mr. Nance's last known exposure. The court in Locke did not specifically hold that the decision would apply retroactively, so as to revive causes of action which had previously been barred by the statute of limitations. Even if the Locke decision is interpreted to compel the revival of an extinguished cause of action, Mr. Nance's personal injury action would still have been viable for only two years. Mr. Nance was diagnosed as having asbestos-related illnesses in May 1976. Under the Virginia two year statute of limitations,[4/] therefore, Mr. Nance's claim should have been brought no later than May, 1978--it was not brought until April, 1980.

4/ The relevant statute is Va. Stat. §8.01-243(A).

CONCLUSION

For the foregoing reasons, the district court incorrectly determined that the statute of limitations of the state where the cause of action was discovered is applicable. The trial court's decision should be reinstated.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Main Brief on the Merits of Petitioner was served by mail this 20th day of May, 1985 on all counsel on the attached service list.

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