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

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

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REPLY ARGUMENT

Nance first asserts that the motion for certification in Meehan was not presented in a timely fashion (Nance Brief at p. 8). It is not clear how that assertion, even if true, affects the Nance case. It must be remembered that although Meehan and Nance were orally argued in the same en banc proceedings in the district court, and although both cases present the same fundamental question -- construction and application of Florida's borrowing statute -- the cases are nevertheless distinct. Owens Corning is not even a party in Meehan. It would therefore be inappropriate for Owens Corning to respond to Nance's argument concerning the timeliness of the motion for certification in Meehan. It would appear, however, that the motion for certification in Meehan was timely, because the en banc opinion

to which it was addressed was a new opinion, even though it reaffirmed the panel opinion because of a tie en banc vote. In any event, Nance makes no attack on the timeliness of Owens Corning's motion for certification in Nance. Thus, there is no question concerning this Court's jurisdiction in Nance.

Nance next asserts that the question certified by the district court, which was the same in Meehan and Nance, applies only to the facts of Meehan and not to Nance. Thus, Nance argues, this Court should not accept jurisdiction of the Nance case. Nance's argument should be rejected by this Court, for several reasons. First, the certified question does apply to the facts of Nance, even that part of the certified question which refers to a cause of action being barred in another state "because that state does not recognize postponement of accrual until discovery." Although the rule announced in Locke v. Johns-Manville Corp., 221 Va. 951, 275 S.E.2d 900 (1981) is characterized by Nance as a "discovery" rule, that is not accurate. The court in Locke stated that under Virginia law the statute of limitations begins to run from the date of injury, or damage, rather than the date of the last exposure to asbestos. Injury or damage would have to be proved by medical evidence, but the court stated that injury would likely occur when the disease (mesothelioma) first manifested itself or it was diagnosed, whichever occurred earlier. The court specifically declined to adopt a "discovery" rule, under which the statute of limitations

begins to run when a cause of action is discovered, or in the exercise of reasonable care should have been discovered. 275 S.Ed.2d at 905. It is therefore accurate to say that Virginia statute of limitations law does not include a "discovery" provision.

Even if this Court should determine that the language of the certified question does not accurately state the situation presented in Nance, jurisdiction should nevertheless be accepted. The district court relied on the Meehan decision in deciding Nance; since Meehan is properly before this Court, it is appropriate that Nance be decided concurrently with Meehan.

Owens Corning further submits that it is not the manner in which the certified question is worded which is important in this case, but rather, the fundamental question of the construction and application of Florida's borrowing statute to asbestos and other similar injuries. The language used by the district court in framing the certified question is not dispositive of whether, in fact, the question is one of great public importance. The fact that one clause of the certified question may not apply does not lessen the public importance of the issue presented. The slight variation between the facts of Nance and Meehan could be resolved by the Court substituting the phrase "because the action is barred in that state" for the phrase "because that state does not recognize postponement of accrual until discovery" in the certified question.

Furthermore, Owens Corning submits that the determination to be made by this Court on the merits of the borrowing statute question will be aided by the fact that two cases are presented, Meehan and Nance, which involve two different states' statutes of limitations laws. Thus, the Court will more easily be able to assess the practical effect of whatever decision is reached on the construction and application of the borrowing statute.

Owens Corning takes issue with Nance's statement that "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 Brief at p. 9, n. 4). Nance makes a similar argument throughout the brief. Apparently, Nance's argument is that because under Locke the statute of limitations does not commence until the plaintiff's injury manifests itself or is diagnosed, and because Mr. Nance's injury manifested itself in Florida, then under Virginia law, the cause of action arose in Florida. Nance's logic is interesting, but is without foundation.

First, the Locke case does not address itself to the question of whether another state's statute of limitations applies if the plaintiff's injury manifests itself while the plaintiff is residing in that other state. Second, what Nance is really proposing is the application of the renvoi doctrine; that

is, if the forum state looks to the law of another state on a particular question (here, under the borrowing statute, Florida courts would look to the limitations law of Virginia), then the analysis is continued even further by determining whether the other state's (Virginia's) courts would look to yet another state (or back to Florida) for the law on the particular question. The applicability of the renvoi doctrine is discussed in Restatement 2d, Conflict of Laws, §8. As noted in that section, the renvoi doctrine is generally not applied. Once the forum state court determines that it must apply the law of a foreign state (by virtue of the forum state's choice of law rules), that does not include consideration of the foreign state's choice of law rules. The renvoi doctrine has been repeatedly repudiated in this country. The reason for this repudiation is that application of the doctrine is likely to result in the court's pursuing a course equivalent to a never ending circle. Haumschild v. Continental Casualty Co., 7 Wis.2d 130, 95 N.W.2d 814, 820 (1959).

Owens Corning agrees that Florida law controls with respect to the interpretation of Florida statutes of limitations. Owens Corning further agrees that in interpreting Florida's borrowing statute, Florida law controls in the determination of where a cause of action arises.[1/] That is where

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1/ As pointed out in Nance's brief, the petitioners in this case do not take a consistent approach with respect to how (cont'd)

the agreement with Nance's position ends, however.

The position taken by Owens Corning, as reflected in its main brief, is twofold: (1) that discovery is not an element of a cause of action; and (2) that there is a distinction between where a cause of action arises and when a cause of action accrues (discovery being relevant to the latter inquiry only).[2/]

On page 18 of her brief, Nance states that the "courts of this state have consistently held that discovery is an element of the cause of action." Nance provides no citation of authority to support this contention. On page 19 of the brief, Nance cites a number of cases for the proposition that when 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. All of the cited cases are ones in which the courts have discussed when a cause of action accrues; that is, when the statute of limitations begins to run. That inquiry is not relevant to the issue presented in this case. The borrowing statute, after all, does not refer to where a person resides at the time his cause of

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the borrowing statute should be interpreted. Although Owens Corning obviously believes that its approach is the correct one, it would urge this Court to consider all the theories argued by petitioners and amicus curiae in rendering an opinion on this important question.

2/ Owens Corning fully recognizes that the courts of this state have sometimes used the terms "arise" and "accrue" interchangeably. Owens Corning suggests that the Meehan and Nance cases present an appropriate opportunity for this Court to clarify and correct the repeated misuse of these terms.

action is discovered, but rather, refers to the place where the cause of action arose. When one considers the underlying rationale for having a borrowing statute (see Owens Corning's Main Brief at p. 12), it becomes apparent that discovery is not a relevant inquiry in making a determination under the borrowing statute. Because the borrowing statute's purpose is to avoid forum shopping, then the district court's interpretation of the borrowing statute, which will promote forum shopping, is inconsistent with the legislative intent.

Owens Corning reiterates its position that venue cases and the principles underlying venue determinations, are relevant to the present inquiry. Nance attempts to distinguish the case of Gaboury v. Flagler Hospital, Inc., 316 So.2d 642 (Fla. 4th DCA 1975) by stating that the tort in that case 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." (Nance Brief at p. 22). This analysis of Gaboury ignores the fact that the cause of action asserted in Gaboury was not the personal injury claim, but rather, a claim for wrongful death. Furthermore, the Gaboury court did not discuss when or where the plaintiff or the plaintiff's decedent "discovered" the cause of action. It may be inferred from a reading of the opinion, however, that the cause of action (whether it be for personal injury or for death) was not "discovered" until the plaintiff died. However, the court

nevertheless held that venue was proper in the county in which the malpractice had been committed on her rather than the county in which she died.

Finally, Nance states that she proposes that the result reached in the district court be applicable only where the plaintiff resided in Florida. The district court does not so limit its holding. The basis for the district court's opinion is that discovery is an element of the cause of action. Residence has absolutely nothing to do with when or where a cause of action is discovered and residence has absolutely nothing to do with where a cause of action arises. In proposing that residency at the time a cause of action is discovered be determined, Nance implicitly recognizes the fallacy of the district court's decision. Nance makes no effort to support the district court's decision, choosing instead to suggest an alternative involving determination of residence. Unfortunately, that alternative is just as illogical and unfounded as the district court's approach. Even if it were logical to consider residence, forum shopping would not be discouraged, and the legislative intent in passing the borrowing statute would not be served.

CONCLUSION

Based upon the foregoing arguments and authorities, and those contained in the main brief of Owens Corning, the district court opinion in this case should be quashed.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief on the Merits of Petitioner, Owens Corning Fiberglas Corporation was served by mail this 26th day of August, 1985 on all counsel on the attached service list.

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