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IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,938

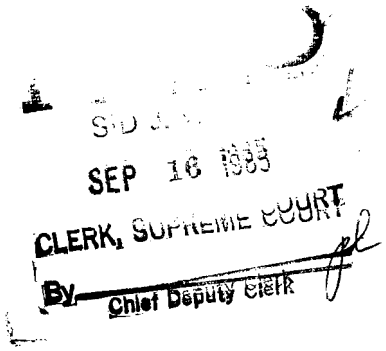
THE CELOTEX CORPORATION, et al.,

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

REPLY BRIEF ON THE MERITS
OF PETITIONER GAF CORPORATION

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ARGUMENT

Respondent Jean Nance ("Nance") in her Answer Brief generally duplicates the arguments raised in Carmella Meehan's ("Meehan") Answer Brief in The Celotex Corporation v. Meehan, Case No. 66,937, which is being considered together with this appeal.[1/] Rather than duplicate argument, and because Nance has adopted and incorporated the arguments presented by Meehan, Petitioner GAF Corporation ("GAF") adopts its Reply Brief in The Celotex Corporation v. Meehan. GAF's argument in Meehan in all respects applies to Nance as fully as it does to Meehan, except as otherwise set forth herein.

I. THE CERTIFIED QUESTION IS APPLICABLE

Nance contends at pages 8 through 12 of her Answer Brief that the certified question[2/] is inapplicable to this case, because under her interpretation of Virginia law Mr. Nance's cause of action arose in Florida, and not in Virginia.

1/ Citations to Nance's Answer Brief will be indicated parenthetically by "A.Br." followed by the page number. Citations to GAF's Initial Brief or Reply Brief in The Celotex Corporation et al. v. Meehan, will be indicated parenthetically by "GAF Initial Br.-Meehan" or "GAF Reply Br.-Meehan" followed by the page number.

2/ The Third District certified the following question to this Court for review:

> 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?

Mr. Nance was exposed to and inhaled asbestos fibers in Virginia from 1940 to 1945. Nance argues that Mr. Nance's injury did not occur until his condition was diagnosed in Florida in 1976. (A. Br. 9-10).

The issue before this Court, however, is identical to that presented in The Celotex Corporation v. Meehan, except that the plaintiffs are different and the place of exposure is Virginia rather than New York. That issue is whether Florida's Borrowing Statute operates to bar Nance's cause of action for Mr. Nance's wrongful death from the latent diseases of asbestosis and mesothelioma, when the defendants' allegedly wrongful acts and Mr. Nance's exposure to and inhalation of asbestos fibers occurred in Virginia, and the manifestation of Mr. Nance's symptoms and his death occurred in Florida.

Nance's interpretation of Locke v. Johns-Manville Corporation, 221 Va. 951, 275 S.E.2d 900 (1981), is erroneous. Locke does not adopt a discovery rule. Instead, it adopts "injury" as the event which determines the existence of a cause of action and commences the running of Virginia's statute of limitations, whether or not the injury has been discovered. In Locke, the Virginia Supreme Court held: "the cause of action accrued and the statute of limitations began to run from the time plaintiff was hurt . . . to be established from available competent evidence, produced by a plaintiff or a defendant, that pinpoints the precise date of injury with a reasonable degree of medical certainty." 275

N.E.2d at 905. The Virginia Supreme Court clearly stated that "the rule we have just articulated is not a so-called 'discovery' rule, . . ." Id.

This case, therefore, fits the scenario presented by the certified question: Nance's action cannot be maintained in Virginia, where the defendants' allegedly wrongful conduct occurred, because that state does not postpone accrual of causes of action until discovery.[3/]

II. FLORIDA'S BORROWING STATUTE IS APPLICABLE BECAUSE MR. NANCE'S CAUSE OF ACTION AROSE IN VIRGINIA AND IS NOT AFFECTED BY DISCOVERY IN FLORIDA

Nance contends Mr. Nance's cause of action arose in Florida, where Mr. Nance's injury "manifested itself". (A. Br. 9). Nance also contends Florida's courts should

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3/ The Virginia Legislature has since enacted the following statute of limitations for asbestos-related injuries:

> § 8.01-249 When cause of action shall be deemed to accrue in certain personal actions. The cause of action in the actions herein listed shall be deemed to accrue as follows:
>
> * * *
>
> 4. In actions for injury to the person resulting from exposure to asbestos or products containing asbestos, when a diagnosis of asbestosis, interstitial fibrosis, mesothelioma or other disabling asbestos-related injury or disease is first communicated to the person or his agent by a physician. However, no such action may be brought more than two years after the death of such person.

This 1985 amendment has prospective application, and does not affect the certified question as to Nance.

apply only Florida law to determine where a latent disease cause of action arises, thereby attempting to bring her case under Florida's discovery rule. (A. Br. 13-16). These contentions misconstrue the effect of the discovery rule, and erroneously apply Florida law instead of Virginia law to Mr. Nance's cause of action. Under Florida's Borrowing Statute, Mr. Nance's diagnosis in Florida had no effect on his cause of action.

It is undisputed that impact -- the harmful insult to Mr. Nance's body caused by exposure to asbestos fibers, occurred in Virginia.[4/] Mr. Nance's initial injury occurred upon exposure to and inhalation of asbestos fibers.[5/] Mr. Nance's cause of action, therefore, arose in Virginia.

4/ While New York holds as a matter of law that injury occurs upon exposure to asbestos fibers, it is not clear whether a Virginia court would make this same finding for asbestosis. If there is a genuine issue as to when Mr. Nance was injured, this Court should cause this case to be remanded to the trial court for this determination.

5/ Nance argues that under Locke, "there was no injury upon inhalation of defendants' asbestos fibers." 275 N.E.2d at 905. Locke, however, had mesothelioma, and the Virginia Supreme Court was examining the medical relationship between inhalation of asbestos fibers and the growth of a mesothelioma tumor. The court reviewed the plaintiff's proffer of medical evidence which allegedly would have established at trial that "the dates of the victim's exposures to asbestos fibers . . . bear no medical relationship to when and if a mesothelioma [tumor] will occur in that person." Id. at 902-903

Mr. Nance, however, was diagnosed as having asbestosis and mesothelioma. While Locke may establish that for mesothelioma "injury" does not occur upon exposure to asbestos fibers, Locke did not address when injury occurs for the disease asbestosis. The majority of courts addressing the

(Footnote continued)

Under Virginia law, once the tort is complete, the statute of limitations runs against all damages resulting from the wrongful acts, including damages which may not arise until a future date. Joyce v. A.C. & S., Inc., 591 F.Supp. 449 (W.D. Va. 1984). (In action for damages from asbestos diseases, Virginia statute of limitations began to

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(Footnote continued from previous page.)

question have found sufficient the clinical evidence that "injury" in cases of asbestosis occurs upon exposure to and inhalation of asbestos fibers.

Four federal circuit courts of appeals have considered when "injury" occurs under insurance policies held by manufacturers of asbestos products. The United States Fifth, Sixth and District of Columbia Circuit Courts of Appeals have concluded that the clinical evidence was sufficient to establish that asbestos causes injuries to tissues from the time the plaintiff is first exposed to the fibers, even though external symptoms may not appear for many years. Insurance Co. of North America v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), aff'd on rehearing, 657 F.2d 814 (1981), cert. denied, 454 U.S. 1109 (1981) (injury occurs upon exposure for asbestosis and mesothelioma); Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir.), cert. denied, 454 U.S. 1109 (1981); Keene Corp. v. Insurance Co. of North America, 667 F.2d 1034 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007 (1982). See Sandoz, Inc. Employer's Liability Assur. Corp., 554 F.Supp. 257, 263-64 (D. N.J. 1983). Only the First Circuit has adopted the manifestation theory. Eagle-Pitcher Industries, Inc. v. Liberty Mutual Insurance Co., 682 F.2d 12 (1st Cir. 1982), cert. denied, 460 U.S. 1028 (1983). The unique public policy considerations applicable to insurance coverage cases, i.e., to give effect to the purposes of the insurance policy, see Keene Corp., 667 F.2d at 1041, have resulted in these insurance cases being distinguished from statute of limitations cases which also address the issue of whether injury occurs upon exposure or manifestation of symptoms. Id. at 1043, n. 17. ("The [policy] considerations involved in [statute of limitations] cases have no bearing on the considerations relevant to this case."] These cases are offered, however, for their evaluation of the sufficiency of the medical evidence in support of the exposure theory.

run when plaintiff's x-rays showed injury in 1970, and plaintiff could not maintain separate actions for subsequent or future asbestos-related injuries.)

There would be no need for a "discovery rule" if the cause of action did not even exist until the injury was first discovered. Florida's discovery rule is based upon the need 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 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.

Florida's Borrowing Statute directs Florida's courts to apply the "laws" of Virginia to determine the viability of Mr. Nance'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."). The "laws" to be considered include those which might toll the running of Virginia's statute of limitations. 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), 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:

> [I]n all jurisdictions having a borrowing statute, with the exception of Ohio, not only is the specific prescriptive period utilized, but all of its accouterments as well whether in the form of additional statutory provisions or interpretive judicial decisions. Ester, Borrowing Statutes of Limitation and Conflict of Laws, 15 U. of Fla. Law Rev. 33, 57 (1962). As the court in Devine v. Rook, Mo.App. 1958, 314 S.W.2d 932, 935, has very aptly stated:

> "But when such [limitational] statute is so borrowed, it is not wrenched bodily out of its own setting, but taken along with it are the court decisions of its own state which interpret and apply it, and the companion statutes which limit and restrict its operation. This we think is the general law." (Bracketed material added, footnote omitted.)
>
> 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.

Virginia's laws do not toll the running of its statute of limitations pending discovery. Mr. Nance's discovery of his injury in Florida, therefore, had no effect on his cause of action, which was previously barred by Virginia's statute of limitations. As Mr. Nance could have only one cause of action for the injuries he suffered, Florida's Borrowing Statute must therefore bar Nance's alleged "second" cause of action.

III. NANCE MISINTERPRETS THE CASES CITED FROM FLORIDA AND OTHER JURISDICTIONS AND FAILS TO SUPPORT HER PROPOSED RESULT

Nance cites numerous cases for the proposition that "[w]here 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." (A. Br. 19). These cases, however, are distinguishable from Nance's position in this case. First, none of the cases concerns application of a borrowing statute or addresses facts suggesting that the cause of action arose outside of Florida. Second, the personal injury cases only discuss the time when a cause of action accrues for statute of limitations purposes, not the place where the cause of action arose for borrowing statute purposes. Third, the wrongful death cases are inapposite in light of 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.), and Hudson v. Keene Corporation, 445 So.2d 1151 (Fla. 1st DCA 1984), approved, 472 So.2d 1142 (Fla. 1985) (per curiam) (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.).

Nance also cites Lewis v. Associated Medical Institutions, Inc., 345 So.2d 852 (Fla. 3d DCA), cert. denied, 353 So.2d 676 (Fla. 1977), where a blood transfusion

resulted in the later contracting of hepatitis. Lewis, however, did not even reach the statute of limitations issue. It held only that the cause of action for breach of implied warranty under the Uniform Commercial Code was barred because it arose after the effective date of the statute declaring that providing blood transfusions was a service and not a sale of goods. The court held the discovery rule applicable, but no borrowing statute, or facts involving any other jurisdiction, were at issue.

Nance asserts the outcome of this case should turn on the fact Mr. Nance was a Florida resident when his condition was diagnosed in Florida. She suggests causes of action of non-residents would arise someplace else, because they would be in Florida only on a temporary visit for diagnosis of their conditions. This interpretation of the Borrowing Statute is without precedent or logic, particularly in light of the language in the Borrowing Statute which does not distinguish between residents and non-residents, but does distinguish between whether a cause of action arose in a foreign jurisdiction or in Florida. Parish v. B.F. Goodrich Co., 395 Mich. 271, 235 N.W.2d 570 (1975) (Where the language of the Borrowing Statute made no mention of residency, this suggested no legislative policy of special concern for residents; the tendency of the borrowing statute is to bar residents and non-residents alike.)

Further, Nance's assertion that the "courts of this state have consistently held that discovery is an element of the cause of action" (A. Br. 18), is without citation and completely erroneous. (See GAF Initial Br. - Meehan, 12-16). Nance fails to cite any case which stands for the proposition that a cause of action can arise upon diagnosis in Florida even though the wrongful acts and injury occurred in another jurisdiction where the action is now barred.

When the Florida Legislature adopted Florida's Borrowing Statute it determined that when a cause of action arose in another state, traditional choice of law rules are inapplicable to that cause of action. The public policy of Florida is declared by the statute -- to apply the "laws" of that other state to determine the viability of the cause of action, all other considerations notwithstanding.

In sum, Nance proposes, without authority, that this Court ignore the legislative will and adopt its own borrowing scheme. Her analysis is unsound and does not provide this Court with the precedent to so hold, or to affirm the Third District's holdings.

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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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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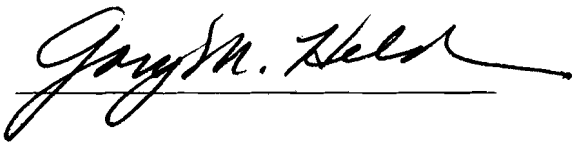

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