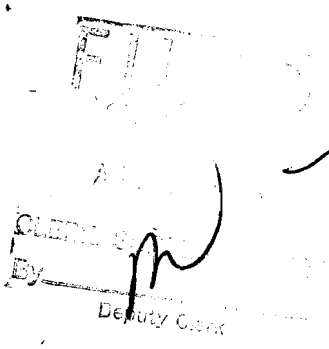

IN THE

SUPREME COURT OF FLORIDA

APPEAL NO. 68,972

H. RICHARD BATES, Personal
Representative of the Estate of
Dr. Philip O. Littleford, deceased,

Plaintiff-Appellant,

versus

COOK, INC.,

Defendant-Appellee,

Certified Question from the United States

Court of Appeals For the Eleventh Circuit

BRIEF OF APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

It is believed that oral argument would be of assistance to the Court in a consideration of the complex legal and factual issues raised in this appeal.

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STATEMENT AS TO RECORD REFERENCES

In this brief, the following designations are used:

A. The letter "R" followed by a page number is in reference to the record on appeal.

B. Various affidavits, depositions and documentary exhibits are referred to by the description of each item (i.e., Littleford affidavit), or where such items appear in the record.

C. The letters "R.E." followed by a reference number refers to the record excerpts included in the Appendix accompanying this brief. The record excerpts contain the following:

Document	R.E. No.
Docket entries for the Record Below	1
Complaint in Civil Action 79-447-ORL-CIV-Y, Earlier Florida Lawsuit (R.16-29)	2
Order of Dismissal in Civil Action 79-447-ORL-CIV-Y (R.75-76)	3
Order of Dismissal in Earlier Indiana Litigation, Civil Action IP 80-941-C (R.86-93)	4
Complaint in Civil Action 82-512-ORL-CIV-EK (R.5-7)	5

STATEMENT OF CASE

This case is before this Court upon certification from the United States Court of Appeals for the Eleventh Circuit of the following question:

> For the purpose of applying Florida's limitation of actions "borrowing" statute, Fla.Stat.Ann. § 95.10 (West 1982), is the determination whether a cause of action for theft of trade secrets has arisen in a state other than Florida to be made solely with reference to the state in which the "last act necessary to establish liability" occurred, Colhoun v. Greyhound Lines, Inc., 265 So.2d 18, 21 (Fla.1972), or with reference to the "significant relationships" that the respective states have to the cause of action, Bishop v. Florida Specialty Paint Co., 389 So.2d 999, 1000-01 (Fla.1980)? Cf. Pledger v. Burnup & Sims, Inc., 432 So.2d 1323 (Fla.App. 4 Dist.1983), review denied 446 So.2d 99 (Fla.1984); Meehan v. Celotex Corp., 466 So.2d 1100 (Fla.App. 3 Dist.1985); Steiner v. Mt. Vernon Fire Ins. Co., 470 So.2d 3 (Fla.App. 2 Dist.1985) (per curiam).

The United States Court of Appeals for the Eleventh Circuit certified the above question recognizing that it involved:

> [A] question or proposition of law of the State of Florida which may be determinative of the cause, and there appear to be no clear controlling precedents in the decisions of the Supreme Court of Florida....

The litigational background which was the forerunner to the appeal to the Eleventh Circuit is described below.

1. The Earlier Florida Litigation

On September 27, 1979, Dr. Philip O. Littleford, and his exclusive licensee, Devices for Medicine, Inc., filed Civil Action No. 79-447-ORL-CIV-Y against Mercy Hospital and Cook, Inc. (R.E.2). That case was assigned to District Judge George C. Young. The complaint in this earlier Florida litigation alleged infringement by Mercy Hospital of Dr. Littleford's United States Patent No. 4,166,469, and a theft by Defendant Cook of certain of Dr. Littleford's trade secrets. In answering, Cook admitted subject matter and in personam jurisdiction within the State of Florida.[1] Judge Young ruled that the trade secret claim against Defendant Cook had its principal nexus in the patent infringement claim, and initially ordered a transfer to Cook's home district in Indiana; however, Judge Young later dismissed the case without prejudice, at the request of Plaintiffs Littleford and Devices for Medicine (R.E.3).

2. The Earlier Indiana Litigation

After dismissal of the Florida action described immediately above, Defendant Cook filed a declaratory judgment

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[1] Cook is a large medical device manufacturer that distributes its products worldwide and extensively in the State of Florida; see page 11 infra.

action regarding Dr. Littleford's patent in the United States District Court for the Southern District of Indiana in Indianapolis, naming Dr. Littleford and Devices for Medicine as party defendants. (Civil Action IP 80-941-C). Dr. Littleford and Devices for Medicine moved for dismissal on the grounds that the Indiana court lacked in personam jurisdiction; District Judge Steckler agreed with Defendants Littleford and Devices, and dismissed the action, noting that Dr. Littleford had no significant contacts with Indiana, and there simply was no basis as a matter of law for the Court to exercise in personam jurisdiction over either Dr. Littleford or Devices for Medicine. A copy of Judge Steckler's order of dismissal is set forth at R.E.4.

3. **Civil Action 82-512**

Following the dismissal of Defendant Cook's Indiana complaint for lack of in personam jurisdiction, Dr. Littleford reinstituted the trade secret claims on July 13, 1982, in Florida Circuit Court, Civil Action No. CI-82-7196; Cook removed the action to the Federal District Court in Orlando, the case being identified there as Civil Action No. 82-512-ORL-CIV-EK. (R.E.5) The matter was assigned to District Judge Elizabeth Kovachevich, but was later assigned to District Judge G. Kendall Sharp.

Initially, Cook asserted that the trade secret claims should be transferred to Indiana, pursuant to Judge Young's earlier Order of transfer in Civil Action No. 79-447-ORL-CIV-Y (R.70). Judge Kovachevich denied Cook's request in this regard, noting that there was no longer any related patent infringement claim pending in the action (R.94-95).

Substantial pretrial discovery was completed, and Judge Sharp set the matter for trial (May 3, 1984, entry; this Order does not appear in the record). On the eve of trial, Defendant Cook filed a motion for summary judgment, asserting that Dr. Littleford's trade secret claims were barred under the Indiana two-year statute of limitations (R.113-119).

By an Order dated December 20, 1984, Judge Sharp granted Defendant Cook's motion for summary judgment under the Indiana two-year statute of limitations, but denied all of Defendant Cook's other motions (R.E.7). This appeal ensued (R.E.8).

STATEMENT OF THE FACTS

For purposes of this appeal, Appellant, adopts the Statement of Facts as set forth by the Eleventh Circuit Court of Appeals, with the following edifications.

1. Preliminary Statement

Dr. Philip O. Littleford was a respected physician of international reputation specializing in cardiovascular diseases at Florida South Hospital in Orlando, Florida. Dr. Littleford and his 12-year old son were killed in a tragic aircraft accident in Alaska on August 28, 1984. The executor of Dr. Littleford's estate, H. Richard Bates, Esq., was substituted for Dr. Littleford as Plaintiff.

The statements set forth below have been prepared in chronological order to assist the Court in understanding the locus of the events relevant to this litigation. Accordingly, the state (e.g., Florida, New Jersey, California and Indiana) where each event took place is underscored and set forth in boldface type.

2. The Development of Dr. Littleford's Inventions, and Contacts Between Dr. Littleford's Representative and Defendant Cook Between December 1977 and March 1978

As noted earlier, Dr. Philip O. Littleford was a cardiologist at Florida Hospital South in Orlando, **Florida**. During several years prior to 1977, Dr. Littleford worked on the development of a system and method for the rapid and atraumatic insertion of permanent pacemaker electrodes through the subclavian vein. All of Dr. Littleford's activities took place in the State of **Florida** (Littleford Affid., ¶2). Dr.

Littleford's developments revolutionized techniques for inserting pacemakers, resulting in less patient trauma and reducing costs. His techniques are now used worldwide.

In the fall of 1977, Dr. Littleford entered into an oral agreement with Mr. Larry Junker, a medical device sales representative who then (and still) resides and has offices in the Clearwater, **Florida,** area (Littleford Affid., ¶3). This agreement was reached in Orlando, **Florida**, and provided that Dr. Littleford and Mr. Junker would proceed cautiously to clinically evaluate Dr. Littleford's inventions and that thereafter Mr. Junker would market the associated apparatus. This agreement was subsequently reduced to a written contract which applied **Florida** law (Littleford Affid., ¶4 and Ex.1 thereto). This agreement provided for royalties for the sale of devices incorporating Dr. Littleford's inventions, which royalties were due and payable in Orlando, **Florida**.

In December, 1977, Dr. David Spector, a cardiovascular surgeon, made the first surgical use of Dr. Littleford's invention; this use took place at Florida South Hospital, Orlando, **Florida** (Littleford Affid., ¶5 and Ex.2 thereto).

On December 13, 1977, Dr. Littleford filed a patent application for his invention; the application was prepared by Tampa, **Florida** patent counsel, and mailed from **Florida** to the United States Patent and Trademark Office (Littleford Affid., ¶6).

Some time prior to December 26, 1977, Mr. Junker called from his office in **Florida** to the offices of Defendant Cook in **Indiana**, and discussed with Mr. Brian Bates the possibility of Cook providing OEM (Original Equipment Manufacturing) services for Mr. Junker's company in **Florida** for the Littleford apparatus (Bates dep. 23/15-25/16). On December 26, 1977, Mr. Junker mailed a letter from his **Florida** offices to Mr. Bates and enclosed a copy of the drawings from Dr. Littleford's patent application; Mr. Bates clearly received the information in confidence as a prospective supplier in the proposed OEM relationship (Bates dep. 47/4-16, PX-7 thereto). On January 9, 1978, Mr. Bates wrote to Mr. Junker at his **Florida** offices and expressed Defendant Cook's continued interest in providing the OEM services requested by Mr. Junker (Bates dep. 54/20-56/15, PX-8 thereto).

On March 1, 1978, Mr. Bates wrote to Mr. Junker at his **Florida** offices, forwarding additional samples of Cook's products proposed for use by Mr. Junker's company in **Florida** in the OEM arrangement (Bates dep. 64/3-66/18, PX-10 thereto).

At a professional medical meeting in Anaheim, **California** during the period of March 6-9, 1978, Messrs. Bates and Junker personally met for the first time; substantive discussions were had between Messrs. Bates and Junker as to the deficiencies in the Cook prototypes sent to Mr. Junker in **Florida** as samples in December 1977 and with Mr. Bates' January

9, 1978 letter, and the need for peelable sheaths in a clinical evaluation (Bates dep. 72/6-73/14). Some time later, possibly late March or early April, Mr. Bates sent additional Cook prototypes to Mr. Junker at his **Florida** offices (Bates dep. 76/13-77/19).

3. Activities of Dr. Littleford in Conducting Clinical Evaluations

Beginning in January 1978, Dr. Littleford engaged the assistance of respected cardiovascular surgeons and cardiologists in well-known cardiac treatment centers in Newark, **New Jersey** (Beth-Israel Medical Center); Nashville, **Tennessee** (St. Thomas Hospital where Dr. Littleford received cardiology training); Miami, **Florida** (Miami Heart Institute); Lakeland, **Florida** (Lakeland General Hospital); Winter Park, **Florida** (Winter Park Hospital) and Orlando, **Florida** (Florida Hospital South, where Dr. Littleford is on staff) (Littleford Affid., ¶7). The information supplied by Dr. Littleford to these physicians included a confidential description of the subclavian vein technique, as well as limited quantities of the associated apparatus (Littleford Affid., ¶7 and Ex.3-207 thereto). The purpose of these activities was to obtain a thorough clinical evaluation of the apparatus and technique, and to identify and to quantize difficulties with the procedure so as to later permit compliance with Food and Drug

Administration 510(K) requirements under the Medical Devices Act of 1976 (Littleford Affid., ¶7). As explained by Dr. Vincent Parsonnet of Newark Beth-Israel Medical Center, Newark, **New Jersey**, the confidentiality of the information given to him by Dr. Littleford was "implicit" (Parsonnet dep., 25/11-21).

The clinical evaluation by Dr. Littleford and his medical colleagues continued through approximately July 1978 (Littleford Affid., ¶7 and Exs. 3-205 thereto). Dr. Littleford then prepared at his offices in **Florida** and later collaborated with Dr. Parsonnet in Newark, **New Jersey**, a medical study based on 150 of the clinical evaluations (Littleford Affid., ¶8 and Ex.206 thereto). Dr. Littleford also collaborated with Dr. Spector at the facilities of Florida South Hospital in Orlando, **Florida** to prepare a preliminary report of the procedure (Littleford Affid., ¶8 and Ex.207).

4. Defendant Obtained Dr. Littleford's Trade Secrets through Dr. Parsonnet in New Jersey

Dr. Vincent Parsonnet of Newark Beth-Israel Medical Center in Newark, **New Jersey** was one of the evaluators selected by Dr. Littleford in connection with the clinical evaluation (Littleford Affid., ¶7). Mrs. Jean Linn is an employee at the Newark Beth-Israel Medical Center in the catheter laboratory, and is on a first-name basis with Mr. Brian Bates of Defendant Cook (Bates dep. 81/4-82/8). Some time in late April or early

May 1978, Mrs. Linn telephoned Mr. Bates from Newark, **New Jersey** and advised him that Dr. Parsonnet was interested in the Littleford technique, and inquired as to whether Defendant Cook manufactured a Littleford-type product; Mrs. Linn also told Mr. Bates that she had such equipment obtained from Mr. Junker (Bates dep. 85/16-89/13; Linn dep. 11/14-18). In response to a request from Mr. Bates, Mrs. Linn sent to Mr. Bates an envelope containing a complete specimen of Dr. Littleford's invention; the envelope containing this equipment was postmarked from Newark, **New Jersey** on May 12, 1978 (Bates dep. 85/4-7, Exs.13 and 14 attached hereto). Mr. Bates called Mr. Junker at his **Florida** offices in May 1978 about the proposed OEM arrangement; but it appears that Mr. Bates made no reference to his ongoing dealings with Mrs. Linn in **New Jersey** (Bates dep. 79/11-24).

Mr. Bates received the envelope from Mrs. Linn and thereafter sent proposed prototypes of Dr. Littleford's invention back to Dr. Parsonnet in **New Jersey** (Bates dep. 93/8-11, Ex.18 thereto; R.688). However, Mr. Bates' correspondence indicated that he did not understand how the product functioned and solicited Dr. Parsonnet's assistance in further developing the product (Bates Dep., Ex.23; R.690). Mr. Bates wrote to Dr. Parsonnet in **New Jersey** on September 22, 1978, agreeing to withhold the Cook product from evaluation by others (Bates dep. 103-104, Ex.22 thereto; R.693). Subsequently, Mr. Bates wrote

to Dr. Parsonnet in **New Jersey** and offered to identify the product as the "Parsonnet Lead Introducer" and to pay him a royalty in **New Jersey** (Bates dep. 122/3-7, Ex.27 thereto). Dr. Parsonnet wrote to Mr. Bates from **New Jersey** and declined to permit Cook to identify him as the developer, noting that Dr. Littleford of Orlando, **Florida** was the developer of the product (Bates dep. 140/7-11, Ex.32 thereto; R.692).

Defendant Cook later commercialized products embodying Dr. Littleford's inventions by selling those products; first commercial sales by Defendant were to Dr. Parsonnet's hospital in **New Jersey** (Bates dep. 99/18-22, and Exs.12 and 20 thereto).

In October 1978, Mr. Junker's company was terminated as the exclusive licensee but was later reinstated as Hart Medical Company (see below). Dr. Littleford granted a further license to Devices for Medicine, Inc., an Orlando, **Florida** company. Devices for Medicine granted licenses to Cordis Corporation of Miami, **Florida**, Daig Corporation of Minnetonka, **Minnesota** and Hart Medical Company of Clearwater, **Florida**. All of these license agreements apply **Florida** law (Littleford Affid., ¶9).

5. Defendant Cook Does Business Throughout the United States and the World

Defendant Cook is a multinational corporation with operations throughout the world. The product which is the subject of this litigation, peel away sheath introducers for

permanent pacemaker electrodes, is sold by Defendant Cook in all of the fifty states and in foreign countries. Cook has admitted such in this litigation (R.E.6, ¶4).

Cook has been a defendant in trade secret litigation in another forum. See, MBL, Inc. v. William Cook, et al., 90 F.R.D. 570 (E.D. Ill. 1981). In that litigation, the United States District Court for the Northern District of Illinois chose Illinois, not Indiana, law to determine the applicable legal principles.

SUMMARY OF ARGUMENT

It is the position of the Appellant that the "significant relationships" test should be used in applying Florida's borrowing statute. The borrowing statute should not be given an automatic inflexible application because of outdated substance/procedure labels applied before Florida had adopted the "significant relationships" test in Bishop v. Florida Specialty Paint Co., 389 So.2d 999, 1000-01 (Fla. 1980). Moreover, The American Law Institute in May of this year (1986), eliminating the distinction between procedure and substance, did in fact adopt the "significant relationships" test as applicable to statute of limitations and borrowing statutes. 54 U.S.L.W. 2597 (May 27, 1986).

Although the trial court applied the "significant relationships" test in the instant matter, it first applied a

lex loci delicti analysis noting that the status of Florida's choice of law rules as they pertain to the statute of limitations and borrowing statute was unsettled. Unfortunately, the trial court erred in its application of both the rule of lex loci delicti and "significant relationships" test.

The trial court incorrectly held that Indiana and not Florida has the most significant relationship to the occurrence and parties in this case. Sections 145 and 6 of the Restatement (Second) of Conflicts of Law provide that certain factors and principles should be considered when engaging in a choice of law involving a matter sounding in tort.

Section 145 contacts to be considered include:

(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicil, residence, nationality, place of incorporation, and the place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered. These contacts are to be evaluated according to their relative importance with respect to the particular issue.

The §6 choice of law principles to be applied are:

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied. Restatement (Second) of Conflict of Laws, §6 (1971).

The trial court made an incorrect factual determination that Indiana was the place of Defendant's wrongful conduct and then compounded that error by failing to comprehend the significance of the place of injury under §145. More importantly, the court neglected to treat the interests of the parties as delineated in §6 of the Restatement. It is respectfully submitted that choice of law decisions in Florida rely on the interests enumerated in §6 of the Restatement.

Considering all the relevant factors and principles, it is clear that Florida, not Indiana, had the most significant relationship to the occurrences and parties in this action. The trial court's determination, as based on incorrect factual findings and misapplication of the choice of law factors and principles, should be reversed.

Finally, the trial court's findings with regard to the rule of lex loci delicti contained several errors. Among these errors was the trial court's incorrect factual determination that the cause of action in this case--for purposes of Florida's borrowing statute--arose in Indiana, not Florida or New Jersey.

There was a clear factual dispute as to the place of Defendant's wrong; and thus, the trial court's determination on summary judgment that the cause of action arose in Indiana was improper and should be reversed.

ARGUMENT

I. THE "SIGNIFICANT RELATIONSHIPS" TEST SHOULD BE USED IN APPLYING FLORIDA'S BORROWING STATUTE

F.S. §95.10 (the Florida "borrowing statute") 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 should be maintained in this state.

In other words, Florida's borrowing statute bars actions brought in Florida which arise outside of the state of Florida and which would have been time-barred in the jurisdiction in which the cause of action arose. However, F.S. §95.10 gives no indication of how such a determination should be made. So the question becomes "What standard(s) of law does one use to make the determination under Florida's borrowing statute of where the cause of action arose?"

This was the exact question facing the trial court in the instant matter.[2] The trial court made a valiant effort at trying to discern the status of Florida law so it could answer the question. However, it is extremely important to note that the trial court began its opinion with a substance-procedure analysis using lex loci delicti and then, having qualms about

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[2] Defendants stated both at the trial level and in their brief to the Eleventh Circuit Court of Appeals that the "significant relationships" test applied in the instant case.

its applicability, reverted to a "significant relationships" analysis to detect where the cause of action arose (R.E.7, pp. 22, 25).[3]

Plaintiff respectfully submits that the trial court made at least two incorrect factual determinations in its analysis under both the rule of lex loci delicti and the "significant relationships" test. First the trial court incorrectly found under both tests that the primary locus of defendant's wrongful use/conduct was in Indiana. Secondly, the trial court made an incorrect factual finding that Defendant Cook's alleged wrong in this case did not involve a wrongful "procurement" of information; instead, the court found the only wrong was the Defendant's misuse of Dr. Littleford's trade secrets (R.E.7, p.25).

Judge Sharp's incorrect analysis is attributable to two fallacies:

1) that Florida's borrowing statute is procedural and thereby the significant relationships test as adopted by Bishop v. Florida Specialty Paint Co., 389 So.2d 999 (Fla. 1980), was not applicable; and

2) that the significant relationships test in both statute of limitations and borrowing statute questions is automatically linked to the law that determines the merits of the dispute (the lex causae).

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[3] Unfortunately, the trial court erred in its application of the facts to both of the methods it used in concluding that Indiana, and not Florida, law applied (R.21).

Most writers are now in agreement that statute of limitations and related borrowing statutes should not be given an automatic inflexible application because of antiquated substance/procedure labels applied before a state even considered analysis akin to the significant relationships test. Reese, The Second Restatement of Conflict of Laws Revisited, 34 Mercer L. Rev. 501 (1983) (hereinafter cited as Reese, Second Restatement); Millhollin, Interest Analysis and Conflicts Between Statutes of Limitation, 27 Hastings L.J. 1 (1975) (hereinafter cited as Millhollin, Interest Analysis); R. Weintraub, Commentary on the Conflict of Laws, 62 (2d ed. 1980).[4]

In fact, the American Law Institute in May of this year (1986) eliminated the distinction between procedure and substance on statute of limitation problems. 54 U.S.L.W. 2597 (May 27, 1986). §142, as proposed by Willis L. M. Reese, the reporter for the Restatement (Second) of Conflict of Laws, reads as follows:

> An action will be maintained if it is not barred by the statute of limitations of the forum unless the action would be barred in some other state

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[4] At the very least, most writers agree that insofar as statute of limitations and related borrowing statutes deny any judicial relief to plaintiffs, they ought to be characterized as substantive. Goodrich, Conflicts of Laws, §227 n.4 at 241 (3rd ed. 1949).

> which, **with respect to the issue of limitations, has a more significant relationship to the parties and occurrence.** Id. (Emphasis added.)

Judge Sharp could not find such a solution to the dilemma in Florida choice of law cases because Florida's choice of law rules as they apply to the borrowing statute are not settled.

The trial court made this telling observation:

> Although Florida law clearly governs the choice of a conflict of law standard ... the conflict of laws principle applicable under the Florida borrowing statute is not clear. (R.702, R.E.7 at p. 21).

The trial court recognized that Florida did adopt the "most significant relationships" test in Bishop v. Florida Specialty Paint Co., 389 So.2d 999 (Fla. 1980). (R.E.7, p. 21). However, the supreme court's ruling in Bishop was overshadowed by the trial court's analysis of the Fourth District Court of Appeals case, Pledger v. Burnup & Sims, Inc., 432 So.2d 1329[3] (Fla. 4th DCA 1983), pet. for rev. den., 446 So.2d 99 (Fla. 1984). Relying on Pledger, the Court determined that Bishop did not apply to Florida Statute §95.10 (borrowing statute). This conclusion is not supported by Pledger.

The statute of limitation and borrowing statute points in Pledger were never presented to the Supreme Court of Florida. The supreme court simply denied a rehearing. Pledger at 1331. Furthermore, the Pledger court itself conceded that

the Florida legislature could have assumed that the Bishop significant relationships test would also be applied to Florida's borrowing statute. Id. at 1330-1331. This would be the logical conclusion since the initial application of lex loci delicti to Florida's borrowing statute is a judicial construction. Nowhere in §95.10 is there any mention of what choice of law tests would be used in applying Florida's borrowing statute.

The Pledger court ultimately decided that the legislature could have also assumed that Bishop dealt with substantive rights (and not the borrowing statute) and held Bishop inapplicable. Id. at 1331. Plaintiff respectfully submits that the Pledger decision, based on assumptions of what the Florida Supreme Court meant in Bishop and what the Florida legislature thought the supreme court meant in Bishop, cannot and does not provide a sound basis on which to resolve choice of law issues. Moreover, there is also a difference of opinion on Pledger among the district courts of appeal. See Cohen v. Ada Turkish Trask, 471 So.2d 1294 (Fla. 3d DCA 1985).

In Cohen, summary judgment was entered by the trial court against the plaintiff on the ground that the action was barred by New York's one-year statute of limitation. The court of appeals reversed holding that although the complaint for defamation was imprecise, it could be viewed as saying that republication occurred in Florida, thus meaning that Florida's longer statute of limitation should apply. Id.

Judge Jergenson's dissent in Cohen pointed out that the issue was strictly which statute of limitation should apply and that the complaint did not even mention any tortious acts occuring in Florida. Yet, the Third District Court of Appeals, despite the trial court's application of Pledger, supra, overturned summary judgment. Id.

More important to note however, is the decision of the Florida Supreme Court in Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (1972) which demonstrates that as early as 1972 the supreme court was already taking an enlightened view of the application of Florida's borrowing statute.

In Colhoun a Florida resident was injured in Tennessee on a bus trip which began in Florida, where she purchased her ticket. 265 So.2d at 19. Her Florida suit was timely under Florida's three-year limit for contract actions, but was barred by the shorter Tennessee period for tort actions. Id. at 20. Florida's borrowing statute required a foreign reference "when the cause of action has arisen in another state or territory of the United States." Id. at 20, citing F.S. 95.10. The court held that the tort claim arose in Tennessee because "a cause of action sounding in tort arises in the jurisdiction where the last act necessary to establish liability occurred." Id. at 21. The contract claim, however, was a different matter. The court concluded that the place of the last act necessary to complete performance was the place of the contract. The court

found the contract was completed in Florida with the purchase of the bus ticket and applied Florida's three-year statute of limitations.

After Colhoun, Florida courts placed substantial emphasis on the interests enumerated in §6 of the Restatement, even prior to the supreme court's official adoption of the "significant relationships" test in Bishop. For instance, in Temporarily Yours-Temporary Help Services, Inc., v. Manpower, Inc., 377 So.2d 825 (Fla. 1st DCA 1979), the court enforced a restrictive covenant in a contract in which the parties clearly designated that Wisconsin law was to govern. The court did this by applying Florida law to uphold the covenant instead of Wisconsin law, which would have defeated the covenant. The covenant, which was made in Florida, restricted a former employee of Manpower from engaging in a competitive business within a two hundred mile radius of Manpower for two years. Wisconsin law would have enforced the covenant only if the restrictions were reasonably necessary to protect the employer; any unreasonably restrictive covenant would be totally void. The court, however, applied Florida law because Florida's policy, expressly stated in the statute, was that covenants not to compete, which are reasonable in time and geographic area, would be enforced. Id. at 827. After finding the restrictions reasonable, the court affirmed the trial court's issuance of an injunction against the former employee. Id.

Additionally, the Florida Supreme Court decision in Gillen v. United Services Automobile Association, 300 So.2d 3 (Fla. 1974) clearly displays Florida's §6, Restatement analysis approach to conflicts. In Gillen, the supreme court applied Florida law to protect the interests of its citizens:

> Here, the substantial interest of Florida in protecting its citizens from the use of "other insurance" clauses rises to a level above New Hampshire's interest in permitting them. Public policy requires this court to assert Florida's paramount interest in protecting its own from inequitable insurance arrangements. Id. at 7.

The court thus went beyond a bare assertion that the law was offensive to Florida's policy. The court analyzed the states' interests and found that Florida's interest in having its law apply was superior to that of New Hampshire because a Florida resident was involved.

In the second prong of its analysis in Gillen, the supreme court found that Florida policy could be invoked because Florida had a "significant relationship to the insurance contract," although the court refused to adopt or reject the Restatement's "significant relationships" test. The court's decision that Florida had a significant relationship to the contract was based on the following factors: (1) the vehicles covered were located in Florida, and the insured had given the insurer appropriate notice of this fact; (2) the insured had taken affirmative action to establish a residence

in Florida; and (3) the policy risk was centered in Florida with only minimal risk in New Hampshire. Finally, the court stated that very little importance should be attached to the fact that the contract was executed in New Hampshire because the insured "merely received a standard form insurance policy from respondent's main office in Texas which was completed and returned." Id. at 7.

Thus, the Florida Supreme Court made an analysis of interests akin to those in §6 of the Restatement. See also, Government Employers Ins. Co. v. Grounds, 311 So.2d 164 (Fla 1st DCA 1975), modified, 332 So.2d 13 (Fla. 1976); Aviation Credit Corp. v. Batchelor, 190 So.2d 8 (Fla. 3rd DCA 1966) (avoided impact of §95.10 by recharacterization).[5]

Since Bishop two cases and a recent bar journal article demonstrate the havoc Florida's borrowing statute plays with choice of law rules - Meehan v. Celotex Corp., 466 So.2d 1100 (Fla. 3d DCA 1984) (presently before the Florida Supreme Court on issue regarding Florida's borrowing statute); Proprietor's Ins. Co. v. Valsecchi, 435 So.2d 290 (Fla. 3d DCA 1983); and Morley, Applying the Significant Relationships Test to

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[5] Characterization, under traditional conflicts theory, is an escape device that courts use to avoid the unjust and irrational results of traditional rules by characterizing a particular cause of action, deciding from one area of law rather than another, to allow application of choice of law rules that would produce the desired result. E. Scoles and P. Hay, **Conflict of Law** §18.17-.20 (1982).

Florida's Borrowing Statute, 59 Fla. B.J. 17 (July 1985) (hereinafter Applying Significant Relationships).

In his article, Samuel Morley treated the central issue on this appeal--that lex loci delicti, a rule of judicial construction, has been at odds with Florida law since 1980 when the supreme court in Bishop, supra, adopted the policies underlying the "significant relationships" test of the Restatement (Second) of Conflict of Laws. Id. at 17. Morley points out that the Valsecchi decision recently reiterated the policies adopted in Bishop.

The main concern in Valsecchi was to avoid applying the laws of the state of the "classic fortuitous accident cite." Valsecchi at 297. As succinctly pointed out by Morley, this major concern is ignored under the present judicial construction (lex loci delicti) of where a cause of action occurs for purposes of the borrowing statute:

> The policies of Bishop and Valsecchi against using the law of the accident site would be seriously breached since the fortuitous state's law is not just applied to change a standard of proof in statutory construction but completely to bar the action. Applying Significant Relationships at p. 18.

In addition, the problems met by Florida courts in applying lex loci delicti are further demonstrated in Meehan v. Celotex Corp., 466 So.2d 1100, (Fla. 3d DCA 1984) question certified, 10 FLW 904 (April 26, 1985), where the court

struggled with the question--when does the last act necessary to establish liability under lex loci delicti occur? The Meehan court decided that a tort was not complete until a Plaintiff knows of the negligent act and reversed summary judgment holding that the record didn't conclusively establish whether the cause of action arose in New York or Florida. On motion for clarification and rehearing, because of confusion over whether the Florida borrowing statute requires Florida to also borrow the law as to accrual of causes of action, the court did the only thing reasonable in light of Florida's unsettled law and certified the question of accrual to the Florida Supreme Court which appeal is presently pending.[6] See also, Tomlin v. Boeing Co., 650 F.2d 1065 (9th Cir. 1981) (borrowing statute enacted before state's adoption of Interest Analysis, not applicable); Mitchell v. United Asbestos Corp., 426 N.E. 2d 350 (Ill. 5th DCA 1981) ("significant relationships" test applied to borrowing statute); Dinde v. Whitney, 429 F.2d 25 (1st Cir. 1970) (court adopted statute of

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[6] It is important to note that hovering in the background of the Meehan decision, was the recognition of the substantitive nature of statute of limitations in choice of law issues. Judge Pearson (in the revised decision) and Judge Schwartz (in the dissent) made such observations.

limitations with most significant relationship to the litigation).

Of great significance to this case is the law of New Jersey since of the three jurisdictions that have the most connections with the occurrences in this case, New Jersey is second after Florida. New Jersey has a six-year statute of limitations. N.J. Tit. 2A:14-1.[7]

Although New Jersey has no borrowing statute, courts in that state nonetheless follow an interest analysis approach to determine which statute of limitations applies in interstate tort actions. Heavner v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412 (N.J. 1973).

As evidenced by the preceding case law, the American Law Institute in May 1986, and the Reese and Millhollin articles, there is a clear and compelling statement which has emerged in choice of law -- the "significant relationships" test should be used to apply borrowing statutes. When a conflict exists, the forum should apply the law of the state with the most significant relationship to the issue of statute of limitations (not the merits of the case): "the place where the cause of action arose or the locus of defendant's conduct is not as important as the forum's contacts

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[7] The six-year New Jersey statute of Limitations is not applicable to this action, since Florida's borrowing statutes requires only the application of another state's shorter limitation period. N.J. Tit. 2A:14-1.

with the plaintiff." Reese, Second Restatement at 505-507; Millhollin, Interest Analysis at 33-53.

II. POLICY UNDERLYING STATUTE OF LIMITATIONS

Oddly, in the instant conflict case dealing with statutes of limitations, there was no analysis by the trial court of the purpose and function of the statute of limitations. These purposes were reiterated by Mr. Justice Jackson, in a 1944 United States Supreme Court case:

> Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944).

Preventing surprises and stale demands would appear to be the magical phrases, but what do such phrases mean in the instant case which does not involve lost evidence, faded memories, etc.? Plaintiff submits that the policy behind Florida's statute of limitations and borrowing statute has been amply supported in this matter and, therefore, serve as no

justification for using Florida's borrowing statute to deny Plaintiff's day in court.

The defendant herein was placed on notice of Plaintiff's claim in September 1979, when Dr. Littleford and Devices for Medicine first filed an infringement and theft of trade secret claim (R.E.2). Judge Young ruled that the trade secret claim should be transferred to Cook's home district Indiana, as its principal nexus was in the patent infringement claim; but the case was later dismissed without prejudice (R.E.3). Just after its dismissal, however, Defendant Cook filed a declaratory judgment action in federal district court in Indiana; but that action was dismissed as to Littleford and Devices with the Court holding that Dr. Littleford's contacts with Indiana were insufficient as a matter of law for the exercise of in personam jurisdiction (R.E.4). Following this dismissal, Dr. Littleford reinstituted trade secret claims in Florida Circuit Court on July 13, 1982 (R.E.5).

As the Court can see, Plaintiff and Defendant herein have been involved in an ongoing dispute since 1979 with Plaintiff diligently pursuing its claims. Defendant was not surprised by Plaintiff's initiation of this action. Furthermore, Defendant could have easily anticipated that its business activities in Florida would make it amenable to Florida law including Florida's four year statute of limitation §95.11 (3). Moreover, Dr. Littleford was a Florida resident

bringing an action in Florida. Certainly no intent to forum shop can be evidenced in this case.

III. THE TRIAL COURT ERRED IN HOLDING THAT INDIANA HAD THE MOST SIGNIFICANT RELATIONSHIP TO THE OCCURRENCE AND PARTIES IN THIS CASE

A. The "Significant Relationships" Test as Applied to the Facts by the Trial Court.

The issue of which state's statute of limitations should be applied in the instant case is an intensely factual matter and was inappropriate for determination on summary judgment. May v. United States Leasing Co., 239 So.2d 73 (Fla. 4th DCA 1920). In essence the trial court tied the "significant relationships" test to the merits of the dispute. Using the "most significant relationships" test, the trial court made factual findings on (1) the place of injury; (2) the place of wrong; and (3) the place where conduct causing injury occurred. These findings were made despite the disagreement between the parties regarding the determinative facts under section 145 of the Restatement (Second) of Conflict of Laws (1971) and their relative importance.

Under Florida choice of law rules a tort claim, such as trade secret misappropriation, is governed by the "significant relationships" test of the Restatement (Second) of Conflict of

Laws (1971), as adopted by the Florida Supreme Court in Bishop v. Florida Specialty Paint Co., 389 So.2d 999 (Fla. 1980). Section 145 of the Restatement sets forth the general principle for tort claims:

1. The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in §6.

2. Contacts to be taken into account in applying the principles of §6 to determine the law applicable to an issue include:

   (a) the place where the injury occurred,
   (b) the place where the conduct causing the injury occurred,
   (c) the domicil, residence, nationality, place of incorporation, and place of business of the parties, and
   (d) the place where the relationship, if any, between the parties is centered. These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Additionally, the other principles to be applied with choice of law matters are set out in the Restatement, section 6:

§6. Choice-of-Law Principles:

   (a) the needs of the interstate and international systems,
   (b) the relevant policies of the forum,
   (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
   (d) the protection of justified expectations,
   (e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied. Restatement (Second) of Conflicts of Law, §6 (1971).

Considering all the relevant factors, it is clear that Florida has the most significant relationship to the occurrence and the parties in this action. The trial court erroneously concluded that Indiana was the place of injury, and then inappropriately concluded that the place of injury was the determinative factor under §145 while failing to treat the factors enumerated under §6 of the Restatement. These determinations were made by the trial court despite Plaintiff's evidence to the contrary and the disagreement among the parties and were, therefore, inappropriate for summary judgment.

B. Defendant's Pacemaker Introducer Sheath Was Developed in Florida and New Jersey, Not in Indiana

It is quite clear that the pacemaker introducer sheath eventually marketed by Defendant was developed from the trade secret information obtained from Dr. Littleford and Dr. Parsonnet.[8] This can be discerned from several exchanges of correspondence between Dr. Parsonnet and Brian Bates of Cook (R.688-693).

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[8] During that time, Dr Parsonnet believed that Cook had a relationship with, or was obtaining a license from Dr. Littleford. (Parsonnet dep., p. 72/10.)

More specifically, Mr. Bates of Cook had a difficult time grasping the significance of the thin-walled sheath and the susceptability to kinking in the subclavian vein application (R.688). Subsequently, Bates learned from Dr. Parsonnet in New Jersey, that the sheaths were of insufficient wall thickness--a fact that he had earlier learned from Mr. Junker, but was apparently unable to grasp.

In a letter to Dr. Parsonnet on September 22, 1978, Mr. Bates acknowledged the obligation of Cook to refrain from making commercial uses of the introducer sheath at that time:

> Per your request, no other individual prior to this time received introducers for evaluation purposes. Do you feel that we should go ahead with marketing at this time, or do you feel that further refinements are needed? If you feel that we should make it available to other individiuals, would it be possible for you to forward a summary of the proposed technique and this would be extremely helpful to those who are interested in learning (R.689).

Bates later wrote Dr. Parsonnet on October 18, 1978 (R.688), acknowledging his own lack of understanding of the technique, stating:

> This letter is in reference to our phone conversation several weeks ago regarding the assistance which you offered in writing an outline of the procedure for introducing permanent pacemaker leads with an introducing sheath. I have outlined in a very rudimentary way, the step-by-step procedure. As you can see, a great deal of expansion is needed; however, due to my lack of knowledge of anatomical terms, coupled with an incomplete understanding of the details involved in placing the lead, I was unable to proceed further. (Emphasis added.)

It is clear that Mr. Bates acknowledged in this letter that he did not fully understand the technique, nor the use of the apparatus.

Cook offered Dr. Parsonnet a royalty for his activities (all of which took place in New Jersey). Cook's recognition of Dr. Parsonnet's efforts in this regard are shown in the following language from another Bates' letter:

> With respect to our discussion regarding a royalty arrangement, I believe that this is an appropriate way to recognize the contribution which you have given to development of this technique, as well as the help that you have given us on the development of the introducer set (R.693).

Just a few days prior to that letter, Dr. Parsonnet had written Mr. Bates and stated:

> Thank you very much for your note of December 11. I am pleased with the potential royalty arrangements, but I would prefer that you postpone any action until I have worked out my relationship with Dr. Littleford. This position makes me a bit uncomfortable (R.692).

It is obvious that when Mr. Junker "cut off" Cook from participating in the commercialization of the pacemaker sheath introducer product, Cook subverted the relationship between Dr. Littleford and Dr. Parsonnet to its own benefit--with Dr. Parsonnet believing that Cook was in the process of obtaining approval from Dr. Littleford; see Parsonnet dep. 72/10 where the following exchange took place:

Q. (by Plaintiff's counsel): I understand that. But I'm not so concerned with the characterization as I am the time. In that time frame between June-July of 1978 and the publication of the Cardiology Journal article in May of 1979, was it your impression from your conversations with Mr. Bates that Cook was in fact attempting to work out an arrangement with Dr. Littleford?

A. (by Dr. Parsonnet): I guess I would say that that's approximately right. I don't remember having--if you would quiz me at that point, I don't know that I would have been that--had said it that strongly, but I assumed that something was transpiring behind the scenes that I wasn't seeing.

The development of the commercial version of Defendant's pacemaker lead introducer sheath occurred in Florida and New Jersey by Drs. Littleford and Parsonnet, using Dr. Littleford's trade secrets, and did not occur in Indiana. The trial court's summation of the facts is incorrect. At the very least, the facts before the court presented a genuine factual dispute, which dispute was recognized by the trial court itself:

> Although a limited amount of defendant's use of the trade secrets in further developing their introducer sets arguably took place in New Jersey, the primary locus of defendant's wrongful use was in Indiana (R.E.27, p. 25).

This factual dispute prohibited the trial court from finding, as a matter of law, that Indiana law should be applied.

In addition, Plaintiff respectfully points out that in the earlier Indiana litigation brought by Defendant the United

States District Court for the Southern District of Indiana, when weighing Plaintiff's contacts with Indiana, held that Dr. Littleford's contacts with Indiana were insufficient as a matter of law for the Court to exercise in personam jurisdiction over Dr. Littleford (or Devices for Medicine) (R.86-93; R.E.4 at p. 7). Yet, the trial court here found that the same contacts incapable of meeting the constitutional muster for due process, nevertheless supports a choice of law denying Plaintiff the right to proceed under Florida law. The contacts necessary for jurisdiction go to litigational convenience, while the contacts for choice of law are much more important: for the Plaintiff herein, choice of the Indiana statute of limitations means the guillotine without a day in court.

C. Defendant Cook Wrongfully Procured Plaintiff's Trade Secrets From Dr. Littleford in Florida and From Dr. Parsonnet in New Jersey

The facts before the trial court demonstrated that the Defendant wrongfully obtained Dr. Littleford's trade secrets from two sources: (1) through various telephone conversations and correspondence with Mr. Junker in Florida, supra, pp. 4-11, and (2) from Dr. Parsonnet in New Jersey. See discussion in "B" above. The place of the wrong in trade secret cases includes the place where the defendant misappropriates

plaintiff's trade secrets. National Instrument Laboratories, Inc. v. Hycel, Inc., 478 F.Supp. 1179, 207 U.S.P.Q. 989 (D. Del. 1979).[9] In this case, that place would be either Florida or New Jersey. The trial court's conclusion that the wrong in this case occurred in Indiana where Defendant wrongfully used the trade secrets was improper in light of the facts as discussed in "B" above.

The trial court, in reaching its conclusion that the wrong was Defendant's misuse, had to determine factually that this case involved absolutely no wrongful taking of Dr. Littleford's trade secrets in either Florida or New Jersey. This determination was not a matter for summary judgment, since the facts were in dispute as to the wrongful taking of Dr. Littleford's trade secret by the Defendant. In essence, the trial court, before it made its choice of law, made a factual determination as to the merits of this case which was improper on summary judgment. May v. United States Leasing Co., 239 So.2d 73 (Fla. 4th DCA 1970).

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[9] The United States Supreme Court long ago put to rest the idea that a cause of action can arise under only one legal system. Clay v. Sun, Inc. Office Ltd., 377 U.S. 179 (1964). A single event can cause rights of action to arise simultaneously in as many legal systems as are prepared to give relief.

D. Consideration of the Place of Injury Under §145 Shows That Florida is the Place Where the Injury Occurred

The trial court found that the alleged injury in the instant case was Plaintiff's loss of sales (R.E.7, p. 27). Further, the trial court said that since the injury occurred "nationwide and, indeed, worldwide", the place of injury was not significant in determining which state's law was applicable (R.E.7, p. 27).

There are several reasons why the trial court's findings with respect to the significance of the place of injury should be reversed.

First: During the course of the hearing on July 23, 1984, Defendant's counsel admitted that the products sold by Defendant, and adapted from the trade secret information received from Dr. Littleford and through Dr. Parsonnet, are sold throughout the United States (R.Vol.4, p. 9-10). This admission has particular relevance to the "significant contacts" evaluation under the Restatement as demonstrated by the analysis in the note, The Choice of Law and Multistate Unfair Competition: A Legal-Industrial Enigma, 60 Harvard Law Review 1315-1323 (1947). This note is fully applicable in deciding the relevant weight to be given the place of injury under the Restatement in the instant case. The author, like the trial court, recognized that "Where no single state has a

substantial preponderance of (defendants') sales, the justification for exclusive application of the law of any one state becomes more questionable". Id. at 1319. However, unlike the trial court below, the author did not simply disregard the place of injury but delineated other factors which, when coupled with the place of injury factor, mandates the application of the law of the forum state:

> The forum state may well be entitled to special consideration in choosing the law which is to govern. This preference would be a realistic recognition of the fact that, in this field, courts apply their own law whenever possible. In addition, courts and attorneys of the forum are familiar with their own rules, and therefore more likely to reach a satisfactory solution with them than with foreign rules. Investigation of the laws of other states may require laborious examination of expert witnesses and scrutiny of foreign statutes and decisions, all done in a cast of mind developed under an alternate system. **Therefore, where a substantial number of impacts have occurred within the forum, and where it is also the main place of business of either the plaintiff or defendant, its law should govern.** (Emphasis added.) Id. at 1320.

Second: The facts in this case amply demonstrate that the substantial number of contacts occurred in Florida and New Jersey and not Indiana, supra pp. 4-11. In particular, the facts demonstrate that Dr. Littleford's only place of business was Florida. Dr. Littleford's cardiology practice was in Florida, he worked in Florida on the development of his system and method for the permanent pacemaker electrode insertion,

and, the first use of the invention was in Florida. These contacts demonstrate the place of injury, including Florida (although it may be widespread), when coupled with the numerous other contacts in Florida, calls for the application of Florida's statute of limitations.

Third: The trial court's disregard of the place of injury as a significant contact without considering the other Florida occurrences does no more than give Defendant Cook a safe haven for misappropriation activities. To allow a defendant who does business in numerous states to avoid litigation in any of those states because the place of injury is deemed insignificant as compared to the other factors in §145 does nothing more than provide defendants safe haven in their home states. More appropriately, as a large company doing business in many states, Defendant Cook has a reasonable expectation that it would be subjected to a longer statute of limitation in a foreign state.

E. Consideration of the Place of Defendant's Conduct Under §145 Was Not Entitled to Greatest Weight Among the §145 Factors; Nor Was Indiana the Principal Place of Defendant's Conduct

The trial court selectively applied comment f of §145, Restatement (Second) of Conflict of Laws to determine that Defendant's conduct was entitled to the greatest weight among the §145 factors (R.E.7, p. 28.). Comment f provides:

> [T]he place of injury is less significant in the case of fraudulent misrepresentations (see §148) and of such unfair competition as consists of false advertising and the misappropriation of trade values. The injury suffered through false advertising is the loss of customers or of trade. Such customers or trade will frequently be lost in two or more states. The effect of the loss, which is pecuniary in its nature, will normally be felt most severely at the plaintiff's headquarters or principal place of business. But this place may have only a slight relationship to the defendant's activities and to the plaintiff's loss of customers or trade. The situation is essentially the same when misappropriation of the plaintiff's trade values is involved, except that the plaintiff may have suffered no pecuniary loss but the defendant rather may have obtained an unfair profit. For all these reasons, the place of injury does not play so important a role for choice-of-law purposes in the cases of false advertising and the misappropriation of trade values as in the case of other kinds of torts. Instead, the principal location of the defendant's conduct is the contact that will usually be given the greatest weight in determining the state whose local law determines the rights and liabilities that arise from false advertising and the misappropriation of trade values. (Emphasis added.)

Although the trial court did recognize that Plaintiff's Florida residence was the place where the effect of the lost sales was felt most severely (R.E.7, p. 28), it once again neglected to consider the numerous other Florida and New Jersey contacts of both the Plaintiff and Defendant.[10]

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[10] As evidenced by Krasnosky v. Meredith, 447 So.2d 232 (Fla. 1st DCA 1983); Harris v. Berkowitz, 433 So.2d 613 (Fla. 3d DCA 1983) and Valsecchi, supra, Florida courts emphasize the residence of the parties when applying the "significant relationships" test in tort matters.

Accordingly, the comment f analysis used by the trial court was simply irrelevant to the instant case, since the actual place of injury, i.e., Florida, has a substantial relationship to the circumstances and is also a place where Defendant has had an ongoing business activity as part of its interstate enterprise. See supra pp. 4-11.

In addition, as discussed previously herein, the parties strongly disagree as to the locus of Defendant's conduct. Plaintiff provided facts (as admitted by the trial court) from which it could have been determined that New Jersey, not Indiana, was the locus of Defendant's misuse of Plaintiff's trade secrets. It was, therefore, improper for the court to choose between the disputed facts and enter summary judgment.

F. The Factors Under §6 of the Restatement Also Support Application of Florida Law, Not Indiana Law.

The trial court completely neglected to analyze any of the choice of law principles listed in §6 of the Restatement (Second) of Conflict of Laws (1971). Reese, in the Second Restatement, explained that emphasis of all the §6(2) factors is necessary for a proper choice of law decision:

> [T]he fact remains that these are the values that underlie choice of law and that have guided the courts in their decisions. To emphasize only one

> of these values, as some devotees of the 'governmental interest' approach apparently desire, would not be true to the law as it has developed and should develop in the future. Emphasis on all of these values is necessary to explain the decisional law as it actually exists. Id. at 510.

Of course, Plaintiff's concern is that the trial court considered none of the §6 factors in making its determination, and instead did exactly what the Restatement reporter warns against: selected one contact--the locus of Defendant's conduct--which went to the merits of the Plaintiff's case and totally ignored the policy considerations of the Restatement.

Yet, these same policy considerations have been applied by Florida courts even before the adoption of the significant relationships test in Bishop. See pp. 20-23 herein for a discussion of the case law.

An analysis of the §6 factors demonstrates first that Florida's law evinces a clear protection for its citizens from the misappropriation of their trade secrets. F.S. 812.081[11] gives specific statutory relief to those persons whose trade secrets have been misappropriated, and F.S. 95.11(3) gives those persons four years in which to prosecute their claims. Thus, Florida would advance its own plaintiff protecting policy only by application of its four-year statute of limitation, a specific conflicts factor under Restatement §6(b) and (e).

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[11] Theft of a trade secret is punishable as a first degree misdemeanor under F.S. §812.081(2).

Second, Indiana's only contact to the occurrence is the location of Defendant's business. New Jersey is the other state with any significant contacts with Plaintiff and Defendant, since it was in New Jersey and Florida where Defendant improperly obtained Plaintiff's trade secrets, where the Plaintiff's information was used to develop Defendant's introducer; and it was in New Jersey where the first commercial sales were made by Defendant to Dr. Parsonnet's hospital. Thus, under Restatement §6(c), New Jersey would be the next state after Florida with the most interest in the outcome of this litigation. (New Jersey applies a six-year statute of limitations to misappropriation of trade secrets and the "significant relationship" test to statute of limitation questions.) N.J. Tit. 2A:14-1; Uniroyal v. Heavner, supra.

Third, as discussed previously, Defendant Cook should have easily anticipated that Florida law would apply to its actions since it conducted business activities here. Moreover, Defendant Cook has had foreign state law applied to similar activities in trade secret litigation. See, MBL, Inc. v. William Cook, et al., 909 F.R.D. 570 (E.D. Ill. 1981). Defendant would not be surprised by the application of Florida law, while Dr. Littleford, a Florida resident engaged in the development of his pacemaker introducer sheath in Florida, would reasonably expect Florida law to govern his activities.

Thus, to protect justified expectations under Restatement §6(d), Florida law should be applied.

The totality of facts before the trial court showed a systematic and continuous relationship between the forum (Florida) and Dr. Littleford. Supra pp. 4-11. A condensed review of Plaintiff's contacts with Florida show that: (1) all of Dr. Littleford's activities took place in Florida; (2) Dr. Littleford entered the oral agreement with Mr. Junker in Florida; (3) the first surgical use of Dr. Littleford's device was in Florida; and (4) Mr. Junker and the Defendant communicated through Junker's Florida office. Plaintiff's contacts with the forum (Florida) were substantial; Defendant also had substantial contact with the forum as it admittedly did business here. In short, there was no choice of law problem in the present case because there was a false conflict between Plaintiff and Defendant. Florida has the greater interest in having its law applied to this case.

IV. THE RULE OF LEX LOCI DELICTI SUPPORTS THE APPLICATION OF FLORIDA, NOT INDIANA, LAW

Florida law requires the application of Florida's four-year statute of limitation. Florida's borrowing statute and the lex loci delicti rule is triggered only upon a finding that a cause of action arose in another state. Colhoun, supra. If

the claim arises in Florida, then the borrowing statute is never called into play and Florida's statute of limitations controls the action.

The last act necessary to establish liability occurred in Florida or New Jersey, not Indiana. The trial court recognized in its Order, that "The nature of Plaintiff's claim is a tort suit for damages...." (R.E.7, p. 31). Under Florida law a cause of action in tort is deemed to arise in the jurisdiction where the last act necessary to establish liability occurs. Colhoun, supra p. 21. Since the record before the trial court did not conclusively establish that the last act necessary to establish liability on the part of Defendant occurred outside of Florida, and specifically in Indiana, the court erred in granting summary judgment under the Indiana statute of limitations. As discussed earlier, herein under Argument III both the wrongful use and wrongful procurement of Dr. Littleford's trade secrets occurred in Florida or New Jersey and not Indiana. At the very least, these matters involved issues of disputed fact, which under Florida law prohibits the entrance of summary judgment in a conflicts case. May v. United States Leasing, 239 So.2d at 75.

Defendant's development of its pacemaker introducer sheath and defendant's procurement of trade secrets occurred in Florida and New Jersey, not in Indiana and the record demonstrated that Florida is the place where Plaintiff's cause of action arose.

The facts showing that Defendant's pacemaker introducer sheath was developed in Florida and New Jersey and not in Indiana are discussed, supra pp. 31-35. The facts showing that Defendant wrongfully procured Dr. Littleford's trade secrets in Florida and New Jersey are discussed, supra pp. 35-36.

The evidence clearly demonstrates that Florida, under Colhoun v. Greyhound Lines, Inc., is the place where Plaintiff's cause of action arose. Dr. Littleford developed his invention and entered into the business arrangement with Larry Junker here. Dr. Littleford learned of the tort and his right to bring an action in Florida. All correspondence, contracts, and business arrangements regarding the invention emanated from Florida. Dr. Littleford solicited both the expertise of other specialists, as well as potential business relationships from Florida, and prepared his scholarly publications and patent applications here. Florida is the place where the injury occurred, since it was here that Defendant refused to pay royalties for the use of Plaintiff's trade secrets, and refused as well to honor the confidential relationship arising out of Junker's disclosure to Defendant as a potential OEM. It is a fundamental and long accepted principle of law in Florida that a tort has not been committed and a cause of action has not arisen unless and until an injury has been suffered by the plaintiff. City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954); McIntyre v. McCloud, 334 So.2d 171 (Fla. 3d DCA 1976). Certainly, the impact of the injury is in

Florida, where Dr. Littleford's business is located and where the unfair "headstart" advantage obtained by Cook is most keenly felt.

CONCLUSION

Since the certification by the Eleventh Circuit to this Honorable Court indicated that the Florida Supreme Court was not restricted in its consideration of the issues involved and based upon the arguments and citations of authority contained herein, Appellant respectfully prays:

1) That the "significant relationships" test be adopted in applying Florida's borrowing statute and in any event

2) That the trial court's order applying the Indiana statute of limitations be deemed incorrect in its application of both the "significant relationships" tests and the rule of lex loci delicti.

Respectfully submitted,

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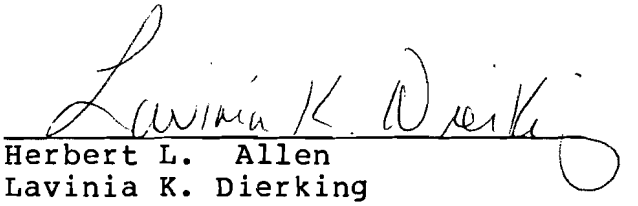
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of this **BRIEF OF APPELLANT** has been forwarded by Federal Express to the Clerk, The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301, with a true and exact copy of the foregoing furnished by First Class U.S. Mail to C. DAVID EMHARDT, ESQUIRE, Woodward, Weikart, Emhardt & Naughton, One Indiana Square, Suite 2600, Indianapolis, IN 46204, and to MICHAEL P. MCMAHON, ESQUIRE, Akerman, Senterfitt & Eidson, Post Office Box 231, Orlando, FL 32802, on this 14th day of August, 1986.



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