

IN THE
SUPREME COURT OF FLORIDA
APPEAL NO. 68,972

Deputy Clerk

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

Plaintiff-Appellant,

vs.

COOK, INC.,

Defendant-Appellee.

Certified Question from the United States
Court of Appeals for the Eleventh Circuit

BRIEF OF APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

It is believed that oral argument will be helpful to the Court in its consideration of the complex issues involved in this appeal.

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PRELIMINARY STATEMENT

Appellee, Cook, Inc., the defendant in the trial court and Appellee/Cross-Appellant in the appeal to the Eleventh Circuit Court of Appeals is referred to herein as "Cook" or "Defendant."

Appellant, H. Richard Bates, personal representative of the estate of Dr. Philip O. Littleford, deceased, the Appellant/Cross-Appellee in the appeal to the Eleventh Circuit Court of Appeals is referred to herein as "Dr. Littleford," the identity of the original Plaintiff herein. Alternately, Appellant is also referred to herein as "Plaintiff."

References to the record as indexed in the Eleventh Circuit Court of Appeals are designated by the prefix "R" or by the description of each item (i.e., Bates affidavit).

Where items in the record are provided in the Appendix/Record Excerpts accompanying Appellant's Brief, they are designated by the prefix "A."

Where items in the record are provided in the Appendix accompanying Appellee's Brief, they are designated by the word "Appendix" followed by the prefix "A" and page reference, e.g., "Appendix A-16."

STATEMENT OF THE CASE

This case involves a determination of the following certified question from the Eleventh Circuit Court of Appeals:

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).

It is noted that Court's inquiry is not intended by the Eleventh Circuit to be restricted by the phrasing of the above certified question, and it is specifically intended that this Court have latitude in responding thereto in order to be fully instructive regarding the problems and issues involved as perceived by this Court.

STATEMENT OF THE FACTS

Cook accepts the statement of the facts set forth in the trial court's decision (A 7) and in the decision of the Eleventh Circuit Court of Appeals opinion (A 9) certifying the Florida law question to this Court.

SUMMARY OF ARGUMENT

Whether to apply the "lex loci delicti" standard or the "most significant relationships" test in determining where a cause of action arises under Florida's borrowing statute is immaterial to Cook's cause because, under either standard, Indiana's statute of limitations should be applied. This result follows under a lex loci delicti analysis similar to that set forth in Pledger v. Burnup & Sims, Inc., 432 So.2d 1323 (Fla. 3rd DCA 1983), pet. for rev. den., 446 So.2d 99 (Fla. 1984) or under a "most significant relationships" analysis under the guide of the Restatement (Second) of Conflict of Laws (1971).

The Pledger decision is Florida's only reported decision applying the Florida lex loci delicti standard to interpret Florida's borrowing statute, Fla. Stat. Ann. §95.10, in a multi-state tort action. The Fourth District's rationale in Pledger supports a rule that, in a trade secret misappropriation case, lex loci delicti requires application of the law of the place where defendant misused the trade secrets. The Second District Court of Appeals recently followed the Pledger decision in Steiner v. Mt. Vernon Fire Ins. Co., 470 So.2d 3 (Fla. 2d DCA 1985). Reference to the place of misuse is also consistent with the lex loci delicti "last act" test set forth in Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972). Thus, applying the law of the place of

misuse is the most workable and rational way to interpret the borrowing statute "arising" language under the lex loci delicti rule in a trade secrets misappropriation case.

Under the "most significant relationships" analysis set forth in Bishop v. Florida Specialty Paint Co., 389 So.2d 999 (Fla. 1980), the contact afforded the greatest weight in a trade secret misappropriation case is the principal location of defendant's conduct causing the injury. Restatement (Second) of Conflict of Laws, §145, Comment f (1971). Given that the principal location of defendant's conduct is Indiana and that the other contacts do not point strongly to another state, Indiana has the most significant relationship to the parties and the occurrence.

The above analysis is consistent with the well-established body of law that is applied in patent cases. Patent cases--as do trade secret cases--relate to the misuse by a defendant of a plaintiff's technological property. Therefore, decisions in patent cases regarding where lawsuits should be brought have many of the same considerations, and provide guidance here. In this regard, patent cases are brought in the jurisdictional situs of defendant's principal place of business and center of defendant's alleged infringing activity.

While Cook's cause is affirmed under either test, the Eleventh Circuit has asked this Court for instruction as

to the correct standard to be applied. The Restatement (Second) of Conflict of Laws "most significant relationships" test should be adopted because it affords the most sensible approach to addressing the problems and concerns which can arise in the varied situations which Florida's borrowing statute will be applied.

A lex loci delicti analysis can lead to absurd or illogical results when applied to actions, such as the one involved here, where the injury, conduct causing the injury, and knowledge of the cause of action, occur at different times and places. This is precisely what happened in Meehan. By adopting the "most significant relationships" test to make the determination of where a cause of action arises, the Florida borrowing statute will operate very closely to the model borrowing statute set forth in the revision to Restatement (Second) of Conflict of Laws, §142 (1971) recently adopted by the American Law Institute. 54 U.S.L.W. 2597 (May 27, 1986)..

Since the Eleventh Circuit has requested this Court to not limit its consideration of the certified question as framed, it will be helpful and important for the Court to be fully instructive on the proper application of Florida law in this case. Accordingly, whatever test is found appropriate, the Court should instruct how Florida law is applied to determine where a trade secret misappropriation cause of action arises under Florida's borrowing statute.

ARGUMENT

- I. The "most significant relationships" test should be applied in determining where a cause of action "arises" under Florida's borrowing statute

In Bishop v. Florida Specialty Paint Co., this Court expressed its desire to move away from a strict application of the lex loci delicti choice of law rule in tort cases. That move served to align Florida law with the more modern "most significant relationships" approach for resolving substantive choice of law issues set forth in the Restatement (Second). While Bishop thus clearly stands as a decision in favor of a more modern approach to Florida choice of law problems, the Court's prior decision in Colhoun v. Greyhound clearly states that choice of law questions involving Florida's borrowing statute, Fla. Stat. Ann. §95.10, should be decided under the rigid lex loci delicti standard.

In Colhoun, this Court held that Florida statutes of limitations are viewed as procedural. This holding reaffirmed a longstanding practice of Florida courts viewing statutes of limitations as procedural matters. At the time Colhoun was decided, the Restatement (Second) position supported the substance-procedure dichotomy in choice of law decisions that forms the basis of the

Colhoun decision. This is no longer the case.

The modern trend in addressing conflict of laws problems in choosing statutes of limitations is expressed as follows in the recently approved American Law Institute (ALI) revision to Restatement (Second) of Conflict of Laws §142:

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 which, with respect to the issue of limitations, has a more significant relationship to the parties and the occurrence. 54 U.S.L.W. 2597 (May 27, 1986).

The ALI adoption of this revision to the Restatement (Second) of Conflict of Laws (hereinafter also referred to as the "Restatement (Second)") is intended to represent a shift away from the substance-procedure dichotomy expressed in §§142 and 143 of the Restatement (Second). As now revised, the Restatement (Second) position is intended to view choice of law questions involving statutes of limitations in the same manner as any other choice of law issue.

The recent Restatement (Second) adoption of the significant relationships test for "borrowing statute" purposes signifies a trend away from the rule that the forum state should apply its longer statute of limitations simply because it is the forum. The Restatement (Second) revisions thus recognize that a forum state with little or

no significant contacts to the parties and the action has no interest in maintaining actions which are barred in other jurisdictions having a greater interest in the controversy. See, Reese, The Second Restatement of Conflict of Laws Revisited, 34 Mercer L. Rev. 501 (1983).

If Bishop does not implicitly overrule application of the lex loci delicti standard set forth in Colhoun, the Court should now expressly overrule it and adopt the "most significant relationships" approach. Adoption of the "most significant relationships" test in choice of law questions involving Florida's borrowing statute will give Florida courts a more comprehensive and modern approach to deciding difficult choice of law issues and harmonize the choice of law approach to borrowing statute issues with that taken for "substantive" law issues.

- A. Application of the "most significant relationships" test will better serve the policies underlying Florida's borrowing statute in atypical cases where application of the lex loci delicti rule leads to illogical or unpredictable results

Florida's borrowing statute generally evinces an intent that Florida courts should not hear foreign claims which are stale in other jurisdictions. Brown v. Case, 86 So. 684 (Fla. 1920). This intent is in keeping with the modern view expressed in the Restatement (Second)

revisions. However, using a rigid lex loci delicti "last act" analysis to apply Florida's borrowing statute does not necessarily serve this purpose in all situations.

Indeed, in atypical tort cases, such as the trade secret misappropriation case here involved or the latent injury case involved in Meehan v. Celotex, application of lex loci delicti to Florida's borrowing statute can result in the maintenance of a cause of action which would have been barred in another jurisdiction where the action more reasonably should have been brought. While the trial court's decision prevented such a result in this case, that is precisely what happened in Meehan. In fact, if the Meehan "knowledge" requirement is factored into a "last act" analysis, Florida's borrowing statute could even be employed to bar claims in situations where the wrong clearly occurred in Florida and where Florida's substantive law would have been applied.

- B. Adoption of the "most significant relationships" test will not result in a departure from lex loci delicti in those more typical situations where the lex loci delicti rule is easily and rationally applied

As earlier noted, in Bishop, this Court expressed its desire to move away from the rigid lex loci delicti rule in tort cases. The purpose in adopting the new rule,

however, was not to abandon lex loci delicti altogether. Rather, this Court expressly stated that in most situations, lex loci delicti would remain the decisive consideration. Bishop, 389 So. 2d at 1001. This Court rightly perceived that in some situations other factors could combine to outweigh lex loci delicti. The adoption of the "most significant relationships" test was therefore intended to offer a more modern process for choosing the appropriate body of law in those cases where lex loci delicti failed to provide logical results.

Similar considerations apply in conflict of laws situations involving statutes of limitations. Lex loci delicti offers certainty, predictability and uniformity of result in more traditional and uncomplicated cases, such as a typical personal injury lawsuit. In cases such as that involved here, however, where the injury, conduct causing the injury and knowledge of the injury may have occurred in a multitude of jurisdictions, lex loci delicti offers less predictability and the further possibility of irrational results not furthering the purposes of Florida's borrowing statute.

Adoption of the "most significant relationships" test will serve to better promote the policies underlying Florida's borrowing statute and yet will not constitute a judicial intrusion into the legislature's sphere. The

problems which arise in modern litigation quite understandably could not have been anticipated by a legislature confronting the horse-and-buggy era problems which prevailed when the current version of Florida's borrowing statute was first enacted over a hundred years ago. It is precisely in these situations that the Court should exercise its judicial function to interpret a statute so as to permit it to be rationally applied.

By adopting the "most significant relationships" test the Court will afford trial courts the opportunity to resolve where a cause of action "arises" so as to meet the legitimate expectations of the parties involved and thereby add that certainty of result now lacking in complex cases.

II. The trial court correctly applied the "most significant relationships" test in determining that plaintiff's trade secret misappropriation cause of action arose in Indiana

Under Bishop, one looks to the Restatement (Second) for guidance in applying the "most significant relationships" test. The trial court's application of the "most significant relationships" test faithfully followed the guidelines set forth in Restatement (Second) §145 Comment regarding the application of the §145 contacts in a trade secret misappropriation case. In determining where plaintiff's cause of action "arose", the trial court

reviewed the §145 significant contacts and attached a particular weight to each of the contacts through its consideration of the factors set forth in §6 of the Restatement (Second). In doing so, the trial court was guided by Comment f to give decisive weight to the "principal place of defendant's conduct causing the injury" contact because the other §145 contacts did not strongly point to another jurisdiction. (A 7)

A. No fact disputes exist which render summary judgment inappropriate in this case

Before arriving at its decision to grant summary judgment on statute of limitations grounds, the trial court necessarily had to determine whether this case was an appropriate one for summary judgment disposition. This analysis required the trial court to review the factual evidence of record and decide whether there existed any genuine issues of material fact. In granting summary judgment, the trial court correctly found that there was no genuine fact dispute over the events which transpired between the parties relating to plaintiff's trade secret misappropriation claim. (A 7)

Plaintiff disputes the trial court's conclusion that there was no genuine issue of material fact. Plaintiff argues that it was improper for the trial court to decide,

under either choice of law rule, where defendant's conduct causing the injury occurred. Plaintiff points to several events which it argues occurred in New Jersey and Florida. The conclusion is that these events create a disputed fact question concerning the location of Defendant's conduct which could not have been resolved on summary judgment.

Plaintiff's contentions are incorrect. For purposes of this summary judgment decision, Cook has not disputed any of Plaintiff's assertions as to the events which transpired to give rise to this lawsuit. Rather, what Cook has all along vigorously disputed is the legal significance which Plaintiff attaches to these events for choice of law consideration purposes.

For example, for purposes of summary judgment, Cook does not dispute Plaintiff's fact assertion that Mr. Junker, while in Florida, made a confidential disclosure of trade secret information to Cook's employee, Mr. Bates, in Indiana through the course of interstate telephone calls and mail correspondence. This event is therefore an undisputed fact. Plaintiff argues that this fact and others result in a conclusion that the Restatement (Second) §145 contact (3) relating to the location of defendant's wrongful conduct is a Florida or New Jersey contact. This conclusion is not a factual finding, but

rather a conclusion of law. When the underlying facts are not disputed, it is appropriate for the court to make such a conclusion in applying the "most significant relationships" test.

Plaintiff also argues that the trial court "had to determine factually that this case involved absolutely no wrongful taking of Dr. Littleford's trade secrets in either Florida or New Jersey." (Appellant's Brief p. 36) The trial court did not make any such finding. This statement is a misreading of the trial court's opinion. The trial court's conclusion (A 7 p. 25) was that ". . . it is defendant's use of the trade secrets rather than the method by which the defendant obtained the trade secrets which is of critical importance in this case." Clearly, the thrust of the trial court's opinion was that even assuming Plaintiff's trade secrets were wrongfully obtained, the principal wrongful conduct in this case was the misuse of the trade secrets to develop and manufacture a product to usurp Plaintiff's headstart in the market. Again, Plaintiff misconstrues a legal conclusion made by the trial court for purposes of applying choice of law rules as a "factual finding" on the merits of Plaintiff's claim.

Plaintiff cites May v. United States Leasing Co., 239 So.2d 73 (Fla. 4th DCA 1970) as legal support for its argument that statute of limitations issues are not

appropriate for summary judgment disposition. The May decision does not support Plaintiff's position under the facts present here. May involved a statute of limitations issue, but it related to whether the limitations period had run, not a choice of law decision. Plaintiff has not disputed that its complaint is barred if Indiana law is applied.¹ Rather, Plaintiff disputes the trial court's choice of law. A choice of law issue is not one which should desirably be left to a jury. Indeed, if at all possible, choice of law issues need to be resolved before the jury is asked to make its decision so that the jury can be properly instructed as to the applicable law.

It would be inappropriate to ask a jury to determine whether §145 contact (3) is a New Jersey, Florida or Indiana contact. Reaching such a conclusion requires an understanding of how choice of law questions are resolved in the context of trade secret misappropriation cases. When the kernel facts necessary to such a decision are not disputed, the court should be the one to evaluate the facts and make the conclusions necessary to what may prove to be a complex "most significant relationships" analysis.

Indeed, Florida courts have had little reluctance resolving statute of limitations issues by the summary judgment process where the underlying matter in dispute

¹Plaintiff did not dispute that Indiana law would bar his claim either before the trial court or the Eleventh Circuit.

involved a choice of law question. Colhoun and Pledger both involved situations where summary judgment was found appropriate to resolve a choice of law issue involving statutes of limitations. See also, Januse v. U-Haul Co., Inc., 399 So.2d 402 (Fla. 3rd DCA 1981).

Finally, while Cook submits that the trial court's analysis concerning the propriety of summary judgment was correct, this issue may not be one which this Court may feel it should address. The ripeness of this case for summary judgment is a federal procedural law issue involving Rule 56, Fed. R. Civ. Proc. It is therefore an issue which is appropriate for the Eleventh Circuit's consideration.

B. The trial court correctly applied the Restatement §145 factors

Plaintiff's next contention is that the trial court improperly analyzed the §145 contacts under Florida law. Specifically, Plaintiff contends that (1) the place of defendant's conduct was not Indiana; (2) the place of defendant's conduct was not entitled to decisive weight among the §145 factors; (3) the place of injury contact under §145 points to Florida; and (4) the §6 factors support the application of Florida law.

1. The principal place of defendant's wrongful conduct was Indiana

While Plaintiff wrongly characterizes the trial court's determination that defendant's wrongful conduct principally occurred in Indiana as a finding of "fact," Plaintiff would also dispute the legal correctness of the trial court's finding. It will be seen, however, that when one properly focuses upon defendant's activities as the trial court did, the correct conclusion is that the place of defendant's conduct is Indiana.

Plaintiff's "Statement of the Facts" (Appellant's Brief pp. 4-12) carefully portrays the facts in this case so as to create the impression that the alleged trade secret misappropriation must have occurred in Florida or New Jersey. Plaintiff creates this impression by wrongly focusing upon the activities of Dr. Littleford, Mr. Junker and Dr. Parsonnet, instead of upon the activities of defendant Cook. Thus, it is only by not looking at defendant's conduct that Plaintiff manages to arrive at the remarkable conclusion that defendant's wrongful conduct occurred in New Jersey or Florida.

Even close scrutiny of Plaintiff's "Statement of the Facts" discloses that, other than a brief meeting between Mr. Junker and Mr. Brian Bates of Cook at a medical products trade show in Anaheim, California, no actions of

Cook relating to the alleged trade secret misappropriation occurred outside Indiana. All of the contacts between Cook and Mr. Junker which Plaintiff portrays as Florida contacts indisputably were interstate telephone calls and mail correspondence to or from Cook's employee Mr. Bates in Indiana.

In concluding that defendant's wrongful conduct occurred in Florida, Plaintiff wrongly focuses upon where Mr. Junker was located when he transmitted or received communications from Cook. Mr. Junker is not the defendant in this lawsuit. A proper analysis of Defendant's conduct requires one to focus upon Cook's activities, and not upon Mr. Junker.

Cook's communications with Mr. Junker closely parallels the situation present in Molinaro v. Burnbaum, 201 U.S.P.Q. (BNA) 83, 95 (D. Mass. 1977). In Molinaro, plaintiff alleged that defendant obtained trade secret information in confidence via an interstate telephone communication. The court found that defendant's wrongful conduct was the breach of confidence, and that breach occurred in Massachusetts where the information was used to manufacture products. Applying the Molinaro rationale here, any wrongful use of the confidential information allegedly imparted to Cook by Mr. Junker occurred in Indiana where the products allegedly incorporating the confidential information were manufactured by Cook.

As to the alleged misappropriation of trade secrets from Dr. Parsonnet, Plaintiff claims that the facts disclose a "wrongful procurement" by Cook in New Jersey.² The trial court fully considered this fact but concluded that, even assuming a wrongful procurement was involved, the principal wrongful conduct of defendant was the misuse of the trade secrets. This conclusion was not in error.

There is no dispute that the facts giving rise to Dr. Parsonnet's alleged disclosures also involved interstate telephone calls or mail correspondence between Cook in Indiana and Dr. Parsonnet or Ms. Jean Linn in New Jersey. Again, it is only by wrongly focusing upon where Dr. Parsonnet was located when he transmitted or received communications from Cook that Plaintiff is able to conclude that Cook's conduct occurred in New Jersey. Moreover, it is Plaintiff's position that Dr. Parsonnet's alleged disclosures were made to Cook under circumstances giving rise to a duty of confidentiality. Thus, it is proper to focus upon Defendant's acts which allegedly constitute a breach of this duty.

2. Under the patent laws, and as Plaintiff admitted, Dr. Littleford's patent was a full and complete disclosure of his trade secret invention. It is undisputed that, on or prior to December 26, 1977, Mr. Junker sent the patent drawings from Littleford's previously filed patent application and a description of the method to Cook. (Appellant's Br. p. 7) Therefore, as a matter of law, Mr. Junker's disclosure was a full disclosure of Littleford's trade secret invention. See Rototron Corp. v. Lake Shore Burial Vault Co., Inc., 712 F.2d 1214 (7th Cir. 1983)

In order to determine where the principal conduct of Defendant causing Plaintiff's alleged injury occurred, it is important to bear in mind the nature of Plaintiff's alleged injury. Plaintiff succinctly stated its theory of damages in this case in its Pre-trial Memorandum (p. 14) as follows:

In this case the Plaintiff alleges that the Defendant misappropriated information constituting a trade secret from the Plaintiff, and that with this information the Defendant developed a product and beat the Plaintiff's licensees to the marketplace with that product. Because of the Defendant's "headstart," the damage caused to Plaintiff exceeds sales lost to the Defendant in the time before Plaintiff's licensees entered the market.

Thus, the gist of Plaintiff's alleged injury in this case is the loss of "headstart." Clearly, the principal conduct of Defendant which most directly contributed to this alleged injury was Cook's misuse of the confidential information in developing and marketing a product which beat Plaintiff's licensees to the market.

Plaintiff is in a poor position to now complain that Defendant's principal conduct causing the injury is not the misuse of the trade secrets. Plaintiff urged precisely this position to the trial court. At page 15 of Plaintiff's main brief to the trial court on the statute of limitations issue, Plaintiff affirmatively characterized the wrong in this case as defendant's misuse:

The injury to a plaintiff in a trade secrets case consists of the defendant's use of the information so obtained. Here, after the disclosure of the trade secret information to Defendant, Defendant commenced

the manufacture and sale of its product incorporating the [trade secret] and continues to this day to sell or license that product. [Emphasis in original].

2. The "place of defendant's conduct" was entitled to decisive weight among the §145 factors

Contrary to Plaintiff's position, in a trade secret misappropriation case the principal location of defendant's conduct will usually emerge as the decisive contact under a Restatement (Second) most significant relationships analysis. Permagrain Products, Inc. v. U.S. Mat & Rubber Co., Inc., 489 F.Supp. 108, 208 U.S.P.Q. 541 (E.D. Pa. 1980); and Perfect Subscription Co. v. Kavalier, 427 F.Supp. 1289, 194 U.S.P.Q. 394 (E.D. Pa. 1977). See also, FMC Corp. v. Varco Int'l., Inc., 217 U.S.P.Q. 135 (5th Cir. 1982); Gilson v. Republic of Ireland, 223 U.S.P.Q. 957 (D.C. Cir. 1984)

Permagrain involved a trade secret misappropriation case brought in a Pennsylvania district court by a plaintiff incorporated in and having a principal place of business in Pennsylvania. The defendant was incorporated in and had a principal place of business in Massachusetts. The trade secret involved a laminated floor covering product which was allegedly taken from plaintiff's predecessor in Massachusetts and developed at defendant's facility in Massachusetts. The court in Permagrain noted that Pennsylvania followed the "most significant relationships" choice of law rule.

Accordingly the court found that Massachusetts law would apply, noting that that was where defendant developed its product incorporating the trade secret and where the theft of the trade secret occurred.

In Perfect Subscription, plaintiff, a Delaware corporation with a principal place of business in New Jersey, brought a trade secret misappropriation action against an ex-employee and his employer. The ex-employee defendant, a Pennsylvania resident, learned of the trade secrets in confidence in New Jersey and later misused the trade secrets in Pennsylvania. Since Pennsylvania earlier adopted the "most significant relationships" test in Griffith v. United Airlines, Inc., 416 Pa.1 (1964), the court presumably applied this test when it determined that Pennsylvania law applied and denied plaintiff a preliminary injunction.

Plaintiff urges that the place of a plaintiff's residence should be entitled decisive weight in applying the "most significant relationships" test to a trade secret misappropriation case. Yet, in none of the above trade secret misappropriation cases was the law of the place of plaintiff's residence applied under the "most significant relationships" test. Moreover, Comment f to §145 clearly points to place of defendant's conduct as the contact which will usually be decisive in misappropriation of trade secret cases.

3. The place of the injury contact points to no particular state because plaintiff's injury occurs from the loss of sales

Restatement (Second) of Conflict of Laws §145 Comment f in pertinent part states:

[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 case 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.

Plaintiff contends that Comment f is irrelevant because the place where the injury occurred, i.e. Florida, has a substantial relationship to the circumstances. This argument fails for two reasons: First, under Comment f the question is not whether the place of injury has a substantial relationship to the "circumstances" but

whether the place of injury has a substantial relationship to defendant's activities and to plaintiff's loss of customers or trade. Second, the place of the injury in a misappropriation of trade secrets case is not the place of plaintiff's residence, but rather the place of the loss of customers or trade. Since this injury occurred in many states, the place of the injury contact carries little weight.

Comment f is unambiguous in describing what the injury is in a misappropriation of trade secrets case. It states that ". . . [t]he 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 situation is essentially the same when misappropriation of the plaintiff's trade values is involved . . ." (Emphasis added).

Plaintiff cites a law review note, The Choice of Law and Multistate Unfair Competition: A Legal-Industrial Enigma, 60 Harvard Law Review 1315-1323 (1947), to support its contention that when defendant's sales are in two or more states the law of the forum should be applied. At page 37 of its brief, Plaintiff states that: "[t]his note is fully applicable in deciding the relevant weight to be given the place of the injury under the Restatement in the instant case."

To the contrary, it is beyond question that the above note is totally inapplicable to the Restatement analysis which must be made in this case. The "most significant relationships" test which should be followed in this case is set forth in the Restatement (Second). When the above law review note was written in 1947 the Restatement (Second) did not yet even exist, it having been adopted by the American Law Institute in 1969. Clearly, the pro-forum choice of law test set forth in this 1947 law review note is not the one which was many years later codified in the Restatement (Second).

Assuming arguendo that the place of injury is Florida because that is where Plaintiff resides, it is clear that Florida has very little, if any, relationship to Defendant's activities or Plaintiff's loss of customers or trade. Cook's alleged activities involved its receiving trade secret information and the subsequent use of that information to develop, manufacture and market a product incorporating the trade secrets. None of these activities of Cook occurred in Florida, but rather emanated from Cook's principal business location in Bloomington, Indiana (A 7 pp.3-5; A 9 pp. 3997-8).

Neither does Florida have any particular relationship to the loss of customers or trade. It is undisputed that plaintiff does not manufacture a product incorporating the

trade secrets, but rather licenses to manufacturers. Plaintiff's licensees lost customers or trade wherever defendant made sales, and this indisputably occurred throughout the United States. As Comment f clearly states, it is the pecuniary effect of the lost customers or trade which will normally be felt most severely by plaintiff where plaintiff resides. But where, as here, plaintiff merely collects royalties from its licensees, plaintiff's residence has no relationship to the loss of customer's or trade.

4. The place of defendant's development and manufacture is the most significant contact, by analogy to patent law

The above analysis is consistent with the well-established body of law that is applied in patent cases. Patent cases--as do trade secret cases--relate to the misuse by a defendant of a plaintiff's technological property. Therefore, decisions in patent cases regarding where lawsuits should be brought have many of the same considerations, and provide guidance here.

In this regard, patent cases are brought in the jurisdictional situs of defendant's principal place of business and center of defendant's alleged infringing activity. A typical example is found in S.C. Johnson & Son, Inc. v. The Gillette Company, 571 F.Supp. 1185 (N.D.

Ill. 1983). In Gillette the court granted transfer under forum non conveniens grounds, and sent the case to the jurisdiction where defendant had its manufacturing facilities. In Gillette, the court found that virtually all of defendant's development and production was in the transferee forum. Pertinently, the court stated the general rule that ". . . the preferred forum is that which is the center of the accused activity[.]", based upon the principle that "the trier of fact ought to be as close as possible to the milieu of the infringing device and the hub of activity centered around its production." See also, Amp Incorporated v. Burndy of Midwest, Inc., 340 F.Supp. 21, 24-5 (N.D. Ill. 1971).

Thus, the analysis in patent cases further supports that, in a trade secret misappropriation case, the principal location of defendant's conduct, i.e. the location of its manufacturing and development, will usually emerge as the decisive contact under a Restatement (Second) most significant relationships analysis.

5. The Restatement §6 factors support the application of Indiana law

Plaintiff contends that the trial court totally failed to consider the Restatement §6 factors in making its determination. This argument deserves little attention. At pages 26-27 of its opinion, the trial court set forth

the various §6 factors in its opinion and expressly stated that it considered the §6 contacts in concluding that Indiana had the most significant relationship to the parties and the occurrence in this case (A 7 pp. 26-7 and 30). The trial court then presented a lengthy and detailed analysis of the various §145 factors explaining its considerations in applying each (A 7 pp. 27-30).

Plaintiff further contends that the §6 factors do not support the application of Indiana law. Specifically, Plaintiff states that §6 (2) factors (b), (d), and (e) support application of Florida law, while §6 factor (c) supports application of New Jersey law.

Plaintiff's arguments are superficial and miss the point. To begin with, Plaintiff fails to perceive that the entire analysis is not being made for the purpose of determining who's trade secret law is to be applied, but rather who's statute of limitation will be applied. Thus, the analysis of §6 begins with subsection (1) which reads:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

Restatement (Second) of Conflict of Laws §6 (1) (1971).

Florida's borrowing statute is a choice of law rule. It requires a Florida court to adopt another state's statute of limitations to bar an action in certain clearly expressed situations. The legislative directive of this

statute was long ago noted by this Court in Brown v. Case,
86 So. at 864 as follows:

It is clear that the Legislature [by this statute] intended to give a debtor against whom a cause of action accrued in another state or territory, or in a foreign country, the benefit of statutes of limitations of those jurisdictions if they were shorter than that of this state.

Of course, the whole purpose in applying the "most significant relationships" test is to rationally resolve ambiguity in how to interpret the "arising" language of the borrowing statute in difficult situations. Nevertheless, as one proceeds to consider the §6 (2) factors, it is important to keep in mind the general claim-barring purpose of the borrowing statute.

The §6 (2) general choice of law principles are enumerated as follows:

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

- (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 relevant policy of the forum, Florida, as expressed in its borrowing statute is to bar any claim which is stale in the jurisdiction where it arose. While many states have borrowing statutes with exceptions to protect resident plaintiffs, Florida does not. Therefore, since the Florida legislature expressed no favoritism towards Florida plaintiffs, no plaintiff-protecting policy emerges on this issue. Thus, consideration (b) of §6 (2) is neutral.

On the other hand, Indiana has a borrowing statute with an exception protecting its resident defendants. Thus, if Plaintiff had brought its claim against Cook in Indiana, Cook could theoretically have availed itself of the Indiana borrowing statute, while a non-resident could not. This evinces a policy in Indiana to protect resident defendants on statute of limitations issues. Thus, consideration (c) of §6 (2) is favorable to Indiana.

Further, Plaintiff could not have had a justified expectation that Florida law would govern its trade secrets once Plaintiff allowed its trade secrets to leave Florida. Under Florida law, the holder of trade secrets has the responsibility for maintaining his trade secrets. Keystone Plastics, Inc. v. C & P Plastics Inc., 340 F.Supp. 55 (S.D. Fla. 1972), aff'd. 506 F.2d 960 (5th Cir. 1975). Therefore it is reasonable to expect a trade

secret owner to act in a manner consistent with the laws of any state where the trade secrets are taken.

Dr. Littleford willingly disclosed his trade secrets to Mr. Junker for the purpose of entering into a license agreement for the marketing of his trade secrets (Dr. Littleford affidavit ¶3 and 4). Dr. Littleford's licensee, Mr. Junker, then contacted Cook outside Florida and disclosed the trade secrets (A 5 p. 2; Appellant's Brief p. 7). Dr. Littleford also directly disclosed his trade secrets to doctors in New Jersey and Tennessee for clinical evaluation purposes (Dr. Littleford affidavit ¶7). Once Dr. Littleford allowed persons in other states to gain access to the trade secrets, whether confidentially or not, he could not reasonably have expected that a misappropriation of his trade secrets would be governed by Florida law.

On the other hand, Cook could justifiably expect that its conduct in using the alleged trade secrets to develop and manufacture a product in Indiana would be governed by Indiana law. As noted in Comment g to §6 of the Restatement, "[g]enerally speaking, it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state." Moreover, to the extent Cook could have expected a Florida law to

apply regarding the statute of limitations, the justified expectation given where Cook's conduct occurred was that the Florida borrowing statute would apply. Thus, consideration (d) of §6 (2) is favorable to Indiana.

Finally, if uniformity of result is to be achieved here, it can only be accomplished if Indiana's statute of limitations is applied. If this case had been brought in Indiana at the time Plaintiff filed its complaint in Florida, Plaintiff's action would have been barred. Therefore, unless Indiana's limitation law is applied by Florida, a different result is obtained in Florida than an Indiana court would have reached. Thus, consideration (d) of §6 (2) is favorable to the application of Indiana law.

III. Applying the *lex loci delicti* rule, plaintiff's trade secret misappropriation cause of action "arose" in Indiana

- A. In a trade secret misappropriation case, application of the *lex loci delicti* rule should result in a reference to the law of the place where the trade secrets are wrongfully misused

Colhoun v. Greyhound requires that the *lex loci delicti* rule be interpreted to apply the law of the place where the last act necessary to establish liability occurred. In most tort cases, it is relatively simple to conclude what the "last act" was and where it occurred. This is not so in trade secret misappropriation cases.

Trade secret cases are peculiar causes of action which have dynamics which set them apart from many other causes of action. Courts have struggled for years to develop a coherent set of rules to govern trade secret cases. For example, trade secret cases cannot even be simply categorized in one field of law. Tort, property and contract principles are all variously applied in trade secret cases.

In 1979, the National Conference of Commissioners on Uniform State Laws, after ten years of study, approved a Uniform Trade Secrets Act (See , Appendix A-1). According to the prefatory notes to the Uniform Trade Secrets Act, the major impetus behind the act was the confused state of the common law of trade secrets (Appendix A-2).

The trial court's analysis of the lex loci delicti rule as it applies to Plaintiff's cause of action is sound. The trial court's analysis is consistent with this Court's previous decision in Colhoun v. Greyhound and the later Fourth District Court of Appeals decision in Pledger v. Burnup.

The Pledger decision is Florida's only reported decision applying the Florida lex loci delicti standard to interpret Fla. Stat. Ann. §95.10 in a multi-state tort action. Pledger supports that in a trade secret

misappropriation case lex loci delicti requires application of the law of the place where defendant's principal conduct causing the injury occurred. The Pledger decision was recently followed by the Second District in Steiner v. Mt. Vernon Fire Ins. Co.

The trial court had no Florida decisions interpreting the lex loci delicti rule in trade secret misappropriation cases to follow. Therefore, the court reviewed numerous trade secret cases in other jurisdictions applying lex loci delicti to determine, sub judice, a rational and workable way to apply it to the complex fact situation present in this case. Based upon this review, the trial court wisely concluded that lex loci delicti required application of the law of the place where Defendant used the trade secrets to manufacture the product which usurped Plaintiff's headstart. It should also be noted that the previous discussion regarding the analogy of patent law principles to trade secret cases also supports this finding.

Selecting the law of the place where the trade secrets were misused provides both a rational and workable way to interpret lex loci delicti in this trade secret misappropriation case. It is undisputed that the initial disclosure of trade secrets to Cook was a confidential disclosure by Mr. Junker. The gist of Plaintiff's claim

is therefore grounded in a breach of confidence, irrespective of whether an additional disclosure was made later under "wrongful procurement" circumstances. Accordingly, the trial court rationally determined that because Plaintiff's claim was based upon breach of confidence, the locus of the wrong was the place of misuse.

The place of misuse is a workable solution from the standpoint of a last act analysis. In a trade secret misappropriation case such as this, it is clear that Plaintiff's cause of action is fully complete when Defendant misuses the trade secrets. Here, the acts constituting Defendant's misuse, i.e., the development and manufacture of a product incorporating the trade secrets, occurred at Defendant's principal place of business in Bloomington, Indiana. Thus, trial court's conclusion that the cause of action arose in Indiana is consistent with the last act analysis of Colhoun v. Greyhound.

B. The Meehan decision's "last act" analysis is incorrect and should be overruled

The Meehan decision should not be followed in this case because it is highly irrational and unworkable in a trade secret misappropriation case to make a choice of law decision based upon where plaintiff obtains knowledge of the cause of action.

First, since such facts will usually be obtainable only from plaintiff, a rule of this nature simply invites abuse.

Second, it may often be the case that plaintiff should have known of the trade secret cause of action before actual knowledge was acquired. Cf., Brown v. Armstrong World Industries, Inc., 441 So.2d 1098 (Fla. Ct. App. 3 Dist. 1983). If defendant succeeds in establishing the time when such knowledge should have been acquired by plaintiff, must the parties establish where plaintiff was located when this hypothetical knowledge should have been acquired? Clearly, this makes no sense.

Third, where knowledge is acquired will oftentimes have little or only a fortuitous relationship to the parties and occurrences giving rise to the trade secret cause of action. And, the fact that in trade secret cases the plaintiff is often a corporation as opposed to an individual only further complicates the inquiry.

Moreover, any rational basis for the Meehan decision in the context of asbestos injury cases disappears in the context of a trade secret misappropriation case. A trade secret misappropriation case does not involve a latent injury. Rather, this case is closer to the type of situation presented to the First District in Kellermeier v. Miller, 427 So.2d 343 (Fla. App. 1 Dist. 1983).

In Kellermeyer, plaintiff argued that his legal malpractice cause of action did not accrue until he acquired knowledge of legally cognizable damages. The court distinguished plaintiff's situation from latent injury cases where the aggrieved party may have knowledge of the negligent act, but damages have not yet occurred. The court then found that some damage had occurred, though the amount remained uncertain, of which plaintiff had actual knowledge. Accordingly, the First District affirmed the trial court's grant of summary judgment on statute of limitations grounds.

Here, there is no dispute that Plaintiff was aware of his cause of action at least as early as August, 1978 when Dr. Littleford's attorney sent Cook a cease and desist letter regarding Cook's misuse of the trade secrets. Therefore, if Meehan is interpreted to require Florida law be followed to determine when a foreign cause of action accrues, Kellermeyer supports a finding that Plaintiff's action accrued outside the Indiana two year statute of limitations.

The Meehan decision, however, goes further than simply requiring knowledge of a cause of action to start the running of a foreign statute of limitations for purposes of Florida's borrowing statute. Meehan adds a knowledge element to a cause of action in determining where the

action arose.³ This leads to horrible results when the other states having a relationship to the cause of action do not have similar knowledge requirements.

This is just such a case. Under Indiana law, a cause of action accrues whether or not a plaintiff has any knowledge of the cause of action. Shideler v. Dwyer, 417 N.E.2d 281 (Ind. 1981). Thus, if Meehan is followed, Indiana and Florida differ as to what the "last act" is. Such a situation subverts the intent of Florida's borrowing statute because it prevents defendants from obtaining the benefit of the shorter foreign statute of limitations.

Plaintiff has not argued that the Meehan decision is good law. It is submitted that the analysis of Judge Schwartz in Meehan represents the better view and that the panel's decision should be overruled.

3. Note that the Uniform Trade Secrets Act ("USTA") avoids any Meehan type problems caused by interpreting a knowledge requirement into the cause of action. The UTSA incorporates "knowledge of the cause of action" into its statute of limitations §6, but not as an element of the cause of action. Thus, under the USTA the event determining "where" the action arises may well be different from the event determining "when" the statute of limitations begins running (Appendix A-16).

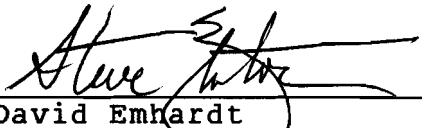
CONCLUSION

For the reasons set forth above, it is respectfully submitted:

- (1) that the "most significant relationships" test adopted by this Court in Bishop be applied in construing where a cause of action "arises" under the Florida borrowing statute;
- (2) that application of the "most significant relationships" test in this case leads to the conclusion that the cause of action arose in Indiana;
- (3) that in the event lex loci delicti is the applicable choice of law rule, the panel opinion in Meehan should be reversed with instructions that in a trade secret misappropriation case the cause of action "arises" at the place where the wrongful misuse occurred, i.e. Indiana.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of this BRIEF OF APPELLEE has been sent by Federal Express to the Clerk, The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301, and that true copies of the foregoing were furnished by U.S. Mail, first class, to the following attorneys of record on October 3rd 1986:

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