IN THE SUPREME COURT OF FLORIDA

CASE NO: 87,110

THE FULTON COUNTY ADMINISTRATOR,
as Administrator of the Estate of
LITA MCCLINTON SULLIVAN,

Petitioner/Plaintiff,

v.

JAMES VINCENT SULLIVAN,

Respondent/Defendant.
_____/

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S MOTION FOR REHEARING

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Respondent, James Vincent Sullivan, through undersigned counsel, pursuant to this Court's Order dated March 5, 1998, files this Brief in Opposition to point three of Petitioner's Motion for Rehearing and states:

I. Introduction

Petitioner argues that the Second District's decision in Robinson v. Merkle, 700 So. 2d 723 (Fla. 2d DCA 1997), dictates that Georgia's statute of limitations laws, rather than Florida's, should have been applied by the trial court. Respondent concedes that if this Court were to adopt the rationale set forth in Robinson and later in the Second District's decision in Mezroub v. Capella, 1997 WL 716835 (Fla. 2d DCA November 19,1997), Georgia's statute of limitations laws would apply. However, to adopt this rationale, this Court would first be obligated to recede from 142 years of its own precedent; precedent apparently ignored by the Second District. See Perry v. Lewis, 6 Fla. 555 (1856); Brown v. Case, 80 Fla. 703, 86 So. 684 (1920). Moreover, even if this Court were to adopt Robinson, unless this Court ignores the Georgia Supreme Court's own interpretation of Georgia law, Florida law would still apply and the result would be no different. Finally, as a matter of policy, should this Court adopt Robinson, this Court would be opening the floodgates to matters more properly brought elsewhere and would be encouraging forum shopping.[1]

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[1] Respondent notes that the exact issue addressed in this Brief is presently before this Court in Merkle v. Robinson, Case No. 91,967. Petitioner's Initial Brief in that matter is attached hereto as Exhibit "A."

II. The Second District's decision in Robinson v. Merkle ignored 142 years of this Court's precedent which holds that, absent application of the borrowing statute, the statute of limitations of the forum where suit is initiated controls and further, the Second District misconstrued this Court's decision in Bates v. Cook

Petitioner argues that this Court should adopt the rationale set forth in Robinson. However, to do so would require this Court to recede from 142 years of precedent holding that, absent application of the borrowing statute to shorten the limitations period, the statute of limitations of the forum where suit is initiated controls. Brown, 86 So. at 684 (noting that the above rule first appeared in Florida jurisprudence in 1856). Such a turn-about would be ill-advised.

In this Court's decision in Brown, as in this case, the question before this Court was whether to apply the statute of limitations of Florida, where the action was brought, or New York, where the action accrued. In finding that the Florida statute controlled, this Court first recognized, referring to Perry v. Lewis, 6 Fla. 555 (1856), the "well-settled principle that a statute of limitations is the law of the forum, and operates upon all who submit themselves to its jurisdiction." Id. at 684. This Court then held, in discussing a statute nearly identical to the present day borrowing statute, that there is nothing in the statute which would allow the Court to conclude that the legislature intended to deprive a defendant of the privilege of pleading the Florida statute of limitations, even if the cause of action was not barred by the limitations statutes of another state. Id. at 684. Accordingly, the lower court's ruling, which dismissed the action, was affirmed. See also Townsend v. Jemison, 9 How. 407, 13 L.Ed. 194 (quoted in Brown; stating "We thought then, and still think, that it has become

a formulary in international jurisprudence, that all suits must be brought within the period prescribed by the local law of the country where the suit is brought — the lex fori.")

The Brown holding has been applied without hesitation by Florida's courts since 1920. See Sullivan v. Fulton County Adm'r, 662 So. 2d. 706 (Fla. 4th DCA 1995); Strauss v. Sillin, 393 So. 2d 1295 (Fla. 2d DCA 1981); Central Home Trust Co. of Elizabeth v. Lippincott, 392 So. 2d 931 (Fla. 5th DCA 1981). See also Wells v. Simonds Abrasive Co., 345 U.S. 514, 517, 73 S.Ct. 856, 858, 97 L. Ed. 1211 (1953) (recognizing the established principle that if an action is barred by the statute of limitations of the forum, no action can be maintained even though the action is not barred in the state where the cause of action arose).

Most recent among these decisions is the Third District's decision in Rodriguez v. Pacific Scientific Co., 536 So. 2d 270 (Fla. 3d DCA 1988), which this Court declined to review. See Pacific Scientific Co. v. Rodriguez, 545 So. 2d 1368 (Fla. 1989). In Rodriguez, the appellants argued that if a tort cause of action was not barred by the statute of limitations where the cause of action arose, it could be maintained in Florida even though the action was time-barred by Florida's statute of limitations. Id. at 271. The Third District disagreed and affirmed the lower court's Order dismissing the action.

In reaching this conclusion, the court first recognized that this Court's decision in Bates v. Cook, 509 So. 2d 1112 (Fla. 1987) did not overrule Brown. In Bates, this Court addressed an issue irrelevant to Rodriguez and to the instant matter — whether the significant relationship test should be employed to determine in which state a cause of

action "arose" under section 95.10, Florida Statutes, Florida's "borrowing statute."[2] The borrowing statute has effect only where the limitations period for the foreign jurisdiction is less than Florida's limitations period and has expired, therefore requiring dismissal of the action. This was not the case in Rodriguez and it is not the case here where Georgia's limitations period, because of Georgia's tolling provision, exceeds that of Florida.

The court in Rodriguez also recognized that its holding was not inconsistent with the 1986 revision of the Restatement (Second) of Conflicts of Laws, section 142, which this Court cited with approval in Bates. The revision provides:

> 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.

Bates, 509 So. 2d at 1114 (emphasis added). In this case, as in Rodriguez, the action is time barred in the forum state, Florida, and therefore the Third District's decision conflicted with neither the Restatement nor Bates.

Petitioner, of course, maintains that Robinson should be adopted by this Court. Robinson is, however, clearly an erroneous decision. In Robinson, the Plaintiff filed suit

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[2] As this Court stated in Bates:

> Our ruling does not do violence to Florida's borrowing statute. We simply hold that the significant relationship test should be employed to decide in which state the cause of action "arose." The borrowing statute will only come into play if it is determined that the cause of action arose in another state.

Id. at 1115.

in Florida after the Florida statute of limitations expired but before the West Virginia statute of limitations applicable to her claim had expired. It was Plaintiff's position that because West Virginia had the most significant relationship to the cause of action, West Virginia's statute of limitations applied; this despite the fact that the cause of action had been filed in Florida. Id. at 724. The Second District agreed and reversed the trial court's Order dismissing the action as being barred by section 95.11, Florida Statutes (1995).

To reach this result, the Second District relied heavily on this Court's decision in Bates. However, this reliance was clearly misplaced because, as previously noted, Bates addressed an issue irrelevant to the facts in Robinson . Bates was not meant to create the new legal doctrine advanced in Robinson. To the contrary, its purpose was solely to answer a question certified by the Eleventh Circuit — which test should be used to determine where a cause "arose" under Florida's borrowing statute. [3] See Campo v. Tafur, 704 So. 2d 730 (Fla. 4th DCA 1998) (discussing the application of the significant relationship test to the borrowing statute). This fact is made all the more clear by the lack of any mention of this Court's decision in Brown and its progeny, and the fact that this Court declined to review this exact issue in 1989 when the Rodriguez case was at issue. The Second District's decision in Robinson is unquestionably an improper and ill-advised expansion of this Court's decision in Bates.

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[3] Section 95.10, Florida Statutes (1995), reads as follows:

> When the cause of action **arose** in another state or territory of the United Stated, or in a foreign country, and its laws forbid the maintenance of the action because of lapse of time, no action shall be maintained in this state. (emphasis added).

III. Even if this Court adopts the Second District's rationale in Robinson v. Merkle, Georgia law dictates that the statute of limitations of the forum where suit was initiated is controlling — in this case, that forum is Florida

Even if this Court chooses to adopt Robinson, Petitioner still faces a daunting problem. To reach the result achieved in Robinson, this Court must remove any distinction between substantive and procedural matters with regard to choice of law on statute of limitations issues. That way, trial courts will be free to apply the law of the state with the most significant relationship.

In the instant case, in considering which states' wrongful death act to apply, the trial court ruled that Georgia has the most significant relationship.[4] However, applying the law of Georgia will not alter the result in this case because the law of the State of Georgia dictates that the statute of limitations of the forum where the suit was filed is controlling — in this case, that forum is Florida.

As recently stated in Gray v. Armstrong, 474 S.E. 2d 280 (Ga. App. 1996), Georgia considers its statute of limitations, including that applied to wrongful death actions, to be procedural. Id. (citing to Hunter v. Johnson, 259 Ga. 21, 22, 376 S.E. 2d 371 (1989) and Taylor v. Murray, 231 Ga. 852, 204 S.E. 2d 747 (1974)). Under the rule of lex fori, also presently the rule of law in Georgia, procedural questions are governed by the law of the state in which the action is brought. Id. at 281. Therefore, should this Court hold that

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[4] The court never ruled on the issue of which statute of limitations applied. However, presumably the trial court, if given the opportunity, would reach the same conclusion with regard to the statute of limitations as it did with regard to the wrongful death claim.

Georgia law applies to an action filed in Florida where the cause of action sued upon arises in Georgia, the result will not change.

Application of Georgia law requires that the Florida court apply the law as a Georgia court would. The Florida court cannot pick and choose which aspects of Georgia's statute of limitations law to apply and which to omit. It must apply Georgia's law in full. In this case, a Georgia court faced with the issue of which statute of limitations to apply would be compelled to apply Florida's statute of limitations because Florida is the location where the action was instituted. This is required by the Georgia Supreme Court's decision in Taylor. Equally, a Florida court, applying Georgia law, would be compelled to reach the same result and apply Florida's, not Georgia's, statute of limitations.

As the Georgia Supreme Court recognized in Taylor, and as this Court should recognize here, a statute of limitations "is the public policy of the state. It bars the institution of . . . litigation after a lapse of this period and the period can not be extended by the legislatures of foreign states." Taylor, 204 S.E. 2d at 749.

IV. Receding from the long-standing precedent set forth in Brown v. Case will encourage forum shopping and will severely hamper the orderly administration of justice

Should this Court choose to recede from its long-standing precedent, Respondent would be remiss if it did not point out the grave consequences which may result. The purpose of Florida's statute of limitations is not solely to prevent a plaintiff from pursuing an untimely remedy, it is also to allow for orderly, effective and timely judicial administration of legal actions whose nexus is Florida. Adopting the Robinson rationale will completely

eviscerate this purpose. Any Plaintiff who wishes to avail himself of Florida's legal system, and who can meet Florida's jurisdictional requirements, will be free to file a claim barred by Florida's statute of limitations with the expectation that Florida's courts will breathe life into the claim because it could have been timely filed elsewhere, whether that place be the State of Georgia or the Republic of Georgia. This will occur regardless of whether the claim "arose" in another forum and more properly should have been brought in that forum.

Not only will Florida's judges have to be experts in Florida's law, but they will also have to become experts in the laws of every other state and country in the world because they will be applying those territories' substantive and procedural laws any time a plaintiff or defendant can demonstrate that the cause of action arguably arose elsewhere. This opening of the floodgates is clearly not in the best interest of Florida's legal system. See Hertz Corp. v. Piccolo, 453 So.2d 12, 16 (Fla. 1984) (Shaw, J., dissenting) ("Judicial economy is not furthered by enlarging the body of law under which Florida courts are required to apply unfamiliar foreign law.") Whereas litigators may have previously been discouraged from suing in Florida, with the adoption of the Robinson rationale, no one will ever again be concerned that Florida's statute of limitations will bar their ability to maintain a suit in Florida if they can make a plausible argument that the cause of action arose elsewhere.

V. Conclusion

For the reasons set forth above, Petitioner's Motion for Rehearing must be denied.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing has been mailed to John B. Moores, Esq., 777 South Flagler Drive, 8th Floor, West Tower, West Palm Beach, Florida 33401; David William Boone, Esq., 3155 Roswell Road, Suite 100, The Cotton Exchange, Atlanta, Georgia 30305; Richard Kupfer, Esq., The Forum, 1655 Palm Beach Lakes Boulevard, Suite 810, West Palm Beach, Florida 33401; and Roy D. Wasson, Esq., Suite 450, 1320 South Dixie Highway, Miami, Florida 33146, this 13 day of March, 1998.

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