IN THE SUPREME COURT OF THE STATE OF FLORIDA

LEROY H. MERKLE, JR., as Personal Representative of the ESTATE OF CARMELO L. TERLIZZI, deceased,

Petitioner,

vs.

CARRIE HARGIS ROBINSON, an infant under the age of eighteen years who sues by her mother and next friend, SHIRLEY HARGIS,

Respondents.

CASE NO. 91,967

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT

Case No. 95-5178

INITIAL BRIEF OF PETITIONER

Marie A. Borland, Esquire
Fla. Bar No. 847984
HILL, WARD & HENDERSON, P.A.
101 East Kennedy Boulevard
Suite 3700 - Barnett Plaza
Tampa, Florida 33601
(813) 221-3900
(813) 221-2900 Facsimile
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

STATEMENT OF THE FACTS AND OF THE CASE

A. Statement of the Facts.

On May 12, 1977, Shirley Hargis was admitted to the Cabell Huntington Hospital located in Cabell County, West Virginia, to deliver her child, Carrie Hargis Robinson. (R. 2)[1] Ms. Hargis' obstetrician was the late Carmelo L. Terlizzi, M.D. (R. 2) Ms. Hargis' daughter was delivered by Dr. Terlizzi later in the day. (R. 2) At the time of her delivery, Miss Robinson allegedly suffered from "absent respiration, limp muscle tone, pale blue color and no response to nasal catherization," and had the "umbilical cord around her shoulder and leg." (R. 3) Miss Robinson was allegedly diagnosed as suffering from perinatal asphyxia, hypoxia and seizure disorder, and purportedly suffers from cerebral palsy. (R. 3-4) Sometime after Miss Robinson's birth, Dr. Terlizzi retired to Florida, where he died on July 7, 1987. (R. 2)

B. Statement of the Case.

1. Nature of the case.

This case presents the question of whether Florida's conflict of law principles require the application of Florida's statute of limitations to bar a claim arising in a state where the statute of limitations has not run. Respondent Carrie Hargis Robinson, by her mother Shirley Hargis ("Respondents"), filed the medical malpractice complaint against Leroy H. Merkle, Jr., as Personal Representative of the Estate of Carmelo L. Terlizzi, M.D. ("Petitioner") in the Pinellas County Circuit Court on October 25, 1994 -- more than seventeen years following the alleged act of

---

[1] References to the record on appeal will be referred to as (R.), followed by the appropriate citation to the page number of the record on appeal.

malpractice. (R. 1)[2] Florida's medical malpractice limitations statute, § 95.11(4)(b), establishes an absolute limitation of seven years for commencing a medical malpractice action in this state. West Virginia's general limitations statute is longer. West Virginia Code, § 55-2-15 (1995).

2. Course of the proceedings.

Petitioner filed a motion to dismiss the complaint on May 25, 1995, based on Florida Statutes § 95.11(4)(b) and a number of other grounds. (R. 18-19) At the hearing on the motion, Petitioner argued that Florida's medical malpractice limitations statute applied to bar Respondents' claim. Respondents, in turn, argued that West Virginia's longer statute of limitations applied to the litigation.

On July 19, 1995, the trial court dismissed the complaint under Florida's medical malpractice statute of limitations. (R. 80) Respondents filed a motion for rehearing and a motion for leave of court to file an amended complaint. (R. 93) On November 6, 1995, the trial court denied Respondents' motions for rehearing and motion to amend, and entered a final judgment of dismissal. (R. 97; 99-100)

Respondents filed a notice of appeal to the Second District Court of Appeal on December 5, 1995. (R. 101) On February 8, 1996, Respondents filed a motion requesting the Second District to remand the case to the trial court to consider a motion for leave to add the late Dr. Terlizzi's medical malpractice insurer as a defendant, and to file a third amended complaint. The Second

---

[2] Respondents also filed an action against Petitioner and the Cabell Huntington Hospital in West Virginia on December 8, 1994. (R. 131) On November 21, 1997, the West Virginia Supreme Court of Appeals affirmed the West Virginia circuit court's order dismissing Respondents' complaint against Petitioner for lack of personal jurisdiction, and denying Respondents' motion to amend their complaint to join the late Dr. Terlizzi's insurance carrier. Robinson v. Cabell Huntington Hospital, 1997 WL 725914 (W. Va. Nov. 21, 1997).

District granted Respondents' motion for remand on March 14, 1996. Respondents then filed a motion with the trial court for leave to add a party defendant and file a third amended complaint. (R. 108) The trial court denied Respondents' motion on April 18, 1996. (R. 237) On May 1, 1996, the trial court entered its order on remand. (R. 155)

3. The Second District Court of Appeal's Opinion.

The Second District Court of Appeal heard oral argument in the appeal on March 19, 1997, and filed its opinion on September 19, 1997. Robinson v. Merkle, 700 So. 2d 723 (Fla. 2d DCA 1997). (Appendix A) In its opinion, the Second District focused on "whether Florida's statute of limitations was properly applied to a tort action which arose in West Virginia and which is not barred by that state's statute of limitations." Id. at 724. Based on its interpretation of this Court's holding in Bates v. Cook, 509 So. 2d 1112 (Fla. 1987), the Second District reversed the trial court. Id. at 726. The court concluded that "because West Virginia has a more significant relationship with the parties and the action, West Virginia's statute of limitations should have been applied." Id. at 725-726. The Second District expressly acknowledged a conflict between its opinion and the Third District Court of Appeal's ruling on the same issue in Rodriguez v. Pacific Scientific Co., 536 So. 2d 270 (Fla. 3d DCA 1988), review denied, 545 So. 2d 1368 (1989). Id. at 726. Accordingly, the Second District certified the following question to this court:

> DOES THE SIGNIFICANT RELATIONSHIPS TEST ADOPTED IN BATES V. COOK, 509 SO. 2D 1112 (FLA. 1987), FOR USE IN APPLYING FLORIDA'S BORROWING STATUTE, § 95.10, FLORIDA STATUTES, ALSO APPLY TO CASES INVOLVING FLORIDA'S STATUTE OF LIMITATIONS § 95.11, FLORIDA STATUTES?

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal erred when it ruled that the trial court should have borrowed West Virginia's longer statute of limitations to permit the litigation in Florida of a claim time barred under Florida law. In reaching its conclusion, the Second District misinterpreted this Court's opinion in Bates v. Cook, where the Court simply approved the use of the "significant relationships test" to determine the state in which a cause of action arose for purposes of applying the Florida borrowing statute. The Second District's opinion is contrary to Florida law. Specifically, Florida law is clear that the courts of this state will apply Florida's own limitations statutes barring claims which have little or no connection to the state -- even if the statute of limitations of the state with a more significant relationship to the cause of action has not expired.

The Third District Court of Appeal in Rodriguez v. Pacific Scientific Co. considered the precise issue presented to the Second District in this case and reached a contrary result -- that an action which is time-barred in Florida cannot be maintained in Florida, regardless of whether the action is still viable in the jurisdiction in which it arose. The Third District's interpretation of the law in Rodriguez is correct. Accordingly, this Court should respectfully resolve the conflict arising from the Second District's opinion herein and the Third District's holding Rodriguez, by overturning the Second District's erroneous opinion in this case.

ARGUMENT

I. **THE SECOND DISTRICT COURT OF APPEAL ERRED WHEN IT HELD THAT A FLORIDA COURT MUST BORROW THE LONGER STATUTE OF LIMITATIONS OF THE STATE WITH THE MORE SIGNIFICANT RELATIONSHIP TO THE CAUSE OF ACTION, EVEN THOUGH THE CLAIM IS BARRED IN FLORIDA UNDER FLORIDA'S LIMITATIONS STATUTE.**

A. Introduction.

The Second District's holding that a Florida court should borrow the **longer** statute of limitations of the state having a more significant relationship to the cause of action, when the claim is time barred under Florida law, is contrary to the law and public policy of this state. Although the decision is founded upon Bates, it is contrary to the principle advanced by that decision. In Bates, this Court authorized the Florida courts to borrow the **shorter** limitations statute of the state with the more significant relationship to the cause of action, where the action was not barred under Florida law. In so holding, this Court in Bates advanced the purpose of the borrowing statute -- to discourage the filing of lawsuits in Florida that are barred in the jurisdiction where the cause of action arose. Celotex Corp. v. Meehan, 523 So. 2d 141, 143 (Fla. 1988). The effect of the opinion was to protect Florida courts from having to entertain litigation having little or no connection to the state, simply because Florida's limitations statute had not expired.

The Second District's opinion, in contrast, has the opposite effect -- it promotes the pursuit of litigation in Florida having little connection to the forum, by permitting the maintenance of litigation in Florida which is time-barred under Florida law.[3] The Second District's certified

[3] The Second District's misinterpretation of the law is not entirely surprising given the confusion often associated with the resolution of conflict of laws principles. As Justice Grimes noted in his concurring opinion in Sturiano v. Brooks, 523 So. 2d 1126, 1130 (Fla. 1988):

The more I read of it the more I tend to agree with Dean Prosser when he said that

question underscores its misinterpretation of the law. The Second District should have more accurately posed the following question:

> MAY A FLORIDA COURT DISREGARD ITS SHORTER STATUTE OF LIMITATIONS BARRING THE CLAIM AND BORROW THE LONGER STATUTE OF LIMITATIONS OF THE STATE HAVING A MORE SIGNIFICANT RELATIONSHIP TO THE CAUSE OF ACTION?

The response to this question -- the real issue presented in this case -- is no.

B. <u>This Court's analysis in Bates v. Cook</u>.

The Second District's erroneous conclusion stems from its misinterpretation of this Court's opinion in <u>Bates v. Cook</u>. In <u>Bates</u>, the Eleventh Circuit Court of Appeals certified the following question to this Court:

> For the purpose of applying Florida's limitation of actions 'borrowing' statute," 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, <u>Colhoun v. Greyhound Lines, Inc.</u>, 265 So. 2d 18, 21 (Fla. 1972), or with reference to the "significant relationships" that the respective states have to the cause of action, <u>Bishop v. Florida Specialty Paint Co.</u>, 389 So. 2d 999, 1000-01 (Fla. 1980).

<u>Bates v. Cook, Inc.</u>, 79 F. 2d 1525, 1528 (11th Cir. 1986).

As the certified question reveals, the Eleventh Circuit sought guidance from this Court as to the appropriate test to use to determine the state in which a "cause of action arose" for purposes of

---

> "[t]he realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it."

applying the Florida borrowing statute, § 95.10.[4] The Eleventh Circuit's inability to resolve the issue resulted from the confusion surrounding this Court's holding in Colhoun that the "cause of action . . . arises in the jurisdiction where the last act necessary to establish liability occurred," and this Court's later adoption of the Restatement (Second) Conflict of Laws ("Restatement") §§ 145-146 "significant relationships test" in Bishop.

In responding to the certified question, this Court acknowledged that the purpose of the borrowing statute is to "bar actions brought in Florida which arise outside the State of Florida and which are time-barred in the jurisdiction in which the cause of action arose." Id. at 1113. The Court then addressed its adoption in Bishop of the "significant relationships test," and considered whether this test should be applied in deciding where a cause of action arose for purposes of the borrowing statute. Id. at 1114. The Court recognized that the traditional justification for failing to apply the "significant relationships test" to limitations statutes is that courts generally regard limitations statutes as procedural devices governed by the law of the forum, while the "significant relationships test" applies to issues of substantive law. Id.

This Court in Bates acknowledged a trend away from classifying statutes of limitations as procedural for choice of law purposes. Id. The rationale underlying this trend was to avoid the automatic application of the forum's **longer** statute of limitations as a pure matter of procedure, where the claim was already time barred under the limitations statute of the state with a more

---

[4] 95.10. **Causes of action arising out of the state. --**
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 shall be maintained in this state.

significant relationship to the cause of action.[5] The trend discouraged the pursuit of litigation in Florida having little connection to the state, simply because the claim was not barred under Florida's limitations statutes. This Court in Bates approved this movement away from the mechanical application of the forum's longer statute of limitations as a procedural matter, and adopted the significant relationships test to resolve conflict of law questions concerning the appropriate application of a limitations period under Florida's borrowing statute. This Court specifically held:

> We simply hold that the significant relationships 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.

C. Under Florida law, a Florida court will continue to apply its own shorter limitations statute barring a claim, without regard to the significant relationships test.

Before the Bates decision, Florida courts explained the practice of applying Florida's limitations statutes to actions filed in Florida by referring to statutes of limitations as procedural and therefore governed by the law of the forum. See, e.g., Colhoun v. Greyhound Lines, Inc., 265 So. 2d 18, 20 (Fla. 1972) ("statutes of limitations traditionally have been considered procedural matters, and as such, the limitation action of the law of the forum is applicable"); Walter Denson & Son v. Nelson, 88 So. 2d 120, 122 (Fla. 1956) ("ordinarily, statutes of limitation are construed as being applicable only to the remedy and not to the substantive right"); Strauss v. Sillin, 393 So. 2d 1205, 1206 (Fla. 2d DCA 1981) ("in conflict of law situations, matters of procedure are generally resolved by the law of the state in which the action has been instituted"); Central Home Trust Co. of Elizabeth

---

[5] This explanation is more fully set forth in the various articles cited by this Court in Bates at p. 1114.

v. Lippincott, 392 So. 2d 931, 932 n. 1 (Fla. 5th DCA 1980) (although plaintiff sought to rely on a New Jersey statute, it is well-established that the forum's statute of limitations is generally applicable).

Following Bates, the Florida courts' application of the forum's **shorter** statute of limitations barring a claim remains good law. This rule furthers fundamental state policy concerns by providing repose against the litigation of stale claims and by conserving judicial resources. This Court's adoption in Bates of the American Law Institute's 1986 revision of Restatement § 142 reveals the Court's continued adherence to this well-established rule. The § 142 revision, which precludes the maintenance of litigation of claims which are time-barred in the forum court, reads:

> 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.

Id. at 1115. (emphasis added)[6] This Court's adoption of Restatement § 142 in Bates was expressly

---

[6] Restatement § 142 was further revised in 1988, and now reads:

> § 142. **Statute of Limitations.**
> Whether a claim will be maintained against the defense of the statute of limitations is determined under the principles stated in § 6. In general, unless the exceptional circumstances of the case make such a result unreasonable:
>
> (1) **the forum will apply its own statute of limitations barring the claim**;
>
> (2) the forum will apply it own statute of limitations permitting the claim unless:
>
> (a) maintenance of the claim would serve no substantial interest of the forum; and
>
> (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.

acknowledged by this Court in Kramer v. Piper Aircraft Corp., 520 So. 2d 37, 38 n. 1 (Fla. 1988) and Celotex Corp. v. Meehan, supra.

In Fulton County Administrator v. Sullivan, 22 Fla. L. Weekly S578 (Fla., Sept. 25, 1997), this Court recently confirmed its approval of the principle underlying Restatement § 142. In Sullivan, the Fourth District Court of Appeal reversed a judgment in favor of the parents of a murder victim, on the grounds that the defendant's fraudulent concealment of his identity did not toll Florida's two year statute of limitations for wrongful death actions, § 95.11(4)(d). Sullivan v. Fulton County Administrator, 662 So. 2d 706 (Fla. 4th DCA 1995). Although the Fourth District found that the cause of action arose in Georgia, the court applied Florida's wrongful death limitations statute to bar the claim. The court did so based on the "well-established rule that the statute of limitations of the forum state is applicable except where there is a shorter limitations period in the state where the tort occurred," citing to Rodriguez v. Pacific Scientific Co., supra, and Restatement § 142. Id. at 707. The court, however, asked this Court to consider whether statutes of limitations for civil actions are tolled by the fraudulent concealment of the identity of the defendant. Id. at 710.

This Court answered the certified question in the negative. 22 Fla. L. Weekly S578. Notably, the Court did not disturb the Fourth District's application of Florida's statute of limitations under the authority of Rodriguez and § 142 of the Restatement, even though the Court acknowledged that the claim would have been viable under Georgia law. Id. at S581. Significantly, neither the Fourth District nor this Court engaged in a "significant relationships" analysis to determine whether

Florida's or Georgia's limitations statute should apply, because the claim was already barred under Florida's limitations statute.

Although Florida law clearly provides for the application of Florida's limitations statute barring a claim, until Rodriguez v. Pacific Scientific Co., supra, no Florida court had expressly considered the precise issue presented in this case -- whether a Florida court may disregard its shorter statute of limitations barring a claim, and apply the longer limitations statute of the state having a more significant relationship to the cause of action, to permit the litigation to proceed in Florida. The Third District in Rodriguez ruled that the Florida court must apply its shorter limitations statute. An analysis of Rodriguez reveals that the Third District's interpretation of the law is correct.

In Rodriguez, the trial court considered whether an action filed in Florida arising out of a helicopter crash in Puerto Rico could be maintained in Florida, where the action was barred under Florida's limitation statute but was not barred under Puerto Rico's limitation statute. Rodriguez at 271. The plaintiffs in Rodriguez argued that because Puerto Rico had the more significant relationship to the occurrence and the parties, Puerto Rico's "longer" limitations statute controlled. Id. The Third District in Rodriguez, like the Second District in the present case, discussed the significance of Bates to the issue at hand. Id. However, unlike the Second District, the Third District recognized the "threshold distinguishing fact" between Bates and Rodriguez -- the cause of action was not barred by Florida's limitations statutes in Bates. Id. The Third District concluded that because the action was barred under Florida's statute of limitations it could not be maintained in Florida, even though the action was not barred by the limitations statute of the territory with the more

significant relationship to the cause of action. Id. The Rodriguez court expressly acknowledged that its holding was consistent with § 142 of the Restatement. Id.[7]

D. The Second District's opinion is incorrect.

The Second District's conclusion that a Florida court must borrow the **longer** limitations statute of the state with the most significant relationship to the cause of action, even when the claim is time barred in Florida, is contrary to well-established law. In reaching its conclusion, the Second District relied upon this Court's adoption of the "significant relationships test" in Bishop, and the Court's application of the significant relationships test "in the context of a procedural conflicts of law" in Bates. Id. at 725. Although the Second District recognized that Bates involved the application of the significant relationships test to Florida's borrowing statute, § 95.10, the court concluded that the language in Bates is applicable "to any conflict of law question concerning a statute of limitation, including § 95.11, Fla. Stat. (1993)." Id. From this conclusion, the Second District held that "Florida's statute of limitations should not be used to bar a cause of action which arose in another state or territory, when that state or territory has the more significant relationship to the cause of action, and the action is not barred in the foreign state." Id.

The Second District's reliance on Bates in reaching its conclusion is flawed, because Bates supports a contrary conclusion. Bates simply authorizes an exception to the general rule requiring Florida courts to apply Florida's statute of limitations to claims filed in the state. Under Bates, even though Florida's limitations statute has not run, a Florida court may borrow the **shorter** statute of

---

[7] See also Watkis v. American National Insurance Co., 967 F. Supp. 1272, 1274 (M.D. Fla. 1997) (finding that the court lacked jurisdiction to consider the case because the applicable statutes of limitations had expired, citing to Rodriguez for the principle that "once an action is time barred in Florida, the action cannot be maintained in Florida, regardless of whether the action would still be viable in the jurisdiction in which it arose").

limitations of a state which has a more significant relationship to the cause of action. This Court's adoption of Restatement § 142 in Bates reveals the Court's approval of the rule favoring the application of the forum's limitations statute barring a claim. The Second District's opinion ignores this fundamental aspect of the Bates decision.

Notwithstanding the black letter rule requiring the application of Florida's shorter limitations statute to bar a claim, the Second District in this case took an unprecedented step -- it authorized the Florida courts to borrow a foreign state's longer statute of limitations, to permit litigation in Florida of claims which are time barred under Florida law, and which have little connection to the state. The Second District's holding was based on its failure to recognize that the "significant relationships test" only applies where a claim is not barred in Florida, but is barred in the state where the cause of action arose. The effect of the Second District's opinion is to encourage the pursuit in Florida of litigation having little or no connection to the forum, and is therefore contrary to the well-established law and policies of this state.

CONCLUSION

The Second District Court of Appeal erred when it held that the trial court should have borrowed West Virginia's longer statute of limitations in an action filed in Florida and time barred under Florida law. The Second District's opinion is contrary to well-established law, as correctly applied by the Third District in Rodriguez v. Pacific Scientific Co. Accordingly, for the reasons set forth herein, Petitioner, LEROY H. MERKLE, JR., as Personal Representative of the ESTATE OF CARMELO L. TERLIZZI, M.D., deceased, respectfully requests that this Court quash the opinion of the Second District Court of Appeal.

Respectfully submitted,

Marie A. Borland, Esquire
Florida Bar No. 847984
HILL, WARD & HENDERSON, P.A.
Suite 3700 - Barnett Plaza
101 E. Kennedy Boulevard
P.O. Box 2231
Tampa, FL 33601
(813) 221-3900
(813) 221-2900 telecopier
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 23 day of January, 1998, to Roy L. Glass, Esquire, 3131 - 66th Street North, Suite A, First Union National Bank Bldg., St. Petersburg, Florida 33710.

ATTORNEY

F:\WP61\WORK\JLH\ROBINSON\INITIAL.BRF