IN THE SUPREME COURT OF FLORIDA

NO. 69,494

HAROLD C. KRAMER and

JOAN W. KRAMER

APPELLANTS

vs.

PIPER AIRCRAFT CORPORATION
a Pennsylvania corporation,

Appellee

On certification from the United States Court of Appeals for the Eleventh Circuit

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No. 85-5727

Brief of Appellants

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STATEMENT OF THE ISSUES

I

Whether under Florida law, a person injured while a passenger on an airplane has a cause of action in implied warranty against the airplane manufacturer, separate and distinct from a strict liability action.

II

If the answer to question (1) is yes, which statute of limitations should be applied to such a cause of action?

(i) STATEMENT OF THE CASE

References to the record on appeal will be made through use of the symbol "[R]." References to the Appendix to this brief will be made through use of the symbol "[APP]".

The United States Court of Appeals for the 11th Circuit, has certified this case to the Supreme Court of Florida to answer controlling questions of Florida law.

The Petitioners, HAROLD C. KRAMER, and his wife, JOAN W. KRAMER, were the appellants in the United States Court of Appeal for the Eleventh Circuit. They are citizens of the State of Florida and will be referred to herein as "the KRAMERS" or "Appellants."

The Appellant, Piper Aircraft Corporation, is a Pennsylvania corporation and was the appellee in the United States Court of Appeals for the Eleventh Circuit. Piper Aircraft will be referred to herein as "PIPER" or "Appellee".

The Plaintiffs filed their four count Complaint against PIPER on March 30, 1978 in which they sought to recover damages as a result of the injuries they sufered on December 6, 1975 in a crash of a PA-32R-300 Cherokee Aircraft. The crash occurred on take-off from Hummel Airport in Topping Virginia.[R1-1] The KRAMERS, who were passengers on the aircraft, alleged that PIPER negligently designed and manufactured the aircraft and sought recovery on the theories of negligence (Count I), strict liability (Count II) and breach of implied warranties of fitness and merchantability (Counts III and IV).[R1-5]

On November 5, 1978, the District Court entered Summary Judgment in favor of PIPER as to KRAMERS' claims for relief based on negligence and strict liability but denied Summary Judgment on the breach of implied warranty claim.[R2-35] The Court held that under the doctrine of lex loci delicto adhered to under Florida law, the accident was governed by Virginia law and that by virtue of Florida's "borrowing statute" (§95.10, Fla. Stat.) the tort claims, were barred by Virginia's two year statute of limitations for personal injury. However, the court found that the breach of warranty claims had "appropriate relation" to the State of Florida, and therefore, its law applied.

PIPER moved for reconsideration, [R2-38] whereby the District court granted Summary Judgment in favor of PIPER on the breach of warranty claims, holding that the KRAMERS were also barred on that claim by borrowing the Virginia statute of limitations.[R2-40]

Final judgment dismissing the KRAMERS' cause on the merits was entered on August 28, 1980.[R2-41] On September 18, 1980, the Plaintiffs noticed their appeal to the United States Court of Appeals for the 11th Circuit.[R2-42]

On September 30, 1981, the 11th Circuit remanded the case to the trial court to review the case in light of the then recent decision of Bishop v. Florida Specialty Paint Co., 389 So.2d 999 (Fla. 1980).[R2-43] The case was called for hearing on December 19, 1984 and on June 28, 1985, final judgment was entered in favor of Piper Aircraft.[R2-52] Appellants' Motion for re-

hearing was denied August 5, 1985.[R2-56] Appeal was again taken to The United Sates Court of Appeals for the 11th Circuit. The Court of Appeals held that determination of this case required certification of questions to the Florida Supreme Court.

(ii) STATEMENT OF FACTS

The parties stipulated to a number of facts [App.1-2]. PIPER is a Pennsylvania corporation, qualified to do business in the State of Florida, and maintains facilities for the manufacture of aircrafts in Florida. The PA-32R-300 Cherokee aircraft in question was designed, manufactured and tested in Florida.[R2-25, R2-26] It was operated a total of 17 hours prior to the crash in which the KRAMERS were injured, 6-7 hours of which involved the Flight of the aircraft from Florida to Turner Field near Philadelphia, Pennsylvania.[App.1-2]

The aircraft was sold in Pennsylvania to a purchaser other than the KRAMERS.[App.1-2] The aircraft crashed on take off from Hummel Airport in Topping, Virginia on December 6, 1975 while in route to Florida.[App.1-2] The Kramers are citizens of Florida, but were residents of New Jersey at the time of the crash.[App.1-2]

On those facts, the District Court held that under Florida's conflict of law principles, and Florida's Borrowing Statute (§95.10 F.S.) the law of Virginia governed and its statute of limitations barred Plaintiffs' tort and breach of implied warranty actions.

On the second appeal, the United States Court of Appeals for the 11th Circuit, then certified the following controlling questions to the Supreme Court of Florida:

I

Whether under Florida law, a person injured while a passenger on an airplane has a cause of action in implied warranty against the airplane manufacturer, separate and distinct from a strict liability action.

II

If the answer to question (1) is yes, which statute of limitations should be applied to such a cause of action?

SUMMARY OF THE ARGUMENT

I. AN INJURED PARTY CLEARLY HAS A CAUSE OF ACTION IN IMPLIED WARRANTY AGAINST THE MANUFACTURER, SEPARATE AND DISTINCT FROM A STRICT LIABILITY ACTION, BECAUSE IT WOULD BE INCONSISTENT TO HOLD THAT THE DOCTRINE OF STRICT LIABILITY APPLIES WHILE REJECTING THE THEORY OF IMPLIED WARRANTY.

A. Based on pre-West case law, Florida did not require contractual privity for a breach of implied warranty action, and lack of contractual privity, should not now bar such a cause of action.

B. The better reasoned decisions have abolished contractual privity in implied warranty claims while simultaneously maintaining the implied warranty and strict liability theories in order to better afford consumer protection.

II. ABSENT AN AGREEMENT BETWEEN THE PARTIES, AN ACTION FOR BREACH OF IMPLIED WARRANTY WILL ACCRUE "WHERE THE TRANSACTION BEARS AN APPROPRIATE RELATION TO THIS STATE."

ARGUMENT

I. AN INJURED PARTY CLEARLY HAS AN ACTION IN IMPLIED WARRANTY AGAINST THE MANUFACTURER SEPARATE AND DISTINCT FROM A STRICT LIABILITY ACTION BECAUSE IT WOULD BE INCONSISTENT TO HOLD THAT THE DOCTRINE OF STRICT LIABILITY APPLIES WHILE REJECTING THE THEORY OF IMPLIED WARRANTY.

A. Based on pre-West case law, Florida did not require contractual privity for a breach of implied warranty action, and thus lack of contractual privity, should not now bar such a cause of action.

The first question is whether common law breach of implied warranty still exists in Florida. In West v. Caterpillar Tractor Co., Inc., 336 So.2d 80 (Fla. 1976), a pedestrian was injured when a Caterpillar Tractor backed over her and injured her. This court stated at p.91:

> The adoption of the doctrine of strict liability in tort does not result in the demise of implied warranty. If a user is injured by a defective product, but the circumstances do not create a contractual relationship with the manufacturer, then the vehicle for recovery could be strict liability in tort. If there is a contractual relationship with the manufacturer, the vehicle of implied warranty remains. (Emphasis added).

This language of the court seems to with one broad brush do away with implied warranty actions where privity does not exist between the "user" and the manufacturer. In this case, Mrs. West, the pedestrian, was not a "user" in the sense of the word. Since Mrs. West was not a "user", it is clear that the

language contained in this Supreme Court opinion referring to "users" was merely dicta. The fact that it was merely dicta has been recognized by courts interpreting West and will be discussed further.

The following cases have four basic issues in common. First, there is no privity existing between the plaintiff and the defendant manufacturer. Second, all plaintiffs have causes of action for breach of implied warranty. Third, they all rely upon West v. Caterpillar in arriving at their decisions, and fourth, notwithstanding their reliance upon West v. Caterpillar, and the absence of privity, in none of the cases is a plaintiff prevented from pursuing his breach of implied warranty claim. Vaughn v. Chadbourne, 462 So.2d 512 (Fla. 1st DCA 1985); Copeland v. Celotex Corp., 447 So.2d 908 (Fla. 3d DCA 1984); Auburn Machine Works Co., Inc. v. Jones, 366 So.2d 1167 (Fla. 1979); Halpryn v. Highland Insurance Co., 426 So.2d 1050 (Fla. 3d DCA 1983); Hartman v. Opelika Machine and Welding Co., 414 So.2d 1050 (Fla. 3d DCA 1983); Spring Lock Scaffolding Rental Equipment Co., Inc. v. Charles Poe Masonry, 358 So.2d 84 (Fla. 3d DCA 1978); Rohrsen v. Waco Scaffold and Shoring Co., 355 So.2d 770 (Fla. 1978); Sansing v. Firestone Tire and Rubber Co., 354 So.2d 895 (Fla. 4th DCA 1978); Jones v. Auburn Machine Co., Inc., 353 So.2d 917 (Fla. 2d DCA 1977); Tri-County Truss Co. v. Leonard, 467 So.2d 370 (Fla. 4th DCA 1985); Kellan v. Holster, 518 F.Supp. 175 (M.D. Fla. 1981); Smith v. Fiat Roosevelt Motors, Inc., 556 F.2d 728 (5th Cir. 1977); Houdaille Industries, Inc. v. Edwards, 374 So.2d

490 (Fla. 1979). However, none of these above cases discuss specifically what the Supreme Court meant by its language in West with reference to privity. Furthermore, in none of the above cited cases was the impact of the language on the evolution of privity requirements for breach of implied warranty actions in Florida discussed. However, in each case, the court writing the decision, was aware of West, discussed West, relied upon West in arriving at the decision they arrived at, and notwithstanding that knowledge and reliance, did not utilize the absence of privity in any of those cases as a basis for dismissing the breach of implied warranty claim.

By abolishing the privity requirements, the court meant to extend liability of the manufacturer to the ultimate consumer, not to limit the latter's recovery. More importantly, this was a means by which the court could protect the consumer and also keep manufacturers responsible for the products that they put into the marketplace.

The case of Nicolodi v. Harley Davidson Motor Co., Inc., 370 So.2d 68 (Fla. 2d DCA 1979), involved a claim based on strict liability and breach of implied warranty where Harley Davidson Motor Co. manufactured a motorcycle in which the injured party was riding as a passenger. The motorcycle struck a truck causing the appellant to suffer serious injuries. The complaint contained three counts against appellee: one for negligence; one for breach of implied warranty; and one for strict liability.

The court states at Page 72:

> Having passed that hurdle, we address the question whether appellant's counts for breach of implied warranty and strict liability should stand ... [T]he doctrine of strict liability was not adopted by the Florida Supreme Court until six months after the decision in Evancho, [Ford Motor Company v. Evancho, 327 So.2d 201 (Fla. 1967)] when the court issued its opinion in West v. Caterpillar Tractor Co., Inc., 336 So.2d 80 (Fla. 1976). In the West case, the court added the theory of strict liability to the traditional theories of negligence and breach of implied warranty as available vehicles for recovery in products liability cases...It pointed out that the adoption of the doctrine of strict liability in tort does not result in the demise of the contractual remedy based on implied warranty. If the user is injured by a defective product, but the circumstances do not create a contractual relationship with the manufacturer, then the vehicle for recovery could be in tort for negligence on strict liability. If there is a contractual relationship with a manufacturer the vehicle of implied warranty remains ... We hold that the allegations of the appellants' counts against appellee for negligence, breach of warranty and strict liability are sufficient to state a cause of action on each of those theories of recovery ... The breach of implied warranty count alleges the existence of an implied warranty by appellee that its mortorcycles are reasonably fit for ordinary use as motorcycles upon which passengers can be transported with a reasonable degree of safety and that a breach of that warranty occurred when appellee failed to provide any safety device on its motorcycle to protect passengers' legs during collisions. (Emphasis supplied)

The Plaintiff passenger in the above case, as the plaintiff passengers in the case at bar, was not in privity with the manufacturer. Although the Court specifically considered the same language from West, relied upon by the Appellee to dispose

of Plaintiff's claims herein, that lack of privity was not held to be a bar to the Plaintiff's breach of warranty action.

In the case of Ellison v. Northwest Engineering Company, 521 F.Supp. 199 (S.D. Fla. 1981), Plaintiff, a person not in privity, brought an action where his hand and arm were mangled in a drag line machine manufactured by the defendant. The machine was manufactured in 1957 and changed owners at least once since original delivery. The Court discussed West v. Caterpillar with respect to the strict liability claim and then it turned to a discussion of the implied warranty claim stating:

> As to the implied warranty claim, the manufacturer's duty under the florida U.C.C. would extend to the purchaser and the purchaser's employee if use by an employee is reasonably expected, in actions covered by Sections 672.2-318 Fla. Stat. Ann. (West Supp. 1981). But the Florida U.C.C. does not apply to the instant case. Section 680-10-101(2) Fla. Stat. Ann. (West Supp. 1981) provides that the Florida U.C.C. applies to transactions entered into after January 1, 1967.

The court held that since the machine was bought prior to 1957, the abrogation of privity requirements under the U.C.C. did not apply to that machine and plaintiff's claim for breach of implied warranty was barred for lack of privity. The court although discussing West did not rely upon West to bar the implied warranty claim, relying instead upon the fact that the U.C.C. wasn't adopted until 1967 and the machine was purchased in 1957 before the U.C.C. became effective. The trial judge did not discuss the possible application of a common law implied warranty

action. (see Vandercook & Son, Inc. v. Thorpe, 344 F.2d 930 (5th Cir. 1965), aff'd 395 F.2d 104, and cases cites therein)

The case of Walsh v. Ford Motor Company, 588 F.Supp. 1513 (D.D.C. 1984) involved a suit under the Magnuson-Moss Warranty Act. This was an action for damages, declaratory and injunctive relief, for breach of both written and implied warranties, negligence, and strict liability. Plaintiff alleged that the transmission in his car slipped into the reverse position after the driver had attempted to place the car in the park position. The complaint included some 210 named plaintiffs and 158 motor vehicles.

With respect to the implied warranty claims, the Court states at Page 1524:

> In addressing this claim, Ford argues that numerous plaintiffs must be dismissed and cannot be counted towards meeting the 100 named plaintiff requirement because they failed to state a claim for relief. Specifically, it argues that certain plaintiffs with implied warranty claims, when examined under their own State law, cannot assert a claim for relief because they lack the required vertical privity with Ford. The requirement in certain states of vertical privity demands that a consumer, in order to bring warranty claims against the manufacturer, must have purchased the product in question directly from that manufacturer. It is undisputed that there are no plaintiffs in this action who purchased their vehicles directly from Ford. Therefore, plaintiffs are not in privity of contract with Ford, but rather only with independent Ford dealers or the former owners of the vehicle.

The court held:

> "If, in this action, there are to be any implied warranty claims at all under Magnuson-Moss, they must "originate" from or "come into being" from state law. Therefore, if the state does not provide for a cause of action for breach of implied warranty where vertical privity is lacking, there cannot be a Federal cause of action for such a breach.

At Page 1525.

The Court then goes on to consider the vehicles on a state by state basis and at Page 1528 states:

> Defendant argues that Florida requires that vertical privity be present when pursuing implied warranty claims. It pursues this argument despite a long line of Florida cases that hold that privity of contract is not required when pursuing implied warranty claims. (Citations omitted). Ford claims, however, that the Supreme Court of Florida's ruling in West v. Caterpillar Tractor Company, 336 So.2d 80, 86-90 (Fla. 1976), implicitly overruled those decisions. The Court does not agree. The decision in West did not address the question of whether indirect purchasers face vertical privity obstacles in Florida. Further, in a case decided after the West opinion, the United States Court of Appeals for the Fifth Circuit noted that indirect purchasers may recover against manufacturers under an implied warranty theory. Smith v. Fiat Roosevelt Motors, Inc., 556 F.2d 728, 730 (5th Cir. 1977). Therefore, this Court must conclude that the victim in West did not reverse a long line of Florida decisions that hold that vertical privity is not required in order for a consumer to pursue claims against a manufacturer under the theory of implied warranty." (Emphasis supplied)

What public interest of the citizens of Florida is served by denying those citizens who are secondary purchasers their rights under the "Magnuson-Moss Warranty Act." This is an example of the type of claim which could be swept away by the dicta of West.

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It should be noted that in all the cases reviewed, that there is not one reported case that the appellant has been able to find which cites West for the proposition that a breach of implied warranty claim for personal injury should be barred against a person within the range of forseeable users because of lack of privity. This notwithstanding the fact that West as reflected in Sheppard's Florida Citations has been cited in no less than eighty three decisions. In preparing this brief counsel for the appellant has read all eighty-three decisions. There is no question that the Supreme Court in West said what the Appellees as well as the courts have quoted it as saying. However, no Federal, or state trial court, or appellate court in the 10 years since West has applied the dicta in West to bar a breach of implied warranty claim for personal injury. Appellees cannot and have not cited a single case which follows the dicta in West to bar a personal injury claim by a person within the range of forseeable users of the product.

B. The better reasoned decisions have abolished contractual privity in implied warranty claims while simultaneously maintaining implied warranty and strict liability theories in order to better afford consumer protection not erode consumer protection.

The seminal case in the area of strict liability is the case of Greenman vs. Yuba Power Products, Inc., 377 P.2d 897 (Ca. 1962). Greenman, the plaintiff, received a Christmas present from his wife, the present was a Shopsmith's power tool which

among other things adapted itself as a power lathe. Plaintiff was injured when the machine malfunctioned and the piece of wood that he was turning suddenly flew out of the machine and struck him on the forehead. Plaintiff sued the retailer and manufacturer for negligence and breach of express and implied warranties. The manufacturer appealed the verdict against it contending that the plaintiff did not give notice of the breach of warranty within a reasonable time and that since it could not be determined whether the verdict against it was based on negligence or warranty the error in presenting the warranty cause of action to the jury was prejudicial. Justice Traynor in writing the opinion at page 899 analyzes, as the Florida Courts later do, (hereinafter discussed) why law of sale principles don't apply to actions for breach of implied warranty. "Like other provisions of the Uniform Sales Act (Civ. Code, §§ 1721-1800), Section 1769 deals with the rights of the parties to a contract of sale or a sale. It does not provide that notice must be given of the breach of a warranty that arises independently of a contract of sale between the parties. Such warranties are not imposed by the Sales Act, but are the product of common law decisions that have recognized them in a variety of situations." (citations omitted). (Emphasis supplied)

At the time Justice Traynor was writing his decision in Greenman, LaHue v. Coca Cola Bottling, 50 Washington 2d 645, 314 P. 2d 421, 422; and, Chapman v. Brown, D.C., 198 F.Supp. 78, 85 aff'd. Brown v. Chapman, 9th Cir. 304 F.2d 149 had already held

the notice requirement of Sec. 1769 was not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt. Justice Traynor following that lead and dispensing the Defendant's argument at page 900 states that the notice requirements in an action by a consumer against a manufacturer are really inappropriate: "Since in those cases, however, the court did not consider the question whether a distinction exists between a warranty based on a contract between the parties and one imposed on a manufacturer not in privity with a consumer, the decisions are not authority for rejecting the rule of the LaHue and Chapman cases, supra."

Justice Traynor in adopting for the first time the strict liability in tort concept states at page 900, "a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." In further discussing this concept at page 901, Justice Traynor states,

> "Although in these cases strict liability has usually been based on the theory of an expressed or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law...and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products... make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot

> properly be invoked to govern the manufacturer's liability to those injured by their defective products unless those rules also serve the purposes for which such liability is imposed...the purpose of such liability is to insure that the cost of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. ...The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales...to establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use." (emphasis supplied)

The decision of Justice Traynor in Greenman back in 1962 makes as much sense in 1986 as it did when it was written. The consumer ought not to be made to depend upon the intricacies of the laws of sales in determining whether he has a right to recover from a manufacturer who has put an unreasonably dangerous and defective product on the market and if the strict liability in tort remedy is not available to that consumer he should still be able to resort to that wealth of common law recognized across the length and breadth of this country that provided him relief under breach of implied warranty. The citations which have been omitted from the above quotation from Justice Traynor's decision come from Kansas, Ohio, Texas, Tennessee, Washington, California, New Jersey, Iowa, New York, the District of Columbia and federal courts of the Seventh, Ninth and Tenth Circuits. And this is by no means a comprehensive analysis of the existing cases even in 1962.

In Florida alone the cases are legion developing the exceptions to the privity requirements for common law breach of implied warranty actions.

Florida Courts have held "where the requirement of privity of contract was once necessary, it is now discarded in most instances where the cause of action is breach of implied warranty." Barfield v. Atlantic Coastline Railroad Company, 197 So.2d 545 (2d DCA 1967); see also, Continental Copper & Steel Industries, Inc. v. "Red" Cornelius, 104 So.2d 40 (Fla.App. 1958); Renninger v. Foremost Dairies, Inc., 171 So.2d 602, (Fla.App. 1965); McBurnette v. Playground Equipment, 137 So.2d 563 (Fla. 1962); Bernstein v. Lily-Tulip Corporation, 177 So.2d 362 (Fla. 1965); Lily-Tulip Cup Corporation v. Bernstein, 181 So.2d 641 (Fla. 1966); Vandercook & Son, Inc. v. Thorpe, 344 F.2d 930 (5th Cir. 1965); Matthews v. Lawnlight, (88 So.2d 299 (Fla. 1956); Dudley v. Mae's Discount Fabrics, 323 So.2d 279 (Fla.App. 1975); Marrillia v. Lyn Craft Boat Co., 271 So.2d 204 (Fla.App. 1973); and King v. Douglas Aircraft, 159 So.2d 108 (3d DCA 1963).

In McBurnette, supra, this Court stated in determining whether the son had the benefit of the implied warranty in the playground equipment purchased for him by his father at page 565

> "...the senior petitioner came within 'the class of cases where the buyer relies upon the seller's judgment of the fitness of a particular article for the purpose intended'. The sole issue is whether the respondent's implied warranty of fitness for use as play equipment ran only to the father or also to his minor son for whose use it was sold.

> Comments on all aspects of product liability law are now multitudeness, and the authorities in hopeless conflict. The case at bar illustrates perfectly the absurdities which confront the Courts: where the product or equipment involved is susceptible of use only by small children, then to confine the implied warranty of fitness for use to cover only damages to an adult purchaser, when the warranty is breached, is to deprive the merchantability warranty of any reasonable scope of operation whatever... but where the implied warranty of merchantability is itself not a statutory creation, we think the question of its scope of operation in a particular situation is one peculiarly suited to judicial disposition, as evidenced by the so-called exceptions to the privity rule already recognized in our decisions. (Citation omitted)...We think common sense requires the presumption that one in the position of the minor plaintiff in this cause is a naturally intended and reasonably contemplated beneficiary of the warranty of fitness for use or merchantability implied by law, and as such he stands in the shoes of the purchaser in enforcing the warranty."

The McBurnette decision continues with an excellent exposition of why the inroads to the privity doctrine had been made in implied warranty actions against manufacturers concluding

> "The Court therein approves those decisions which base implied warranty liability upon a presumption or inference from the circumstances of a sale or the nature of the product sold that the seller intended to assume liability for or warrant against injury resulting from ordinary use by one other than the buyer in person: 'it would be wholly opposed to reality to say that use by such persons is not within the anticipation of parties to such a warranty'...".

Likewise the manufacturer of the 6-seater airplane which the Kramer's were passengers in surely must know that persons other than the purchasers are going to use that plane.

The Appellate Courts in Florida have been very clear to distinguish claims by ultimate consumers against manufacturers from other claims. "However, we wish to make clear that we express no opinion as to the issues of whether a suit based on implied warranty by an ultimate consumer against one other than a manufacturer is with the ambit of Section 95.11(5)(e), or Section 95.11(4). Barfield v. United States Rubber Company, 234 So.2d 374 (Fla. App. 1972), goes on to state at p.376:

> "Proceeding from the earthy but accurate observation of Lord Ellenborough in Gardiner v. Gray, (H.L. 1815), 4 Camp. 144, 171 Eng.Rep. 46, that the 'purchaser cannot be supposed to buy goods to lay them on a dunghill,' our Courts have developed and are continually developing a body of law pertaining to products liability in a fashion that has been termed the model of the growth of a common-law institution. (Citation omitted). As much as any area of the common law, the jurisprudence of products liability reflects the 'complex, highly industrialized, Madison Avenue, 25-inch screen,' 'hardsell,' atomic age of the expert in which we live.' In light of the prodigious growth of this body of law, which has witnessed in recent years the elimination of privity as a requirement in consumer suits based on implied warranty against the manufacturer and the inapplicability of disclaimer clauses to such suits. (citation omitted) The precedent of a past decade or even of a past year is at times of less value than in other areas of law... . Since implied warranty as applied to consumer suits against a manufacturer is generally recognized to be a concept based neither on fault nor failure to exercise reasonable care (citation omitted) it is not 'tortious' in the traditional sense of that word. However, this does not mean that it is contractual. When a manufacturer cannot absolve himself of liability in implied warranty through contract; when no privity is required for the ultimate consumer or user of a manufacturer's product to bring suit

> against him; and when the provision of the Uniform Commercial Code pertaining to exclusion or modification of warranties is held to be inapplicable to such suits, it would take a large measure of imagination to find such an action to be contractual in nature. (Citations omitted)

There exists no overriding public policy or public interest in eliminating this cause of action for consumers. In fact, there remain several areas which apparently are not covered by strict liability in tort but are covered by breach of implied warranty including economic loss, used goods, and non dangerous or defective goods to mention a few. It is easy to visualize cases involving goods which may not be fit for the ordinary purposes for which consumers use such goods but yet are not unreasonably dangerous or defective or don't cause personal injury or property damage and therefore the cause of action for strict liability would not lie, and by the same token the person may not fall within the scope of §672.318 defining persons entitled to bring an action under the U.C.C.1/ Obviously in the West

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1/ §672.318 **Third-party beneficiaries of warranties express or implied.** - A Seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer, who is a guest in his home or who is an employee, servant or agent of his buyer if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude nor limit the operation of this section. See Schuessler v. Coca-Cola Bottling Company of Miami, 279 So.2d 901 (4th DCA 1973), in which remote buyer under appropriate facts would have been allowed to recover for common law breach of implied warranty where claim not viable under U.C.C.:

Cont'd.

scenario this court was dealing with a dangerous instrumentality and a personal injury and wasn't necessarily concerned with the niceties of those persons whose causes of action would be eliminated if the common law breach of implied warranty was done away with with one broad sweep of the judicial brush. There is a vast ocean of consumers that fall in the crack between the U.C.C. and strict liability in tort and who are covered under the common law concept of breach of implied warranty that has been established in this State and throughout the country for decades. Their rights should not be done away with without a conscious analysis of whether or not that is what this Court really wants to do. Such an analysis clearly did not give rise to the dicta appearing in West which has caused this question to be certified by the Eleventh Circuit to this Court.

> "It would seem to us to be more sound to predicate the bottler's responsibility on the reasonable needs of the consumer rather than the bottler's status as a manufacturer. Except where statutes intervene, implied warranties of fitness and merchantability have been recognized from time to time by decisional law as a matter of public policy to meet the needs of the consumer. (Hence the term 'implied warranty' is often of a misnomer.) As the court put it in Blanton v. Cudahy Packing Co., 1944, 154 Fla. 872, 19 So.2d 313, 316:
>
> '...The rationale of the implied warranty theory of liability is in effect that the right of recovery by injured consumers ought not to depend upon or turn on the intracies of the law of sale nor upon the privity of contract, but should rest on right, justice and welfare of the general purchasing and consuming public.'

The appellees contended that there is no cause of action in implied warranty, separate and distinct from a strict liability action. However, many jurisdictions have held otherwise.

In the case of Fisher v. Sibley Memorial Hospital, 403 A.2d 1130 (D.C. Cir. 1979), the plaintiff brought an action to recover for personal injuries sustained when she contracted hepatitis from a transfusion of blood supplied by the hospital. The plaintiff in this case brought a cause of action under strict liability and implied warranty.

The District Court of Columbia viewed both the actions of breach of warranty and strict liability in tort as being expressions of a single basic public policy as to the liability for defective products; However, the court allowed the plaintiff to maintain a separate and distinct cause of action for each, because it would be inconsistent to hold that the doctrine of strict liability applied, while rejecting the theory of implied warranty. Additionally, in Payne v. Soft Sheen Products, Inc., 486 A.2d 712 (D.C. Cir. 1985), a customer in a beauty salon was allegedly burned as a result of application of a permanent wave product. In her complaint, she asserted the theories of negligence and breach of implied warranty and later asserted a strict liability cause of action as an implied pendant claim under the warranty count of the complaint. The court stated that the jurisdiction of Washington, D.C. recognized both tort and warranty theories of product liability, and thus, the Plaintiff would be allowed to maintain both causes of action.

The doctrine of implied warranty was created to protect the consumer. Later, the courts adopted strict liability to further this objective. Strict liability was not formulated to limit consumer protection, but only to extend it. In formulating this doctrine, the courts held that injured consumers ought not to be dependent upon the intracacies of the law of sales. A consumer's remedy against a manufacturer should not be dependent upon his successfullness in proving lack of disclaimer, adequate notice of defects, or lack of inconsistencies with express warranties. Basko v. Sterling Drug, Inc., 416 F.2d 417 (2d Cir. 1969). It is clear, that the courts undoubtedly longed to protect the consumer therefore, if a consumer is barred from asserting a claim based on strict liability, the courts certainly should not leave him without a remedy, but should allow him to establish his claim based on the theory of breach of implied warranty.

II. ABSENT AN AGREEMENT BETWEEN THE PARTIES, AN ACTION FOR BREACH OF IMPLIED WARRANTY WILL ACCRUE "WHERE THE TRANSACTION BEARS AN APPROPRIATE RELATION TO THIS STATE."

Although this is an action based on common law implied warranty, appellants have been unable to find case law which states where the cause of action under such a theory accrues in order to determine whether the statute of limitations has run.2/

2/ Although no case law has been found to determine where the cause of action accrues for purposes of common law breach of implied warranty claims, it is clear that the four year statute is applicable to these causes of action. The case previously cited Barfield v. United States Rubber Company, 234 So.2d 374 (2nd DCA 1970), states:

> "For the foregoing reasons we are unable to see how consumer actions against a manufacturer based on implied warranty come within the specific provisions of Fla.Stat. §95.11(5) (e), 1967, F.S.A. a section which has traditionally been applied to actions clearly contractual in nature, and which has only been inferentially applied by the courts of this state to those actions in implied warranty retaining some semblance of a contractual nature-suits by a buyer against an immediate vendor. Therefore, in answer to the question certified to this court, we hold that the cause of action ordered to be reinstated by our decision... is governed by the four year statute of limitations set forth in Fla.Stat §95.11(4), 1967, F.S.A."

This case was followed by the Fifth Circuit in Eastburn v. Ford Motor Company, 438 F.2d 125 (5th Cir. 1971), which stated at page 126

> "In Barfield v. United States Rubber Company, (Fla.Dist.Ct.of App. 1970), 234 So.2d 374, an intermediate appellate Court of Florida held that a cause of action by the ultimate consumer against a manufacturer with whom the consumer has no privity was not the kind of obligation toward which the 'contract'

Cont'd.

The appellees argue that the appropriate law to be applied is that of tort. However, in a case factually analogous to the one at bar, Halstead v. U.S., 535 F.Supp 782, (D. Conn. 1982), Halstead, the administrator of estates of Connecticut domiciliaries, brought a wrongful death actions against a Colorado manufacturer of an allegedly defective navigational chart which allegedly caused the death of Connecticut domicilaries in a West Virginia plane crash. The court stated that Plaintiff's claims against the Defendants based upon breach of express and implied warranties were contractual in nature and evidenced this fact by applying the Connecticut Uniform Commercial Code.

In Westerman v. Sears, Roebuck and Company, 577 F.2d 873 (5th Cir. 1978), the Court stated at page 879 that in an action for breach of express and implied warranties the choice of law rule is provided in the Uniform Commercial Code, which states as follows:

> consumer has no privity was not the kind of obligation toward which the 'contract' statute (note 1, supra) was directed. In September 1970 the Supreme Court of Florida denied certiorari in Barfield, 239 So.2d 828."

Neither Barfield nor any other cases however shed light on where the cause of action accrued for purposes of determining whether the borrowing statute §95.11 F.S. would apply. They do determine that the statute of limitations does not run from the time of deliverly but rather from the time that the Plaintiff knows or should have known of the defect giving rise to the cause of action. See Creviston v. General Motors Corp., 222 So.2d 331 (Fla. 1969); and Herndon v. Stanley Home Products, Inc., 225 So.2d 553 (3d DCA 1969).

> (1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or such other state or of nation shall govern their rights and duties. Failing such agreement this code applies to transaction bearing an appropriate relation to this state. (Emphasis supplied)

The facts of Westerman are as follows: (i) Florida residents purchased a tire in Florida; (2) The tire was serviced and used in Florida; (3) The accident, however, occurred in Texas. Based on these facts, the Westerman court applied Florida statute §671.105(1) of the Uniform Commercial Code to the breach of implied warranty claim. This section provides that absent an agreement otherwise, Florida law applies to transactions bearing an appropriate relationship to this state. Fla. Stat. §671.105(1), (1983). The court in Westerman held that although the accident occurred in Texas, the cause of action for the breach of implied warranty claims arose in Florida, and accordingly, Florida's interpretation of the Uniform Commercial Code governs the breach of warranty claims. Westerman supra at 879. Halstead, supra, reaffirms Westerman's rationale. In Halstead, although the deaths of the Connecticut domiciliaries occurred in West Virginia, the defect in the navigation chart was manufactured in Colorado by a Colorado corporation and purchased in Colorado by the pilot's employer. Based on these facts, the court determined that Colorado had met the "appropriate relationship" test, and therefore applied Colorado law.

Similar to Westerman and Halstead in our case, Florida is where the Defendant designed, manufactured, tested and delivered the airplane; Florida is defendants principle place of business and a significant part of the airplane's use occurred in Florida. The Plaintiffs are Florida residents and if their cause of action is barred in Florida, Florida's public services not Virginia's will have to provide for the Plaintiffs. These facts, like Westerman and Halstead bear an "appropriate relation" to Florida, and thus absent a common law case telling where the cause of action accrues we should draw by analogy from that portion of the Florida Uniform Commercial Code which governs breach of implied warranty claims.

In addition, the place of incorporation of the Defendant is Pennsylvania; the purchase of the plane was in Pennsylvania; the plane was used prior to the accident in both Florida and Pennsylvania. All of the elements in our case except the fortuitous crash occurred in Pennsylvania and/or Florida. Therefore, the choice of law should be either of these 2 states.

If the Court determines that Pennsylvania is the site for the breach of warranty cause of action, the Court will find that under the law of Pennsylvania, which is the same as Florida, the statute of limitations for breach of implied warranty is four (4) years.

CONCLUSION

Under Florida law, an injured party should clearly have a cause of action against a manufacturer of an unsafe and dangerous product. It would be inconsistent to hold that the doctrine of strict liability applies exclusively and prevent Plaintiff from recovering under the theory of implied warranty. It has been the view of the enlightened jurisdictions to abolish the contractual privity requirement in implied warranties and simultaneously maintain the implied warranty and strict liability theories in order to better afford consumer protection. This court in West undoubtedly wished to protect the consumer and hold the manufacturer accountable. He should not now be left without a remedy, but rather, should be allowed to bring the breach of implied warranty action he would be entitled to bring prior to West. It would be contrary to the spirit of West to apply West to deprive a consumer of a remedy at law which he had prior to West.

The statute of limitations which should be applied to this cause of action is the 4 year common law breach of implied warranty statute of limitations of Florida. Absent case law or statutes to the contrary fairness, justice and logic dictate that the "appropriate relationship" test should be used to determine the proper law to apply to determine where the cause of action accrues for a common law breach of implied warranty action.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellants was mailed this 6th day of November, 1986, to JAMES E. TRIBBLE, ESQ., Blackwell, Walker, Gray, Powers, Flick & Hoehl, Attorneys for Appellee, 2400 Amerifirst Building, One S.E. Third Avenue, Miami, Florida 33131.

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