IN THE SUPREME COURT OF FLORIDA

CASE NO: 69,494

HAROLD C. KRAMER and JOAN W. KRAMER,

Appellants,

v.

PIPER AIRCRAFT CORPORATION, a Pennsylvania corporation,

Appellee.

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

This brief on two certified questions from the United States Court of Appeals for the Eleventh Circuit is filed on behalf of Piper Aircraft Corporation ("Piper"),[1/] the defendant in the United States District Court for the Southern District of Florida and the appellee in the Court of Appeals. Although the statement of the case and facts in the Kramers' brief (KB 2-5) is substantially correct, Piper believes that it is more appropriate in these proceedings to accept the history of the case and the pertinent facts as stated in the certification decision, which focuses accurately and succinctly on the facts pertinent to the issues before this Court. For the convenience of the Court, that portion of the certification decision is reproduced here verbatim:

> Harold and Joan Kramer were injured when the Piper Cherokee aircraft in which they were passengers crashed on take-off from Hummel Field near Topping, Virginia, on December 6, 1975. On March 30, 1978, approximately two years and four months after the crash, the Kramers filed their complaint in this action, naming the manufacturer of the plane, Piper Aircraft Corp., a Pennsylvania corporation, as the only defendant. The complaint asserted four different theories of recovery: negligence, strict liability, breach of implied warranty of fitness, and breach of implied warranty of merchantability.

1/ This brief will use the same abbreviations and party designations as those used in the brief of the plaintiffs-appellants, the Kramers. In addition, the abbreviation "KB ___" will be used to refer to the Kramers' brief filed in this Court.

The parties stipulated to a number of facts. The design, manufacture, and testing of the aircraft occurred in Florida. The sale of the aircraft took place in Philadelphia, Pennsylvania. The Kramers were not the purchasers of the aircraft and were not in privity with Piper. At the time of the crash, the Kramers were residents of New Jersey, although they now are residents of Florida. The final flight of the aircraft commenced and terminated in Virginia. Prior to the crash the airplane had been flown a total of 17 hours, six to seven of which were consumed in flying the aircraft from Florida to Pennsylvania and the rest in pilot familiarization and a flight from Philadelphia to Hummel Field. The preparatory servicing for the final flight was performed in Pennsylvania.

The district court entered summary judgment for Piper on the ground that the Virginia statute of limitations, which provides that every action for personal injuries, whether based on contract or tort, must be brought within two years of the date on which the cause of action accrues. Va.Code §8.01-243; Tyler v. R.R. Street & Co., 322 F.Supp. 541, 543 (E.D.Va.1971). It reasoned that the Virginia statute of limitations applied because under Florida's "borrowing statute," Fla.Stat.Ann. §95.10, the causes of action "arose" in Virginia, where the crash and injuries occurred. This Court remanded the case to the district court for further consideration in light of the then recent Florida decision of Bishop v. Florida Specialty Paint Co., 389 So.2d 999 (Fla.1980). The district court again entered judgment for Piper, citing Pledger v. Burnup & Sims, Inc., 432 So.2d 1323 (Fla. 4th DCA 1983), review denied, 446 So.2d 99 (Fla.1984). This appeal followed. [Kramer v. Piper Aircraft Corp., 801 F.2d 1279 at 1280 (11th Cir. 1986)].

SUMMARY OF ARGUMENT

The correct answer to Certified Question 1 is "No". The Kramers, who had no contractual relationship with Piper, do not have an action in implied warranty separate and distinct from their action for strict liability. In adopting strict liability in West v. Caterpiller Tractor Company, Inc., 336 so.2d 80 (Fla. 1976), this Court eliminated personal injury actions based on non-contractual common law warranty. None of the post-West Florida decisions cited by appellants undermine the authority of West, and there is ample case law from other jurisdiction to support it. There are no sound reasons for departing from West, which rendered non-contractual warranty actions superfluous with the recognition of strict liability.

The correct answer to Certified Question 2 is that, by operation of Florida's borrowing statute, Virginia's two-year statute of limitations for all types of products liability actions applies to any warranty claims which the Kramers may have. Any non-contractual warranty actions still recognized in Florida after West are actions in the nature of tort, not contract. Under Florida law, which controls the operation of its borrowing statute, a tort action arises in the state where the last act necessary to establish liability occurs. In this case, that state is Virginia, where the crash and the injuries occurred.

ARGUMENT

CERTIFIED QUESTION 1

> UNDER FLORIDA LAW, DOES A PERSON INJURED WHILE A PASSENGER ON AN AIRPLANE HAVE A CAUSE OF ACTION IN IMPLIED WARRANTY AGAINST THE AIRPLANE'S MANUFACTURER, SEPARATE AND DISTINCT FROM A STRICT LIABILITY ACTION?

The correct answer to the first certified question is "No". In West v. Caterpillar Tractor Company, Inc., 336 So.2d 80 (Fla. 1976), this Court adopted the doctrine of strict of liability in tort and eliminated recovery for common law breach of warranty for personal injury in non-privity cases. The Court summarized the evolution of products liability law in Florida and acknowledged that the judiciary had, in an attempt to provide justice to injured parties, created inconsistencies in, and misapplied, the law of warranty. The Court stated:

> To summarize, we recognize that in the present day marketing milieu treatment of the manufacturers' liability to ultimate purchasers or consumers in terms of implied warranty is simply using a convenient legal device to accomplish some recourse for an injured person. Traditionally, warranty has had its source in contract. Ordinarily there is no contract in a real sense between a manufacturer and an ultimate consumer of its product. As a result, warranty law in Florida has become filled with inconsistencies and misapplications in the judiciary's attempt to provide justice to the injured consumer, user, employee, bystander, etc., while still maintaining the contract principles of privity.
>
> The obligation of the manufacturer must become what in justice it ought to be - an

> enterprise liability, and one which should not depend on the intricacies of the law of sales. [Id. at 92; emphasis added].

In order to provide a remedy for persons who are injured by defective products without regard to the injured party's relationship to the manufacturer or seller of the product and in an effort to curtail further inconsistencies in, and misapplications of, warranty law, the Court adopted the doctrine of strict liability. With regard to the future co-existence of the theories of breach of warranty and strict liability in tort, the Supreme Court stated:

> 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 a 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. [Id. at 91; emphasis added]

It is clear from the Court's statement that recovery for personal injuries resulting from breach of implied warranty is available only when the plaintiff has a contractual relationship with the manufacturer or seller of an allegedly defective product; otherwise, the exclusive and sufficient remedy is strict liability.

Based on this Court's pronouncement in West, the Fifth Circuit Court of Appeals held in West v. Caterpillar Tractor Company, Inc., 547 F.2d 885 (5th Cir. 1977) that the personal

representative of Mrs. West's estate could not recover under implied warranty. The Court stated:

> In a most helpful and definitive opinion ... [the Florida Supreme] Court replied that strict liability, but not implied warranty, lies in bystanders [sic] actions..." [Id. at 887; emphasis added]

See also, Navajo Circle, Inc. v. Development Concepts Corporation, 373 So.2d 689, 692 n.3 (Fla. 2d DCA 1979), in which the court acknowledged that:

> A warranty, whether express or implied, is fundamentally a contract. A contract cause of action requires privity.2/

In this case, appellants themselves acknowledge that they were not the purchasers of the subject aircraft and were not

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2/ Although the court in Navajo Circle, Inc., did not address West's effect on the theory of implied warranty in personal injury actions, it outlined the development of products liability law and observed that "in response to the premise that there should be liability where there is fault, an implied warranty theory was fashioned which did not require privity." Id. at 692 n. 3. The court noted, however, that

> The implied warranty theory was found to be a somewhat unwieldy apparatus to effect the result desired in these type of cases. In most jurisdictions the doctrine of products liability replaced the implied warranty theory. Products liability is ... free of the conceptual problems experienced with implied warranty. Id.

In Florida, the doctrine of strict liability in tort has replaced the implied warranty theory in non-privity personal injury cases. West, 336 So.2d at 91. As the Court impliedly recognized in West, with the advent of strict liability in tort, there is no reason for extending the doctrine of implied warranty to non-privity personal injury actions. Strict liability supplies the remedy in such cases.

in privity with PIPER at any material time. (AB. 9; App 1). As a result, the Kramers' implied warranty counts are not cognizable as actions ex contractu under Florida law.[3/] Their claims are exclusively tort claims, which, as demonstrated by this brief's discussion of Question 2, are governed by Florida's borrowing statute, §95.10 Florida Statutes, and are barred by the two-year statute of limitations of Virginia, where the claims arose.

Appellants' brief cites a substantial number of post-West Florida cases involving non-privity warranty claims and makes the point that in none of those cases did the courts use the absence of privity "as a basis for dismissing the breach of implied warranty claim." (KB 9-10).[4/] None of the these cases undermines the validity of West's rationale that breach of warranty actions in non-privity situations are no longer needed or permitted with the advent of strict liability. The courts in those cases had no occasion to address the question of the post-West survival of non-privity warranty claims. The very number of such cases in which the issue was never raised indicates the correctness of this Court's observation in West that the adoption

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3/ Even before West, it was recognized in Florida that a non-privity warranty claim was not contractual in nature. Barfield v. United States Rubber Co., 234 So.2d 374 (Fla. 2d DCA 1970), cert. den. 239 So.2d 828 (Fla. 1970).

4/ The certification decision of the Court of Appeals cited a number of the same cases as examples of situations "in which implied warranty claims have been asserted in non-privity situations," but in which the courts "did not expressly discuss the issue . . . ." Kramer, 801 F.2d at 1282.

of strict liability "in most instances, accomplishes a change of nomenclature", and that the distinctions between various theories of products liability "frequently have been of more theoretical then practical significance." West, 336 So.2d at 86.

The case of Nicolodi v. Harley Davidson Motor Co., Inc., 370 So.2d 68 (Fla. 2d DCA 1979), discussed and quoted from at KB 10-11, has no real relevance to the present issue and therefore merits no extended discussion. It is simply another case in which the plaintiff's assertion of claims for both breach of implied warranty and strict liability made no practical difference. Since the issue of the post-West survival of non-contractual warranty was neither raised nor decided, Nicolodi contributes nothing to the resolution of the questions posed here.

Most of the Kramers' arguments against applying the implied warranty ruling of West are based on hypothetical cases significantly different from the case at bar. In fact, appellants' counsel studiously avoids calling attention to the only reason why the Kramers want to assert a breach of warranty claim. A warranty claim adds nothing substantively to their right of action; the sole reason they are pressing that claim on appeal is that they want to circumvent Florida's borrowing statute and the Virginia statute of limitations under which their products liability claims are barred.

One example of an argument raised by appellants which has no application in the present case is that based on §672.318, Fla. Stat. (1985). (KB 12, 22). The U.S. Court of Appeals correctly recognized that this section does not apply in the present case:

> It seems clear that the Kramers may not assert implied warranty claims under the Florida Uniform Commercial Code as they do not fall within the scope of the statute's intended beneficiaries. See Fla.Stat.Ann. §672.318 ("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...."). If an implied warranty claim does exist, it must be of common law origin. [Kramer, supra, 801 F.2d at 1281].

As the certified question framed by the Court of Appeals states, the Kramers were passengers in the aircraft. They plainly do not fall into any of the classes of claimants specified in §672.318. Accordingly, the certified questions do not call on this Court to decide whether the pertinent language in West has the effect of eliminating implied warranty actions by plaintiffs who fall into the various classes of third party beneficiaries of warranties as specified by the statute.5/

5/ There is not necessarily any inconsistency between §672.318 and the ruling in West that strict liability supplants breach of warranty where "the circumstances do not create a contractual relationship with a manufacturer...." West, at 91. (cont.)

Another example of an argument raised by the Kramers which has no relevance to this case is that relating to the right of consumers to recover for breaches of warranty which merely result in a diminished value of the product itself. (KB 22). The fallacy in this argument is that it has been held that strict liability as adopted by West "should be reserved for those cases where there are personal injuries or damages to other property only." Cedars of Lebanon Hospital Corp. v. European X-Ray Distributors of America, Inc., 444 So.2d 1068, 1071 (Fla. 3d DCA 1984). Since West would not extend strict liability to cases involving damage to the product itself, strict liability would not supplant any rights based on implied warranty in such cases. Again, appellants are arguing matters not embraced within the questions certified to this Court.

As this Court went on to state:

> If there is a contractual relationship with the manufacturer, the vehicle of implied warranty remains. [Id.; emphasis added].

It could reasonably be concluded that by operation of §672.318, certain classes of persons are effectively placed in a "contractual relationship" with sellers of goods covered by the UCC. Under this reasoning, it may have been the intent of the court in West not to exclude warranty actions by the classes of persons covered by §672.318. If that is the proper construction of this Court's opinion, it would not affect the outcome of the present case, since the Kramers do not fall within any of the classes enumerated in the statute. If the pertinent language in West is given the effect that was obviously intended, it necessarily follows that the remedy of persons like the Kramers is exclusively in strict liability, which has swallowed up any common law warranty actions which may have formerly existed in non-privity situations.

Appellants' counsel goes on to argue on behalf of "a vast ocean of consumers that fall in the crack between UCC and strict liability in tort..." whose "rights should not be done away with without a conscious analysis of whether of not that is what this Court really wants to do." (KB 23). This argument not only erroneously assumes that this Court did not make "a conscious analysis" of the effect of the West decision, but also misconstrues the pertinent language in West. The West opinion plainly did not say that any remedies in warranty would be eliminated in cases not covered by the new remedy of strict liability. West left no "crack" between the UCC and strict liability through which consumers' claims could fall. Rather, West created a new right of action which encompassed and displaced non-contractual breach of warranty, with all its attendant technical niceties and complexities.

Appellants argue that the "better reasoned decisions" abolish privity while "simultaneously maintaining implied warranty and strict liability theories in order to better afford consumer protection". (KB 15). The cases cited and discussed by appellants do not, however, support that broad proposition. (KB 15-18). Neither Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1962) nor the other cases cited by appellants (KB 16) squarely faced or decided the question of whether a claimant should be permitted to assert both the remedies of strict liability and non-contractual warranty. The appellants' argument

thus provides no reason why this Court should retreat from its decision in West that strict liability supplants and renders unnecessary a side-by-side remedy of non-contractual warranty.

There is abundant authority from other jurisdictions which supports the Florida view. See, e.g., Austin v. Ford Motor Co., 86 Wis.2d 628, 273 N.W.2d 233, 240 (1979) ("[I]t is inappropriate to bring an action for breach of warranty where a tort remedy is sought . . . . A breach of warranty theory is encumbered with the ancient baggage of contract actions and should not be employed where the recovery is one for tort."); Kirkland v. General Motors Corp., 521 P.2d 1353, 1362, 1364-1365 (Okla. 1974) (Oklahoma Supreme Court, in adopting doctrine of manufacturers' products liability, held "that it is no longer necessary to rely upon theories of negligence or any form of warranty for recovery."; court also stated "that breach of implied warranty is no longer an appropriate remedy for recovery in products liability actions except as provided in the Uniform Commercial Code"); Christofferson v. Kaiser Foundation Hospitals, 15 Cal. App. 3d 75, 92 Cal. Rptr. 825, 828 (1971) (no error in failure of trial judge to submit case involving allergic reaction of prescription drug on theory of implied warranty of merchantability, since "that doctrine has been largely superseded" by strict liability under Greenman); Fisher v. Gate City Steel Corp., 190 Neb. 699, 211 N.W.2d 914, 917 (1973) (no error in withdrawing issue of implied warranty from the jury

where instruction was given on strict liability; "the strict liability theory is essentially the liability of implied warranty divested of the contract doctrines of privity, disclaimer, and notice").

The remedy of breach of warranty in non-privity cases was simply rendered superfluous by West, and was replaced by strict liability. Therefore, contrary to appellants' contentions (KB 24), there is no inconsistency whatever in allowing recovery under strict liability but disallowing recovery for breach of implied warranty where there is no contractual relationship.6/

6/ Again, the cases cited by appellants do not support their contention. Fisher v. Sibley Memorial Hospital, 403 A.2d 1130 (D.C. Cir. 1979), did not allow the plaintiff, as appellants' brief asserts, "to maintain a separate and distinct cause of action for ..." breach of warranty and strict liability in tort. (KB 24). On the contrary, the court squarely held that the trial judge had correctly directed a verdict on both breach of implied warranty and strict liability, "because neither theory applies to the administering of blood transfusions by a hospital." Id. at 1131. In reaching that decision, the court noted that the two theories "'are but two labels for the same legal right and remedy, as the governing principles are identical.'" Id. at 1133, citing Cottom v. McGuire Funeral Services, Inc., 262 A.2d 807, 808 (D.C. App. 1970). This holding is entirely consistent with Piper's position on this appeal.

The case of Payne v. Soft Sheen Products, Inc., 486 A.2d 712 (D.C. Cir. 1985) discussed at KB 24, also gives more support to Piper than to the Kramers. The court in Payne, while recognizing both tort and warranty theories of products liability, expessly noted that warranty had originated as a tort action, and that the controlling decision of Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919 (D.C. Cir. 1962) had "in effect stripped the warranty action of its contractual baggage and reestablished the original tort action for warranty free of contract associations." [Payne at 719; emphasis added]. Payne thus squarely supports Piper's contention under Certified Question 2 that any non-contractual warranty theory that survives in Florida does so as an action in tort, not contract.

The adoption of appellants' position would, however, be patently inconsistent with the entire rationale of West, which was carefully crafted to extricate the law of Florida from the welter of inconsistencies and ambiguities into which implied warranty had degenerated. Appellants are inviting this Court to step right back into the legal morass from which it so recently emerged with the advent of West.

Finally under this point, the Kramers' counsel argues that:

> [I]f a consumer is barred from asserting a claim based on strict liability, the court 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. (KB 25).

That argument patently lacks merit. Neither the law nor the courts left appellants without a remedy. They had a full and complete remedy in tort, which is barred only because they allowed the applicable statute of limitations to run before they filed their action. It should not be the business of this Court to restructure the law to accommodate the needs of litigants who want to resurrect stale claims.

CERTIFIED QUESTION 2

> IF THE ANSWER TO QUESTION (1) IS YES, WHICH STATUTE OF LIMITATIONS SHOULD BE APPLIED TO SUCH A CAUSE OF ACTION?

The correct answer to certified question 2 is that the Kramers' non-contractual warranty claim arose in Virginia, and

that Virginia's two-year product liability statute of limitations applies by operation of Florida's borrowing statute. It is true, as appellants state (KB 26), that there is no case authority on the specific issue of where a non-contractual warranty claim "arises" for the purpose of applying Florida's borrowing statute. It is equally true, however, that there is no sound legal basis for applying a rule of contract law to a non-contractual warranty claim. It would be contradictory to do so.

As far back as 1969, this Court noted:

> [T]he forward trend in the area of products liability cast[s] considerable doubt on the classification of a breach of such a warranty as ex contractu. [Creviston v. General Motors Corp., 225 So.2d 331, 332 n. 1 (Fla. 1969)].

The Second District Court of Appeal in Barfield, supra (relied on by appellants at KB 20), noting that this Court had quashed its decision in Creviston v. General Motors Corp., 210 So.2d 755 (Fla. 2d DCA 1968), expressly receded "from any suggestion in our decision in Creviston that a suit based on implied warranty by an ultimate consumer against a manufacturer is based on contract." Id. 234 So.2d at 376. Moreover, the entire rationale of West strongly suggests that non-contractual warranty, like strict liability, belongs in a category with torts, not contracts.

The case of Halstead v. United States, 535 F.Supp. 782 (D. Conn. 1982), relied on by appellants (KB 27) did not involve a borrowing statute but a choice of law problem which the court resolved by common law conflict of law principles, unrestrained

by the language of any statute. Moreover, the appellants are incorrect in their analysis of that case. Contrary to their contention, the court did not state that the breach of warranty claims in that case "were contractual in nature" (KB 27). Rather, the court expressly stated that it did not have to decide that question:

> There do not appear to be any Connecticut choice of law cases definitively characterizing an action for breach of warranty as sounding in tort or contract . . . . Fortunately, this Court need not make such a determination at this juncture. [Id. at 792; citations omitted; emphasis added].

The case of Westerman v. Sears, Roebuck & Co., 577 F.2d 873 (5th Cir. 1978), on which appellants heavily rely, like Halstead, did not involve the operation of a borrowing statute. Moreover, that case did not involve non-contractual warranty, since the plaintiffs purchased the allegedly defective tire from Sears, which was both the manufacturer and the retailer. Accordingly, Westerman's recognition of a contractual warranty claim governed by the law of Florida, where the tire was purchased, has no bearing on this case.

Appellants apparently contend, based on Westerman, that the provisions of §671.1-105, Florida Statutes, Florida's version of the Uniform Commercial Code, apply to this action.[7/] (KB 28-

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7/ Section 671.1-105 provides:

> Except as provided hereafter in this section, when a transaction bears a reasonable rela-

(cont.)

29). They argue that the "transaction" bears an "appropriate relationship" to Florida because the aircraft was designed, manufactured and tested in Florida and because the Kramers are Florida residents. (KB 29). Those contentions lack merit, because they overlook both the absence of any "transaction" between the Kramers and PIPER and the controlling effect of the borrowing statute.

Section 671.1-105 was obviously intended to govern situations where the parties to a multistate commercial transaction have an opportunity "to choose their own law" by agreement, though they may elect not to exercise that choice. See, the Official Uniform Commercial Code Comment to §671.1-105(1), 19A Florida Statutes Annotated at page 41. In this case, there is no basis for applying §671.1-105 or any other section of the Code, because the Kramers were not parties[8/] to any "transaction" with PIPER. Even if by some strained interpretation it could be said that a "transaction" took place when the

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> tion to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this code applies to transactions bearing an appropriate relation to this state.

8/ The Code expressly distinguishes between parties and third parties. Pursuant to §671.1-105(29):

> "Party", as distinct from "third party", means a person who has engaged in a transaction or made an agreement within this code. (emphasis added).

Kramers became passengers in the aircraft manufactured by PIPER, that "transaction" did not take place in Florida, but in Virginia, where, pursuant to §8.01-243 of the Code of Virginia, plaintiffs' personal injury claims are barred.[9/]

Even if appellants have a valid claim under Florida law for breach of non-contractual warranty, §671.105(1) does nothing to defeat the application of the Virginia statute of limitations pursuant to the operation of Florida's borrowing statute. The only effect of §671.105(1) is that, where the parties have not agreed otherwise, "this code" (i.e., Florida's version of the UCC) applies to transactions having an "appropriate relation" to Florida. There is no provision in "this code" regarding the time when an action is to be brought.

Florida's version of the Uniform Commercial Code contains no separate statute of limitations applicable to actions under the code. All time limitations for bringing actions are contained in chapter 95, Florida Statutes. Thus, appellant's

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9/ There is a vast and crucial difference between non-privity actions and actions in which there is a contractual relationship between the injured plaintiff and the manufacturer or seller of the allegedly defective product. In privity actions, such as that in Westerman, supra, the contract or commercial transaction between the litigants serves as the basis for looking to the law of the state where the contract was completed, rather than that of the place of injury. There is, however, absolutely no basis in non-privity actions for looking to the law of the state of manufacture or sale because there is no contractual relationship or commercial transaction between the litigants in that state. In non-privity actions, such as this, the cause of action arises at the place of injury, not where the product was manufactured or sold.

contention that they are entitled to the benefit of Florida's four year statute of limitations on their warranty claim (KB 29) in unavailing. Section 671.1-105 beats a circular path right back to Chapter 95, which contains §95.10, the borrowing statute applicable to this case. Since appellants' non-contractual warranty claim "arose" in Virginia, where the crash and injuries occurred, Virginia's two-year product liability statute of limitations applies, and appellants' action is barred.

Section 8.01-243 of the Virginia code requires that every action for personal injuries, whatever the theory of recovery, be brought within two years of the date on which the cause of action accrues. The two year limitation period of §8.01-243 applies to personal injury claims based on breach of warranty. Tyler v. R.R. Street & Co., Inc., 322 F. Supp. 541 (E.D. Va. 1971); Caudill v. Wise Rambler, Inc., 168 S.E.2d 257 (Va. 1969); Friedman v. Peoples Service Drug Store, Inc., 160 S.E.2d 563 (Va. 1969). See also, §8.01-246, Code of Virginia, which provides that the limitation period prescribed in §8.01-243, not that set forth in Virginia's Uniform Commercial Code, applies to products liability actions for personal injury. It cannot be disputed that appellants' claims for personal injury were barred under Virginia law when they instituted suit on March 30, 1978, over two years after the December 6, 1975 crash of the subject aircraft.

There is no merit to appellants' alternative contention that Pennsylvania's four-year statute of limitations for breach of implied warranty should apply. (KB 29). Florida's borrowing statute may not be used to borrow Pennsylvania's four-year breach of warranty statute of limitations because §95.10, by its own terms, applies only when the cause of action arises in another state or country and the laws of that state or country forbid the maintenance of the action because of lapse of time. Section 95.10 provides:

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

Accordingly, if, as appellants contend, they had a breach of implied warranty claim which was not time barred in Pennsylvania when they instituted this action, §95.10 may not be used to apply Pennsylvania's statute of limitations.

More importantly, however, appellants' contention overlooks the crucial fact that no cause of action for breach of implied warranty arose in Pennsylvania. The determination of where a cause of action arose for the purpose of Florida's borrowing statute is made in accordance with Florida law, the law of the forum. Meehan v. Celotex Corporation, 466 So.2d 1100, 1101 (Fla. 3d DCA 1985). As already demonstrated, any cause of action for breach of non-contractual implied warranty which continues to exist under Florida law does so as an action in the

nature of tort, not contract. Since appellants were not in privity with Piper, any warranty cause of action they might have should be treated as an action in tort for the purpose of applying Florida's borrowing statute.

In its recent decision in Davis v. Pyrofax Gas Corp., 492 So.2d 1044 (Fla. 1986), this Court expressed the view, at least implicitly, that product liability causes of action for negligence, breach of implied warranty, and strict liability accrue at the place where the personal injury occurs, not at the place where the product was purchased. Davis came before this Court on a certified question from the U.S. Court of Appeals for the Eleventh Circuit concerning the operation of Florida's long arm statute. The plaintiff in Davis purchased a gas heater in Michigan and brought it into Florida where it malfunctioned, causing injury. Davis, 492 So.2d at 1044. As the certification decision shows, the plaintiff's complaint alleged negligence, breach of implied warranty and strict liability. Davis v. Pyrofax Gas Corp., 753 F.2d 928, 929 (11th Cir. 1985). As part of the rationale of its decision that Florida's long-arm statute applied, this Court stated:

> We do not think the Legislature intended to deny a person the right to maintain an action in Florida, where the cause of action accrued . . . . [Davis, 492 So.2d at 1045; emphasis added].

The emphasized language demonstrates this Court's adherence to the view that a products liability action, which

includes counts of strict liability, negligence and implied warranty, arises in the state where the accident occurs and where the injuries are suffered. In the present case, that state is Virginia. Since the Kramers' causes of action, including that for breach of implied warranty, accrued or arose in Virginia, the Virginia statute of limitations applies by operation of Florida's borrowing statute.

Florida's adoption in Bishop v. Florida Specialty Paint Co., 389 So.2d 999 (Fla. 1980) of the "most significant relationships" choice of law test in tort cases does not in any way affect the application of Florida's borrowing statute to this case.[10/] On the contrary, Bishop provides additional cogent support for the application of the statute. Bishop expressly adopted the choice-of-law rule of the Restatement, (Second) Conflict of Laws, including Section 6. Section 6(1) of the Restatement rule expressly provides:

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

The official American Law Institute comment to subsection 1 goes on to state:

10/ This portion of Piper's argument overlaps with the question certified in Bates v. Cook, Inc., 791 F.2d 1525, 1528 (11th Cir. 1986), pending before this Court as case number 68,972. Since an integral part of Piper's argument is that an action in tort arises where the "last act necessary to establish liability occurred," and that Florida's borrowing statute applies to this case, Piper deems it appropriate and necessary to present a brief argument on this issue.

> The court must apply a local statutory provision directed to choice of law provided that it would be constitutional to do so. [Restatement (Second) of Conflict of Laws, §6, comment A, at page 11 (1971); emphasis added].

The provision of the Restatement which unquestionably controls this case is §142(1), which provides:

> An action will not be maintained if it is barred by the statute of limitations of the forum, including a provision borrowing the statute of limitations of another state. [emphasis added].

Since this Court adopted the Restatement rule in Bishop, it would be inconsistent not to follow the Restatement rule on the application of borrowing statutes. The common law choice of law rule of Bishop is simply not applicable in the face of the legislative mandate of the borrowing statute, which requires that Florida courts apply the statute of limitations of the state where the cause of action "arises".

Appellants' contention in the trial court that a cause of action in tort arises in the state that has the most significant contacts with plaintiffs' claims was addressed and firmly rejected by Florida's Fourth District Court of Appeal in Pledger v. Burnup and Sims, Inc., 432 So.2d 1323 (Fla. 4th DCA 1983) rev. den. 446 So.2d 99 (Fla. 1984). The court phrased the issue thus:

> [I]n view of the Supreme Court's adoption of Restatement (Second) of Conflict of Laws §145, did the cause of action arise in New York, where publication occurred, or in Florida, which has the most significant relationship? [Id. at 1330].

Acknowledging that the conflicts of law rule adopted in Bishop governs the choice of substantive law and that §95.10 is purely procedural, the court held that appellant's cause of action for defamation arose in New York, not in Florida, which "unquestionably" had the most significant contacts with appellant's claim. The court further determined that appellant's cause of action was barred by the application of §95.10 and the relevant New York statute of limitations.

Pledger was recently cited with approval by Florida's Third District Court of Appeal in Meehan, supra.[11/] In considering the application of §95.10 to the case before it, the court stated:

> It is clear that the borrowing statute is triggered only upon a finding that the cause of action arose in another state. Because Florida's borrowing statute is considered to be purely procedural, ... the determination of where a "cause of action arose" is made in accordance with the law of the forum state, (here Florida), ... rather than New York, the state apparently deemed by the trial court to have the most significant relationship to the occurrence and to the parties.
>
> Under the thus applicable Florida law, a cause of action in tort "arises in the jurisdiction where the last act necessary to

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11/ Florida's Second District Court of Appeal also recently adopted the rationale of Pledger insofar as it pertained to §95.10. Steiner v. Mt. Vernon Fire Insurance Company, 470 So.2d 3 (Fla. 2d DCA 1985).

establish liability occurred." [Id. at 1101-1102; emphasis added; footnote and citations omitted].12/

A strikingly similar question was decided by the Supreme Court of Missouri in Trzecki v. Gruenewald, 532 S.W.2d 209 (Mo. 1976). At the time that case was decided, Missouri, like Florida, had recently abandoned the lex loci delicti rule in favor of the "most significant relationships" that of §145 of the Restatement (2d) of Conflicts of Laws. See Kennedy v. Dixon, 439 S.W.2d 173 (Mo. 1969). Missouri had a borrowing statute, similar to Florida's §95.10, which provided that if a cause of action is barred by the laws of the state "in which it originated", that bar would be a defense to any action brought in Missouri.

The plaintiff in Trzecki argued that the abandonment of the lex loci delicti rule should result in the application of the "most significant relationships" test to a question involving the statute of limitations. The Missouri Supreme Court expressly

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12/ In holding that a cause of action in tort arises in the jurisdiction where the last act necessary to establish liability occurs, not in the jurisdiction having the most significant relationship to the claims of the plaintiff, the Third District Court of Appeal noted:

> [A]t least one Florida court has specifically rejected the application of the significant relationship test to §95.10. Pledger v. Burnup & Sims, Inc., 432 So.2d 1323. Cf. Proprietors Insurance Company v. Valsecchi, 435 So.2d 290 (Fla. 3d DCA 1983)(rejecting the "interest" approach to conflict of law choices). [Id. at 1102 n. 1].

rejected that argument and held that the Missouri borrowing statute still controlled. In reaching this result, the court relied on two very similar decisions in Richardson v. Watkins Bros. Mem. Chapels, 527 S.W.2d 19 (Mo. 1975) and McIndoo v. Burnett, 494 F.2d 1311 (8th Cir. 1974).

In Richardson, the Missouri Appellate Court pointedly noted at page 21 of its opinion that the Kennedy case (the Missouri counterpart to Bishop) was "a case in which the court had the right to make the choice of law." (Emphasis added). The same is true in Florida of the Bishop decision. In Bishop this court was free to reach a decision under common law principles as to the choice of law, because there was no controlling statute. In this case, however, as in Trzecki, Richardson, and McIndoo, the borrowing statute of the forum state must control, notwithstanding the abandonment of the lex loci delicti rule in cases not governed by the statute.

Here, the "last act necessary to establish liability" occurred in Virginia, where the aircraft crashed. Accordingly, appellants' causes of action in tort arose in Virginia. Since the Kramers instituted their suit after Virginia's two year statute of limitations had expired, their tort claims are barred and may not, pursuant to §95.10, be maintained in the State of Florida.

CONCLUSION

Based on the foregoing reasons and authorities, certified question 1 should be answered No. If the answer to question 1 is yes, the answer to question 2 should be that the Virginia statute of limitations should be applied to appellants' warranty claim, by operation of Florida's borrowing statute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 1st day of December, 1986 to DOUGLAS S. LYONS, ESQUIRE, Stinson, Lyons & Schuette, P.A., Counsel for Appellants, 1401 Brickell Avenue, Ninth Floor, Miami, Florida 33131.

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