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

Amended Reply Brief of Appellants

STINSON LYONS & SCHUETTE, P.A.
1401 Brickell Avenue
Ninth Floor
Miami FL 33131
Tel (305) 373-7571
Attorneys for Appellants
Harold C. Kramer and
Joan W. Kramer

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STINSON, LYONS & SCHUETTE, P. A., NINTH FLOOR, 1401 BRICKELL AVENUE, MIAMI, FLORIDA 33131 · TELEPHONE (305) 373-7571

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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 STRICT LIABILITY?

Appellee urges the Court to answer this first certified questions "No". Appellee relies on the following language from West [1] at page 5 of the Appellee's Brief which Appellee contends has resulted in the demise of implied warranty in Florida where a contractual relationship between the user and the manufacturer does not exist:

> "The adoption of the doctrine of strict liability in tort does not result in the demise of 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 strict liability and tort. If there is a contractual relationship with the manufacturer, the vehicle of implied warranty remains. (Emphasis supplied by the Appellee)

In reaching its conclusion, the Appellee inserts the word only at page 5 of its Brief which it submits is to be read in conjunction with the last sentence which it underlined in its Brief, thus modifying the decision to read "only if there is a contractual relationship with the manufacturer, the vehicle of implied warranty remains." The court did not say only and it is presumed that if the court meant only that it would have said

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1/ West v. Caterpillar Tractor Company, 336 So.2d 80, Fla. 1976.

only. Further, the court in the preceding sentences states the vehicle for recovery could be strict liability in tort. The court does not say the vehicle for recovery now is only strict liability in tort. The Appellee goes beyond the language of the opinion which clearly says that "the adoption of the doctrine of strict liability in tort does not result in the demise of implied warranty". As indicated in Appellant's main Brief, and by the certified question none of the courts construing West since West have read West to be as restrictive as the Appellee contends.

Appellee next relies on Navajo Circle, Inc. v. Development Concepts Corporation, 373 So.2d 689 692-3 (Fla. 2d DCA 1979). Navajo Circle involves a class action in negligence by a unit owner against the architects and builders for negligent supervision in and construction of a roof. The case nowhere cites West nor discusses the effect of West on implied warranty actions for personal injury, and basically holds that privity is not required for a tort action. The language relied upon by the Appellees is from footnote 3 of that decision. The key language in that footnote is found in the last paragraph of that footnote which states at p.693:

> "In the ordinary circumstances where the implied warranty at issue is in the nature of a guarantee of mechantability of a product's fitness for the use intended which is not unreasonably dangerous and does not cause personal injuries, there are no reasons compelling expansion of liability. Privity of contract has continued vitality in such circumstances as we believe it should". (Emphasis supplied)

The other side of the coin is that privity of contract does not have continued vitality where the issue is the unreasonably dangerousness of the product and it does cause personal injury as in the case at bar. The court's discussion in the footnote referenced by Appellee is particularly significant in light of the fact that the decision in Navajo is in 1979, three years after West, yet from the language quoted apparently still recognizes implied warranty actions where there is no privity where personal injury and/or unreasonably dangerous products are involved. This decision coming three (3) years after West is additional support for the Appellant's argument that such a cause of action was cognizable by the courts after West even absent privity. The Navajo Court also states at p.692:

> "The supplier of the product was held liable to all those who suffered forseeable injuries from a defective product on an implied warranty of the safety of his product. As in a contract action, the Plaintiff needed to prove breach of an obligation-the warranty implied by law. As in a tort action, the Plaintiff needed to prove that the breach caused a foreseeable injury to him. If those two elements were shown, the action then took on the character of strict liability, for nothing more needed to be proved to find the Defendant liable. He need not prove privity or negligence."

The Court in this language recognized as the courts have all along that breach of implied warranty has elements of both contract and tort. Appellee's argument is rebutted by reading of the very note relied upon without the need of going further.

Appellee then in its Brief goes on to discuss the post West cases and says "none of 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." Appellant's would merely ask the Court to read the cases. We stand by our previous position that in all those cases, the construction which the Appellee is attempting to have the Court put on West was not put on West. Apparently, the reading of Navajo, which does not cite, West is totally consistent with those cases and with Appellant's position. Appellee says that the cited cases had no occasion to address the question of post West survival of non-privity warranty claims. This statement is simply not true. Space does not permit rearguing the cases. We rely on our analysis in our initial brief.

As the Appellee points out at Page 9 of his Brief, the U.S. Court of Appeals states:

> 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).

Appellants do not agree that such a restrictive reading of the UCC was intended either by the drafters of the UCC or by the Florida legislature. Florida Statute §672.318 is adopted from the Uniform Commercial Code and although the Appellants do not fall within that specific language, happily the drafters of UCC and the legislature did not intend the language to be strictly construed and in fact expected and encouraged case law to refine the scope of these warranties. See Barry v. Ivarson, 249 So.2d 44, FL 2d DCA 1971 at page 46. As a practical matter there is no difference theoretically, rationally or conceptually between the seller's obligation and the buyer's interest in providing a remedy for a "guest in his home who is affected by the goods", as distinguished from "a guest in his car, airplane or boat who is affected by the goods." There is no logic to or reason for drawing such a distinction. Clearly the drafters of the Uniform Commercial Code appreciated the fact that there would be certain persons outside rhe household who should be covered by the implied warranty provisions of the Uniform Commercial Code, why that line is drawn at a guest in a home rather rhan including guests in a home, a plane, car, or boat, is not really clear. It is clear that if the Kramers were guests in the home as opposed to guests in the plane, that they would be covered for breach of implied warranty, under the four corners of the Uniform Commercial Code as adopted by Florida in 1965.

As the Appellee points out in footnote 5 at page 9 of the Appellee's Brief there is a conflict between the dicta in West

and Section 672.318, Florida Statutes, which the Appellee attempts to rationalize by stating that §672.318 "effectively places certain classes of persons in a 'contractual relationship' with sellers of goods covered by the UCC", continuing "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 Section 672.318". Just as the UCC "effectively places certain classes of persons in a 'contractual relationship' with sellers of goods covered by the UCC" so does the case law of the state of Florida "effectively place certain classes of person in such a 'contractual relationship'" so as to provide them with a cause of action for breach of implied warranty. Appellee seems to acknowledge that the Court in fact did not intend to paint with as broad a brush as he urges the dicta in West would indicate. The Appellants desire only to subtract a couple of more bristles from that brush and have the class of persons "placed in a contractual relationship" include guests in autos, boats and planes, specifically planes, as well as guests in homes.

Appellee states at Page 14 of its Brief "it should not be the business of this Court to restructure the law to accommodate the needs of litigants who want to resurrect their stale claims."

Appellees are not attempting to resurrect a stale claim, but are merely trying to avoid the onerous imposition of a borrowing statute, which is totally anachronistic, out of step and out of place in the era of Bishop.[2/] The borrowing statute came about

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2/ Bishop v. Florida Specialty Paint Co., 389 So.2d 999 (Fla. 1980)

as a necessary means of avoiding the plastic application of the Florida Statute of limitations to suits brought in Florida, where the cause of action clearly accrued in another jurisdiction and under pre-Bishop "lex loci delecti" the law of that place would be applied as well. It made no sense for a Florida Statute of limitations to apply under such circumstances. With the advent of Bishop, the focus is where it ought to be, that is on applying the law of the state which has "the most significant relationship", i.e. the greatest interest in having its law applied. In this context, the borrowing statute is totally anachronistic, serves no valid purpose and is flatly contrary to the spirit and intent of Bishop. In fact, when it is applied to bar Florida citizens' actions against a corporation designing, manufacturing, testing and distributing products in Florida, it doesn't make sense. Florida has the greatest interest in making sure that under appropriate circumstances its citizens do not become wards of the State, but are compensated by the manufacturers who have done them wrong. The Court should strive in every way possible to strictly construe the borrowing statute when possible to not bar a claim by Florida citizens against a Florida manufacturer because of the fortuitous circumstances that the accident occurs in a jurisdiction where the claim would be barred.3/

3/ "That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve

Cont'd.

The Restatement (Second of Conflict of Laws) as adopted by the Florida Supreme Court in Bishop, supra., provides as follows:

"Section 145. The General Principle.

"(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principle stated in Section 6.
"(2) Contacts to be taken into account applying the principles of Section 6 to determine the law applicable to an issue include"

"(a) the place where the injury occurred,

"(b) the place where the conduct causing the injury occurred,

"(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and

"(d) the place where the relationship, if any, between the parties is centered.

"These contacts are to be evaluated according to their relative importance with respect to the particular issue.

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another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested in reliance upon the old rule. It is thus great writers upon the common law have discovered the source and method of its growth, and in its growth found its health and life. It is not and it should not be stationary. Change of this character should not be left to the legislature.' If judges have woefully misinterpreted the mores of their day, or if the mores of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors." Wheeler, J., in Dwy v. Connecticut Co., 89 Conn 74, 99 [92 A 883, L.R.A. 1915E, 800]

"Section 146. Personal Injuries.

"In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the Principles stated in Section 6 to the occurrence and the parties, in which event the local law of the other state will be applied".

Applying the restatement to the facts in the case at bar, "(a)" the place where the injury occurred is the only fact, which concerns Virginia; "(b)" the place of the Defendant's conduct causing the injury to occur i.e. design, manufacturing and testing was Florida; "(c)" the domicile of the Plaintiffs and place of business of the Defendant is Florida. The Defendants place of incorporation is Pennsylvania; "(d)" the place where the relationship between the parties is centered, is Pennsylvania, as between the Kramers and the pilot, and the pilot and Piper, and Florida as between the Kramers and Piper. It is clear that applying the principles of the restatements as adopted by Bishop that either the law of Pennsylvania or Florida and not Virginia should be applied.

That the law of Florida is controlling in the case at bar can be demonstrated, by analogy, to decisions construing the provisions of the Florida "long arm statute" which provides for in personam jurisdiction over any person who commits a tortious act within this state. 48.193(1)(b), Fla. Stat. 1985. In the case of Jack Pikard Dodge, Inc. v. Yarborough, 352 So.2d 130 (Fla. 1st DCA, 1977), the Court held that Jack Pikard Dodge,

Inc., a North Carolina Chrysler dealer alleged to have negligently serviced a vehicle in which the plaintiff was injured in Florida, was not amenable to service of process under §48.193(1)(b). The Court held that the dealer committed no act in Florida, but rather, any tortious act of negligence occurred in the state of North Carolina. Applying that rationale in the case at bar, if PIPER had designed, manufactured and tested the aircraft in Virginia, its tortious acts and breaches of its implied warranties would clearly be found to have occurred in Virginia. Since PIPER in fact designed, manufactured and tested the aircraft in the State of Florida, its tortious acts of negligence and breaches of its implied warranties were commitred in Florida and Florida law should clearly apply.

The acts of design, manufacture and testing of the aircraft took place in Florida and Florida obviously has a substantial interest in regulating and controlling the design and manufacture of goods within its borders. It cannot be doubted that as a matter of its public policy, the state of Florida has a substantial interest in assuring that the designing, manufacturing and testing of products within its borders is performed in a proper manner so as not to cause injury to others.

Appellee at Page 12 of its Brief in discussing authorities from other jurisdictions, cites Austin v. Ford Motor Co., 86 WIS. 2d, 628, 273 N.W. 2d 233, 240 (1979). There is no question that Wisconsin is one of the states that has totally and unequivocally rejected the application of breach of implied warranty whether

through the UCC or through common law to any action for strict liability in tort. A reading of the Austin case and the cases cited therein leaves no doubt in anybody's mind that from the date of Dippel v. Sciano, 37 Wis. 2d 443, N.W. 2d 55 (1967) in Wisconsin if a person is injured by an unreasonably dangerous or defective product the cause of action is for strict liability in tort and the court specifically does not recognize any cause of action for breach of implied warranty whether under the UCC or under common law. "In these situations the Uniform Commercial Code is inapplicable." Dippel supra at pp. 62-63.

Oklahoma on the other hand is cited by the Appellee in Kirkland v. General Motors Corp., 521 P. 2d 1353, 1362, OK 1974 at page 1364, states, "Thus we conclude, notwithstanding the interpretation placed on the Marathon case, supra, and prior authorities of this jurisdiction (see footnote 5) that breach of implied warranty is no longer an appropriate remedy for recovery in product liability actions except as provided in the Uniform Commercial Code." This Oklahoma decision should be kept in mind as it is the Appellant's intention infra. to discus the interpretation of Oklahoma's Uniform Comercial Code. As will be seen the Appellants would be covered by the Oklahoma UCC as interpreted by the 10th Circuit. In a word the Kramers would be entitled to bring an action for breach of implied warranty in Oklahoma under the Oklahoma UCC which is substantially similar to the Florida UCC.

Appellee next cites the case of Christofferson v. Kaiser Foundation Hospitals, 15 Cal. App 3d 75, 92 Cal. Rptr. 825, 828, (1971), for the proposition that in California the theory of implied warranty of merchantability "has been largely superseded". Note it has been largely superseded but not eliminated. The court goes on to state "that theory, moreover, would aid plaintiff only if it required warning of all dangers, including the highly unusual results she experienced, regardless of the possibility of its earlier discovery. This issue we have resulted (sic) against her." The court does not really discuss whether the instruction was not proper. In any event it is clear that implied warranty of merchantability although largely superseded still does exist in appropriate circumstance.

The next case relied upon by the Appellee is Fisher v. Gate City Steel Corp., 190 Nebraska 699, 211 N.W. 2d 914, 917 (1973). The Court states at Page 917 "there can be no real doubt that Plaintiff failed to establish a prima facia case on implied warranty. Even if the possibility of error were conceded it could scarcely have been prejudicial to the Plaintiff." Again the doctrine implied warranty survives and failure to instruct is harmless error under the circumstances of the Fischer case because the Plaintiff failed to establish a prima facia case on implied warranty.

Of all the cases cited by the Appellee only the Austin case would leave the Kramers without a remedy for breach of implied warranty under the facts of the instant case.

The Appellant disagrees with the Appellees construction of Fischer v. Sibly Memorial Hospital, 403 Atlantic 2d 1130, (D.C. Cir. 1979). The balance of the quotation cited in footnote 6 of the appellant's brief which is found at page 1133 of Fischer is as follows "because we view actions for breach of warranty and strict liability in tort as being expressions of a single basic public policy as to liability for defective products, it would be inconsistent to hold that the doctrine of strict liability applies to blood transfusions while rejecting Plaintiff's breach of warranty claim. As this court has stated, 'the current doctrines of implied warranty and strict liability in tort are but two labels from the same legal right and remedy as the governing principles are identical'." Can there be any doubt from this quote that the court views these causes of action as being co-extensive and co-existant. Nowhere is the breach of implied warranty claim rejected.

In conclusion on the first point, the Defendant, PIPER AIRCRAFT CORPORATION, asserts the position that the parties in the case at bar are not in privity of contract and therefore cannot maintain an action based upon breach of implied warranty. The law in Florida fails to support this position. On the contrary, the law is well established that where the product involved is a dangerous instrumentality, privity of contract is not required in a product liability action against a manufacturer based on a theory of breach of implied warranty. Matthews v. Lawnlite Co., 88 So.2d 299 (Fla. 1956). In Blanton v. Cudahy

Packing Co., 154 Fla. 872 19 So. 2d 313 (1944), the Court established a similar exception to the privity of contract requirement in actions involving foodstuffs.

In product liability actions, the Florida Supreme Court carved out the dangerous instrumentality and foodstuff exceptions to privity in recognition of the complex interrelationship between contract and tort. The Florida Supreme Court even went so far as to hold that privity of contract is no longer required in any consumer action against a manufacturer based on a breach of implied warranty theory. Lily-Tulip Cup Corp. v. Bernstein, 181 So. 2d 641 (Fla. 1966). The Court in Lily-Tulip., however, did not totally abrogate privity in breach of implied warranty actions, for the Court stated, "we fully recognize that the Florida law has not reached the point where the doctrine of privity has been removed in all suits based upon implied warranty". Lily-Tulip., 181 So. 2d at 364 (Fla. 1966). Accordingly, Lily-Tulip., made it clear, that absent certain recognized exception to the privity requirement, privity of contract remains. Of particular significance is the fact that Lily-Tulip., was decided in 1966, one year after the UCC was adopted in Fla. in 1965.

The Defendant relies on West in support of its position that privity of contract is required in all actions based upon breach of implied warranty. Such reliance is misplaced, for West provides no basis to support this proposition. The court in West held that a manufacturer may be liable to a consumer under a

theory of strict liability in tort where the action involves a defective product. West, recognizing the complex interrelationship between contract and tort, held that in product liability actions based upon a breach of implied warranty theory, contributory negligence is a defense. West, pp. 91-92. The holding in West does not reinstate privity of contract as a requirement to all actions based upon breach of implied warranty. The Court stated, "(i)f 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". West, 336 So.2d at 91(emphasis added). the Court added, "the adoption of the doctrine of strict liability in tort does not result in the demise of implied warranty". West, 336 So.2d at 92. Such can only mean thar strict liability could be an appropriate vehicle absent privity of contract in a product liability action where the product involved is an ordinary defective product. Thus where ordinary defective products are involved, strict liability provides injured plaintiffs with an easier theory of recovery than the complex law of sales and negligence. Moreover, the addition of strict liability eliminates the need for courts to further extend the recognized exceptions to privity of contract in an attempt to redress injured parties. For those circumstances where strict liability cannot provide relief to an injured party, the theory of breach of implied warranty remains. See, West 336 So.2d at 92.

Apellants do not believe the Court in West intended to make strict liability the sole and exclusive remedy in product liability actions. If it had, the Court would have stated that absent privity of contract, strict liability is, not could be, the vehicle for recovery. Absent such a statement, the Court in West did not overrule or recede from its previous decisions which carved out the recognized exceptions to privity and specifically so states at p.88.

Breach of implied warranry remains a vehicle for recovery, notwithstanding the lack of privity, where the product involved is either a dangerous instrumentality or foodstuff. As stated in Navajo Circle Inc. v. Development Concepts Corporation, supra.:

> (i)n the ordinary circumstances where the implied warranty at issue is in the narure of a guaranty of merchantability or a products fitness for the use intended which is nor unreasonably dangerous and does not cause personal injuries, there are no reasons compelling expansion of liability. Privity of conrract has continued vitality in such circumstances and we believe it should.

Through such statements, the Navajo court recognized thar even after West, the exceptions to privity retain their vitality.

Pursuant to West and the recognized exceptions, privity of contract is not required in the case at bar. An airplane in operation, as was the airplane in which the Plaintiffs were riding, is a dangerous instrumentality per se. See Shattuck v. Mullen, 115 So.2d 597 (Fla. 2d DCA 1959). Accordingly, this case presents a recognized exception to privity of contract, so that an action lies based upon a breach of implied warranty theory and question number one should be answered yes.

CERTIFIED QUESTION 2

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

Appellee says the correct answer to Certified Question Two is that Kramer's implied warranty claim arose in Virginia and that Virginia's two year negligence statute of limitations applies by operation of Florida's borrowing statute. Appellee relies on the Pledger and Meehan decisions[4/] to support its position. The Pledger and Meehan cases stand for the proposition that a cause of action in tort arises where the last act necessary to give rise to the cause of actions occurs. In the case at bar the crash is the last act necessary to give rise to the tort actions. Applying Pledger and Meehan, §95.10 would borrow the Virginia Statute of Limitations to Bar Plaintiff's claim. The tort claim having been barred, the next question is did the implied warranty claim arise in Virginia or did it arise in Florida or Pennsylvania. If it arose in Florida or in Pennsylvania, then §95.10 does not apply and the Plaintiffs' claims are not barred. Appellee correctly notes that Appellants rely heavily on Westerman v. Sears for the proposition that non tort claims arise where the "significant part of the transaction in question occurred." See Westerman v. Sears, at page 879. It is true that Westerman applies to a Florida UCC breach of implied

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4/ Pledger v. Burnup & Sims, Inc., 432 So.2d 1323 (Fla. 4th DCA 1983); rev. den. 446 So.2d 99 (Fla. 1984); Meehan v. Celatex Corporation, 466 So.2d 1100 (Fla. 3d DCA 1985).

warranty action. It is clear that if the Plaintiffs in the case at bar were guests in the home of the owner of the airplane as opposed to guests in the airplane of the owner of the airplane that the Westerman case and the Florida UCC would clearly cover their situation. It is clear that the transaction between the Plaintiffs and the owner of the plane originated in Pennsylvania. It is clear that the transaction between the owner of the plane and Piper originated in Florida and was culminated in Pennsylvania. As in Westerman all use of the plane except the ill-fated trip occurred either in Florida or in Pennsylvania. Even the trip in which Plaintiffs were injured originated in Pennsylvania and was to be concluded in Florida. In every sense Westerman applies to the case at bar except for the fact that the Plaintiffs were guests in the plane instead of guests in the home. The question therefore is distilled down to the essential question of whether the Plaintiffs breach of implied warranty action is an action in tort or is an action for breach of implied warranty. If it is a tort under Pledger and Meehan the tort arises in Virginia and §95.10 would apply to bar it. If it is a breach of implied warranty whether common law or under the UCC under Westerman the cause of action arises either in Pennsylvania or Florida and §95.10 F.S. 1985 would not apply to bar the cause of action since it did not arise in Virginia. The essential question then is whether this case is more a kin to the breach of implied warranty action recognized under the Florida UCC or is it a tort.

Section 2.318 of the Uniform Commercial Code with respect to third party beneficiaries of warranty express or implied provides three alternatives.

Alternative A provides:

> "a seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home 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 or limit the operation of this section."

This was the alternative adopted by the Florida Legislature in 1965, the Florida Legislature having added the additional language concerning employees in 1967.

Alternative B provides:

> "a seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who in injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section."

Alternative C provides:

> "A seller's warranty whether express or implied extends to any person who may be reasonably expected to use, consume or be affected by the goods and who is injured by breach of warranty. A seller may not not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends. As amended 1966."

It can be seen that if either of the alternatives B or C had been adopted by Florida, the Kramers clearly would have fallen within the ambit of the UCC breach of implied warranty. The question is did the Florida Legislature then intend to exclude persons who were not guests in homes but were guests in airplanes, cars or boats from the developing case law. This specific question has not been addressed as such by the Florida Courts. The official comment to the U.C.C. states:

> "the first alternative expressly includes as beneficiaries within its provisions the family, household and guests of the purchaser. Beyond this, the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive change. The second alternative is designed for states where the case law has already developed further and for those that desire to expand the class of beneficiaries. The third alternative goes further, following the trend of modern decisions as indicated by the Restatement of Tort section, §402A (draft #10, 1965) in extending the rule beyond injuries to the person."

Florida case law in the area of breach of implied warranty since the adoption of the first alternative puts Florida more in line and in keeping with the second alternative set forth by the UCC. As indicated, there are no Florida cases directly on point stating whether or not this developing case law is to be specifically applicable to the UCC.

Oklahoma as alluded to above, also adopted the same language of the UCC. In 1967, Oklahoma via the 10th Cir. in the case of

Speed Fasteners Inc. v. Newsom, 10 Cir. 382 F.2d 395, 398, 10th Cir. 1967 considered whether this "neutral provision" which was not intended to be "restrictive" in fact would prevent a breach of implied warranty claim under the UCC. The court there considering the question "whether the manufacturer's liability extends to a person who is neither a purchaser nor a user" notes that "under the Oklahoma law the warranty extends to any natural person who is in the family or household of his buyer or who is a guest in his home." In that case, the manufacturer, as in the case at bar, argued that this clause has the effect of excluding all those not within the mentioned categories. The 10th Circuit in construing Oklahoma law stated:

> "We are convinced that this was not the legislative intent. The Plaintiff was neither the buyer nor the user. The buyer was his employer and the user was a fellow workman. The Plaintiff insists that in the situation presented the principle of strict liability applies and that even a bystander might recover. The manufacturer argues that, except in food and drink cases, Oklahoma has never applied the theory of strict liability in implied warranty cases... The extension of a manufacturer's liability to anyone injured by a product not suitable for the use intended has been the subject of much discussion. In general, privity is not essential where an implied warranty is imposed by the law on the basis of public policy. We believe that the injured employee stands in the shoes of his employer and that his cause of action based on implied warranty is not barred by the shield of privity. The manufacturers know that most businesses are carried on through employees who will actually use the product purchased by their employers. In the absence of an Oklahoma decision to the contrary, we are

satisfied that the employee may sue on the theory of implied warranty".

It is respectfully submitted that the Uniform Commercial Code did not mean for the language to be restrictive and meant to recognize that developing case law could modify that language. Although the Florida common law implied warranty cases did not reference the UCC it is reasonable to assume that the drafters of the UCC envisioned the dynamic development of the common law as modifying the scope of users covered under the UCC. The 10th Circuit in interpreting Oklahoma law has so held and the Appellants would urge the Supreme Court of Florida to follow that example which is consistent with the legislative intent, the intent of the drafters of the Uniform Commercial Code and the intent of the Florida Courts developing breach of implied warranty actions in Florida after the adoption of the Uniform Commercial Code. The court should not "cast into the trash can of legislative unforseeability some fifty years of this state's jurisprudence upon a critical subject of paramount importance to the citizens of this State." West at p.88.

The borrowing statute is a remedial statute. A cause of action cannot arise until one has a substantive right. The conflict of law rules enunciated in the restatement and adopted by the Florida Supreme Court are applied to determine substantive rights and liabilities. Therefore, it is first imperative to determine which substantive law applies to determine what the Plaintiffs rights are.

As indicated above it is respectfully submitted that in the case at bar the substantive law of the State of Florida should apply to determine the rights of the Plaintiffs. If the substantive right, i.e. cause of action is determined to be a Florida substantive right or cause of action, then the borrowing statute of Florida should not apply to borrow the Virginia statute of limitations to bar the claim in Florida. Appellee relies on Pledger to apply the Virginia Statute of Limitations to bar Plaintiffs' claim. The Pledger court unfortunately does not explore the question of where the cause of action arises under the restatement, even though it acknowledges that; "if the cause of action arose in Florida then Section 95.10 does not apply."

The Court after determining that the essential question is "where the cause of action arose," does not make any determination or have any discussion of where the cause of action arose.

The Court continued "if the cause of action arose in Florida then Section 95.10 does not apply." The Court then states "to resolve this question, we must determine the purpose of statutes of limitations, including borrowing statutes." The Court although saying it will determine the purpose of the borrowing statute does not determine the purpose of the borrowing statute. There is, however, an excellent explanation of the purpose of the borrowing statute in the article Borrowing Statutes of Limitations in Conflicts of Laws found at 15 University of Florida law Review page 33 in which the author at page 39 states that:

> "regardless of the 'simplicity and convenience' of the common law rule, little can be said in its favor when applied to permit plaintiff to recover for a tort or a breach of contract established solely by reference to some foreign law, notwithstanding the fact that he could not recover in the jurisdiction to which reference is made. Moreover, would it not be equally simple and convenient to apply the limitation rules of the same jurisdiction whose law establishes the existence of a tort or the breach of a contract? In short, statutes of limitations do not regulate the formal procedure of litigation, and there is no valid reason why the forum should not apply the limitation rules of the same jurisdiction to which reference is made for the purpose of finding a legally recognized cause of action."

This concept gave rise to the borrowing statute so that the courts would have compatibility in applying the statute of limitations of the jurisdiction whose laws would be applied to govern the substantive issues in the case. Florida adopting that position in 1872 followed other states in attempting to correct the same anomaly. Now Florida, abandoning lex loci deliciti has adopted the significant contacts approach "for the purpose of finding a legally recognized cause of action." In the case at bar adopting the significant contacts approach the legally recognized cause of action is found in Florida under Florida law and those same arguments which brought the borrowing statute into being apply with equal logic for its inapplicability under the facts of the case at bar. The borrowing statute under the facts in the case at bar has to be looked on with disfavor and if there is any way which the Court can avoid applying it, it should do so.

In addition to the other reasons set forth above for not applying the borrowing statute it is submitted that the Court may avoid applying the borrowing statute by finding that the cause of action arose in Florida where the conduct of the Defendant which gave rise to the cause of action occurred, i.e. the design, manufacture and testing of the aircraft in which the Plaintiff was injured. The Pledger case may be distinguished on this basis. In Pledger, supra, the action of the defendant occurred in New York and the injury as well occurred in New York and therefore the court sub-silentio determined the cause of action arose in New York and applied New York's statute of limitations to bar Count IV of the Plaintiff's complaint. In the case at bar, the action of the Defendant occurred in Florida and an argument can be made with equal force that the cause of action therefore arose in Florida. The author in the above referenced Law Review article in analyzing the policy factors for the existence of borrowing statutes continues at Page 41:

> "Apart from these particular policy factors two more basic reasons may be found for wide spread enactment of borrowing legislation. First, as a matter of policy, there is sound reason why an obligee should be entitled to recover in the forum if his action has been fully barred by the law of the state in which it arose, residence of that state for its full statutory period and Defendant was subject to the jurisdiction of its courts. If the right of action has been extinguished this defense should accompany Defendant to each jurisdiction in which he might subsequently reside. Second, the prevailing interpretation of tolling statutes based on Defendant's absence from the enacting jurisdiction, coupled with the rule requiring the forum to apply its own

> periods of limitation, have resulted in the possibility of perpetual liability for an ambulatory defendant.

None of these policy factors apply to the case at bar. In fact, none of the policy factors expounded anywhere support application of the borrowing statute to the case at bar.

The Pledger case does not provide a basis for the granting of defendant's Motion for Summary Judgment for the following reasons:

1. The Pledger court merely discussed the borrowing statutes as an additional basis for affirming the Summary Judgment as to Count IV and therefore as it relates to the decision on the borrowing statute is dicta.

2. The decision by the Pledger court is not a decision of the highest court of the state and therefore is not binding on this court.

3. The facts in the Pledger court are distinguishable from the facts in the case at bar in that the conduct of the defendant which gave rise to the cause of action occurred in the State of Florida whereas the Pledger case the conduct occurred in New York.

4. The public policy as enunciated in the Bishop case is best served by the application of Florida law and construing the cause of action as having arisen in Florida.

5. An analysis of the historical reasons for the borrowing statute in light of Florida's adoption of the Restatement Section 145, 146, Conflict of Laws, indicates the purpose of that statute

is better served by application of Florida statute of limitations.

6. And finally, the use of significant contacts should be the rule applied to decide where the cause of action arises and not the old lex loci delecti rule. Once it is determined that the cause of action arises in Florida the borrowing statute has no application.

CONCLUSION

In conclusion the court should answer question number 2 yes. The breach of implied warranty cause of action arises in either Florida or Pennsylvania and §95.10 should not apply to borrow the statute of limitations of Virginia for a cause of action that does not arise there.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand delivered this 12th day of January, 1987 to: JAMES E. TRIBBLE, ESQ., Blackwell, Walker, Gray, Powers, Flick & Hoehl, 2400 AmeriFirst Building, One Southeast Third Avenue, Miami, Florida 33131.

DOUGLAS S. LYONS, ESQ. of
Stinson, Lyons & Schuette, P.A.
1401 Brickell Avenue
Ninth Floor
Miami, Florida 33131
(305) 373-7571

022DSLkram