IN THE FLORIDA SUPREME COURT

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

# SUPPLEMENTAL BRIEF OF APPELLEE (WITH SEPARATE APPENDIX)

James E. Tribble and
Douglas H. Stein of
BLACKWELL, WALKER, FASCELL & HOEHL
Attorneys for Appellee
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
Telephone: (305) 358-8880

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TELEPHONE (305) 358-8880

## INTRODUCTION

This supplemental brief is filed pursuant to this Court's order dated July 31, 1987. The purpose of this supplemental brief is to present argument in regard to the constitutionality of this Court's decision in Bates v. Cook, Inc., 12 F.L.W. 397 (Fla. July 16, 1987) and the constitutional implications of applying Bates to the instant case. Piper relies on its Brief of Appellee in regard to all other issues presented to the Court. In this brief, all emphasis is added unless otherwise indicated.

## STATEMENT OF THE CASE AND FACTS

For the convenience of the Court, a short statement of the case and facts will be presented. As reported by the Eleventh Circuit Court of Appeals in its decision of Kramer v. Piper Aircraft Corp., 801 F.2d 1279 (11th Cir. 1986), the Kramers were injured when the aircraft in which they were passengers crashed in Virginia on December 6, 1975. On March 30, 1978, approximately two years and four months after the crash, the Kramers filed their complaint naming Piper, the manufacturer of the airplane, as defendant. The complaint asserted counts in negligence, strict liability, breach of implied warranty of fitness, and breach of implied warranty of merchantability.

The trial court entered summary judgment for Piper on the ground that the Kramers' action was barred by the two-year Virginia statute of limitations. The Virginia statute of limitations applied because under Florida's "borrowing statute," Florida Statute § 95.10, the causes of action "arose" in Virginia, where the crash and injuries occurred. The Eleventh Circuit Court of Appeals remanded the case to the trial court for further consideration in light of this Court's decision of Bishop v. Fla. Specialty Paint Co., 389 So.2d 999 (Fla. 1980). The trial court again entered judgment for Piper. The Kramers appealed and the Eleventh Circuit Court of Appeals certified two questions to this Court, one concerning the construction of § 95.10.

The Eleventh Circuit Court of Appeals stated that the question of construction of § 95.10 had earlier been certified to this Court in Bates and that this Court may choose to consider that issue in this case along with Bates. Kramer v. Piper, supra at 1281. On May 5, 1987, this Court heard oral argument in the instant case and in Bates. No argument was presented in Bates in regard to the constitutional consequences of this Court altering its previous construction of § 95.10. This supplemental brief affords this Court the opportunity to consider whether its decision in Bates was violative of both the Florida and United States Constitutions.



One Southeast Third Avenue Blackwell Walker Fascell & Hoehl Miami, Florida 33131
TELEPHONE (305) 358-8880

## LEGAL ARGUMENT

### I

### ARTICLE 2, SECTION 3 OF THE FLORIDA CONSTITUTION PROHIBITS THIS COURT FROM ALTERING ITS CONSTRUCTION OF FLORIDA STATUTE § 95.10 AFTER THE LEGISLATURE HAD ADOPTED THAT CONSTRUCTION AS PART OF THE LEGISLATION.

Section 95.10 dictates that when a cause of action arises in another state, and the statute of limitations of that state bars the action, the action is also barred in Florida. Prior to Bates, this Court had interpreted § 95.10 and held that a tort action arises in the jurisdiction where the last act necessary to establish liability occurred. Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972). The borrowing statute was enacted in 1872 and has been continually re-enacted by the legislature through the present. See Fla. Stat. §§ 11.2421 - .2424 (1943 - 1986).

It is no less than axiomatic that "when the legislature reenacts a statute which has a judicial construction placed upon it, it is presumed that the legislature is aware of the construction and intends to adopt it, absent a clear expression to the contrary." Gulfstream Park Racing Ass'n, Inc. v. Department of Business Regulation, 441 So.2d 627, 628 (Fla. 1983). "[W]here a clause [of a statute] has received a definite construction, the subsequent adoption of that clause by the



One Southeast Third Avenue Blackwell Walker Fascell & Hoehl Miami, Florida 33131
TELEPHONE (305) 358-8880

law-making department carries with the language adopted also the construction put upon it." Advisory Opinion to the Governor, 96 So.2d 541, 546 (Fla. 1957). See also Delaney v. State, 190 So.2d 578 (Fla. 1966); Collins Investment Co. v. Metropolitan Dade County, 164 So.2d 806 (Fla. 1964). Thus, this Court's interpretation in Colhoun of where a cause of action arises was legislatively incorporated into § 95.10 upon the legislature's re-enactment of the statute.

"[W]here a statute is re-enacted, and the judicial construction thereof presumed to have been adopted in the re-enactment, the Courts are barred and precluded from changing the earlier construction." Deltona Corp. v. Kipnis, 194 So.2d 295, 297 (Fla. 2d DCA 1966). A subsequent change in that construction can only be accomplished through legislation. The Florida constitution prohibits the Supreme Court from legislating judicially. State v. Wershow, 343 So.2d 605 (Fla. 1977); Aldrich v. Aldrich, 163 So.2d 276 (Fla. 1964). "No person belonging to one branch [of government] shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Fla. Const. art. 2, § 3.

In Bates this Court engaged in prohibited judicial legislation. The citation of Bishop v. Fla. Specialty Paint Co., 389 So.2d 999 (Fla. 1980) in Bates reveals that this Court did not consider the legislative nature of the Bates



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decision. Bishop was a case concerning only common law choice of law rules. This Court has the power to change common law rules when social needs dictate. Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). In regard to statutes of limitation, however, the legislature has modified the common law choice of law rule. The common law is only in effect insofar as it has not been modified or superseded by statute. In re Forfeiture of 1978 Chevrolet Van, 493 So.2d 433 (Fla. 1986); Fla. Stat. § 2.01.

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. Bishop cannot control the instant case which concerns a choice of law rule enacted by the state legislature. Upon changing that choice of law rule, this Court effectively repealed § 95.10 and left the determination of choice of law in regard to statutes of limitation to the common law rules. If a determination of choice of law in regard to statutes of limitation is to be governed by common law principles, § 95.10 is superfluous and serves no useful purpose. "In construing legislation, courts should not assume that the legislature acted pointlessly." North Miami v. Miami Herald Publishing Co., 468 So.2d 218, 220 (Fla. 1985). "Statutory interpretations that render statutory provisions superfluous are, and should

be, disfavored." Johnson v. Feder, 485 So.2d 409, 411 (Fla. 1986). See also Smith v. Piezo Technology and Professional Administrators, 427 So.2d 182 (Fla. 1983); Dickinson v. Davis, 224 So.2d 262 (Fla. 1969); Sharer v. Hotel Corp. of America, 144 So.2d 813 (Fla. 1962).

It must be presumed that the legislature was aware of this Court's decision in Bishop when it re-enacted § 95.10. Ford v. Wainwright, 451 So.2d 471 (Fla. 1984). Had the legislature intended that a determination of choice of law in regard to statutes of limitation be governed by the common law principles espoused in Bishop, re-enactment of § 95.10 would have been pointless. It must be presumed that the legislature intended that § 95.10 not be governed by Bishop. Rather, the legislature incorporated this Court's construction of §95.10 in Colhoun into the statute. This Court, in Bates, effectively repealed § 95.10. This judicial repeal of the borrowing statute violated article 2, § 3 of the Florida Constitution.

In Bates, this Court cited a proposed revision of § 142 of the Restatement (2d) of Conflict of Laws in support of the citation of Bishop as controlling authority in the instant case. Citation of that proposed revision was premature. On June 2, 1987, The United States Law Week reported that the American Law Institute (ALI) refused to adopt the proposed

revision. The revision was defeated by a vote of 103 to 39. 55 U.S.L.W. 2653-54 (June 2, 1987). (Copies of the April 15, 1986 and March 31, 1987 versions of the proposed revision and accompanying comments have been included in the Appendix to this brief. In addition, a copy of The United States Law Week report is included in the Appendix.) Thus the ALI has refused to adopt a "significant relationship" choice of law test in regard to statutes of limitation.

Even under the rejected revision, a "significant relationship" test could not apply in those states where the legislature has already adopted a different test. There has been absolutely no public comment adopted by the ALI as to how the revision relates to existing borrowing statutes. This Court emphasized reporter Willis L. M. Reese's comment that "the issue of which statute of limitations applies should be determined like any other choice of law issue." That statement makes no mention of borrowing statutes. It is surely not arguable that the ALI would promote judicial legislation in violation of a state constitution. Thus, it is only logical that reporter Reese's statement, and the Restatement revision itself, is directed to state legislatures rather than to state judicial bodies. Absent some comment as to the relation of the proposed § 142 to existing borrowing statutes, it should not be assumed that the ALI intended that the Restatement

abrogate a statute enacted by a state legislature. It can only be assumed that the ALI was directing its comments to state legislatures to assist them in enacting borrowing statutes, and to judicial bodies in states which have yet to have enact a borrowing statute. As Florida already has enacted a borrowing statute, only the legislature, not the judiciary, can amend the borrowing statute.

II

APPLICATION OF Bates TO THE INSTANT CASE WOULD VIOLATE THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AS PIPER WOULD BE DIVESTED OF A VESTED SUBSTANTIVE RIGHT.

Not only does Bates violate the Florida Constitution, application of the Bates decision to the instant case would violate Piper's due process rights as guaranteed by the 14th Amendment of the United States Constitution. Until the Bates decision, § 95.10 dicated that Virginia's two-year statute of limitations was applicable in this case and that the instant action was barred. After Bates, it is more than probable that a court would find Florida's four-year statute of limitations applicable. Under that statute, the Kramers' causes of action would not be barred. Thus, the effect of Bates was to modify the borrowing statute so as to revive a claim which had been barred. As Piper had gained a vested property right of protection from being sued upon the expiration

of the Virginia statute of limitations, the revival of the barred claim violated the guaranties of the 14th Amendment.

The 14th Amendment's protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests, property interests, may take many forms. Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972). To have a property interest in a benefit, a person must have more than a unilateral expectation. "He must, instead, have a legitimate claim of entitlement to it. . . Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules are understandings that secure certain benefits and that support claims of entitlement to those benefits." Id. at 577.

As clearly stated by the United States Supreme Court, it is state law which determines the existence of a "property interest" for purposes of determining whether there has been a deprivation in violation of the 14th amendment. See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1004, 81 L.Ed.2d 815, 104 S.Ct. 2862 (1984) ("We therefore hold that to the extent that Monsanto has an interest in its health, safety and environmental data cognizable as a trade-secret property

right under Missouri law, that property right is protected by the Taking Clause of the Fifth Amendment." Id. at 1003-04 (footnote omitted)).

The shelter of a statute of limitations can be designated as a property interest by a state, and therefore subject to the protection of the United States Constitution. Annot., 133 A.L.R. 384, 389-90 (1941), supplementing, Annot., 36 A.L.R. 1316, 1321 (1925). When a state has determined that a statute of limitations relates to a remedy only, the rights expected under the statute of limitations are not property rights protected by the due process clause. Chase Securities Corp. v. Donaldson, 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945). Osmundsen v. Todd Pacific Shipyard, 755 F.2d 730 (9th Cir. 1985); Starks v. S. E. Rykoff & Co., 673 F.2d 1106 (9th Cir. 1982); Davis v. Valley Distributing Co., 522 F.2d 827 (9th Cir. 1975), cert. denied, 429 U.S. 1090, 97 S.Ct. 1099, 51 L.Ed.2d 535 (1977). However, when a state has determined that the statute of limitations affects the substantive rights of the parties, the bar imposed by the statute of limitations is a property interest protected by the United States Constitution. William Danzer & Co. v. Gulf & Ship Island Railroad Co., 268 U.S. 633, 69 L.Ed. 1126, 45 S.Ct. 612 (1925); Carter v. Supermarkets General Corp., 684 F.2d 187 (1st Cir. 1982); Penry v. Wm. Barr, Inc., 415 F.Supp. 126 (E.D. Tex. 1976).

In Florida, state law dictates that once the period prescribed by the statute of limitation has run, the defendant has a vested substantive right to rely on that statute as a defense. Walter Denson & Son v. Nelson, 88 So.2d 120 (Fla. 1956); Corbett v. General Engineering & Machinery Co., 160 Fla. 879 37 So.2d 161 (1948); Mazda Motors of America, Inc. v. S. C. Henderson & Sons, Inc., 364 So.2d 107 (1st DCA 1978), cert. denied, 378 So.2d 348 (Fla. 1979). As best stated by this Court:

> Ordinarily statutes of limitation are construed as being applicable only to the remedy and not to the substantive right. Parties to a contract, in the absence of a specific provision in the contract, have no vested interest in particular limitation laws until the period prescribed by the statute of limitation has run. The Legislature has the power to increase a prescribed period of limitation and to make it applicable to existing causes of action provided the change in the law is effective before the cause of action is extinguished by the force of a pre-existing statute.

Walter Denson & Son v. Nelson, supra at 122.

In the instant case, upon the expiration of the Virginia statute of limitations, Piper gained a vested property right of protection from being sued. Application of this Court's decision in Bates to the instant case would divest Piper of that right. As Bates was decided after the expiration of the limitation period prescribed by Virginia, and Bates effectively increased the limitation period in the instant

case, this divestment constitutes a deprivation of due process. See Lakeland v. Catinella, 129 So.2d 133 (Fla. 1961); Seaboard System Railroad, Inc. v. Clemente, 467 So.2d 348 (Fla. 3d DCA 1985); North Bay Village v. Miami Beach, 365 So.2d 389 (Fla. 3d DCA 1978). When the law of a state other than the forum is applicable in a suit, a right lawfully vested under the law of the foreign jurisdiction may not be ignored by the forum; "rejection of such rights is a deprivation of due process of law." Carriers Insurance Co. v. Leroy, 309 So.2d 35, 37 (Fla. 3d DCA 1975). See also Confederation Life Ass'n v. Ugalde, 151 So.2d 315 (3d DCA 1963), aff'd in part and rev'd in part on other grounds, 164 So.2d 1 (Fla. 1964). Application of Bates to the instant case, would divest Piper of a substantive right and constitute a deprivation of due process in violation of the United States Constitution.



One Southeast Third Avenue Blackwell Walker Fascell & Hoehl Miami, Florida 33131
TELEPHONE (305) 358-8880

## CONCLUSION

This Court should withdraw its decision and opinion in Bates. If this Court choses not to do so, Bates should not be applied to this case and the answer to question 2 certified to this Court should be that the Virginia statute of limitations applies by operation of Florida's borrowing statute.

BLACKWELL, WALKER, FASCELL
& HOEHL
Attorneys for Appellee,
PIPER AIRCRAFT CORPORATION

By _____
for JAMES E. TRIBBLE

and

By _____
DOUGLAS H. STEIN



One Southeast Third Avenue Blackwell Walker Fascell & Hoehl Miami, Florida 33131
TELEPHONE (305) 358-8880

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Brief was hand-delivered to DOUGLAS S. LYONS, ESQ., Stinson, Lyons & Schuette, P.A., Counsel for Appellants, 1401 Brickell Avenue, Ninth Floor, Miami, Florida 33131 and mailed to HERBERT LEE ALLEN, JR., ESQ. and LAVINIA K. DIERKING, ESQ., Duckworth, Allen, Dyer, P.A., 400 W Colonial Drive, P.O. Box 3791, Orlando, Florida 32802; VINCENT O. WAGNER, ESQ. and STEVE ZLATOS, ESQ., Woodward, Weikart, Emhardt & Naughton, One Indiana Square, Suite 2000, Indianapolis, Indiana 46204; and THOMAS R. JULIN, ESQ., Steel, Hector and Davis, 4000 S.E. Financial Center, Miami, Florida 33133-2398 this 14th day of August, 1987.

BLACKWELL, WALKER, FASCELL
& HOEHL
Attorneys for Appellee,
PIPER AIRCRAFT CORPORATION

By _____
for JAMES E. TRIBBLE

and

By _____
DOUGLAS H. STEIN
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33133
Telephone: (305) 358-8880

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