**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. 83,014**

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| **ARROW AIR, INC.,** | ) |
| | ) |
| Petitioner, | ) |
| | ) |
| **vs.** | ) |
| | ) |
| **MICHAEL WALSH,** | ) |
| | ) |
| Respondent. | ) |
| | ) |
| | ) |

**On Discretionary Review from the District Court of Appeal of Florida, Third District**

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# PETITIONER'S INITIAL BRIEF ON THE MERITS (WITH APPENDIX)

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## INTRODUCTION

This brief is filed by Petitioner, Arrow Air, Inc. The symbol "R" will be used to designate the record on appeal, and the abbreviation "App." will be used to designate the attached appendix.

## STATEMENT OF THE CASE

Plaintiff below, Michael Walsh ("Walsh"), sued his former employer, Arrow Air Inc. ("Arrow"), in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County. (R. 2-5) Walsh alleged that on May 15, 1989, he was wrongfully terminated from his employment. The action was brought under New York Labor Law § 740 (McKinney 1989). (R. 3, 4) Walsh sought reinstatement; reinstatement of full fringe benefits and seniority rights; compensation for lost wages, benefits and other remuneration; and costs of suit and attorney's fees. (R. 4-5)

Arrow filed motions to dismiss and strike the complaint for failure to state a cause of action or allege grounds sufficient to invoke the jurisdiction of Florida's courts. (R. 6-8) Arrow also filed a Motion for Change of Venue to Dade County, based on the fact that it did no business in Broward County. (R. 9-14) The case was transferred to Dade County. (R. 15)

Arrow's Motion to Dismiss the Complaint was granted after the trial judge determined that the action was governed by Florida law and that Florida law did not recognize a cause of action for



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retaliatory discharge. (R. 27) Walsh filed a Motion for Rehearing/Reconsideration with a supporting Memorandum of Law. (R. 18-23) The motion was based on plaintiff's contention that the action was governed by the law of New York. Walsh specifically stated:

> Plaintiff is not arguing or even requesting this Court to establish a Florida cause of action for wrongful discharge. He acknowledges that the Florida Supreme Court has rejected this possibility. However, he does argue that choice of law principles allow the application of a foreign state's law where the "significant relationships test" so dictates.

(R. 22-23)

The Motion for Rehearing was denied. (R. 28) Plaintiff then appealed and the District Court of Appeal, Third District, affirmed. In an opinion filed on May 21, 1991, the court unanimously held that plaintiff's cause of action was governed by Florida law and that Florida does not recognize a cause of action for wrongful discharge. (App. 1-5) On June 5, 1991, Plaintiff filed a Motion for Rehearing on the sole ground that the action was governed by New York law. (App. 6-8)

On June 7, 1991, Sections 448.101, et seq., Florida Statutes, known as the private sector "Whistle Blower's Act" became effective.[1] In any action for retaliatory personnel action brought

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[1] Section 448.102 provides that:

> An employer may not take any retaliatory personnel action against an employee because the employee has:
>
> (1) Disclosed, or threatened to disclose to any appropriate governmental agency, under oath, in



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pursuant to the act a court may order relief, including an injunction restraining continued violation of the act; reinstatement of the employee; reinstatement of full fringe benefits and seniority rights; compensation for lost wages, benefits and other remuneration and any other compensatory damages allowable at law. Section 448.103, Florida Statutes (1991). The act further provides for an award of reasonable attorney's fees, court costs and expenses to the prevailing party. Section 448.104, Florida Statutes (1991).

On November 23, 1992, nearly a year and a half after Walsh moved for rehearing, the Third District ordered Arrow to file a supplemental brief addressing, among other things, whether Section 448.102, Florida Statutes (1991), could be applied to the case at bar. (App. 9-10) The order also provided that Walsh could file

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> writing, an activity, policy, or practice of the employer that is in violation of a law, rule, or regulation. However, this subsection does not apply unless the employee has, in writing, brought the activity, policy, or practice to the attention of a supervisor or the employer and has afforded the employer a reasonable opportunity to correct the activity, policy, or practice.
>
> (2) Provided information to, or testified before, any appropriate governmental agency, person, or entity conducting an investigation, hearing, or inquiry into an alleged violation of a law, rule, or regulation by the employer.
>
> (3) Objected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation.
>
> Section 448.102, Florida Statutes (1991).



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a reply brief within 15 days after the supplemental brief was filed. Arrow's supplemental brief, arguing that the private sector Whistle Blower's Act could not be retroactively applied, was filed on January 25, 1993, and Walsh filed no reply.

On May 11, 1993, the District Court of Appeal, Third District, in a 2-1 decision, vacated its opinion filed on May 21, 1991, and filed a new opinion, reversing the dismissal of Walsh's complaint. (R. 29-44; App. 11-18) The majority held that the action for retaliatory termination was governed by Florida law; that the private sector Whistle Blower's Act should be applied retroactively to a termination that occurred more than two years prior to its enactment; and that Walsh should be permitted to amend his complaint to state a cause of action under the private sector Whistle Blower's Act. (R. 30-44; App. 11-18)

Arrow's motions for rehearing, rehearing en banc, and certification were denied. (R. 45-48; App. 17-18) Arrow then sought review in this Court, and on May 13, 1994, this Court accepted jurisdiction.

## STATEMENT OF THE FACTS

Plaintiff below, Michael Walsh, a Florida resident, was employed by Arrow as a flight engineer. (R. 2) Arrow, a Florida corporation, has its principal place of business in Dade County, Florida. (R. 2, 10)

According to the allegations of Walsh's complaint, on April 25, 1989, while Walsh was a flight engineer on Arrow's flight 506 out



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of New York, the flight crew discovered a hydraulic leak in the aircraft's number 2 engine. The flight crew reported the leak to Arrow's maintenance crew.[2] (R. 2-3) The maintenance crew subsequently reported in the flight log book that the hydraulic system checked out and verbally assured Walsh that certain repairs had been effected. (R. 3) Walsh inspected the system and discovered that a hydraulic leak still existed. Flight 506 was delayed for five hours at Walsh's insistence while maintenance effected repairs. (R. 3) The maintenance director protested and complained about the write-ups in the log book by Walsh.[3] (R. 3) Three weeks later, on May 15, 1989, Walsh was terminated from his employment with Arrow. (R. 3)

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[2] Although the opinion of the District Court states that Walsh discovered and reported the leak, *see Walsh v. Arrow Air, Inc.*, 629 So. 2d 144, 145 (Fla. 3d DCA 1993), the complaint simply states that "the flight crew discovered and reported a hydraulic leak" to the maintenance crew. (R. 2-3)

[3] There is no support in the record for the statement in the opinion of the District Court that "Arrow Air, by and through its employees, threatened Walsh for his actions in reporting the incident and grounding the flight." *Walsh v. Arrow Air, Inc.*, 629 So. 2d at 146.

## ISSUES PRESENTED

I.

WHETHER THE DISTRICT COURT MAJORITY CORRECTLY HELD THAT FLORIDA'S PRIVATE SECTOR WHISTLE BLOWER'S ACT COULD BE APPLIED RETROACTIVELY WHERE THE LEGISLATURE DID NOT PROVIDE FOR RETROACTIVE APPLICATION.

II.

WHETHER THE DISTRICT COURT MAJORITY CORRECTLY HELD THAT A STATUTE WHICH CREATED NEW SUBSTANTIVE RIGHTS AND OBLIGATIONS COULD BE APPLIED RETROACTIVELY.

III.

WHETHER THE DISTRICT COURT MAJORITY CORRECTLY HELD THAT A PARTY'S CONSTITUTIONAL DUE PROCESS RIGHTS WERE NOT VIOLATED BY RETROACTIVE APPLICATION OF A STATUTE WHICH CREATED NEW SUBSTANTIVE RIGHTS AND OBLIGATIONS.

IV.

WHETHER THE DISTRICT COURT MAJORITY CORRECTLY HELD ON REHEARING THAT PLAINTIFF BELOW SHOULD BE PERMITTED TO AMEND HIS COMPLAINT TO STATE A CAUSE OF ACTION UNDER THE FLORIDA WHISTLE BLOWER'S ACT, WHERE THE SOLE POINT RAISED BY PLAINTIFF ON REHEARING WAS THAT THE COURT SHOULD HAVE APPLIED NEW YORK LAW, AND PLAINTIFF NEVER SOUGHT LEAVE TO AMEND TO STATE A CAUSE OF ACTION UNDER FLORIDA LAW.

## SUMMARY OF ARGUMENT

I.

The District Court majority erred in holding that Florida's private sector Whistle Blower's Act could be applied retroactively where the legislature did not provide for retroactive application. In the case at bar, the Act did not take effect until more than two years after plaintiff below, Walsh, was terminated from his employment. It is well established under Florida law that, in the absence of a clear legislative intent to the contrary, a statute is presumed to apply prospectively. The presumption applies with particular force where the statute in question creates a new liability in connection with a past transaction.

In enacting the private sector Whistle Blower's Act, the legislature simply specified an effective date. Where the legislature does no more than specify an effective date, that rebuts any argument that retroactive application of the law was intended.

II.

The District Court majority erred in holding that a statute which created new substantive rights and obligations could be applied retroactively. Prior to the enactment of the private sector Whistle Blower's Act it was well established under Florida law that an employer could terminate an at-will employee at any time, for any cause or no cause at all, without incurring

liability. The Act is, therefore, a drastic departure from the common law.

It is well established under Florida law that statutes creating new substantive rights and liabilities may not be applied retroactively. Although the Act may be "remedial" in purpose, the rule that remedial statutes are applied retroactively does not apply where the remedial act creates new substantive rights and liabilities.

## III.

The District Court majority erred in holding that a party's constitutional due process rights were not violated by retroactive application of a statute which creates new substantive rights and obligations. It is well established under Florida law that retroactive application of a statute is invalid if a new obligation or duty is created or imposed in connection with past transactions. Retroactive application of the Whistle Blower's Act to an employee termination that occurred two years prior to the statute's enactment is clearly unconstitutional.

## IV.

The District Court majority erred in holding, on rehearing, that plaintiff below should be permitted to amend his complaint to state a cause of action under Florida's Whistle Blower's Act, where the sole point raised by plaintiff on rehearing was that the court should have applied New York law, and plaintiff never sought leave

to amend to state a cause of action under Florida law. A plaintiff is bound by the allegations of his complaint, and it is well established that a plaintiff who fails to seek leave to amend in the trial court will not be granted leave to amend on appeal. In the case at bar, plaintiff never sought leave to amend in the trial court or in the District Court. Furthermore, it is not the function of a District Court to raise and assert alternative theories of liability on behalf of a plaintiff that were never raised in the trial court or on appeal by the plaintiff.



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## ARGUMENT

### I.

### THE DISTRICT COURT MAJORITY ERRED IN HOLDING THAT FLORIDA'S PRIVATE SECTOR WHISTLE BLOWER'S ACT COULD BE APPLIED RETROACTIVELY WHERE THE LEGISLATURE DID NOT PROVIDE FOR RETROACTIVE APPLICATION.

According to the allegations of plaintiff's Complaint, Walsh was terminated from his employment on May 15, 1989. Section 448.101, et. seq., Florida Statutes, the private sector "Whistle Blower's Act" did not take effect until more than two years later, on June 7, 1991. *See* Chapter 91-285, Section 9, Laws of Florida 1991.

It is well established under Florida law that, in the absence of a clear legislative intent to the contrary, a statute is **presumed** to apply prospectively. *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1368 (Fla. 1994); *Walker & LaBerge, Inc. v. Halligan*, 344 So.2d 239, 241 (Fla. 1977); *Larson v. Independent Life & Accident Insurance Co.*, 29 So. 2d 448 (Fla. 1947) ("It is academic to say that courts indulge the presumption that all acts of the legislature operate prospectively unless there is a clear or expressed intent that they have a retroactive effect."); *Heberle v. P.R.O. Liquidating Co.*, 186 So. 2d 280, 282 (Fla. 1st DCA 1966) ("A strict rule of statutory construction indulged by the courts is the presumption that the legislature, in the absence of a positive expression, intended statutes... to operate prospectively only..."). The presumption against retroactive application applies

with particular force where the statute in question creates a new liability in connection with a past transaction. *State v. Lavazzoli*, 434 So. 2d 321, 322 (Fla. 1983) (rule against retroactive application of statutes applies with "particular force" where retrospective operation of the law would impair or destroy existing rights); *Larson v. Independent Life & Accident Insurance Co., supra*.

In order for a statute to be applied retrospectively, there must be a clear and unequivocal expression of legislative intent for retroactive application. *Walker & LaBerge, Inc. v. Halligan, supra; Larson v. Independent Life & Accident Insurance Co., supra*. Where the legislature simply specifies an effective date in a statute, that rebuts any argument that retroactive application of the law was intended. *State, Department of Revenue v. Zuckerman-Vernon Corp.*, 354 So. 2d 353, 358 (Fla. 1977).

Sections 448.101, et seq., Florida Statutes (1991) were enacted by the legislature in chapter 91-285, Laws of Florida 1991. As to an effective date, Section 8 of Chapter 91-285 simply provides that, "This act shall take effect upon becoming a law." The act was approved by the Governor and filed with the Secretary of State of June 7, 1991. In addition, Section 448.105, entitled "Existing rights" provides that:

> This act does not diminish the rights, privileges or remedies of an employee ***or employer*** under any other law or rule or under any collective bargaining agreement or employment contract."

[Emphasis added.]

Because the legislature did not clearly and unequivocally provide for retroactive application, and instead simply specified an effective date, Section 448.101, et. seq., may not be applied retroactively. *State, Department of Revenue v. Zuckerman-Vernon Corp.*, 354 So. 2d 353, 358 (Fla. 1977).

## II.

**THE DISTRICT COURT MAJORITY ERRED IN HOLDING THAT A STATUTE WHICH CREATED NEW SUBSTANTIVE RIGHTS AND OBLIGATIONS COULD BE APPLIED RETROACTIVELY.**

The majority below erred in holding that the private sector Whistle Blower's Act, which creates an entirely new cause of action for wrongful termination, could be applied retroactively to an employee's termination that occurred more than two years prior to the statute's enactment. At the time Walsh was fired by Arrow, on May 15, 1991, Florida courts adhered to the rule that where a term of employment was for an indefinite period of time, either party could terminate the employment at any time, for any cause or no cause at all, without incurring liability. *Smith v. Piezo Technology & Professional Administrators*, 427 So. 2d 182, 184 (Fla. 1983); *Hartley v. Ocean Reef Club, Inc.*, 476 So. 2d 1327, 1329 (Fla. 3d DCA 1985) ("creation of a cause of action for retaliatory firing of an at-will employee would abrogate the inherent right of contract between employer and employee ... [and] overrule longstanding Florida law...").

Recognizing that the employment at will doctrine was well entrenched in the common law of Florida, Walsh sued Arrow for wrongful discharge pursuant to the New York Labor Code. The complaint was dismissed after the trial court concluded that Florida law applied and the Third District affirmed. While the case was pending for nearly two years on rehearing, the Florida Legislature enacted Section 448.101, et seq, Florida Statutes, the private sector Whistle Blower's Act. The Act is a drastic departure from the common law employment at will doctrine and provides, under certain circumstances, for a cause of action for retaliatory discharge and also provides for the recovery of attorneys' fees. The Third District, on its own initiative, held in a 2-1 decision that the new Florida statute could be applied retroactively to provide Walsh with a cause of action for retaliatory termination that occurred more than two years prior to the statute's effective date.

The majority below stated that:

> Although the general rule is that statutes creating new rights operate prospectively, Florida Dep't of Revenue v. Zuckerman-Vernon Corp., 354 So. 2d 353 (Fla. 1977), the rule is not absolute. 2 Sutherland, Statutory Construction, § 40.01 (4th ed. 1986); 49 Fla. Jur. 2d, Statutes, § 107 (1984).

*Walsh v. Arrow Air, Inc.*, 629 So. 2d 144, 148 (Fla. 3d DCA 1993). The majority misstated Florida law in regard to statutes which affect substantive rights and liabilities. The law in Florida is: Although the general rule is that statutes operate prospectively, the rule is not absolute. In regard, however, to *statutes creating*



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*new substantive rights and liabilities* the rule against retroactive application is rigidly enforced. *L. Ross, Inc. v. R. W. Roberts Construction Co., Inc.*, 481 So. 2d 484, 485 (Fla. 1986) (statute which increases substantive obligations could not be applied to a cause of action in existence on date of enactment); *Young v. Altenhaus*, 472 So. 2d 1152, 1154 (Fla. 1985) (statute which creates a "new obligation or duty" is substantive in nature and can be applied only prospectively); *State v. Lavazzoli*, 434 So. 2d 321, 323 (Fla. 1983) (statutes which affect existing rights are presumed to apply prospectively); *Larson v. Independent Life & Accident Insurance Co.*, 29 So. 2d 448 (Fla. 1947) (statutes which create new obligations and impose new penalties are "rigidly construed" as being prospective); *Recon Paving Inc. v. Cook*, 439 So. 2d 1019, 1021 (Fla. 1st DCA 1983) (substantive statutes are prospective only); *Ratner v. Hensley*, 303 So. 2d 41, 45 (Fla. 2d DCA 1974) ("defendant's vested rights protect him from being subjected to the retroactive application of statutes creating new causes of action").

The majority below attempted to avoid application of the well established rule in the cited decisions by holding that the private sector Whistle Blower's Act is "remedial" and must, therefore, be given retroactive application. For that proposition, the majority relied upon this Court's decision in *Martin County v. Edenfield*, 609 So. 2d 27 (Fla. 1992), holding that Section 112.3187, Florida Statutes (1989), the public sector Whistle Blower's Act, was a



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"remedial statute designed to encourage the elimination of public corruption ...." 609 So. 2d at 29.

In *Edenfield* this Court held that Section 112.3187 was remedial solely in the context of determining whether the statute, which was clearly in derogation of common law, should be broadly or narrowly construed. In *Edenfield*, however, this Court also held that substantive amendments to the Whistle Blower's Act which took effect during the pendency of the case could not be applied retroactively. 609 So. 2d 27, 29, n.2. In *Edenfield*, the issue before this Court was whether an employee who was in pari delicto with the wrongdoer whose malfeasance he revealed was precluded from seeking relief under the public sector Whistle Blower's Act of 1986. At the time the employee was subjected to adverse actions by his employer, the statute provided that the employee's participation in the corruption alleged could be raised as a defense by the employer. Subsequently, in 1992, the statute was amended to provide that the statute's protection was not available to an individual who intentionally participated in wrongdoing.

Although this Court held that the statute was "remedial" and should therefore be broadly construed, this Court also held that the subsequent substantive amendment could not be applied retroactively, stating, "[T]he 1992 amendments do not apply to the present cause of action [which accrued prior to the amendment's effective date]." 609 So. 2d at 29, n.2. If a substantive amendment to a portion of the public sector Whistle Blower's Act

cannot be applied retroactively, then certainly the entire private sector Whistle Blower's Act cannot be applied retroactively.

While Section 448.101, et seq., may be remedial in purpose, it is also clearly substantive because it creates an entirely new cause of action for wrongful termination in the private sector that was never before recognized under Florida law. Substantive law is that part of the law which creates and defines rights. *Alamo Rent-A-Car v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994) (substantive law prescribes duties and rights); *Haven Federal Savings & Loan Association v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991) ("Substantive law has been defined as that part of the law which creates, defines, and regulates rights ...."); *Young v. Altenhaus*, 472 So. 2d 1152 (Fla. 1985) (statute which creates a new obligation or duty is substantive); *Recon Paving, Inc. v. Cook*, 439 So. 2d 1019 (Fla. 1st DCA 1983) (by any standard, statute increasing benefits payable under Worker's Compensation Act is substantive legislation).

In *Alamo Rent-A-Car v. Mancusi, supra*, this Court held that a statute limiting the amount of punitive damages to no more than three times the amount of compensatory damages was substantive, stating:

> The establishment or elimination of such a claim is clearly a substantive, rather than procedural, decision of the legislature because such a decision does, in fact, grant or eliminate a right or entitlement.

632 So. 2d at 1358. Obviously, a statute which creates an entirely new cause of action is substantive.

The rule that remedial statutes will be applied retroactively does not apply where the remedial act also creates a new cause of action. In *City of Lakeland v. Catinella*, 129 So. 2d 133 (Fla. 1961), this Court held that:

> Remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against retrospective operation of statutes.

129 So. 2d at 136. *See also Hapney v. Central Garage, Inc.*, 579 So. 2d 127, 134 (Fla. 2d DCA 1991) ("Remedial statutes, which do not create new or take away vested rights but only further existing rights, are to be applied retrospectively"), *rev. denied*, 591 So. 2d 180 (Fla. 1991); *Ziccardi v. Strother*, 570 So. 2d 1319, 1321 (Fla. 2d DCA 1990) (same). The obvious corollary rule is that a remedial act which ***does*** create new or take away vested rights may not be applied retroactively. That rule is consistent with the holding in *Edenfield, supra*, where this Court found that the public sector Whistle Blower's Act was remedial in purpose, but that substantive amendments to the statute could not be applied retroactively.

The reliance by the majority below upon the decision of this Court in *City of Orlando v. Desjardins*, 493 So. 2d 1027 (Fla. 1986), was also misplaced. In *Desjardins*, this Court gave

retroactive application to an amendment to the Public Records Act, noting that the statute was addressed to "[r]emedial rights [arising] for the purpose of protecting or enforcing substantive rights." *Id.* at 1028. Unlike Section 448.101, et seq., the statute in *Desjardins* did not create a new cause of action.

The rule against retroactive application should apply with particular force in the case at bar which arises from termination of an "at will" employee. This case is unlike the typical "accident" case where it cannot reasonably be said that any of the parties "relied" upon existing law prior to being involved in an accident. On May 5, 1989, when Walsh was discharged by Arrow, it was clear under Florida law that when a term of employment was for an indefinite period of time, either party could terminate the employment at any time, for any cause or no cause at all, without incurring liability. *Walsh v. Arrow Air*, 629 So. 2d 144, 146 (Fla. 3d DCA 1993).

Arrow should be entitled to rely on longstanding case law existing at the time of the termination which clearly established that Walsh's employment was terminable at will. *See, e.g., Harley v. Ocean Reef Club, Inc.*, 476 So. 2d 1327 (3d DCA 1985) (holding that Florida law did not recognize a "whistle blower's" cause of action for retaliatory discharge). Arrow should not be subjected, ex post facto, to liability under a statute which created a cause of action more than two years after Walsh's termination. As this Court stated in *Dewberry v. Auto-Owner's Insurance Co.*, 363 So. 2d



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1077 (Fla. 1978), "The citizens of this State cannot be charged reasonably with notice of the consequences of impending legislation before the effective date of that legislation, for it is generally accepted that a statute speaks from the time it goes into effect." 363 So. 2d at 1080.

The majority below also stated that application of the prohibitions contained in Section 448.102, Florida Statutes, would not actually subject Arrow to any new obligations because a common carrier always had a duty to use care in the conduct and management of its conveyances. 629 So. 2d at 1050. That observation would have merit if the statute in question simply codified a passenger's pre-existing common law right to sue for injuries sustained as a result of safety violations. In regard to wrongful termination, however, there was no pre-existing common law right to sue an employer. Section 448.102 is a drastic departure from the common law and it should not be applied to impose new substantive rights and obligations in regard to a transaction that occurred more than two years prior to its enactment.

The United States Supreme Court recently reaffirmed the presumption that statutes affecting substantive rights, liabilities or duties do not apply to conduct occurring before their enactment in *Landgraf v. USI Film Products*, 62 U.S.L.W. 4255 (U.S. Apr. 26, 1994). The Court stated:

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that

> individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." [Citation omitted.]

62 U.S.L.W. at 4261. See also *Trustees of Tufts College v. Triple R. Ranch, Inc.*, 275 So. 2d 521, 524 (Fla. 1973) ("The bias against retroactive legislation is deeply rooted in the Anglo-American law.")

In *Landgraf*, the United States Supreme Court held that Section 102 of the Civil Rights Act of 1991, which created a new right to recover compensatory and punitive damages for intentional discrimination violative of Title VII of the Civil Rights Act of 1964, could not be applied retroactively, stating:

> [T]he new compensatory damages provision would operate "retrospectively" if it were applied to conduct occurring before [its enactment]. Unlike certain other forms of relief, compensatory damages are quintessentially backward-looking. Compensatory damages may be *intended* less to sanction wrongdoers than to make victims whole, but they do so by a mechanism that affects the liabilities of defendants. They do not "compensate" by distributing funds from the public coffers, but by requiring particular employers to pay for harms they caused. The introduction of a right to compensatory damages is also the type of legal change that would have an impact on private parties' planning. In this case, the event to which the new damages provision relates is the discriminatory conduct of respondents' agent...; if applied here, that provision would attach an important new legal burden to that conduct. The new damages remedy in § 102, we conclude, is the kind of provision that does not apply to events antedating its enactment in the absence of clear congressional intent.

> In cases like this one, in which prior law afforded no relief, § 102 can be seen as creating a new cause of action, and its impact on parties' rights is especially pronounced. Section 102 confers a new right to monetary relief on persons like petitioner who were victims of a hostile work environment but were not constructively discharged, and the novel prospect of damages liability for their employers. Because Title VII previously authorized recovery of backpay in some cases, and because compensatory damages under § 102(a) are in addition to any backpay recoverable, the new provision also resembles a statute increasing the amount of damages available under a preestablished cause of action. Even under that view, however, the provision would, if applied in cases arising before the Act's effective date, undoubtedly impose on employers found liable a "new disability" in respect to past events. [Citation omitted.]
>
> * * *
>
> It will frequently be true, as petitioner and amici forcefully argue here, that retroactive application of a new statute would vindicate its purpose more fully. That consideration, however, is not sufficient to rebut the presumption against retroactivity.

62 U.S.L.W. at 4266-67.

In the case at bar the presumption against retroactive application of a statute which creates an entirely new cause of action should be applied. The presumption "is founded upon sound considerations of general policy and practice, and accords with long held and widely shared expectations about the usual operation of legislation." *Landgraf*, 62 U.S.L.W. at 4267.



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## III.

**THE DISTRICT COURT MAJORITY ERRED IN HOLDING THAT A PARTY'S CONSTITUTIONAL DUE PROCESS RIGHTS WERE NOT VIOLATED BY RETROACTIVE APPLICATION OF A STATUTE WHICH CREATES NEW SUBSTANTIVE RIGHTS AND OBLIGATIONS.**

Retroactive application of Sections 488.101, et seq., Florida Statutes (1991) to an employee's termination that occurred more than two years prior to the statute's effective date would violate Arrow's due process rights under the United States and Florida Constitutions. In *Young v. Altenhaus*, 472 So. 2d 1152 (Fla. 1985) and *McCord v. Smith*, 43 So. 2d 704 (Fla. 1949), this Court held that retroactive application of a statute is invalid if "a new obligation or duty is created or imposed ... in connection with transactions or considerations previously had or expiated." *Young*, 472 So. 2d at 1154; *McCord*, 43 So. 2d at 79. There are numerous other cases to the same effect. *See, e.g. Florida Patient's Compensation Fund v. Scherer*, 558 So. 2d 411, 414 (Fla. 1990) ("Due process considerations preclude retroactive application of a law that creates a substantive right"); *Cantor v. Davis*, 489 So. 2d 18 (Fla. 1986) (statute which provided for award of attorney's fees in medical malpractice action was unconstitutional as applied to action which accrued prior to statute's effective date); *L. Ross, Inc. v. R.W. Roberts Construction Co.*, 466 So. 2d 1096 (Fla. 5th DCA 1985) (legislature cannot constitutionally increase an existing obligation, burden or penalty as to a set of facts after those facts have occurred), *aff'd.*, 481 So. 2d 484 (Fla. 1986); *Stone v.*

*Town of Mexico Beach*, 348 So. 2d 40, 43 (Fla. 1st DCA 1977) (retrospective statute is invalid if a new obligation or duty is imposed or an additional disability is established in connection with a previous transaction), *cert. denied*, 355 So. 2d 517 (Fla. 1978).

*L. Ross Inc. v. R.W. Roberts Construction Co., supra*, involved the issue of whether the repeal of a statute placing limitations on the amount of attorney's fees recoverable in an action by a subcontractor against a surety on a bond could be applied retroactively. In holding that the statutory amendment could not be applied retroactively, this Court stated:

> The right to attorney's fees is a substantive one, as is the burden on the party responsible for paying the fee. A statutory amendment affecting the substantive right and concomitant burden is likewise substantive.

481 So. 2d at 485. In the case at bar, the right to recover for wrongful termination and collect attorneys fees is substantive, as is the burden on the employer sought to be held liable. Section 448.101, et. seq., which affects those substantive rights is likewise substantive.

In holding that the amendment to the attorney's fee statute could not be applied retroactively, because it was not merely "remedial" but also "substantive", the Fifth District stated:

> Statutes . . . which create a new right to attorney's fees create a substantive right in favor of a limited class of potential plaintiffs. ... and a substantive burden or obligation upon a limited class of potential defendants. . . The right to an attorney's fee is substantive because it gives to a party who did not have that right the legal right to recover substance



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> (money) from a party who did not theretofore have the legal obligation to render or pay that money. The right is not merely a new or different remedy to enforce an already existing right and is, for that reason, not merely procedural.
>
> * * *
>
> [S]ubstantive rights and obligations as to attorney's fees in particular types of litigation vest and accrue as of the time the underlying cause of action accrues.
>
> It is a facet of constitutional due process that, after they vest, substantive rights cannot be adversely affected by the enactment of legislation. Likewise, but conversely, it is fundamentally unfair and unjust for the legislature to impose, ex post facto, a new or increased obligation, burden, or penalty as to a set of facts after those facts have occurred. For the same reason, regardless of the intent of the legislature, the legislature cannot constitutionally increase an existing obligation, burden or penalty as to a set of facts after those facts have occurred.

*L. Ross, Inc. v. R.W. Roberts Const. Co.*, 466 So. 2d 1096, 1097-98 (Fla. 5th DCA 1985).

Section 448.102, which creates a new right to sue for wrongful termination, with an accompanying right to recover attorney's fees, creates substantive rights in favor of a limited class of potential plaintiffs and imposes substantive burdens or obligations upon a limited class of potential defendants. The right to sue for wrongful termination and the right to recover attorney's fees are substantive because they give to a party who did not have those rights the legal right to recover substance from a party who was not theretofore legally liable. It would be fundamentally unfair and unjust to apply, ex post facto, a new cause of action and right to attorney's fees to a set of facts after those facts have

Retroactive application of the private sector Whistle Blower's Act to an employee termination that occurred two years prior to its effective date would clearly be unconstitutional. *Young v. Altenhaus, supra; Florida Patient's Compensation Fund v. Scherer, supra; see also* 10 Fla. Jur. 2d, *Constitutional Law* § 296 (1979) (Retroactive legislation is invalid where vested rights are adversely affected or destroyed or when a new obligation or duty is created or imposed, or an additional disability is established, in connection with transactions or considerations previously had or expiated.)

## IV.

**THE DISTRICT COURT MAJORITY ERRED IN HOLDING, ON REHEARING, THAT PLAINTIFF BELOW SHOULD BE PERMITTED TO AMEND HIS COMPLAINT TO STATE A CAUSE OF ACTION UNDER FLORIDA'S WHISTLE BLOWER'S ACT, WHERE THE SOLE POINT RAISED BY PLAINTIFF ON REHEARING WAS THAT THE COURT SHOULD HAVE APPLIED NEW YORK LAW, AND PLAINTIFF NEVER SOUGHT LEAVE TO AMEND TO STATE A CAUSE OF ACTION UNDER FLORIDA LAW.**

In both the trial court and the District Court, Walsh steadfastly insisted that his action for wrongful termination was governed by New York law, not Florida law. After the trial court dismissed the complaint for failure to state a cause of action Walsh moved for a rehearing and stated, "it has never been this Plaintiff's contention that Florida recognized ... a cause of action [for retaliatory discharge]." (R. 19) Plaintiff also asserted that he was "not arguing or even requesting this Court to establish a Florida cause of action for wrongful discharge."

(R. 22) Plaintiff did not seek leave to amend in order to allege additional facts showing application of New York law and never asked for leave to amend to state a cause of action under Florida law. Plaintiff elected to stand on his complaint, filed pursuant to New York law, and pursued an appeal to the District Court.

The sole issue raised by Walsh before the District Court was whether "the trial court erred in dismissing the plaintiff's complaint when on its face the complaint stated a cause of action under New York law." *Walsh v. Arrow Air, Inc., supra,* at 149 (Gersten, J., dissenting). In his initial brief, appellant stated, "Appellant, MICHAEL WALSH, has never argued and does not argue now that such allegations state a cause of action for wrongful discharge under Florida law." *Id.* The District Court correctly affirmed the dismissal of Walsh's complaint.

Walsh moved for rehearing. The sole basis for rehearing was Walsh's contention that the court should have applied New York law. (App. 6-8) Two days later, the private sector Whistle Blower's Act became effective. Walsh never filed the statute as supplemental authority and never asserted that the statute should be applied to him.

Almost a year and a half after Plaintiff's Motion for Rehearing, the District Court entered an order requiring Arrow to file a supplemental brief answering four questions, including whether the Whistle Blower's Act could be applied retroactively.

The District Court's order provided that Walsh could file a supplemental brief in reply, however, Walsh never filed a brief.

Nearly two years after the Motion for Rehearing was filed, the District Court withdrew its original opinion and substituted an opinion reversing the dismissal of Walsh's complaint. The majority ruled that Walsh should have the opportunity to amend his complaint to state a cause of action under the private sector Whistle Blower's Act, despite the fact that he never sought leave to amend his complaint; despite the fact that Walsh repeatedly asserted that Florida law did not apply to his case; and despite the fact that Walsh never asserted at any stage of the proceedings that he was entitled to recover under the Florida Whistle Blower's Act.

Because Walsh never asserted that Florida law applied to this case, he should not be permitted to take advantage of a change in Florida law. A plaintiff is bound by the allegations of his complaint and cannot be permitted to alter his theory on a stated cause of action at the appellate stage. *United Bank of Pinellas v. Farmers Bank of Malone*, 511 So. 2d 1078, 1080 (Fla. 1st DCA 1987). An assertion that a cause of action could be stated under an alternative theory of liability comes too late when it is raised for the first time on appeal. *Angora Enterprises, Inc. v. Cole*, 439 So. 2d 832, 835 (Fla. 1983), *cert. denied*, 466 U.S. 927 (1984).

It is axiomatic that a plaintiff who fails to seek leave to amend in the trial court will not be granted leave to amend on appeal. *Century 21 Admiral's Port, Inc. v. Walker*, 471 So. 2d 544,

(Fla. 3d DCA 1977); *Ely v. Shuman*, 233 So. 2d 169 (Fla. 3d DCA 1970), *cert. denied*, 237 So. 2d 761 (Fla. 1970). Because plaintiff never sought leave to amend in the trial court to state a cause of action under Florida law, plaintiff should not be permitted to amend his complaint now, especially where he never even sought leave to amend on appeal.

It is well established that it is not the function of a District Court to raise and assert alternative theories of liability on behalf of a plaintiff that were never raised in the trial court or on appeal by the plaintiff himself. *City Contract Bus Service, Inc. v. Woody*, 515 So. 2d 1354, 1356-57 (Fla. 1st DCA 1987) (district court could not properly determine alternative theory not argued below); *Somatra Lines, Ltd. v. Rayne International, Inc.*, 419 So. 2d 803, 804 (Fla. 3d DCA 1982) ("There is no occasion to consider any possible alternative theory of liability since no other was contained in the plaintiff's pleadings.")

The sole ground for rehearing raised by plaintiff, Walsh, was that the District Court erred in failing to apply New York Law. Plaintiff never sought leave to amend in the trial court and plaintiff never sought leave to amend in the appellate court, even after the enactment of the Whistle Blower's Act and even after the Court issued an order requesting supplemental briefs on application of the new statue. Walsh never bothered to file a supplemental reply brief, and never argued that he should be permitted an

opportunity to amend his complaint to state a cause of action under the Whistle Blower's Act. The District Court should not have retroactively applied a new Florida Statute for the plaintiff's benefit when the plaintiff himself insisted that Florida law did not apply and never sought leave to amend.



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## INDEX TO APPENDIX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1991

MICHAEL WALSH, **

Appellant, **

vs. ** CASE NO. 90-1846

ARROW AIR, INC., **

Appellee. **

Opinion filed May 21, 1991.

An Appeal from the Circuit Court for Dade County, Jon Gordon, Judge.

Krupnick, Campbell, Malone and Roselli, and Walter G. Campbell, Jr., and Kelley B. Gelb, for appellant.

Thornton, David, Murray, Richard & Davis, and Barry L. Davis, and Andrew L. Ellenberg, for appellee.

Before FERGUSON, JORGENSON, and GERSTEN, JJ.

PER CURIAM.

Appellant, Michael Walsh, appeals the dismissal of his complaint for failure to state a cause of action against appellee, Arrow Air, Inc. We affirm.

Appellant is a citizen of Florida and was employed by appellee, a Florida corporation, as a flight engineer. Appellant contends that his employment with appellee was wrongfully terminated as a result of his reporting mechanical difficulties during a pre-flight inspection. The mechanical difficulties occurred while the plane and appellant were in New York.

Appellant contends that Florida's choice of law principles allow him to maintain a cause of action not recognized in Florida but recognized under New York law. Appellee asserts that Florida is the correct forum for this cause of action, and that since Florida does not recognize a cause of action for wrongful discharge, appellant's case was properly dismissed.

Florida law does not recognize a cause of action for wrongful discharge:

> In the absence of a specific statute granting a property interest, a contract of employment (implied or expressed) which is indefinite as to term of employment is terminable at the will of either party without cause and an action for wrongful discharge will not lie.

Kelly v. Gill, 544 So.2d 1162 (Fla. 5th DCA), rev. denied, 553 So.2d 1165 (Fla. 1989), cert. denied, ____ U.S. ____, 110 S.Ct. 1477, 108 L.Ed.2d 614 (1990).

In his complaint, appellant sought to apply New York law, alleging that his discharge was proscribed by New York law. See § 740 New York Labor Laws (McKinney 1989). At issue is whether appellant's complaint sets forth sufficient allegations to allow the application of New York law under Florida's choice of law principles.

In order to apply New York law in a cause of action brought in Florida, appellant must meet a choice of law test, either under a breach of contract, or a tort analysis. Goodman v. Olsen, 305 So.2d 753 (Fla. 1974), cert. denied, 423 U.S. 839, 96 S.Ct. 68, 46 L.Ed.2d 58 (1975); Bishop v. Florida Specialty Paint Company, 389 So.2d 999 (Fla. 1980).

According to Florida law, a breach of contract action is determined:

> Where the place of making and of performance of a contract are the same, the law of that state determines and controls the validity, interpretation, and rights and obligations under the contract.

Boat Town U.S.A., Inc. v. Mercury Marine Division of Brunswick Corp., 364 So.2d 15 (Fla. 4th DCA 1978).

In determining the choice of law under tort principles, a "significant relationships" test is applied by analyzing the following contacts:

> (a) The place where the injury occurred,
> (b) The place where the conduct causing the injury occurred,
> (c) The domicil, 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 respective importance with respect to the particular issue.

Bishop v. Florida Specialty Paint Company, 389 So.2d at 1001.

Although in considering a motion to dismiss, all well pleaded allegations of the complaint are considered as true, Clark v. Boeing Co., 395 So.2d 1226 (Fla. 3d DCA 1981), appellant's complaint fails to meet the choice of law test under tort or

contract law. At issue is appellant's employment and termination; yet, the complaint is devoid of any facts regarding the locus of such employment or termination.

Therefore, under a breach of contract analysis, the complaint is deficient because it does not state facts regarding where the contract was made or performed. Under a tort analysis, i.e., the wrongful discharge, the complaint is deficient because the facts indicate more significant contacts with Florida than with New York.

Accordingly, we affirm.

JORGENSON, Judge, specially concurring.

The established law of this district does not provide a cause of action for retaliatory discharge to a "whistle-blowing" employee. See Hartley v. Ocean Reef Club, Inc., 476 So. 2d 1327 (Fla. 3d DCA 1985).

I would affirm on that authority.

IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
THIRD DISTRICT

CASE NO.: 90-1846

MICHAEL WALSH,

Appellant,

v.

ARROW AIR, INC.,

Appellee.

_____/

MOTION FOR REHEARING

COMES NOW the appellant, MICHAEL WALSH, by and through the undersigned attorneys, and files this Motion for Rehearing, and would state as follows:

Appellant, MICHAEL WALSH, seeks rehearing of the Court's opinion that applying tort choice of law principles, New York law does not apply to appellant's complaint for wrongful discharge. In reaching that conclusion, this Court misapprehended the application of the "significant relationships" test. The Court's opinion sets forth the "significant relationships test as adopted by the Florida Supreme Court in Bishop v. Florida Specialty Pain Co., 309 So.2d 999 (Fla. 1980), but the opinion does not directly apply that analysis to this case. If the analysis is applied, one can see that the complaint alleges sufficient facts to support an application of New York law.

Applying the "significant relationships" test:

1. The place where the injury occurred: Wrongful discharge law in intended not only to prevent injury to the employee, but also to prevent injury to the general public which is subjected to danger when employees fail to report dangerous acts by their employers because of fear they will be discharged. Therefore, the injury in this case is to the citizens of New York who were subjected to danger when appellee, ARROW AIR, INC., discouraged its employees from reporting leaks, such as the one in this case, by verbal threats and warnings and eventual discharge.

2. The place where the conduct causing the injury occurred: The conduct causing the injury occurred at J.F. Kennedy Airport when appellee's, ARROW AIR, INC., threatened appellant, MICHAEL WALSH, when he refused to overlook the leak and later conduct causing injury occurred in Florida when the appellee took action on those threats and discharged appellant.

3. The domicile, residence, nationality, place of incorporation and place of business of the parties: Appellant is a resident of Broward County and appellee is a resident of Dade County, Florida. Appellee did business in New York when it flew into New York's J.F. Kennedy Airport.

4. The place where the relationship, if any, between the parties is centered: The relationship in question is the one which existed at New York's J.F. Kennedy Airport when appellant, MICHAEL WALSH, took action for which he was threatened by appellee, ARROW AIR, INC., and for which he was later discharged. That was the

AIR, INC., and for which he was later discharged. That was the crucial point in the factual context of the case.

An evaluation of the facts in accordance with the "significant relationships" test shows that the significant relationships lie with the State of New York. Although admittedly, some relationships exist with the State of Florida, the more significant ones are with the State of New York. Appellant should be allowed to further establish the significance of the relationships through discover. Accordingly, it was erroneous for the trial court to dismiss appellant's complaint and this court should reconsider its opinion in this regard.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 5 day of June, 1991 to: LINDA SINGER STEIN, ESQUIRE, Thornton, David, Murray, Richard and Davis, Attorneys for Appellee, 2950 Southwest 27th Avenue, Suite 100, Miami, Florida, 33133.

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Florida Bar No.: 161009

KBG:mam

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1992

NOVEMBER 23, 1992

MICHAEL WALSH, **

Appellant, **

vs. ** CASE NO. 90-1846

ARROW AIR, INC., **

Appellee. **

The appellee, Arrow Air, Inc., is ordered to file a supplemental brief, not to exceed twenty pages, in response to the following points: (1) Whether section 448.102, Florida Statutes (1991), applies to the facts of this case; (2) whether section 448.102 overrules Florida case law which held that there is no cause of action for retaliatory termination of an at-will employee; (3) assuming that it does, whether the law should be applied to this case which predates enactment of the statute; and (4) whether it is permissible for this Court to apply Florida law when the only requested relief was under New York law.

The response is due in twenty days. Appellant may reply whithin fifteen days after the supplemental brief is filed.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By 
Deputy Clerk

cc: Walter G. Campbell, Jr.
Barry L. Davis

Linda Singer Stein

/nbc

Michael WALSH, Appellant,

v.

ARROW AIR, INC., Appellee.

No. 90-1846.

District Court of Appeal of Florida, Third District.

May 11, 1993.

On Motion for Rehearing Dec. 7, 1993.

Flight engineer filed wrongful discharge action against airline. The Circuit Court, Dade County, Jon I. Gordon, J., dismissed for failure to state a cause of action. Engineer appealed. The District Court of Appeal, Ferguson, J., held that: (1) state law governed the action, even though the events which led up to the discharge occurred in another state, and (2) the Whistle-blower's Act, which protects employees against discharge for disclosing employer violations of law, rule, or regulation, or for objecting to or refusing to participate in activity, policy, or practice which is a violation of the law, rule, or regulation, and which modifies the at-will employment rule, is a "remedial statute" and may be applied retroactively to a case pending on appeal on its effective date.

Reversed and remanded for further proceedings.

Gersten, J., dissented with opinion.

**1. Torts ⇐2**

Contacts to be considered in deciding which state has most significant relationship to occurrence and to parties, for purposes of determining which state's law to apply in tort action, include place of injury, place of conduct causing injury, the domicile, residence, nationality, place of incorporation, and place of business of parties, and place in which parties' relationship is centered.

**2. Master and Servant ⇐18.5**

State law governed tort claims in wrongful discharge action by flight engineer, who was state resident, against airline that was incorporated and had its principal place of business in state, even if conduct giving rise to action occurred in another state, where actual discharge occurred in state.

**3. Master and Servant ⇐20**

Under common-law rule, either party may terminate employment at any time, for any cause or for no cause at all, without incurring liability if term of employment is for indefinite period of time.

**4. Master and Servant ⇐30(1.10)**

Public policy exception to employment at-will rule does not displace common-law rule, but provides mechanism for identifying legally recognized improper grounds for dismissal.

**5. Master and Servant ⇐30(6.35)**

Whistle-blower's Act, which protects employees against discharge for disclosing employer violations of law, rule, or regulation, or for objecting to or refusing to participate in any activity, policy, or practice of employer which is violation of law, rule, or regulation, has modified common-law rule of at-will employment. West's F.S.A. § 448.102.

**6. Statutes ⇐267(1)**

Generally, statutes creating new rights operate prospectively, but rule is not absolute.

**7. Statutes ⇐264**

Remedial statute is presumed to have been intended to apply to pending cases.

**8. Statutes ⇐264**

"Remedial statute," which may be presumed to apply in pending cases, is legislative enactment that intends to afford private remedy to person injured by wrongful act; it is designed to correct existing law, redress existing grievance, or introduce regulations conducive to public good.

See publication Words and Phrases for other judicial constructions and definitions.

**9. Master and Servant ⇐10½**

Whistle-blower's Act, which protects employees against discharge for disclosing employer violations of law, rule, or regulation, or for objecting to or refusing to participate in activity, policy, or practice of employer

which is violation of law, rule, or regulation, is "remedial statute" and may be applied retroactively to case pending on appeal on its effective date. West's F.S.A. § 448.102.

On Motion For Rehearing

**10. Master and Servant ⇐10½**

Airline had underlying obligation to use care in conduct and management of its conveyances that predated enactment of Whistle–Blower's Act and, therefore, Act could be given retroactive application without violating any substantive rights of airline to discharge employees for disclosing violations of law, rule, or regulation, or for objecting to or refusing to participate in activity, policy, or practice that violated law. West's F.S.A. §§ 448.102, 860.02.

**11. Master and Servant ⇐10½**

Power of employer to discharge employee for doing that which law required or for any reason clearly contrary to strong public policy that may have existed before enactment of Whistle–Blower's Act was not substantive right based on any concept of justice, ethical correctness, or principles of morals and, therefore, giving retroactive application to Act would not violate constitution. West's F.S.A. § 448.102.

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Krupnick, Campbell, Malone and Roselli, and Walter G. Campbell, Jr., and Kelley B. Gelb, Fort Lauderdale, for appellant.

Thornton, David, Murray, Richard & Davis, and Barry L. Davis and Andrew L. Ellenberg, Miami, for appellee.

Before FERGUSON, JORGENSON and GERSTEN, JJ.

ON MOTION FOR REHEARING

FERGUSON, Judge.

The main issue in this appeal, from an order dismissing a complaint, is whether Walsh has a cause of action for wrongful discharge based on a public policy which protects employees who object to, or refuse to participate in, employment activities which violate a law, rule, or regulation. There is also a threshold choice of law issue, i.e., whether the "significant relationship" test compels the application of Florida law.

We affirm the trial court's finding that the case is governed by Florida law, but reverse the finding that no viable cause of action is alleged under Florida law.[1]

*Facts of this Case*

Michael Walsh, a Florida resident, was employed as a flight engineer by Arrow Air, a Florida corporation with its principal place of business in Dade County, Florida. On April 25, 1989, Walsh discovered a hydraulic leak in connection with Flight 506 scheduled for departure from John F. Kennedy Airport in New York.[2] He reported the leak to the flight's maintenance crew. Subsequently the crew reported that the leak had been checked and repaired. On a visual re-exami-

1. In response to the first point in the dissent we note that although Walsh contended in the trial court that New York law governed, Arrow Air argued, correctly, that Florida law applied. As the case was postured the trial court was obligated to choose between the law of New York and the law of Florida.

In our original panel opinion we observed, unanimously, that "[a]t issue is whether appellant's complaint sets forth sufficient allegations to allow the application of New York law under Florida's choice of law principles." We held, in affirming a dismissal of the complaint, that "the facts indicate more significant contacts with Florida than with New York", and that "Florida law does not recognize a cause of action for wrongful discharge."

Arrow Air filed a supplemental brief in response to our request which, again, makes no suggestion that the trial court went beyond the question presented in deciding that Florida law applied. Instead it is conceded by Arrow Air that "this court was correct in affirming" the trial court's determination that Florida law applied. The appellee agrees that the issues on rehearing are whether the new Florida statute should be given retroactive application, and if so, whether a cause of action is stated under the new statute.

2. We chronicled a history of faulty maintenance practices by Arrow Air, including flying an aircraft with a leaking hydraulic system, in reversing a summary judgment for the airline on a wrongful death claim brought by the widow of a copilot. *Connelly v. Arrow Air*, 568 So.2d 448 (Fla. 3d DCA 1990), *rev. denied*, 581 So.2d 1307 (Fla.1991).

mination, Walsh saw that proper repairs had not been made and that a dangerous leak still existed in the system. He reported the incident and, against the wishes of the employer, grounded the flight for approximately five hours while necessary repairs were performed.

Arrow Air, by and through its employees, threatened Walsh for his actions in reporting the incident and grounding the flight. Approximately three weeks later, Walsh was terminated from his employment with Arrow Air.[3] He commenced this action for wrongful termination.

*Choice of Law*

[1, 2] "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," *Bishop v. Florida Specialty Paint, Co.*, 389 So.2d 999, 1001 (Fla.1980), (citing *Restatement (Second) of Conflict of Laws* §§ 145–146 (1971)). Further, the court noted, the contacts to be taken into account in determining 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. *Id.* Both parties are Florida residents and the alleged tortious act occurred in Florida. We agree with the appellee that applying the factors from *Bishop* to the facts as alleged in the complaint, Florida has a more significant relationship to the case than New York, and that the law of this state should determine the outcome.

*Common-Law Rule on Termination of At-Will Employees*

[3] Under the common-law rule, when a term of employment is for an indefinite period of time, either party may terminate the employment at any time, for any cause or no cause at all, without incurring liability. *Marco v. Publix Super Markets, Inc.*, 884 So.2d 1253, 1254 (Fla.1980). This employment-at-will doctrine harmonized with the laissez faire political and economic philosophy of the nineteenth century which was based on the belief that employers should be free to run their businesses without government interference. The rule was also consistent with the freedom of contract ideology prevalent during the nineteenth century. According to that doctrine, the freedom to make contracts included the freedom to terminate them unless the parties were bound for a specific period of time. Mark A. Redmiles, *Shelter from the Storm: The Need for Wrongful Discharge Legislation in Alaska*, 6 Alaska L.Rev. 321 (1989).

Although the rule gained wide acceptance in this country during that period, courts and lawmakers learned over the years that the mutuality of obligations rationale is based on a false premise of equal bargaining power between employees at-will and employers, and that the rule is inadequate to protect employees' interests. Andre D. Bouffard, *Emerging Protection Against Retaliatory Discharge*, 38 Me.L.Rev. 67 (1986); John E. Gardner, *Federal Labor Law Preemption of State Wrongful Discharge Claims*, 58 U.Cin. L.Rev. 491 (1989). Changed social values, as well as changes in modern employment relationships, have led to an erosion of the traditional rule. "A veritable avalanche of scholarly opinion has, with near unanimity, come down in favor of abolishing the at will rule." Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 Harv.L.Rev. 1931 (1983). *See generally* Michael A. DiSabatino, Annotation, *Modern Status of Rule that Employer May Discharge At Will Employee for any Reason*, 12 A.L.R.4th 544 (1982).

*Modern Trend*

[4] One commentator, in a 1986 law-review article, noted that all but nine states had abandoned the traditional rule regarding the termination of at-will employees—Florida, Colorado, Georgia, Iowa, Louisiana, Mis-

3. The material facts are taken from the complaint and must be accepted as true for the purpose of a motion to dismiss for failure to state a cause of action. *Singer v. Florida Paving Co.*, 459 So.2d 1146 (Fla. 3d DCA 1984).

sissippi, Rhode Island, Utah and Vermont. Michael G. Whelen, *Unsuccessful Employee Arbitrants Bring Wrongful Discharge Claims*, 35 Buff.L.Rev. 295 (Winter 1986) (citing H. Perritt, *Employee Dismissal Law and Practice* (1985)). Since publication of the 1986 study, several of the remaining nine states, including Florida, no longer adhere strictly to the common-law rule. Expressing disenchantment with the common-law rule, the Mississippi supreme court wrote in *Shaw v. Burchfield*, 481 So.2d 247 (1985), that under the appropriate factual situation, it would be inclined to re-address the at-will termination rule.

A public policy exception is frequently relied on by courts to circumvent the at-will rule where the results would be unconscionable. Redmiles, *supra*, at 322 (thirty-two states have adopted the public policy exception). It is premised on the rationale that while an at-will employee may be terminated for no reason, or for an arbitrary reason, an employee may not be terminated for an unlawful reason or one that is contrary to a clear mandate of public policy. Nina G. Stillman, *Workplace Claims: Wrongful Discharge Public Policy Actions and Other Common Law Torts*, 375 PLI/Lit 745 (June 1, 1989). The public policy exception does not displace the traditional at-will rule; it merely provides a mechanism for identifying certain legally recognized improper grounds for dismissal. Redmiles, *supra*, at 326.

*Status of the Rule in Florida*

[5] *Hartley v. Ocean Reef Club, Inc.*, 476 So.2d 1327, 1329 (Fla. 3d DCA 1985), involved an employee who was discharged for allegedly refusing to participate in his employer's violation of federal and state environmental statutes and regulations. He complained of a wrongful discharge. Dismissal of the complaint for failure to state a cause of action was affirmed. We resisted urgings to follow the modern trend on grounds that the public policy exception "is too vague a concept to justify the judicial creation of such a tort." *Hartley*, 476 So.2d at 1329. According to *Hartley*, choosing between competing public policies is a function best left to the legislature. *Id.*

A year after *Hartley*, the legislature enacted section 112.3187, the Whistle-blower's Act of 1986 which, among other things, prohibits the discharge of public employees or employees of independent contractors doing business with state agencies, in retaliation for reporting employer violations of laws that create a danger to the public's health, safety, or welfare.

In 1991, the Whistle-blower protection was expanded to cover private-sector employees who disclose, or threaten to disclose, employer violations of law, rule or regulation, or who object to, or refuse to participate in any activity, policy, or practice of the employer which is in violation of a law, rule or regulation. § 448.102, Fla.Stat. (1991).[4] Without question sections 112.321 and 448.102 have

4. Section 448.102 provides:

> Prohibitions.—An employer may not take any retaliatory personnel action against an employee because the employee has:
>
> (1) Disclosed, or threatened to disclose, to any appropriate governmental agency, under oath, in writing, an activity, policy, or practice of the employer that is in violation of a law, rule, or regulation. However, this subsection does not apply unless the employee has, in writing, brought the activity, policy, or practice to the attention of a supervisor or the employer and has afforded the employer a reasonable opportunity to correct the activity, policy or practice.
>
> (2) Provided information to, or testified before, any appropriate governmental agency, person, or entity conducting an investigation, hearing, or inquiry into an alleged violation of a law, rule, or regulation by the employer.
>
> (3) Objected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation.
>
> In defining terms used in the chapter, section 448.101(4), provides that any law, rule, or regulation under section 448.102 "includes any statute or ordinance or any rule or regulation adopted pursuant to any federal, state, or local statute or ordinance applicable to the employer and pertaining to the business."
>
> Among other statutes or regulations, Arrow Air's actions may have violated is chapter 860, which governs offenses concerning aircraft and other public conveyances, and provides a criminal penalty for "whoever, having management or control over ... [a] public conveyance used for the common carriage of passengers is guilty of gross carelessness or neglect in or in relation to the conduct, management and control of such conveyance." § 860.02, Fla.Stat. (1991).

modified the common law in Florida which permitted private employers to terminate an at-will employee at any time, for any cause, or for no cause at all. Arrow Air argues, however, that section 448.102 is not applicable to this case because it post-dates the operative facts. As the final point we consider whether the statute, which was enacted while the case was pending on appeal, should be given retroactive application.

*Retroactive Application*

[6, 7] Although the general rule is that statutes creating new rights operate prospectively, *Florida Dep't of Revenue v. Zuckerman-Vernon Corp.*, 354 So.2d 353 (Fla.1977), the rule is not absolute. 2 Sutherland, *Statutory Construction*, § 41.01 (4th ed. 1986); 49 Fla.Jur.2d, *Statutes*, § 107 (1984). Whether the new statute controls the outcome of this case depends on legislative intent as clearly expressed or implied. Under Florida law an intent that a statute have application to cases pending will be presumed if the statute is remedial in nature. *City of Orlando v. Desjardins*, 493 So.2d 1027 (Fla.1986). This final discussion examines the statute in light of the above principles.

[8] A remedial statute is a legislative enactment that intends to afford a private remedy to a person injured by a wrongful act. It is designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good. *Black's Law Dictionary* 1292–93 (6th ed. 1990) (citing *Application of City of New York*, 71 Misc.2d 1019, 337 N.Y.S.2d 753 (N.Y.Sup.Ct.1972); *In re Estate of McCracken*, 9 Ohio Misc. 195, 224 N.E.2d 181, 182 (Ohio Prob.1967)). An examination of a statute in historical context is essential to a determination that it is remedial.

[9] Several significant occurrences, mentioned earlier in this opinion, preceded passage of section 448.102. Workplace realities showed the at-will doctrine to be harshly unequal; an avalanche of criticism was heaped on the rule in treatises and case law from other jurisdictions; Florida laws which chipped away at the doctrine came close on the heels of cases which dismissed wrongful-termination cases as a matter for legislative intervention. Undoubtedly, the statute was enacted in response to those developments and with the intent to give a private remedy to employees who suffer discharge where their only transgression is disobedience to employer practices which violate laws enacted to protect the public safety and health.

In holding that a new Florida Public Records Act exemption was remedial and to be applied retroactively, the supreme court gave the statute a similar "contextual examination". *City of Orlando v. Desjardins*, 493 So.2d at 1028. It noted that there was "little doubt as to [the exemption's] salutary and protective purpose of mitigating the harsh provisions of the [Act] as applied to public entities' litigation files in ongoing litigation." Reasoning further, the court concluded that the legislature having now acted to correct the unbalanced posture and disadvantaged status of public entities, retroactive application of the law should not be denied on the technical ground that it is a substantive rather than a procedural law. *Id.* at 1029.

Applying similar reasoning, the Supreme Court of Florida recently held that section 112.3187, which created a civil cause of action for wrongful discharge of public employees, is a remedial statute. The court wrote in *Martin County v. Edenfield*, 609 So.2d 27, 29 (Fla.1992), "we believe it clear that the Whistle Blower's Act is a remedial statute designed to encourage the elimination of public corruption by protecting public employees who 'blow the whistle.' As a remedial act, the statute should be construed liberally in favor of granting access to the remedy." [5]

5. *Martin County v. Edenfield*, 609 So.2d 27 (Fla. 1992), as the dissent notes, does not deal extensively with the subject of retroactive application of new statutes. The case does hold, however, that the government employees' whistle-blower's act is remedial. Six years earlier, in *Orlando v. Desjardins*, 493 So.2d 1027 (Fla.1986), the court held that "[i]f a statute is found remedial in nature, it can and should be retroactively applied in order to serve its intended purpose. *Id.* at 1028.

The rule is otherwise, assuredly, where the legislature expressly limits the application of a new law. *See Boynton v. Burglass*, 590 So.2d 446 (Fla. 3d DCA 1991) (en banc). That was the case with section 455.2415, Florida Statutes

For the same reasons relied upon by the supreme court in construing the Florida Public Records Act and section 112.3187 as remedial statutes, we hold that section 448.102 applies to this case which was pending on appeal when the law became effective.

We have decided only the broad question whether a private employee has a cause of action for wrongful termination from an at-will employment in Florida. Still to be decided by the trial court is whether the complaint states, or can be amended to state, a cause of action within the statutory framework.

Reversed and remanded for further consistent proceedings.

JORGENSON, J., concurs.

GERSTEN, Judge (dissenting).

The majority opinion determines that: (1) Florida law applies, notwithstanding the fact that appellant sought relief under New York law; (2) although Florida law did not provide a cause of action for wrongful discharge at the time the complaint was filed or at the time of the appeal, a new Florida statute should be applied retroactively to this case; and (3) the cause should be remanded so that appellant may amend his complaint to include this new retroactive cause of action. Because of these determinations, I respectfully dissent.

The record reveals that at all trial court proceedings, appellant, who instituted this action, only sought to apply New York, and not Florida law. After the trial court dismissed the complaint, appellant filed a motion for rehearing which again stated that New York law applied.

Similarly, even on appeal, appellant's only point as stated in his initial brief, is:

> The trial court erred in dismissing the plaintiff's complaint when on its face the complaint stated a cause of action under New York law.

Additionally, appellant's initial brief stated, "Appellant, MICHAEL WALSH, has never argued and does not argue now that such allegations state a cause of action for wrongful discharge under Florida law."

Yet, the majority reaches beyond appellant's issue. The majority concludes that the complaint, if amended, could now possibly state a cause of action under Florida law.

In considering a motion to dismiss for failure to state a cause of action, a trial court is limited to the four corners of the complaint. *Edward L. Nezelek, Inc. v. Sunbeam Television Corporation*, 413 So.2d 51 (Fla. 3d DCA), *review denied*, 424 So.2d 763 (Fla. 1982); *Kaufman v. A-1 Bus Lines, Inc.*, 363 So.2d 61 (Fla. 3d DCA 1978). The trial court, adhering to this rule, found that appellant's complaint did not state a cause of action.

It is not this court's function to theorize or speculate causes of action a plaintiff may plead in a complaint. *See Raney v. Jimmie Diesel Corporation*, 362 So.2d 997, 998 (Fla. 3d DCA 1978); *Thompson v. City of Jacksonville*, 130 So.2d 105, 108 (Fla. 1st DCA 1961), *cert. denied*, 147 So.2d 530 (Fla.1962). The burden of bringing a proper cause of action, alleging sufficient facts to overcome a motion to dismiss, lies with a plaintiff. Fla. R.Civ.P. 1.110(b). Neither the trial court, nor this court, can substitute its judgment for that of a plaintiff and his counsel, who decide how to frame a complaint. *See Broward Marine, Inc. v. New England Marine Corporation of Delaware*, 386 So.2d 70, 73 (Fla. 2d DCA 1980).

Even if the issue was properly presented and preserved for our review, the law is clear that appellant has not stated a cause of action under Florida law. Florida law holds that when the term of employment is discretionary with either party, then either party for any reason may terminate it at any time, without incurring liability. *DeMarco v. Publix Super Markets, Inc.*, 384 So.2d 1253 (Fla. 1980).

The majority now erroneously concludes that section 448.102, Florida Statutes (1991), which was enacted *after* the original panel

(1988), discussed in *Boynton*, which provides confidentiality in communications between a patient and a psychiatrist. In drafting the law the legislature added that it "does not apply to causes of action arising prior to the effective date of this act." Ch. 88-1, § 86, at 186, Laws of Fla.

decision in this case was released, should be applied retroactively. The complaint in this case was filed on November 17, 1989. The acts complained of occurred in April of 1989. The original opinion affirming the trial court's order was filed on May 21, 1991. The new whistle-blower's act did not take effect until June 7, 1991. Ch. 91-285, § 9, at 2750, Laws of Fla.

Retroactive application of the statute at this stage of the case turns the rule of statutory construction on its head. "It is a well-established rule of construction that in the absence of clear legislative expression to the contrary, a law is presumed to operate prospectively." *Walker & LaBerge, Inc. v. Halligan*, 344 So.2d 239 (Fla.1977); *Keystone Water Company, Inc. v. Bevis*, 278 So.2d 606 (Fla.1973); *Larson v. Independent Life and Accident Insurance Co.*, 158 Fla. 623, 29 So.2d 448 (1947). There is no clear legislative expression that section 448.102, Florida Statutes (1991), was intended to apply retroactively. *See* Ch. 91-285, Laws of Fla.

The cases cited by the majority in support of retroactive statutory application do not apply to this case. Though *City of Orlando v. Desjardins*, 493 So.2d 1027 (Fla.1986), held that a new Florida Public Records Act exemption (section 119.07, Florida Statutes (1985)) was remedial and to be applied retroactively, *Desjardins* is a factually different case. It deals with a different and wholly unrelated statute, and thus has no bearing on this case.

Similarly, the majority's reliance on *Martin County v. Edenfield*, 609 So.2d 27 (Fla. 1992), is also misplaced. *Martin County* dealt with section 112.3187, Florida Statutes, a government employee's whistle-blower's act. Most importantly, *Martin County* does not address the issue of retroactivity.

Acts which create new obligations and impose new penalties, are rigidly construed and operate prospectively only. *Larson v. Independent Life & Accident Ins. Co.*, 29 So.2d 448. Section 448.102, Florida Statutes (1991), creates new obligations on the part of employers, and should be rigidly construed as applying prospectively. Moreover, the legislature expressed its intent to prospectively apply section 448.102, Florida Statutes: "This act shall take effect upon becoming law." Ch. 91-285, § 9, at 2750, Laws of Fla.

In conclusion, appellant never sought to apply Florida law, and because Florida law did not provide a remedy for the acts complained of, and because the new whistle-blower's act is not to be applied retroactively, I respectfully dissent.

## ON MOTION FOR REHEARING

PER CURIAM.

[10, 11] Arrow Air's principal contention in the motion for rehearing is that application of the new statute to give the plaintiff a cause of action for wrongful termination violates the rule against the retroactive application of new statutes. Stated otherwise, it seems the employer's argument is that before the enactment of section 448.102, Arrow Air had a right to fire its employees for complying with the law against its wishes, without fear of civil liability, and in that sense the new statute impairs a substantive right while imposing a new duty on the employer.

First, the underlying obligation of a common carrier to use care in the conduct and management of its conveyances, which might include maintenance, is not new, but is codified in a twenty-two year old criminal statute, section 860.02 Florida Statutes. *See* original opinion, n. 4 (May 11, 1993). Second, the power of an employer to terminate an employee for doing that which the law requires, or for any reason clearly contrary to a strong public policy, which may have existed prior to the exactment of section 448.102, is not a substantive right based on any concept of justice, ethical correctness, or principles of morals. *See Black's Law Dictionary* 1223 (6th ed. 1992). In the words of Justice Holmes:

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.

*Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355, 28 S.Ct. 529, 531, 52 L.Ed. 828 (1908); *see also State Dep't of Transp. v. Knowles*, 402 So.2d 1155, 1158 (Fla.1981) (the rule against retroactive application of statutes is not absolute; the test requires a balancing of the public interest to be advanced by the legislation against the importance of any private right abrogated). We are not persuaded that there is a constitutional impediment to giving the remedial statute retroactive application.

Rehearing is denied.

FERGUSON and JORGENSON, JJ., concur.

GERSTEN, J., dissents.


**PINE RIDGE AT HAVERHILL CONDOMINIUM ASSOCIATION, INC., a Florida not for profit corporation, Appellant,**

**v.**

**HOVNANIAN OF PALM BEACH II, INC., a Florida corporation, Appellee.**

**No. 92-0781.**

District Court of Appeal of Florida, Fourth District.

June 16, 1993.

Rehearing and Clarification Denied Dec. 14, 1993.

Condominium association sued condominium complex owner for damages for construction defects. After jury awarded damages to association, the Circuit Court, Palm Beach County, Edward Rodgers, J., denied association's motion to assess prejudgment interest. Association appealed. The District Court of Appeal held that prejudgment interest should have been awarded from turnover date of condominium property to association.

Reversed and remanded.

**Interest ⇐39(2.30)**

Jury verdict awarding damages for construction defects in condominium complex, including failure to install adequate lighting and failure to properly install windows resulting in water intrusion, had effect of fixing damages at no later than turnover date of condominium property to condominium association; thus, prejudgment interest should have been awarded on those claims from that date.

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Kenneth A. Marra of Nason, Gildan, Yeager, Gerson & White, P.A., West Palm Beach, for appellant.

James R. Merola of Merola & Cox, Palm Beach Gardens, for appellee.

PER CURIAM.

We affirm the final judgment on appeal except as to the determination of prejudgment interest and attorney's fees.

After verdict appellant moved to assess prejudgment interest which was denied because the jury's damage verdict did not specifically fix a date of loss. We disagree. The jury verdict awarded damages for construction defects in the appellant's condominium complex, including failure to install adequate lighting and failure to properly install windows resulting in water intrusion. The jury finding in this regard had the effect of fixing the damages at no later than the turnover date of the condominium property to the association which was in January 1985. Therefore, prejudgment interest should have been awarded on those claims from that date. *See Bergen Brunswig Corp. v. Department of Health and Rehabilitative Serv.*, 415 So.2d 765 (Fla. 1st DCA 1982), *approved in Argonaut Ins. Co. v. May Plumbing Co.*, 474 So.2d 212 (Fla.1985).

Because we reverse for an award of prejudgment interest, we also reverse the award to appellee of attorney's fees pursuant to an offer of judgment. It appears to us that