

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

CLEMENCE MICHAUD, individually, :  
and as Personal Representative of the Estate :  
of Jean Provencher, Deceased, :

and :

LYNE STRICKER-BOULANGER, :  
individually, as mother and natural guardian of :  
GINGER STRICKER, a minor, and as Personal :  
Representative of the Estate of Walter Stricker, :  
Deceased, and HANSULRICH STRICKER, SR., :

Plaintiffs, :

v. : C.A. No. 00C-06-156-SCD

FAIRCHILD AIRCRAFT INCORPORATED, :  
THE B.F. GOODRICH COMPANY, and :  
B.F. GOODRICH AEROSPACE COMPONENT :  
OVERHAUL & REPAIR, INC., :

Defendants. :

*Defendant Fairchild Aircraft Incorporated's Application  
for Certification of an Interlocutory Appeal – GRANTED*

Submitted: December 13, 2001  
Decided: December 26, 2001

**O R D E R**

On this 26th day of December 2001, upon defendant Fairchild Aircraft Incorporated's ("FAI") Application for Certification of an Interlocutory Appeal, it appears that:

(1) FAI has filed a timely Application for Certification of an Interlocutory Appeal, and plaintiff has filed a timely response.

(2) Supreme Court Rule 42 governs certification of interlocutory appeals. It provides:

No interlocutory appeal will be certified by the trial court or accepted by this Court unless the order of the trial court determines a substantial issue, establishes a legal right and meets 1 or more of the following criteria:

- (i) . . . . Any of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41;<sup>1</sup> or  
\* \* \* \*
- (v) Case dispositive issue. A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice.

(3) An interlocutory order is not appealable unless “there has been the determination of a substantial issue *and* the establishment of a legal right.”<sup>2</sup> “[T]he Supreme Court has stated that the denial of a limitations defense does not establish a ‘legal right’ between the parties’ but simply involves the denial of an affirmative defense . . . .”<sup>3</sup> “On the other hand, other Supreme Court cases take the view that a trial court’s decision not to dismiss claims as time-barred can involve a substantial issue establishing a legal right.”<sup>4</sup> Vice Chancellor Strine stated that “[he is] not sure that one can honestly reconcile the cases on this point.”<sup>5</sup>

[W]hether interlocutory review of a denial of a dispositive motion premised on a statute of limitations defense is appropriate really turns on whether the limitations issue at stake otherwise warrants Supreme Court review under the factors set forth in Supreme Court Rule 42(b)(i)-(v) – in particular whether the trial court’s resolution

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<sup>1</sup> Supreme Court Rule 41 states:

(b) *Requirements for accepting a certification.* Certification will be accepted in the exercise of the discretion of the Court only where there exist important and urgent reasons for an immediate determination by this Court of the questions certified. A certification will not be accepted if facts material to the issue certified are in dispute. A certificate shall state with particularity the important and urgent reasons for an immediate determination by this Court of the question certified. Without limiting the Court’s discretion to hear proceedings on certification, the following illustrate reasons for accepting certification:

(i) Original question of law. The question of law is of first instance in this State.

<sup>2</sup> *Gardinier, Inc. v. Cities Service Co.*, Del. Supr., 349 A.2d 744, 745 (1975).

<sup>3</sup> *Cochran v. Stifel Fin. Corp.*, Del. Ch., C.A. No. 17350, 2000 Del. Ch. LEXIS 69, at \*5, Strine, V.C., (Apr. 6, 2000).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 7.

turned on an unsettled question of law of sufficient importance to merit interlocutory review by the Supreme Court.<sup>6</sup>

(4) I concluded that GARA, the General Aviation Revitalization Act of 1994,<sup>7</sup> did not apply to the undisputed facts of this case. FAI seeks a review of that decision. GARA is a defense to this claim and if successful it would end the litigation as it is a statute of repose. GARA is a statute that has not been widely interpreted. This Court's interpretation is a matter of first impression in Delaware. A review of the interlocutory order may terminate the litigation.

(5) As to the second grounds for the interlocutory, I find that the requirements of Supreme Court Rule 42 are not met as there are factual issues as to whether the conduct of FAI met the standards of simple negligence. The issue of whether or not Delaware will recognize a post-sale duty to warn is not ripe as the case has been allowed to proceed under, *inter alia*, a theory of simple negligence. Accordingly, FAI's Application for Certification of an Interlocutory Appeal is GRANTED solely on the issue of GARA.

IT IS SO ORDERED.

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Judge Susan C. Del Pesco

Original to prothonotary  
xc: Robert Jacobs, Esquire  
Anthony G. Flynn, Esquire  
J. Michael Johnson, Esquire

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<sup>6</sup> *Id.*

<sup>7</sup> 49 U.S.C. § 4010.