IN THE SUPREME COURT OF FLORIDA

Case No. 46,709

LEON WEST, individually and as personal representative of the Estate of GWENDOLYN WEST, deceased, et al.,

Plaintiff-Appellee,

vs.

CATERPILLAR TRACTOR COMPANY, INC.,

Defendant-Appellant.

BRIEF OF AMICUS CURIAE DADE COUNTY DEFENSE BAR ASSOCIATION

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INTRODUCTION

This brief is filed on behalf of the amicus curiae, Dade County Defense Bar Association (hereafter Defense Bar), in accordance with leave granted by this Court in its order of January 28, 1974.

Undoubtedly, the answers to the questions certified by the United States Court of Appeals, Fifth Circuit, will have a profound effect on the law of Florida relating to personal injury and products liability. Since the members of the Defense Bar are principally involved in civil litigation dealing with personal injury and products liability, it is particularly appropriate

for them to assist this Court in deciding the significant legal questions presented.

Inasmuch as the Defense Bar's primary interest in this case is to address the legal issues certified, a discussion of the facts below will be omitted, except to the extent necessary to resolve these questions. Additionally, the treatment afforded these issues will be somewhat broader in scope than the facts of the present case technically require, in order to demonstrate as fully as possible the propriety or impropriety of adopting various available legal doctrines and to point out the ultimate ramifications of shaping this, as yet, unsettled and somewhat confused area of Florida's jurisprudence.

In seeking to achieve this goal, the Defense Bar will attempt to fully explore existing Florida law relating to the questions certified, pointing out the areas of uncertainty and providing recommendations which we believe reasonably and fairly adjust the rights,needs and responsibilities of our commercial enterprise system with those of an injured party.

I. "STRICT LIABILITY" CLARIFIED

The first question certified by the Fifth Circuit Court of Appeals provides as follows:

> "Under Florida law, may a manufacturer be held liable under the theory of strict liability in tort, as distinct from breach of implied warranty of merchantability, for injury to a user of the product or a bystander?"[1]

A simple answer to this question, but one which does not completely explain the present state of the law in Florida on this subject, is that Florida has not adopted strict liability in tort. See Lipsus v. Bristol-Meyers Company, 265 So.2d 396 (Fla. App. 1st 1972); C.L.E., Products Liability in Florida, §1.1, page 4 and the cases cited therein.[2]

While this answer is correct as a general legal proposition, it does not reflect the confusion

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[1]While the above question only asks whether Florida has adopted strict liability, it is clear from page 1 of the Fifth Circuit's decision that the Court intended to ask whether strict liability as defined by the Restatement of Torts, §402A or as defined by the District Court's jury instruction has been adopted in Florida.

[2]However, it should be noted that Restatement of Torts, Second, §402A was approved by the Fourth District in a case where only implied warranty and not strict liability in tort was pleaded. Keller v. Eagle Army-Navy Department Stores, Inc., 291 So.2d 58 (Fla. App. 4th 1974).

and uncertainty which unfortunately exists in Florida as a result of the judiciary's divaricated use of the term "strict liability" to conceptually describe the separate and distinct theories of "absolute liability," "implied warranty of merchantability," and "strict liability in tort" as provided in Restatement of Torts, §402A.[3]

The interchangeable use of this term to describe the above theories of recovery has had the negative effect of seemingly blending these immiscible propositions of law together. While it is conceded that these independent theories have certain similarities, their distinct and insoluble elements must be examined in order to clarify the present confusion in the law and arrive at a rational and logical course which Florida should follow in products liability cases. Thus, the following discussion of these three theories of recovery is directed toward achieving this goal.

Perhaps more than any other field of the law, torts have provided the single greatest area for the

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[3]Compare Morse v. Hendry Corporation, 200 So.2d 816 (Fla. App. 2d 1967); Rostocki v. S. W. Florida Blood Bank, Inc., 276 So.2d 475 (Fla. 1973); Keller v. Eagle Army-Navy Department Stores, Inc., 291 So.2d 58 (Fla. App. 4th 1974).

implementation of social theory. It is generally agreed that in its earliest stages, tort law began by making a man act at his peril since "the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering." Lambert v. Bessey, 1681, T. Ray. 421, 83 Eng. Rep. 220. Gradually, over the centuries, society moved away from the theory of absolute liability and accepted the concept of moral standards or "fault" as a basis for liability. Prosser, Law of Torts, 4th Ed., page 492. As the doctrine of liability predicated on "fault" developed, the concept of strict liability for harm done by harmless things virtually disappeared. Prosser, Id. at page 496. However, strict or absolute liability for abnormally dangerous things or ultrahazardous activities continued and developed as a vestige of the past.

The leading case from which the first modern statement of this rule is attributed is Rylands v. Fletcher, 1868, L.R. 3 H.L. 330; Prosser, Id. at page 505. There, the defendants were held absolutely liable for damages caused when water broke through a reservoir on their land and flooded plaintiff's coal mine. In short, it was held that where a thing or activity is unduly dangerous

and inappropriate to the place where it is maintained, there exists absolute (strict) liability for the harm done because of the inherently dangerous nature of the activity and the need to protect society from its consequences, rather than due to any traditional concept of "fault." The rule in Rylands v. Fletcher, supra, is presently accepted in one form or another by most American jurisdictions and it has arguably been adopted in Florida.[4]

The significance of the previous discussion becomes readily apparent in attempting to clearly distinguish between the above more common and traditionally understood use of the term "strict liability", and the sometimes confusing connotations attributed to it by various jurisdictions, including Florida, in the context of implied warranty and other products liability cases.

Under its traditional definition, strict liability means absolute liability arising solely as a result

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[4]In Morse v. Hendry Corporation, 200 So.2d 816 (Fla. App. 2d 1967), the Second District held that Florida should follow the weight of authority in the United States imposing absolute liability in the performance of blasting by the use of dynamite; Isaacs v. Powell, 267 So.2d 864 (Fla. App. 2d 1972), applied the concept of strict liability to the keeper of a wild animal. See also Florida Statute §767.04 (dogs); Rutland v. Biel, 277 So.2d 807 (Fla. App. 2d 1973). Various jurisdictions have applied this rule to such activities as blasting, keeping wild animals, using toxic chemicals and gases, pile driving, etc. Prosser, Law of Torts, 4th Ed., pages 509-510.

of the ultrahazardous nature of the activity. Thus, the mere doing of the activity, without proof of a defect or wrongdoing, creates liability to anyone for injuries resulting from that activity. Under some of its more modern adaptations, especially in Florida, the term "strict liability" has been used coextensively with the term "implied warranty" and to describe the liability imposed by Restatement of Torts, Second, §402A.[5]

However, the use of this term in these separate contexts has often caused confusion since, unlike traditional strict or absolute liability, strict liability in tort as described by the Restatement of Torts, Second, §402A requires inter alia, a showing of a defect and that the defect created an unreasonably dangerous condition. Restatement of Torts, Second, §402A(1). Additionally, the Restatement's concept of strict liability recognizes certain defenses which a manufacturer may utilize. Restatement of Torts, Second, §402A.

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[5]Rostocki v. Southwest Florida Blood Bank, Inc., 276 So.2d 475 (Fla. 1973) ("strict or implied warranty"); Keller v. Eagle Army-Navy Department Stores, Inc., 291 So.2d 58 (Fla. App. 4th 1974); Community Blood Bank, Inc. v. Russell, 196 So.2d 115 (Fla. 1967).

Similarly, strict liability in implied warranty also requires, inter alia, proof of a defect and is also subject to various warranty defenses.[6] One illustration of the confusion which exists may be found in Keller v. Eagle Army-Navy Department Stores, Inc., 291 So.2d 58 (Fla. App. 4th 1974). There, the Fourth District stated that strict liability under the Restatement of Torts, Second, §402A was the correct and applicable rule of law in a case that asserted breach of implied warranty and not strict liability in tort.

While the various uses of the term "strict liability," (which normally brings to mind the principles of traditional absolute liability) have created confusion in the law, one common denominator appears to exist each time that it is utilized; the concept of liability without proof of negligence.

Thus, in evaluating the existing law of warranty and the propriety or impropriety of adopting Restatement of Torts, Second, §402A, the concept of strict liability

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[6] McCarthy v. Florida Ladder Company, 295 So.2d 707 (Fla. App. 2d 1974); Adair v. The Island Club, 225 So.2d 541 (Fla. App. 2d 1969); Power Ski of Florida v. Allied Chemical Corp., 188 So.2d 13 (Fla. App. 3d 1966).

in these areas should not be confused with absolute liability or liability which would require a manufacturer or retailer to be an insurer of his customer's safety.[7] Rather, in the context of a products liability case, this term has simply obviated the necessity of proving negligence while preserving other very distinct elements of proof and several very important defenses. Armed with this fundamental understanding of the use of the term "strict liability" in its various contexts, we are now prepared to properly evaluate the course Florida should follow.

II. RESTATEMENT OF TORTS, SECOND, §402A vs. THE UNIFORM COMMERCIAL CODE

The focal point of our discussion of strict liability in tort will be the Restatement of Torts, Second, §402A since it was dealt with in the Fifth Circuit's certificate and since Florida courts have from time to time used some of its provisions as guidelines in resolving traditional warranty cases. Unquestionably, the social theory behind both implied warranty under

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[7] Ausness, From Caveat Emptor to Strict Liability: A Review of Products Liability In Florida, 24 U. of Fla. L. Rev. 410, 428-429; Hursh & Bailey, American Law of Products Liability 2d p. 651 and - Cumulative Supplement p. 333 (1961-1973).

the Uniform Commercial Code and strict liability in tort under the Restatement is to permit the growth and prosperity of our commercial enterprise system, while imposing a duty on those who manufacture and distribute goods to provide reasonably safe products for consumers.

In advancing this social theory, the Florida Legislature adopted the Uniform Commercial Code in 1967, which contains many specific rules for products liability cases and other general,more flexible rules which preserve the decisional law of Florida on particular issues. Thus, in resolving the questions certified by the Fifth Circuit, this Court should first determine whether the Legislature's enactment of the U.C.C. precludes judicial adoption of strict liability in tort, since there exist substantial differences and inconsistent provisions between implied warranties under the U.C.C. and Restatement of Torts, Second, §402A.

Then, only if it is determined that this Court would not be infringing upon our tripartite system of government in adopting strict liability in tort, and if it is further determined that this Court is the proper vehicle to consider and implement such sweeping social change, should the merits and demerits of the Restatement of Torts, Second, §402A be evaluated. Until these issues

are resolved, an intelligent decision regarding strict liability in tort cannot be made.

Dean William Prosser's "assault upon the citadel"[8] of privity achieved a tactical victory in 1961 when he presented a draft of the Restatement of Torts, Second, §402A to the American Law Institute. As first submitted, this draft limited the imposition of strict tort liability to "food."[9] However, the American Law Institute advanced Dean Prosser's cause by extending strict tort liability to include "products for intimate bodily use."[10] Finally, in 1964, under the leadership of Dean Prosser, the American Law Institute revised section 402A to include "all products" and thereby provided an awesome weapon, the use of which could only result in the indiscriminate destruction of all vestiges of the "citadel" in products liability cases involving personal injury.[11]

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[8]Prosser, The Assault Upon the Citadel, 69 Yale L.J. 1099 (1960).

[9]38 ALI Proceedings 50-56 (1961); Titus, Restatement (Second) of Torts Section 402A and the Uniform Commercial Code, 22 Stan. L. Rev. 713 (1970); Prosser, Law of Torts, p. 657 n.51 (4th Ed.).

[10]Prosser, Law of Torts, p. 657 note 51 (4th Ed.); Restatement (Second) of Torts Section 402A (Tent Draft No. 71962).

[11]Prosser, Law of Torts, p. 657 note 51 (4th Ed.).

After the adoption of section 402A, the courts of several states joined Dean Prosser's crusade and utilized this weapon to storm the "citadel." The apparent overanxiousness of several courts in ascending "over the corpses of the slain" to take part in the attack upon the "citadel" has caused legal scholars and some courts to reexamine the stated justifications for unequivocally adopting section 402A to determine whether they are based on sound judicial reasoning.[12]

Professor Herbert W. Titus's analysis of this issue reveals that some courts adopted section 402A in situations where the plaintiff had suffered only economic loss, while other courts adopted the rule where the issue of strict liability was never pleaded.[13] Professor Titus goes on to discuss the generallyweak reasoning and the lack of judicial restraint utilized in adopting section 402A, including the almost total failure of the courts to deal with the views expressed in opposition to this rule.[14]

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[12]Titus, Restatement (Second) of Torts, Section 402A and the Uniform Commercial Code, 22 Stan. L. Rev. 713 (1970); Franklin, When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases, 18 Stan. L. Rev. 974 (1966).

[13]See note 5.

[14]See Titus, referred to in note 5, pointing out that one very significant criticism to the adoption of the rule

One of the most significant criticisms of the decisions which have adopted section 402A is that very little serious consideration has been given to the question of whether the legislative enactment of the Uniform Commercial Code, in every state except Louisiana, precludes judicial adoption of the strict liability in tort rule.[15]

It is particularly important for this Court to resolve this issue since Florida adheres to the rule that where the legislature has spoken on a subject by enacting a valid statutory scheme, courts are bound by those statutes and must give them effect to the fullest extent possible, without in any way defeating their

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14(cont.) is that no court has really questioned the accuracy of the case law cited by the American Law Institute in its support.

[15]See Titus, Restatement (Second) of Torts, Section 402A and the Uniform Commercial Code, 22 Stan. L. Rev. 713 (1970); Franklin, When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases, 18 Stan. L. Rev. 974 (1966); Rapson, Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort, 19 Rutgers L. Rev. 692 (1965); Shanke, Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers, 17 W. Res. L. Rev. 5 (1965); Products Liability, 7 Creighton L. Rev. 396.

provisions.[16] In the present case, the Defense Bar contends that the judicial adoption of section 402A would absolutely violate the above rule of law since the U.C.C. covers the same area of products liability and since section 402A directly conflicts with and emasculates portions of the U.C.C.[17] The following discussion fully supports this contention.

A. THE AREA OF PRODUCTS LIABILITY COVERED BY SECTION 402A IS ALREADY ENCOMPASSED BY THE U.C.C.

An examination of the Uniform Commercial Code and section 402A reveals that both specifically involve the duties and liabilities of "sellers" to "consumers" for damages arising out of the commercial sale of goods. The commercial nature of the transaction is emphasized by both section 402A and the U.C.C. Under section 402A liability without proof of negligence may be imposed only

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[16] Overman v. State Board of Control, 62 So.2d 696 (Fla. 1953); Willis v. Special Road and Bridge District, 74 So.2d 495 (Fla. 1920).

[17] While it is admitted that many states have judicially adopted section 402A, despite the existence of the Uniform Commercial Code, this fact is not dispositive of how Florida should deal with the question since no real consideration has been given to the conflicts which exist between the two doctrines.

against a seller engaged in the business of selling the particular product. Restatement of Torts, Second, §402A(1)a. In fact, comment f of section 402A analogizes this commercial limitation with that of the U.C.C.'s limitation that liability without proof of fault under implied warranties of merchantability will only be imposed ". . .if the seller is a merchant with respect to goods of that kind." Florida Statute §672.314.

Thus, admittedly both the U.C.C. and section 402A are not attempting to impose liability without fault on the "occasional seller" of products or on an ordinary individual making an isolated sale. Restatement of Torts, Second, §402A.[18] Instead, both are directed to such persons or corporations as manufacturers, retailers, wholesalers and distributors.

Additionally, the types of damages recoverable under section 402A are also recoverable under the U.C.C. However, the U.C.C. is somewhat broader than section 402A since it permits recovery for injury to persons, property and for economic loss[19], while section 402A

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[18]Liability without fault would therefore not apply to a housewife,who on one occasion,sells her neighbor a jar of jam or to an individual,who sells his automobile.

[19]See Florida Statutes §672.318; Florida Statutes §672.715; See also Florida Statutes §672.719(3); Restatement of Torts, Second, §402A(1); Products Liability, 7 Creighton L. Rev. 396.

limits recovery to damages resulting from physical harm to a user, consumer or his property.[20]

Another common ground between these doctrines is that under section 402A, liability does not arise until a product has been found to be in a defective condition unreasonably dangerous to the user or consumer or to his property, while under the implied warranty of merchantability provision of the U.C.C., liability arises if goods are not fit for their ordinary purposes.[21] Although the term "fit for ordinary purposes" would appear to be broader in scope than the term "defect", many courts, including those in Florida, have used these terms interchangeably.[22]

It should also be noted that in order to recover under either of these doctrines, it must be demonstrated

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[20]It should be noted that while section 402A does not provide for recovery of economic loss, such as loss of profits or bargains, some courts have begun to further infringe upon the U.C.C. by allowing such damages. Sales, An Overview of Strict Liability and Its Effect on Property Damage, Insurance Counsel Journal p. 288; 294 (July, 1974). For other similarities between these doctrines, see Hicks and Sternlieb, Products Warranty Law in Florida-A Realistic Overview, 25 U. of Miami L. Rev. 241, 263 (1970-71).

[21]Restatement of Torts, Second, §402A; Florida Statutes §672-314.

[22]See McCarthy v. Florida Ladder Co., 295 So.2d 707 (Fla. App. 2d 1974); Royal v. Black and Decker Manufacturing Co., 205 So.2d 307 (Fla. App. 3d 1967).

that the product was in a defective condition when it left the "seller".[23] The similarities between these legal theories, in covering the same basic subject matter, has led to the observation that, in many instances, a case brought under the Code and one filed under §402A would lead to the same result.[24]

It is apparent from the preceding discussion that by its enactment of the U.C.C., the Florida Legislature has spoken directly to the same area of the law encompassed by section 402A. Thus, the following discussion is intended to point out the conflicts and inconsistencies which exist between these doctrines in order to demonstrate that judicial adoption of section 402A would not only violate the Legislature's express mandate in this area, but it would also have the effect of totally emasculating the implied warranty provisions and limitations of the U.C.C.

B. CONFLICTS BETWEEN SECTION 402A, THE U.C.C. AND APPLICABLE FLORIDA DECISIONAL LAW.

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[23]Restatement of Torts, Second §402A(1)b and comment g; See also McCarthy case note 15; Further discussion of the term "defect" may be found on page 21 of this brief.

[24]Titus, Restatement (Second) of Torts, Section 402A and The Uniform Commercial Code, 22 Stan. L. Rev. 713, 755 (1970).

The enactment of the Uniform Commercial Code by the Florida Legislature exemplifies its intent to provide wide-range consumer protection, but with certain defined limitations and conditions precedent to recovery.[25] Standing in stark contrast to this legislative scheme is section 402A, which, in effect, strips away most limitations to recovery imposed by the Code.

1. Disclaimers:

The Uniform Commercial Code specifically provides that warranties, including implied warranties of merchantability, can specifically be disclaimed by the "seller". Florida Statute §672.316. It is also important to observe that an implied warranty of merchantability can be displaced by an inconsistent express warranty. Florida Statute §672.317(e).

However, it should be noted that under Florida law certain limitations exist as to the validity and use of disclaimers. For instance, certain requirements, such as conspicuousness, must be satisfied in order to effect a valid disclaimer.[26] Additionally, it has

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[25]Cf. Products Liability, 7 Creighton L. Rev. 396.

[26]Florida Statutes §672.316; Ford Motor Company v. Pittman, 227 So.2d 246 (Fla. App. 1st 1969); Orange Motors of Coral Gables v. Dade County Dairies, Inc., 258 So.2d 319 (Fla. App. 3d 1972); Rehurek v. Chrysler Credit Corp.,

been held that since only the "seller" can disclaim warranties, a manufacturer,who does not sell a product directly to the ultimate consumer,is not the "seller" and thus is not entitled to disclaim warranties of merchantability.[27] However, a manufacturer or retailer, who does sell a product directly to a consumer,is entitled to disclaim warranties under the U.C.C.[28]

Thus, despite some of the limitations which exist in Florida regarding the use of disclaimers, it is apparent that disclaimers, nevertheless, presently constitute a viable method of limiting liability.[29]

However, in contrast to the allowance of the use of disclaimers under the U.C.C., section 402A completely

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26(cont.) 262 So.2d 452 (Fla. App. 2d 1972).

[27] Ford Motor Company v. Pittman, 227 So.2d 246 (Fla. App. 1st 1969); Rehurek v. Chrysler Credit Corporation, 262 So.2d 452 (Fla. App. 2d 1972). This rule is basically in accord with pre-Code law in Florida. Manheim v. Ford Motor Co., 201 So.2d 440 (Fla. 1967).

[28] See Florida Statutes §672.316 and notes 19-20. This philosophy appears to be consistent with pre-Code law. Desandolo v. F & C Tractor and Equipment Co., 211 So.2d 576 (Fla. App. 4th 1968).

[29] It is important to note that if a disclaimer involving consumer goods is determined to be unconscionable, the Code provides a method by which it can be held unenforceable. Florida Statute §§672.301(1); 672.719(3).

eliminates this limitation of liability and permits recovery without regard to their existence.[30] Accordingly, the judicial adoption of section 402A would not only virtually eliminate the use of disclaimers,but it would also conflict with the Legislature's clear intent to preserve them.

2. Notice:

The Uniform Commercial Code also requires that the buyer must provide the seller with notice of the breach within a "reasonable time" after he discovers or should have discovered it or be barred from any remedy.[31] Thus, under the Code it appears that while all consumers need not give notice, a buyer must do so in order to recover.[32]

An examination of section 402A comment m reveals that it totally eliminates any requirement of notice. In fact, comment m specifically provides that a consumer

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[30]Restatement of Torts, Second, §402A comment m.

[31]Florida Statute §672.607(3); For cases requiring notice where personal injuries have been incurred see, Frumer and Friedman, Products Liability §19.05(1) p. 5-151; Requirement of Notice, By Buyer of Goods, of Breach of Warranty as Applicable to Actions for Personal Injury, 6 A.L.R.3d 1371.

[32]However, see Florida Statute §672.607 comment 5 regarding notice by other consumers.

is not ". . .required to give notice to the seller of his injury within a reasonable time after it occurs, as is provided by the Uniform Act." Thus, by its own terms, section 402A directly conflicts with the U.C.C. by completely eliminating the requirement of notice as a limitation to recovery.

3. Privity:

At the time that Florida adopted the U.C.C., several alternatives existed with regard to the issue of privity. One alternative which was adopted by approximately eight states extended the Code's protection ". . .to any natural person who may reasonably be expectant to use, consume or be affected by the goods and who is injured in person by the breach of the warranty."[33]

However, rather than adopt this very liberal application of warranty, Florida elected to enact a more conservative alternative which eliminates privity ". . .to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume

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[33]The Bystander's Liberation Front - U.C.C. §2-318 or Strict Liability, 19 Kan. L. Rev. 251 (1970-71).

or be affected by the goods and who is injured in person. . ." Florida Statute §672.318. Thus, in adopting the Code in Florida, the Legislature elected not to totally eliminate privity but instead, left its development to the case law. Florida Statute §672.318 comment 3.

An examination of Florida's decisional law on this subject reveals that presently privity of contract is not required to support an action by a consumer against a manufacturer for breach of implied warranty of merchantability.[34] However, privity of contract is a condition precedent to recovery by a consumer against a retailer or distributor, where the product is not an inherently

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[34] a) Lilly-Tulip Cup Corporation v. Bernstein, 181 So.2d 641 (Fla. 1966); b) Barfield v. Atlantic Coastline R.R. Co., 197 So.2d 545 (Fla. App. 2d 1967); c) Adair v. The Island Club, 225 So.2d 541 (Fla. App. 2d 1969); d) Vandercook & Son, Inc. v. Thorpe, 395 F.2d 104 (5th Cir. 1968); e) Rehurekv. Chrysler Credit Corp., 262 So.2d 452 (Fla. App. 2d 1972); f) Manheim v. Ford Motor Co., 201 So.2d 440 conformed to 201 So.2d 909(Fla. 1967); g) Power Ski of Florida, Inc. v. Allied Chemical Corp., 188 So.2d 13 (Fla. App. 3d 1966); h) McCarthy v. Florida Ladder Co., 295 So.2d 707 (Fla. App. 2d 1974); e) Marrillia v. Lyn Craft Boat Co., 271 So.2d 204 (Fla. App. 2d 1973). While a manufacturer's liability extends to a forseeable user or consumer, this Court has limited a bystander's recovery to those persons who may be expected to be in the vicinity of a product which constitutes a dangerous commodity. Toombs v. Fort Pierce Gas Co., 208 So.2d 615 (Fla. 1968).

dangerous commodity, a foodstuff, or a product for intimate bodily use.[35]

Thus, while Florida has made many inroads into the walls of the once impenetrable "citadel" of privity, it has clearly and logically preserved privity in certain areas. It is certainly consistent with balancing the rights of our free enterprise system with those of an injured party, to partially insulate a retailer from liability without fault where nondangerous products are involved.

The very nature of a retailer's business and the fact that he does not have the resources and technology to inspect every product, negates any contention that his liability should be coequal with that of a manufacturer. This is especially true since many times the proper testing of a product by a retailer would not only involve a prohibitive expense, but it would also necessitate the destruction of the physical integrity of that product.

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[35] a) Adair v. The Island Club, 225 So.2d 541 (Fla. App. 2d 1969); b) Marrilliav. Lyn Craft Boat Co., 271 So.2d 204 (Fla. App. 2d 1973); But see McBurnett v. Playground Equipment Corp., 137 So.2d 563 (Fla. 1962), wherein the Supreme Court permitted a minor to recover against a retailer for injuries caused by a swing purchased by his parents. However, it appears from this Court's discussion of McBurnett in Toombs v. Fort Pierce Gas Co., 208 So.2d 615 (Fla. 1968), that the swing, as constructed, might be considered inherently dangerous.

It is apparent that retailers, distributors and wholesalers stand in a substantially different position than does a manufacturer and thus, they are entitled to different treatment in order not to hinder the growth of our free enterprise system.

An examination of section 402A reveals that it has, as one of its avowed purposes, the goal of completely rendering all vestiges of the "citadel" to rubble. Consequently, the total elimination of privity as a limitation to recovery is contrary to the basic philosophy of the Florida Legislature in adopting the existing alternative to Florida Statute §672.318, rather than its more liberal counterpart. Additionally, section 402A is absolutely inconsistent with Florida's decisional law preserving privity in certain defined areas.[36]

If privity should be relegated to the "ashcan," then it should be done by legislative fiat within the framework of the U.C.C. There presently exists an alternative to Florida Statute §672.318 which totally eliminates privity. However, this existing alternative has not been

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[36]While the facts of the case sub judice do not involve the liability of a retailer or distributor, it is, nevertheless, necessary to examine the total effect of adopting section 402A.

adopted by the Florida Legislature and should therefore not be judicially implemented through section 402A. Prosser, Law of Torts p. 658 (4th Ed.).

Clearly, the Uniform Commercial Code is a definite expression of legislative policy in the field of products liability cases. The previous discussion of some of the indisputable differences between section 402A and the Code logically leads to the conclusion that the adoption of the "insurance theory" doctrine of section 402A would absolutely emasculate the Code in products liability cases since ". . .no consumer plaintiff would use Code warranty theory if he had section 402A's rule of strict tort liability available."[37] If legislative supremacy in statutory implementation means anything, it must mean that the courts cannot properly adopt the strict liability rule under section 402A since it will effectively displace the products liability scheme of the U.C.C.

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[37]Titus, Restatement (Second) of Torts, Section 402A and the Uniform Commercial Code, 22 Stan. L. Rev. 713, 755 (1970).

However, even if this Court could conceivably determine that it has the authority to adopt section 402A, certainly the Legislature would be a more appropriate vehicle to enact this doctrine in order to best resolve the conflicts with the U.C.C. and to correct the inherent inadequacies of section 402A.

III. THE ADOPTION OF SECTION 402A

In the unlikely event that this Court elects to adopt section 402A, the Defense Bar considers it necessary to comment on some of its provisions and also to answer the portion of the Fifth Circuit's first question regarding whether strict tort liability would apply to a bystander such as Mrs. West.

A. "DEFECTIVE CONDITION UNREASONABLY DANGEROUS TO THE USER"

As a condition precedent to recovery, section 402A requires that the user or consumer must demonstrate not only that the product was defective when it left the seller,but also that the defect created an "unreasonably dangerous" condition. Restatement of Torts, Second, §402A comments g-i.

Thus, while a plaintiff under strict tort liability need not assert the negligent acts of a manufacturer, he must, nevertheless, impugn the product itself by proving a defect and that it created an unreasonably dangerous condition. While the term "defect" is difficult of precise definition in a products liability case, its definition becomes even more difficult in "design" cases since many times there is no real deviation from the norm.

The mere fact that a design is capable of inflicting injury should not render it defective. Otherwise, there would exist absolute liability on a manufacturer.[38] Instead, it is the "unreasonable danger" element that places the appropriate limitation on the concept of defect in the context of strict liability in tort, especially with regard to design defects such as are involved in the instant case.

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[38]Florida has rejected the concept that a product must be made accident-proof. It is not a breach of duty to supply materials which are reasonably safe but which might conceivably be made more safe. Royal v. Black and Decker Manufacturing Co., 205 So.2d 307 (Fla. App. 3d 1967).

At present, a few states which have adopted section 402A have eliminated the "unreasonable danger" condition as a limitation on the types of defects which are compensable under strict tort liability.[39] However, in order to provide some limitation to a "seller's" liability under section 402A and not cross into the realm of absolute liability or total enterprise liability, the "unreasonably dangerous" requirement should receive primary emphasis.

B. BYSTANDER'S LIABILITY

Section 402A specifically applies to users and consumers[40] and by its own terms it leaves the issue of bystanders to the individual states. In Florida, a bystander's right to recovery has been limited by this Court to those persons who may be expected to be in the vicinity of the use of a product which constitutes a dangerous commodity. Toombs v. Fort Pierce Gas Co.,

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[39]See Cronin v. J.B.E. Olsen Corp., 8 Cal.3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); Glass v. Ford Motor Co., 123 N.J. Super. 599, 304 A.2d 562 (Sup. Ct. L. Div. 1973).

[40]Consumer includes those who consume the product and prepare it. Consumption includes all ultimate intended uses. User includes all those passively enjoying the benefit of a product or doing work upon it. Restatement of Torts, Second, §402A comment 1.

208 So.2d 615 (Fla. 1968); Compare Rodriguez v. Shell's City, Inc., 141 So.2d 590 (Fla. App. 3d 1962).[41] The Toombs case involved bottled gas, an inherently dangerous commodity,which this Court losely described as a "dangerous instrumentality". The Defense Bar suggests that the bystander rule in Toombs should be restricted to commodities which have been judicially declared to be inherently dangerous, such as explosives. It should not be extended to include products, such as automobiles, which have been declared "dangerous instrumentalities" for reasons of public policy (e.g. imposition of liability on owner of automobile which is being negligently operated on the public streets and highways). In the event that this Court adopts section 402A, it should not allow a bystander's right to recover to go beyond that which presently exists.

C. DEFENSES TO SECTION 402A

The last two parts of the first question certified by the Fifth Circuit state as follows:

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[41]See also Piercing the Shield of Privity in Products Liability - A Case for the Bystander, 23 U. of Miami L. Rev. 266 (1968-69).

"(b) If the answer to 1(a) is in the affirmative, what type of conduct by the injured party would create a defense of contributory or comparative negligence?"

"(1) In particular, under principles of Florida law, would lack of ordinary care, as found by the jury in this case, constitute a defense to strict tort liability?"

While the Defense Bar strongly urges that question 1(a) be answered in the negative, we will discuss some of the more significant defenses which should properly be available in the event that section 402A is approved, taking into consideration this Court's recent decision adopting comparative negligence. Hoffman v. Jones, 280 So.2d 431 (Fla. 1973).[42]

1. Assumption of the Risk:

Initially, it is significant to observe that comment n of section 402A specifically states that assumption of the risk is an absolute defense to strict tort liability.

[42]Other defenses, such as statute of limitations, will not be discussed here. However, it would appear that several defenses available in negligence and warranty cases would also properly apply in strict liability cases. See generally C.L.E. Products Liability in Florida pp. 19-40; Hicks and Sternlieb, Products Warranty Law In Florida - A Realistic Overview, 25 U. of Miami L. Rev. 241.

The adoption of comparative negligence by this Court in Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), did not in any way vitiate the defense of assumption of risk. Rather, Florida, like other jurisdictions that have adopted comparative negligence, still recognizes assumption of the risk as a bar to a plaintiff's claim. Dorta v. Blackburn, 302 So.2d 450 (Fla. App. 3d 1974).

2. Misuse, Unintended or Abnormal Use:

Another defense recognized by §402A as an absolute bar to recovery is misuse or intended use of the product.[43] The retention of this defense is also consistent with present Florida products liability law.[44]

3. Unavoidably Unsafe Product:

A third defense recognized by section 402A is that the product was "Unavoidably Unsafe." Under

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[43]Restatement of Torts, Second, §402A, comment h. W. Prosser, The Law of Torts, §102 at 668 (4th Ed. 1971); Noel, Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk, 25 Van. L. Rev. 93 (1972).

[44]Power Ski of Florida, Inc. v. Allied Chemical Corp., 188 So.2d 13 (Fla. App. 3d 1966); see also Rawls v. Ziegler, 107 So.2d 601 (Fla. 1958); Coleman v. American Universal of Florida, 264 So.2d 451 (Fla. App. 1st 1972).

comment k, the Restatement recognizes that many products, which are properly prepared and which are accompanied by proper directions and warnings, are incapable of being made safe for their intended use. However, these products, such as drugs and chemicals, are necessary and desirable to society and thus, a "seller" is relieved of strict liability for the unfortunate consequences which may result from their use. The retention of this defense is also consistent with present Florida law.[45]

4. Contributory (Comparative) Negligence:

Section 402A, comment n, specifically provides that contributory negligence, which consists of failure to discover the defect or to guard against the possibility of its existence, i.e., lack of ordinary due care, is not an absolute defense to strict liability in tort. However, while section 402A will not bar recovery for lack of ordinary due care, this in no way indicates that in a comparative negligence jurisdiction such as Florida, the lack of ordinary care should not reduce the plaintiff's recovery.

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[45] McLeod v. W. S. Merrill Co., 174 So.2d 736 (Fla. 1965); E. R. Squibb & Sons, Inc. v. Jordan, 254 So.2d 17 (Fla. App. 1st 1971); see also Community Blood Bank, Inc. v. Russell, 196 So.2d 115, 120 (Fla. 1967). Justice Roberts concurring.

Obviously, one of the reasons that contributory negligence does not preclude recovery under section 402A is that such a result would be extremely harsh and it would not effectively achieve justice among the parties. However, as noted by this Court in Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), a more realistic and equitable system of determining liability and achieving justice among the parties is to prevent a plaintiff from recovering the portion of his damages that he caused.

Moreover, while it is true that a seller's negligence need not be proven as a condition precedent to recovery in strict liability cases, it does not logically follow that an injured user's negligence, which contributes to his own injuries, should not reduce his recovery.[46] To permit a plaintiff to recover damages for injuries that he caused would certainly do violence to the more equitable concept of a comparative approach to liability. Such a rule would also be as inequitable as the "contributory negligence" doctrine recently discarded by this Court.

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[46]In a pre-Hoffman case, it was held that contributory negligence is a defense to implied warranty. An analogy can properly be drawn since implied warranty also does not require proof of negligence. Coleman v. American Universal of Florida, Inc., 264 So.2d 451 (Fla. App. 1st 1972).

Accordingly, the district court in the instant controversy not only erred in holding that Florida has adopted strict liability but also in holding that the negligence of Mrs. West, which was determined to have contributed to the accident to a degree of 35 percent, would not reduce her recovery. Thus, even if this Court approves section 402A, it should, nevertheless, hold that under present Florida law, the plaintiff's recovery must be reduced by the percentage of her own negligence.

5. Independent Intervening Cause:

Since section 402A requires that as a condition precedent to recovery it must be demonstrated that the defect proximately caused the injury, the defense of independent intervening cause is highly material in demonstrating a break in causation. If the defect did not proximately cause the accident then there can be no recovery. See Isaacs v. Powell, 267 So.2d 864 (Fla. App. 2d 1972) (wherein the defense of independent intervening cause was recognized by way of dictum in an "absolute liability" case).[47] Thus, the defense of independent

[47]See generally Florida National Bank of Jacksonville v. The Exchange Bank of St. Augustine, 277 So.2d 313 (Fla. App. 1st 1973); General Telephone Co. of Florida, Inc. v. Mahr, 153 So.2d 13 (Fla. App. 2d 1963).

intervening cause should remain viable under section 402A.

IV. CONTRIBUTORY OR COMPARATIVE NEGLIGENCE DEFENSES TO IMPLIED WARRANTIES OF MERCHANTABILITY.

The final two-part question certified by the Fifth Circuit states as follows:

> "2. Assuming Florida law provides for liability on behalf of a manufacturer to a user or bystander for breach of implied warranty, what type of conduct by an injured person would constitute a defense of contributory or comparative negligence?"
>
> "(a) In particular, does the lack of ordinary due care, as found by the jury in the case, constitute such a defense?"

Prior to addressing these issues, it is significant to comment on the unqualified assumption made by the Fifth Circuit that in Florida a manufacturer is liable to a bystander for breach of implied warranty. As previously noted, this Court's decision in Toombs v. Fort Pierce Gas Co., 208 So.2d 615 (Fla. 1968), limits a bystander's right to recover on the theory of breach of implied warranty of merchantability to persons who

may be expected to be in the vicinity of the use of a product which constitutes an inherently dangerous commodity, e.g., bottled gas, explosives, electricity. Thus, a bystander is, in most instances, still subject to the requirement of privity when pursuing an action based upon implied warranty of merchantability.

Since the Fifth Circuit's question only relates to the contributory or comparative negligence defenses applicable to implied warranties of merchantability, we will not readdress the defenses of notice, disclaimer and privity (see pages 18 through 26 of this brief). Additionally, in order to avoid repetition, reference will be made to the discussion of the defenses to section 402A where they are equally applicable to implied warranties.[48]

1. Assumption of the Risk:

As previously noted, assumption of the risk has been recognized as an absolute bar to recovery under section 402A and in a Florida case decided after Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). Dorta v. Blackburn, 302 So.2d 450 (Fla. App. 3d 1974).

[48]This discussion of applicable defenses is not intended to be exhaustive. For other applicable defenses see C.L.E., Products Liability in Florida, p.p. 19-41.

Additionally, assumption of the risk has traditionally been recognized as a defense in implied warranty cases. See Adair v. The Island Club, 225 So.2d 541 (Fla. App. 2d 1969); Matthews v. Lawnlite Co., 88 So.2d 299 (Fla. 1956). This result is totally logical since the act of voluntarily and deliberately exposing oneself to a known danger not only has the effect of vitiating any implied warranty which may have existed, but it also breaks the chain of causation essential to imposing liability on the "seller". (See also discussion at pages 30-31 of this brief).

2. Misuse, Unintended or Abnormal Use:

Clearly, these defenses are presently available to bar a plaintiff's recovery for implied warranty. (See authorities and discussion on page 31 of this brief). The concept of implied warranty necessarily envisions that an injury is caused by a product while being used for its intended purpose. It would be totally illogical to assert, for example, that the manufacturer of an ordinary drinking glass should be held liable where a person is injured attempting to boil water in the glass

on his stove. Like assumption of the risk, such conduct on the part of an injured party would also clearly break the chain of causation and vitiate the warranty. Thus, it is apparent that the adoption of comparative negligence has not in any way altered this absolute defense. See 4 A.L.R. 501, 511.

3. Unavoidably Unsafe Product:

(See the applicable discussion of this defense on pages 31 through 32 of this brief).

4. Contributory (Comparative) Negligence:

Prior to the adoption of Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), the First District Court of Appeal held that contributory negligence is available as a defense in an action for breach of implied warranty. Coleman v. American Universal of Florida, 264 So.2d 451 (Fla. App. 1st 1972).[49] While admittedly the Coleman decision is not a model of clarity, it does state that

[49]By inference in Tampa Drug Company v. Wait, 103 So.2d 603 (Fla. 1958); Matthews v. Lawnlite Co., 88 So.2d 299 (Fla. 1956).

contributory negligence, including lack of due care, is a defense to implied warranty.[50]

Undoubtedly, since this Court's adoption of comparative negligence, the lack of due care would now merely diminish the plaintiff's recovery, rather than completely bar it. In order to avoid repetition, we will refer to pages 32 through 34 of this brief for the arguments confirming that lack of ordinary care should properly diminish a plaintiff's recovery.

5. Independent Intervening Cause:

(The arguments and authorities cited on pages 34 through 35 of this brief are equally applicable here).

CONCLUSION

Based upon the foregoing arguments and authorities, this Court should decline to adopt strict liability in tort as the law of this State. In the alternative, if strict liability in tort is adopted, then it should be done in accordance with the recommendations suggested by the Defense Bar.

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[50]Some doubt as to the meaning of Coleman was expressed in Florida Power & Light Company v. R. O. Products, Inc., 489 F.2d 545 (5th Cir. 1974).

Additionally, this Court should reaffirm the viability of the defenses to implied warranty as discussed in this brief.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Brief of Amicus Curiae, Dade County Defense Bar Association, was mailed to ROBERT ORSECK, ESQUIRE, Podhurst, Orseck & Parks, P.A., 66 West Flagler Street, Concord Building, Miami, Florida 33130; LAW OFFICES OF PAPY, LEVY, CARRUTHERS & POOLE, 328 Minorca Avenue, Coral Gables, Florida 33134 and WILLIAM M. HICKS, ESQUIRE, 66 West Flagler Street, Miami, Florida 33130, this 11th day of February, 1975.

Respectfully submitted,

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