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.,

Appellee,

vs.

CATERPILLAR TRACTOR COMPANY INC.,

Appellant.

BRIEF OF AMICUS CURIAE ACADEMY OF FLORIDA TRIAL LAWYERS

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INTRODUCTION

This brief is filed on behalf of the Amicus Curiae, The Academy of Florida Trial Lawyers, in support of this Court in its Order of February 5, 1975.

Because it is the Academy's intention to solely address the legal issues certified to this Court, a discussion of the facts below has been omitted.

I. STRICT LIABILITY
A. THE CONTRACT MASK

The privity concept of implied warranty actions under the Uniform Commercial Code has created confusion for Florida in the area of products liability. Many states have chosen to abandon this relic altogether. See, 13 A.L.R. 3d 1057,1071.

Florida in an attempt to protect its consuming public, instead has chosen to stretch the privity concept. The approach from a public policy standpoint is an admirable one, but unfortunately it contains certain inconsistencies. For example, in Manheim v. Ford Motor Co., 201 So.2d 440 (Fla. 1967), the Court abolished the necessity of privity where a purchaser brought suit against a manufacturer yet clung to the privity concept when the same manufacturer attempted to apply its dealer disclaimers to said purchaser.

In addition, the courts have abandoned the necessity of privity in actions against manufacturers, yet curiously have maintained the privity requirement in suits against retailers, except where the product sold was a foodstuff or a dangerous instrumentality. Continental Copper & Steel Industries v. E.C.Red Cornelius, 104 So. 2d 40 (Fla.App. 3d, 1958); Carter v. Hector Supply Co., 128 So. 2d 390 (Fla. 1961).

A sounder basis for products liability decisions is found in the theory of strict tort liability whereby the Court is relieved of the burden of having to wrestle with the privity concept in its attempt to protect the consuming public.

> "No one doubts that in the absence of privity, the liability must be in tort and not in contract. There is no need to borrow a concept from the contract law of sales and it is only by some violent pounding and twisting, that warranty can be made to serve the prupose at all. It would be far simpler if it were simply said that there is strict liability in tort, declared outright, without an illusory contract mask." Prosser, Law of Torts §97 at 681 (3ed. 1964).

Strict liability in tort is the alternative open to the courts to disperse the confusion surrounding the implied warranty action in those circumstances where the plaintiff is injured by a defective product, but is devoid of any contractual relationship with the defendant.

B. THE JUDICIAL APPROACH

The first question certified by the Fifth Circuit Court of Appeal asked:

> "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."

The answer to the above question appears to be yes, but the Florida Courts have yet to unequivocally express what they have so often implied. In Keller v. Eagle Army Navy Department Stores, Inc. 291 So.2d 58,61 (Fla.App.4th 1974), the Court said the

> "Restatement of the Law of torts, Second 402A. . . concisely states the correct rule of law applicable to this case
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

Judge Ferris' statement would probably have been dispositive of this matter but for the fact that the plaintiffs in Keller pleaded an implied warranty theory rather than one of strict liability.

Toombs v. Fort Pierce Gas Co., 208 So.2d 615 (Fla. 1968) also applied the strict tort liability concept to a bystander but labeled it under the misnomer of the "dangerous instrumentality exception in implied warranty," thereby adding to the confusion.

Additionally, the Third District Court of Appeal in Royal v. Black & Decker Mfg.,Co.,205 So. 2d 307 (Fla. App. 1967) tacitly approved the strict liability theory, but did not unconditionally adopt this theory simply because the plantiff had failed to allege sufficient facts to prove that the product was defective.

In essence, the Florida Courts have adopted strict liability in tort but extenuating circumstances have continued to make that fact unclear. The theory behind strict liability is a sound one;

> "that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it-that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand

> behind their goods; that public policy demands that the burden of accidental injuries. . . be placed upon those who market them . . . [T]he consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products". Second Restatement of Torts, §402A, Comment C.

C. DEVELOPING APPROACH; CASE LAW AND LEGISLATIVE

As already stated, Florida Courts have seemingly adopted the theory of strict liability. Aside from the interchangeable use of the terms "warranty" and "strict" liability in the cases, it is additionally obvious that in Florida there is no remaining distinction between the two theories in products liability suits against a manufacturer.

(i) All vestiges of the traditional "warranty" theory are gone, leaving a specie of strict liability. Privity is no longer required and the "warranty" extends to users and ultimate consumers and bystanders. Toombs v. Fort Pierce Gas Co., supra.

(ii) A disclaimer by a manufacturer does not bar an ultimate consumer, user or bystander from assertion of his claim. Manheim v. Ford Motor Corp., 201 So.2d 440 (Fla. 1967).

(iv) The requirements to prove liability for "strict liability" and for "breach of warranty" are the same for all practical purposes. Vandercook & Son,Inc., v. Thorpe, 395 F.2d 104 (5th Cir.1968).

The Florida Legislature, through the warranty provisions of the Uniform Commercial Code,has in essence adopted the theory of strict liability in tort against manufacturers. Florida Statutes, § 672-312-19. The Florida judiciary,by carving out various privity exceptions to the warranty concept has also effectively adopted strict liability in tort.

Finally, the Florida judiciary has,on numerous occasions, without regard to warranty or privity principles expressed its favor for adoption of strict liability in tort. E.g.Keller, supra.

The Academy submits that this Court should re-affirm the positions already taken by the Judiciary and the Legislature.

II.DEFENSES TO STRICT LIABILITY IN TORT

Because Florida has yet to explicitly adopt strict liability in tort, this discussion will make

reference to analagous warranty defenses and the approach taken by other jurisdictions which have already adopted strict liability in tort.

Notwithstanding some judicial language indicating the contrary, the case law generally is in accord with the Restatement of Torts in holding that contributory negligence of the plaintiff is not a defense when such negligence consists merely of a failure to discover the defect in the product, or to guard against the possibility of its existence. 63 Am.Jur.Products Liability §149(1972).

In a warranty action, a Florida District Court of appeal held that the trial judge's charge to the jury that contributory negligence was an available defense was correct where the conduct at issue was a misuse of the product or where the plaintiff's conduct was the sole proximate cause of his injuries. Coleman v. American Universal of Florida, 264 So.2d 451, (Fla.App. 1st 1972).

Misuse has been defined as a use different from and more strenuous than that contemplated to be safe by ordinary users or consumers. Greene v. Clark Equipment Co., 237 F.Supp.427 (ND,Ind.1965).

Additionally, in Messick v. General Motors Corporation, 460 F.2d 485 (5th Cir. 1972), the court

held that contributory negligence of the kind which amounts to assumption of the risk is an available defense in a strict liability suit. The court distinguished the contributory negligence of a failure simply to look for a defect or to discover it.

Although courts may sweepingly use the term contributory negligence, in fact they have in mind conduct which is an assumption of the risk or the sole cause of an event not just a failure to discover or look out for harm.

Prosser was well aware of the misappellation that often occurs in describing defenses to strict liability in tort. He commented:

> "It has been said very often that contributory negligence is never a defense to strict liability. It has been said somewhat more often that it is always a defense. The disagreement, however, is a superficial one of language only. . . If the substance of the cases is looked to with due regard to their facts, they fall into an entirely consistent pattern." Prosser, supra at P.670.

The pattern Dean Prosser spoke about is the distinction between a mere failure to look out and conduct which is a misuse of a product, an assumption of the risk or the sole cause of an event. Accordingly, a lack of ordinary due care should not constitute a defense to strict tort liability and conduct which

is a misuse of a product, an assumption of the risk or the sole cause of an event..

III WARRANTY DEFENSES

Because the warranty concept is so close to that of strict tort liability, their defenses are accordingly also similar. In breach of warranty cases, the defense of contributory negligence applies only under certain fact patterns that is, where the plaintiff is on notice of the defect and nevertheless challenges it; or misuses the product, or plaintiff's conduct is the sole cause. It is not a defense where the plaintiff simply fails to avail itself of opportunities to discover a defect or to discover a danger. See cases cited in part II.

IV THE EFFECT OF COMPARATIVE NEGLIGENCE

Comparative negligence in Florida found its touchstone in Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973). The Court in Hoffman adopted comparative negligence wherever contributory negligence was previously available as a defense.

As discussed earlier, conduct which is the sole cause of the event, product misuse or assumptin of the risk are available defenses to actions brought under the theories of warranty or strict tort liability Coleman, supra 264 So.2d 451, had allowed contributory negligence as a defense to strict liability-warranty situations. Coleman, however, was decided prior to

Florida's adoption of comparative negligence and therefore must be reexamined in view of the Hoffman decision. Although Hoffman was a "negligence case", the policy adopted of rejecting the age old bar of contributory negligenee is highly relevant and applicable to warranty and strict tort liability cases. Otherwise, a plaintiff who for example is only one per cent negligent will be forced to sue under a theory of negligence in order to avoid the "contributory" bar of warranty and strict tort liability, thereby providing the manufacturer/seller with a loophole from the public policy which demands that the burden of accidental injuries be placed on those who market the dangerous items. Without comparative negligence, in these type suits, proving the product to be defective will not be sufficient. The plaintiff will be forced to show the actual negligent acts of the defendant who may be some 3,000 miles away. If comparative negligence is not so applied, the effect will be to indirectly but nonetheless effectively turn the theories of strict tort liability and warranty into obsolete causes of action. Wisconsin incorporated strict liability in tort into its comparative negligence statute thereby avoiding a slip back into the dark ages of products liability law. Wis.Stat.Ann.§331.045(1958).

Therefore, if contributory negligence of the kind discussed in Coleman is found, comparative negligence should then be applied.

CONCLUSION

Based on the foregoing arguments and authorities, the Academy respectfully submits that this Court should adopt strict liability in tort and apply the doctrine of comparative negligence in limited instances where applicable as herein described for actions of warranty and strict tort liability. It is time for Florida to specifically adopt this modern, sensible, fair, logical, doctrine in accordance with the trend of the law throughout the country.

The certified questions should be answered as follows:

(a) Yes.(strict liability applies in Florida.

(b) Defenses would be misuse, or knowing exposure to the defect or danger (on a comparative basis)

(1) Lack of ordinary care would be no defense. At most, such a defense would be comparative in nature.

(2) As to implied warranty only misuse, or knowing exposure to the danger resulting from defect would be available as contributory or(comparative) negligence defense.

(a) Lack of ordinary care (failure to discover danger and defect) is no defense; at most it is a comparative defense.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Brief of Amicus Curiae was mailed to ROBERT ORSECK, ESQ. of Podhurst, Orseck & Parks, P.A., 66 West Flagler Street, Concord Building, Miami, Florida 33130; Law Office of PAPY, LEVY, CARRUTHERS & POOLE, 328 Minorca Avenue, Coral Gables, Florida 33134 and MARK HICKS, ESQ., of Blackwell, Walker, Gray, Powers, Flick & Hoehl, 2400 First Federal Building, One Southeas-Third Avenue, Miami, Florida 33131 this 20th day of February, 1975.

Respectfully submitted,

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