IN THE SUPREME COURT OF FLORIDA

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.



Appeal from the United States District Court for the Southern District of Florida

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Certified Questions from the United States Court of Appeals, Fifth Circuit, to the SUPREME COURT OF FLORIDA

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# BRIEF OF PLAINTIFF, APPELLEE

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## I
## STATEMENT OF THE CASE

In 1965, the American Law Institute approved Section 402A of the Restatement of Torts (Second Ed.1965). That section pronounces what has popularly come to be known as the doctrine of "strict liability in tort" in products liability cases. In the short period of a single decade, the majority of jurisdictions in the United States already have specifically adopted the doctrine, based as it is on common sense; consumer protection; the spreading of risks in a highly industrialized, mass production society; and principles of fairness, equity and justice.

This proceeding is before the Court on the Certificate from the United States Court of Appeals, pursuant to Florida Appellate Rule 4.61; and F.S.25.031 (1971). The Certificate, among other things, directly requests this Court to pronounce the Florida position on the strict liability in tort doctrine of 402A.

The relevant history of the case and facts are presented in the Certificate and we quote therefrom:

> "1. Style of the Case.
>
> The style of the case in which this certificate is made is Leon West, individually and as personal representative of the Estate of Gwendolyn West, deceased, Appellee, v. Caterpillar Tractor Company, Inc., Appellant, being Case No. 73-3217, United States Court of Appeals for the Fifth Circuit, such case being an appeal from the United States District Court for the Southern District of Florida.
>
> 2. Statement of the Case.
>
> A caterpillar grader operated by an employee of Houdaille Industries struck and ran over, with its left rear tandem wheel, Gwendolyn West on a street under construction in Miami, Florida, on September 1, 1970. Gwendolyn West died of massive internal injuries after six days in the hospital. As a result, the deceased's husband, Leon West, individually and as administrator of the estate of his deceased wife, claimed a right to damages against Houdaille Industries and Caterpillar Tractor Company, Inc., the manufacturer of the machine. He ultimately settled with Houdaille Industries for $35,000 damages and brought a products liability suit against the manufacturer of the grader, Caterpillar Tractor Company,



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Inc., in the United States District Court, in and for the Southern District of Florida bottomed on diversity of citizenship jurisdiction.

West's Complaint contained two counts: (1) negligent design of the grader by failure to provide an audible warning system for use while backing the grader, by failure to provide adequate rear view mirrors, and by manufacturing the grader with a blind spot created by obstructions when looking to the rear while driving in reverse, and (2) a breach of implied warranty or strict liability based upon the same design defects.

At trial, the evidence indicated that preceding the accident Gwendoyln West had walked to the corner, stood on the west curb of the sttreet which was under construction, speaking to a friend, for a period while the grader operated in a forward manner, southward and proceeded to pass her. The machine reached the end of its southward operation and commenced to back up. In the meantime, Mrs. West began walking across the street intersecting the path of the grader while it was travelling in reverse. She had been waiting for a bus, and as it approached she commenced to walk across the street, looking to her left; and then she looked into her purse; and continued to look into her purse until the time of the accident. She did not look to her right at any time toward the approaching grader. Both West and Caterpillar presented extensive conflicting expert testimony about the alleged defects in the design of the caterpillar.

The expert proof on the plaintiff's side, in essence, showed improper design and configuration of various parts of the grader obstructing visibility to the rear; absence of appropriate mirrors; and absence of available warnings on a machine created for rearward use; and design with a 'blind spot' behind the operator.

The expert proof of the defendant, in essence, was that the machine was designed in an ordinary, standard fashion in a practical, reasonable manner, and thus was properly designed and constructed in a reasonably safe manner.

The district court submitted the case to the jury on three potential theories of recovery: negligence, which is not pertinent to this certificate; breach of an implied warranty of merchantability; and strict tort liability. On implied warranty the Court instructed the jury that:

Thus, in order for the plaintiff to prevail on the basis of the breach of an implied warranty of merchantability, the plaintiff must establish each of the following elements by a preponderance of the evidence:

1. The motor grader manufactured by the defendant, Caterpillar Tractor Company, was not reasonably fit for the purposes for which it was sold and intended to be used;

2. The motor grader manufactured by the defendant was defective on the date of its delivery to Houdaille Industries, whose employee was operating the vehicle at the time of the accident;a nd

3. The plaintiff incurred damages as a result of the alleged defects.

On Strict liability, the Court instructed:

. . .in order for the plaintiffs to recover under the theory of strict tort liability, the plaintiff must establish each of the following elements by a preponderance of the evidence:

1. That at the time of the sale the road-grading vehicle was in a defective condition unreasonably dangerous to forseeable users or bystanders; and

2. That the defective, unreasonably dangerous condition in the road-grading vehicle was a proximate cause of the damages complained of in this litigation by the plaintiff.

Additionally, the Court asked the jury to consider Gwendolyn West's negligence:

. . .the burden is upon the defendant, Caterpillar Tractor Company, to establish by a preponderance of evidence that Mrs. West was constibutorily negligent, as alleged, and that such negligence contributed one of the proximate causes of any injuries sustained by the plaintiff. On the defense of contributory negligence you must determine. . .

1. Was Mrs. West herself negligent in the manner alleged by the defendant? If yes,

2. Was such negligence a proximate cause of the incident complained of by the plaintiff? If yes,

3. What was the percentage of Mrs. West's negligence which contributed to the accident complained of by the plaintiff?

The Court did not instruct the jury as to assumption of risk.[1]

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[1] The appellant contends that it made timely application for jury instruction on its defense as pled of assumption of risk. The appellee denies same.

In answer to special interrogatories, the jury found Caterpillar liabile on all three theories of recovery and determined that damages totalled $125,000. The jury also concluded that Mrs. West's negligence contributed to the accident to a degree of 35 percent.

The Court entered judgment for West and disregarded comparative negligence on the basis of strict liability and concluded that contributory (comparative) negligence was no defense to strict liability in Florida. The Court thus awarded damages of $90,000 which represented the full jury award of $125,000 set off by the earlier $35,000 settlement. This appeal followed."

## II
## QUESTIONS PRESENTED

The questions presented are those which have been certified. They are set forth in the Certificate as follows:

"3. Questions to be Certified.

1. (a) 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?

(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 due care, as found by the jury in this case, constitute a defense to strict tort liability?

2. Assuming Florida law provides for liability on behalf of a mnaufacturer 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?"

As the opinion-certificate recites, the entire record in the case, together with copies of the briefs of the parties and agreed certification in the Fifth Circuit, have been transmitted to this Court.



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## III
## ARGUMENT

I. (a) UNDER FLORIDA LAW, THE EQUIVALENT OF STRICT LIABILITY IN TORT AGAINST A MANUFACTURER ALREADY EXISTS; AND THIS COURT FLATLY SHOULD PRONOUNCE THAT FLORIDA LAW RECOGNIZES THE DOCTRINE OF STRICT LIABILITY IN TORT PURSUANT TO RESTATEMENT OF TORTS, §402A (2nd Ed.1965); THUS, UNDER FLORIDA LAW, A MANUFACTURER MAY 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 BY-STANDER.

At the outset, we here ask for a direct adoption of §402A of the Restatement of Torts (2d Ed.1965). As a matter of fact, this flat-out recognition of the Restatement, in an action against a manufacturer of a product like this one, would be no great new departure in the law of this State. It simply would be a matter of nomenclature; a matter of designating a doctrine of products liability according to what it really is. For it is clear that Florida long since has recognized what for all discernible purposes amounts to strict liability in tort, in actions against manufacturers, for personal injuries, wrongful death, or damages resulting from products which are not reasonably fit or safe, in design or construction, for their intended purpose. As a practical matter then, Florida, in its developing case law, in effect has adopted 402A, without a direct pronouncement by this Court that it has done so. The decisions of this Court and the District Courts of Appeal have removed all vestiges of the traditional contractual "warranty". There already exists a specie of strict liability, which obviously cannot be bottomed upon contractual relations. For example:

1. Florida requires no privity in a products liability suit against a manufacturer of a commercial product; and the liability for unreasonable unfitness extends to ultimate purchasers and consumers and "users" regardless of the nature of the product. And there is no requirement that the product be either a food stuff nor inherently dangerous product. The sole test is whether or not the

product is not reasonably safe for its intended use, as manufactured, and designed, when it leaves the plant of the manufacturer. BERNSTEIN v. LILY-TULIP CUP CORP. 181 So.2d 641 [paper cup]; see also Fla.App.1965, 177 So.2d 362; CONTINENTAL COPPER & STEEL INDUSTRIES, INC., v. E.C. RED CORNELIUS, INC., Fla.App.1958, 104 So.2d 40 [cable]; BARFIELD v. A.C.L.R. CO., Fla.App.1967, 197 So.2d 545 [hose]; VANDERCOOK & SON, INC., v. THORPE, 5 Cir.1965, 344 F.2d 930; 5 Cir.1968, 395 F.2d 104; (printing press); MARRILLIA v. LYN CRAFT BOAT COMPANY, Fla.App.1973, 271 So.2d 204 [pleasure boat]; GAY v. KELLY, Fla.App.1967, 200 So.2d 568 [container]; MANHEIM v. FORD MOTOR CO., Fla.1967, 201 So.2d 440 [automobile]; GATES & SONS, INC. v. BROCK, Fla.App.1967, 199 So.2d 291, cert.denied, Fla.1967, 204 So.2d 328 ["snap-tie" used in construction industry]; POWER SKI OF FLA. INC., v. ALLIED CHEM. CORP., Fla.App.1966, 188 So.2d 13 [skis on outboard powered water craft]; McCARTHY v. FLORIDA LADDER CO., Fla.App.1974, 295 So.2d 707 [ladder]; MATTHEWS v. LAWNLITE CO., Fla.1956 88 So.2d 299 [lawnchair]; KING v. DOUGLAS AIRCRAFT CO., Fla.1964, 159 So.2d 108 [airplane engine].

2. Indeed, the nature of the defect, or unsafe condition of the product, which must be shown under Florida law, is precisely the same as must be shown under 402A. So that whether characterized as "warranty" or "strict liability in tort", the Florida doctrine requires that the product, in manfacture, assembly or design, be not reasonably fit for its intended purpose, or that it be unsafe to an unreasonable degree, when it leaves the manufacturer's hands. Compare, VANDERCOOK & SON, INC. v. THORPE, 5 Cir.1965, 344 F.2d 930; 5 Cir.1968, 395 F.2d 104 [Florida law]; McCARTHY v. FLA. LADDER CO., supra, 295 So.2d 709; and Restatement, 402A [2d Ed.]. The test for compliance with the manufacturer's responsibility in Florida then is "reasonable fitness"; see GREEN v. AMERICAN TOBACCO CO.,

Fla.1963, 154 So.2d 169--precisely the test under 402A, for all practical purposes.*

3. And of course the doctrine of strict liability in Florida--however characterized--extends to "design" defects as well as any other, just as it does under the Restatement: VANDERCOOK & SON, INC. v. THORPE, supra; KING v. DOUGLAS AIRCRAFT CO., Fla.1964, 159 So.2d 108; GATES & SONS, INC. v. BROCK, Fla.App. 1967, 199 So.2d 291; MATTHEWS v. LAWNLITE CO., Fla.1956, 88 So.2d 299.

Again, the requirements to prove liability for "strict liability" and for "breach of warranty" are the same for all legal purposes: VANDERCOOK & SON, INC. v. THORPE, supra; compare RESTATEMENT, TORTS, §402A.

4. A disclaimer between a manufacturer and direct purchaser does not bar an ultimate consumer, user (or in this case, as we will show, bystander) from recovery for damages or injuries resulting from a product which is not reasonably fit or safe: MANHEIM v. FORD MOTOR CORP., Fla.1967, 201 So.2d 440; FORD MOTOR CO. v. PITTMAN, Fla.App.1969, 227 So.2d 246.

5. Indeed, the statute of limitations applied in cases like this is not the traditional contract one; nor does it commence to run when a traditional contract cause of action would commence to run--that is at the time of the original sale. Rather, the statute commences to run only when the defect is discovered; or when the accident occurs. And even then, it is the four-year ordinary tort statute of limiations which governs, because most assuredly the liability of a manufacturer to a third person--not in any sense in privity with the manufacturer--

* The manufacturer is not an absolute insurer although negligence need not be shown. It is required only to market a product which is "reasonably" fit and safe for intended use.

is not bottomed on any contract theory: BARFIELD v. U.S. RUBBER CO., Fla.App. 1970, 234 So.2d 374 [squarely so holding], cert.denied, Fla.1970, 239 So.2d 828; and see, e.g. CREVISTON v. GENERAL MOTORS, Fla.1969, 225 So.2d 331 [the statute of limitations commences (by various legal fictions and theorizing) when the accident happens--not on the sale by the purchaser].

6. Florida already has recognized the "crash-worthy" doctrine--which is a natural off-shoot of strict liability in tort. In short, an automobile which presents an unreasonable danger upon impact or accident, because of its design, may cast the defendant-manufacturer-designer in liability. This is in accord with the modern, well-reasoned, concept of strict liability in tort: EVANCHO v. THIEL, Fla.App.1974, 297 So.2d 40; and see NOONAN v. BUICK CO., Fla.App. 1968, 211 So.2d 54.

7. Florida even uses the terms interchangeably and this Court as well as the various District Courts of Appeal have characterized Florida's common-law warranty doctrine, in products liability suits against manufacturers, as a specie of "strict liability". The terms are used as one: ROSTOCKI v. S.W. FLA. BLOOD BANK, INC., Fla.1973, 276 So.2d 475 ["strict liability"]; KELLER v. EAGLE ARMY-NAVY DEPT. STORES, INC., Fla.App.1974, 291 So.2d 58, 61 [uses breach of warranty, and strict liability, interchangeably, and relies on 402A, in a slightly different setting]; KING v. DOUGLAS AIRCRAFT CO., Fla.App.1964, 159 So.2d 108 [citing, as controlling, leading New York case which characterizes type of liability here involved as better designated "strict liability in tort];* EVANCHO v. THIEL, Fla.App.1974, 297 So.2d 40, 43 [in design case, involving crash worthy principle, terms "breach of implied warranty" and "strict liability of the manufacturer for a defective and dangerous automobile" used interchangeably]; McCLEOD v. W.S. MERILL CO., Fla.1965, 174 So.2d 736, 739 [characterizing GREEN

* See GOLDBERG v. KOLLSMAN INSTRUMENT CORP., 12 N.Y.2d 432, 191 N.E.2nd 81.



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v. AMERICAN TOBACCO CO., supra, 154 So.2d 169, as "strict liability" case, imposing such liability on manufacturers of commercial products introduced into stream of commerce; but holding doctrine inapplicable, just as Restatement does, as to an unavoidably unsafe product such as a prescription drug; see Comment K to 402A of Restatement; indeed McCLEOD seems to passively recognize existence of 402A, in this State, in ordinary commercial product cases].

8. And, despite the arguments to the contrary in the brief of an amicus curiae filed on behalf of the defense bar, it is clear that the commercial, contractual provisions of the Uniform Commercial Code, adopted in Florida on January 1, 1967, in no way, shape or form delimit developing case law in FLorida, or restrict a party--not in privity with the manufacturer--in his rights of recovery against the manufacturer of a defective or unreasonably safe product. The doctrine of products liability, no matter how designated, in cases such as this, is not bottomed on a direct contractual or commercial transaction, governed by the restrictive provisions of the Code; but obviously on some other specie; and the Courts of this state, as other courts, repeatedly have so held: FORD MOTOR CO. v. PITTMAN, Fla.App.1969, 227 So.2d 246; FAVORS v. THE FIRESTONE TIRE & RUBBER CO., Fla.App.1975, _____So.2d_____ [case nos. 73-552 and 73-553, Fourth District, February 14, 1975; Footnote 2]. ACCORD; SCHUESSLER v. COCA COLA BOTTLING CO. OF MIAMI, Fla.App.1973, 279 So.2d 901 [distinguishing case law warranties from code warranties]; and BARRY v. IVARSON, INC., Fla.App.1971, 249 So.2d 44 [distinguishing common law retailer warranties from code warranties]; and see on this issue, AUTREY v. CHEM TRUST INDUSTRIES CORP., D.C.Del.1973, 362 F.Supp.1085, under Florida law.

It has expressly been recognized that an action like this, where no privity exists, and the suit is bottomed upon a defective product, or a product


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respectfully, be sensless at the same time to hold or find that the strict liability in tort finding is somehow precluded under Florida law.

At this juncture, we believe it only fitting to set forth, verbatim, Restatement, §402A (2d Ed.1965):

> "§402A. Special Liability of Seller of Product for Physical Harm to User or Consumer
>
> (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."

The Comments of the American Law Institute to the Restatement trace the history of the development of this form of "strict liability". Since early days, it had been the policy of the law to impose strict liability upon producers or suppliers of foodstuffs, or products designed for intimate body use; or inherently dangerous products. The legal fiction, to avoid privity concepts, included various "ingenious" devices and "fictious theories" of liability to fit the case into a contractual cubby hole. Thus, as the American Law Institute states in Comment b:

> "The various devices included an agency of the intermediate dealer or another to purchase for the consumer, or to sell for the seller; a theoretical assignment of the seller's warranty to the intermediate dealer; a third-party beneficiary contract; and an implied representation that the food was fit for consumption because it was placed on the market; as well as numerous others. In later years, the courts have become more or less agreed upon the theory of a 'warranty' from the seller to the consumer, either 'running with the goods' by

analogy to a covenant running with the land, or made directly to the consumer.

The Comment then explains that in more recent years, strict liability in tort--not dependent upon either contract or negligence--has flatly been recognized; and the doctrine has discarded any limitation to intimate association with the body, of the product involved. It applies to any product which, if it should prove to be defective, "may be expected to cause physical harm" to the plaintiff (Comment b; Comment d). The Restatement, of course, requires that the product be unreasonably dangerous or in a defective condition (Comment g-i). And, of course, the Restatement itself recognizes that use of terminology of "warranty" with its contractual connotations, does not preclude "strict liability in tort". This is so because as the Restatement points out, warranty indeed had its origin as a matter of tort liability, in nature of deceit; but that that terminology has become so intertwined with the law of sales and contract, that the theory has become something of an obstacle to the recognition of strict liability where there is no contract. The Restatement authors recognize that there is nothing in 402A which would prevent a Court from treating the rule stated herein as a matter of "warranty" to the user or consumer, but that if this is done, it should be recognized and understood that "warranty" is a very different kind of warranty from those usually found in the sale of goods, and that it is not subject to various contract rules which have grown up to surround such sales (Comment m).

This is what Florida--most assuredly--has done in its developing case law; it already has applied the theory of strict liability in tort, under the nomenclature of warranty. But in developing the case law, this Court, and various District Courts of Appeal, have already stripped away those contractual requirements which would preclude recovery in various situations.

We turn now to the policy reasons which allow breach of warranty--strict liability in tort actions to be maintained by an appropriate plaintiff



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against a manufacturer, even absent privity. The Restatement itself provides the answer:

> c. On whatever theory, the justification for the strict liability has been said to be 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 accidential injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the 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."

Florida has always been in the forefront in the area of development of products liability, regardless of nomenclature afforded to its theory of recovery. Thus, in EVANCHO v. THIEL, supra, 297 So.2d 42, the Third District Court of Appeal held as follows:

> "...We think that it should be noted that as pointed out in Ford Motor Co. v. Pittman, Fla.App.1969, 227 So.2d 246:
>
> > 'From the time of Judge Cardozo's enunciation on the subject in MacPherson v. Buick Motor Co., [217 N.Y.382, 111 N.E.1050] products liability law has evolved into a fertile field of litigation upon the judicially-inspired theory of "implied" warranties, and relaxation of the rigid evidentiary rules in proving negligence under the theory of res ipsa loquitur. Florida has been a member of the advance patrol in scanning this developing area of the law.' (227 So.2d 248)
>
> Beginning with Blanton v. Cudahy Packing Co., 154 Fla.872, 19 So.2d 313 (1944), the Florida Supreme Court has held that liability in products liability cases should rest upon right, justice and welfare of the general purchasing and consuming public. See Mathews v. Lawnlite Co., Fla.1956, 88 So.2d 299; Manheim v. Ford Motor Co., Fla.1967, 201 So.2d 440; Noonan v. Buick Co., Fla.App.1968, 211 So.2d 54."

A mass of reasons, which coincide with the development of our economic system, and our society,have been advanced for the position of strict liability in tort, against all commercial venturers in the distributive chain:

i) The manufacturer of a product certainly is in a better position to guard against defects, and to employ all of its monumental expertise in safeguarding against defects and dangers in mass production and distribution of a product;

ii) The relative cost of an injury to a plaintiff, and to the industry is totally out of balance; the industry indeed can spread the risk of loss in either a slightly increased price, or in the procurement of liability insurance;

iii) Public policy dictates an imposition of this form of liability because it increases the motivation upon the industry, which advertises and mass produces and inundates the market with commercial goods, to steadily and consistently improve the products with regard to their safety features;

iv) Retailers, wholesalers and distributors should be included because they are conduits in the commercial process, and have an action over against the manufacturer.*

v) The complexities of products liability litigation make it very difficult at least and virtually impossible at most for an injured plaintiff to demonstrate precisely just how a manufacturer has been negligent; the doctrine of strict liability in tort requires that the product be reasonably fit and safe without a showing of negligence; the plaintiff frequently does not have the ability, wherewithal, or economic means to prove negligence;

vi) The rule is designed to compel our hughe, mass producing, industrial complexes, and dynamic commercial sellers, retailers and distributors, who impliedly represent the reasonable safety and fitness of their products, to be

* In this regard, it should be noted that a retailer of course may recover any damages he sustains by virtue of his strict liability, against the manufacturer or his predecessor in the distributive chain and that at least in Florida, jurisdiction in the ordinary case will be no problem: F.S.48.193.

ever vigilant to the production of safe products. See, BRANDENBERGER v. TOYOTA MOTOR SALES, Mont.1973, 513 P.2d 268.

Rarely has a doctrine of law been so swiftly accepted in the United States of America by the vast majority of jurisdictions; and virtually every jurisdiction that has been called upon to determine the question in the last decade has flatly accepted 402A as the controlling law. Thus, at least, the following jurisdictions have adopted 402A in surge forward of law in this area:

ALASKA: BACHNER v. PEARSON, Alaska 1970, 479 P.2d 319.

ARIZONA: CARUTH v. MARIANI, 11 Ariz.App.188, 463 P.2d 83 (1970) [holding that statutes like Uniform Sales Act and Uniform Commercial Code and their provisions governing commercial transactions and contractual liabilities do not govern or restrict actions, like this, bottomed in strict liability in tort without contractual involvement]; WETZEL v. COMMERCIAL CHAIR CO., 18 Ariz.App.54, 500 P.2d 314 (1972); BEAUCHAMP v. WILSON, 21 Ariz.App.14, 515 P.2d 41 (1974).

CALIFORNIA: GREENMAN v. YUBA POWER PRODUCTS, INC., 59 Cal.2d 57, 377 P.2d 897 (1963); [genesis of rule; contractual requirements and defenses; and warranty-contractual requirements and defenses inapplicable; strict liability in tort for defective product which causes injury; genesis of entire concept; mass of California case follow; see VANDERMARK v. FORD MOTOR CO., 61 Cal.2d 256, 391 P.2d 168 (1964)].

CONNECTICUT: WACHTEL v. ROSOL, 159 Conn.496, 271 A.2d 84 (1970); GIGLIO v. CONN. LIGHT & POWER CO., CONN.App.1971, 284 A.2d 308; BASCO v. STERLING DRUG INC., 2 Cir.1969, 416 F.2d 417 [statutory Uniform Commercial Code privity restrictions inapplicable].

COLORADO: SCHENFELD v. NORTON TIRE CO., 10 Cir.391 F.2d 420.

HAWAII: STUART v. BUDGET RENT-A-CAR CORP., Hawaii 1970, 470 P.2d 240.

ILLINOIS: SUVADA v. WHITE MOTOR CO., 32 I11.2d 612, 210 N.E.2nd 182 (1965) [a leading case; square holding that privity limitations of Uniform Commercial Code, governing commercial actions bottomed on contractual breach of warranty, simply are inapplicable here].

INDIANA: PERFECTION PAINT & COLOR CO. v. KONDURIS, Ind.App.1970, 258 N.E.2d 681; SILLS v. MASSY FERGUSON, INC., D.C.Ind.1969, 296 F.Supp.776.

IOWA: HAWKEYE-SECURITY INS. CO. v. FORD MOTOR CO., Iowa 1970, 174 N.W.2nd 672; and Iowa 1972, 199 N.W.2d 373; and PASS WATERS v. GENERAL MOTORS CORP., 8 Cir. 1972, 454 F.2d 1270.

KENTUCKY: DEALERS TRANSPORT CO. v. BATTERY DISTRIBUTING CO., KY.1965, 402 S.W.2d 441; ALLEN v. COCA COLA BOTTLING CO., Ky.1966, 403 S.W.2nd 20.

LOUISIANA: SPILLER v. MONTGOMERY WARD & CO., INC., La.App.1973, 282 So.2d 546, 550; WELCH v. OUTBOARD MARINE CORP., 5 Cir.1973, 481 F.2d 252.

MICHIGAN: PIERCEFIELD v. REMMINGTON ARMS CO., 375 Mich.85, 133 N.W.2d 129 (1965)

MINNESOTA: KERR v. CORNING GLASS WORKS, 284 Minn.115, 169 N.W.2d 587 (1969); DALELDEN v. CARBORUNDUM CO., 8 Cir.1971, 438 F.2d 1017.

MISSISSIPPI: FORD MOTOR CO. v. COCKRELL, Miss.1968, 211 So.2d 833; STATE STOVE MFG. CO., v. HODGES, Miss.1966, 189 So.2d 113; FORD MOTOR CO. v. DEES, Miss. 1969, 223 So.2d 638.

IDAHO: SHIELDS v. MORTON CHEMICAL, 95 Idaho 674, 518 P.2d 857 (1974); RINDLISBAKER v. WILSON, 95 Idaho 752, 519 P.2d 421 (1974).

MISSOURI: GIBERSON v. FORD MOTOR CO., Mo.1974, 504 S.W.2d 8

MONTANA: BRANDENBURGER v. TOYOTA MOTOR SALES, Mo.1973, S.13 P.2d 268

N EBRASKA: KOHLER v. FORD MOTOR CO., 187 Neb.428, 191 N.W.2d 601 (1971); WESTRIC BATT CO. v. STANDARD ELECTRIC CO., 10 Cir.1973, 482 F.2d 307, 315-316 [Uniform Commercial Code provisions do not exclude strict liability in tort].

NEVADA: NEVADA GENERAL ELECTRIC CO. v. BUSH, Nev.1970, 498 P.2d 366; GINNIS v. MAPES HOTEL CORP., Nev.1970, 470 P.2d 135.

NEW HAMPSHIRE: KELLY v. VOLKSWAGON, N.H.1970, 268 A.2d 837; McLAUGHLIN v. SEARS ROEBUCK & CO., 111 N.H.265, 281 A.2d 587 (1971); BUTTRICK v. AUTHUR LESSARD & SONS, INC., N.H.1969, 260 A.2d 111; STEPHAN v. SEARS, ROEBUCK & CO., N.H.1970, 266 A.2d 855.

NEW JERSEY: SANTOR v. A & M KARAGHEUSIAN, INC., 44 N.J.52, 207 A.2d 305 (1965); CINTRONE v. HERTZ TRUCK LEASING & RENTAL SERVICE, 45 N.J.434, 212 A.2d 769 (1965).

NEW MEXICO: STANG v. HERTZ CORP., 83 N.M.730, 497 P.2d 732 (1972); GARRETT v. NISSEN CORP., 84 N.M.16, 498 P.2d 1359 (1972).

NEW YORK: CODLING v. PAGLIA, 32 N.Y.2d 330, 298 N.E.2d 622 (1973) [and cases cited].

OHIO: LONZRICK v. REPUBLIC STEEL CORP., 1 Ohio App.2d 374, 205 N.E.2d 92 (1965), aff'd., 6 Ohio State 2d 227, 218 N.E.2d 185 [In terms of warranty].

OKLAHOMA: KIRKLAND v. GENERAL MOTORS CORP., Okla.1974, 521 P.2d 1353; MOSS v. POLLYCO, INC., Okla.1974, 522 P.2d 622, 626 [not to be restricted by or confused with Uniform Commercial Code commercial transaction statutory warranties]; MARSHALL v. FORD MOTOR CO., 10 Cir., 446 F.2d 712 [jury instructions on strict liability essentially similar to warranty requirements so there was no difference anyhow]

OREGON: McGRATH v. WHITE MOTOR CORP., Ore.1970, 484 P.2d 838; ANDERSON v. CLICKS CHEMICAL CO., Ore.1970, 472 P.2d 806.

PENNSYLVANIA: WEBB v. ZURN, 422 Pa.424, 220 A.2d 853 [1966]; FERRARO v. FORD MOTOR CO., 423 Pa.324, 223 A.2d 746 (1966).

RHODE ISLAND: TURCOTTE v. FORD MOTOR CO., 1st Cir.1973, 494 F.2d 173; RITER v. NARAGANSET ELECTRIC CO., R.I.1971, 283 A.2d 255.

TENNESSEE: FORD MOTOR CO. v. LONON, Tenn.1966, 398 S.W.2d 240.

TEXAS: DARRYL v. FORD MOTOR CO., Tex.1969, 440 S.W.2d 650.

UTAH: JULANDER v. FORD MOTOR CO., 10 Cir.1973, 488 F.2d 839.

VERMONT: WASIK v. BORG, 2 Cir.1970, 423 F.2d 44.

WASHINGTON: ULMER v. FORD MOTOR CO., 75 Wash.2d 522, 452 P.2d 729 (1969); BROWN v. QUICK MIX CO., 75 Wash.2d 833, 454 P.2d 205 (1969); SEATTLE FIRST NATIONAL BANK v. VOLKSWAGON, Wash.1974, 525 P.2d 286.

WISCONSIN: DIPPEL v. SCIANO, 37 Wis.2d 443, 155 N.W.2d 55; HOWES v. HANSEN, 56 Wis.2d 247, 201 N.W.2d 825 (1972).

Thus, at least 34 jurisdictions have adopted the doctrine beginning with California in 1964, at a time when 402A was in tentative draft form. Florida, of course, has never been hesitant to adopt modern trend tort doctrines -- or any other -- when the time has come to do so. There is no reason for a state like this one, in the forefront of the law in so many respects, to wait any longer. 402A is sound in principle, has been adopted by the overwhelming majority of jurisdictions since the adoption of 402A by the American Law Institute; and indeed virtually all of the principles therein, in actions such as this against manufacturers--have already been approved.

Application To Bystander

We turn next to the second portion of certified question 1(a) concerning application of the doctrine to a user of the product or a bystander. Certainly, there can be little doubt that Florida's Products Liability Doctrine encompasses fault without negligence for a defective or unreasonably unsafe product; and of course the "warranty" runs to persons in the distributive chain who have no direct relationship with the manufacturer; BERNSTEIN v. LILY-TULIP CUP CORP., Fla.App.1965, 177 So.2d 362, aff'd, Fla.1965, 181 So.2d 641; MANHEIM v. FORD MOTOR


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CORP., Fla.1967, 201 So.2d 440; and further extends to "users" of the product; VANDERCOOK & SON, INC. v. THORPE, 5 Cir.1965, 344 F.2d 930; 5 Cir.1968, 395 F.2d 104 [employee of purchaser using product]; BARFIELD v. ATLANTIC COASTLINE RAILROAD CO., Fla.App.1967, 197 So.2d 545; McCARTHY v. AMERICAN LADDER CO., supra; GATES & SONS, INC. v. BROCK, supra; [employees of company who purchased product; KING v. DOUGLAS AIRCRAFT CO., Fla.App.1964, 159 So.2d 108 [passenger in defective airplane]. Indeed, the "warranty" theory in Florida has been applied where a purchase has not even been involved; for example, a potential customer who cut his finger on a sharp part on a lawn chair in display in a department store was held to have a cause of action against the manufacturer for warranty in MATTHEWS v. LAWNLITE CO., Fla.1956, 88 So.2d 299; and Florida's warranty theory has even extended to lessees who are permitted to maintain an action against commercial lessors of defective products. W.E. JOHNSON EQUIPMENT CO. v. UNITED AIRLINES, INC., Fla.1970, 238 So.2d 98; WASHWELL, INC. v. MOREJON, Fla.App.1974, 294 So.2d 30, cert.denied, Fla.1975 [case no. 45695; 2/19/75; rehearing pending].

In a word, the doctrine has been applied to ultimate purchasers, consumers, users, lessees, and even shoppers.

Now the question is whether the strict liability theory, and the policy of it, in actions against manufacturers, as here, extends to protect forseeable bystanders who come within the range of the danger. The answer once again is an emphatic affirmative.

Hand in hand with the rapid adoption of 402A, virtually all of the recent decisions, in precise accordance with common sense and the policy of the doctrine, have extended it to cover persons like the deceased here.

Recently, the prestigious New York Court of Appeals added the weight of its authority to the "bystander" doctrine. CODLING v. PAGLIA, 32 N.Y.2d 330, 298 N.E.2d 622 (1973). In that case, a defective automobile went out of control, thereby colliding with another automobile, and injuring a party in the other automobile. The New York Court of Appeals held that the person in the other car--an innocent bystander injured by the defective product--was entitled to maintain an action, bottomed on strict liability in tort, against the manufacturer. The bending and final dissolution of privity requirements in New York was traced through food cases, dangerous instrumentality and household products cases, and cases in which the result turned on the classification of the injured person. In adopting strict liability in tort, with all of its simple ramifications, the New York Court of Appeals held as follows:

> "As we are aware, the erosion of the citadel of privity has been proceeding apace and even more rapidly in other jurisdictions, all with the enthusiastic support of text writers and the authors of law review articles as evidenced by an extensive literature. Once one exception has been made, others have followed as appealing fact situations presented in instances in which, in language of result, liability has been imposed to avoid injustice and for the protection of the public. Fact situations where recovery was allowed have shifted from those in which the touchstone was said to be the character of the product manufactured (e.g., dangerous instrumentalities, or household products) to those in which the result turned on the classification of the injured person (e.g. member of the family, employee, user, rescuer).
>
> The dynamic growth of the law in this area has been a testimonial to the adaptability of our judicial system and its resilient capacity to respond to new developments both of economics and of manfacturing and marketing techniques. A developing and more analytical sense of justice, as regards both the economics and the operational aspects of production and distribution has imposed a heavier and heavier burden of responsibility on the manufacturer. It is significant that the Appellate Divisions in three of our four Judicial Departments, the First, Third and Fourth, have now found sufficient encouragement in the decisions and opinions of our court, and elsewhere, to extend the liability of the manufacturer of a defective product to a nonuser bystander. . . .

We think that the time has now come when our court, instead of rationalizing broken field running, should lay down a broad principle, eschewing the temptation to devise more proliferating exceptions. . . .
"Much of what we have written in extending the liability of the manufacturer to the noncontracting user is equally applicable to the bystander. 'The policy of protecting the public from injury physical or pecuniary, resulting from misrepresentations outweighs allegiance to old and out-moded technical rules of law which, if observed, might be productive of great injustice. The manufacturer * * * unquestionably intends and expects that the product will be purchased and used in reliance upon his express assurance of its quality and, in fact, it is so purchased and used. Having invited and solicited the use, the manufacturer should not be permitted to avoid responsibility, when the expected use leads to injury and loss, by claiming that he made no contract directly with the user.' . . .

The Appellate Divisions, confronting this issue and concluding that protection should now be extended to the innocent bystander, have spoken firmly. '[T]he ultimate purpose in widening the scope of the warranty is to cast the burden on the manufacturer who put his product in the marketplace.'. . . '[T]here would appear to be no logic or reason in denying a right to relief to persons injured by a defective dangerous instrumentality solely on the ground that they were not themselves a user of the instrument.* * * Manufacturers of articles which may be a source of danger to several people if not properly manufactured should not be immune from liability for breach of implied warranty, a tortious wrong, to persons injured by a defectively manufactured article, where the manufacturer could reasonably contemplate injury to such persons by reason of the defect'. . . .'To restrict recovery to those who are users is unrealistic in view of the fact that bystanders have less opportunity to detect any defect than either purchasers or users. Our decision is one of policy but is mandated by both justice and common sense'. . .

Today as never before the product in the hands of the consumer is often a most sophisticated and even mysterious article. Not only does it usually emerge as a sealed unit with an alluring exterior rather than as a visible assembly of component parts, but its functional validity and usefulness often depend on the application of electronic, chemical or hydraulic principles far beyond the ken of the average consumer. Advances in the technologies of materials, of processes, of operational means have put it almost entirely out of the reach of the consumer to comprehend why or how the article operates, and thus even father out of his reach to detect when there may be a defect or a danger present in its design or manufacture. In today's world it is often only the manufacturer who can fairly be said to know and to understand when an article is suitably designed and safely made fot its intended purpose. Once floated on the market, many articles in a very real practical sense defy detection of defect, except possibly in the hands of an expert after laborious and perhaps even destructive disassembly. By way of direct illustration, how many automobile purchasers or users have any idea how a power steering mechanism operates or is intended to operate, with its 'circulating worm and piston assembly and its cross shaft splined to the Pitman arm'?


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> Further, as has been noted, in all this the bystander, the nonuser, is even worse off than the user--to the point of total exclusion from any opportunity either to choose manufacturers or retailers or to detect defects. We are accordingly persuaded that from the standpoint of justice as regards the operating aspect of today's products, responsibility should be laid on the manufacturer, subject to the limitations we set forth.
>
> "Consideration of the economics of production and distribution point in the same direction. We take as a highly desirable objective the widest feasible availability of useful, nondefective products. We know that in many, if not most instances, today this calls for mass production, mass advertising, mass distribution. It is this mass system which makes possible the development and availability of the benefits which may flow from new inventions and new discoveries. justice and equity would dictate the apportionment across the system of all related costs--of production, of distribution, of postdistribution liability. Obviously, if manufacturers are to be held for financial losses of nonusers, the economic burden will ultimately be passed on in part, if not in whole, to the purchasing users. But considerations of competitive disadvantage will delay or dilute automatic transferral of such added costs. Whatever the total cost it will then be borne by those in the system, the producer, the distributor and the consumer. Pressures will converge on the manufacturer, however, who alone has the practical opportunity, as well as a considerable incentive, to turn out useful, attractive, but safe products. To impose this economic burden on the manufacturer should encourage safety in design and production; and the diffusion of this cost in the purchase price of individual units should be acceptable to the user if thereby he is given added assurance of his own protection." (298 N.E.2d 626-628)

The New York Court of Appeals then cited cases from Arizona, California, Connecticut, Florida (Toombs v. Ft. Pierce Co., Fla.208 So.2d 615), Michigan, Mississippi, New Jersey, and Pennsylvania which already had imposed a form of strict products liability in favor of non-users who sustained personal injury as a result of defective or unreasonably dangerous products.

And, as in the case of the adoption of strict liability in tort itself, the trend of all of the recent cases (including more than those cited in CODLING) is to extend the strict liability for the protection of bystanders, in the forseeable range of danger, since there is no practical difference between policy behind protecting users or consumers, and innocent bystanders in the forseeable danger zone. The tide of "by-stander" cases includes:

ARIZONA: CARUTH v. MARIANI, 11 Ariz.App.188, 463 P.2d 83 (1970).

CALIFORNIA: ELMORE v. AMERICAN MOTORS CORP., 70 Cal.2d 578, 451 P.2d 84.

CONNECTICUT: MITCHELL v. MILLER, 26 Conn.Sup.142, 214 E.2d 694.

ILLINOIS: WHITE v. JEFFREY GALION, INC., Ed.Ill.1971, 326 F.Sup.751; WINET v. WINET, Ill.1974, 310 N.E.2d 1 [rejecting duty to bystander only because bystander was officious intermeddler].

INDIANA: SILLS v. MASSEY FERGUSON, INC., D.C.Ind.1969, 296 F.2d 776.

IOWA: PASSWATERS v. GENERAL MOTORS CORP., 8 Cir. 1972, 454 F.2d 1270.

LOUISIANA: SPILLER v. MONTGOMERY WARD & CO., INC., La. 1973, 282 So.2d 546, 550. WELCH v. OUTBOARD MOTOR CORP., 5 Cir. 1973, 481 F.2d 252.

MICHIGAN: PIERCEFIELD v. REMMINGTON ARMS CO., 375 Mich. 85, 133 N.W.2d 129 (1965).

MISSISSIPPI: FORD MOTOR CO. v. COCKELL, Miss.1968, 211 So.2d 833.

NEW JERSEY: LAMENDOLA v. MIZELL, N.J.App. 1971, 280A.2d 241.

OKLAHOMA: MOSS v. POLLY CO., Okla. 1974, 572 P.2d 622, 626.

PENNSYLVANIA: WEBB v. ZERN, 422 Pa. 424, 220A2d 853 (1966).

RHODE ISLAND: KLIMAS v. INTERNATIONAL TEL & TEL., D.C.R.I. 1969, 297 F.2d 937 (dictum).

UTAH: JULAND v. FORD MOTOR CO., 10 Cir. 1973, 488 F.2d 829.

VERMONT: WASIK v. BORG, 2 Cir. 1970, 423 F.2d 44.

In short, a mass of jurisdictions in rapid succession in very recent years have quite naturally included innocent bystanders--in the foreseeable range of use of a product--within the ambit of those protected under strict liability. This is the trend, and common sense view, and the decisions, including Codling, have one after the other adopted this position. This position of common sense simply parallels the development of products liability law in the negligence field. There, privity in any of its aspects has been abolished where the product is negligently manufactured or designed. And, of course, the duty of reasonable care extends not only to consumers and users, but also to those who



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the manufacturer should reasonably expect to "be in the vicinity of its probable use" (Restatement; Torts, §398; MATTHEWS v. LAWNLITE CO., Fla.1956, 88 So.2d 299.

McPHERSON v. BUICK MOTOR CO., 217 N.Y. 382. 111 N.E. 1050 (1960) abolished any privity concepts where negligent manufacture or design was involved. And strict products liability of necessity must follow that concept. Because the policy reasons are the same; if products liability is to exist, it must extend to all those who reasonably come within the range of the use or are exposed to the dangers. Nothing else makes any sense. The New York Court of Appeals carefully pointed out that the policy reasons are the same and an articifical distinction between a user--no matter how much that term is strained; and an innocent bystander simply makes no sense. If the public is to be protected it is to be protected. Florida, of course, has all but abolished any such distinctions anyhow. In TOOMBS v. FT. PIERCE GAS CO., Fla.1968, 208 So.2d 615, this court specifically extended Florida's so-called products liability "warranty" remedy to bystanders. While the doctrine was framed in terms of a dangerous device exception or inherently dangerous instrumentality qualification to the ordinary application of the privity rules; nevertheless it is clear that this court equated the ordinary product, with a danger lurking in it because of its design or assembly, with a dangerous instrumentality (208 So.2d at 617); thus parallelling McPHERSON v. BUICK, supra, in the negligence field.*

* Most assuredly, a grader, designed for backward use near a highway, with obstructed visibility design, qualifies as a dangerous--or inherently dangerous anyway.

Then indeed, the Court held that the warranty liability extended--just as the negligence remedy does--to the protection of persons that the defendant "should expect to use the chattel lawfully or to be in the vicinity of its probable use" (208 So.2d at 617).

So then, the last step of the "assault on the citadel" remains only to be specifically stated--because as a practical matter, the citadel has been overcome in Florida. Strict liability in tort has existed and it is only a matter of semantics now; and liability extends to bystanders in the foreseeable range of use. Question 1A should be answered in the affirmative in all respects. A limitation of liability to only inherently dangerous products can no longer be permitted to stand, in cases involving bystanders. For a design or manufacture which renders a product unreasonably dangerous makes it as dangerous--as was the case here--to a bystander, as does a design defect in an inherently dangerous product. It is the lurking danger upon which liability is bottomed. Nothing else makes any sense. IA should be answered in the affirmative in every respect.

NO OTHER CONSIDERATIONS OR PRACTICAL REASONS EXIST FOR NON-ADOPTION OF DOCTRINE; UNIFORM COMMERCIAL CODE INAPPLICABLE, AND ITS RESTRICTIVE PROVISIONS DO NOT--AND NEVER HAVE--PREVENTED APPROVAL OF 402A; STRICT LIABILITY FOR COURTS TO DETERMINE

In an amicus brief, the defense bar raises numerous arguments--all totally without merit--in an effort to block the flood tide and to prevent Florida from falling into line with the modern, informed, well-reasoned viewpoint. Many arguments--all long since rejected in the mass of cases adopting strict liability, are advanced from the distant past. Indeed 34 states at least approve 402A; and the adopting of the U.C.C. in every state but Louisiana has not precluded this.

The defense bar nevertheless resorts to restrictive provisions of the Uniform Commercial Code, in an effort to stem the tide.

a) Disclaimers

A "seller" under the Uniform Commercial Code can "disclaim" statutory, commercial implied warranties under certain conditions. F.S. 672.316. And it is urged that an implied warranty can be displaced by an inconsistent express warranty; F.S. 672.317(e). Disclaimers must be conspicuous to be valid. According to the defendants, strict 'liability' in tort would be inconsistent with the disclaimer provisions of the Code. This is simply not the case and is irrelevant anyhow. For strict liability in tort is not founded upon a contract at all; and the Uniform Commercial Code has absolutely nothing to do with the type of liability imposed here. Indeed, the defendant here is not even a "seller" to these plaintiffs. So Code implied warranties are inapplicable (F.S. 672.2-314; 672.2-315; 672.2-103;106).

Even Florida products liability doctrine, framed in terms of "warranty" law, refuses to permit Uniform Commercial Code disclaimer allowability to impede strict liability in an non-commercial or non-contractual setting, where there is no privity. And Florida recognizes clearly that its own case law warranties exist separate and apart from restrictive provisions of the code, where they are inapplicable and inapposite to a situation: FORD MOTOR CO. v. PITTMAN, Fla.App.1969, 227 So.2d 246 [manufacturer not code "seller" to ultimate non-privity consumer; disclaimer under code simply does not apply to such a warranty in Florida, allowable even in the absence of privity]; and see MANHEIM v. FORD MOTOR CO., Fla.1967, 201 So.2d 440.

In short, Florida strict liability--phrased in terms of warranty--in no way is pre-empted by anything in the Code: PITTMAN, supra; FAVORS v. FIRESTONE FIRE & RUBBER CO., Fla.App. 1975, ___So.2d___ [Case No. 73-552 and 553; Feb. 14,1975; Fourth District]; and see e.g., SCHUESSLER v. COCA-COLA BOTTLING CO. OF MIAMI, supra, 279 So.2d 901; BARRY v. IVARSON, supra, 249 So.2d 44; and AUTREY, supra, D.C.,Del.1973, 362 F.Supp.1085 [Fla.law], all recognizing continued existence of



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non-code warranties and doctrine. Masses of the cases above cited, in the adoption of strict liability in tort, have ruled out disclaimers, because the doctrine here imposed is not bottomed on contract; and is not bottomed on a commercial transaction. See, e.g.; DIPPEL v. SCIANO, supra; YUBA, supra.

b) Notice

The Uniform Commercial Code provides that a buyer must provide a seller with notice of breach within a "reasonable time" after he discovers or should discover the defect (F.S.672.607(3)). Florida Common law warranties never have imposed such a requirement, which is purely a contractual doctrine. The Uniform Commercial Code specifically covers only particular contractual situations between sellers and buyers [extended to include members of the household, or employees of the purchaser reasonably expected to use the product and be affected by its use] (F.S.672.2318).*

* Even the official comments to the Code itself state that the restrictive privity doctrine in no way is intended to impede case law development of products liability; and expansion of parties who are protected by such concepts: see F.S.672.2-313 [Comment 2; Warranty sections of Code "are not designed in any way to disturb those lines of case law growth" which recognize that warranties need not be confined either to the sales contract or to the direct parties to such a contract; F.S. 672.2-318; [Comment 3; Section includes certain parties beyond immediate purchaser; but is "not intended to enlarge or restrict the dedeveloping case law on whether the seller's warranties, given to a buyer who resells, extend to other persons ..."].

But a requirement of notice is simply a contractual doctrine which has no place or part in a case like this brought by a third person who is not a purchaser under the code. Many cases have so held: PIERCEFIELD v. REMMINGTON ARMS CO., supra, 375 Mich. 85, 133 N.W.2 129; DIPPEL v. SCIANO, 37 Wis.2d 443, 155 N.W.2d 55; GREENMAN v. YUBA PRODUCTS, INC., supra, 377 P.2d 897. Here, we are not concerned with a contractual suit or a code warranty at all; this is not an action between a "seller" and a "buyer" as encompassed within the code. This squarely has been recognized in Florida; see e.g. PITTMAN, supra. Notice has nothing to do with a suit bottomed, as this one is, on something other than a contract; see eg. BARFIELD v. U.S. RUBBER CO., supra, 234 So.2d 374, cert.den., 239 So.2d 828. Notice of a breach deals with a contract and a contract alone. It has no place in this area of the law.

c. Privity

It is urged that strict liability in tort would end privity requirements as encompassed in the code (F.S.672.2-318 [extending implied warranty liability of "sellers" beyond purchasers but only to members of purchaser's household and to employees if reasonably expected to use product and be affected by its use]. As we have seen, even the code itself never has been intended to restrict development of warranty case law to protect persons other than the limited persons to whom the code applies. Such development has specifically been left to case law by the official comments of the code (see Comment 2, F.S.672.2-313; Comment 3, F.S. 672.2-318). Florida's "developing" case law has obliterated the privity requirement against manufacturers in all cases, and indeed has already extended the warranty liability to protect bystanders where a product, as manufactured and designed, is dangerously defective or inherently dangerous: TOOMBS, supra. [as here]. We have seen, clearly, that privity is not required against a

manufacturer, in an action by a consumer or user regardless of the nature of the product. BERNSTEIN v. LILLY TULIP CUP CORP., supra, MANHEIM v. FORD MOTOR CO., supra. [Florida Supreme Court cases]; and mass of cases above cited.

These warranty liabilities survive the Uniform Commercial Code of course, and it squarely has been so held in other jurisdictions which have adopted the code: SUVADA v. WHITE MOTOR CO., supra, 210 N.E.2d 182 [leading Illinois case; privity abolished; and the code does not restrict developement; 210 N.E.2nd at 188; action for breach of warranty under Code is separate creature]. The cause of action bottomed on tort simply does not require privity; and nothing in the Code, concerned as it is with actions arising out of a contract, can prevent this.

Of necessity , once privity is abolished, contractual restrictions on recovery simply are irrelevant. Our notes following many of the cases adopting strict liability, above, show that Uniform Commercial Code restrictive provisions have been considered to be separate and apart, on a contractual basis; and they simply do not apply to actions, such as this, bottomed as they must be upon something other than the contract. Florida over and over again has abolished the privity requirement as to manufacturers.

d) Retailers

It is urged next, however, that adoption of 402A would impair the Uniform Commercial Code privity requirements, and indeed extend Florida case law privity doctrine, to allow actions against retailers or wholesalers despite absence of privity. To this, we answer simply that all that the Fifth Circuit here asked was whether strict liability should be applied

against manufacturers; and the answer to this is an emphatic yes; so that retailer liability is not involved.

But the adoption of 402A, in toto, is here sought anyhow. Because retailers should be included within the strict liability doctrine, as persons within the commercial distributive chain, who pass the product on for profit. The retailer generally is the party who passes the product on to the plaintiff; and often is local, and the person to whom the purchaser looks and upon whom he relies. And, of course, retailers have an action over against the manufacturer to recoup their losses by way of imdemnity; and often are the most available defendant for the injured member for the public to reach. The policy reasons for including retailers have many times been discussed in the strict liability cases; and thus any "seller" of the product should be included, under 402A: BRANDENBURGER v. TOYOTA MOTOR SALES, supra, Mo.1973, 513 P.2d 268; SUVADA v. WHITE MOTOR CO., supra; KIRKLAND v. GENERAL MOTORS CORP., Okla. 1974, 521 P.2d 1353; ELMORE, supra, [California]; CARUTH, supra. [Arizona]; SEATTLE FIRST NAT. BANK v. VOLKSWAGON, Wash.1974, 525 P.2d 286 [Wash.]; VANDERMARK v. FORD MOTOR CO., Cal. 1964, 391 P.2d 168.

Indeed, in Florida, the "assult on the citadel", insofar as middlemen is concerned has likewise continued apace. The Code itself extends warranties (regardless of nature of product) by "sellers", including "retailers", to purchasers and members of their household and employees reasonably expected to use the product--regardless of the nature of the product.

And warranties in Florida extend by case law from retailers to persons not in privity, who use or consume it, regardless of who they

are, if the product is a "dangerous" one: KELLER v. EAGLE ARMY NAVY DEPARTMENT STORES, INC., Fla.App.1974, 291 So.2d 58; 256 So.2d 248; also CARTER v. HECTOR SUPPLY CO., Fla.1961, 128 So.2d 390.

Florida case law early made inroads, by use of the fictional "agency" theory, to allow persons not directly in privity with the retailer to recover: McBURNETTE v. PLAYGROUND EQUIPMENT CORP., Fla.1962, 137 So.2d 563, [minor son of a purchaser of a skyrider, obviously designed for the child's use]. In short, inroads even under the Code already have been made on the privity doctrine insofar as retailers are concerned; and the dangerous instrumentality doctrine is a further exception; and indeed would appear even to extend retailer liability to bystanders where the product is dangerous TOOMBS, supra. So the final step is all that is required; retailers do then, fall within the ambit of strict liability, for public policy reasons; and they have their remedy over. The policy of the law requires that all persons in the distributative chain who merchandise the product, should be responsible to members of the innocent public injured thereby for an unreasonably unfit product or an unreasonably dangerous product. This court does not even have to reach the retailer question here, but there is no reason for it not to.

Florida's warranty doctrine has already been extended outright to lessors of commercial property; W.D. JOHNSON EQUIPMENT, CO. v. UNITED AIRLINES, INC., Fla.1970, 238 So.2d 98; WASHWELL INC., v. MOREJON, supra. The law has as much reason to impose strict liability on commercial retailers as on lessors. In short, privity limitations of the Uniform Commercial Code--bottomed on contract principles--simply do not apply to the doctrine; and the tort-liability here imposed exists separate and apart from the implied warranties imposed by virtue of contract principles under

the Uniform Commercial Code, and masses of cases in recent years have so held, as noted above in the listing of the cases adopting strict liability.

The use of the Uniform Commercial Code to prevent adoption of 402A is a subterfuge.

e) Statute of Limitations

Other arguments assigned for non-adoption of 402A have many times been rejected. For example, Uniform Commercial Code's Statute of Limitations--bottomed on contract states that in most cases, the statute commences to run upon tender of the goods or sale or delivery of the goods, regardless of when discovery of the defect is made. (F.S.672.2-725.) This principle has been rejected under Florida law in non-code situations; and has been rejected under the doctrine of strict liability in tort in other jurisdictions. The statute commences to run only on the happening of the accident or upon discovery of the defect or danger in the product. Of this there can be no doubt. BARFIELD v. U.S. RUBBER CO., supra, 234, So.2d 374, cert.den., 239 So.2d 828 [non-code warranty, pre-existing adoption code; Florida common law warranty against manufacturer by one not in privity; thus cause of action not bottomed on contract, and contract statute of limitations does not govern; statute commences to run upon happening of accident and tort statute of limitations governs]; and see CREVISTON v. GENERAL MOTORS CORPORATION, Fla.1969, 225 So.2d 331; accord: KOHLER v. FORD MOTOR CO., Neb. 1971, 191 N.W.2d 601; RIVERIA v. BERKELEY SUPER, Wash., 44App.Div.2d 316, 354 N.Y.S.2d 654 (Second Department, 1974). The statute of limitations of the Uniform Commercial Code (F.S.672.2-725) applicable to warranties between "sellers" and "buyers" (with certain extensions) does not apply here.

f) Strict Liability Court Made Tort Concept--No Need To Await Legislative Action

Finally, it is argued that adoption of strict liability in tort is a legislative prerogative. This is true, argues the defense bar, because the Uniform


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Commercial Code has recently been adopted by the legislature, applies here; and its intent, it is said, is paramount. But, as admitted in the brief of the defense bar, every state, except for Louisiana already has adopted the Uniform Commercial Code; and this has not prevented, in very recent years, the overwhelming flood tide of decisions adopting, by case law, strict liability in tort--a doctrine separate and apart from the warranty remedy imposed by the Code for commercial transactions between buyer and seller. This court, of course, has abolished privity; extended the warranty doctrine; and has regulated the development of products liability law in this state. Adoption of 402A is a matter not for the legislature but is a matter of adoption of a Restatement position--something which this court has never been hesitant to do in the past (MATTHEWS v. LAWNLITE, supra). It is a matter of court development of tort law, and the idea that the legislature alone can adopt 402A is totally without merit. A doctrine such as this is a matter for the Supreme Court of this State to determine. The same argument has been rejected in many states (SUVADA, supra;) STANG v. HERTZ CORP., 83 N.M. 730, 497 P.2d 732 (1972); and this court in the area of tort law, has never hesitated to bring the law of Florida into modern trend of the law: GATES v. FOLEY, Fla.1971, 247 So.2d 40; HARGROVE v. TOWN OF COCOA BEACH, Fla.1957, 96 So.2d 130; HOFFMAN v. JONES, Fla.1973, 280 So.2d 431. This is not a legislative matter--it is a matter for this Court to decide the same as it was for some 34 courts in other states. Strict liability must be permitted to exist and there is no reason for Florida to wait any longer.*

* Sporadic statements in lower appellate courts in Florida that strict liability has not been adopted are without any basis. For example, LAPSIUS v. BRISTOL-MYERS, Fla.App.1972, 265 So.2d 296, cites, in support of this negative proposition, McCLEOD v. W.S. MERRILL, Fla.1965, 174 So.2d 736. McCLEOD, of course, simply refused to extend 402A and its strict liability provisions to a retail drugust filing a prescription. This is in precise accordance with provisos and comments to 402A itself (see Comment K; unavoidably unsafe products). Durgs and medicines do not fall within the ambit of the doctrine in cases like McCLEOD. But McCLEOD, to the contrary, does recognize strict liability of a manufacturer of a commidity, like the grader involved here, which is put in the public stream of commerce. It recognizes 402A. The Fourth District Court of Appeal has at the same time recognized 402A (KELLER v. EAGLE ARMY-NAVY

The cases on strict liability in tort under 402A are collected in a massive annotation in 13 ALR 3rd 1057 (and see later case services and pocketparts). The last chips of the "citadel" of privity and non-responsibility must be removed and dissipated in Florida. See, Prosser, The Assult Upon the Citadel (Strict Liability To the Consumer) 69 Yale Law Journal 1099, 1134; Prosser Torts, §84, Page 510 [Second Edition 1955]; The Fall of the Citadel, 50 Minn. L.Rev. 791 (1966). There can be no question that the massive weight of the articles written on the subject favors strict liability in tort; see Cummulative Appendix to Restatement Torts 402A (1966); and see for example; Piercing the Shield of Privity and Products Liability--A Case For the Bystander; 23 University of Miami Law Review 266; 33 ALR 3d 415; (Products Liability; Extension of Strict Liability in Tort to Permit Recovery by a Third Person Who is Neither a Purchaser Nor User of Product); Strict Products Liability And The Bystander, 64 Columbia L.R., 916-937 (1964); see also, Two Harper & James, Law of Torts Page 1572. No one can seriously urge that the time is not ripe for adoption of the doctrine in this state; and Florida, most repectively, should adopt it. Consumer protection demands it.

The second part of question I is:

1(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 DUE CARE AS FOUND BY THE JURY IN THIS CASE, CONSTITUTE A DEFENSE TO STRICT TORT LIABILITY ?

We answer this question very simply in accordance with absolute edicts of the overwhelming majority of jurisdictions that have adopted strict

* (continued from page 32)
DEPARTMENT STORES, INC., supra, 291 So.2d 58; and has seemed to state that it has not yet been recognized in Florida: see FAVORS v. FIRESTONE TIRE AND RUBBER CO., supra. But none of these isolated comments have any basis in the law as promulgated by this Court.

liability in tort. The starting point, of course, is the Restatement itself. Comment n, under Restatement, §402A provides as follows:

> "n. Contributory negligence. Since the liability with which this Section deals is not based upon negligence of the seller, but strict liability, the rule applied to strict liability cases (see §524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists involuntarily and unreasonably preceding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery."

The defense bar seems to urge that principles of comparative negligence, under HOFFMAN v. JONES, supra, should be employed. We disagree. Failure to look for or discover a danger in a piece of equipment, by a user--or by a bystander as here--cannot conceivably be a defense. And the lack of reasonable care in failing to discover a defect or danger which inheres in a product, should not even be a mitigating defense under the doctrine of comparative negligence in a strict-liability, products liability setting.

The conduct of the deceased had nothing to do with the warranty, (strict liability) or the defect.

The only kind of contributory-comparative negligence which is a defense to breach of warranty or strict liability is that form of contributory negligence which consists in misuse of the product in a way not reasonably contemplated by the manufacturer, or involuntary exposure by the deceased or the plaintiff to the defect or to the danger caused by it. Ordinary contributory negligence or comparative negligence, in

the abstract, which does not involve the defect, is simply not available. See, e.g., COLEMAN v. AMERICAN UNIVERSAL OF FLA., INC., Fla.App.1972, 264 So.2d 451, 454; compare FLA.POWER & LIGHT CO. v. R.O. PRODUCTS, INC., 5 Cir.1974, 489 F.2d 549.

Here, there was no misuse of the product insofar as this deceased was concerned. Nor was there any voluntary, knowing exposure to the defect or danger resulting from the breach of warranty.

In strict liability or breach of warranty cases (and the nomenclature is not really important) the defense of contributory negligence or comparative negligence applies only under certain fact patterns--that is, where the plaintiff (or decedent) is on notice of the defect and nevertheless voluntarily challenges it; or misuses the product in such a way as to negate the manufacturer's responsibility to furnish a product reasonably safe and fit for intended use--that is, uses it in a manner not contemplated by the manufacturer; or in such a way as to be the legal cause. Contributory (comparative) negligence is not a defense where the plaintiff simply fails to avail himself of opportunities to discover a defect or danger. A recent District Court of Appeal decision, (which pre-dated HOFFMAN v. JONES, supra) held that there was no error in charging on the defense of contributory negligence, (now comparative negligence) in a warranty-strict liability situation, where the Court specifically found that in essence the instruction was promulgated on the theory that the plaintiff misused the product, or that his conduct was solely responsible for the incident involved: COLEMAN v. AMERICAN UNIVERSAL OF FLORIDA, Fla.App.1972, 264 So.2d 451; see also, FLA. POWER & LIGHT CO. v. R. O. PRODUCTS, INC., 5 Cir. 1974, 489 F.2d 549. The COLEMAN case, as noted in FLA. POWER & LIGHT CO., is confusing, to be sure, but does involve misuse; and does not clearly answer the question. The Court referred to the split of authority on the general issue of contributory

(now comparative) negligence and discussed at length the assumption of risk type of contributory negligence, as opposed to the mere failure to discover. In that case, since the court found that misuse was an issue, contributory negligence was held to be appropriate. There was absolutely no proof here that the deceased was aware of the specific danger or defect and nevertheless voluntarily encountered it. Certainly, the deceased never did become aware of the specific danger or its extent, or the defect.

COLEMAN, supra, indicates that Florida would follow the better doctrine that contributory negligence is a defense under the factual pattern there involved--that is where possible misuse or knowing exposure to harm was involved. It is not conclusive on anything beyond that. A mass of authorities are collected at 4 ALR 3d 501; and 2 Frumer & Friedman, "Products Liability", §16.01(3); 3-20 to 3-22; and see §16A(5)(f). These authorities collect the cases. Other relevant decisions and authorities, showing that the type of "failure to observe or discover" comparative negligence here is no defense to strict--liability warranty are: MESSICK v. GENERAL MOTORS, 5 Cir.1972, 460 F.2d 485; HAWKEYE SECURITY INS. CO. v. FORD MOTOR CO., Iowa 1972, 199 N.W.2d 373; O.S.STAPLEY CO. v. MILLER, Ariz. 1968, 447 P.2d 248, 249; BROCKETT v. HARRELL BROS., INC., Vir.1965, 143 S.E.2d 897, 902; SHAMROCK FUEL & OIL SALES v. TUNKS, Tex.Civ.App. 1966, 406 S.W.2d 483; SHIELDS v. MORTON CHEM., Idaho,1974, 518 P.2d 857; CINTRONE v. HERTZ, 45 N.J. 434, 212 A.2d 769; 13 ALR3d. 1100-1103, and BEXIGA v. HAVER MANUFACTURING CORP., N.J. 1972, 290 A.2d 281; see also, Restatement, Torts, 402 A, and Comment (n); Prosser, Torts, 3d Ed., 538-540; 656.

The reasoning in many of the authorities is discussed in COLEMAN, supra (see also, EASTBURN v. FORD MOTOR CO., 5 Cir. 1972, 471 F.2d 21; SEARS ROEBUCK & CO. v. DAVIS, Fla.App.1970, 234 So.2d 595 [raising but not resolving issue as to whether defense ever available]).

The sum of the better reasoned holdings is that ordinary contributory negligence--failure to discover or look out for harm--is not a defense to strict liability, or breach of warranty, where as here, there is absolutely no proof of awareness of defect in the product; or misuse of the product; or that the plaintiff [or deceased] knowingly exposed himself to the danger created by the defect.

Many cases flat-out reject the defense of contributory negligence (now comparative) of any kind in this setting in any event; others apply it when they really mean a form of misuse, not contemplated by the warranty or manufacturer, or assumption of risk. None of the misuse, or voluntary exposure cases apply here.

In sum, the only kind of contributory or comparative negligence which is a defense to breach of warranty or strict liability is that form of contributory negligence which consists in misuse of the product in a way not contemplated by the manufacturer, or voluntary exposure by the deceased or the plaintiff to the defect or danger, with appreciation or awareness of the defect or danger. Ordinary contributory negligence or comparative negligence in the abstract, which does not challenge the defect or danger (or warranty) is simply not available; see e.g., COLEMAN v. AMERICAN UNIVERSAL OF FLA., INC., supra; compare FLA. POWER & LIGHT CO. v. R. O. PRODUCTS, INC., 5 Cir. 1974, 489 F.2d 549 [which find contributory negligence, in misuse, or voluntary exposure to known defect, as a defense to warranty in Florida; cases decided prior to HOFFMAN v. JONES, supra].*

* Where appropriate type of conduct is involved, and contributory--comparative negligence is allowed as a defense, it has been applied on a comparative basis, in comparative negligence jurisdictions, in strict liability cases: HAGENBUCH v. SNAP ON TOOLS CORP., D.N.Hampshire, 1972, 339 F.Supp.676; DIPPEL v. SCIANO, Wisc. 1967, 155 N.W.2nd 55; and see TAMPA ELECTRIC CO. v. STONE & WEBSTER ENGINEERING CORP., M.D. Fla.1973, 367 F.Supp.27, 38 [ostensibly under Florida law].

Ordinary failure to discover danger contributory (comparative) negligence is no defense; misuse or voluntary exposure is.

The adoption of comparative negligence does not change the substantive features of any defense relating to a plaintiff's conduct in a strict-liability case. And it does not alter or broaden the availability of any defense bottomed on plaintiff's unreasonable conduct, or make it applicable to situations where it should not apply. In short, nothing in HOFFMAN v. JONES, supra, dictates that lack of ordinary care in failing to discover a danger in a product amounts to a defense to a strict liability--warranty case. Here, of course, there can be no question that the deceased was not guilty of voluntarily exposing herself to a known risk or danger. She walked across the street, looking toward the bus and into her change purse, after the machine had passed her and continued to look into it as she crossed the street, and she was struck. There is not a scintilla of evidence that she voluntarily exposed herself to a known risk--here, the blind spot behind the driver; or that she even was aware that the grader was approaching. She was not aware of the absence of warnings on the machine and the defective configuration of the seat and the blind spot. There was absolutely no awareness of the unreasonable danger in the machine--or for that matter of any danger. No hint of assumption of risk, or voluntary exposure, under Florida's formulation of the doctrine was shown.*

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* CLEVELAND v. CITY OF MIAMI, Fla.1972, 263 So.2d 573 [and cases cited]; S.C.L.R.CO. v. MAGNUSON, Fla.App.1974, 288 So.2d 302; DANA v. BURSEY, Fla. App.1964, 169 So.2d 845; BREVARD COUNTY v. JACKS, Fla.App.1970, 238 So.2d 156,159; LORA v. MALL INDUSTRIES, Fla.App.1970, 235 So.2d 743; ACOSTA v. DAUGHERTY, Fla.App.1972, 268 So.2d 416; DePEW v. SYLVIA, Fla.App.1972, 265 So.2d 75; JONES v. CREWS Fla.App.1967, 204 So.2d 24; see also, CARR v. CROSBY BUILDERS SUPPLY CO., INC., Fla.App.1973, 283 So.2d 60. The sum of all of these cases is it is only actual awareness of danger and exposure to it, which may constitute assumption of risk under Florida law. A showing that a plaintiff or deceased "should have" or might have discovered a defect in the exercise of reasonable care or might have or should have discovered a danger, is the basis for an instruction to the jury on contributory--comparative negligence, but not assumption of the risk.

The most that can be said--as the jury found--is that the deceased "should have" observed the grader as it approached backwards. There is no hint she did observe it; or ever actually became aware of it, after it passed her; or that she ever was aware of the danger in design. This is--at most--comparative negligence but not of the "voluntary exposure to a known risk, assumption of risk" type under Florida law. Here, the trial court quite correctly refused to instruct on the assumption of risk--even if the matter properly was requested under the Federal Rules which we assert was not the case. This is covered in our main brief in Fifth Circuit (Pages 28-32).

So then, here, the deceased, a foreseeable bystander, was hit, crushed and killed because of an unreasonably dangerous machine which contained no warnings and a blind spot behind. It passed her. She then crossed, unaware of the backward return. She was totally unaware of the danger involved (although she "should have been") and no proof shows to the contrary. The certified question, 1(b)(1) asks what type of conduct on the part of the injured party would create a defense, of contributory or comparative negligence; and whether absence of ordinary care, as found by the jury in this case, would constitute a defense to strict tort liability.

The answer is clear; misuse of the product by the plaintiff or the deceased may be a defense if the misuse leads to the injury. Alteration of the product by the plaintiff or deceased, or anyone, which alteration results in the injury may constitute a defense as may any material change in the product. And conduct of the plaintiff or deceased may be such that it alone is the proximate cause or an intervening cause of the injury. All of the above authorities so indicate. But ordinary failure to discover a defect or danger in a product simply is not a defense; ordinary lack of reasonable care is no defense to strict liability nor should it be be even to warranty. COLEMAN, supra, equates Florida's warranty doctrine with strict liability in tort and applies the same tests, and concludes that contributory negligence is

a defense, at least where misuse or voluntary exposure to the defect is involved. Thus, even under Florida's "warranty" formulation of the doctrine of strict liability, the principles of strict-liability authorities are considered and applied. COLEMAN seems to indicate, in a First District Court of Appeal case, that contributory negligence might be a defense (preHOFFMAN) but the case really shows that it is only a defense where actual knowledge of the defect, or misuse, might be involved. See also, FLA. POWER & LIGHT CO., v. R.O. PRODUCTS, INC., supra, 489 F.2d 549, (discussing COLEMAN under Florida law).

402A answers the question (Comment n). We ask for its simple adoption, with all of its sensible ramifications. It can be no defense, on public policy grounds, to fail to discover a "defect" or danger arising out of it; or to look for a defect and resulting danger, in a commercial, dangerous product. Public policy demands that absence of ordinary care in failure to look for a defect, as here, or a resultant danger, is no excuse in whole or in part; in a strict-liability suit. There should be no burden on consumers, users, and especially bystanders, to discover defects, or dangers. Such a burden would be directly contrary to the assumptions of reasonable safety and fitness they are entitled to make, which are the bases for strict-liability, warranty-liability, in the first instance.

Lack of ordinary care is no defense.

Question 2 asks the following:

> II. 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?

We have seen that strict liability now is the rule, in effect, in Florida or should be made the rule in an action such as this, against a manufacturer. Accordingly, the defenses which are available, based upon the conduct of the plaintiff or deceased, are assumption of risk, misuse, change of the product, and intervening cause.* But lack of ordinary care, such as that found by the jury here, is not a defense. This is true, even if strict liability in tort, per se, is not adopted. COLEMAN, supra, and the Fifth Circuit discussion in FLORIDA POWER & LIGHT CO., supra, reveal that Florida law might well follow the general rule with regard to defenses to strict liability in tort; even if Florida's doctrine is characterized in terms of "warranty". Since the liability, no matter how viewed, is "strict" in nature, the same rules should apply as are utilized in strict liability jurisdictions. The reason for strict liability, in products liability cases against manufacturers, dictates that this be the case. The protection of the doctrine is for the consumer, user and bystander. Mitigating defenses, predicated upon a plaintiff's (or deceased's) failure to discover a danger in a product, cannot be permitted. It would actually negate or diminish the warranty, or strict liability, or the manufacturer's duty to produce a product which the public may assume is

* See, e.g. GATES & SONS, INC. v. BROCK, supra (jury question on misuse, forseeability; intervening cause; non-privity "warranty" suit against manufacturer).

reasonably fit and reasonably safe. The liability is strict--meaning that no negligence is required. So that careless failure to discover a danger by a plaintiff or deceased cannot be and should not be a defense as the overwhelming mass and weight of authority holds.

Question 2(a) must be answered in the negative. Lack of ordinary due care, as found by the jury in the case here, does not constitute a defense to breach of "warranty" in an action against the manufacturer such as this one. Only assumption of risk, misuse, change of product, and defense of that nature do. But an attempt to impose a comparative negligence defense here cannot be permitted to stand; it is only a voluntary exposure which is a defense. (See discussion under I(b), supra; see also cases collected, FRUMER & FRIEDMAN, supra, §16.01[3], and cases collected; arguably the "better view that contributory negligence as such, as distinguished from misuse of the product, is not a defense"; in warranty case; cases collected; see, CHAPMAN v. BROWN, 9 Cir.1962, 304 F.2d 149). We rely on I(b) discussion here. The same reasoning applies.

## III. PRINCIPLES DISCUSSED APPLIED TO THIS CASE; "DEFECTIVELY" DESIGNED PRODUCT SHOWN AS PREDICATE FOR STRICT LIABILITY (OR WARRANTY) RECOVERY AGAINST MANUFACTURER

There was, of course, expert testimony here on departure from reasonably safe satandards of design and engineering of this grader in its visibility and warning features. This type of expert testimony establishes the defect under both Florida law and the Restatement principles: GATES & SONS, INC. v. BROCK, supra, 199 So.2d 291; KING v. DOUGLAS AIRCRAFT CO., supra, 159 So.2d 108; and of course the test is reasonable fitness and safety. It is not necessary that the product collapse or

fail for it to be "defective": MATTHEWS v. LAWNLITE CO., supra, 88 So.2d 299 ["warranty" liability exists; design of lawnchair contains inherent danger]; EVANCHO, supra [crashworthy doctrine; injury from protruding sharp feature]. Here, the jury found, in accordance with the expert testimony, that indeed the product was not reasonably fit and safe [under the warranty charge]; and found that it was defective under the strict liability charge--which also required a finding that it was not reasonably safe. The "defects" here were exactly like those shown in WIRTH v. CLARK EQUIPMENT CO., 9 Cir.1972, 457 F.2d 1262; and PIKE v. FRANK G. HOUGH CO., 2 Cal.3rd 465, 467 P.2d 229 (1970). On facts almost exactly like those on the principles involved here, jury questions were found to exist. All of the factors in issue here, were discussed there, including the noise of the machine--a reminder of its presence, but not necessarily of its "approach", WIRTH, supra; and absence of mirrors and warning devices, and reasonably contemplated machine use in a backward direction.

In short, the two leading cases on the subject, directly applicable here, demonstrate the propriety of the challenged instruction on strict liability. The defendant seems to question whether a "defective" or unreasonably unfit or unsafe design and product was proved here, and implies that an open, patent, apparent danger is insufficient and any danger or hazard here was of such a variety.

The deceased here, of course, was a mere by-stander; a housewife, 19 years of age, who was struck by the grader as she crossed the construction area. The claim of strict liability was grounded on defective design in that the visibility of the operator was impaired creating an unreasonable danger; there were no mirrors; and there was no alarm system or warning system.

Both cases, PIKE and WIRTH, finding strict liability to virtual bystanders as Florida already does in cases of dangerous products like this, TOOMBS v. FORT PIERCE GAS CO., Fla.1968, 208 So.2d 615, specifically found that strict liability of the kind challenged here, was a jury question on facts on legal all fours with the facts here.

In the PIKE case, (467 P.2d 229) a bystander was struck and killed by a paydozer, backing up on a job site. The equipment was performing essentially the same function the grader was performing here. The deceased, directing dump trucks, was standing 30-40 feet to the rear, and there was a substantial blind spot established in both lay and expert testimony. As here, there were no mirrors or audible alarm system.

The trial court was reversed for directing verdicts for the defendant on negligence and strict liability claims.

The California Supreme Court made numerous holdings controlling here. Specifically, however, on the precise issue involved, finding a design defect, the Court said:

> "Defendant contends that the danger of being struck by the paydozer was a patent peril, and, therefore, that it had no duty to install safety devices to protect against an obvious danger. We do not agree. First, although all vehicles contain the potential of impact, it is not necessarily apparent to bystanders that the machine operator is incapable of observing them though they are 30 to 40 feet behind the vehicle and in its direct path. The danger to bystanders is not diminished because the purchaser of the vehicle is aware of its deficiencies of design." (467 P.2d at 234)
>
> . . . . .
>
> Here the trial court held as a matter of law that the paydozer was not defectively designed and that the doctrine of strict liability was inapplicable. We cannot agree. The Restatement Second of Torts, Section 402A succinctly recites the standard for strict liability applicable to manufacturers: '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 bystander], 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.' In the instant action, plaintiffs contend that the paydozer contained a fundamental defect of design which made it unreasonably dangerous for its intended use, in that the operator could not see persons working behind him within a rectangular area 48 feet by 20 feet." (467 P.2d at 236).

. . .

"Of course, we do not decide whether the paydozer is in fact unreasonably dangerous for its intended use, but only that plaintiffs' evidence was sufficient to support a jury verdict in their favor. A jury could decide that an earth-moving machine with a 48-foot by 20-foot rectangular blind spot was dangerous 'to an extent beyond that which would be contemplated by the ordinary consumer who purchases it [or by a by-stander], with the ordinary knowledge common to the community as to its characteristics.' (Rest. 2d Torts, §402A, com. i, at p.352).

The judgment for Frank G. Hough Company is reversed. The judgment is affirmed as to International Harvester Company. Plaintiffs are to recover their costs on appeal." (Emphasis supplied) (467 P.2d at 237).

Similarly, in WIRTH, supra, (457 F.2d 1262) the Ninth Circuit Court of Appeals (Oregon law) reversed the trial court's determination that there was no strict liability as a matter of law, in a case just like this, involving unsafe design of a machine; a van carrier with obstructed visibility; and absence of mirrors. The van carrier ran over the plaintiff, a longshoreman working in conjunction with the machine. In finding a jury question on the issue involved here, the Court said:

"(d) The opinion in Pike v. Frank G. Hough Co., 2 Cal.3d 465, 85 Cal.Rptr.629, 467 P.2d 229 (1970), was published subsequent to the decision here appealed from. The facts in the two cases are substantially identical, the Pike case involving a large 'paydozer' whose function was to spread and tamp dirt fill deposited by dump trucks. The decedent whose job was to direct the trucks to the appropriate spots for dropping their loads, was standing with his back to the paydozer and some thirty feet behind it. The driver of the paydozer, hampered by problems of visibility similar to those pertaining to the carrier here concerned, backed into the decedent and killed him. The California Supreme Court reversed a judgment of nonsuit that had been entered by the trial court under the assumption that the doctrine of strict liability was inapplicable. In the course of an extensive opinion, it was noted that California courts extend protection to bystanders in products liability cases, and the opinion concluded as follows:

> 'Of course, we do not decide whether the paydozer is in fact unreasonably dangerous for its intended use, but only that plaintiffs' evidence was sufficient to support a jury verdict in their favor. A jury could decide that an earth-moving machine with a 48-foot by 20-foot rectangular blind spot was dangerous "to an extent beyond that which would be contemplated by the ordinary consumer who purchases it [or by a bystander], with the ordinary knowledge common to the community as to its characteristics." (Rest.2d Torts, §402A, com. i, at p.352).' (2 Cal.3d at 477, 85 Cal.Rptr. at 637, 467 P.2d at 237). (Bracketed clause in the opinion)" (457 F.2d at 1266)

In sum, both cases clearly show a submissible jury question on the issue involved. Here, experts on both sides were needed to testify as to the precise extent of the blind spot and obstructions and experts furnished opinions as to the relative safety or unsafety of the design. (See, e.g., discussion in CODDING v. PAGLIA, supra).

Certainly then, as PIKE and WIRTH hold, a jury question was presented as to whether the blind spots here were dangerous to an extent beyond that which would be contemplated by the ordinary consumer or [bystander], with the ordinary knowledge common to the community as to its characteristics.

No ordinary reasonable man (or woman) could be charged as a matter of law with contemplation of the dangerous condition and danger involved here. Certainly, a jury could find that he would not be. Thus, the jury instruction, leaving the matter to the jury, was proper. No error is shown in this regard.

The defect, in the sense of unreasonably unsafe design, which could not be contemplated by the bystander or injured deceased, was found to exist by a jury. The jury verdict was founded on solid evidence and should be permitted to stand.

In all events, even under Florida's Warranty Doctrine, unreasonable unfitness of the product was found and unreasonably unsafe design was found. This was sufficient in all events. MATTHEWS v. LAWNLITE CO., supra. So that the charge on strict liability added nothing to the case because unreasonable unfitness and breach of warranty was found anyway. The requirements of strict liability


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under 402A, and under FLorida's warranty doctrine are precisely the same already (see 402A, Restatement; compare McCARTHY v. FLORIDA LADDER COMPANY, supra, 295 So.2d 707, 709; VANDERCOOK & SONS, INC. v. THORPE, supra, 395 F.2d 104).*

A product which is designed in a fashion which is not reasonably safe from an engineering and safety standpoint contains a defect. And such a defect is not open and apparent to by-standers such as the plaintiff-deceased here or even to consumers or users; and is not such an open, apparent peril as to rule out strict liability. It is design characteristics, which require expert testimony to define, which imposes the liability here. See, e.g. EVANCHO v. THIEL, Fla.App.1974, 297 So.2d 40. It is how those design features cause dangers in particular situations which gives rise to strict liability here, for unsafe design and unreasonably unfit design. Design "defects" may and do exist under Florida "warranty" law; EVANCHO v. THIEL; STEMPEL v. CHRYSLER, 5 Cir.1974, 495 F.2d 1247; GATES & SONS, INC. v. BROCK, supra; KING v. DOUGLAS AIRCRAFT, supra; MATTHEWS v. LAWNLITE CO.

The defense bar, and the defendant assert absence of a "defect" here. The PIKE and WIRTH cases dispose of this. Nor is this case governed at all by ROYAL v. BLACK & DECKER MFG. CO., supra, 205 So.2d 307 (cert.den., Fla.1968, 211 So.2d 214). That case involved an ordinary electric plug, not defective, nor fraught with "unexpected danger" or "unreasonable danger" (205 So.2d at 310). [See discussion in THORPE, supra, 395 F.2d at 105, footnote 2]. The plug was not alleged to depart from industry standards. It was not shown

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* The defense contends that industry standards were met. The defendant here was the standards leader and seeks to set its own engineering standards; notwithstanding that they incorporated departures from reasonably safe engineering principles. Strict liability in tort as does breach of warranty, negates such a contention. Self-imposed "prevailing industry standards" do not "supplant the ordinary standard of objective truth and proof". They are in no sense "conclusive on the issue of a product's reasonable fitness for human use"; and the test is reasonable fitness and reasonable safety and none other: GREEN v. AMERICAN TOBACCO CO., Fla.1963, 154 So.2d 169, 173; see also SEABOARD AIRLINE R. CO. v. WATSON, Fla.1927, 113 So.2d 760; [analogous cases]; and see SUVADA, supra.

as required by Restatement, Torts, 402A, Comment i, that the article was dangerous to an extent beyond that contemplated by the ordinary consumer (here, beyond that contemplated by the ordinary bystander) with common knowledge in the community. Here, there were allegations of "defect" and absence of "appropriate" devices, shown to be required by engineering-design safety standards; all conspicuously lacking in ROYAL. (See cases above).

PIKE, supra; and WIRTH, supra, under facts just like these, show jury questions on just that issue, "unexpected" or 'unreasonable" danger to the plaintiff-bystander. The jury was charged on this very issue. The machine was sophisticated; not an ordinary plug.

Even the operator (or owner) could not be aware of the precise degree of danger, and extent of visibility restriction. Experts were required to show this. Certainly, the deceased bystander (See PIKE, supra; WIRTH, supra) to whom the "warranty" or strict liability duty extended, was not. To this extent, the danger was latent--something lacking in ROYAL.

All of the ingredients of strict liability in tort here exist. The full verdict and judgment for the plaintiff amounted to $125,00 (less the $35,000 set-off amount) should be affirmed. There should be no reduction allowed for simple contributory-comparative negligence.

## CONCLUSION

Questions should be answered in accordance with the foregoing and the judgment should be affirmed in every respect.*

The assault on the citadel should be completed now. A final half a step is required. We ask that it be taken so that the Florida law and products liability may be brought into line with the modern, overwhelming trend. There is no reason not to do so.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Brief of Plaintiff, Appellee, was mailed this 24th day of March, 1975 to: BLACKWELL, WALKER, GRAY, POWERS, FLICK & HOEHL, 1 S.E. Third Avenue, Miami, Florida; and to PAPY, LEVY, CARRUTHERS & POOLE, 328 Minorca Avenue, Coral Gables, Fla. 33134.

BY Robert Orseck
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* The most that possibly can happen here is reduction on a proper percentage basis, based upon the comparative negligence of the deceased of 35%. This would be the result even if strict liability were rejected because negligence and warranty were found in any event.