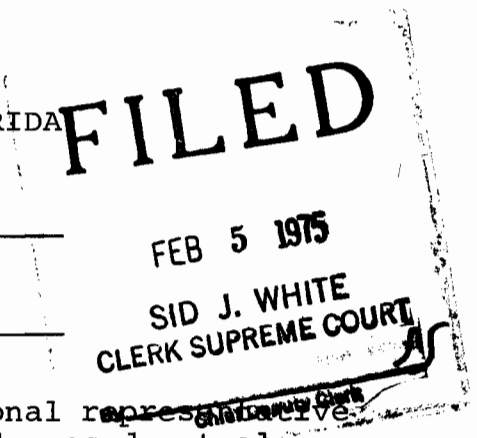
In the

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

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

BRIEF OF CATERPILLAR TRACTOR COMPANY, INC., Defendant/Appellant.

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JAMES S. USICH, ESQUIRE

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Defendant/ Appellant.	*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, TO SUPREME COURT OF FLORIDA

BRIEF OF CATERPILLAR TRACTOR COMPANY, INC., DEFENDANT/APPELLANT

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CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, TO SUPREME COURT OF FLORIDA

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 THE PRINCIPLES OF FLORIDA LAW, WOULD LACK OR 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 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?

STATEMENT OF THE FACTS AND CASE

Having worked closely with the Appellees in the preparation of the Certificate to this Honorable Court, Appellant stipulates as the Statement of the Case as set forth in the Certification to this Court. Additional expansion upon the Statement of the Case, in fact, can be readily gleaned by this Honorable Court through the Appellant's Statement of the Case and Statement of the Facts, as submitted in his original Appellant's Brief, and additionally through the Statement of the Case duly submitted to the United States Court of Appeals, Fifth Circuit, by the Appellees herein.

ARGUMENT 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?

UNDER FLORIDA LAW, A MANUFACTURER MAY NOT BE HELD LIABLE UNDER THE THEORY OF STRICT LIABILITY IN TORT, AS DISTINCT FROM BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY, FOR INJURY TO A USER OF THE PRODUCT OR A BYSTANDER.

The doctrine of strict tort liability, as set forth in the Second Restatement of Torts, Section 402(a) states:

> "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 the ultimate user or consumer, or to his property, or (a) the Seller is engaged in business of selling such product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it was sold. . . ."

and has not been adopted as a matter of law or as a matter of proceeding under circumstances similar to the case at bar in the State of Florida.

In cases involving foodstuffs or deleterious substances which are to be inhaled or digested by individuals, the rule of strict tort liability under certain circumstances has been applied, Green v. The American Tobacco Co., 154 So. 2d 169, (Fla. 1963). Green, supra, instituted an absolute or strict liability theory to the manufacturer of a commodity who placed such commodity into a normal channel of trade for consumption by the general public.

In the case at bar, by no stretch of the imagination is a Caterpillar motor grader a commodity that would be consumed by the general public.

In McLeod v. W. S. Merrell Co., Division of Richardson-Merrell, 174 So. 2d 736 (Fla. 1965), a more analogous situation occasioned itself. In McLeod, the Plaintiff was asking the imposition of an absolute or strict liability theory without fault against a retail druggist who was simply selling a prescription of a manufactured drug. Even though the Complaint therein was couched in one of implied warranty of fitness for the purpose intended, this Honorable Court determined that the real cause of action sought was one of strict tort liability. This Court set forth that:

> "As to the final salient point concerning the doctrine of strict liability, this jurisdiction has rejected such doctrine in McLeod v. W. S. Merrell Co., Division of Richardson-Merrell, 174 So. 2d 736, 739 (Fla. 1965)"

The tenor of the McLeod, supra, by this Court infers that strict liability in this unique type of situation would be available, upon proper proof, of course, only against the manufacturer of said drug. There are other exceptions, of course, in drug cases. However the test as set forth in Green was not satisfied in McLeod.

Royal v. Black & Decker Manufacturing Company, 205 So. 2d 307 (Fla. App. 1967) evidences the attitude of the Appellate Courts in the State of Florida in their consideration of strict tort liability as to manufacturers of equipment or other goods not designated primarily for human consumption.

Royal v. Black and Decker, supra, as indicated by the Third District Court of Appeal in the State of Florida, set forth the primary concern in regards to the doctrine of so called "strict liability". The dicta therein indicates that strict liability in tort may be imposed upon the manufacturer

> "When an article he places on the market, knowing that it is to be used without inspecting for defects, proves to have a defect and causes injury to a human being."

The Court went on further to state exactly what a defect is, relative in nature, to the fact that there could be no requirements or restrictions upon the manufacturer of a product beyond protecting the user from an unreasonably dangerous product, or one fraught with unexpected danger, or to make an accident-proof or fool-proof product. This is logical. Additionally, the Court held that facts must be introduced from which reasonable men could conclude that the products could be unreasonably dangerous or defective. Some type of deviation from the norm, either in comparison with similar products or comparison with products used for similar purposes, would be the test therein. In conclusion in Royal v. Black and Decker, supra, the Court relied upon the cases of Evans v. General Motors Corporation, 359 F. 2d, 822 (7th Cir. 1966), and Campo v. Scofield, 301 N.Y. 468 95 N.E. 2d, 802, (1950), and Matthews v. Lawnlite Company, (Fla. 1956) 88 So. 2d 299.

> "It is not in itself a breach of duty to supply materials which are reasonably safe and customarily used, even though the material might be conceivably made more safe, nor must manufacturer make his product "more" safe, when the danger to be avoided is obvious to all." Royal v. Black and Decker, supra, at 310.

From a terse reading of Royal v. Black and Decker, supra, and the attendant cases indicated therein, the Third District Court of Appeal, representing the tenor of the Appellate Courts in the State of Florida, indicates that a manufacturer will not be ~~reasonable~~ liable under the theory of strict tort liability for failing to make an accident proof and fool-proof product, when the danger, if any, from his product, is obvious to all individuals.

Similiarly, Matthews v. Lawnlite Company, supra, indicate this Honorable Court's opinion, even as to an implied warranty, where the hazard involved would be apparent to the complaining party.

Keller v. Eagle Army-Navy Department Stores, Inc., 291 So. 2d 58 (Fla. App. 1974) did not reach the question involved in this certification, to wit; whether or not strict tort liability is applicable against the manufacturer of a product put into the normal course of trade in the State of Florida, when such product injures a party plaintiff. Keller, supra, was an action by a minor against a retailer for personal injuries sustained when a patio torch exploded, wherein the basic determination was one of whether or not the torch involved therein was a dangerous instrumentality, raising an imposition of strict liability upon the owner thereof. The First District Court of Appeals held that the law applicable was set forth in Matthews v. Lawnlite Company, supra, by saying that:

> "An implied warranty does not protect against hazards apparent to the plaintiff, it protects against an usual or apparent use. It does not protect against injury imposed while carelessly using a dangerous mechanism."

The Court further went on to state that the manufacturer can be subjected to liability if the user sustains an injury as a result of "an inherently dangerous condition", in a seemingly innocuous looking instrumentality. This obviously, is a question of fact for the trier of fact, however, it is important to realize that in Keller, supra, the action of the Plaintiff was against the retailer and not against the manufacturer. Although Keller was reversed on different grounds, as to the sufficiency of evidence, adduced by the Plaintiff to have prohibited a directed verdict by the trial Judge at the end of the Plaintiff's case, the action is one in implied warranty of fitness for the purpose intended, and is not one in strict tort liability. These two theories are not analagous.

The point involved of significance in Keller, supra, was the dicta set forth that Florida has recognized the dangerous instrumentality doctrine as to automobiles, airplanes, motorcycles, and boats, and the attendant liability, strict in nature, that has been imposed upon the owners for their improper use. The point of interest is that the owners are held strictly liable, however, the users obviously, have the right to contend that their negligence was not a proximate cause or the sole proximate cause of the injuries to the Plaintiff or Plaintiffs. The responsibility of an owner is substantially different than that of a manufacturer. Once again, the Court referring to Matthews, supra, held that the manufacturer could be subjected to liability (although not strict liability was indicated by the Fourth District Court of Appeal), if an inherently dangerous condition was created by their manufacturer.

Keller, supra, which as stated heretofore, involving a torch, and the gaseous state that resulted therefrom, was really a dangerous instrumentality, similar to a stick of dynamite in a shoe box. No one could imagine nor appreciate nor understand the dangers involved therein until they actually opened the shoe box. In the case at bar, there was no innocent looking instrumentality, that had an inherently dangerous condition therein. It is hard for this writer to imagine what more ominous product there would be than a yellow road grader being approximately thirty feet long, nine feet wide, standing at it's canopy fifteen feet high, and weighing approximately fifteen tons.

To impose strict liability upon a manufacturer for conditions so blatantly obvious would lead to litigation never contemplated by this Honorable Court and by other Courts through this country. To have a plaintiff recovery by simply establishing the defect, when such defect would be obvious to any reasonable person would result in litigation from tissues to tea bags, with the Defendants therein having no logical defenses available to them.

The majority of cases found dealing with strict tort liability emanate from jurisdictions outside of the State of Florida. The landmark case of Greenman v. Yuba Products, Inc., 59 Cal. 2d 57, 27 Cal. Rptr., 697, 377, P. 2nd 897 (1963), set forth the attitude of the Courts of California regarding the responsibility of a manufacturer for liability.

Additionally, the New Jersey Court in Henningsen v. Bloomfield Motors, Inc., 32 N.J., 358, 161a 2nd 69 (1960), established strict liability as a result of placing absorbtion powers of

economic burdens upon the shoulders of manufacturers, rather upon the shoulders of consumers or users.

The State of Arizona, likewise, has adopted strict tort liability, however, no cases can be found in the State of Florida, which under a similar fact pattern, strict tort liability can be applied to the manufacturer.

The duty of the legislature of any state, and more specifically in the case at bar in the State of Florida, is to establish law which could and would protect classes of individuals to which the Plaintiff has alluded. As seen in implied warranty and expressed warranty cases, such were not the offspring of judicial interpretation, but were the direct descendent of legislative ability, to wit; the Uniform Commercial Code.

Based upon the foregoing argument and authority thereto, there is no question but that Florida has not adopted the doctrine and theory of strict liability in tort, however, it is conceded that Florida has adopted a breach of implied warranty of merchantability for injuries to users of a product or bystanders.

ARGUMENT 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?

Assuming, arguendo, that this Court determines that there is in fact liability upon a manufacturer, strict in nature, ~~for negligent~~ or defective design, ~~or negligent~~ or defective manufacture, then the question obviously occasions itself as to the defenses available thereto.

Since Florida has not adopted the doctrine of strict tort liability as involved in the certified question in the case before the Court, there are no jurisdictional decisions on point. However, referring to cases outside of this jurisdiction, in states that have adopted strict tort liability, determinations have been made as to defenses that are applicable. In O.S. Stapley Company v. Miller, 430 P.2d 701 (1967), the Arizona Appellate Court, in a product liability case against the manufacturer of a steering mechanism for a boat, determined that strict tort liability was applicable. They Stated:

> "Having decided the liability of a manufacturer of an article is in tort . . . rather than a part of the law of contracts, we have no difficulty in determining that contributory negligence is a defense in a strict tort liability action."

Likewise, the Restatement of Torts, Second Edition, Section 402a, states that:

> "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 existance. On the other hand, the form of contributory negligence which consists involuntarily and unreasonably proceeding to encounter a known danger and commonly passes under the name of assumption of risk, is a defense under the 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 (or she) is barred from recovery."

Additionally, the State of New Jersey, in the case of Cintrone v. Hertz Truck Leasing, etc, 212A, 2d 769 (1955) held that the lower Court had properly submitted the question of the Plaintiff's contributory negligence to the jury. The facts in Cintrone, supra, were that the Plaintiff had failed to protect himself from a situation in which he was cognizant, to wit; defective brakes. The Court states at page 783 therein:

"Cintrone, with knowledge of danger presented by the defective brakes, failed to take the care for his own safety, which a reasonably prudent person would have taken under the circumstances. Therefore, it would have been improper for the trial Court to have removed the defense of contributory negligence from jury consideration."

In Cintrone, supra, the rule of law set forth is the reasonably prudent person rule, to wit; that which a reasonably prudent person other than the Plaintiff would have done under the circumstances.

The doctrine of "assumption of risk", has long been held to be applicable to negligence action such as the one before this Honorable Court. The United States Court of Appeals, Fifth Circuit, has indicated by their certification, that a

determination is also to be made by this Court as to whether or not assumption of risk would be a logical defense available in the event that this Court determines that strict tort liability is the law in the State of Florida.

In Cleveland v. The City of Miami, 263 So. 2d 573, (Fla. 1972), this Honorable Court held that assumption of the risk under certain circumstances would be available as a defense. This Court further stated in Cleveland, supra, that:

> "The committee recommends that the charge 'assumption of risk' not be given as a matter of course as a second charge in contributory negligence, and that it be given only in the cases where a jury may find that claimant more or less deliberately and willingly exposed himself to the specific risk which resulted in his injury and damage." At page 557.

This Court further went on to state that in this particular case there was no testimony showing that Cleveland had willingly exposed himself, nor did he have a reasonable opportunity to avoid the danger once he became aware of it. From a cursory reading of the committee's notes on the charging of assumption of risk, it very well could be inferred in the case at bar, that the jury might have found that Gwendolyn West more or less deliberately and willingly exposed herself to the specific risk which resulted in her injury and subsequent damages to her Estate.

In Crosier v. Joseph Abraham Ford Company, 150 So. 2d 499, (Fla. App. 1963), the Third District Court, in citing from 65 C.J.S. Negligence, Section 174, at Page 851, stated as to the assumption of risk that:

". . .In order to invoke the doctrine of assumed or incurred risk, it is essential that the risk or danger shall have been known to, and appreciated by the Plaintiff, or that it shall have been so obvious, that he must have been taken to have known and comprehended it."

In the case at bar, since an assumption of risk charge was never given, it is difficult to determine whether or not the jury would have inferred that Gwendolyn West knew about the danger involved, it being so obvious to anyone, and that therefore, she must be taken to have known and comprehended it. Likewise, see Byers v. Dunn, 81 So. 2d 273 (Fla. 1955), City of Jacksonville Beach v. Jones, 101 Fla. 95, 131 So. 369, and Bartholf v. Baker, 71 So. 2d 480 (Fla. 1954).

In the case at bar, the demand for a charge on assumption of risk was not an alternative or addition to the charge on contributory negligence, but rather from a very close reading of the record on appeal, it is evident that anyone under the circumstances would have known the risk involved, and would have not voluntarily chosen to continue to expose themselves to the risk, which ultimately would cause their injuries and subsequent damages.

As a result of this Honorable Court's decision in Hoffman v. Jones, 280 So. 2d 431, (Fla. 1973), the question of whether or not the doctrine of assumption of risk could or would be a total bar to strict tort liability or tort liability was not reached. As stated on Page 439 therein, this Court determined that:

> "Petitioners in this cause, and various amicus curiae who have filed briefs, have raised many points, which they claim we must consider in adopting comparative negligence, such as the effects of such a change on the concept of 'assumption of risk', and no 'contribution' between joint tort feasors. We decline to consider all those issues, however, for two reasons, One reason is that we already have a body of case law in this state dealing with comparative negligence, under our earlier railroad statute. Much of this case law would be applicable under the comparative negligence rule we are now adopting generally."

It is evident, therefore, that the doctrine of assumption of risk as a result of the cases set forth heretofore in other jurisdictions, indicate that assumption of risk, and even under certain circumstances, contributory, or in this particular case, comparative negligence, would be a defense to strict tort liability.

ARGUMENT 1 (b) (1)

IN PARTICULAR, UNDER THE 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.

LACK OR ORDINARY DUE CARE CONSTITUTES A DEFENSE TO STRICT TORT LIABILITY.

Based upon the argument in 1(b) it seems obvious to assume that in fact comparative or contributory negligence as well as assumption of risk are proper defenses to strict tort liability.

Once again, this Court's decision in Hoffman v. Jones, supra, indicate the intent of this Court to try and abandon doctrines which are "unjust and inequitable". The inception of comparative negligence instead of a total bar by and through contributory negligence has, in fact, achieved this goal. This Court has left determinations as to relative fault now with the proper party, the trier of fact, to wit; basically the jury.

However, assuming once again, arguendo, that this Court establishes the doctrine of strict tort liability, as stated heretofore, then there must be a defense available to the defendants or manufacturers accordingly. In Hoffman, supra, this Court stated that:

> "A primary function of a Court is to see that legal conflicts are equitably resolved. In the field of tort law, the most equitable result that can be reached by a Court is the equation of liability with fault. Comparative negligence does this more completely than contributory negligence, and we would be shirking our duty if we did not adopt a better doctrine."

The intent of this Court, obviously, is to see that jus-

tice, equitable in nature, is done, and to formulate an equation of liability with fault with no defenses, would, in this writer's opinion, be diametrically opposed to the duties that this Court has chosen not to shirk. Comparative negligence, and the doctrine set forth in Cintrone, supra, indicate that the reasonably prudent person rule would be applicable as a defense to strict tort liability. This is to say that lack of ordinary care and not conducting oneself in the reasonably prudent manner would be a logical defense, depreciating in nature, or totally barring the plaintiff under certain circumstances therein.

ARGUMENT 2

Coleman v. American Universal of Florida, Inc., 264 So. 2d 451, (Fla. App. 1972), basically goes to the heart of answering the question of whether or not contributory negligence, or in the alternative, comparative negligence would be a defense to a breach of implied warranty situation by a manufacturer, and answers this question in the affirmative. It must be kept in mind when applying Coleman that Coleman was decided before Hoffman v. Jones, supra. In Coleman, supra, the First District Court of Appeals held that the Plaintiff, who had sued a scaffold lessor under a breach of implied warranty situation could be held to have been contributorily negligent, and therefore, such could have precluded his recovery. The Court went on to make a distinguishment in determination between the aspect of breach of implied warranty as being one found in a contract, and therefore, contributory negligence could not be a defense, and the determination that breach of implied warranty action was one in tort, as established by judicial determination, and therefore, could have available thereto a defense of contributory negligence.

> "Contributory negligence in the sense of a failure to discover a defect, or to guard against the possibility of its existance, is not a defense. Contributory negligence is the sense of an unreasonable use of a product after discovery of a defect, and the danger is a defense." Cited from Coleman, supra, at Pg. 453-454 (To Frumer and Friedman, Products Liability.)

Similiarly, Florida Power and Light v. R. O. Products, Inc., 489 F. 2d 539 (5th Cir, 1974), affirms the District Court's opinion in regard to contributory negligence being an absolute bar to recovery under a breach of warranty action. The difference, must, of course, be appreciated in FP& L, supra, as this was an action by a power company against a seller of a hydraulic outrigger unit. Florida Power and Light, had, in fact, settled, and paid various claimants who were injured as a result of the breach of warranty alleged against R & O Products by Florida and Light. The basic determination made in Florida Power and Light, supra, was the applicability that Coleman, supra, had as to contributory negligence, and whether such would have to be a 'sole proximate cause' or ' a legal contributing cause'. The Fifth Circuit Court of Appeals determined that a better view in interpretation of Coleman, supra, would be that the Plaintiff's negligence must only be 'a proximate cause'. Therefore, interpreting Coleman in its proper light, it would seem to infer that any negligence on behalf of a plaintiff which would be a proximate cause of the plaintiff's injuries, would therefore avail to the defendants rights to a charge on comparative negligence on the face of a claim against them on a breach of implied warranty.

As seen in Schrieber and Rheinbold, (Products Liability) Chapter Five, Page 32, they conclude that:

> "As is readily apprehended, contributory negligence in a defense of a product liability action is a can of worms. But, if this is recognized that there is no such thing as "contributory negligence", and that the defense contemplated is that of abnormal, unintended, or unforseen use, or is that of assumed risk, or that of lack

". . .of due care, then there may perhaps be order brought out of chaos."

Further, Florida Power and Light, supra, interprets Coleman, supra, and the jury instructions given in Coleman to mean that the contributory negligence does not have to be the only cause of the accident involved. Theoretically, it could be a combination of acts, since Florida now has comparative negligence actions both of the plaintiff and defendants acting in concert, would and should avail the defendant to a charge of contributory or comparative negligence . See also Nelson v. Anderson, 245 Minn. 455, 72 N.W. 2d 861, (1955), Dallison v. Sears and Roebuck Company, 313 F. 2d, 343, 10th Cir, (1962), and Arnaud's Restaurant, Inc. v. Potter, 212 F. 2d 883, (Fifth Cir. 1954).

It would seem therefore, that the conduct by and through this question that has been certified to this Honorable Court, are necessary by an injured person so as to raise the defense of contributory or comparative negligence, would be one simply of the lack of due care, or in the alternative, a violation of the reasonably prudent person rule.

ARGUMENT 2 (a)

IN PARTICULAR, DOES THE LACK OF ORDINARY DUE CARE, AS FOUND BY THE JURY IN THE CASE, CONSTITUTE SUCH A DEFENSE?

The Answer to this question that has been certified to this Honorable Court must be answered in the affirmative, based upon the argument presented in 2 above, and citations attendant thereto. This writer does not feel it would be proper to unduly reiterate the argument set forth prior hereto, simply adopts the response to question 2 of the question certified to this Court, and its response to question 2 (a).

CONCLUSION

Based upon the authorities and arguments heretofore submitted to this Honorable Court, the Defendant/Appellant, Caterpillar Tractor Company, Inc., respectfully suggests that under Florida law in a case similar to the one before this Court at this time, there is no authority or reason to establish Strict Tort Liability against a manufacturer. Further, the defendant/Appellant, Caterpillar Tractor Company, suggests that in the event this Court determines strict tort liability applicable, that assumption of risk would be a total defense to strict liability in tort, and that comparative or contributory negligence would be a depreciating defense thereto. Finally, the Defendant/Appellant, Caterpillar Tractor Company, Inc., suggests to this Court that as to breach of implied warranty and the defenses available to a manufacturer therein, that contributory negligence in a sense of lack of ordinary due care would be a defense thereto, depreciating the amount of the verdict or judgment accordingly.

Respectfully submitted,

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Brief was hand-delivered this 5th day of February, 1975 to: SER AND KEYFETZ, 704 Ainsley Building, Miami, Florida, BERKELL, STRAUSS & BENJAMIN, P.A., 1500 N. E. 162nd Street, North Miami Beach, Florida, PODHURST, ORSECK & PARKS, P.A., 66 West Flagler Street, Concord Building, Miami, Florida, and BLACKWELL, WALKER, GRAY, POWERS, FLICK & HOEHL, 1 S. E. Third Avenue, Miami, Florida.

BY _____
JAMES S. USICH, ESQUIRE