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.

FILED

APR 2 1975

SID J. WHITE
CLERK SUPREME COURT
By ______ Chief Deputy Clerk

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

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

PAPY, LEVY, CARRUTHERS & POOLE
328 Minorca Avenue
Coral Gables, Florida 33134
Attorneys for Defendant/Appellant

JAMES S. USICH, ESQUIRE

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PREFACE

The purpose of a Reply Brief by an Appellant is not to reargue his position as set forth in his original Brief; rather it is his duty to point out to this Honorable Court the inconsistencies of fact and law set forth by and through the Reply Brief of the Appellees.

Once again, the positions of the respective parties will be referred to as they stood in the trial court, unless named specifically for clarity.

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Prosser, Restatement of Torts, Second Edition, 1965, Section 402(a) 3, 5, 8

STATEMENT OF THE CASE

The Statement of the Case as set forth by the Appellant and by the Appellee in their respective briefs is hereby accepted by the Defendant-Appellant, CATERPILLAR TRACTOR COMPANY, INC., including the Certificate from the Fifth Circuit Court of Appeals to the Supreme Court of Florida.

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 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?

ARGUMENT 1 (a)

UNDER FLORIDA LAW, MAY A MANUFACTURER BE HELD LIABILE 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 Plaintiff sets forth in his Reply Brief his interpretation of Florida law as defining "warranty" exactly the same as "strict tort liability" in its effect on a manufacturer of a product. For some unknown reason, the Plaintiff takes the position that unless Section 402(a) of the Restatement of Torts (Second Edition, 1965) is adopted <u>in toto</u> by this Court, that plaintiffs will be greatly prejudiced and will not be able to bring action for products liability claims in the future. This is absurd.

The law in the State of Florida has allowed product liability actions for damages for numerous decades based upon negligence and warranty, and the case law has been expanded by and through the District Courts and the Supreme Court of this State so as to relieve various plaintiffs of the necessity of proving contractual relations before an action can be maintained against a manufacturer.

However, to expand the law even further, so as to effectively strike any defenses that a manufacturer may have, would be unfair to the point of creating gross injustice, with the inevitable result of forcing many manufacturers to abandon the manufacture of various linesof useful products.

Plaintiff's assertions that Florida no longer requires privity does not recognize disclaimers; that the Statute of Limitations is

in tort rather than in contract; that a pseudo "crashworthy" doctrine has been adopted; that any direct contractual relationship between a manufacturer and a plaintiff now is not necessary, are of no application or effect when discussing a theory of strict tort liability. In Evancho v. Thiel, (Fla. App. 1974) 297 So. 2d 40, the Third District Court of Appeal discussed the Seventh Circuit opinion in the case of Evans v. General Motors Corp., 359 F. 2d 822 (7th Cir. 1966), in regard to the duty of an automobile manufacturer to design an automobile reasonably fit for the purposerfor which it was made. This case involved the "crashworthy" doctrine that the plaintiff has referred to as being a vestige of warranty in strict liability. The Seventh Circuit Court held that the intended purpose of a vehicle

> "Does not include its participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions may occur. As defendant argues, the defendant also knows that its automob-le may be driven into bodies of water, but it is not suggested that defendant has to equipt them with pontoons." 359 F. 2d 825.

The Court further stated:

> "Perhaps it would be desirable to require manufacturers to construct automobiles in which it would be safe to collide, but that would be a legislative function, not an aspect of judicial interpretation of existing law." 359 F. 2d 824.

Even though Evancho, supra, in its interpretation of Evans, supra, seems on its face to be comical and rather absurd, its ludicrous repercussions upon products, goods and industry, would become real probabilities if in effect that this Court were to establish a strict liability in tort doctrine for products.

Regarding for a moment, the public policy argument advanced by the plaintiff herein, it is hard to fathom the total reliance plaintiff places on the Restatement of Torts (2d Ed. 1965). The plaintiff cites the Restatement of Torts as if it is the Bible, and must be obeyed. The Restatement of Torts in and of itself is only slightly persuasive encyclopedic law stating generalities to which this Court is not bound. If in fact the Restatement of Torts was the ultimate authority on determination of liability in any negligence case, be it product liability or otherwise, it would be very easy for all of the Courts through this United States to relinquish their judicial descretion and rely on the Restatement of Torts as their sole authority. This is not the function of the Supreme Court, nor District Courts, nor any appellate Court in the United States, and especially in the State of Florida.

The plaintiff himself admits, at page 13 of his brief, in citing from Evancho v. Thiel, supra, that:

> "...We think that it should be noted that as pointed out in Ford Motor Co. v. Dittman, (Fla. App. 1969) 227 So. 2d 246:
>
> > 'From the time of Judge Cardozo's enunciation on the subject in McPherson v. Buick 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 Matthews v. Lawn Light Co., (Fla. 1956) 88 So. 2d 299; Manheim v. Florida Motor Co., (Fla. 1967) 201 So. 2d 440; and Noonan v. Buick Co. (Fla. App. 1968) 211 So. 2d 54."

By and through the relaxation of rules of evidence and definitive decisions by the appellate courts in the State of Florida in product liability actions in negligence, and in cases concerning implied warranty of merchantability and fitness for the purpose intended and the use intended, it has become much easier for the plaintiffs to prove their cases without the need to resort to a defenseless action more commonly known as "strict tort liability".

Although the Plaintiffs have cited some sixty-four cases from thirty-four other jurisdictions, involving the adoption in those jurisdictions of some form of strict tort liability, the State of Florida very obviously does not appear. The implication seems clear that plaintiff is fully aware that strict tort liability is not the law in the State of Florida.

It is hard to fathom the plaintiff's arguments as to the complexity of products liability litigation and the difficulty or impossibility of the plaintiff being able to demonstrate how a manufacturer has been negligent. To alleviate this problem, the plaintiff seems to feel that strict tort liability will reduce the burden of proof necessary to prevail against a manufacturer, thereby providing a more sympathetic forum for injured plaintiffs. As a practical matter, the plaintiff's argument just does not comport with logic. In order for a plaintiff to prove how a manufacturer has been negligent, as in the case at bar, he simply puts an expert on the

stand to say, "The product was not reasonably fit nor reasonably built." The defense, of course, then puts it's expert or experts on the stand, and the question of negligence becomes one for the jury. This is logical.

The final salient point of argument as to Question 1(a)of the questions certified from the Fifth Circuit Court of Appeals to the Supreme Court of Florida, as set forth by the plaintiff, is that as a direct result of the decision in Toombs v. Fort Pierce Gas Co. (Fla. 1968) 208 So. 2d 615, any type of limitation of liability to bystanders cannot possibly be restricted only to inherently dangerous products. Toombs, supra, simply does not stand for that proposition. At Page 208, this Court stated that:

> "The inherently dangerous instrumentality qualification of the privity requirement in warranty, when applicable, has instead been regarded as extending liability to those persons one should expect to use the chattel lawfully or be in the vicinity of its probably use." 28 Fla. Jury. 522

As a practical matter, then, it must be definitively established that there is an inherently dangerous product before a bystander can recover in an action for breach of implied warranty.

There simply is no authority in the State of Florida as a result of case law or statutory mandate which would establish strict tort liability in the case at bar.

The answer to Question 1(a) which has been certified must be in the NEGATIVE.

QUESTION 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 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?

The Plaintiffs have blatantly set forth to try to excise defenses properly available to a manufacturer involved in a strict product liability case, limiting those defenses only to an assumption of risk, which at best is a very subjective defense, or, in the alternative, misuse of the product involved.

To so limit defenses in actions on the part of injured plaintiffs can only open the Pandora's box of product liability claims, with the manufacturers unjustly restricted in their defenses thereto.

An adoption of the Restatement of Torts, § 402 (a), Comment (n), as to the meaning of contributory negligence as a defense in strict tort liability would be inappropriate and useless to defendants involved in litigation here in the State of Florida.

Looking for the moment at other jurisdictions to make a determination as to whether or not other jurisdictions which have adopted strict liability have adopted any form of comparative or contributory negligence as a defense of the manufacturer therein, it is necessary to ascertain thh tenor of the law on this particular issue. In <u>Bachner v. Pearson,</u> (Alaska, 1970) 479 P.2d 319, the Supreme Court of Alaska struck the defense of contributory negligence in strict

liability in tort, as they had adduced that there was insufficient evidence of contributory negligence to go to the jury. This is to say, in the alternative, that had there been sufficient evidence to go to the jury, a contributory negligence charge would have been given.

Likewise, Idaho, in Rindlisbaker v. Wilson, (Idaho, 1974) 519 P.2d 421, in an action that was brought against the manufacturer held that jury instructions on that type of contributory negligence which would involve the subjective actions of a particular plaintiff were applicable as a defense in that action. In Rindlisbaker, supra, the Court instructed that:

> "If the danger is so obvious that a reasonable man should realize such danger, then to use the machine is contributory negligence..."

which would be a bar to the recovery of the plaintiff herein.

The State of New York also has held that contributory fault of a plaintiff is a defense to an action for strict products liability, as seen in Codling v. Paglia (N.Y. App. 1973) 298 N.E. 2d 622, which case involved an automob-le strict liability question. The Court of Appeals in New York stated:

> "As indicated, contributory fault of the plaintiff is a defense to an action for strict products liability, and the charge that it was not, even when taken in combination with the other, more specific, charges given here, constitutes reversible error...
>
> The contributory fault of a plaintiff could be found in the use of the product for other than its normally intended purpose or other than in the manner normally intended. The jury was properly charged on this aspect of the case, and its finding in favor of Paglia as plaintiff cannot be disturbed. Or,

contributory fault could be found in the failure to exercise such reasonable care as would have disclosed the defect and the danger attributable thereto."

Wisconsin, New Hampshire, New Jersey, Kentucky, and New Mexico have likewise determined that some form of contributory or comparative negligence not specifically under the guise of assumption of risk may be a defense to strict tort liability. See Dipple v. Sciano, (Wisc. 1967) 155 N.W.2d 55; Buttrick v. Arthur Lessert & Sons, Inc. (N.H. 1968) 260 A. 2d 111; Bexiga v. Haver Manufacturing Corp. (N.J. 1972) 290 A. 2d 281; Dealers Transport Co. v. Battery Distributing Co. (Ky. App. 1965) 402 So. 2d 441; Garrett v. Nissen Corporation (N. Mex. 1972) 498 P.2d 1359.

The Plaintiff seeks to infer that Coleman v. American Universal of Fla., Inc., (Fla. App. 1972) 264 So. 2d 451, on its face, sets forth that contributory negligence is not a reasonable defense to a product liability claim, which upon any reading of Coleman was not the holding of the First District Court of Appeal. They set forth that:

> "As isreadily apprehended, contributory negligence is a can of worms in the defense of a product liability action. But, if it is recognized that there is not such a thing as 'contributory negligence' and that the defense contemplated the sort of abnormal, unintended, or unforeseen use, or is that of assumed risk, or that of lack of due care, then there may perhaps be order brought out of the chaos. However, it is strongly suggested that even these defenses are, in the absence of uncontrovertible facts, no panacea for the defendants. There are much better ways to beat a products liability claim than relying on contributory negligence, an illusory defense." At p. 454.

Additionally, *Fla. Power & Light Co. v. R. & O Products, Inc.,* (5th Cir., 1974), 489 F. 2d 549, does not definitively answer the question as to whether or not contributory negligence or, in the alternative, comparative negligence wyuld be a defense to strict liability in Florida. Although *Fla. Power & Light Co.*, supra, goes to misuse, or a type of voluntary exposure to a known defect, as a defense to warranty, the question as to simple negligence was not by any stretch of the imagination refuted, but was simply not answered. Voluntary exposure, (Once again under the guise of assumption of risk), is a very subjective type of defense; thus it is probable that in all death cases, since the subjective state of mine of the deceased plaintiff could not be proved, as a matter of proceeding, the plaintiff would always prevail. We are confident that this Honorable Court does not seek to subject the State of Florida to the foreordaining of such a result.

The Plaintiff points out very clearly, on page 38 of his reply brief, that:

> "She (Gwendolyn West) 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 was even 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 nature of 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."

This type of result is exactly what must be guarded against by this Court in its determination of whether or not comparative or contributory negligence would be a reasonable defense to strict tort liability. The fact that the plaintiff is now deceased and her subjective state of mind cannot be shown would, under the pre-ordained result of so subjective a test, destroy those equities which are so finely balanced between the plaintiffs and defendants under the state of law as it presently exists in the State of Florida.

The answer to the certified question, based upon the presently existing Florida law and law from other jurisdictions having adopted strict tort liability is obvious, not only misuse of a product, but intervening causes which are the proximate cause of the injury, as well as comparative and/or contributory negligence, whether under the guise of assumption of risk or otherwise, are proper defenses applicable to strict tort liability.

In the case at bar, GWENDOLYN WEST, as a matter of finding, was found to be thirty-five per cent responsible for her injuries, through special interrogatories submitted to the jury by the Honorable Peter Fay; therefore, even assuming, arguendo, that the doctrine of strict liability is found to be the law in the State of Florida, any such recovery by the plaintiffs herein must be diminished by thirty-fivepper cent.

The respective position of the defendant, CATERPILLAR TRACTOR COMPANY, INC., in the case at bar, as to certified question number two and number two (a) has been duly answered and expanded upon in the original brief submitted by this defendant. Additionally, the

argument heretofore made by the defendant in the reply brief submitted herein, can be relied upon by this Court for authority for these two certified questions.

CONCLUSION

In the case at bar, and according to all briefs submitted by all parties herein, it affirmatively appears that there is no strict tort liability in the State of Florida.

Assuming, arguendo, that, in fact, this Court establishes strict tort liability (which the defendant respectfully suggests that this Court does not do), then any recovery after any type of set-off should be reduced by 35%, as in fact, this is what the jury in this particular case found the comparative negligence on the part of Gwendolyn West to be.

Respectfully submitted,

LAW OFFICES OF PAPY, LEVY,
CARRUTHERS & POOLE
Attorneys for Defendant-
Appellant
328 Minorca Avenue
Coral Gables, Florida 33134

by ______________________
JAMES S. USICH

CERTIFICATE OF MAILING

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 31st day of March, 1975 to:

SER AND KEYFETZ
Attorneys for Plaintiffs
704 Ainsley Building
Miami, Florida

and

PODHURST, ORSECK & PARKS, P.A.
Co-Counsel for Plaintiffs
66 West Flagler Street
Concord Building
Miami, Florida

and

BERKELL, STRAUSS & BENJAMIN, P.A.
Co-Counsel for Plaintiffs
1500 N. E. 162nd Street
North Miami Beach, Florida

LAW OFFICES OF PAPY, LEVY
CARRUTHERS & POOLE
Attorneys for Defendant-Appellant
328 Minorca Avenue
Coral Gables, Florida

by ______________________
JAMES S. [illegible]USICH