Supreme Court of Florida

No. SC09-1264

In re Standard Jury Instructions (Civil)
Products Liability Committee Report 09-10

RESPONSE AND APPENDIX OF GARY M. FARMER,
CHAIR, SUB-COMMITTEE ON PRODUCTS LIABILITY

The issue prompting a special response by the chair of the products liability sub-committee is the elimination of dual instructions on separate theories of strict liability for design and manufacturing defects. Current SJI PL4-5 has one instruction for manufacturing defects and an entirely different one for design defects, the latter based largely on negligence. Newly proposed SJI 403.7 eliminates the dual instructions but continues comingling strict liability and negligence for design defects. Substantively the second paragraph of SJI 403.7 for design defects is not strict liability at all, but negligence disingenuously called "strict" liability.

Separate theories do not correctly state Florida law previously recognized by this court. In merging SJI PL4-5 into a single instruction for all defects, the proposal now laid before the court does not change or revise previously

recognized Florida law on strict liability. Instead the first part of SJI 403.7 restores strict liability to a single instruction for all cases despite the origin of the defect. This correction is necessary to make strict liability coherent with RESTATEMENT (SECOND) OF TORTS, § 402A, adopted by this court in *West v. Caterpillar Tractor Co.* and explained in *Ford Motor Co. v. Hill*.

But in usage Note 3 the SJI committee clings to a disclaimer of any position on whether there are really two strict liability causes of action, one for manufacturing and another for design. Note 3 continues to be out of harmony with Florida's single theory of strict liability.

A consequence of so many lawyers voting on statements of common law principles is incoherent outcomes. For various reasons, some voters may not consider, or may ignore, the history underlying the adoption of the common law principle and its rationale. They may also give undue weight to lower court decisions misapplying § 402A. The current incoherency, the pending proposal and usage notes reflect these inconvenient truths.

Attached to this response is an outline of the history of the development of the theory behind the common law of products liability law in Florida. The outline sketches the following development:

- from *Winterbottom v. Wright* and the rule of privity;

- to *Thomas v. Winchester* and the first intrusion on privity for "imminently dangerous" products;

- to *MacPherson v. Buick Motor Co*., recognizing liability as a matter of law for dangerous instrumentalities;

- to *Henningsen v. Bloomfield Motors*, inferring a warranty of merchantability in a sale of defective goods harmful to humans and their property;

- to Prosser's influential law review article, *The Assault Upon The Citadel (Strict Liability To the Consumer)*, arguing for a blanket rule of law making any supplier in the distribution chain of defective products unreasonably dangerous to users and bystanders strictly liable for damages *as an enterprise liability without proof of fault*;

- to *Greenman v. Yuba Power Products*, adopting Professor Prosser's proposition;

- to the American Law Institute's RESTATEMENT (SECOND) OF TORTS, § 402A, restating the rule of strict liability as proposed by Professor Prosser and adopted in *Greenman*; and finally

- to *West v. Caterpillar Tractor Co.*, adopting § 402A as the law of Florida, and *Ford Motor Co. v. Hill*, specifying a single theory of strict liability under § 402A in Florida that applies to all claims whether the defect arose in design or in manufacturing.

A study of this history shows that the common law began by barring most claims. It ended by giving claimants a single burden: prove simply that defendant was a purveyor in the stream of commerce of an unreasonably dangerous product causing injury, for which strictly liability is imposed as a cost of doing business. When this court decided *West v. Caterpillar Tractor*

Company, it adopted the theory of § 402A, RESTATEMENT (SECOND) OF TORTS.

Products liability law has evolved from a policy of *caveat emptor* to a policy of *caveat venditor*. An enterprise in the market chain supplying an unreasonably dangerous product was now liable without negligence, fault or knowledge. Liability is based solely on entrepreneurial responsibility for costs caused by defective products moving in the streams of commerce.

In *Ford Motor Co. v. Hill* this court explicitly considered the argument that strict liability under § 402A requires different tests for manufacturing and design defects:

> "*Ford … contends* there are such significant differences between manufacturing flaws (where products do not conform to planned specifications due to manufacturing error) and design defects (where products are produced as designed but the design itself is defective) that *this Court should utilize a negligence standard for design defects and permit strict liability for manufacturing errors*….
>
> "It appears that analysis of whether a product is in a defective condition unreasonably dangerous to the user involves a negligence analysis in a 'design defect' case, unlike the analysis ordinarily required in a 'manufacturing flaw' situation. *But this does not mean it is erroneous to apply the doctrine of strict liability to design defect cases*." [e.s.]

In rejecting Ford's argument, this court quoted the following with undisguised endorsement:

> "It would be a strange result if we said that a manufacturer who carefully designs a product and thereafter negligently produces it should be held liable, but a manufacturer who negligently designs the product and thereafter carefully produces it pursuant to the negligent design should be relieved of liability." (quoting *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979)).

Similarly, this court also endorsed the following quote:

> "The policy reasons for adopting strict tort liability do not change merely because of the type of defect alleged. If a product, due to its design, is dangerous at the time of an accident, that should be sufficient to impose strict tort liability." (quoting 2 L. Frumer & M. Friedman, PRODUCTS LIABILITY § 16A(4)(f) (iv)(D) at 3B-136.2(p) (1981)).

In its holding on the argument for dual tests, this court said:

> "We feel that the better rule is to apply the strict liability test to all manufactured products *without distinction as to whether the defect was caused by the design or the manufacturing*. If so choosing, however, a plaintiff may also proceed in negligence." [e.s.]

404 So.2d at 1051-52. Some objectors dismiss *Hill*, saying it is merely a crashworthiness case, as though that would make some difference in products liability law. Obviously it is incorrect to argue that this court's decisions require different tests on manufacture and design.

Although none of the objectors so concedes, § 402A actually does address design defects and the risk-utility test, but not in the way these objectors contend. The ALI appended several Comments to § 402A

explaining its meaning. Within that body of comments is Comment *k*, § 402A, stating:

> UNAVOIDABLY UNSAFE PRODUCTS. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. … The seller of such products, … with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

RESTATEMENT (SECOND) OF TORTS, § 402A, Comment *k*. The rule in § 402A expressly applies to "any product" dangerously defective, not just those whose defect arose in manufacturing rather than design. In all of ALI's Comments explaining § 402A, however, only Comment *k* calls for an exemption from § 402A's broad categorical rule imposing strict liability on anyone who markets *any product* unreasonably dangerous to the user. And the single exemption in Comment *k* is very specifically restricted to a single subclass of "any product" — namely, those that are *unavoidably unsafe*.

The Comment *k* exemption aims at very few products, certain drugs being the primary example. The "risk" addressed in Comment *k* is the use of an efficacious product dangerous when used as intended. The "utility"

addressed in Comment *k* comes not from the design but instead from some rare public benefit making the risk acceptable. To interpret the Comment *k* exemption to apply to any product is to ignore or reject its rare application. Absolutely nothing in the whole of § 402A, or for that matter in *West*, suggests that this rigorously restricted exemption was ever meant to apply across the board to the design of just any product.

The risk-utility test of Comment *k* was further meant to be available only upon proof of facts that the product has been "properly prepared and marketed, and proper warning is given, where the situation calls for it." Obviously the only party is in a position to establish the factual predicate for the exemption (proper preparation, proper marketing, giving proper warning) is the enterprise placing the product in the stream of commerce.

In sum, it necessarily follows that the risk-utility test restrictively allowed by Comment *k* is in the nature of an avoidance of otherwise overall liability. It was intended to function only as an affirmative defense, pleaded and proved by defendant. Nothing in the text of § 402A or its history suggests any logic in claimant having to plead this exemption as an element of a cause of action in strict liability.

In spite of this history, many of the objectors argue that defects from

design should require proof that defendant was negligent in failing to design a safer product. Not a single one makes any attempt to show any support in the foregoing history leading to the common law theory of strict liability in § 402A or *West*. It is therefore necessary to have at hand this historical perspective of how Florida came to § 402A. To lose this perspective is to be mired in a web of conflicting arguments blind to the policy served by the adoption of this rule.

From a textual and structural standpoint, the position of those arguing for a different test for design defects is ill-founded. The categorical rule set forth in § 402A specifies *any product* dangerous when used as intended. Again, Comment *k*, the source of the risk-utility test, is the only exemption from the *any product* rule in § 402A. Hence, textually and structurally, the risk-utility test functions only as an exemption to a categorical rule and is itself plainly restricted to unavoidably unsafe products having a rare public benefit. With this text and structure, no recognized principle of legal interpretation of written documents would allow the exemption to be read as an extension of the rule itself.

The objectors seek to make the exemption in Comment *k* applicable to the design of many products: cars, ladders, tools, appliances, building

supplies (to list just a few). Is it possible to manufacture any product without some design? Probably not. It seems unlikely today that many products are made and sold in retail commerce without some prior design, scheme, plan, or template. Although it is argued that design defects should be treated differently because design can be complex, that was certainly true in the 1960-70s when § 402A and *West* were adopted. Nevertheless, the rule of strict liability was then made to apply to *any product* dangerous when used as intended.

But for the objectors, no product would seem to be outside the reach of their design/risk-utility theory except for those they concede arise from manufacturing defects. By this reasoning does exemption swallow rule. Most defective products would be subject to proof of negligence. Thus would end true strict liability.

The fact that designing products is commercially complex hardly justifies exempting them from the categorical rule of strict liability. In fact it makes strict liability even more compelling. If not even the product's designer can make it reasonably safe to use as intended, how are its users — who lack a designer's special skill, knowledge and experience — expected to protect themselves from the danger? Under the enterprise theory of liability,

placing the costs created by design defects on those who market them will more effectively and cheaply cleanse the streams of commerce of such dangers, leaving products of safer design.

Many objectors support their argument with highly selective decisions in Florida and other jurisdictions, with legal theorists in the literature, and with the more recently published Third Restatement. Their real purpose is to have this court abandon the RESTATEMENT (SECOND) OF TORTS as adopted in *West* and replace it with a new theory advanced by a later Restatement.

Basically those arguing for a dual theory seek to bend the law backwards to a negligence theory of liability for all defectively designed products. They aspire to convincing this court to get rid of the true strict enterprise liability for such claims stated in § 402A, *West* and *Hill*. In light of the history of the adoption of § 402A and its text, those arguing for a policy of dual design/manufacturing tests necessarily assume a burden of addressing significant, outcome-determinative questions. The pertinent questions are these:

> ► If the real basis for strict liability theory is one of enterprise liability as an ordinary cost of doing business, and if the claimant is not required to show diligence in discovering the defect before using the product as intended, what would justify requiring claimants to locate the cause of the defect in the process of design, manufacture, distribution or sale as an element of liability?

► If strict liability is imposed for simply purveying a defective product having an unreasonable danger unexpectedly embedded in the product's ordinary use causing injury, what relevance as an element of the cause of action would the source of the defect have?

► Even if a claimant could figure out what made the design defective, what is the coherence of a policy behind requiring claimant to prove negligence in designing the product if strict liability is an enterprise liability for marketing such products?

► If a product is shown to be unreasonably dangerous when used as intended, why shouldn't the cause of the defect be the concern only of defendant as a matter of contribution or indemnification?

Not a single one of these questions is addressed and answered by those arguing for dual tests.

Two Florida appellate courts have held that this court adopted only the RESTATEMENT (SECOND) OF TORTS — not the design/risk-utility theory of a later Restatement. On the other hand — and in spite of the very restricted availability of the risk-utility exemption in Comment *k* — another appellate court in Florida has relied on a later Restatement to hold that the design/risk-utility exemption is an element of the current general theory of products liability requiring allegations about design. Although this court has not addressed the issue of risk-utility as an affirmative defense, two appellate decisions have held that risk-utility is an affirmative defense under § 402A.

Two sub-committee members argue that *Hill* rejects an implication that a

claimant need not allege whether the product defect arose from design or manufacture. Given the history, *Hill* cannot possibly mean anything but that. One objector, who happens to have been the lawyer for appellee in *Hill*, argues with *ipse dixit* that design and manufacturing claims are subject to different rules. He too offers nothing in the history, the text of § 402A, *West* or any other supreme court decision to support his assertion or explain a plausible basis for such a distinction.

Indeed many objectors openly seek to have this court recede from § 402A, *West* and *Hill* in favor of a negligence rule for design defects under a later Restatement. I understand that the role of the SJI committee is to propose standard formulations of existing Florida law comprehensible to lay jurors. I do not understand that our role is to rewrite the law to change theories. I further understand that we must find current law primarily from the Florida Supreme Court rather than eccentric, outlier decisions from lower courts and in other jurisdictions. The committee may look favorably on some foreign decisions — but only to the extent they cohere with the policies adopted by this court on the same subject.

These proposed revisions do not present an occasion to recede from *West* and adopt a later and different Restatement. Nor is it the role of the

committee to propose changes in the law. Rather our role is only to formulate a strict liability SJI conforming to the original meaning of the law recognized by this court: § 402A, *West,* and *Hill*. In approving such instructions this court is obviously not engaged in considering changes to the common law.

In approving standard jury instructions for general use, this court traditionally insists that its approval should not be taken to authorize a SJI in any particular case. Unquestionably, the trial judge must first decide if the pleadings and evidence support a SJI. Nonetheless this court's approval of SJI grants their correctness as generic statements of existing Florida law.

There is one — and only *one* — test for strict liability in Florida. It is called the consumer expectations test. It applies to all defective products, not just manufacturing mistakes. It is not concerned with how a product became dangerous or about its utility. It applies to any defendant who is a link in a chain of commerce supplying products to users and consumers.

Conclusion

History teaches that strict liability is based on pursuing a business supplying products unreasonably dangerous when used as expected. Liability for designing, making, importing, distributing, supplying or selling

a defective product is imposed solely because defendant placed the product in a position to cause the injury. Neither § 402A nor *West* nor *Hill* require proof of a better design or pleading a cause of action in negligence.

Respectfully submitted,

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Certificate Of Service and E-filing

I hereby certify that on this 19th day of February, 2010, a true copy of the foregoing was placed in the United States Mail, addressed to Tracy Raffles Gunn, Chair, Supreme Court Committee on Standard Jury Instructions (Civil), 400 N. Ashley Drive, Suite 2055, Tampa, FL 33602; and that the original hereof was transmitted by electronic mail to tgunn@gunnappeals.com, and for filing to e-file@flcourts.org (subject: SC09-1264).

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Appendix to Response of Gary M. Farmer

STRICT LIABILITY IN FLORIDA: ONE TEST OR TWO

I. Evolution of Strict Liability

1. *Winterbottom v. Wright*, 152 Eng. Rep. 402, 404-05 (Ex. 1842)

Holding: Applying contract privity doctrine to negligence actions for personal injury from dangerous products.

- *Caveat Emptor*
- Described by Keeton as a "fishbone in the throat of the law".

2. *Thomas v. Winchester*, 6 N.Y. 397 (1852)

Holding: No privity needed for "imminently dangerous" product, here a mislabeled drug.

3. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916)

Holding: No privity required for auto with defective wheel, deemed a dangerous instrumentality.

4. *Henningsen v. Bloomfield Motors, Inc*., 161 A.2d 69 (N.J. 1960)

Recognized implied warranty of merchantability without privity for products dangerous to users

> "And of tremendous significance in a rapidly expanding commercial society was the recognition of the right to recover damages on account of personal injuries arising from a breach of warranty. … [U]nder such circumstances strict liability is imposed upon the maker or seller of the product. Recovery of

damages does not depend upon proof of negligence or knowledge of the defect."

5. William L. Prosser, *The Assault Upon The Citadel (Strict Liability To the Consumer)*, 69 YALE L.J. 1099 (June 1960).

Arguing for Strict Liability:

"What is needed is a blanket rule which makes any supplier in the chain liable directly to the ultimate user, and so short-circuits the whole unwieldy process. This is in the interest, not only of the consumer, but of the courts, and even on occasion of the suppliers themselves."

69 YALE L.J., at 1122-24.

6. *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1962).

Adopting Strict Liability:

"A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. Recognized first in the case of unwholesome food products, such liability has now been extended to a variety of other products that create as great or greater hazards if defective."

7. American Law Institute, RESTATEMENT (SECOND) OF TORTS, § 402A (1965).

Stating rule of Strict Liability:

"(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.

Comments:

a. This Section states a special rule applicable to sellers of products. The rule is one of strict liability, making the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product.

…

c. … [T]he 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 accidental 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.

…

f. Business of selling. The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant. It is not necessary that the seller be engaged solely in the business of selling such products. Thus the rule applies to the owner of a motion picture theatre who sells popcorn or ice cream,

either for consumption on the premises or in packages to be taken home.

…

g. Defective condition. The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained. …

…

i. Unreasonably dangerous. The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. … The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. …

…

k. Unavoidably unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no

assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk."

II. Florida Adoption of Strict Liability

A. *West v. Caterpillar Tractor Co.*, 336 So.2d 80 (Fla. 1976).

Holding:

> "The obligation of the manufacturer must become what in justice it ought to be — *an enterprise liability*, and one which should not depend upon the intricacies of the law of sales. The cost of injuries or damages, either to persons or property, resulting from defective products, should be borne by the makers of the products who put them into the channels of trade, rather than by the injured or damaged persons who are ordinarily powerless to protect themselves. We therefore hold that *a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being*. This doctrine of strict liability applies when harm befalls a foreseeable bystander who comes within range of the danger." [e.s.]

336 So.2d at 92.

B. *Explication of* West

1. *Ford Motor Co. v. Hill*, 404 So.2d 1049, 1051-52 (Fla. 1981).

Holding: Cause of action for strict liability does not distinguish between manufacturing and design defects:

> "*Ford … contends* there are such significant differences between manufacturing flaws (where products do not conform to planned specifications due to manufacturing error) and design defects (where products are produced as designed but the design itself is defective) *that this Court should utilize a negligence standard for design defects and permit strict liability for manufacturing errors*. Ford reasons that in manufacturing flaws there is a guide, the plan or blueprint of the product, to aid jurors in determining defectiveness, but that no such comparison guide is available for design defects. Instead, Ford contends that the highly technical issues involved in an engineering design choice are too complex for jurors with no engineering training or manufacturing experience. Thus, Ford asserts that the product must be evaluated in terms of how well it performed, taking into account all of the practical and technical problems of the designer's options a negligence standard.
>
> "It appears that analysis of whether a product is in a defective condition unreasonably dangerous to the user involves a negligence analysis in a 'design defect' case, unlike the analysis ordinarily required in a 'manufacturing flaw' situation. But this does not mean it is erroneous to apply the doctrine of strict liability to design defect cases. *Huff v. White Motor Corp*., 565 F.2d 104 (7th Cir. 1977), the Seventh Circuit Court of Appeals overruled its earlier decision in *Evans v. General Motors Corp*., 359 F.2d 822 (7th Cir. 1966), saying:
>
> > 'One who is injured as a result of a mechanical defect in a motor vehicle should be protected under the doctrine of strict liability even though the defect was not the cause of the collision which precipitated the injury. There is no rational basis for limiting the manufacturer's liability to those instances where a structural defect has caused the collision and resulting injury. This is so because even if a collision is not caused by a structural defect, a collision may

precipitate the malfunction of a defective part and cause injury. In that circumstance the collision, the defect, and the injury are interdependent and should be viewed as a combined event. Such an event is the foreseeable risk that a manufacturer should assume. Since collisions for whatever cause are foreseeable events, the scope of liability should be commensurate with the scope of the foreseeable risks.'

565 F.2d at 109.

Commenting on this language the Nebraska Supreme Court in *Hancock v. Paccar, Inc*., 204 Neb. 468, 283 N.W.2d 25 (1979), stated:

'Such result, based upon either simple logic or the law, makes sense. *It would be a strange result if we said that a manufacturer who carefully designs a product and thereafter negligently produces it should be held liable, but a manufacturer who negligently designs the product and thereafter carefully produces it pursuant to the negligent design should be relieved of liability*.'

Id. at 475, 283 N.W.2d at 33. Moreover, some commentators agree that

'*(t)he policy reasons for adopting strict tort liability do not change merely because of the type of defect alleged. If a product, due to its design, is dangerous at the time of an accident, that should be sufficient to impose strict tort liability*.'

2 L. Frumer & M. Friedman, PRODUCTS LIABILITY § 16A(4)(f)(iv)(D) at 3B-136.2(p) (1981). *Contra*, Henderson, Renewed Judicial Controversy over Defective Product Design: Toward the Preservation of an Emerging Consensus, 63 MINN. L. REV. 773 (1979).

"*We feel that the better rule is to apply the strict liability test to all manufactured products without distinction as to whether the defect was caused by the design or the manufacturing.* If so choosing, however, a plaintiff may also proceed in negligence." [e.s., c.o.]

2. *Radiation Technology Inc. v. Ware Const. Co.*, 445 So.2d 329 (Fla.

1983).

NB: Does Not Involve A Strict Liability Claim. A general contractor sued its supplier for breach of contract; the supreme court explained the meaning of the term "unreasonably dangerous" in *West* for cases not involving strict liability:

> "With the adoption of strict liability in *West v. Caterpillar Tractor Co.*, 336 So.2d 80 (Fla.1976), the phrase became largely passé except as a rhetorical device …. Section 402A refers to products which are 'unreasonably dangerous to the user or consumer or to his property' regardless of privity. The term 'unreasonably dangerous' more accurately depicts liability of a manufacturer or supplier in that it balances the likelihood and gravity of potential injury against the utility of the product, the availability of other, safer products to meet the same need, the obviousness of the danger, public knowledge and expectation of the danger, the adequacy of instructions and warnings on safe use, and the ability to eliminate or minimize the danger without seriously impairing the product or making it unduly expensive. Thus, an unsafe product, whether it be characterized as inherently dangerous or unavoidably dangerous, would not necessarily be an unreasonably dangerous product." [c.o.]

3. *Kramer v. Piper Aircraft Corp.*, 520 So.2d 37 (Fla. 1988).

Holding: *West* abolished the cause of action for breach of implied warranty without privity:

> "As we noted in *West* our recognition of the strict liability cause of action, in most instances, merely 'accomplishes a change in nomenclature' rather than presenting any great new departure from present law. 336 So.2d at 86. The source of warranty law is in contract while *the obligation imposed upon a manufacturer is in the nature of enterprise liability and should not be governed by the law of sales*. [e.s.]

C. Selected DCA Decisions discussing *West*

1. *Cassisi v. Maytag Co.*, 396 So.2d 1140 (Fla. 1st DCA 1981).

Holding:
- when a product malfunctions during normal operation, a legal inference of product defectiveness arises and plaintiff thereby establishes a prima facie case for jury consideration,
- fact that defendant was not in control of product when injury occurred not a bar to inference of defective
- immaterial that plaintiffs failed to identify specific cause of malfunction
- when evidence consists only of proof showing that product malfunctioned during normal operation, court will infer that defect was not from design, because malfunction of product is not result ordinarily intended by manufacturer

2. *Adams v. G.D. Searle & Co.*, 576 So.2d 728 (Fla. 2d DCA 1991).

Holding: §402A, Comment *k* avoidance of strict liability, concerning unavoidably unsafe products, did not intend that the avoidance should be applied to all prescription drugs; and it is an affirmative defense for defendant to plead and prove:

> "[B]y its terms comment k applies to products which current knowledge and technology cannot make safe for their ordinary use, but for which society has a need great enough to justify using the product despite its dangers. Comment k increases the standard a plaintiff must meet from that of strict liability to negligence.[FN]
>
> FN: Comment k protects manufacturers from strict liability only for design defects. An injured party may seek strict liability for manufacturing defects or inadequate warnings even though comment k applies.
>
> …

"[W]e believe that the policy reasons supporting a blanket approach are countervailed by those supporting a more selective application of the comment.

"[C]omment k itself adopts a risk/benefit analysis in using the Pasteur rabies vaccine as an 'outstanding example' of a product which is protected by comment k. It notes that injecting the vaccine may lead to very serious consequences, but because the disease 'invariably leads to a dreadful death,' the vaccine's marketing and use are justified. *Applying comment k uniformly to all prescription drugs therefore rejects the comment's own approach to determining its scope*.

…

"*We therefore hold that* ***the seller has the burden*** *to establish the application of comment k.* We also hold that whether comment k applies is a mixed question of fact and law. If reasonable minds could reach only one conclusion, then the trial judge may rule; but if reasonable minds might differ, then the matter must be submitted to the jury." [e.s., c.o.]

3. *Force v. Ford Motor Co.*, 879 So.2d 103 (Fla. 5th DCA 2004)

Holding: Consumer expectations test is applicable to design defect claim:

"*Both parties agree that the risk-utility* standard (or, as it sometimes called, the risk-benefit standard), is applicable to the present dispute." [e.s., c.o.]]

…

"Ford and Mazda argue with some force that the consumer-expectation test cannot be applied to design defect claims involving complex products, in general, and seatbelts in particular.

…

"We conclude that there may indeed be products that are too complex for a logical application of the consumer-expectation standard. We leave the definition of those products to be sorted out by trial courts. With respect to seatbelts, however, we

believe that the cases finding that they may be tested by the consumer-expectation standard are better reasoned and more persuasive." [879 So.2d at 106, 110]

4. *McConnell v. Union Carbide Corp.*, 937 So.2d 148 (Fla. 4th DCA 2006).

Holding:
- Consumer expectations test applies in strict liability claim for failure to warn of dangerously designed product used as intended
- Plaintiff is not required to plead whether defect is from design or manufacturing
- *West* adopted §402A, RESTATEMENT (SECOND) OF TORTS; Florida does not recognize the RESTATEMENT (THIRD) OF TORTS and its risk-benefit test.

> "In objecting to FSJI PL4-PL5, Carbide argued that plaintiffs had not specifically pleaded whether it was a design or a manufacturing defect that made the product defective. But it is not apparent to us why it would matter whether the defect originated specifically in its design or its manufacture or both. In *Ford Motor Co. v. Hill*, 404 So.2d 1049 (Fla.1981), the court quoted the following with approval:
>
> > 'It would be a strange result if we said that a manufacturer who carefully designs a product and thereafter negligently produces it should be held liable, but a manufacturer who negligently designs the product and thereafter carefully produces it pursuant to the negligent design should be relieved of liability.' "
>
> …
>
> Thus, pleading specifically that the defect in the product came from its design or, instead, its manufacture is not required to make the claim a strict liability claim under section 402A or to make FSJI PL4-PL5 applicable. Accordingly, Carbide's argument — that FSJI PL4-PL5 was not applicable because of the failure to plead and prove whether the defect came from its design or from its manufacture — is not correct."

937 So.2d at 153.

5. *Agrofollajes S.A. v. E.I. Du Pont De Nemours & Co. Inc.*, --- So.3d ---, 34 Fla. L. Weekly D2578, 2009 WL 4828975 (Fla. 3 DCA Dec. 16, 2009).

Holding:
Consumer expectations test could not be used as an independent basis for finding systemic fungicide defective in product liability claim against manufacturer and marketer of fungicide; risk-utility/risk-benefit test of Restatement (Third) of Torts § 2 determined defectiveness.

N.B. The *Agrofollajes* opinion does not cite or discuss any of the following authorities:

RESTATEMENT (SECOND) OF TORTS, § 402A
West v. Caterpillar Tractor Co.
Ford Motor Co. v. Hill
McConnell v. Union Carbide Corp.
Force v. Ford Motor Co.
Adams v. G.D. Searle & Co.

6. *See also* 41A FLA. JUR. 2d, Products Liability § 74:

"There are some products that, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. … *It is an affirmative defense to a strict liability claim that a product is unavoidably unsafe*, and negligence must be established before the manufacturer may be subject to liability in tort.") [e.s.]

Conclusions

☼ The only test for a strict liability claim under § 402A and *West* is the

consumer expectations test which applies categorically and explicitly to “any product” unreasonably dangerous when used as intended.

☼ The **s**upreme court’s decision in *Ford Motor Co. v. Hill* rejects two different strict liability tests, one for manufacturing, a different one for design.

☼ The current SJI PL 4-5 with their dual tests are incoherent with § 402A as adopted in *West* and explained in *Ford Motor Co. v. Hill*.

☼ The committee comments taking no position on the risk-utility test retains the incoherency problem with § 402A as adopted in *West* and explained in *Ford Motor Co. v. Hill*.

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