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Thus, the settled prior law[61] concerning the standard of suitable work for union members under unemployment compensation laws is apparently undisturbed by article I, section 6 of the Florida Constitution. However, the significance of the instant case lies not in its preservation of the traditional understanding of the disqualification provisions of unemployment compensation laws, but in the majority's failure to specifically address the constitutional issue. In rejecting the claimant's constitutional contentions by implication rather than by explication, the instant court failed to take the opportunity to clearly delineate which aspects of union membership are granted constitutional protection in Florida. Apparently, the right to be free from discriminatory treatment in job opportunities and the right to negotiate for more favorable working conditions are incidents of union membership safeguarded by the constitution. Incidents of membership such as retirement or medical benefits or even a membership card, however, may not be of this importance. This conclusion does conform with the philosophy of the Unemployment Compensation Law, and is in accord with the Florida Constitution but the instant court did not deal adequately with the issues presented. Therefore, when given a second opportunity, the Supreme Court of Florida should fully articulate the implications of this decision and finally lay the arguments of the dissent to rest.

ROBERT WARREN WEDAN, JR

PRODUCTS LIABILITY IN FLORIDA UNDER SECTION 402A: NEW LANGUAGE OR NEW LAW?

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

Gwendolyn West was killed by a Caterpillar grader as she crossed a street under construction in Miami, Florida. The grader was not equipped with adequate rear view mirrors, and the operator was unable to see Mrs. West as she heedlessly crossed the street. Her husband brought a diversity suit in the federal district court[1] against the manufacturer of the grader, claiming damages in negligence, implied warranty liability and strict liability. The court entered

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unemployed into the job market regardless of prior work history, the protective mantle of union contracts and union demands arising out of a prior job should not merit consideration." *Id.*

Another view is that the threat of losing union benefits or membership is only as serious as the threat of losing fringe benefits. At present, this threat is not considered as worthy as other factors which do justify refusal of work: substantial decrease in wages, threat to health and safety, infringement of religious freedom. *See* Bowers, *Job Refusal in Unemployment Compensation Claims*, 13 CLEV. MAR. L. REV. 523, 526 (1964). *See also* Sherbert v. Verner, 374 U.S. 398 (1963).

61. See text accompanying notes 24-29 *supra*.

1. United States District Court for the Southern District of Florida (an unreported opinion). The facts and holding of the lower court opinion are contained in West v. Caterpillar Tractor Co., 504 F.2d 967, 968 (5th Cir. 1974).

judgment[2] against Caterpillar on all three theories of liability,[3] but disregarded the jury's finding that Mrs. West was contributorily negligent.[4] On appeal, the Court of Appeals for the Fifth Circuit[5] certified questions on strict liability, implied warranty liability and contributory negligence to the Supreme Court of Florida.[6] In response, the court adopted section 402A of the RESTATEMENT (SECOND) OF TORTS[7] and HELD, that "a manufacturer may be held liable under the theory of strict liability in tort . . . for injury to a user of the product or a bystander,"[8] and that failure to use "ordinary due care" is a comparative negligence defense to actions in strict liability and implied warranty liability.[9]

2. West was awarded net damages of $90,000 representing the jury's finding of total damages of $125,000 less a $35,000 settlement between West and the operators of the grader, Houdaille Industries. *Id.* at 969.

3. The plaintiff's expert testimony "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." *Id.* at 968.

4. The evidence showed that Mrs. West had walked into the street while looking into her purse and "continued to look into her purse until the time of the accident. She did not look . . . at any time toward the approaching grader." *Id.* at 968. The jury found that this behavior was negligent and contributed "to the accident to a degree of 35 percent." *Id.* at 969. The District Court determined that, under Florida law, contributory negligence was neither a total bar to recovery nor a comparative defense in strict liability. Therefore, it did not reduce the judgment. See note 24 *infra.*

5. 504 F.2d 967 (5th Cir. 1974).

6. The following questions were 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? *Id.* at 969-70. The certification procedure was enacted by the Florida legislature as a means by which the United States appellate courts could determine state law as required in diversity cases under the *Erie* doctrine. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). The Florida supreme court has discretion in deciding whether to answer the certification from the federal court, FLA. STAT. §25.031 (1975), but it has been held that the answer is binding on the federal court. Boyd v. Bowman, 455 F.2d 927 (5th Cir. 1972). *See also* Note, *Florida's Interjurisdictional Certification: A Re-examination to Promote Expanded National Use,* 22 U. FLA. L. REV. 21 (1969).

7. RESTATEMENT (SECOND) OF TORTS §402A, which states: "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."

8. 336 So. 2d at 89.

9. *Id.* at 92.

Products liability in Florida has developed within the contractual framework of implied warranty liability.[10] The consumer's heavy burden of establishing the requisite privity and of negating disclaimers, which were inherent in an implied warranty action, often immunized manufacturers from liability for personal injuries caused by their defective products.[11] A growing concern for consumer protection and a concommittant awareness of the difficulty in surmounting these contractual barriers to recovery caused Florida courts to impose liability when an injured user or consumer was not in privity of contract with the manufacturer[12] as well as when the manufacturer contractually disclaimed his liability.[13] Thus, manufacturers were held to an increasingly strict standard of liability for personal injuries that resulted from their defective products.[14]

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10. Implied warranty was first used as a basis of recovery for personal injuries in Smith v. Burdine's, Inc., 144 Fla. 500, 198 So. 223 (1940), where the seller of defective lipstick was held liable for the injuries sustained by the purchaser. Under the contractually based implied warranty action the injured plaintiff must prove that his injuries were caused by a product which was not "merchantable" or "fit for the ordinary purposes for which such goods are used." Hicks & Sternlieb, *Products Warranty Law in Florida — A Realistic Overview*, 25 U. MIAMI L. REV. 241, 241 (1971). By contrast, in a tort action the plaintiff has the greater burden of proving the negligence of the seller. The implied warranty action, however, is burdened by such contractual vestiges as the need for privity of contract between seller and buyer, the requirement for a notice of the breach, and the seller's opportunity to disclaim his liability contractually. The evolution from the purely contractual warranty action to a purely strict tort action was accomplished by judicial erosion of these vestiges. See notes 11-14 *infra*; *see also* Ausness, *From Caveat Emptor to Strict Liability: A Review of Products Liability in Florida*, 24 U. FLA. L. REV. 410 (1972).

11. It is ironic that the contractual elements were crucial to a warranty action since "[t]he action for breach of warranty was originally one on the case, sounding in tort and closely allied to deceit, from which it was not distinguished; and it was not until 1778 that the contract action was held to lie at all." Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1126 (1960) (footnotes omitted). Subsequently, warranty became so firmly established as a contractual concept that there was reluctance to imply a warranty in the absence of a contract. Thus, the modern "merger" between warranty and tort is really an historical anomaly; the fictions devised by courts to overcome the contractual obstacles of warranty have essentially been mechanisms for restoring warranty to its original concept, rather than creating a new one. *Id.* at 1124, n.153.

12. Soon after implied warranty was first used in a personal injury action, a manufacturer of contaminated canned meat was held liable for the injuries sustained by a user who had purchased the meat from a third party. Blanton v. Cudahy Packing Co., 154 Fla. 872, 19 So. 2d 313 (1944). *Blanton* was soon extended: to manufacturers of defective bottles purchased from machines, Florida Coca-Cola Bottling Co. v. Jordon, 62 So. 2d 910 (Fla. 1953); to wholesalers of seeds which did not conform to their representation, Hoskins v. Jackson Grain Co., 63 So. 2d 514 (Fla. 1953); to manufacturers of "inherently dangerous" products, Matthews v. Lawnlite Co., 88 So. 2d 299 (Fla. 1956); and finally to manufacturers of products which are neither foodstuffs nor inherently dangerous, Bernstein v. Lily-Tulip Cup Corp., 177 So. 2d 362 (3d D.C.A. Fla. 1965). *Lily* is often cited as the case which completely eliminated the privity requirement in manufacturers' liability. *See* Ausness, *supra* note 10, at 418.

13. The manufacturer's defense of disclaimer was firmly renounced in Ford Motor Co. v. Pittman, 227 So. 2d 246 (1st D.C.A. Fla. 1969). See Hicks & Sternlieb, *supra* note 10, at 254. The status of a retailer's disclaimer is uncertain. See note 50 *infra*.

14. Florida's position on so-called unavoidably unsafe products is not clear. In Green v. American Tobacco Co., 154 So. 2d 169, 170 (Fla. 1963), the supreme court stated that in Florida "a manufacturer's or seller's actual knowledge or opportunity for knowledge of a

In clinging to the language of implied warranty, however, Florida for years lagged behind the national trend of explicitly recognizing manufacturers' liability as strict liability in tort. Within the last decade the majority of states have moved to a strict liability theory.[15] Many have adopted the formulation given in section 402A of the RESTATEMENT (SECOND) OF TORTS which holds a manufacturer strictly liable for a user's injuries caused by a product which is in a "defective condition unreasonably dangerous to the user."[16]

Several states have gone beyond the Restatement's position by extending manufacturers' liability to injuries suffered by bystanders.[17] Bystanders have recovered under implied warranty in Florida, but only when the product involved was a "dangerous instrumentality" or "inherently dangerous".[18] This posture resulted in confusion, and the federal court in the instant case could not discern whether injured bystanders received the same degree of protection under state law as injured users of defective products.

The Fifth Circuit was also unsure of the available defenses to a strict liability action in Florida. The specific issue had not yet arisen in a Florida case because Florida had not expressly recognized strict liability. Under the Restatement, recovery is barred only if the user "discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the prod-

defective or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty." This was so even "when the manufacturer . . . 'could not, by the reasonable application of human skill and foresight, have known of the danger'." *Id.*, citing Green v. American Tobacco Co., 304 F.2d 70, 86 (5th Cir. 1962). Subsequently, the court has seemingly backed away from the broad language in *Green*, at least with respect to a seller's liability. *See, e.g.*, McLeod v. W. S. Merrell Co., 174 So. 2d 736 (Fla. 1965), *aff'g* 167 So. 2d 901 (3d D.C.A. Fla. 1964) (retail druggist escaped liability for injuries caused by new and experimental drugs); and Russell v. Community Blood Bank, Inc., 185 So. 2d 749 (2d D.C.A. Fla. 1966), *rev'd on other grounds*, 196 So. 2d 115 (Fla. 1967) (blood bank would be liable only if defect in blood were capable of being detected). Subsequently, a statute was passed which immunizes blood banks and hospitals from implied warranty liability in blood transfusions when the defect in the blood is not reasonably detectable. FLA. STAT. §672.316(5) (1975). See also Ausness, *supra* note 10, at 424-27.

15. At least thirty-four states recognize strict liability for the manufacturer. *See* West v. Caterpillar Tractor Co., 336 So. 2d 80, 87 n. 1 (Fla. 1976), for a compilation of the leading cases in each state. The evolution of strict products liability nationwide has been chronicled by Dean Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

16. See note 7 *supra*. See West v. Caterpillar Tractor Co., 336 So. 2d 80, 87 n.1 (Fla. 1976), for a compilation of the cases in those states which have explicitly adopted §402A.

17. The Restatement expressly declines to take a position on bystander's liability. RESTATEMENT (SECOND) OF TORTS §402A, caveat (1) at 348 (1965). Most states that have extended recovery to bystanders have done so without restriction. "[T]he manufacturer of a defective product is liable to *any* person injured or damaged. . . ." Codling v. Paglia, 32 N.Y.2d 330, 342, 298 N.E.2d 622, 628, 345 N.Y.S.2d 461, 469 (1973) (emphasis added). "[I]f any distinction should be made between bystanders and users, it should be made . . . to extend *greater* liability in favor of the bystanders." Elmore v. American Motors Corp., 70 Cal.2d 578, 586, 451 P.2d 84, 89, 75 Cal. Rptr. 652, 657 (1969) (emphasis added).

18. "[L]iability of the manufacturer or supplier [should be limited] to one who is injured while 'in the vicinity of such use' . . . to cases involving an inherently and imminently dangerous defect. . . ." Rawls v. Ziegler, 107 So. 2d 601, 608 (Fla. 1958). *See also* Toombs v. Fort Pierce Gas Co., 208 So. 2d 615 (Fla. 1968); Ausness, *supra* note 10, at 421.

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uct. . . ."[19] Some states, however, recognize the plaintiff's inadvertent failure to use ordinary due care as a complete defense to a strict liability action through the theory of contributory negligence.[20] Other states treat contributory negligence as a comparative defense mitigating but not totally barring the damage recovery.[21] Florida had adopted the comparative negligence doctrine in negligence actions,[22] but failure to use ordinary due care was a total bar to recovery in an implied warranty action.[23] The federal court apparently felt that existing case law was not sufficiently clear to decide the defense issue in the instant case.[24]

Since the jury found against Caterpillar on all three theories of liability, the main issue on appeal was whether Mrs. West's negligence should mitigate damages. In order to reach that issue, however, it was first necessary to clarify Florida's position on strict liability in general, and as applied to bystanders in particular.[25] Thus, the supreme court was asked whether manufacturers were held strictly liable to users and bystanders and, if so, whether failure to use due care would be used to mitigate damages through the doctrine of comparative negligence.[26] The court was also asked whether failure to use due care was a comparative negligence defense in an implied warranty action.[27] Each of these questions was answered affirmatively.

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19. RESTATEMENT (SECOND) OF TORTS §402A, comment n at 356 (1965). This is apparently the position adopted by the majority of courts nationwide. Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk,* 25 VAND. L. REV. 93, 118-19 (1972).

20. The leading case is Codling v. Paglia, 32 N.Y.2d 330, 298, N.E.2d 622, 345 N.Y.S.2d 461 (1973).

21. *See, e.g.,* Dippel v. Sciano, 37 Wisc. 2d 443, 155 N.W.2d 55, 64-65 (1967), where, in dictum, the Supreme Court of Wisconsin recognized the comparative negligence defense in a strict liability action. *See generally* Noel, *supra* note 19, at 117.

22. Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

23. Coleman v. American Universal, 264 So. 2d 451 (1st D.C.A. Fla. 1972).

24. This position is understandable, especially since only a lower appellate court had ruled on the contributory negligence defense in implied warranty actions. *See* note 23 *supra.* However, it is not clear why the district court judge decided that contributory negligence was no defense at all. See note 4 *supra.* Although this was the position adopted by a majority of courts nationwide, *see* note 19 *supra,* Florida had already given an indication of a reluctance to take that position by adopting the comparative negligence defense doctrine in negligence actions and the contributory negligence doctrine in implied warranty actions. If anything, it was predictable that Florida would allow (comparative) contributory negligence as a defense in implied warranty and ultimately in strict liability actions. *See* Timmons and Silvis, *Pure Comparative Negligence in Florida: A New Adventure in the Common Law,* 28 U. MIAMI L. REV. 737, 765-66 (1974).

25. For example, if Florida held manufacturers strictly liable for bystanders' injuries, but did not allow a contributory or a comparative negligence defense to a strict liability action, West's damage award would not be mitigated. This would be the correct holding despite Florida's recognition of the contributory negligence defense in implied warranty actions and the comparative negligence defense in negligence actions. On the other hand, if Florida did not have strict liability or at least did not extend the doctrine to bystanders' injuries, the Fifth Circuit needed to know whether negligence was a comparative defense to an implied warranty action.

26. See note 6 *supra,* certified question 1.

27. See note 6 *supra,* certified question 2.

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The court first addressed the nature of manufacturers' liability in Florida. Observing that manufacturers had, in practice, been held to a strict liability standard the court adopted section 402A, adding that this step was "no great new departure from present law and, in most instances, accomplishes a change of nomenclature."[28] To reach this conclusion the court did not make a detailed comparative analysis between section 402A and the Florida common law.[29] Instead, it generally traced the history of the erosion of the privity requirement in Florida and the development of the implied warranty standard of proving that the product was "unmerchantable."[30] Noting that "unmerchantability" was essentially the same as "defectiveness," the court concluded that the Florida standard of proof was already equivalent to the section 402A standard.[31]

In an effort to dispel the concern that judicial adoption of section 402A would conflict with the implied warranty liability created under the Uniform Commercal Code (U.C.C.),[32] the court pointed out that Florida courts had already reconciled the co-existence of this brand of strict liability with the U.C.C. implied warranty liability.[33] The opinion further stated that other U.C.C. states had adopted section 402A.[34] This reconciliation was justified on the grounds that strict tort liability and the contractual U.C.C. implied warranty liability are "two parallel but independent bodies of products liability law," and that the legislature had not indicated that the contract action would be an exclusive remedy for personal injuries.[35]

In answer to the next question the court clarified the confusion surrounding manufacturers' liability for bystanders' injuries. Despite the Restatement's neutral position on strict liability toward bystanders the court felt comfortable in extending the doctrine to bystanders by reasoning that "[a] restriction of the doctrine to the users and consumers would have to rest on the vestige of

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28. West v. Caterpillar Tractor Co., 336 So. 2d 80, 86 (Fla. 1976). *See also* Brief for Appellee at 7-18.

29. For example, the court mentioned nothing about disclaimers or retailers' liability, although both issues are covered by the Restatement. RESTATEMENT (SECOND) OF TORTS, §402A, comment m at 355, comment f at 350 (1965). Significantly, the Restatement's position differs from Florida's. See note 50 *infra*. Similarly, the court's cursory analysis of the standard of proof was insufficient to reveal several problems. See notes 54-59 *infra* and accompanying text.

30. 336 So. 2d 80, at 84-87.

31. *Id.* at 86, 88. See also note 57 *infra*.

32. The Dade County Defense Bar Association filed an amicus curiae brief in the instant case challenging the court's authority to adopt §402A. *Id.* at 87. Brief of Dade County Defense Bar Association, as Amicus Curiae. Since the U.C.C. and §402A conflict in many areas, some commentators have suggested that the adoption of §402A is tantamount to judicial amendment of a legislative enactment. See Dickerson, *The ABC's of Products Liability — With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439, 447-53 (1969).

33. West v. Caterpillar Tractor Co., 336 So. 2d at 87-88. The problem had arisen under implied warranty in Ford Motor Co. v. Pittman, 227 So. 2d 246 (1st D.C.A. Fla. 1964), *cert. denied*, 237 So. 2d 177 (Fla. 1970). In the instant case the court used the same reasoning employed by the district court to resolve the problem.

34. 336 So. 2d at 88. See also note 35 *infra*.

35. *Id.* at 88. Though commentators have insisted that the problem cannot be avoided by simply labeling one action tort and the other contract, most courts have had no difficulty reconciling their co-existence. *See, e.g.*, Caruth v. Mariana, 11 Ariz. App. 188, 192, 463 P.2d 83, 87 (1970); Dickerson, *supra* note 32, at 447-53.

the disappearing privity requirement."[36] Thus, by emphasizing the logical inconsistency between the emerging strict liability philosophy in Florida and a doctrine immunizing a manufacturer from liability for a bystander's injuries, the court reached the desired result while preserving continuity with existing law.

Similarly, in an effort to be consistent with Florida's recognition of the comparative negligence defense in negligence actions the court held that this defense should also apply in strict liability actions. Characterizing strict liability as "negligence as a matter of law or negligence per se," the court indicated that denying the defense "would, in effect, abolish the adoption of comparative negligence."[37] In also extending the comparative negligence defense to implied warranty actions the court reasoned that implied warranty, though contractually based, "retain[s] certain aspects of the law of torts," thereby eliminating conceptual difficulties arising from the assertion of a tort defense to a contractual action.[38] Thus the court viewed the legal distinction as merely a problem in semantics,[39] and held that the defense should lie as a matter of policy.

The court's affirmative response to the certified question is correct in the sense that manufacturers in Florida have been held strictly liable for injuries caused by their defective products. Moreover, a contrary ruling on the bystander and defense issues would have created inconsistencies with existing Florida law. The court's adoption of section 402A, however, raises major conceptual and practical difficulties. In the first place, the issue of liability under section 402A was not certified to the court; it was raised on the court's initiative.[40] Furthermore, adopting section 402A was not necessary to resolve the strict liability question, since the court could have recognized strict liability for manufacturers under existing Florida law without referring to section 402A or any other formulation. Finally, section 402A is not even relevant to the bystander issue[41] and runs counter to the position taken by the court on the defense issue.[42] Thus, it is not clear why the court adopted section 402A[43] and,

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36. 336 So. 2d at 89.

37. *Id.* at 90.

38. *Id.* at 91.

39. *Id.* at 91-92. The court seemed to back away from the position it had taken earlier in the opinion where the strict liability tort remedy was viewed as being independent from the implied warranty contract remedy.

40. This is an apparent departure from the court's prior practice of rigidly adhering to the issues presented in the certified questions. *See, e.g.,* Green v. American Tobacco Co., 154 So. 2d 169, 170 (Fla. 1963). In *Green* the court noted several issues collateral to the one certified but declined to address them.

41. The Restatement is neutral toward bystanders. See note 17 *supra.*

42. The Restatement recognizes only assumption of the risk type defenses to a strict liability action. See note 19 *supra* and accompanying text.

43. It is intriguing that the court chose (or took advantage of) a certified question from a federal court as the mechanism for making the change rather than waiting for an appeal, a writ of certiorari, or a certified question from one of the Florida appellate courts. Was the court engaging in a bit of judicial one-upsmanship? Consider the following sequence: In 1973 the supreme court reprimanded the Fourth District Court of Appeal for overruling the supreme court's position on contributory negligence. Hoffman v. Jones, 280 So. 2d 431, 433-34

more importantly, what effect this adoption will have on Florida law. By stressing the continuity between this decision and existing Florida law, the court created the impression that the adoption of section 402A would affect Florida law very little, if at all. A closer inspection, however, reveals that this position is contingent on several questions left unanswered in the instant case.

The threshold question concerns the scope of section 402A, that is, who will be liable and who will be allowed to recover under 402A in Florida. Since the court adopted 402A in response to the certified question on a manufacturer's liability to users and bystanders, it is arguable that 402A was intended to apply in this context. However, the comments to the Restatement indicate that 402A liability extends not only to manufacturers but also "to any wholesale or retail dealer or distributor, and to the operator of a restaurant."[44] The court did not mention the comments and, of course, is not bound in any legal sense to abide by them. However, every other state that has adopted 402A has extended the liability at least to retailers, and some have gone even further than the Restatement by holding lessors strictly liable.[45] Because the court did not respond directly to this issue any interpretation of the intended scope of 402A is largely speculative.

An argument for a broad reading of the case could be inferred from the court's discussion of implied warranty liability. Prior to the instant case recovery in products liability cases could be made under two theories of implied warranty, one a hybrid tort-contract action founded in common law and the other a pure contract action based on the U.C.C. The court's contention that "[t]he adoption of the doctrine of strict liability in tort does not result in the demise of implied warranty" is clearly intended to assure that the remedy in contract based on the U.C.C. still remains.[46] The court also indicated its recognition of *two* theories of recovery in products liability: "[o]ne, strict liability, is an action in tort; the other, implied warranty, is an action in contract."[47]

(Fla. 1973). In 1974 the supreme court reprimanded the Fourth District for ignoring the supreme court-sanctioned impact rule. Gilliam v. Stewart, 291 So. 2d 593, 594-95 (Fla. 1974). Later that same year the Fourth District almost adopted §402A: "Section 402A . . . concisely states the correct rule of law applicable to this case." Keller v. Eagle Army-Navy Dept. Stores, Inc., 291 So. 2d 58, 61 (4th D.C.A. Fla. 1974). Perhaps through the use of the federal certification procedure the supreme court saved itself the task of another reprimand. (The above analysis evolved from discussions with Professor Walter Probert, University of Florida Law School.)

44. RESTATEMENT (SECOND) OF TORTS §402A, comment f at 350 (1965).

45. *See, e.g.*, Stang v. Hertz Corp., 83 N.M. 730, 735, 497 P.2d 732, 737 (1972), where 402A was adopted and used to hold an automobile lessor strictly liable for injuries sustained by the lessee. The New Mexico supreme court also noted that "this principle of strict liability (§402A) which we hereby adopt would also apply in cases involving . . . retailers." *See also* Kirkland v. General Motors Corp., 521 P.2d 1353, 1361 (Okla. 1974): "[W]e would adopt [strict liability] for Oklahoma, but would prefer to call it 'Manufacturers' Products Liability', . . . [and] . . . would include in the definition of manufacturer — processors, assemblers, and all other persons who are similarly situated in processing and distribution"; and Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 814-17 (1965).

46. The statement is made in the context of the court's discussion of the U.C.C. implied warranty liability. 336 So. 2d at 91.

47. *Id.* at 88. The court stated further that "[i]f a user is injured by a defective product, but the circumstances do not create a contractual relationship with a manufacturer, then the

Thus, it could be implied that the court intended 402A to completely supersede the common law implied warranty theory, leaving one pure tort and one pure contract theory in products liability cases.[48] If so, it is reasonable to assume that 402A would apply in all situations where the common law implied warranty has been applied. For example, one would expect that a retailer's liability under the common law would be replaced by a retailer's liability under 402A.

If the Court's words are interpreted to mean that actions under common law implied warranty are still available, we are left with two remedies in tort. However, no inferences concerning the scope of 402A can be drawn from this interpretation.[49]

If 402A is not really different from the tort remedy of common law implied warranty, as the court suggests, the scope issue is purely academic. However, there is at least one area of substantial difference between 402A and common law implied warranty. Under 402A, retailers are held strictly liable to users without restriction, while in Florida, under common law implied warranty, they have been held liable to both users and bystanders in the absence of privity only under special circumstances.[50] Thus, if the instant case is interpreted broadly it implicitly overrules such previous supreme court decisions as

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vehicle for recovery could be strict liability in tort. If there is a contractual relationship with the manufacturer, the vehicle of implied warranty remains." *Id.* at 91. Read literally, this statement suggests that implied warranty liability will be abolished in practice, since rarely is there "a contractual relationship with the manufacturer." That is precisely the problem with a purely contractual warranty theory. (Read literally, the statement quoted above and the statement quoted in the text also suggest the abolition of negligence actions. Presumably, this was not the court's intent.)

48. There is precedent in at least one other jurisdiction for such an interpretation. In adopting §402A the Oklahoma supreme court stated that: "[W]e conclude . . . that *breach of implied warranty* is no longer an appropriate remedy for recovery in products liability actions except as provided in the Uniform Commercial Code." Kirkland v. General Motors Corp., 521 P.2d 1353, 1364-65 (Okla. 1974) (emphasis original). The repercussions of this doctrine were felt soon thereafter in a case where an action was barred by the tort statute of limitations (two years). The contract statute of limitations (five years) had not expired but the court held that unless the plaintiff could plead facts which would bring the action under the U.C.C., recovery would be denied. O'Neal v. Black & Decker Mfg. Co., 523 P.2d 614 (Okla. 1974). This particular problem probably would not arise in Florida since it has been held that the common law implied warranty is classified under FLA. STAT. §95.11(3)(p) (1975) ("Any action not specifically provided for in these statutes") and governed by a four year statute of limitations. Barfield v. United States Rubber Co., 234 So. 2d 374 (2d D.C.A.), *cert. denied*, 239 So. 2d 828 (Fla. 1970). The strict liability statute of limitations is probably also four years, whether classified under FLA. STAT. §95.11(3)(p) (1975) or §95.11(3)(a) (1975) ("an action founded on negligence"). *See also* Hicks & Sternleib, *supra* note 10, at 261.

49. Under the "two tort theory" hypothesis, if the court intended 402A to apply only to manufacturers, retailers would still be liable according to the rules of the common law implied warranty liability. On the other hand, the court could also have intended that 402A should apply as broadly as the Restatement suggests, in which case retailers would be liable according to the 402A rules. There is no compelling reason to favor either of these positions. But, if the common law implied warranty liability is abolished and 402A is to extend only to manufacturers, retailers would be liable only under U.C.C. implied warranty (they would also be liable under negligence, of course). The effect is to reduce a plaintiff's chances for recovery. Since the court surely did not intend this it must be inferred that 402A will apply broadly if common law implied warranty is to be abolished. See note 47 *supra*.

50. In the absence of privity retailers have been held liable for: injuries caused by

Carter v. Hector Supply Co.[51] and *Foley v. Weaver Drugs, Inc.*,[52] which denied recovery to users not in privity with the retailers.[53] Since the court did not even mention retailers, the broad interpretation necessarily rests on the tenuous assumption that the court adopted the comments to the Restatement as well as 402A. And since the Restatement is silent on bystanders, it is even more uncertain whether retailers will be held strictly liable to bystanders.

Even if the scope problems are ultimately resolved, there remain other problems which are inherent in the Restatement's peculiar formulation of the standard of proof. Although the court specifically referred to 402A's standard of proof, it did not acknowledge that the Restatement requires a greater burden of proof than does the U.C.C. nor that its standard conflicts, at least theoretically, with the principles of comparative negligence.

To recover under 402A a plaintiff must prove a "defective condition unreasonably dangerous to users and consumers."[54] According to the Restatement, "unreasonably dangerous" requires a showing that the product sold "must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it."[55] It was the court's contention that this standard is equivalent to the implied warranty standard of "unmerchantability."[56] If the court is referring to the common law standard, its position is

products which are foodstuffs, Sencer v. Carl's Markets, Inc., 45 So. 2d 671 (Fla. 1950); products obviously purchased for a third person, McBurnette v. Playground Equip. Cor., 137 So. 2d 503 (Fla. 1962); or dangerous instrumentalities. This last exception was apparently first applied in Carter v. Hector Supply Co., 28 So. 2d 390 (Fla. 1961). It was suggested as an alternate basis for the *McBurnette* decision, Ausness, *supra* note 10, at 420, by a natural extension of the reasoning in Matthews v. Lawnlite Co., 88 So. 2d 299 (Fla. 1956) (manufacturer's liability in the absence of privity for an inherently dangerous product). It was explicitly recognized as a basis for recovery in Keller v. Eagle Army-Navy Dept. Store, Inc., 291 So. 2d 58 (4th D.C.A. Fla. 1974) (cause remanded for new trial).

The status of another contractual vestige, retailers' disclaimers, has been somewhat unclear since Florida adopted the Uniform Commercial Code. FLA. STAT. §§672.2-101 – 672.2-724 (1975). In Ford Motor Co. v. Pittman, 227 So. 2d 246, 249 (1st D.C.A. Fla. 1969), it was reasoned that the "manufacturer . . . is not the 'seller' to the ultimate consumer under the terms of the Uniform Commercial Code." It has been suggested that this reasoning implies that retailers (i.e. "sellers") may be able to disclaim warranties under the U.C.C. Ausness, *supra* note 10, at 424.

51. 128 So. 2d 390 (Fla. 1961), *aff'g* 122 So. 2d 22 (3d D.C.A. Fla. 1960). Plaintiff-employee of the purchaser of a riding sulky (a cart used for trotting races) was injured when the frame of the sulky collapsed. Recovery against the retailer was denied since the sulky did not fall into either the foodstuffs or dangerous instrumentality exceptions to the privity requirement.

52. 177 So. 2d 221 (Fla. 1965), *aff'g* 172 So. 2d 907 (3d D.C.A. Fla. 1965). Plaintiff lacerated her wrist while attempting to open a bottle of reducing pills purchased by her husband. Recovery against the retailer was denied since the product did not fall into any of the categories of exceptions to the privity requirement.

53. It seems clear that, under Florida's liberal third-party beneficiary clause of the U.C.C. FLA. STAT. §672.318 (1975), the plaintiffs in Carter v. Hector Supply Co., 128 So. 2d 390 (Fla. 1961) and Foley v. Weaver Drugs Co., 177 So. 2d 221 (Fla. 1965), could sue the retailer in a U.C.C. implied warranty action. However, since notice, disclaimers, and the contract statute of limitations would be potential obstacles in a U.C.C. action the enactment of the U.C.C. cannot be said to overrule *Carter* and *Foley*.

54. See note 7 *supra*.

55. RESTATEMENT (SECOND) OF TORTS §402A, comment i at 352 (1965).

56. 336 So. 2d at 86, 88.

arguably correct.[57] However, the U.C.C. standard of unmerchantability does not require a showing of an unreasonably dangerous condition; a plaintiff need only prove the existence of a defective condition.[58] It seems anomalous that 402A's strict liability remedy, which in principle was devised to protect consumers, should require a greater burden of proof than the contractual remedy.[59]

Perhaps more important is the conflict between the 402A standard and the comparative negligence doctrine. Under 402A the foreseeability of the danger is crucial in determining whether a defect in a product is "unreasonably dangerous," since it must be "dangerous to an extent beyond that which would be contemplated" by the ordinary purchaser. Since an obvious defect is not

57. The "unreasonably dangerous" requirement or its equivalent has crept into the Florida common law but it is difficult to discern whether proof that the defect in the product is unreasonably dangerous is an element of the prima facie case, or whether proof that the defect was not unreasonably dangerous, that is, in the eyes of an ordinary consumer, see text accompanying note 55 *supra*, is an affirmative defense. In Matthews v. Lawnlite Co., 88 So. 2d 299, 301 (Fla. 1956), the supreme court noted that "[a]n implied warranty does not protect against hazards apparent to the plaintiff." This statement was interpreted by a district court of appeal as acknowledging an affirmative defense. Farmhand, Inc. v. Brandies, 327 So. 2d 76, 78 (1st D.C.A. Fla. 1976). But in Royal v. Black & Decker Mfg. Co., 205 So. 2d 307, 309 (Fla. 1967), the Third District Court of Appeal seemed to treat "unreasonably dangerous" as an element of the plaintiff's proof.

The distinction was a moot point in these cases since the defense would be a total bar. Nevertheless, much confusion has arisen, especially since at least one district court still speaks strictly in terms of defectiveness. McCarthy v. Florida Ladder Co., 295 So. 2d 707, 709 (3d D.C.A. Fla. 1974). Moreover, an "unreasonably dangerous" requirement would appear to be at odds with Florida's "dangerous instrumentality" exception to the privity requirement. Toombs v. Fort Pierce Gas Co., 208 So. 2d 615 (Fla. 1968). It does not make sense to extend liability where the defective product is a "dangerous instrumentality" yet deny liability where the danger would be contemplated by an ordinary consumer. Arguably, an ordinary consumer would be more likely to contemplate a dangerous defect in a product which was a dangerous instrumentality than in one which was not.

The confusion is illustrated by the following question which is currently before the supreme court on certification from the First District Court of Appeal: "May the manufacturer of a machine in a defective condition unreasonably dangerous to the user be held liable to an injured user notwithstanding that the condition was obviously dangerous?" Farmhand, Inc. v. Brandies, 327 So. 2d 76, 82 (1st D.C.A. Fla. 1976). The question makes no sense in the context of §402A since, by definition, a condition (defect) cannot be both unreasonably dangerous and obviously dangerous. The supreme court's response to this question should resolve the prima facie/affirmative defense issue, while perhaps providing more guidelines for §402A's role in Florida law than were provided in the instant case.

58. "(2) Goods to be merchantable must be at least such as: (a) Pass without objection in the trade under the contract description; and (b) In the case of fungible goods, are of fair average quality within the description; and (c) Are fit for the ordinary purposes for which such goods are used; and (d) Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and (e) Are adequately contained, packaged, and labeled as the agreement may require; and (f) Conform to the promises or affirmations of fact made on the container or label if any." FLA. STAT. §672.314(2) (1975).

59. The Supreme Court of California objected to the unreasonably dangerous requirement as "an element which rings of negligence" and eliminated it from the standard of proof in strict liability actions. Cronin v. J.B.E. Olson Corp., 8 Cal.3d, 121, 132, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972).

"unreasonably dangerous," a plaintiff negligent in failing to discover a defect whose danger would be obvious to the ordinary consumer would be barred from recovering under 402A since he could not even make out a prima facie case.[60]

On the other hand, in a comparative negligence jurisdiction such as Florida a plaintiff's failure to discover an obvious defect is not necessarily a complete bar to recovery, but may only mitigate damages instead.[61] The conflict between the unreasonably dangerous standard and the plaintiff's negligence was not present in the instant case since Mrs. West's negligence was not related to the grader's inadequate rear-view mirrors, but it may arise in future cases.[62] Since the court did not address the question directly, it is possible that future courts may interpret the holding as allowing a plaintiff's negligence — even if it relates to the foreseeability of the defect — to be treated comparatively in all cases. Furthermore if plaintiffs are barred under 402A they may nevertheless recover under negligence or U.C.C. implied warranty theories. In any event the court's merger of the unreasonably dangerous requirement and the comparative negligence defense raises a conflict which could be difficult for other courts to ignore.

Future court interpretation of the instant case will be difficult because of the circumstances in which the issues were addressed. The court's legal analysis is of limited utility since, as discussed above, the adoption of 402A is superfluous to the resolution of the issues presented in the certified questions. Furthermore, due to the peculiar posture of this case, the facts are of relatively minor importance. The opinion was written in the abstract since under the certification procedure the court responds only to generalized legal questions.[63] Once cited, the facts of the case were not referred to again in the opinion. Thus the interpretation of the adoption of 402A is not necessarily constrained by any factual context. Finally, the court gave neither an explicit indication of

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60. This result could be interpreted as undermining the Restatement's own position on contributory negligence. Comment n states that "[c]ontributory 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.*" RESTATEMENT (SECOND) OF TORTS §402A, comment n at 356 (1965) (emphasis added). The standard here seems to be subjective. The implication is that a plaintiff would not be barred for failure to guard against hidden defects, or, one might say, defects whose dangers he did not contemplate. And yet the standard of proof is clearly objective: defects whose danger would be contemplated by the ordinary consumer are not "unreasonably dangerous."

61. Some Florida courts have treated proof of a patently dangerous defect as an affirmative defense. *See* Farmhand, Inc. v. Brandies, 327 So. 2d 76, 78 (1st D.C.A. Fla. 1976). It would follow from the holding in the instant case that such a defense would be used to mitigate damages. However, the problem is complicated by some decisions which seem to treat proof of a patently dangerous defect as undermining the plaintiff's prima facie case. See text accompanying note 57 *supra.*

62. Such conflicts will arise only rarely, where the danger is open and obvious to all. However, such a case is currently before the supreme court on a certified question. Farmhand, Inc. v. Brandies, 327 So. 2d 76 (1st D.C.A. 1976). In this case the plaintiff was injured by a feed mixer whose mixing components were "readily visible and, in operation, openly and obviously dangerous." *Id.* at 77. See also text accompanying note 57 *supra.*

63. FLA. STAT. §25.031 (1965).

the intended scope of 402A[64] nor did it acknowledge (much less suggest a solution for) the problems inherent in the "unreasonably dangerous" standard under 402A.

Questions which will arise in the future will involve application of 402A in instances when it does not mesh with the common law implied warranty doctrines. The most likely cases will involve the nature of a retailer's liability toward users and bystanders and the efficacy of a retailer's disclaimer. Conflicts between the "unreasonably dangerous" standard and comparative negligence will probably occur less frequently than problems with retailers, but are sure to cause even more problems due to the difficulty in separating these concepts from such closely related concepts as assumption of the risk and the "dangerous instrumentality" doctrine. It is expected that these problems will occupy the courts for some time.

Since in the instant case the court based its holding on the conclusion that 402A is not different from Florida law, future courts will find it difficult to apply 402A in retailer situations without implicitly overruling (or at least extending) the instant case. Furthermore, adjudication of a case that squarely presents the confrontation between the "unreasonably dangerous" and comparative negligence doctrines will necessarily overrule the instant case since the two principles are mutually exclusive. Even so, it is preferable and justifiable to interpret the instant case as intending to include retailers and other middlemen within 402A liability and to subordinate the "unreasonably dangerous" principle to the comparative negligence doctrine. Any other interpretation conflicts with the Restatement's position on retailers, creates conflicts with the court's own picture of the theoretical basis of products liability — one tort action, one contract action — and undermines the court's strong desire to preserve the comparative negligence doctrine. More fundamentally, this interpretation is consistent with the basic spirit of the decision: relieving a person injured by a defective product from the cost of the injury to the extent that the injury was not caused by that person's negligence.

Whether the courts will move in this direction is uncertain since the ambiguities inherent in the instant case clearly allow for other interpretations.[65] It is almost certain, however, that each of these issues will eventually be litigated. This perhaps is an inevitable consequence of changing the basis for a body of law and, in the complex area of products liability, the benefits are probably worth the costs. Nevertheless, it is disquieting that an opinion which, on its face, purports to clarify the theoretical basis for products liability law in Florida, not only fails to clarify many of the problems in the existing theory but introduces new problems as well. It is likely that, as a result, the future of products liability in Florida will be characterized by the piecemeal approach that has caused so much of the confusion in the past.

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64. Other courts adopting §402A have expounded, in dictum, on the intended future scope of §402A. See note 45 *supra*.

65. Retailer's liability, for example, was not an issue and was never mentioned in the case. See text accompanying note 50 *supra*.