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Miscellaneous

Charles J. Heinzer IV

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PRODUCTS LIABILITY — RESTATEMENT (SECOND) OF TORTS — SECTION 402A — A MANUFACTURER IS LIABLE UNDER SECTION 402A FOR AN INJURY CAUSED BY A DEFECTIVE PRODUCT WHEN ALTERATIONS MADE BY THE BUYER WERE FORESEEABLE BY THE MANUFACTURER.

Capasso v. Minster Machine Co. (1976)

Plaintiff, an employee of Westinghouse Electric Company (Westinghouse), was injured while operating a power press machine purchased by Westinghouse from the defendant-manufacturer.[1] The machine was originally equipped with a two-button control system which required an operator to use both hands while operating.[2] However, the manufacturer also provided an optional foot switch that could be used instead of the two-button system.[3] Westinghouse ordered the optional switch and, after delivery of the machine, installed it in place of the button device.[4] Plaintiff was injured when the machine was accidentally activated by the footswitch while her hand was within the area of operation.[5] Plaintiff instituted suit against the defendant-manufacturer in the United States District Court for the Western District of Pennsylvania alleging negligence and strict liability in tort under section 402A of the *Restatement (Second) of Torts (Restatement).*[6] On appeal from an order granting the manufacturer's motion for a directed verdict, the Third Circuit[7] reversed, *holding* that because the alteration of the machine was within the contemplation of the manufacturer, the purchaser's substitution of the optional foot switch did not constitute such a "substantial change" so as to preclude strict liability for a defective product under section 402A. *Capasso v. Minster Machine Co.,* 532 F.2d 952 (3d Cir. 1976).

While section 402A imposes liability only where the defective product reaches "the user or consumer without substantial change in the condition in which it is sold,"[8] the drafters of that section expressed no opinion as to

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1. Capasso v. Minster Machine Co., 532 F.2d 952, 953 (3d Cir. 1976). The machine was used to trim excess rubber from molded rubber parts. *Id.*

2. *Id.* Because its use ensured that both of the operator's hands were shielded from the area of trimming, the two-button control system was the principal safety feature of the press. *Id.*

3. *Id.* Unlike the two-button control system, use of the footswitch did not prevent the operator from putting his hands within the area of operation of the press. *Id.*

4. *Id.* at 954. Westinghouse installed an adjustable guard to prevent entry of the operator's hands into the area in which the trimming mechanism descended, but this was only partially effective in blocking entry. *Id.*

5. *Id.*

6. *Id.* Westinghouse was made a third party defendant. *Id.*

7. The case was heard by Chief Judge Seitz, and Judges Van Dusen and Weis. Chief Judge Seitz wrote the opinion.

8. Section 402A provides:

(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

whether strict liability applies where a seller expects a product to be altered.[9] In *Capasso,* however, the Third Circuit stated that the concept of substantial change "was designed to protect the maker from liability for uses not reasonably contemplated and for which he could not therefore take safety measures."[10] Because the defendant in the instant case, having sold the footswitch to the plaintiff's employer, had notice at the time of the sale of the machine that the purchaser intended to use the optional switch,[11] and because the machine was expressly designed to be operated by either the two-button switch or the footswitch,[12] the court found that the jury should have been permitted to decide whether the machine was in fact defective and the defendant liable under section 402A.[13]

Pennsylvania state and federal cases have not been entirely consistent in their approach to the "substantial change" doctrine. Some have considered foreseeability;[14] some have considered whether there has been a change in the identity of the product;[15] and others have considered both

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(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.

RESTATEMENT (SECOND) OF TORTS § 402A (1965) (emphasis added). In general, while numerous cases have been brought under section 402A, relatively little has been written on the subject of substantial change. Southwire v. Beloit E. Corp., 370 F. Supp. 842, 856 (E.D. Pa. 1974). However, Pennsylvania has had a comparatively greater number of cases in which substantial change has been discussed. *See generally* Annot., 41 A.L.R.3d 1251 (1972).

9. RESTATEMENT (SECOND) OF TORTS § 402A, Caveat (2) at 348 (1965). The drafters' comment to section 402A speaks in terms of shifted responsibility:

> The question is essentially one of whether the responsibility for discovery and prevention of the dangerous defect is shifted to the intermediate party who is to make the changes. No doubt there will be some situations and some defects, as to which the responsibility will be shifted, and others in which it will not.

Id. Comment p at 357. The manufacturer must also foresee some unusual uses and certain alterations; if the dangers inherent in such uses or alterations are foreseeable, the manufacturer will be liable unless he provides a warning of these dangers. *Id.*, Comment h at 351–52; *see* note 19 *infra.*

10. 532 F.2d at 956.

11. *Id.* at 953.

12. *Id.*

13. *Id.* at 955. Under Pennsylvania law, the lack of proper safety devices can constitute a defective design for which there may be recovery under section 402A. Bartkewich v. Billinger, 432 Pa. 351, 354, 247 A.2d 603, 605 (1968); *see* Carpenter v. Koehring Co., 391 F. Supp. 206 (E.D. Pa. 1975); Ford v. Harnischfeger Corp., 365 F. Supp. 602 (E.D. Pa. 1973).

14. In D'Antona v. Hampton Grinding Wheel Co., 225 Pa. Super. Ct. 120, 310 A.2d 307 (1973), the court stated that "[t]he test [with respect to substantial change] is whether the manufacturer could have reasonably expected or foreseen such an alteration." *Id.* at 125, 310 A.2d at 310; *see* Southwire Co. v. Beloit E. Corp., 370 F. Supp. 842 (E.D. Pa. 1974) (substantial change discussed within the context of proximate causation); La Gorga v. Kroger Co., 275 F. Supp. 373, 383 (W.D. Pa. 1967), *aff'd,* 407 F.2d 671 (3d Cir. 1969) (foreseeability is a factor in section 402A).

15. In Speyer, Inc. v. Humble Oil & Ref. Co., 403 F.2d 766 (3d Cir.), *cert. denied,* 394 U.S. 1015 (1968), *noted in* Comment, *Recent Developments in Products Liability Law in Pennsylvania,* 14 VILL. L. REV. 747 (1969), a contractor who serviced gasoline

factors.[16] It is submitted, however, that the concept of changed identity is, standing alone, too broad a defense to be consistent with the intent of section 402A, since a manufacturer, theoretically, could escape liability on the basis of any change made by a purchaser as long as it changed the identity of the product. The better approach would appear to be that of *Capasso* — if the alteration is not foreseeable, and the product was not previously defective, then the manufacturer is relieved from liability under section 402A.[17]

Thus, *Capasso* suggests that the element of foreseeability, normally required in negligence liability, also serves a purpose in determining strict liability under section 402A.[18] As in negligence liability, anticipated intervening conduct in strict liability will not relieve the manufacturer of responsibility for product failure due to a defective condition.[19]

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pumps for the plaintiff installed a heavy-duty steel hose which created greater pressure than the original hose. 403 F.2d at 768. When the pump exploded, the defendant, the manufacturer of the pump, was not held strictly liable because the substitution of the new hose constituted a substantial change insofar as there was a change "in the condition of the product." *Id.* at 772. Similarly, in Dorsey v. Yoder Co., 331 F. Supp. 753 (E.D. Pa. 1971), the court relied upon Comment p to section 402A, which states that substantial change occurs when the product is so changed as not to be in its original usable state. *Id.* at 764, *citing* RESTATEMENT (SECOND) OF TORTS § 402A, Comment p at 357 (1965); *cf.*, Willeford v. Mayrath, 711 Ill. App. 3d 357, 287 N.E.2d 502 (1972) (assembly by purchaser did not significantly alter the identity of the product). *See generally* Comment, *Substantial Change: Alteration of a Product as a Bar to a Manufacturer's Strict Liability,* 80 DICK. L. REV. 245 (1976); Annot., 41 A.L.R.3d 1251 (1972).

16. In Schreffler v. Birdsboro Corp., 490 F.2d 1148 (3d Cir. 1974), the court used both theories, stating: "[A]fter the defendant relinquished control, the table was so substantially modified that it was then feasible to use the equipment in a manner different from that which would have been expected from observation of the original design." *Id.* at 1153 (citation omitted). Later in the opinion, the court went on to discuss superseding cause. *Id.* at 1153–54.

17. In a very similar case, Hanlon v. Cyril Bath Co., No. 75–1334 (3d Cir., Dec. 9, 1975), the plaintiff was injured while operating a press brake because of accidental activation due to an electric footswitch substituted by the plaintiff's employer in place of a mechanical treadle supplied by the manufacturer. *Id.* slip op. at 3–4. The court found that the substitution of the "significantly different" footswitch was a substantial change; therefore, the manufacturer was not strictly liable. *Id.* slip op. at 4. The court, apparently, never considered whether the installation of the electric footswitch was foreseeable by the manufacturer.

The *Capasso* court summarily distinguished *Hanlon* in a footnote. The court felt that the foreseeability of the change in *Hanlon* removed that case from the substantial change doctrine in section 402A(1)(b), whereas in *Hanlon* it was found as a matter of law that there was a substantial change which relieved the defendant of liability. 532 F.2d at 955 n.1; *cf.* Southwire Co. v. Beloit E. Co., 370 F. Supp. 84 (E.D. Pa. 1974) (a counterweight welded to a casting without the manufacturer's knowledge was held to be a substantial change); D'Antona v. Hampton Grinding Wheel Co., 225 Pa. Super. Ct. 120, 310 A.2d 307 (1973) (the question is whether the defendant could reasonably have foreseen that his grinding wheel would be removed and another manufacturer's substituted).

18. *See* Prosser, *The Fall of the Citadel (Strict Liability to Consumers),* 50 MINN. L. REV. 791, 826–27 (1969). Actually, foreseeability in strict liability in tort under section 402A already plays a part in determining those who are reasonably to be expected to use the product. See RESTATEMENT (SECOND) OF TORTS § 402A(1)(b) (1965).

19. *See* note 9 and accompanying text *supra.* Some courts have imposed far-reaching liability upon manufacturers by holding that even anticipated conduct which could result in substantial though unforeseen changes in the product would not

However, the *Capasso* court not only discussed foreseeability in the context of whether a substantial change contemplated by the manufacturer would relieve him of liability under section 402A. The court also discussed the bearing of the foreseeability of the change in the product on the issue of proximate causation.[20] The court concluded that in the case at bar there was no evidence in the record that would establish as a matter of law that Westinghouse's change of the product constituted a superseding cause; the case would thus be permitted to go to the jury on remand to determine whether the original defect was the proximate cause of the plaintiff's injury.[21] The court seemed to reach this conclusion by reasoning that since the alteration of the product was foreseeable, it did not break the chain of legal causation flowing from the defective machine and optional footswitch to the resulting injuries.[22] While a number of courts have expressed the opinion that this use of the negligence standard of causation, which relies upon foreseeability, has equal application to strict liability,[23] others have argued that it does not. The latter courts, contending that "foreseeability is not a test of proximate cause[,] it is a test of negligence,"[24] would hold a 402A defendant liable for all consequences flowing in natural sequence from the defective product. If the product was unforeseeably and substantially changed, or abnormally (*i.e.*, unforeseeably) used, the defendant is not liable and no consideration of proximate cause is necessary.[25] It is submitted that

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relieve the manufacturer of liability. *See, e.g.*, L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[4], at 247 (2d ed. 1976) (dealer's normal servicing of car after delivery by manufacturer will not relieve the latter of 402A liability).

20. 532 F.2d at 955–56. Many cases have dealt with the related question of what alterations are of sufficient magnitude to be called substantial. Even though an alteration is unforeseeable by the manufacturer, he may still be strictly liable if the alteration is insubstantial and could not have caused the accident. *See generally* Annot., 41 A.L.R.3d 1251, 1253 (1972) (alteration must be substantial).

21. 532 F.2d at 955. Defendant claimed that Westinghouse's installation of the foot pedal broke the chain of causation and constituted a supervening cause. *Id.* The court reasoned that since the changes made in the machine, though substantial, were foreseeable by the defendant, they could not as a matter of law be considered to be a supervening cause. *Id.*

22. *Id.*

23. *See* Southwire v. Beloit E. Corp., 370 F. Supp. 842 (E.D. Pa. 1974); Kiusis v. Baldwin-Lima-Hamilton Corp., 457 Pa. 321, 319 A.2d 914 (1974); Prosser, *supra* note 18, at 826–27.

The *Kiusis* court, in discussing the issue of post-delivery alterations as substantial changes in the product, equated the substantial change defense and the idea of supervening cause. 319 A.2d at 922 n.15. Thus, a change which was foreseen would not break the chain of causation, which only consisted of foreseeable risks. *Id.* A foreseeable change would break the chain only if it were implemented negligently, as the negligence would constitute a supervening (unforeseen) cause of the injuries. *Id.*, *citing* D'Antona v. Hampton Grinding Wheel Co., 225 Pa. Super. Ct. 120, 310 A.2d 307 (1973).

24. Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 94, 337 A.2d 893, 900 (1975), *discussed in* 21 VILL. L. REV. 794 (1976).

25. In Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975), the Pennsylvania Supreme Court held that the use of negligence terms and concepts in jury instructions in section 402A cases constituted reversible error. *Id.* at 94–96, 337 A.2d at 899–902. The court explained that a 402A plaintiff's case would be established upon proof of defect, injury, and proximate cause. *Id.* Furthermore, proof of causation

the latter approach is preferable, as it would be inconsistent with the policy of strict liability under section 402A to require the plaintiff to prove that a reasonable person would have foreseen the consequences of the defendant's conduct.[26]

It should be noted that *Capasso* is not an authoritative statement of Pennsylvania law.[27] Nonetheless, because Pennsylvania courts have generally been consumer-oriented in their interpretation of section 402A,[28] they will probably accept the Third Circuit's position on foreseeability of alteration by the purchaser. Under *Capasso,* a manufacturer is deemed to be strictly liable, despite an alteration of his product by the purchaser, if he provided the means by which the product could be altered.[29] The manufacturer is liable not only for defects in the original equipment provided with his product, but also for defects in any optional components with which he may have supplied the purchaser.[30] Thus, a manufacturer cannot escape liability to a consumer or user under section 402A merely by

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did not depend upon proof of what the reasonable seller would expect the purchaser to know, or what the reasonable purchaser would know. *Id.* Using these tests to determine proximate cause resulted in imposing a negligence-type duty of care on the 402A defendant, which constituted an unwarranted limit on the scope of strict liability. *Id.*; *see* L. FRUMAN & M. FRIEDMAN, *supra* note 19, § 16A[4][d], at 297; *see* note 14 and accompanying text *supra.*

26. For a general discussion of the broad consumer protection policy envisaged by section 402A, *see* Prosser, *supra* note 18. In Southwire Co. v. Beloit E. Corp., 370 F. Supp. 842 (E.D. Pa. 1974), the court discussed the interrelationship of unforeseeable substantial changes and the doctrine of superseding cause in light of the policy of 402A. The court opined that if section 402A was viewed as imposing a heavy burden upon the manufacturer by holding him liable without proof of fault, then this burden should be lessened by relieving him of liability even where the changes in the product were not substantial enough to constitute a supervening cause. *Id.* at 857 n.21. However, if the policy of broad liability under 402A was felt to be warranted, the defendant should be relieved of liability only when the change of the product was substantial enough to qualify as a supervening cause. *Id.*

27. Under the doctrine of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), a federal court sitting in a diversity action must apply state substantive law, but that state's courts are not bound by the federal court decisions. *See generally* C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 1057 (1969).

28. *See, e.g.,* McCown v. International Harvester Co., 463 Pa. 13, 342 A.2d 381 (1975) (expressly rejecting a consumer's contributory negligence as a defense to strict liability); Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975), *discussed in* 21 VILL. L. REV. 794 (1976) (a product need not be "unreasonably dangerous" for liability to be imposed under section 402A); D'Antona v. Hampton Grinding Wheel Co., 225 Pa. Super. Ct. 120, 310 A.2d 307 (1973) (if the manufacturer could foresee alteration of the product, he would not be relieved from strict liability).

29. 532 F.2d 952. Under the related doctrine of abnormal use, a manufacturer will not be liable for a use of his product that was not intended or was abnormal. RESTATEMENT (SECOND) OF TORTS § 402A, Comment h, at 351-52 (1965). However, if the manufacturer could have foreseen a particular use, though abnormal for that product, he will not be relieved of liability under section 402A if the product is defective and an accident is caused by that defect. *See* Kiusis v. Baldwin-Lima-Hamilton Corp., 457 Pa. 321, 319 A.2d 914 (1974). *See generally* Dole & Hilton, *Use of a Product — When is it Abnormal?,* 4 WILLAMETTE L.J. 350 (1967); Noel, *Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk,* 25 VAND. L. REV. 93, 95 (1972).

30. An alternative theory of relief upon which the plaintiff in *Capasso* could have relied is that expressed in a number of cases holding a manufacturer liable for defective component parts. In Greco v. Bucciconi, 407 F.2d 87 (3d Cir. 1968), a

shipping his product in component parts or by providing various options or attachments with which the purchaser might later alter the product.[31] Because such changes by the purchaser are foreseeable by the manufacturer, they do not constitute "substantial change" within the meaning of section 402A.

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machine was shipped in various component parts to the purchaser, who then assembled it. *Id.* at 89. The court held that the assembly was not a sufficient alteration to preclude liability. *Id.* at 91; *see* Burbage v. Boiler Eng'r & Supply Co., 433 Pa. 319, 249 A.2d 563 (1969); RESTATEMENT (SECOND) OF TORTS § 402A, Comment q, at 358 (1965).

31. *See* Comment, *supra* note 15, at 752.