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Nonviolent Occurrence That Causes Product Loss Not Actionable under Section 402A--Gibson v. Reliable Chevrolet, Inc.

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Characterizing the requirement of a physical consequence as an "anachronism,"[67] the court has decided that mental or emotional distress no longer should be treated as a second class tort.[68] *Molien* does not guarantee success to any plaintiff on his claim for negligently inflicted mental or emotional distress. Proof of damages may pose a difficult, if not impossible, obstacle for many plaintiffs.[69] *Molien* only assures that California plaintiffs who suffer serious mental or emotional injuries will have the opportunity to present their claims to a jury.[70] The circumstances of the case will determine whether the plaintiff has a genuine claim;[71] any physical injuries will serve merely as an additional basis for recovery.

CARL J. SPECTOR

NONVIOLENT OCCURRENCE THAT CAUSES PRODUCT LOSS NOT ACTIONABLE UNDER SECTION 402A

Gibson v. Reliable Chevrolet, Inc.[1]

Sherrie Kay Gibson purchased a new car from Reliable Chevrolet, Inc. of Springfield, Missouri, in November 1976. She drove the car 23,500 miles

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Tobin v. Grossman, 24 N.Y.2d 609, 620-21, 249 N.E.2d 419, 425, 301 N.Y.S.2d 554, 563 (1969) (Keating, J., dissenting); W. PROSSER, *supra* note 9, § 12, at 51; *id.* § 54, at 328; Leibson, *supra* note 13, at 182; Magruder, *supra* note 26, at 1058-59; Simons, *supra* note 13, at 39; Comment, *supra* note 5, at 1245.

67. 27 Cal. 3d at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832.

68. *Id.* ("[I]n the light of contemporary knowledge we conclude that emotional injury may be fully as severe and debilitating as physical harm, and is no less deserving of redress.").

69. *See* Comment, *supra* note 5, at 1258-62.

70. The court cited State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952), for the proposition that jurors, by their own experience, are best situated to determine whether the defendant's conduct has caused emotional distress. 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839. In his dissent, Judge Clark stated that the majority incorrectly relied on *Siliznoff*. He said that *Siliznoff* was intended to apply only to intentional inflictions of emotional distress. "A different and difficult medical question is presented when the resulting traumatic effect of mental distress must be determined. It is this question which the majority would depend on jurors to answer." *Id.* at 935, 616 P.2d at 824, 167 Cal. Rptr. at 842 (Clark, J., dissenting).

71. 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

1. 608 S.W.2d 471 (Mo. App., S.D. 1980).

during the next eighteen months.[2] In May 1978, the heater core of the engine ruptured while she was driving, and the engine coolant escaped. Shortly after the coolant escaped, the engine overheated and was damaged beyond repair. Gibson sued Reliable Chevrolet and General Motors Corporation seeking actual and punitive damages under section 402A of the Restatement (Second) of Torts.[3] She asserted that the water temperature gauge always "rested on the zero position" and that had it been functioning properly, she would have been forewarned that her engine was overheating in time to avoid the irreparable damage. The jury awarded Gibson actual damages of $1,140 and punitive damages of $2,000. On appeal, the Missouri Court of Appeals for the Southern District reversed, holding that when only the product is damaged, the plaintiff must show that the loss resulted from a "violent occurrence" to recover damages under section 402A.[4]

The doctrine of section 402A is a tort remedy developed over the last two decades.[5] Under section 402A, a consumer who suffers physical harm[6] because of a defective and unreasonably dangerous product may recover his damages from the seller or manufacturer. Recovery is allowed irrespective of the existence of warranties.[7] The extent to which property losses are compensable under section 402A is a complicated matter. Essentially, there are four types of property damages: damage to property other than the product; physical damage to the product; direct economic loss, *i.e.*, lost product value or loss of the bargain; and indirect economic loss, *i.e.*, consequential losses, such as lost profits.[8] It is well settled that recovery under section 402A is allowed for damage to property other than the product and

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2. The regular warranty on the car had expired prior to the incident. *Id.* at 472.

3. RESTATEMENT (SECOND) OF TORTS § 402A (1965). The plaintiff's verdict directing instruction submitting liability under § 402A was similar to MO. APPROVED INSTR. No. 25.04 (1981). 608 S.W.2d at 472.

4. 608 S.W.2d at 474-75.

5. The first decision adopting strict liability in tort for harms caused by a defective product was Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). For a discussion of and cases and statutes adopting or rejecting strict products liability, see 1 PROD. LIAB. REP. (CCH) ¶¶ 4005-17. Section 402A was adopted in Missouri in Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969) (wrongful death action).

6. "Physical harm," as used in § 402A, refers to both personal injuries and property damage. *See* RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

7. The draftsmen of § 402A sought a consumer remedy in the products liability area devoid of the limitations often placed on warranty recovery. *See* W. PROSSER, LAW OF TORTS 656-57 (4th ed. 1971). *See also* RESTATEMENT (SECOND) OF TORTS § 402A, Comment m (1965).

8. *See generally* Edmeades, *The Citadel Stands: The Recovery of Economic Loss in American Products Liability*, 27 CASE W. RES. L. REV. 647, 650-52 (1977).

is not allowed for indirect economic loss.[9] Many courts have taken the position that direct economic losses are not compensable under section 402A because such losses are already the subject of the Uniform Commercial Code (U.C.C.) warranty provisions.[10] Distinguishing physical damage to the product from direct economic loss is difficult, however, since in both forms of loss, diminished product value is the source of the losses. Accordingly, these courts distinguish physical damage to the product and direct economic loss on the basis of the *cause* of the diminished value. Such courts view losses resulting from violent occurrences as physical damage to the product, and other losses are treated as economic losses for which only U.C.C. remedies exist.[11] Missouri courts never had directly addressed the applicability of section 402A to product losses of nonviolent origin.[12] The *Gibson* court determined that the plaintiff's loss was of a nonviolent origin;[13] thus, the court's denial of section 402A recovery is the first holding in Missouri regarding nonviolent occurrences and section 402A.

The leading case allowing recovery of direct economic loss under a theory of strict tort liability is *Santor v. A & M Karagheusian, Inc.*[14] Santor purchased carpeting, manufactured by the defendant, for use in his home. The carpeting was sold as "No. 1 grade," but almost immediately after it was laid, an irregularity appeared in the carpeting. The irregularity got worse and repeated attempts during the next four years failed to correct the problem. Santor sued the manufacturer, and after holding that recovery would lie under a breach of implied warranty theory, the New Jersey Supreme Court held that the manufacturer would also be liable under a theory of strict tort liability. The court reasoned that liability arose from the mere presence of the product on the market[15] and existed on a showing that the product was

9. *See* 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY 2d § 4:22 (2d ed. 1974); W. PROSSER, *supra* note 7, at 666.

10. *See* notes 21-27 and accompanying text *infra*.

11. *See, e.g.*, Crowder v. Vandendeale, 564 S.W.2d 879, 881 (Mo. En Banc 1978) (dictum), *quoted in* 608 S.W.2d at 472. *Cf.* Cloud v. Kit Mfg. Co., 563 P.2d 248, 251 (Alaska 1977) (sudden, calamitous damage results in direct property damage; deterioration results in economic loss). *See also* Comment, *Products Liability: Expanding the Property Damage Exception in Pure Economic Loss Cases*, 54 CHI.-KENT L. REV. 963, 965 (1978); Comment, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 918 (1966).

12. 608 S.W. 2d at 473. The court provided an appendix of all cases relying on *Keener*, *see* note 5 *supra*, and distinguished them from the issue in *Gibson*. 608 S.W.2d at 475-76.

13. The court concluded that Gibson's losses resulted from a nonviolent occurrence because the heater core rupture transpired after 18 months and 23,500 miles of driving. *Id.* at 474.

14. 44 N.J. 52, 207 A.2d 305 (1965). *Santor* was decided under a strict tort liability theory, but not under § 402A.

15. *Id.* at 65, 207 A.2d at 312.

defective.[16] The *Santor* form of liability is broader than section 402A because the defect can be actionable and yet not render the product dangerous. The rationale of the court was that such enterprise liability would provide the best protection for consumers who, by the nature of the market, lacked adequate knowledge and opportunity to determine whether products were defective at the time of the sale.[17]

The *Santor* approach has not been followed in most jurisdictions,[18] primarily because of potential conflicts between such tort liability and the U.C.C.,[19] a problem not addressed by the *Santor* court. The value of a product is clearly the subject of warranties under the U.C.C., thus direct economic loss may originate in a breached warranty. Warranties do not provide a remedy for all direct economic losses, however, as the U.C.C. has various provisions for limiting such relief. The limits on warranty recovery reflect policies of the legislature that would be thwarted were the courts to allow section 402A recovery of direct economic loss.[20] A comparison of warranty recovery and section 402A recovery illustrates how section 402A would

16. *Id.* at 66-67, 207 A.2d at 313.

17. *Id.* at 64-65, 207 A.2d at 311-12.

18. The leading case against the *Santor* approach is Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). For an explanation of the policy against strict tort liability for economic losses, see *id.* at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23 (Traynor, C.J.). Many courts have embraced the policy expounded by Chief Justice Traynor in *Seely. See, e.g.*, Cloud v. Kit Mfg. Co., 563 P.2d 248, 250-51 (Alaska 1977); Morrow v. New Moon Homes, Inc., 548 P.2d 279, 283-86 (Alaska 1976); Cline v. Prowler Indus., 418 A.2d 968, 975-80 (Del. 1980); Hawkins Constr. Co. v. Matthews Co., 190 Neb. 546, 559-62, 209 N.W.2d 643, 652-53 (1973); Price v. Gatlin, 241 Or. 315, 318, 405 P.2d 502, 503 (1965); Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308, 312-13 (Tex. 1978); Nobility Homes v. Shivers, 557 S.W.2d 77, 79-80 (Tex. 1977).

Three jurisdictions have followed the *Santor* approach. *See* Hiigel v. General Motors Corp., 190 Colo. 57, 544 P.2d 983 (1975) (allowing replacement costs, repair expenses, and loss of business use); Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 182 N.W.2d 800 (1970) (allowing implied warranty recovery of loss of bargain, repair costs, and lost rental profits; Michigan implied warranty recovery is allowed without privity or notice, *see* Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965)); City of LaCrosse v. Schubert, Schroeder & Assocs., Inc., 72 Wis. 2d 38, 240 N.W.2d 124 (1976) (allowing repair and replacement costs for defective roof). *Accord*, Comment, 54 CHI.-KENT L. REV., *supra* note 11, at 973-75; Comment, *Products Liability: The Manufacturer's Responsibility for Economic Loss—Another Look*, 8 MEM. ST. U. L. REV. 653, 660-62 (1978). *See also* Kassab v. Central Soya, 432 Pa. 217, 231, 246 A.2d 848, 854 n.7 (1968) (dictum).

19. *See* notes 21-27 and accompanying text *infra*.

20. *But see* Wade, *Is Section 402A of the Second Restatement of Torts Preempted by the UCC and Therefore Unconstitutional?*, 42 TENN. L. REV. 123 (1974) (Professor Wade finds no statutory pre-emption of § 402A).

undercut the legislatively imposed limitations on direct economic loss recovery.

Because warranties are based in contract, there is a general requirement of privity between the plaintiff and the defendant. As a result, most courts do not allow a consumer lacking privity to recover from the manufacturer.[21] Section 402A, on the other hand, dispenses with the requirements of privity.[22]

The U.C.C. notice requirements of section 2-607(3)(a) must be fulfilled to recover damages under a warranty.[23] Because consumers usually are unaware of these notice requirements, section 402A does not make notice a prerequisite to recovery.[24]

The most significant limitations on U.C.C. recovery are the provisions for disclaimers of warranties[25] and contractual modifications or limitations of remedies.[26] Because a manufacturer's disclaimers and limitations, which are seldom the result of negotiations in the consumer setting, may operate harshly in that setting, recovery under section 402A may not be limited by contract.[27] To allow contractual restrictions would frustrate the consumer protection policies underlying section 402A.

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21. *See* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 407 (2d ed. 1980). The U.C.C. does not require strict privity in the case of personal injuries resulting from a breached warranty as U.C.C. § 2-318 does provide for certain third party beneficiaries of a warranty. There are three alternative versions of this section. *See generally* note 37 *infra*. MO. REV. STAT. § 400.2-318 (1978) is the most restrictive alternative. While these provisions remove the privity problem in the personal injury setting, they have not been a source of relief in the economic loss cases.

22. RESTATEMENT (SECOND) OF TORTS § 402A(2)(b) (1965).

23. U.C.C. § 2-607(3)(a). Missouri has adopted this provision as MO. REV. STAT. § 400.2-607(3)(a) (1978).

24. *See generally* W. PROSSER, *supra* note 7, at 655 (U.C.C. notice requirement is "booby trap for the unwary"). *Cf.* RESTATEMENT (SECOND) OF TORTS § 402A, Comment m (1965) (notice not required as under U.C.C.; § 402A is not contract-based remedy). Recent decisions indicate that a nonprivity consumer seeking recovery under the U.C.C. will be required to give timely notice to a remote manufacturer. J. WHITE & R. SUMMERS, *supra* note 21, at 425.

25. U.C.C. § 2-316. Missouri has adopted this provision as MO. REV. STAT. § 400.2-316 (Cum. Supp. 1981). Under this provision, a seller may exclude all warranties, including the implied warranty of merchantability under U.C.C. § 2-314 and the implied warranty of fitness for a particular purpose under U.C.C. § 2-315. *See generally* J. WHITE & R. SUMMERS, *supra* note 21, at 343-49 (discussion of implied warranty of merchantability); *id.* at 357-60 (discussion of implied warranty of fitness for a particular purpose).

26. U.C.C. § 2-719. Missouri has adopted this provision as MO. REV. STAT. § 400.2-719 (1978).

27. RESTATEMENT (SECOND) OF TORTS § 402A, Comment m (1965). *Accord,* Speidel, *Products Liability, Economic Loss and the UCC*, 40 TENN. L. REV. 309, 312 (1973).

These differences prompted the *Gibson* court to hold section 402A recovery of product damages must be predicated on a violent occurrence causing the loss.[28] The court's denial of section 402A recovery raises two issues: is violent occurrence an adequate proxy for physical damage to the product vis-a-vis direct economic loss, and is it appropriate to restrict a consumer's recovery based on restrictions in a commercial sales statute, *i.e.*, the Uniform Commercial Code?

Although first impressions might be that the violent occurrence distinction is superficial, further analysis supports the sufficiency of the test. First, violent occurrence comports with the "unreasonably dangerous" requirement of section 402A.[29] Indeed, it is difficult to imagine a nonviolent occurrence that can be characterized as unreasonably dangerous. Second, direct economic loss does not refer to rapid diminution in product value.[30] Direct economic loss is associated with loss of a bargain or deterioration; physical damage is associated with calamitous, loss-producing events. Violent events occur quickly; this is the justification for using violence to distinguish the two forms of product loss.

The more difficult issue is whether judicial restraint is called for in the consumer setting in light of the provisions of the U.C.C. At first glance, there appears to be a great inequity in applying a commercial sales statute to the consumer setting.[31] But characterizing Article 2 of the U.C.C. as merely a commercial sales statute is inaccurate. Article 2 was drafted with the differences between commercial and consumer sales in mind. For example, comment 4 to the notice provision indicates that the consumer should be

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28. The court noted that since direct economic loss is subject to legislatively imposed limitations, allowing § 402A recovery would "judicially emasculate the warranty provisions of the UCC." 608 S.W.2d at 475.

29. The court gave four examples of violent occurrences: vehicular collisions, fires, explosions, and building or equipment collapses. *Id.* at 473. The high level of danger associated with such occurrences is not difficult to appreciate.

The court concluded that "plaintiff's pecuniary loss did not result from a violent occurrence *or from a product which was imminently dangerous when sold.*" 608 S.W.2d at 474 (emphasis added). The reference to imminent danger had its origin in Morrow v. Caloric Appliance Corp., 372 S.W.2d 41, 53 (Mo. En Banc 1963). *Morrow* held that an action under an implied warranty could be maintained against a manufacturer, notwithstanding the lack of privity between the parties. The implied warranty action in *Morrow* was a predecessor of strict tort liability and § 402A. While the difference between "unreasonable danger" (the standard in § 402A) and "imminent danger" is one of degree, the court's language apparently was not intended to add an imminent danger standard to the action under § 402A.

30. *See generally* Edmeades, *supra* note 8, at 651-52.

31. Dean Prosser was the most visible advocate of a products liability consumer remedy separate from the law of commercial sales. *See, e.g.*, Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1128-33 (1960).

subject to an extended time standard for the giving of notice.[32] The unconscionability provision, section 2-302, is an example of a strong consumer's tool found in the U.C.C.[33] Under this provision, the court may limit or ignore an unconscionable term or contract.[34] The concept of unconscionability is incorporated elsewhere in the Code. Section 2-719, which allows contractual modifications and limitations of remedies, provides that "[l]imitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable . . . ."[35] Good authority exists that, in the consumer setting, disclaimers of warranties may be unconscionable.[36] The disclaimer issue, however, is unsettled. Moreover, the U.C.C. does not directly address the issue of privity when direct economic loss has occurred. Section 2-318 creates third party beneficiary rights for parties suffering personal injuries due to a breached warranty, but does not state a view with respect to direct economic losses.[37] Allowing a nonprivity consumer to recover direct economic losses in warranty remains a minority view in the courts.[38]

Direct economic losses can prove costly to the consumer, but these losses usually pale when compared with the extreme losses associated with per-

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32. U.C.C. § 2-607, Comment 4.

33. U.C.C. § 2-302. Missouri has adopted this provision as MO. REV. STAT. § 400.2-302 (1978).

34. For the basic test of unconscionability, see U.C.C. § 2-302, Comment 1. Most parties who have asserted and successfully used U.C.C. § 2-302 have been consumers. *See* J. WHITE & R. SUMMERS, *supra* note 21, at 149.

35. U.C.C. § 2-719(3). Missouri has adopted this provision within MO. REV. STAT. § 400.2-719 (1978).

36. *See generally* J. WHITE & R. SUMMERS, *supra* note 21, at 475-81. Professors White and Summers outline the basic arguments that disclaimers are not unconscionable as follows: (1) the formal requirements of U.C.C. § 2-316 prevent oppression and unfair surprise, and (2) at no point does U.C.C. § 2-316 refer to the unconscionability statute, even though many other Code sections do. J. WHITE & R. SUMMERS, *supra*, at 475-76. To the contrary, it may be argued that (1) the unconscionability statute, by its terms, applies to "any clause of the contract," (2) U.C.C. § 2-316 doesn't state that such disclaimers are immune from an attack on the ground of unconscionability, (3) of the 10 cases in Comment 1 to the unconscionability provision, 7 involved disclaimers that were denied full effect, and (4) fully understood disclaimers may still be oppressive. J. WHITE & R. SUMMERS, *supra*, at 476-77. For a discussion of cases on this issue, all indicating that disclaimers may be unconscionable, see *id.* at 479-81.

37. The three alternative versions of U.C.C. § 2-318 are silent on the direct economic loss issues. Alternatives A and B only speak of parties "injured in person by breach of the warranty"; nothing is stated about other harms. Alternative C speaks of parties "injured by breach of the warranty," but does not define the limits of such injury. *Id.*, Comment 3 notes that Alternative C is intended to follow the "trend of modern decisions as indicated by . . . § 402A," but is no more specific.

38. J. WHITE & R. SUMMERS, *supra* note 21, at 408.