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Hearsay Evidence—Admissibility at Criminal Trials of ex parte Statements where Declarant is Unavailable—State v. Hansen, 312 N.W.2d 96 (Minn. 1980)

By focusing upon remedies and public policy to construe the Minnesota Franchise Act and apply it to the facts of *Clusiau,* the court has provided adequate relief without unduly controlling commercial law. It has refined the public policy scope of the Minnesota Franchise Act without limiting it to a tortured construction of the UCC.[43] As long as the dealership agreement between the contracting parties can be shown to fit within the definitional parameters of a franchise,[44] the policy behind the Minnesota Franchise Act covers every part of the agreement and those responsibilities and duties integral or ancillary to it.[45]

Notwithstanding other decisions to the contrary,[46] the holding in *Clusiau*[47] reflects the trend of limiting assignee rights,[48] and increasing judicial skepticism of the validity of waiver of defense clauses.[49] The decision is also in accord with the basic legislative intent to protect the franchisee in situations of unequal bargaining power.[50]

Hearsay Evidence—ADMISSIBILITY AT CRIMINAL TRIALS OF *EX PARTE* STATEMENTS WHERE DECLARANT IS UNAVAILABLE—*State v. Hansen,* 312 N.W.2d 96 (Minn. 1980).

Hearsay evidence[1] is generally inadmissible in court.[2] To be admissible at trial, testimony usually must meet three requirements: the declarant must be under oath,[3] the declarant must be present at trial,[4] and the

43. *See supra* note 39 and accompanying text. The UCC supplements local rules without necessarily replacing them. Chase Manhattan did not qualify itself as a holder in due course by a formal application of the definitional criteria.

44. *See* MINN. STAT. § 80C.01, subd. 4 (1982).

45. *See generally* H. BROWN, *supra* note 25, at 32-51.

46. *See* cases cited *supra* note 26.

47. 308 N.W.2d at 490.

48. Comment, *Sales: Minnesota Statute Regulates Consumer Notes and Limits Rights of Assignee—Minn. Stat. § 325.940-.941 (1971),* 56 MINN. L. REV. 510 (1972).

49. Comment, *Uniform Commercial Code—Assignments—Conditional Sales Contracts—Waiver of Defense Clauses,* 58 KY. L.J. 850, 856-57 (1970). For a contrary argument, see Gilmore, *The Assignee of Contract Rights and His Precarious Security,* 74 YALE L.J. 217, 231-33 (1964).

50. Note, *supra* note 3.

1. Hearsay is defined in MINN. R. EVID. 801(c) as "[a] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *See also* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 246 (2d ed. 1972 & Supp. 1978).

2. For an indepth analysis of the hearsay rule, see 5 J. WIGMORE, EVIDENCE IN TRIAL AT COMMON LAW § 1364 (Chadbourn rev. ed. 1974).

3. *See* C. MCCORMICK, *supra* note 1, § 245, at 582.

> The oath may be important in two aspects. As a ceremonial and religious symbol it may induce in the witness a feeling of special obligation to speak the truth, and also it may impress upon the witness the danger of criminal punishment for perjury, to which the judicial oath or equivalent solemn affirmation would be a prerequisite condition.

declarant must be available for cross-examination.[5] These requirements are designed to ensure that truthful and trustworthy testimony is obtained.[6] If any of the three requirements are not met, the rule against hearsay usually makes the testimony inadmissible.[7] Hearsay, however, may be admissible if it falls within one of a limited number of exceptions to the hearsay rule.[8] The exceptions cover circumstances where there is sufficient reason to believe that the statement is true although the three requirements are not met.[9] Exceptions to the hearsay rule are divided into two categories:[10] First, the admissibility of evidence not affected by the availability of the declarant;[11] second, admissibility of evidence which requires that the declarant be unavailable.[12]

In *State v. Hansen,*[13] the Minnesota Supreme Court addressed the unavailable declarant exception to the hearsay rule. The *Hansen* court held that unsworn, out-of-court statements made by two declarants who refused to testify at the defendant's criminal trial were not admissible as exceptions to the hearsay rule[14] under Minnesota Rules of Evidence 804(b)(3)[15] and 804(b)(5).[16] The court further held that admitting into

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Id.

4. This requirement gives the trier of fact an opportunity to observe the demeanor of the witness. *Hansen,* 312 N.W.2d at 103 (quoting Mattox v. United States, 156 U.S. 237, 242-43 (1895)); *see* Barber v. Page, 390 U.S. 719, 725 (1968).

5. *See* C. MCCORMICK, *supra* note 1, § 245, at 583. Wigmore states that cross-examination is the fundamental test of hearsay evidence. 5 J. WIGMORE, *supra* note 3, § 1362.

6. *See* C. MCCORMICK, *supra* note 1, § 245, at 581.

7. *See id.* at 582.

8. *See* MINN. R. EVID. 803, 804.

9. *See* 5 J. WIGMORE, *supra* note 3, § 1422.

10. "The basis for the distinction is largely historical, and represents a judgment as to which hearsay statements are so trustworthy as to be admissible without requiring the production of the declarant when available." MINN. R. EVID. 803 comment.

11. *See* MINN. R. EVID. 803.

12. *See* MINN. R. EVID. 803 comment. Under MINN. R. EVID. 804(b)(1)-(5), the following are not excluded by the hearsay rule if the declarant is unavailable as a witness: former testimony, statement under belief of impending death, statement against penal interest, statement of personal or family history.

13. 312 N.W.2d 96 (Minn. 1981).

14. *See id.* at 98.

15. Rule 804(b)(3) provides for an exception to the hearsay rule for a statement against interest, defined as:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true.

Id. For a general discussion on statements against interest, see Hack, *Declarations Against Interest: Standards of Admissibility under an Emerging Majority Rule,* 56 B.U.L. REV. 148 (1976); Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule,* 58 HARV. L. REV. 1 (1944).

16. Rule 804(b)(5) provides in pertinent part:

> A statement not specifically covered by any of the foregoing exceptions but hav-

evidence the statements of the two unavailable witnesses violated defendant's sixth amendment right to confrontation.[17] Because admitting the

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ing equivalent circumstantial guarantees of trustworthiness, [is not excluded by the hearsay rule] if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Id. See generally 5 J. WIGMORE, *supra* note 3, § 1455.

17. 312 N.W.2d at 103. "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted by the witnesses against him . . . ." U.S. CONST. amend VI. The sixth amendment right of an accused to confront the witness against him applies to state criminal prosecutions via the fourteenth amendment. *See* Pointer v. Texas, 380 U.S. 400, 403-06 (1965).

In 1976, the Eighth Circuit Court of Appeals held, in United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976), *cert. denied,* 431 U.S. 914 (1977), that a statement made to a grand jury by a subsequently unavailable witness, could be admitted into evidence under the rule 804(b)(5) exception to the hearsay rule. *Id.* at 1354; *see* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 804(b)(5)[01] (1981). The issue presented to the *Carlson* court was whether the defendant waived his constitutional right to confrontation of the accusing witness, when evidence shows that the defendant caused the absence of the witness by threats and intimidation. *See* 547 F.2d at 1359-60. The equitable principle which underlies the *Carlson* decision is set forth in Reynolds v. United States, 98 U.S. 145, 159 (1878), where the Court stated "[t]hat no one shall be permitted to take advantage of his own wrong." *See also* Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One,* 8 CRIM. L. BULL. 99, 139 (1972).

The *Carlson* decision would not have been so dramatic had another court previously dealt with the issue, *see* 547 F.2d at 1358, or if the court had stated an evidentiary standard necessary to create this waiver. 547 F.2d at 1357. An adequate standard would be one indicating the level of evidence necessary prior to the decision to deny the accused of his sixth amendment right. Whether this level should be a fair preponderance of the evidence or something more, *Carlson* does not state.

For recent cases adopting the *Carlson* approach, see Tolbert v. Jago, 607 F.2d 753 (6th Cir. 1979), *cert. denied,* 444 U.S. 1022 (1980); United States v. Bailey, 581 F.2d 341 (3d Cir. 1978); United States v. West, 574 F.2d 1131 (4th Cir. 1978); United States v. Garner, 574 F.2d 1141 (4th Cir.), *cert. denied,* 439 U.S. 936 (1978); United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977). *Carlson* was criticized in United States v. Thevis, 665 F.2d 616, 627-28 (5th Cir. 1982), where the court felt that once hearsay statements are found trustworthy, there is no need to find a voluntary waiver of the defendant's confrontation rights.

The United States Supreme Court has had difficulty defining what is involved in the constitutional right to confrontation. For a historical perspective of the court's problem, see Pointer v. Texas, 380 U.S. 400 (1965). The *Pointer* Court held that the right of confrontation as guaranteed to an accused by the sixth amendment is made obligatory on the states through the fourteenth amendment. *See* 380 U.S. at 403. There is an historical relationship between confrontation and the hearsay exceptions.

In Douglas v. Alabama, 380 U.S. 415 (1965), although the witness, an accused accomplice, refused to testify on fifth amendment self-incrimination grounds, his out-of-court confession implicating Douglas was read in the presence of the jury by the prosecutor. The *Douglas* Court held that: "[o]ur cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination." *Id.* at 418. The *Douglas* Court explained that physical confrontation need not be present if adequate opportunity for cross-examination is satisfied. *Id. But see,* Dutton v. Evans, 400 U.S. 74 (1970) (murder conviction based on an inculpatory statement made by a co-conspirator

statements into evidence was not harmless error beyond a reasonable doubt,[18] the defendant's conviction was reversed and a new trial was granted.[19]

In *Hansen,* the defendant, William T. Hansen, Sr., was charged with three counts of aggravated criminal damage to property.[20] It was alleged that Hansen and others were involved in a shooting incident on a powerline construction site in Polk County on March 14, 1978.[21] Two weeks later, in response to the United Power Association's announcement

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while in prison affirmed). The *Dutton* Court attempted to distinguish prior cases, Roberts v. Russell, 392 U.S. 293 (1968); Barber v. Page, 390 U.S. 719 (1968); Brookhart v. Janis, 384 U.S. 1 (1966); Douglas v. Alabama, 380 U.S. 415 (1965), which together seem to require cross-examination in order to satisfy the right of confrontation. *See Dutton,* 400 U.S. at 83-87.

The dissent in *Dutton* argues that the majority decision is "[c]ompletely inconsistent with recent opinions of this Court." *Id.* at 100. The dissent further stated that "absent the opportunity for cross-examination, testimony about the incriminating and implicating statement allegedly made by Williams [the co-conspirator] was constitutionally inadmissible in the trial." *Id.* at 103.

In California v. Green, 399 U.S. 149, 159 (1970), a majority of the Court rejected the view of the California Supreme Court that "belated cross-examination can never serve as a constitutionally adequate substitute" for contemporaneous cross-examination. The *Green* Court held that the admission of prior inconsistent statements was not in itself a violation of the right of confrontation "as long as the declarant is testifying as a witness and subject to full and effective cross-examination." *Id.* at 158.

The results of these cases have left the lower courts in a quandary since the Supreme Court seems to emphasize the importance of cross-examination yet, in *Green,* the Court allows something less than full cross-examination. In the future a federal or state court's determination of a particular case will be on an *ad hoc* basis. *See* Graham, *The Right of Confrontation and Rules of Evidence; Sir Walter Raleigh Rides Again,* 9 ALASKA L.J. 3 (1971); Natali, Green, Dutton & Chambers: *Three Cases in Search of a Theory,* 7 RUTG.-CAM. L.J. REV. 43 (1975); Younger, *Confrontation and Hearsay: A Look Backward, A Peek Forward,* 1 HOFSTRA L. REV. 32 (1973); *see also* United States v. West, 574 F.2d 1131 (4th Cir. 1978) (construing Supreme Court decisions, allowed admission of hearsay where adequate reliability was provided by means other than a prior opportunity for cross-examination). Notably, the *Dutton* opinion was questioned in United States v. Medico, 557 F.2d 309, 316 n.6 (2d Cir.), *cert. denied,* 434 U.S. 986 (1977), and criticized in United States v. Oates, 560 F.2d 45, 83 (2d Cir. 1977).

18. Harmless errors are errors committed by the trial court which do not affect the outcome of the case or affect any substantial rights of the defendant. "All 50 states have harmless-error statutes or rules, and the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties.' 28 U.S.C. § 211." Chapman v. California, 386 U.S. 18, 22 (1967).

19. 312 N.W.2d at 105.

20. *Id.* at 99.

21. *Id.* at 98. At approximately 11:58 p.m., a light-colored, four-wheel-drive vehicle entered a United Power Association/Cooperative Power Association construction site. Upon hearing gunshots, one of two UPA/CPA guards opened the door to his vehicle. As the dome light went on, a shot pierced the windshield of the guard's vehicle, causing fragments to strike the guard in the face and chest. A few more shots were fired before the light-colored vehicle left the site. *Id.*

of a $50,000 reward for information leading to the conviction of persons involved in the March 14 incident, Ardys Fischer came forward and made a statement to the Minnesota Bureau of Criminal Apprehension (MCBA).[22] Ardys Fischer, the estranged wife of Harold Fischer, made no secret of the fact that she wanted to collect the reward. Her statements, implicating her husband, the defendant, and others as being involved in the shooting incident, were made only after she was assured of a possibility of receiving the reward.[23]

Based on her statements, MBCA agents interviewed her husband. The agents promised Mr. Fischer a lesser charge accompanied with immunity for his wife and daughter if he would make a statement regarding what he knew of the shooting incident and who was involved.[24] During the defendant's trial, both Ardys and Harold Fischer refused to testify.[25] The state attempted to introduce both prior statements of the Fischers into evidence under the statement against penal interest[26] and residual hearsay[27] exceptions to the exclusionary hearsay rule. The defendant objected on the ground that admission of the statements would violate his sixth amendment right of confrontation.[28] The state, in refuting the defendant's claim, argued that defendant had intimidated the witnesses and therefore, he had waived his sixth amendment right.[29] The state

22. *Id.*

23. *See id.* at 102. Ms. Fischer stated that when she returned home that evening, she found her husband, Harold Fischer, the defendant, and others talking in the Fischer kitchen. The group in the kitchen was allegedly discussing going to the powerline construction site "to mess up a crane" and "to shoot at the guard's vehicle." *Id.* at 98.

24. *Id.* at 98-99.

25. *Id.* at 99. Mr. Fischer, when called as a witness, invoked his fifth amendment privilege against self-incrimination. He was found in contempt and incarcerated. Ardys Fischer also refused to testify and was found in contempt but summary punishment was not imposed. *Id.*

26. *Id.* The state moved for admission of Harold Fischer's statements as a statement against penal interest under MINN. R. EVID. 804(b)(3). *See supra* note 15. A statement against penal interest is one which subjects the declarant to criminal liability. Such statements are presumed to be trustworthy even in the absence of an oath, presence at trial and cross-examination, where the statement tends to subject the declarant to criminal liability that a reasonable person would not make the statement unless he believed it to be true. *See generally* C. MCCORMICK, *supra* note 1, § 276 (discussion on statements against penal interest under FED. R. EVID. 804(b)(3)).

27. 312 N.W.2d at 99. The state moved for admission of Ardys Fischer's statements under the residual hearsay exception for statement of unusual trustworthiness under MINN. R. EVID. 804(b)(5). *See supra* note 16.

28. The defendant also objected to the admission of the statements against the witness' penal interest, stating that the declarant must believe that the statement was against his interest at the time he made it. The defendant cited United States v. Dovico, 380 F.2d 325, 327 (2d Cir.), *cert. denied,* 389 U.S. 944 (1967), and United States v. Love, 592 F.2d 1022 (8th Cir. 1979), in support of the proposition that Mr. Fischer's statements did not admit criminal conduct. *See* Appellant's Brief at 20.

29. 312 N.W.2d at 99.

also offered evidence that corroborated the Fischers' statements.[30] Based on these facts, the trial court agreed with the state and admitted the statements.[31] The jury found Hansen guilty on three counts.[32] The defendant was sentenced to concurrent jail terms of two years, from which he brought an appeal.[33]

The Minnesota Supreme Court reversed the trial court's ruling concerning the admissibility of the unavailable declarants' statements. The court held that the evidence was not admissible under either the statement against penal interest exception or the residual hearsay exception.[34] The *Hansen* court determined that Ms. Fischer's statement was inadmissible under the residual hearsay exception because it lacked the necessary assurances of reliability and trustworthiness.[35] The court also concluded that Mr. Fischer's statement given after assurances of lenient treatment "indicate[d] that his statement was not against his penal interest; rather, as a result of the bargain, it was in his best interest to make the statement."[36]

In reaching its conclusion, the *Hansen* court applied the two-step approach that the United States Supreme Court advocated in *Ohio v. Roberts.*[37] First, the evidence must be necessary, which may be shown by

30. *Id.* at 100. Testimony by a crime lab analyst indicated that the truck tire imprints at the scene were consistent with those having been made by tires on Darrell Bartos' pickup truck. Evidence that Darrell Bartos' pickup truck matched the truck's description given by the guards was admitted. Also, in accord with the statement that defendant had come to the Fischers' in a green coupe, state motor vehicle records were presented indicating that a green 1974 Plymouth Duster was registered to defendant's son. Further refuting defendant's contention that he did not know any of the other alleged participants, telephone records were produced showing calls made from the defendant's residence to another accused. 312 N.W.2d at 100.

31. The trial court held an in-chambers hearing to determine whether the defendant had forfeited his right to confrontation by making threats to the witnesses. *Id.* at 99.

32. Mr. Hansen was convicted of:

(1) aggravated criminal damage to property, causing a reasonably foreseeable risk of bodily harm in violation of Minn. Stat. § 609.595, subd. 1(1) (1980);

(2) aggravated criminal damage to property, reducing the value of the property by more than $300 in violation of Minn. Stat. § 609.595, subd. 1(3) (1978); and

(3) conspiring to commit aggravated criminal damage to property, in violation of Minn. Stat. § 609.175, subd. 2(3) (1980), and Minn. Stat. § 609.595, subd. 1(3) (1978).

See id. at 100.

33. 312 N.W.2d at 100.

34. *See id.* at 101.

35. The Minnesota Supreme Court noted that Ms. Fischer's statement was taken some time after the incident, and was not under oath. Her testimony also was fragmented and lacking in firsthand information. The court noted that she was separated from her husband at the time of her testimony and her only motive for giving a statement was to receive the reward. *See id.* at 101-02.

36. *Id.* at 101.

37. 448 U.S. 56 (1980).

proving that the declarant is unavailable.[38] Second, the declarant's statement must be reliable.[39] In applying the *Roberts* two-step analysis to the *Hansen* case, the Minnesota Supreme Court ruled that although the Fischers were unavailable and their testimony was necessary, their testimony was not sufficiently reliable to overcome the conflict between the confrontation clause and the exceptions to the hearsay rule.[40]

The problem the *Hansen* court faced in balancing the defendant's right to confrontation under the sixth amendment and the state's need to introduce evidence made by unavailable declarants is one that is frequently before the court.[41] In 1980, the Minnesota Supreme Court decided two cases that also address this problem: *State v. Olson*[42] and *State v. Black.*[43] In *Olson* and *Black,* the court established the general rule that a defendant who causes the absence of a witness against him by threats or intimidation waives his sixth amendment right to confront the witness.[44] The *Hansen* court examined its facts in light of the *Olson* and *Black* rulings and held that there was no "direct or indirect evidence indicating that defendant's conduct had caused the Fischers' silence."[45]

38. *Id.* at 65. A declarant who refuses to testify based on the fifth amendment, as in *Hansen,* is considered to be unavailable for the purposes of the confrontation clause. *See* Phillips v. Wyrick, 558 F.2d 489, 494 (8th Cir. 1977), *cert. denied,* 434 U.S. 1088 (1978).

39. *See* 448 U.S. at 65-66.

40. *See* 312 N.W.2d at 102-03.

41. This conflict is inherent in all cases that attempt to decide the admissibility of inculpatory extrajudicial statements. *See generally* Comment, *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest,* 66 CALIF. L. REV. 1189, 1215 (1978). Inculpatory statements are declarations which implicate both the declarant and the defendant in criminal activity and which are admitted in evidence against the defendant. Several courts have discussed the issue of whether the drafters intended that statements against penal interest be excluded from the hearsay exceptions. *See* United States v. Sarmiento-Perez, 633 F.2d 1092, 1098 (5th Cir. 1981); United States v. White, 553 F.2d 310, 313 (2d Cir.), *cert. denied,* 431 U.S. 972 (1977); United States v. Rogers, 549 F.2d 490, 498-99 (8th Cir. 1976), *cert. denied,* 431 U.S. 918 (1977).

42. 291 N.W.2d 203 (Minn. 1980). The trial court in *Olson* admitted two out-of-court *ex parte* statements made to the police by the co-conspirator who refused to testify due to threats made by the defendant. Prior to trial the witness was killed. The state offered the witness' testimony as a statement against penal interest. The Supreme Court held that there was a violation of the defendant's right of confrontation and had the defendant not forfeited this right by his own wrongdoing, the conviction would have been reversed. *See id.* at 206. The *Olson* court gave no indication of the evidentiary threshold level necessary for a court to find that a defendant has forfeited his right to confrontation.

43. 291 N.W.2d 208 (Minn. 1980). The *Black* court agreed with the trial court's ruling that the accused had forfeited his right to confrontation, when evidence was heard indicating that the accused had the witness beaten up to prevent her from testifying. *Id.* at 214.

44. *See Black,* 291 N.W.2d at 214; *Olson,* 291 N.W.2d at 207-08.

45. 312 N.W.2d at 104-05. The *Hansen* court stated that "to find a waiver based on a witness' reluctance to testify, absent any evidence of threats attributable to defendant, would destroy the right of confrontation in nearly all cases of alleged crimes against persons." *Id.* at 105; *accord* United States v. Benfield, 593 F.2d 815, 821 (8th Cir. 1979).

The facts surrounding the alleged threats are as follows. Ms. Fischer and her counsel

The *Hansen* court continued, "[W]e are compelled to conclude that the trial court erred in determining that defendant had waived his constitutionally guaranteed right of confrontation."[46]

Justice Yetka dissented, emphasizing the principle that the "defendant should not be permitted to invoke the sixth amendment where he himself is responsible for the failure of the court to have available personal testimony of the Fischers."[47] Justice Yetka was convinced that the only reason that the Fischers refused to testify was because the defendant intimidated them.[48] He could find no reason to differentiate the *Hansen* case from the court's earlier rulings in *Olson* and *Black*.[49]

The majority opinion in *Hansen* stresses the importance of admitting reliable and trustworthy statements into evidence in a criminal trial, whereas Justice Yetka's dissent emphasizes the need to discourage defendants who intimidate prospective witnesses from testifying, by finding that the defendant will thereby waive his sixth amendment right to confrontation. The effect of the *Hansen* decision will be that a defendant's constitutional right to confrontation will not be denied him or her without direct evidence that the defendant did in fact intimidate witnesses, who refuse to testify.

The court held that the Fischers' out-of-court statements were inadmissible both because the statements were hearsay not within an exception to the rule, and their admission violated Hansen's sixth amendment right to confrontation. One wonders why the court included the sixth amendment analysis when the hearsay violation might have provided sufficient grounds for reversal of the conviction; usually the court will avoid a constitutional analysis unless it is necessary to the holding of the case. Further, because the court did not specify which ground made the admission not to be harmless error, the severity of the hearsay violation remains unclear. If the prosecution had placed the Fischers on the witness stand, could their statements have been admitted for purposes other than impeachment? Also, if the Fischers had made sufficiently specific declarations to prove waiver by intimidation of Hansen's right to con-

both denied that she had received any threats from defendant. 312 N.W.2d at 104-05. Mr. Fischer made a few vague references to "getting smoked" or killed. *Id.* at 100. There was no clear indication that his fear was the result of acts by or on behalf of the defendant. Mr. Fischer spoke with Minnesota Bureau of Criminal Apprehension agents while in custody, and made some reference to "this party from Wadena." *Id.* An agent asked whether "that party" was the defendant. Fischer replied, "[Y]eah, that's the party I mean." *Id.* When Mr. Fischer was asked if he had been threatened, he only said, "I don't want to talk about it." *Id.* at 104.

46. 312 N.W.2d at 105.

47. *Id.* at 106. Justice Yetka noted that "there was no lack of an opportunity for confrontation because there is no doubt that if defendant had called the Fischers, they would have testified." *Id.* at 105-06.

48. *Id.* at 105.

49. *Id.* at 106.

frontation, would the admission of the hearsay statements have been harmless error? These questions remain unanswered by *State v. Hansen.*

Products Liability—RECOVERY OF ECONOMIC LOSS IN COMMERCIAL TRANSACTIONS—*Superwood Corp. v. Siempelkamp Corp.,* 311 N.W.2d 159 (Minn. 1981).

The doctrine of products liability was developed primarily to compensate consumers for personal injury and property damage caused by defective products.[1] Most importantly, the doctrine protects non-commercial buyers who cannot adequately protect themselves against defective products.[2] Consumers can recover under warranty, negligence,[3] or strict liability theories[4] for personal injury and property damage.[5]

Courts have not received claims for economic loss damages in commercial transactions as readily as they have received consumer claims. A majority of the states[6] that have considered the issue follow *Seely v. White Motor Co.,*[7] and disallow recovery of economic loss under either negli-

1. *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Henningsen v. Bloomfield Motor Inc., 32 N.J. 358, 161 A.2d 69 (1960); Prosser, *The Assault upon the Citadel: Strict Liability to the Consumer,* 69 YALE L.J. 1099, 1122-24 (1960).

2. *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962).

3. *See* Prosser, *supra* note 1, at 1120; *see also* Seely v. White Motor Co., 63 Cal. 2d 9, 19, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965) (commercial consumer was held to have adequate remedies under the U.C.C.).

4. McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967) (the basic theory of *McCormick* is embodied in RESTATEMENT (SECOND) OF TORTS § 402A (1965)).

5. *See* Noel Transfer & Package Delivery Serv., Inc. v. General Motors Corp., 341 F. Supp. 968 (D. Minn. 1972); Peterson v. Crown Zellerbach Corp., 296 Minn. 438, 209 N.W.2d 922 (1973).

6. *See* Iowa Elec. Light & Power Co. v. Allis-Chalmers Mfg. Co., 360 F. Supp. 25, 27-33 (S.D. Iowa 1973); Miehle Co. v. Smith-Brooks Printing Co., 303 F. Supp. 501, 503 (D. Colo. 1969); Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alaska 1976); Beauchamp v. Wilson, 21 Ariz. App. 14, 515 P.2d 41 (1973); Long v. Jim Letts Oldsmobile, Inc., 135 Ga. App. 293, 217 S.E.2d 602 (1975); Clark v. International Harvester Co., 99 Idaho 326, 581 P.2d 784 (1978); Marcil v. John Deere Indus. Equip. Co., 9 Mass. App. 908, 403 N.E.2d 430 (1980); Rhodes Pharmacal Co. v. Continental Can Co., 72 Ill. App. 2d 362, 219 N.E.2d 726 (1966); Hawkins Constr. Co. v. Matthews Co., 190 Neb. 546, 209 N.W.2d 643 (1973); Ford Motor Co. v. Lonon, 217 Tenn. 400, 398 S.W.2d 240 (1966); City of La Crosse v. Schubert, Schroeder & Assoc., 72 Wis. 2d 38, 240 N.W.2d 124 (1976).

7. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). The *Seely* court considered whether a plaintiff could recover the purchase price of a defective truck and the resulting loss of profits for lack of its normal use. The court refused to allow recovery on the theory of strict liability, stating that the law of sales was designed to meet the needs of parties involved in commercial transactions. To allow other forms of recovery would undermine the law of sales, and would not reflect the intent of the parties. In dicta, the court indicated that economic losses could not be recovered under a negligence theory.