

1986

Joan Stephens v. Brent Henderson, Classic Skating Center : Brief of Respondent

Utah Supreme Court

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860440 IN THE SUPREME COURT OF THE STATE OF UTAH

JOAN F. STEPHENS,	:	
Plaintiff/Respondent,	:	
vs.	:	Docket No. 86-0440
BRENT HENDERSON, d/b/a	:	Category No. 13b
CLASSIC SKATING CENTER,	:	
Defendant/Appellant.	:	

BRIEF OF RESPONDENT

Appeal from the Judgment Upon Jury Verdict of the
Fourth Judicial District Court of Utah County
State of Utah

Honorable Cullen Y. Christensen, Judge

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FILED
JAN 14 1987

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All Statutes are found in Utah Code Annotated
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STATEMENT OF ISSUES:

1. Does This Court Have Jurisdiction to Hear This Matter Where There Is A Counterclaim Not Resolved and There Has Been No Rule 54(b) Certification?

2. Should the Liability Reform Act of 1986 Be Applied Retroactively to Causes of Action Arising Prior to Enactment?

3. Does Jacobson Construction supply the correct doctrine with regard to Assumption of the Risk in a Case Arising in a Roller Rink?

4. Did the Trial Court Error in Failing to Give Certain Jury Instructions Regarding the Applicable Duty of Care?

STATEMENT OF THE CASE

A. NATURE OF THE CASE:

This tort action was filed against Classic Roller Skating Rink claiming that the Joint Negligence of Classic and an unidentified John Doe combined to cause injuries to plaintiff. Subsequent to the action being filed and before the case went to trial, the Utah State Legislature passed the Liability Reform act of 1986. Defendant claimed that the Act should apply to this action, that plaintiff assumed the risk of injury, and that John Does conduct constituted assault and battery upon plaintiff. At issue in this appeal are questions of retroactivity of the Liability Reform Act, Assumption of the Risk by Plaintiff, and whether John Doe's conduct constituted an intentional assault and Battery on plaintiff, absolving Classic of Liability.

B. STATEMENT OF FACTS:

Plaintiff herein filed a complaint against defendants Brent Henderson dba, Classic Skating Center and John Doe, claiming that plaintiff Stevens was injured when struck from behind by defendant John Doe who negligently or intentionally caused her to fall to the ground, and that Classic was negligent in failing to supervise the patrons of their establishment, in failing to supervise their employees, and by the the acts and omissions of their employees in failing to supervise defendant's customers. Record on Appeal pp. 1 through 4 (Attached hereto as exhibit 1).

Defendant Classic filed an Answer and Counterclaim, denying negligence in its part, claiming comparative and contributory negligence, and assumption of the risk by plaintiff. Defendant's counterclaim was brought on the basis that the action was prosecuted in bad faith, without merit, and in violation of §78-27-56 Utah Code Ann. (1953 as amended). Record on Appeal at pp. 8 through 11 (Attached hereto as exhibit 2).

The action was tried to a jury and on July 29, 1986, the jury entered a verdict on special interrogatories, determining that Classic was negligent and a proximate cause of plaintiff's injury, that John Doe was negligent and a proximate cause of plaintiff's injury, and that plaintiff Stevens was not negligent and not a proximate cause of her injury, upon which special interrogatories the Court entered Judgment. Record on Appeal at 283, 284. (Addendum of Plaintiff's Brief at A-1 through A-6). Classic's counterclaim was neither submitted to the Jury nor otherwise resolved.

Defendant Classic accepted that plaintiff Stevens was a business invitee of Classic, and as such Classic had a duty to exercise reasonable care to protect plaintiff. Record on Appeal at 61 (Trial Brief of Classic, p.2). Also, Classic agreed and consented to weighing the negligence of John Doe, a joint tortfeasor, and not a party to this action. Record on Appeal at 63 (Trial Brief of Classic, p.3).

With regard to the issue of Assumption of the Risk,

Classic's manager testified that they average 1,800 people per week and average 1 broken bone per month. Record on Appeal at 441. Classic's expert witness, LaMar Hunt, who has managed this rink and currently manages Classic in Sandy, testified that in his rinks he will see a broken bone type injury "maybe once every six months..." Record on Appeal at 461, lines 4-8.

Classic's counsel argued Assumption of the Risk to the Jury as Comparative Negligence. Record on Appeal at 471 lines 15-24. (attached hereto as exhibit 3). Classic further argued to the Jury that the doctrine of Joint and Several Liability would apply and that if Joan Stevens was found less than 50% negligent "Classic will pay 100% of this judgment." Record on Appeal at 480 line 11, through 482 line 19. (Attached hereto as exhibit 4).

Plaintiff Joan Stevens concurs in the Facts of the Case as presented by defendant Classic.

SUMMARY OF ARGUMENTS

1. Classic does not have a final judgment resolving all issues in the case nor certification pursuant to Rule 54(b).

2. The Liability Reform Act of 1986, should not be applied to this case, first, because it should not be applied retroactively, and second, in light of arguments to the Jury failure to apply would be harmless error.

3. The trial Court properly followed and applied the doctrine of Assumption of the Risk to this case.

4. The conduct of John Doe did not constitute an Intentional Assault and the duty owed by Classic differed from the duty owed by defendants in Gustaveson, infra.

ARGUMENT

POINT I

THIS IS NOT A FINAL JUDGMENT FROM WHICH
APPEAL LIES PURSUANT TO RULE 54(b)

In this action, Defendant filed an Answer and Counterclaim subsequent to being served with a Summons and Complaint in this matter. A copy of said Answer and Counterclaim is included as an exhibit in the appendix to this Brief and labelled Exhibit 2. The matters contained in the Counterclaim were not submitted to the jury, and no Order has been entered with regards to the Counterclaim in this action.

Defendants have not availed themselves of the procedures of Utah Rules of Civil Procedure 54(b), which permits an appeal of "fewer than all the claims or parties," but only after District Court certification. Defendant has neither sought nor received an interlocutory appeal, under Utah Rules of Civil Procedure 72(b), as superseded by Utah Rules of Appellate Procedure 5.

It is well-established law in this jurisdiction that a party to a suit generally is entitled to only one appeal as a matter of right, regardless of the number of parties or issues presented for disposition. An appeal can be taken only from the entry of a judgment that finally concludes the action. Pate v.

Marathon Steel, 692 P.2d 765 (Utah 1984). There is no doubt that the entry of judgment by the jury in this case, and the subsequent entry of judgment by the Court, constitutes a final judgment on the issues presented in Plaintiff's Complaint. However, the District Court did not certify the matter for appeal under Rule 54(b), Utah Rules of Civil Procedure, by entering the express finding that there was "no just reason for delay." Until a final Order is entered, or until a Rule 54(b) certification by the trial Court is obtained, Defendants have not appealed from a final, appealable Order. General Motors Acceptance Corporation v. Martinez, 24 UAR 18 (Utah 1985), quoting Pate v. Marathon Steel Co., supra.

Requirement of having appeal lie only from an Order resolving all issues as to all parties, or having Rule 54(b) certification, is jurisdictional. That is, the Appellate Court obtains no jurisdiction to hear the matter, even though the parties may acquiesce or consent to the appeal. Lack of jurisdiction can be raised at any time by either party or by the Court. Olsen v. Salt Lake City School District, 39 UAR 39 (Utah 1986).

A final point should be noted, that being that plaintiff feels that the Counterclaim was groundless, as based upon the jurys' verdict, and has no objection to this matter being heard on its merits. Entry of a verdict by the Jury in favor of the plaintiff and against defendant Classic establishes that the

action was not groundless and brought in bad faith.

POINT II

THE LIABILITY REFORM ACT OF 1986 SHOULD NOT BE GIVEN RETROACTIVE EFFECT

Defendant claims only two possible errors in the trial court's failure to apply the Liability Reform Act of 1986. Defendant provides first that the Court could have applied the Act prospectively, and second that the Act effected a procedural and not a substantive change in law.

A. Retroactive v. Prospective Application: Defendants' position that the Liability Reform Act may be applied prospectively, without having retroactive effect is wholly without merit and support.

First it should be noted that substantial research by this office has failed to uncover any Utah decisions directly addressing the issue of whether joint and several liability, either its creation or elimination, affects substantive rights or is merely a procedural remedial law. Section 68-3-3 Utah Code Ann. (1953 as amended) specifically states that "no part of these revised statutes is retroactive, unless expressly so declared."

The Liability reform Act of 1986, repeals and reenacts the Utah Code provisions regarding comparative negligence and right to contribution among joint tortfeasors. The changes are sweeping and directly effect a Plaintiff's right to recover from

Joint tortfeasors as well as abolishing the right of contribution among joint tortfeasors.

Unless this Court wishes to address the Liability Reform Act piecemeal, it must address the provisions relating to Contribution. In addition, an analogy may be drawn to the law of Contribution for the proposition that the right to Joint and Several Liability effects substantive rights, and therefore, can not have retroactive application.

The Utah Court has held that the creation of a right to contribution effects substantive rights. Brunyer v. Salt Lake Co., 551 P.2d 521 522 (Utah 1976). As the Utah Liability Reform Act modifies substantive rights, it cannot be applied retroactively.

The doctrine of Joint and Several liability are substantive, pursuant to the definitions provided by the Utah Supreme Court.

Substantive law is law which creates, defines, and regulates the rights and duties of the parties, [and not merely] law which pertains to and prescribes the practice and procedure by which the substantive law is determined or made effective.
Petty v. Clark, 192 P.2d 589, at 593-4 (Utah 1948).

Applying the definitions in Petty to the Utah statute on joint and several liability, it is clear that the joint and several liability and contribution statutes define the rights of the plaintiff and the duties of the joint tortfeasors. The plaintiff had the right to recover from one or more of the joint tortfeasors, and each joint tortfeasor had the duty to pay the

entire damage when this cause of action arose. If the Utah Liability Reform Act is applied as requested by defendant, it would modify existing rights, and would be, in effect, retroactive.

Defendants baldly assert in their Memorandum that Plaintiff had no vested right at the time the Liability Reform Act took effect. Defendant cites no authority for this statement.

Some guidance in this matter may be obtained from the case of United States Fidelity and Guarantee Co. v. Park City Co., 397 F.Supp. 411 (D. Ore. 1973), in which the Court examined a contribution joint tortfeasor statute to determine whether it should be applied retroactively to an accident that occurred prior to the effective date of that statute. In reaching its decision, the Federal District Court noted the general rule against retroactive application absent an express provision of retroactivity. The Court stated:

"The relationship between the parties is fixed as of the date of the action. It is at that time that these parties become joint tort-feasors. Their rights and obligations. . .are governed by the then existing substantive law. . ."

Id. at 414

Similarly, in a case dealing with the amount recoverable under a Workmens' Compensation Statute, the Utah Supreme Court noted that "Civil liabilities already incurred may not be changed by statute unless specifically so provided by the

Legislature." 8000 West Corp. v. Stewart, 546 P.2d 1281, 1282 (Utah 1976).

Other cases dealing with application of substantive law are in accord:

The distinction (between purely procedural and purely substantive legislation) relates not so much to the form of the statute as to its effects. If substantial changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in futuro unless the legislative intent to the contrary clearly appears.

Aetna Casualty Co. v. Industrial Accident Commission, 30 Cal.2d 388, 182 P.2d 159, 162 (1947) (emphasis added).

It thus appears clear from Utah precedent in the areas of contribution from joint tortfeasors and of insurance coverage that the Act effects substantive rights of the parties and the provisions of §68-3-3, rather than its exception, should be applied to deny the Act retroactive effect.

B. Legislative Intent as to Application of the Liability Reform Act.

The Liability Reform Act contains no express language as to whether the Act is to apply to causes of action pending at the Act's effective date. Courts generally apply a rule of strict construction against retroactive application of statutes, unless there is an express text declaring otherwise. See generally, Sutherland, Statutory Construction, §41.04, 4th Ed., 1973:

The strength and continued vitality of the rule favoring exclusively prospective interpretation is often espoused. Words in a statute ought not to have retroactive operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intent of the legislature cannot otherwise be satisfied.

This rule has been codified in Utah Code Ann. §68-3-3 (supra). In Union Pacific Railroad Co. v. Trustees, Inc., 8 Utah 2d 101, 329 P.2d 398 (1958), the Utah Supreme Court emphasized the importance of §68-3-3:

As to any statutory question, Utah's policy demands the inclusion of an express authorization to justify any retrospective application of the statute. Id. at 399.

In the absence of express statutory language, courts often look to the statute's legislative history to determine if the statute was intended to apply retroactively or prospectively. During the 1986 general session of the Utah legislature in a state and local standing committee meeting on January 27, 1986, statements were made which shed light on the legislature's intention. Senator Williams pointedly asked Senator Barlow, the Act's principal sponsor:

Do you foresee any problems with this law coming into effect immediately. . . in terms of cases coming on line right now or within the next six months?

Senator Barlow referred the question to Al Larson, the bill's principal draftsman, who answered:

We perceive that this Act will govern only causes of action or claims which arise after the Act's effective date.

Moments later, Senator Williams again questioned Senator

Barlow and Mr. Larson:

So it really does not matter what the effective date is?

(This question implied that whether the Act became effective upon the Governor's signature or 60 days post adjournment was of no great importance since the relative impact on pending cases would be the same.) In response, Senator Barlow put forth the following example:

"Say you had a serious accident happen the day after the Governor signed the Liability Reform Act. It is now the law. Otherwise, the accident would go under the provisions of the old law.
Utah Senate State and Local Standing Committee Tapes, 1986 General Sess., Utah State Legislature, January 27, 1986.

This series of questions and answers indicate that the bill's principal sponsor believed that causes of action accruing prior to the Act's effective date would be governed by existing law and not the Liability Reform Act. The committee passed the proposed amendment by a unanimous vote immediately following this discussion.

On the floor of the Utah House of Representatives during debate on the final reading of the Act, Representative Adams asked a similar question:

"How does this Act effect lawsuits that are presently being filed or that have been recently settled?"

Representative Demann responded: "It has no bearing on existing cases, it will affect only those accidents that occur after the law has gone into effect." Utah House of

Representatives Floor Records, Utah State Legislature, 1986
General Sess., February 26, 1986, Record No. 18. Within ten
(10) minutes of this statement, the House approved the Act by a
vote of 50 to 13. (Memorandum Decision, Fashon Place
Investment, et al. v. Salt Lake County, et al., Consolidated
Case No. C-84-302, Third District Court for Salt Lake County)

Thus, a review of the legislative history of the Liability
Reform Act indicates that the Legislature intended that it not
apply to pending cases.

C. Cases Cited by the Defendant are not Applicable

The cases cited by Defendants Classic and Henderson, in
support of their position that the Liability Reform Act of 1986
may be applied prospectively are not authoritative or applicable
to this action. Defendant cites dicta from the case of Silver
King Coalition Mines Co. v. Industrial Commission in 2 Utah 2d
1, 268 P.2d 689 (1954), for the proposition that Plaintiff did
not have a right.

The case is not on point. That case sought a determination
regarding the Statute of Limitations on a death benefit statute.
The case was unique to Workers' Compensation Law, involved
numerous contingencies affecting liability, and ultimately the
Court held that the amendment to the law was enacted before the
worker's claim was barred and hence, before his decedent's
rights were barred. The cause of action of his dependants had
not yet arisen, and therefore the statute was not being applied
retroactively. Id. at 693.

Likewise, the Defendants' argument that the case of Campbell v. Stagg, 596 P.2d 1037 (Utah 1979) provides support for the proposition that this statute may be applied prospectively is unjustly and incompletely made. The case is inapplicable in deciding whether the Liability Reform Act should be given retroactive effect and applied to pending cases. Indeed, the Court specifically noted "[w]e do not view the statute as operating retroactively." Id. at 1042. The quote looked at the language of the statute, which explicitly directed that all judgments entered after the Act's effective date must include interest on the amount awarded. They were also careful to point out that the change did not affect judgments entered prior to its effective date. Thus, since the Court did not even consider this statute to be retroactive in effect, the holding in Campbell has no bearing on the issue now before this Court. In addition, the Supreme Court specifically held in Campbell:

Similarly, we believe the legislative intent regarding this statute to be that the date of the act giving rise to the action is in all cases the date used for computing the period of interest.

Pursuant to the legislative analysis provided above, it is clear that the legislative intent in the Liability Reform Act of 1986 was that it not apply to cases that arose prior to the Act's effective date.

D. Substantive Law vs. Procedural Law Approach:

It has often been recognized, as set forth above, that an act may be given retroactive effect if it is procedural and not substantive in character. The Utah Supreme Court has recognized this narrow exception to the general rule of non-retroactivity:

"[w]here an amendment's effect was "procedural" or "remedial." Foil v. Ballinger, Utah, 601 P.2d 144 (1979) (clarified statutory notice provision and changed "commenced" to "initiated"); Petty v. Clark, 113 Utah 205, 192 P.2d 589 (1948) (added new categories or suits where jury is advisory); Boucofski v. Jacobsen, 36 Utah 165, 104 P. 117 (1909) (empowered courts to make additional findings after entry of judgment). In Foil v. Ballinger, 601 P.2d at 151, we quoted with approval a passage from Okland Construction Co. v. Industrial Commission, Utah, 520 P.2d 208, 210-11 (1974), which stated that a statute or amendment may be retroactively applied where it "deals only with clarification or amplification as to how the law should have been understood prior to its enactment."

In Re J.P., 648 P.2d 1364, 1369-1370, fn. 4 (Utah 1982) (emphasis added).

In the case cited, the Court went on to hold that amendments concerning when parental rights may be involuntarily terminated in a child's best interests were not a merely procedural change or clarification, even though the statute's controlling principle was not altered. The amendments could not be applied retroactively since "changes of this magnitude do not fit within the relatively narrow exception" to the general rule. In re J.P., 648 P.2d at 1370, fn. 4. Accord, In the Matter of Disconnection of Certain Territory From Highland City, 668 P.2d 544, 548-549 (Utah 1983) (where amendments do not merely "clarify" or "amplify" how the earlier law should have been

understood, but alter the substantive criteria for decision, they constitute a fundamental change in the law on which both sides have relied in preparing and presenting their cases and cannot be given retroactive effect).

Shortly after the 1973 enactment of §78-27-37, et seq. the Utah Supreme Court had occasion to examine whether or not the right of contribution among joint tortfeasors (§78-27-39, U.C.A. 1953 as amended 1973) was a substantive right or whether the statute was "remedial" or "procedural" in nature. The Court concluded:

[t]he statute above mentioned [§78-27-39] does in fact create a right of action where none existed prior to its adoption. A right of action should be distinguished from remedies. One precedes and gives rise to the other, but they are separate and distinct. The contribution statute established a primary right and duty which was not in existence at the time the injuries in this case arose, and the statute not being retroactive by its terms did not create a right on behalf of the third party plaintiffs.
Brunyer v. Salt Lake County, 551 P2d 521, 522 (Utah 1976) (fn. omitted) (emphasis added).

Other Courts are in agreement with that holding.

[t]he distinction [between purely procedural and purely substantive legislation] relates not so much to the form of the statute as to its effects. If substantial changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in futuro unless the legislative intent to the contrary clearly appears.
Aetna Casualty Co. v. Industrial Accident Commission, 30 Cal.2d 388, 182 P.2d 159, 162 (1947) (emphasis added).

Should this Court determine that the legislative history is not dispositive of the issues, it must be determined whether the act modifies substantive rights. In that regard, defendant Classic has addressed the issues backwards. It should be here noted that the issues of Procedural vs. Substantive rights analysis are intermingled with the issues addressed in Point II-A of this brief.

The issues in this case can be distinguished from the issue before the Iowa Supreme Court in Baldwin v. City of Waterloo, 372 N.W. 2d 486 (Iowa 1985). In Baldwin, the Court analyzed a statute limiting joint and several liability which expressly stated that it was to be applied retroactively. The issue for the Iowa Supreme Court was whether the statute by its terms deprived the plaintiff of a vested right, and thereby violated plaintiff's due process rights under the United States Constitution. In this case, the Court is faced with a different issue. Although it appears clear that the Legislature intended this statute not to apply retroactively, the Courts have used a procedural versus substantive analysis to aid in the determination of the legislative intent.

In McGinn v. Utah Power & Light Co., 529 P.2d 423 (Utah 1947), the Utah Supreme Court examined the substantive/procedural distinction in a case dealing with the Idaho comparative negligence statute. The court held that an error in an instruction concerning the percentage finding on liability

would be prejudicial because: "We think the instructions in a case like this are of a substantive, not procedural bent." Id. at 424.

The Utah court considered the retroactive application of a new statute in Okland Construction Co. v. Industrial Comm., 520 P.2d 208 (Utah 1974), when a workman's compensation amendment resulted in two possible formulas for computing compensation. In deciding which statute was applicable, the court stated:

It is true as the employer Okland contends that it is entitled to have its rights determined on the basis of the law as it existed at the time of the occurrence, and that a later statute or amendment should not be applied in a retroactive manner to deprive a party of his rights or impose greater liability upon him.
Id. at 210

The fact that the claim filed January 25th, 1985, had not been reduced to a judgment does not weaken the relationship that was fixed by the tortious conduct of the defendants. The application of Section 68-3-5, Utah Code Ann., to a claim not yet reduced to a judgment was approved by the Utah Supreme Court in Buttrey v. Guaranteed Securities, 78 Utah 39, 300 P. 1040 (1931).

Comparative negligence statutes examined by other courts have been found to be substantive in nature. See, Johnson v. Safeway Stores, Inc., 568 P.2d 908 (Wyo. 1977); Dunham v. South Side National Bank of Missoula, 548 P.2d 1383 (Mont. 1976).

United States Fidelity & Guaranty Co. v. Park City Corp.,

397 F. Supp. 411 (D. Ore. 1973), is similar to this case. In that case the court examined a contribution joint tortfeasor statute to determine whether it should be applied retroactively to an accident that occurred prior to the effective date of the statute. In reaching its decision, the Federal District Court noted the general rule against retroactive application absent an express provision of retroactivity. The court stated:

The relationship between the parties is fixed as of the date of the accident. It is at that time that these parties become joint tort-feasors. Their rights and obligations as among themselves are governed by the then existing substantive law which did not provide for contribution among joint tort-feasors.

Id. at 414.

The incident on November 8, 1984, fixed the relationship between the parties. The Comparative Negligence Act was in effect at that time, allowing Plaintiffs to recover their entire judgment from any one of the Defendants found liable. The Plaintiff could decide against whom to proceed, and could consider a Defendant's ability to pay as a primary factor. If the Liability Reform Act is applied retroactively, there could be instances where Plaintiffs who made an economic decision not to join certain Defendants would under the new law desire them as parties only to find that the Statute of Limitations had run. Plaintiffs who relied on the continuation of joint and several liability when deciding from which Defendants recovery should be sought would be precluded from obtaining a full recovery.

In Allen v. Fisher, 118 Ariz. 95, 574 P.2d 1314 (App.

1977), the Arizona Appellate Court again recognized the exception to retroactivity for "a statute relating solely to procedural law such as burden of proof and rules of evidence." Id. at 1315. However, that Court refused to apply the exception in a situation where the new statute in question changed the measure of damages. "A rule effecting the measure of damages is a substantive right, . . . and a change in the law effecting the measure of an injured person's right of recovery cannot be applied retroactively." Id. at 1316.

This holding is particularly important here because application of the Liability Reform Act of 1986 to the present case would in fact change the Plaintiff's right of recovery, as defendant Classic has requested that its liability on the judgment entered against it be reduced, and there is no recovery against John Doe. Retroactive application would effect the measure of damages. Retroactive application would effect substantive rights.

Finally, there can be no error on the trial court in this case, as the guidance provided by the Utah Supreme Court in In re: Ingrahams Estate, 148 P.2d 340, 342 (Utah 1944):

If by chance a reasonable doubt should exist as to whether or not a statute operates in futuro or is retroactive, such should be resolved in favor of prospective operation.

Therefore, the trial court in this case properly determined that reducing the Plaintiff's verdict pursuant to the Liability

Reform Act of 1986 would be a retroactive application of the statute and that it would not be procedural, but rather would affect substantive rights.

E. The Retroactive Elimination of Joint and Several Liability Would Violate Public Policy in this State

The Court's rationale, in 8000 West Corp. v. Stewart, supra, is particularly appropriate in this case now before the Court, since insurance coverage is also involved.

"To interpret the statute retrospectively. . . could create chaos in the operations of. . . insurers whose premium rates and loss reserves are computed on their potential liability inherent in the statutory scheme that was in effect upon issuance of the insurance. Cf. Taylor v. Public Employees' Retirement Association, 542 P.2d 383 (Colorado)." 8000 West Corp. v. Stewart, 546 P.2d at 1283 (emphasis added).

In the pending action, retroactive application of the newly-enacted Liability Reform Act of 1986 would result in a windfall to the insurance company involved, since their premium rates and loss reserves at the time this action arose were based on the negligence statutes then in effect. It is not the public policy of this State and this Court to bend to special interest legislation, such as is involved here, and to modify substantive and existing rights, absent some express legislative intent to do so. As the above argument establishes, the legislature did not so intend.

Defendant asserts in its brief that Joint and Several Liability is a common law doctrine which was codified in Utah at

the time plaintiff was injured by defendants negligence. Defendant then argues that it is unfair to require defendant to pay. Plaintiff here argues that it would be unfair to take from her the right to collect for defendant's negligence which right existed at the time this incident occurred.

F. The Jury Award Included a Determination That Defendant Henderson dba Classic Pay All Damages, and Therefore, Non-Retroactive Application of the Liability Reform Act Would Be Harmless Error In Any Event:

Over Plaintiff's counsel objection, Defense counsel argued to the jury that Defendant Henderson would be liable for 100 percent of the damages awarded by the jury. Specifically, he educated the jury as follows:

"It's extremely important that you understand what happens with these percentages.

"If you find Mrs. Stephens was 50 percent or more negligent, she collects nothing. . . If you find that she's less than 50 percent negligent and you get, you can divide the percentages among the other two parties, Henderson or this John Doe, the problem that we have and as why I'm instructing you on it, that you need to be sure when you do, if you give Henderson Enterprises any negligence, that you really want them to pay. Because the way the law works is called joint and several liability, and the way the law works is that if Henderson Enterprises has 1 percent negligence on this special verdict form, the Plaintiff is allowed to collect the percent of the judgment from any of the Defendants. So what does that add up to in this case? You write her down 40 percent negligence and you write John Doe down 50 percent negligence and give Henderson 10 percent negligence, Henderson will pay a hundred percent of the amount that you award. Because nobody knows who John Doe is. And 'till . . ."

[Plaintiff objects and bench conferance is held]

THE COURT: "Your objection is noted, and I will overrule it."

MR. SANDERS: ". . . So the point that you are making is, you need to understand if you find her less and there's another point that I have to address on her, too, but I need to get the basic premise out here for you that Henderson Industries, if you give them one--is going to pay 100 percent of this judgment.

". . . But the one thing I want you to understand is, you don't find Mrs. Stephens 50 percent or more negligent and you give 1 percent to the Hendersons, you need to be sure that you want to pay 100 percent of the negligence, because that's what's going to happen -(unintelligible)- her negligence."

Transcript of Trial; p. 128 line 9, to p. 130 line 19; Record on Appeal at 480-482.

This argument was improper for several reasons. Mainly, it misstated the law in that it failed to instruct the jury that plaintiff's award would be reduced by her pro-rata share of fault.

The jury came back with a finding that Plaintiff Joan Stephens was 0% negligent. The jury likewise determined that 25% negligence would lie on Defendant Henderson dba Classic. In entering a verdict, the jury was advised and intended that Henderson would be liable for the entire amount.

It should be noted that the jury found Henderson approximately 1/4 at fault. The jury awarded approximately 1/5 of the requested special damages, and approximately 1/6 of the requested general damages.

Therefore, it would be extremely unfair to reduce the award against Defendant Henderson dba Classic by their pro-rata share

of fault. The jury has already reduced Henderson's verdict by approximately his pro-rata share of fault.

POINT III.

THE COURT PROPERLY REFUSED TO ALLOW JURY
INSTRUCTIONS ATTEMPTING TO APPLY THE PRIMARY DOCTRINE
OF ASSUMPTION OF THE RISK

A. Current Status of Assumption of the Risk Under Utah Law:

The primary doctrine of assumption of the risk is a complete bar to recovery in a negligence action. That is the defense as it existed at common law and it was deemed to be part of Contributory Negligence. Assumption of the Risk, "in its primary sense, it is an alternative expression for the proposition that defendant was not negligent, that is, there was no duty owed or there was no breach of an existing duty." Jacobsen Const. v. Structo-Lite Engineering, 619 P.2d 306 at 310 (Utah 1980).

In Jacobsen, this Court examined substantial authorities in making its final determination, and quoted favorably from the New Jersey court which stated

"We thought, however, that '[p]erhaps a well-guarded charge of assumption of risk in its primary sense will aid comprehension' (cite ommitted) * * * Experience, however, indicates the term 'assumption of risk' is so apt to create mist that it is better banished from the scene. We hope we have heard the last of it. Henceforth let us stay with "negligence" and "contributory negligence."

Id. at 311.

The Defendants in this case ask this Court to determine that Assumption of the Risk in sporting event cases should be

retained in its primary sense. This argument clearly runs contrary to the Utah Statutory Scheme and the purpose of the Comparative Negligence Statute as recognized by this Court.

At the time this incident arose, the Utah Comparative negligence statute, §78-27-37, Utah Code Ann. (1973) read:

"Contributory negligence shall not bar recovery in an action by any person . . .if such negligence was not as great as the negligence or gross negligence of the person against whom recovery is sought . . .As used in this act, "contributory negligence" includes "assumption of the risk."

The inclusion of "assumption of the risk" in the doctrine of negligence is retained in the 1986 version of the law which defines fault as "any actionable breach of legal duty, act or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including, . . . assumption of the risk" §78-27-37(2), Utah Code Ann. (1986)

The legislative intent to include assumption of risk within contributory negligence terminology and eliminate the use of the term is consistent with a recent trend established by other courts, legislatures, and legal commentators alike. Jacobsen, supra, at 309.

The Jacobsen court recognized Assumption of the Risk in its secondary sense, as part of Comparative Negligence. The Court held:

[t]hat under our comparative negligence statute "assumption of risk" language is not appropriate to describe the various concepts previously dealt with under that terminology but is to be treated, in its secondary sense, as contributory negligence. Specifically, and with particular reference to our comparative negligence act, the reasonableness of

plaintiff's conduct in confronting a known or unknown risk created by defendant's negligence will basically be determined under principles of contributory negligence.² Attention should be focused on whether a reasonable prudent man in the exercise of due care would have incurred the risk, despite his knowledge of it, and if so, whether he would have conducted himself in the manner in which the plaintiff acted in light of all the surrounding circumstances, including the appreciated risk. (cite omitted) Then, if plaintiff's unreasonableness is viewed to be less than that of defendant, according to the terms of the statute, "any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering" (Fn. omitted).

Id., at 312

Therefore, under Utah law, it is clear that the primary doctrine of Assumption of Risk is no longer viable, and the trial court in this case, following the guidelines of the Utah Supreme Court made the proper legal determinations.

B. Analysis in light of the facts of this case

The Defendant claims reversible error of the trial court based upon the failure to give requested instructions. A review of the requested instructions establishes that none of the refused instructions contain the language necessary to comply with the existing law. Specifically, none of the requested instructions contained any of the essential information contained in the last quote, supra, from Jacobsen, which would be essential to the jury in making an informed and fair determination.

In addition, it is clear by the argument of Defendants' counsel that they were not prejudiced by the determinations of

the Court. Defense counsel argued to the jury, without objection, that the plaintiff was comparatively negligent based upon submitting herself to a known and appreciable risk. His argument was as follows:

"Now, we have used a couple of words, or they have, to describe the crowd. One is "rough" and the other is "rowdy." . . . Things get pretty rowdy.

"And so this is the atmosphere in which Mrs. Stephens puts herself, when she goes in there, she walks in, she's in there a half-hour before she gets on that floor, and she sees the crowd, going around, and she sees the nature of the crowd. . . . And she see's what's going on, she has ample opportunity. And I suggest to you, if she had fear for her safety out there, she was negligent to get out onto the floor in that situation.

In Thomas v. Studio Amusements, 123 P.2d 552 (Cal. Dist. Ct. App. 1942), California recognized quite early that assumption of the Risk did not apply to certain circumstances that might occur at a roller skaing rink.

One of respondent corporation's defenses was the assumption by appellant of the risks incident to skating upon such a rink; but it cannot be argued that one of the normal risks involved is the reckless action of other skaters capable of being prevented by guards who are stationed upon the rink for the protection of patrons. While the operator of a skating rink is not an insurer of his patrons' safety, nevertheless, he owes a duty to protect them from risks other than those normally incident to the sport."

Basically, the statement was reiterated by the same appeals court and judge in Harston v. Studio Amusements, 195 P.2d 498 (1948). Therefore, the mere fact that plaintiff was roller skating is no basis for finding that she assumed the risk and is

not entitled to recover for Classic's negligence as demanded by defendant.

C. Plaintiff's Assumption of the Risk is Negligible and
Therefore Plaintiff is Absolved of Liability As Jury Found

By quantifying the assumption of the risk according to testimonies delivered by Brad Harmon and Lamar Hunt, both involved with Classic Skating Rink, and in consideration of the total number of skaters who patronize the Roller Rink on a monthly basis, Plaintiff's assumption of the risk is negligible and she is, therefore, not subject to comparative fault of even 1 per cent.

Mr. Harmon testified that he estimated the number of accidents per month at the Roller Rink to be one, while Mr. Hunt approximated one accident in six months at the Rinks he has managed. Mr. Harmon testified that he averages 1,800 skaters per week. Record at 441.

If the Court considers the vast numbers of patrons who skate at the Rink each month, it can be seen that one accident in six months, and even one accident in each month, is such a small fraction that the individual skater assumes less than 1% (less than .000139%) risk of injury per visit to the Rink. Having this minute percentage of assumption of the risk renders such assumption negligible, in the absence of other aggravating factors. This relieves the individual patron (the Plaintiff) of fault in such an accident as is before the Court in this case,

and justifies the jurys' verdict finding liability on Classic. The question of Assumption of the Risk presents a question for the finder of Fact.

Counsel for Plaintiff Joan Stephens argues that, contrary to the Brief filed by Appellant, the jury was not required to find that the decision to roller skate by the Plaintiff was inherently negligent, which decision Defendant contends "no jury is ever likely to (make)." That, in fact, ample opportunity was given to the jury to properly assess the comparative fault of the parties.

Jacobsen Const. v. Structo-Lite Engineering, 619 P.2d 306 (Utah 1980), further explains that even if assumption of the risk is a consideration, it cannot be a complete bar to recovery in order "to avoid the harshness visited upon Plaintiffs as a result of the all-or-nothing nature of the former rule of law." This being the intent of the law, Defendant Classic's contention that a finding of assumption of the risk in Plaintiff must occur to render the results of this case fair to him is unfounded, as Plaintiff is the party to whom rightfully belongs the Court's protection from a harsh result.

In addition, it should be noted that Defendant Classic now invites this Court to find that roller skating is inherently negligent and that plaintiff is not entitled to recover, even though it admits that no jury is likely to ever so find. It requests a harsh result upon Plaintiff even after this case has

been presented to the Jury and Plaintiff Joan Stevens was found to be 0% at fault. That is clearly not the current state of the Law in Utah with regard to Assumption of the Risk.

POINT IV.

THE COURT PROPERLY INSTRUCTED THE JURY ON THE
APPROPRIATE DUTY OF CARE AND DEFENDANT
CLASSIC DID NOT REQUEST ANY APPROPRIATE INSTRUCTIONS

Defendant claims that the Court should have instructed the jury based on a theory of the case that plaintiff was intentionally assaulted by a patron of the roller rink. In support of that theory, defendant relies upon Gustaveson v. Gregg, 655 P.2d 693 (Utah 1982), for the proposition that the duty of a proprietor to guard patrons against intentional assaults only arises where "a proprietor must have some cause to believe that the particular individual committing the tort would so act."

This argument fails to address the differences between Gustaveson and the present case. In Gustaveson, the plaintiff was assaulted and battered (slugged in the face) by another patron of a bowling alley. In this case, the most serious conduct which may be found on John Doe is that he was skating around the rink tripping people, which defendant Classic admits the floor guards should have seen, and skated up behind plaintiff and tripped her.

A. The Tort in This Case Was Not Intentional:

First, the nature of the tort is different in the two

cases. The tort in this case was not intentional, within the guidelines provided in Matheson v. Pearson, 619 P.2d 321 (Utah 1980). In Matheson, the plaintiff brought an action for damages after he was struck with a "tootsie pop" thrown from a second floor of a school building. The issue before the Court was whether the conduct constituted an intentional assault, for the purposes of determining the applicable statute of limitations.

The Utah Court, citing many authorities, held that: "[I]f the act is undertaken without an intent to harm or a substantial certainty that harm will result from the act, the actor is not guilty of an intentional tort." Id. at 322. The Court went on in its analysis, stating that "It is this absence of intent to harm which renders reckless misconduct or reckless disregard of safety a form of negligence and not an intentional tort."⁷ (fm. omitted, emphasis added).

There is no showing of intent to harm in this case. Indeed, defendant's own witnesses stated that falling down while skating was not unusual and that people who fell down usually did not get injured. The facts of this case, as provided by defendant also establish that John Doe tripped or attempted to trip several people as he skated around the rink. As this Court found in Matheson:

"In the present case, the trier of fact could find the defendant acted with no intent to harm the plaintiff and the[ir] acts did not create a substantial certainty of harm from which a harmful intent can be imputed. Rather, the fact finder could determine the defendants acted in reckless disregard

for the safety of the plaintiff, which constitutes a form of negligence. . ."
Id. at 323.

There was no evidence put on that John Doe intended to cause harm to the plaintiff herein. The facts were very simply that John Doe was causing a hazard to other patrons, in violation of rink rules and employee guidelines, and that Classic was negligent in failing to control such conduct.

B. The Duty Owed Differs In This Case and Gustaveson

Defendant Classic's reliance on Gustaveson is improper in the second instance because it fails to take into consideration the difference between the intentional assault and battery in the bowling alley and the tripping of a patron at a skating rink.

Factually, the court in Gustaveson took into consideration that the desk clerk at a bowling alley is responsible for renting shoes, handing out score sheets, and otherwise dealing with the change of patrons getting off and on the lanes.

However, at a roller rink, the floor guards are charged with the duty of supervising the floor activities and seeing that no skaters create a danger to others by "fast skating, playing tag, tripping, playing crack the whip" and other conduct which creates a danger to other skaters. (Defendants trial exhibits, attached hereto as exhibits 5 and 6, Transcript of trial at 91). In this case the evidence was that the floor guards were absent from the rink, and that they were not

policing the hazardous activity pursuant to their express duties. Record at 359, line 15, to 360, line 10.

In short, at a skating rink, the floor guards are charged with the specific duty to supervise activities and halt hazardous skating practices. At a bowling alley, desk clerks are only charged with the duty to protect patrons where there is "knowledge of previous temper tirades and physical aggression on the part of the assailant." Gustaveson, supra at 696. This Court further supported its decision in Gustaveson with the dicta that:

"In this case, Gregg gave no forewarning or indication that he would strike the plaintiff until moments before he did so. He was not the bowler who had exchanged remarks with the plaintiff. He had not previously assaulted or threatened to assault anyone. In fact, he had displayed no tendency for potentially physically abusive behavior prior to his assault on the plaintiff."

Id. at 696.

Again, in this case, John Doe had given forewarning and indication that he would cause a hazard to other skaters. He was the skater who had previously tripped other skaters, just moments before. John Doe had displayed his tendency for potentially physically abusive behavior, and the floor guards had failed to take any action in violation of their own rules and guidelines.

Finally, with regard to defendant Classic's claim that it was prejudiced by the failure to the court to give proper instructions on the Duty Owed, it should here be noted that

defendant did not request any instruction to which it would be entitled, and therefore, the Trial Court did not error. The instruction based upon Gustaveson v. Gregg was improper because this did not constitute an intentional tort, within the guidelines set forth in Matheson. At the very most, the conduct created a fact question which may have been presented to the Jury ("did John Doe intend to cause injury to Joan Stevens?"), but, defendant did not request an instruction or interrogatory in the issue of intent. Because of that, defendant failed to request an instruction which would "fully inform the jury as to the applicable law in order to enable the jury to fully and fairly resolve the dispute." Elkington v. Foust, 618 P.2d 37 (Utah 1980).

C. An Intentional Act Does Not Cut Off Proximate Cause

Plaintiff would also contend that the failure of the Court to find an Intentional Act does not, by itself, act to absolve defendant Classic of Negligence. It was held by the Utah Supreme Court that an intentional act (in that case criminal conduct of a third person) "[w]ould not preclude a finding of proximate cause if the intervening agency was itself a foreseeable act."²⁰ Mitchell v. Pearson Enterprises, 697 P.2d 240 at 246. (fn. omitted).

As the conduct of John Doe was clearly foreseeable to defendant Classic, as based on their guidelines attached hereto as exhibits 5 and 6, and the record cited to above, the mere

allegation that John Doe's act was intentional would not absolve Classic of liability. Again, Classic requested no Jury Instruction to which it was entitled.

CONCLUSION

Since defendant and appellant Classic has not taken any steps to resolve its counterclaim and no order has been entered with regard to the Counterclaim, and since defendant has not requested nor received Rule 54(b) certification, there is a jurisdictional problem in bringing this appeal.

However, should the Court wish to address this matter on its merits, this Court should address two issues. The Liability Reform Act of 1986 abolishes Joint and Several Liability and Contribution among joint tort feasons. It is clear from the above analysis that the right to collect Jointly and Severally from tort feasons was a substantive right, as was the right to contribution among joint tort feasons. The Act does not provide that it is to apply retroactively, and absent an express indication of such intent, Utah Statutory Law and Common Law prohibit such retroactive application. The Legislative intent was that it not apply to pending cases. Joint and Several Liability and Contribution are not merely procedural/remedial law, as it effects damages, it is substantive law which may not be enforced retroactively. In any event, the failure to apply it retroactively in this case was harmless error in light of the instructions to the jury and the argument of Defense Counsel.

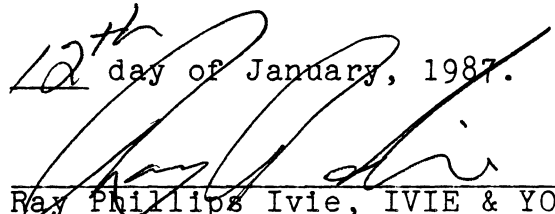
The Trial Court properly ruled on the doctrine of Assumption of The Risk in this case. In following the Jacobson case, the court determined that Assumption of the Risk was to be included in comparative negligence, instructed the Jury on Comparative Negligence and Defendant's Counsel argued Assumption of the Risk to the Jury as Comparative Negligence. The Jury found plaintiff zero percent negligent. Defense counsel requested no instructions to which he was entitled. Defendant/appellant admits that no jury is likely to find rollerskating inherently negligent, and requests this Court to determine such inherent negligence as a matter of law, against authority to the contrary.


Finally, with regard to appellant's argument that the Court failed to properly instruct the Jury on the Duty owed, it should be again be noted that defendant/appellant requested no instructions to which it was entitled. The requested instructions which were denied were improper statements of law, The issue of John Doe's intentional conduct was not requested to be presented to the Jury, defendant/appellant requested no instructions on intent nor any interrogatories on intent. In any event, intentional conduct would not have precluded a finding of negligence on Classic, if the Jury had found John Doe's conduct to have been foreseeable and the record amply supports such foreseeability.

Defendant/appellant Classic is not entitled to any relief

on appeal and the judgment of the Trial Court should be affirmed.

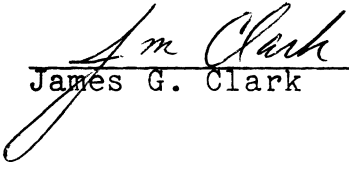
RESPECTFULLY SUBMITTED this 12th day of January, 1987.


Ray Phillips Ivie, IVIE & YOUNG
For Plaintiff/Respondent


James G. Clark, for Respondent

CERTIFICATE OF MAILING

I hereby certify that on the date last listed above, I mailed, by First Class Mail postage prepaid four true and correct copies of the above and foregoing Respondent's Brief, to Gregory J. Sanders, Carman E. Kipp, KIPP AND CHRISTIAN, P.C., Attorneys for Appellant Brent Henderson, dba Classic Skating Center, 600 Commercial Club Building, Salt Lake City, Utah.


James G. Clark

APPENDIX

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Counterclaim	A-5
Argument of Defense Counsel re: Assumption of Risk	A-9
Argument of Defense Counsel re: Joint and Several Liability	A-10
Defendant's Exhibit No. 4 Job Description - Floor Guard	A-13
Defendant's Exhibit No. 5 Roller Skating Rink Safety Standards	A-16

-M.Y.

RAY PHILLIPS IVIE
IVIE & YOUNG
Attorneys for Plaintiff
48 North University Avenue
P. O. Box 672
Provo, Utah 84603

375-3000

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

JOAN F. STEPHENS,	:	
	:	
Plaintiff,	:	C O M P L A I N T
	:	
vs.	:	
	:	
BRENT HENDERSON, dba	:	
CLASSIC SKATING CENTER, and	:	
JOHN DOE,	:	
	:	
Defendants.	:	Civil No. <u>68,622</u>

COMES NOW the plaintiff, Joan F. Stephens, by and through her attorney, Ray Phillips Ivie, and claims as follows:

1. That defendant is a sole proprietorship, doing business in Utah County, State of Utah.

2. John Doe is an individual whose identity is presently unknown to the plaintiff. However, plaintiff will make a timely amendment of her Complaint when the individual's identity becomes known.

COUNT I

3. That on or about November 8, 1984, plaintiff visited the business premises known as Classic Skating Center in Orem, Utah County, State of Utah.

4. That plaintiff's visit was induced by advertisements of "Family Night Skating" and other advertising of the defendant.

5. That plaintiff subsequently paid for admission to defendant's premises.

6. That subsequently, plaintiff was injured when struck from behind by defendant John Doe who negligently or intentionally caused her to fall to the ground.

7. That at all times relevant hereto, the defendant was negligent in failing to supervise the patrons of their establishment, in failing to supervise their employees, and by the acts and omissions of their employees in failing to supervise defendant's customers.

8. That as a proximate result of the defendant's negligence, real or imputed, the plaintiff suffered a serious injury to her arm, and was otherwise injured.

9. That as a proximate result of the defendant's negligence, real or imputed, the plaintiff has sustained special damages in the form of medical bills and lost wages, which are presently uncertain and ongoing, but for which she shall be entitled to recover upon proof at trial.

10. That as a further proximate result of the defendant's negligence, the plaintiff has sustained a permanent and debilitating injury, and resulting general damages in an amount which she shall be entitled to recover for upon proof at trial.

COUNT II

11. By this reference, plaintiff incorporates all other material allegations contained herein.

12. That defendant John Doe is an individual who negligently or intentionally caused plaintiff to fall to the ground, thus injuring plaintiff as alleged herein.

13. That as a proximate result of the negligent or intentional acts of John Doe, the plaintiff has sustained special damages in the form of medical expenses and lost wages, in an amount presently uncertain and ongoing, but for which she shall be entitled to recover for upon proof at trial.

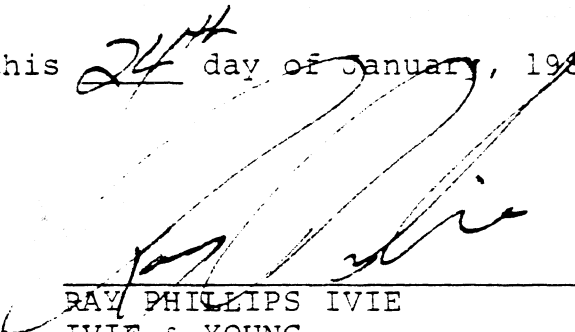
14. That as a further proximate result of defendant John Doe's negligence, the plaintiff has sustained a permanent and debilitating injury, for which she has been generally damaged in an amount that she shall be entitled to recover for upon proof at trial.

WHEREFORE, plaintiff prays for judgment as follows:

1. For special damages to be established upon proof;
2. For general damages to be established upon proof;
3. For interest on special damages as provided by law;

4. For plaintiff's costs incurred herein; and,
5. For such other and further relief as the Court deems just and proper in the premises.

DATED AND SIGNED this 24th day of January, 1985.



RAY PHILLIPS IVIE
IVIE & YOUNG
Attorneys for Plaintiff

Plaintiff's address:

785 West 600 North, #22
Lindon, Utah 84062

FILED
FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY OF UTAH
MAR 12 AM 9:57
CLERK
QA

CARMAN E. KIPP -A1829

KIPP and CHRISTIAN, P.C.

ATTORNEYS FOR Brent Henderson, dba, Classic Skating Center

600 COMMERCIAL CLUB BUILDING

SALT LAKE CITY, UTAH 84111

(801) 521-3773

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

JOAN F. STEPHENS,	:	
Plaintiff,	:	ANSWER AND COUNTERCLAIM
vs.	:	
	:	Civil No.: 68,622
BRENT HENDERSON, dba,	:	
CLASSIC SKATING CENTER, and	:	
JOHN DOE,	:	
Defendants.	:	

Defendant Brent Henderson, by and through his attorney Carman E. Kipp if the firm of Kipp and Christain, P. C., admits, alleges, and denies as follows:

FIRST DEFENSE

That plaintiff's complaint fails to state a claim or claims upon which relief can be granted.

SECOND DEFENSE

1. Admits the allegations of paragraph 1.
2. Denies the allegations of paragraph 2 for lack of knowledge.

COUNT I

1. Denies all of the allegations of count I of plaintiff's complaint for lack of knowledge, and specifically denies that this defendant or his employees, agents, or servants, were in any way negligent.

COUNT II

1. Incorporate the foregoing allegations of this answer as though fully set fourth herein.
2. Denies the remaining allegation of count II for lack of knowledge.

THIRD DEFENSE

As a separate and affirmative defense this defendant alleges that if as a result of some occurrence at the place of business of defendant, plaintiff suffered some injuries and damages, which defendant does not admit, such occurrence was proximately caused by or contributed to by the negligence

or fault of plaintiff, and plaintiff is thereby barred from recovery, or in the alternative that the degree of plaintiff's negligence or fault should be determined and judgment entered accordingly.

FOURTH DEFENSE

As a separate and affirmative defense this defendant alleges that if in fact any risk existed at defendant's place of business, or if in fact any wrongful conduct or omission took place, the defendant knew or should have known of the same, acquiesce therein, participated in any such events that were involved in the occurrence from which this suit arises, and by such knowing and intentionally act she is barred from recovery or in the alternative that her comparative fault should be assessed and judgment entered accordingly.

COUNTERCLAIM

For Counterclaim defendant alleges that defendant is entitled to an award of attorney's fees under the provisions of Utah Code Annotated 78-27-56 1953 as amended, as the action is commenced and prosecuted in bad faith or is without merit.

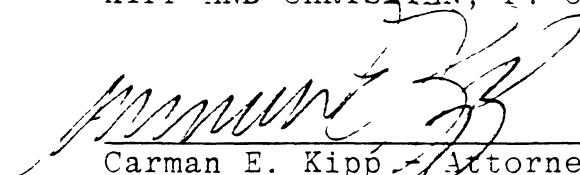
Wherefore having fully answered plaintiff's complaint,

defendant prays that the same be dismissed with prejudice. that the plaintiff take nothing thereby, and that this defendant be granted judgment for no cause of action, and for its costs herein expended.

That judgment be granted on the counterclaim for attorney's fees, costs, and for such other and further relief as the court deems just and proper.

Dated this 11th day of March, 1985.

KIPP AND CHRISTIAN, P. C.




Carman E. Kipp, Attorney for
defendant Brent Henderson

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Answer and Counterclaim, postage prepaid, this 11th day of March, 1985, to the following:

Ray Phillips Ivie
IVIE & YOUNG
Attorney for Plaintiff
48 North University Avenue
P. O. Box 672
Provo, Utah 84603


Secretary

1
2 Now, we have used a couple of words, or they have,
3 to describe the crowd. One is "rough" and the other is
4 "rowdy." And that's really subjective. What's a rowdy
5 crowd? Is a rowdy crowd two kids bumping each other on the
6 floor? Is it 400 people deciding to lynch some patron?
7 You know, what's rowdy? And what's rough? That's subjective.
8 And I suggest to you to a floor guard that's looking at
9 200 to 300 teenage kids out on the floor every night's
10 rowdy. Okay. And so if you have to understand that, well,
11 I could get killed for saying this, but one of the reasons
12 I go to work is I've got five kids and I stayed home before,
13 and I know better than to stay home with five kids. Things
14 get pretty rowdy.

15 And so this is the atmosphere in which Mrs.
16 Stephens puts herself, when she goes in there, she walks
17 in, she's in there a half-hour before she gets on that
18 floor, and she sees the crowd, going around, and she sees
19 the nature of the crowd. And I'm not conceding it's rowdy,
20 I'm saying it's relative when you talk about rowdy. And she
21 see's what's going on, she has ample opportunity. And I
22 suggest to you, if she had fear for her safety out there,
23 she was negligent to get out onto the floor in that situ-
24 ation.

25 People who roller skate know that you can fall

1 act on her part and I suggest that you can write 50 percent
2 in there. Is that, if she was perceiving this problem
3 and exercised poor judgment to get out there into the
4 problem, that that's at least half responsible. And that
5 maybe the other half belongs to John Doe. Fifty-fifty.
6 And zero for Henderson Enterprises. And so you are going to
7 be asked to do there in percentage-wise, obviously, allocate
8 the various percentages in negligence that you find to the
9 various parties. It's extremely important that you under-
10 stand what happens with these percentages.

11 If you find Mrs. Stephens was 50 percent or more
12 negligent, she collects nothing. The law is is that if she's
13 half or more than half at fault for her own injury, she
14 collects nothing. If you find that she's less than 50
15 percent negligent and you get, you can divide the percentages
16 among the other two parties, Henderson or this John Doe, the
17 problem that we have and as why I'm instructing you on it,
18 that you need to be sure when you do, if you give Henderson
19 Enterprises any negligence, that you really want them to pay.
20 Because the way the law works is called joint and several
21 liability. and the way the law works is that if Henderson
22 Enterprises has one percent negligence on this special
23 verdict form. the plaintiff is allowed to collect the
24 percent of the judgment from any of the defendants. So what
25 does that add up to in this case? You write her down 40

1 | percent negligence and you write John Doe down 50 percent
2 | negligence and give Henderson ten percent negligence,
3 | Henderson will pay a hundred percent of the amount that you
4 | award. Because, nobody knows who John Doe is. And till --

5 | MR. CLARK: Your Honor, may we approach
6 | the bench?

7 | THE COURT: Yes, you may.

8 | (Off the record between Counsel and the Court at
9 | the bench, inaudible.)

10 | MR. CLARK: I think for the kind of
11 | argument encourages the Jury to not comply with the law.
12 | And in addition to that, we can -- to let that go for a
13 | minute, but Mr. Sanders has said that if she is found 40
14 | percent negligent and -- whatever, they would pay it all.

15 | THE COURT: Do you think he did it --

16 | MR. CLARK: No, we certainly did not --

17 | (Continued off the record, inaudible.)

18 | MR. CLARK: I just wanted to make a
19 | record on it. I object to the joint and several liability
20 | on the ground that it encourages the Jury to discharge --

21 | THE COURT: Your objection is noted, and
22 | I will overrule it.

23 | MR. CLARK: Thank you, your Honor.

24 | MR. SANDERS: Thank you. I can continue.
25 | So the point that you are making is, you need to understand

1 if you find her less and there's another point that I have to
2 address on her, too, but I need to get the basic premise
3 out here for you that Henderson Industries, if you give them
4 one -- is going to pay a hundred percent of this judgment.

5 And the final point of how this whole system works,
6 and I hope I didn't lose you on this, I try not to talk too
7 much, legally, but is that the percentage which you gave to
8 Mrs. Stephens will be applied to the judgment that's ultimate-
9 ly paid. So to put it in the context, if you award her \$1,000
10 and you find her 40 percent negligent and John Doe 50 per-
11 cent negligent and Henderson ten percent, she'll receive
12 \$600 and Henderson will pay it all. Okay. The problem with
13 this kind of situation is, is you are not allowed to ask
14 questions and go back and forth. And so I apologize for that.
15 But the one thing I want you to understand is, you don't
16 find Mrs. Stephens 50 percent or more negligent and you give
17 one percent to the Hendersons. You need to be sure that you
18 want to pay a hundred percent of the negligence, because
19 that's what's going to happen -- her negligence.

20 To sum this up then is, that it's our position
21 that Henderson Enterprises takes some very definite steps,
22 as they've explained to you, to insure the or to protect the
23 safety of their patrons. Everything was in place that night.
24 We can't make a response to a particular moment of the
25 accident, because nobody on this side of the aisle knows

CLASSIC SKATING

JOB DESCRIPTION - FLOOR GUARD

You are the example of how others should skate. Never violate any rule at any time for any reason. Know all of the floor rules and enforce them politely. When there is a violation of a floor rule follow these steps:

First violation of floor rules

1. Inform skater of what he is doing wrong.
2. Inform skater of all the floor rules in general such as no rough skating, tag, fast skating that would be dangerous to others, etc.
3. Inform skater that next time he violates a rule, he will be taken and reported to the manager.

Second violation of floor rules

1. Minor infraction--of very different nature from the first warning. Repeat first step of first violation.
2. Major infraction--take person to manager. This is done by telling the person that the manager would like to speak to him. Inform the manager of the violation which is the 2nd offense.

Depending upon the violation the person will either be warned that upon another violation he will remove his skates and leave (unless he is too young and must wait for his parents to pick him up) or he will be put in the penalty box for a 15-60 minute period depending on the violation.

Avoid skating backwards. The bigger the crowd the more strictly you must enforce the rules.

When a person is hurt:

1. Do not move him until:
 - a. He says he is all right and can get up by his own strength.
 - b. If he can't get up on his own:
 - 1) Find out what hurts.
 - 2) If a person cannot move:
 - a) Get a responsible person (parent, chaperone, friend)
 - b) Call an ambulance if manager thinks this is necessary.
You are not a doctor so you know absolutely nothing.
 - 3) Let someone else be responsible for moving him. Not you!
 - 4) If no one will take the responsibility send someone to get the manager.
2. Always stand in front of the person so no one will run into him.
3. Always try to make the person as comfortable as possible.

If you become tired or need a rest you can sit where you can watch the floor and where they can see you.

Controlling angry people

Don't get mad at them. Always be very calm. Inform them that anyone caught fighting is kicked out forever. Don't talk about any fight in or out of the rink. If a fight happens blow your whistle loudly and say "fight".

JOB DESCRIPTION - FLOOR GUARD

Page 2

if two people might get into one. Watch for a tripper or problem causer. No second chances are given here. Talk to the individual to see if they have a problem with another skater.

Always pick up any paper or things on skating floor. Wipe up any liquid. Return toe stops to skate counter. Always listen and look for broken skates, bearings, toe stops, trucks etc.

Don't get involved talking to someone while on the job. Pay attention to what is going on!

When not skating, such as during special skates (couples, boys or girls only etc.) pick up all garbage in the lobby and snack bar and return rental skates to skate counter. Check the restroom for garbage, smokers, etc. This should be done at the start of each special skate. At other times always keep watch on the skating floor.

Floor Guards do not skate couples, trios, etc. except by permission each time.

General Rules

No one can sit on the floor at any time or any where.
Fast skating (passing more people than are passing himself) is not allowed.
No cutting in and out of people.
No whips.
No trains of more than 3 people.
No tag or what is similar to chasing, follow the leader etc.
No sitting on the walls or sides.
No throwing of anything.
Inform parents that carrying of children is dangerous and we are not responsible for what might happen.
No hats, food, candy, rat tail combs, or anything that might be dangerous.
No tripping, pushing, pulling.
No jumping on rental skates.
No jumping anything or any one.
No pushing shoot the duck or shoot the duck alone (only in the middle of the skating floor.)
No public display of affection.
No whistling.
No skates with metal wheels or skates which have been used outside.
No smoking anywhere.
No kicking game machines.
No throwing of food, drinks or ice.
No foul language.

List of responsibilities during a session

During the first 30 minutes

1. Help skate boys hand out skates.
2. Watch floor carefully. The first ones out are usually the ones who violate the floor rules.
3. Direct people to locker area.
4. Check skating floor for trash or other dangerous items.

JOB DESCRIPTION - FLOOR GUARD

Page 3

During All Skates

1. Watch for people that have fallen or have been hurt.
2. Enforce All rules, on and off of skating floor.
3. Pick up trash on floor.
4. Listen for broken skates.

During Special Skates (such as Couples, Trios, etc.)

1. Check Restrooms. Pick trash up and flush all toilets.
2. Check Snack Bar. Pick trash off floor.
3. Check Locker Area. Lovers, smokers, trash, etc.
4. Check Kiddie Korner. Big kids.
5. Check Games. Working right and no abuse.

End of a Session

1. If there is only one floor guard, ask manager what you should do.
2. If there are two or more, the first must watch the floor, second help with putting away skates, by tucking in laces, putting away skates or telling people to bring skates to counter.
3. The last couples skate you are not allowed to skate with a partner. Please don't ask.

Your first responsibility is the skating floor and the safety of everyone on it. Never stop watching the floor. Helping hurt people and enforcing the rules is your most important responsibility!

If there is more than one floorguard working, keep each other informed of problem skaters, but always stay as far away as possible from each other so that you are watching a different part of the floor.

ROLLER SKATING RINK SAFETY STANDARDS

The following operational standards for rinks were compiled by the RSROA Risk Management Committee and adopted February 7, 1980, and amended May 2, 1981, as an industry standard by vote of the RSROA Board.

I. Safety Standards for Roller Skating Floor Supervisors

- A. There will be floorguards on duty whenever the rink is open for sessions.
- B. One floorguard shall be on duty for approximately every 200 skaters.
- C. Floorguards must be identifiable by their attire.
- D. The floorguard's duty is to direct and supervise skaters.
 1. The conduct of skaters will be under floorguard's supervision.
 2. When working alone, floorguards will not skate special events with a partner. He or she must be available to assist skaters at all times. Relief of floorguard will be provided by management.
 3. When two floorguards are working, one must be available to assist skaters and supervise the floor.
 4. Additional skating supervision may be provided by personnel observing the premises on or off skates.
 5. Watch for foreign objects of all kinds that may have fallen on the floor.
 6. Watch skates for bad stops, nails or other protrusions.
 7. When a skater falls, if it is necessary, assist the skater off the floor via the nearest exit. If possibility of serious injury exists, CALL MANAGER FOR ASSISTANCE.
 8. A floorguard must use good judgement while being firm and maintaining the respect of the skaters.
 9. Although floorguards must be informative and courteous, conversations must be limited. If a patron needs to be reprimanded more than once, he or she should be brought to the Manager for final disposition.

II. Safety Standards for Building

1. Skating surface shall be inspected before each session and kept clean.
2. Railing, kickboards and wall surrounding skating surface shall be kept in good condition.
3. In rinks with step-up or step-down skating surfaces, the covering on the riser shall be securely fastened.
4. Emergency lighting units should be inspected periodically to insure that they are in proper operating condition.
5. Exit lights and lights in service areas shall remain on when skating surface lights are turned off during special numbers.
6. Fire extinguishers should be inspected at recommended intervals.
7. If a burglar alarm system is installed, it should be checked for operation at least once a month.
8. Conduct in parking areas shall be regulated by rink personnel.
9. When required by applicable law, emergency lighting shall be installed in conformity with that law.
10. When required by applicable law, all fire exits shall have panic hardware installed which shall be in good operating condition, in conformity with that law.

III. Safety Standards for Roller Skating Equipment

1. Skate rentals should be checked on a regular basis for good mechanical condition.

IV. General

1. For safety, intoxicating beverages shall not be sold, dispensed or knowingly used in rink premises.

