

1986

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

Utah Supreme Court

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DOCKET NO. 860440

IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF APPELLANT

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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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES	iv
APPLICABLE STATUTES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENTS	5
ARGUMENT	6
POINT I: THE TRIAL COURT ERRED IN APPLYING THE DOCTRINE OF JOINT AND SEVERAL LIABILITY TO APPELLANT	6
A. The Liability Reform Act:	
1. Introduction:	6
2. Retroactive vs. Prospective Application .	8
3. Substantive vs. Procedural Issues:	11
B. Common Law Doctrine and Public Policy:	14
POINT II: THE FAILURE OF THE COURT TO IN- STRUCT ON ASSUMPTION OF RISK WAS PREJUDICIAL ERROR	21
A. Basic Concepts:	21
B. Analysis	23
POINT III: THE FAILURE OF THE COURT TO IN- STRUCT ON THE APPROPRIATE DUTY OF CARE WAS PREJUDICIAL ERROR	29
CONCLUSION	34
ADDENDUM	37
CERTIFICATE OF SERVICE	38

TABLE OF CASES AND AUTHORITIES

<u>CASES CITED</u>	<u>PAGE</u>
<u>Baldwin v. City of Waterloo</u> , 372 N.W.2d 486 (Iowa 1985)	13
<u>Bartlett v. New Mexico Welding Supply, Inc.</u> , 646 P.2d 579 (N.M. App. 1982)	18
<u>Black v. Nelson</u> , 532 P.2d 212 (Utah 1975)	32
<u>Brody v. Westmoor Beach and Blade Club, Inc.</u> , 524 P.2d 1087 (Colo.App. 1974)	22
<u>Brown v. Keill</u> , 580 P.2d 867 (Kan. 1978)	17, 20
<u>Campbell v. Stagg</u> , 596 P.2d 1037 (Utah 1979)	9, 11
<u>Elkington v. Foust</u> , 618 P.2d 37 (Utah 1980)	30
<u>Fernandez v. Romo</u> , 646 P.2d 878 (Ariz. 1982)	16
<u>Gray v. Scott</u> , 565 P.2d 76 (Utah 1977)	32
<u>Groot v. Oregon Short Line R. Co.</u> , 34 Utah 152, 96 P. 1019 (1908)	15
<u>Gustaveson v. Gregg</u> , 655 P.2d 693 (Utah 1982)	31, 32, 33
<u>Hamilton v. Salt Lake City Corp.</u> , 120 Utah 647, 237 P.2d 841 (1951)	22
<u>Hatley v. Skateland, Inc.</u> , 619 P.2d 1333 (Or.App. 1980)	21, 27
<u>Irwin v. Coluccio</u> , 648 P.2d 458 (Wash. App. 1982)	16
<u>Jacobsen Construction Co. v. Structo-Lite Engineering</u> , 619 P.2d 306 (Utah 1980)	22, 23, 24, 25, 26, 35
<u>Johnson v. Maynard</u> , 9 Utah 2d 268, 342 P.2d 884 (1959)	22

CASES CITED (Continued)**PAGE**

<u>Pearce v. Motel 6, Inc.</u> , 624 P.2d 215 (Wash. App. 1981)	31
<u>Petty v. Clark</u> , 113 Utah 205, 192 P.2d 589 (1948)	13
<u>Pilcher v. State</u> , 663 P.2d 450 (Utah 1983)	12
<u>Ridge v. Kladnick</u> , 713 P.2d 1131 (Wash.App. 1986)	25, 26, 27
<u>Rigtrup v. Strawberry Water User's Assoc.</u> , 563 P.2d 1247 (Utah 1977)	22
<u>Silver King Coalition Mines Company v. Industrial Commission</u> , 2 Utah 2d 1, 268 P.2d 689 (1954)	9
<u>State Dept. of Social Services v. Higgs</u> , 656 P.2d 998 (Utah 1982)	12
<u>Swagger v. City of Crystal</u> , 379 N.W.2d 183 (Minn.App. 1985)	26

STATUTES CITED:

All Statutes are found in Utah Code Annotated (1953, as amended):

§ 78-27-37	22, 28
§ 78-27-38	7
§ 78-27-40	7
§ 78-27-41(1)	15
Please note that the text of these Statutes appears in the Addendum	

SECONDARY SOURCES:

57 AM.JUR.2d, <u>Negligence</u> , § 276-279 (1971)	22
Comment, "Assumption of Risk in a Comparative Negligence System - Doctrinal, Practical and Policy Issues", 39 Ohio St. L.J. 364 (1978)	28
Prosser, <u>Joint Torts and Several Liability</u> , 25 Cal.L.Rev. 413 (1936)	17

STATEMENT OF ISSUES:

1. Whether the trial court erred in applying the doctrine of joint and several liability to appellant.
2. Whether the Court's refusal to give certain jury instructions which attempted to apply the primary doctrine of assumption of risk to this case which involved a sporting activity was reversible error.
3. Whether the court's refusal to give an instruction offered by the defendant concerning the specific duty of care of a proprietor to guard against intentional assaults was reversible error.

DETERMINATIVE STATUTES:

The following statutes bear upon a determination of the resolution of this action:

- A. Laws of Utah 1973, Chapter 209 (old version),
§ 78-27-37, et seq., U.C.A., 1953
(repealed 1986)
- B. Laws of Utah 1986, Chapter 199 (new version),
§ 78-27-37, et seq., U.C.A., 1953

Please note that the complete text of the statutes appear in the Addendum.

STATEMENT OF THE CASE

A. NATURE OF THE CASE:

This is a tort action by a patron of a public roller skating rink against the operator of the rink and another, unidentified patron, for personal injury incurred. The action was filed in the Fourth Judicial District Court of Utah County on January 25, 1985. It came to trial on July 28 and 29, 1986, before a jury. The jury returned a verdict in favor of the plaintiff, as explained more fully below, and final judgment was entered on August 12, 1986. Defendant made payment of the judgment pursuant to a Writ of Execution served August 15, 1986, and entered his Notice of Appeal on August 18, 1986.

B. STATEMENT OF FACTS:

On November 8, 1984, plaintiff went to the Classic Skating Center in Orem, Utah, to roller skate with a friend and the children of her friend. (Trans., p. 28-29.)

The Classic Skating Center is located in Orem, Utah, and is a large commercial facility with a skating floor approximately 85' x 150'. (Trans., pp. 75-76.)

Plaintiff's friend, Mrs. Inglis, entered upon the skating floor prior to the plaintiff and saw a teenage boy, never identified, knock down another woman. (Trans., pp. 6-7.)

The plaintiff then went onto the roller skating floor and was trailing 10 feet behind Mrs. Inglis. (Trans., p. 18.) Mrs. Inglis testified that this same boy pushed the plaintiff down. (Trans., p. 4.) Upon cross-examination, Mrs. Inglis admitted she did not actually see the boy make contact with the plaintiff. (Trans., p. 24.) However, Mrs. Inglis heard the boy yell something to the effect that "I got another one" after making contact with the plaintiff. (Trans., p. 5.) The plaintiff never did see the John Doe that struck her. (Trans., p. 51-52.) As a result of the fall, Mrs. Stephens suffered injury to her left wrist. (Trans., pp. 39-45.)

There was some discrepancy in the testimony about the number of people present when the incident occurred. Mrs. Inglis testified there were approximately 50 people on the floor and 100 people present in the facility. (Trans., pp. 16-17.) Plaintiff testified there were a "few hundred". (Trans., p. 48.) The manager testified that there were 400 patrons present that night. (Trans., p. 87.)

Mrs. Inglis and the plaintiff claimed that the floor guards, employees that controlled the crowd, were negligent in that they were not present to the observation of the plaintiff or Mrs. Inglis and, consequently, did not take steps to protect her. (Trans., pp. 6, 35-37.) The defendant introduced testimony of the manager to the effect that extra floor guards were on duty that night, that he actively supervises them to see that they perform their job and that the staffing was within the guidelines of the industry. (Trans., pp. 78-83, 85-87.)

The defendant claimed that contact with other roller skaters was a normal incident of roller skating as was the mere act of falling down. (Trans., pp. 84, 105, 106.)

At the conclusion of plaintiff's case, defense counsel moved the Court to rule that the doctrine of joint and several liability does not apply to the action. (Trans., pp. 66-67; R., p. 60.) Defense counsel also asked at the conclusion of plaintiff's case that the Court apply the standard of care for an intentional attack upon the plaintiff as established by the evidence and for application of the doctrine of assumption of risk as a matter of law to bar the action of plaintiff in the form of a directed verdict. (Trans., pp. 67-69.) The Court denied both Motions of the defendant. (Trans., pp. 67, 72-74.)

Several jury instructions offered by Henderson and described more specifically in this Brief and set forth in the Addendum, were rejected by the Court. Defendant specifically stated its exceptions to the rejection of the requested instructions at issue in this appeal. (Trans., pp. 111, 112.)

The jury returned a special verdict in favor of the plaintiff in the amount of \$17,357.92 and allocated 75% negligence to the unidentified defendant, John Doe, 25% negligence to the defendant Henderson, and no negligence to the plaintiff. (R., p. 283.)

The verdict was reduced to judgment on August 12, 1986, over the objection of Henderson. (R., pp. 292, 307-308.) A Writ of Execution was issued August 13, 1986. (R., p. 340.) The Writ of Execution was served by a constable on Friday, August 15, 1986, at 9:30 p.m. (R., p. 344.) In lieu of having property seized, the defendant, Mr. Henderson, gave a personal check for the amount of the judgment, plus costs of service, which was replaced later by an insurance company check. (R., p. 345.) Consequently, defendant Henderson has paid 100% of the judgment, plus costs totaling \$18,182.87, while having only been allocated 25% of the liability. (R., pp. 349-351.)

After this case was filed and prior to trial, the 1986 session of the Utah Legislature adopted the Liability Reform Act, which abolished the legal doctrine of joint and several liability. Laws of Utah 1986, Chapter 199. The effective date of the Act was April 28, 1986. The legislature did not provide in the Act for its application to pending cases.

SUMMARY OF ARGUMENTS

Appellant contends that the Liability Reform Act of 1986, which took effect while the case was pending trial, should be applied to this action or that the doctrine of joint and several liability should, for reasons of public policy, not be applied to this action. First, plaintiff has no vested right which would be eliminated by application of the Act. Second, the Act implements a procedural change which may be applied retroactively, where appropriate. Third, the doctrine of joint and several liability is no longer the public policy of the State and, without regard to the application of the Liability Reform Act, the Court should abolish the common law doctrine.

Appellant also claims the Court erred in rejecting its instructions for two reasons. First, the Court refused to instruct the jury on the doctrine of assumption of risk. Appellant

claims that in a sporting activity case the doctrine of assumption of risk remains at issue even though the doctrine has been merged into the comparative negligence statute. Otherwise, the effect would be to overrule the long-existing rule of sporting cases that assumption of risk is always a defense. Second, appellant claims that the failure of the District Court to give a specific instruction on duty of care was reversible error. Specifically, the only evidence presented by the plaintiff showed that the plaintiff was a victim of an intentional assault. The Court gave no instruction on the duty of care, but gave a general instruction on negligence. Consequently, the jury had no definitive guideline to measure whether the duty of care had been breached.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN APPLYING THE DOCTRINE OF JOINT AND SEVERAL LIABILITY TO APPELLANT

A. The Liability Reform Act.

1. Introduction:

At the close of plaintiff's case at trial, Henderson made a motion for the court to rule that the doctrine of joint

and several liability did not apply to this case by virtue of the provisions of the Liability Reform Act of 1986 (The Act), Laws of Utah 1986, Chapter 199, which eliminated the legal doctrine of joint and several liability in Utah. (Trans., p. 66). The Court denied the Motion, finding that the Act did not apply to pending cases. (Trans., p. 67.)

The Liability Reform Act took effect on April 28, 1986, three months before the trial of this action. The Act repealed and re-enacted, among others, Sections 78-27-38 and 78-27-40, U.C.A., 1953. Those sections as re-enacted read as follows:

"The fault of a person seeking recovery shall not alone bar recovery by that person. He may recover from any defendant or group of defendants whose fault exceeds his own. However, no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant.

Subject to Section 78-27-38, the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant. . .
."

In denying defendant's motion, the lower court stated that the Act effected a substantive change in law and "should not be enforced retroactively". (Trans., p. 67). The court's ruling

is erroneous for two reasons. First, the Court could have applied the Act prospectively, and, second, the Act effected a procedural and not substantive change in law.

2. Retroactive vs. Prospective Application:

The district court apparently determined that in order to apply the Act at all to this case, the court must apply it retroactively. Such a conclusion is incorrect since at the time the Act took effect, no right had vested in plaintiff which would have required retroactive application of the Act to defeat.

Plaintiff's right to collect pursuant to the doctrine of joint and several liability obviously does not vest until judgment is rendered. Joint and several liability is merely a doctrine which enables a plaintiff who has recovered judgment to collect 100% of the judgment from any one of the multiple tort-feasors even though each individual tort-feasor's percentage of negligence is less than 100%. Prior to judgment, the plaintiff does not have any right to collect anything from a defendant. The doctrine of joint and several liability does not give plaintiff any additional substantive theory by which a judgment may be recovered. At best, plaintiff acquired, at the time the cause of

action accrued, the expectation that if she were awarded a judgment, the doctrine of joint and several liability would allow her to collect 100% of that judgment from any one of the multiple tort-feasors. Such an expectation is not a vested right. As the Court stated in Silver King Coalition Mines Company v. Industrial Commission, 2 Utah 2d 1, 268 P.2d 689 (1954):

" . . . It is often said that a right is not 'vested' unless it is something more than such a mere expectation as may be based upon an anticipated continuation of the present laws." At p. 692.

Plaintiff had only an expectation with respect to the doctrine of joint and several liability at the time the Act took effect. The Act, prospectively applied, eliminated joint and several liability in all cases where the right to collect had not vested. Accordingly in this case, prospective application of the Act defeats plaintiff's expectation to collect her judgment jointly and severally against Henderson.

The case of Campbell v. Stagg, 596 P.2d 1037 (Utah 1979) addressed an issue similar to that involved in the present action. Campbell involved an action by a plaintiff to recover for injuries sustained in an automobile accident occurring on September 9, 1973. Plaintiff's complaint was filed February 25,

1974. On May 13, 1975 -- after the complaint was filed but before the trial in October, 1977 -- a statute went into effect which allowed the calculation of interest on special damages from the date of the occurrence of the act giving rise to the cause of action. In the judgment in favor of plaintiff, the lower court allowed interest on plaintiff's special damages pursuant to the statute. The defendant appealed, arguing that such was an impermissible retroactive application of the statute.

In addressing defendant's argument, the Court first referred to the general rule that legislative enactments operate prospectively rather than retroactively unless expressly declared otherwise. The Court then made a distinction between an enactment making substantive changes and one making procedural changes and stated that the general rule against retroactive application did not apply to an enactment making a procedural change not affecting substantive rights. The Court stated as follows:

"However, we see no need to resort to the application of distinguishing labels [i.e., procedural vs. substantive] in construing [the statute]. We do not view the statute as operating retroactively. The statute simply directs the court to add interest to the amount of damages found by the jury or the court. The statute is prospective in effect, since it applies to judgments rendered after the effective date of the act; it does not

clearly express any retroactive effect to judgments entered before its effective date, and therefore has no such effect. The fact that the time from which interest should be calculated predates the effective date of the statute does not cause the statute itself to operate retroactively. Plaintiff's right to interest in this case was dependent upon the law in effect at the time the judgment was entered. . . .
." At 1042 (Emphasis in original).

Just as plaintiff's right to interest in Campbell was dependent upon the law in effect at the time the judgment was entered, application of the doctrine of joint and several liability is dependent upon the law in effect at the time the judgment is entered and not at the time the cause of action accrued. The law in effect at the time judgment was entered in this case contained a provision eliminating the doctrine of joint and several liability. Accordingly, the trial court erred when it applied the doctrine of joint and several liability to this case.

2. Substantive vs. Procedural Issues:

The second reason the lower court's ruling was erroneous is that the Act effected not a substantive but a procedural change. Therefore, application of the Act is proper even should the Court view its application as retroactive. While the general rule provides that legislation may not be applied retroactively

in the absence of an express legislative declaration to that effect, an exception to that rule applies when the legislation changes only procedural rather than substantive law. This principle was stated by the Utah Supreme Court as follows:

"Plaintiff argues that retrospective operation of statutes is not favored by the courts. To be sure, this is the rule when retrospective enforcement would modify vested rights or interests.

A contrary rule applies, however, where a statute changes only procedural law by providing a different mode or form of procedure for enforcing substantive rights. Such remedial statutes are generally applied retrospectively to accrued or pending actions to further the legislature's remedial purpose." Pilcher v. State, 663 P.2d 450, 455 (Utah 1983)

See also State Dept. of Social Services v. Higgs, 656 P.2d 998, 1000 (Utah 1982), which held that "[p]rocedural statutes enacted subsequent to the initiation of a suit which do not enlarge, eliminate, or destroy vested or contractual rights apply not only to future actions, but also to accrued and pending actions as well."

The distinction between substantive and procedural law has been defined by the Utah Supreme Court as follows:

"Substantive law is defined as the positive law which creates, defines and regulates the rights and duties of the parties and which may give rise to a cause for action, as distinguished from adjective law which pertains to and prescribes the practice and procedure or the legal machinery by which the substantive law is determined or made effective." Petty v. Clark, 113 Utah 205, 192 P.2d 589, 593-594 (1948).

In Baldwin v. City of Waterloo, 372 N.W.2d 486 (Iowa 1985) the Iowa Supreme Court considered a newly enacted Iowa statute which eliminated joint and several liability and presented the same question of application to pending cases as here. In Baldwin the court ruled that the new statute made a procedural change only and should, therefore, be given retroactive application. The court stated as follows:

"It is well established that a statute is presumed to be prospective only unless expressly made retrospective. Statutes which specifically affect substantive rights are construed to operate prospectively unless legislative intent to the contrary clearly appears from the express language or by necessary and unavoidable implication. Conversely, if the statute relates solely to a remedy or procedure, it is ordinarily applied both prospectively and retrospectively.

We have previously discussed the distinctions between substantive and procedural law. Substantive law creates, defines and

regulates rights. Procedural law, on the other hand, 'is the practice, method, procedure, or legal machinery by which the substantive law is enforced or made effective.'

. . .

Plaintiff had no vested right in a particular result of this litigation or in the continuation of the principle of unlimited joint and several liability. . . . Any interest that these defendants might have in the continued state of the law concerning joint and several liability was not a 'vested' right entitled to constitutional protection." At pp. 491 and 492.

Similarly, the Liability Reform Act made a procedural and not a substantive change in the law and should be given retroactive application. Assuming the Court does not reverse the judgment entirely on other grounds, this Court should order that the judgment be properly entered in the amount of 25% of the total judgment and that the excess paid be refunded, with interest.

B. Common Law Doctrine and Public Policy:

In the District Court, Henderson requested the court to hold that "should the jury determine that the defendant is liable, the doctrine of joint and several liability ought not to be applied." (R., p. 60.) The trial court's denial of

Henderson's request resulted in plaintiff collecting 100% of her judgment from Henderson when Henderson was found to be only 25% at fault. (R., p. 345.) The court's application of the doctrine of joint and several liability was contrary to the public policy and legal doctrine in Utah at the time of judgment.

The doctrine of joint and several liability, which was abolished by the legislature in the Liability Reform Act, is not a statutory but a court-created, common-law doctrine. See generally, Groot v. Oregon Short Line R. Co., 34 Utah 152, 96 P. 1019 (1908). Prior to the enactment of the Liability Reform Act, the only Utah statute which directly related to the doctrine was § 78-27-41(1), U.C.A. (1953), which stated as follows:

"Nothing in [the Comparative Negligence] Act shall affect:

(1) The common-law liability of the several joint tort-feasors to have judgment recovered, and payment made, from them individually by the injured person for the whole injury. . . ." (Emphasis added)

This statutory provision did not create the doctrine of joint and several liability; it merely acknowledged it and stated that the Comparative Negligence Act was not intended to affect the doctrine as it existed at common law.

As a court-made, common-law doctrine, joint and several liability is, as are all rules of the common law, subject to modification or abrogation by judicial decision. As stated by the Court of Appeals of Washington:

"It is generally recognized that when a rule of law has had its origins in the common law and is therefore a creation of the courts, the courts may change or modify such rule." Irwin v. Coluccio, 648 P.2d 458, 459 (Wash.App. 1982).

Similarly, the Arizona Supreme Court has stated:

"Just as the common law is court-made law based upon the circumstances and conditions of the time, so can the common law be changed by the court when conditions and circumstances change. When the reason for a rule no longer exists, the rule itself may be changed by the court." Fernandez v. Romo, 646 P.2d 873, 880 (Ariz. 1982)

The common-law doctrine of joint and several liability apparently had its origins in cases where multiple defendants acted in concert to cause plaintiff's injuries.

"[W]here the defendants acted in concert, 'the act of one was the act of all,' and each was therefore liable for the entire loss sustained by the plaintiff, even

though he might have caused only a part of it. The rule grew out of the common law concept of the unity of the cause of action; the jury could not be permitted to apportion the damages, since there was but one wrong. . . .

But the common law developed likewise a distinct and altogether unrelated principle: a defendant might be liable for the entire loss sustained by the plaintiff, even though his negligence concurred or combined with that of another to produce the result. . . . Apparently liability was based upon an instinctive feeling that defendant was morally responsible for the result, and the evident impossibility of dividing the damages." Prosser, William L., Joint Torts and Several Liability, 25 Cal. L.Rev. 413, 418 and 419 (1936).

Apparently, part of the justification for the doctrine of joint and several liability was that it acted as a counterbalance to the harsh common-law doctrine of contributory negligence which provided that a plaintiff must be totally without negligence to recover. See Brown v. Keill, 580 P.2d 867, 874 (Kan. 1978).

Whatever legal justification existed at common law for the doctrine of joint and several liability, it is clear that retention of the doctrine is no longer justified. The absolute bar of contributory negligence is gone from Utah, eliminating the justification of joint and several liability. The time has come for the common-law doctrine of joint and several liability to be judicially abolished.

Judicial abolition of joint and several liability is supported by court decisions in other states. In the case of Bartlett v. New Mexico Welding Supply, Inc., 646 P.2d 579 (N.M.App. 1982) the New Mexico Court addressed the issue whether joint and several liability ought to be retained in a pure comparative negligence system. While Utah does not have a pure comparative negligence system, the rationale of the New Mexico Court has equal validity in this action. The Court stated as follows:

"The retention of joint and several liability ultimately rests on two grounds; neither ground is defensible.

The first ground is the concept that a plaintiff's injury is 'indivisible'. . . .

Prosser . . . states that the rule holding a concurrent tort-feasor for the entire loss 'grew out of the common-law concept of the unity of the cause of action; the jury could not be permitted to apportion the damages, since there was but one wrong.' The 'unity' concept, in turn was based on common law rules of pleading and joinder. . . . [T]he cases which retained joint and several liability under relaxed American rules of joinder and in cases where causes of injury are concurrent, rather than concerted:

'seem to consider the question, not from the standpoint of whether it is just and reasonable to hold a person liable for all the damages

occasioned by a joint tort in which his individual part may have resulted in little or no damage, but rather from the viewpoint of the unity of a cause in the old technical common-law sense. That as the tort-feasors committed the tort together, and a single writ was brought against them, and they were sued in a single action and found guilty, then the damages should be rendered in a single sum. For, as the action was a unit and all found guilty of the same wrong, they must be equally guilty of the same amount of wrong. . . . But with the broadening in modern times of the legal conceptions regarding real consistency in the law as distinguished from mere technicality, the reasoning which appeared so persuasive to the old English jurists has lost much, if not all, of its force.'

. . .

Joint and several liability is not to be retained in our pure comparative negligence system on a theory of one indivisible wrong. The concept of one indivisible wrong, based on common-law technicalities is obsolete, and is not to be applied in comparative negligence cases in New Mexico. . . .

The second ground is that joint and several liability must be retained in order to favor plaintiffs; a plaintiff should not bear the risk of being unable to collect his judgment. We fail to understand the argument. Between one plaintiff and one defendant, the plaintiff bears the risk of the defendant being insolvent; on what basis does the risk shift if there are two

defendants, and one is insolvent?" At pp. 584, 585.

Similarly, in Brown v. Keill, supra, the Kansas Supreme Court stated as follows:

"There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental agency, and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the co-defendant to pay more than his fair share of the loss. The same is true if one of the defendants is wealthy and the other is not. Previously, when the plaintiff had to be totally without negligence to recover and the defendants had to be merely negligent to incur an obligation to pay, an argument could be made which justified putting the burden of seeking contribution on the defendants. Such an argument is no longer compelling because of the purpose and intent behind the adoption of the comparative negligence statute." At p. 874.

These comments of the New Mexico and Kansas courts take on even greater significance when considered in light of the recent legislative abolition of the doctrine of joint and several liability in the Liability Reform Act. The Utah Legislature has clearly declared that the policy of this state is not to hold defendant joint tort-feasors jointly and severally liable. If the Court does not reverse the entire judgment on other grounds, this Court should rule consistent with that policy and judicially abolish the common-law doctrine of joint and several liability without regard to whether the Liability Reform Act is retroactive, prospective, substantive or procedural. This Court should reverse the judgment and direct the trial court to enter judgment in favor of plaintiff only to the extent of 25% of her damages as found by the trier of fact, and should order that the excess paid by defendant be refunded with interest.

POINT II

THE FAILURE OF THE COURT TO INSTRUCT ON ASSUMPTION OF RISK WAS PREJUDICIAL ERROR

A. Basic Concepts.

Roller skating has been traditionally considered an athletic or sporting activity. Hatley v. Skateland, Inc., 619

P.2d 1333 (Or.App. 1980). The law has long been that those who participate in sporting activities or as spectators assume the risk of injury usually associated with such activity. Hamilton v. Salt Lake City Corp., 120 Utah 647, 237 P.2d 841 (1951); Hatley, supra; Brody v. Westmoor Beach and Blade Club, Inc., 524 P.2d 1087 (Colo.App. 1974).

Prior to the adoption of the Comparative Negligence Act, Section 78-27-37 (Laws of Utah 1973, Chapter 209, Section 1), assumption of risk acted as an absolute bar to recovery by a plaintiff. However, the term "assumption of risk" was a label which actually applied to several concepts. See 57 Am.Jur.2d, Negligence, Section 276-279 (1971). The Utah Courts recognized that assumption of risk may overlap with contributory negligence conceptually but may also stand alone under certain circumstances. Johnson v. Maynard, 9 Utah 2d 268, 342 P.2d 884 (1959). These different concepts were often referred to as primary and secondary assumption of risk. Jacobsen Construction Company v. Structo-Lite Engineering, 619 P.2d 306 (Utah 1980); Rigtrup v. Strawberry Water Users Association, 563 P.2d 1247 (Utah 1977).

In Jacobsen Construction, supra, this Court held that the comparative negligence statute included the concept of assumption of risk and stated that assumption risk terminology is

to be avoided. This Court explained the difference between primary and secondary assumption of risk as follows:

"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. In its secondary sense, assumption of risk is an affirmative defense to an established breach of duty and as such is a phase of contributory negligence." At 310.

Jacobsen Construction then correctly concluded and held:

"We thus hold that 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." At 312 (Emphasis added)

B. Analysis.

In this case, the trial court refused to give the defendant's requested instructions numbered 1, 3, 21, and 26. (R., pp. 210, 212, 231 and 237.) See Addendum for complete text. The thrust of these instructions was that the jury could consider the degree of assumption of risk by the plaintiff in

participating in a sporting activity and convert that assumption of risk to a comparative negligence determination. As explained below, the Court erred in rejecting those instructions to the prejudice of the defendant because instructions numbers 8 and 34, as given, required the jury to find that the decision to roller skate was a negligent act in order to attribute any comparative negligence to the plaintiff. A result no jury is likely to ever find.

Jacobsen Construction, at 310 to 311, appears to reject the distinction between primary and secondary assumption of risk and direct the courts of this state to cease from using that term. All assumption of risk is merged into the concept of comparative negligence.

Unfortunately, the dicta of Jacobsen Construction is overbroad when applied to a sporting activity case. If an injury results from a risk normally associated with the sport, the comparative negligence analysis does not work because a juror would have to assign some percentage of negligence to the plaintiff for the mere decision to participate. The effect of strictly applying Jacobsen Construction is to overrule the long time rule of assumption of risk in sporting cases.

In a skating case strikingly similar to this one, assumption of risk barred the plaintiff with a comparative negligence statute. In Ridge v. Kladnick, 713 P.2d 1131 (Wash.App. 1986), the Court held that a roller skater could not recover as a matter of law where the injury was shown to have arisen out of the usual risk associated with a sporting activity. This Court could choose to apply that rule to this case. The error made by the trial court was rejection of any instruction addressing assumption of risk and ignoring the entire sporting activity doctrine well established in the law.

The error committed can be demonstrated by the use of two hypotheticals. A driver that sees an oncoming train at a crossing and makes a conscious choice to try and beat the train through the crossing is voluntarily assuming a risk which is unreasonable and ought to be judged according to the comparative negligence principles stated in Jacobsen Construction. A person who chooses to play football, however, does not make an unreasonable decision to which comparative negligence may be attached. Rather, that person is assuming known reasonable risks associated with participation in football. A fact finder, under those

circumstances, should be asked to determine not whether an injured football player was negligent, but whether the injury arose out of the normal risks associated with the game which were willingly, but not unreasonably, assumed.

In Swagger v. City of Crystal, 379 N.W.2d 183 (Minn.App. 1985), the Court considered the question of assumption of risk by a spectator injured at a softball game in the context of a comparative negligence statute. There, a jury awarded damages against the city that operated the softball park. The trial court granted the City's Motion for Judgment notwithstanding the Verdict. The Minnesota Court of Appeals held that primary assumption of risk survives the enactment of a comparative negligence statute because, in its primary sense, assumption of risk is not really a negligence concept. Rather, it is a determination that the defendant owed no duty of care originally to the plaintiff.

The defendant presented at trial evidence that contact with other skaters was a normal incident of roller skating and that the plaintiff had experience at roller skating. (Trans., pp. 47-48, 84, 105-106.) See Ridge, supra.

This Court could retain the concept of primary assumption of risk as an absolute bar under the Comparative Negligence Statute and rule, as did the Ridge case, that the plaintiff is

barred. However, the thrust of the rejected instructions, which were drafted in light of Jacobsen Construction, is to retain the concept of primary assumption of risk as a comparative fault consideration for the jury by converting usual risks to a comparative percentage of fault. Otherwise, unless this Court retains primary assumption of risk for sporting cases, no jury will ever, in a sporting case, find comparative fault on the part of the plaintiff because that requires a social conclusion that participating in sports is inherently unreasonable.

Because the jury was required to find that the decision to roller skate by the plaintiff was inherently negligent and because no jury is likely ever to do that, the defendant was deprived of the opportunity to have the comparative fault properly assessed. If the instructions requested had been given, the jury could have quantified to what extent the plaintiff assumed the risk of the type of injury which was incurred willingly as incidental to roller skating. It is not unreasonable to assume that the plaintiff could have been assessed at least 50% fault as that was the conclusion under similar circumstances as a matter of law by the court in Hatley v. Skateland, Inc., and in Ridge v. Kladnick, supra.

In summary, the Court is requested to reverse the judgment based upon the deprivation of the defendant's ability to have comparative fault considered. The Court is further requested to clarify how the trial court is to handle primary assumption of risk in a sporting case under the Comparative Negligence Statute. That is, determine whether primary assumption of risk is an absolute bar to liability as with Ridge, or whether it should have been considered as comparative negligence.

Some consideration should be given to the Court's determination of the first point of appeal, namely whether the Liability Reform Act applies to this case. Appellant proposes to the Court that if the Liability Reform Act does apply to this case, that the error suggested is even more clear. New Section 78-27-37 talks in terms of "fault" rather than "negligence". Accordingly, if the new Act applies, the concept of primary assumption of risk is more easily considered under a fault concept rather than a negligence concept. Rejected Instructions Nos. 1 and 26 would have been particularly useful to a jury in applying a comparative fault concept rather than a comparative negligence concept because, under these circumstances, the term "fault" is broad enough to include primary assumption of risk. See, Comment, "Assumption of Risk in a Comparative Negligence

System - Doctrinal, Practical and Policy Issues", 39 Ohio St. L.J. 364 (1978).

POINT III

THE FAILURE OF THE COURT TO INSTRUCT ON THE APPROPRIATE DUTY OF CARE WAS PREJUDICIAL ERROR.

The evidence presented by the plaintiff was that of an intentional assault on the part of the John Doe skater. A friend of the plaintiff, who witnessed the incident, testified that the plaintiff was deliberately pushed from behind by John Doe. (Trans., p. 4.) She further testified that John Doe, after knocking down the plaintiff, yelled something to the effect of "I scored another". (Trans., pp. 5 and 25.) This witness testified that she had seen John Doe knock down another woman moments before making contact with the plaintiff. (Trans., p. 6.)

The plaintiff testified that she did not see John Doe before the incident nor does she know exactly what he did to injure her. (Trans., pp. 51-52.)

In short, the evidence presented by the plaintiff as to how she was injured established that she was the victim of an intentional tort. That is, John Doe had deliberately knocked her down and caused her injury. Consequently, at trial, appellant

took the position that the standard of care which applied to the case was that of guarding against intentional torts. (Trans., pp. 67 - 68.) Consistent with that argument, appellant offered defendant's Instruction No. 27, which stated the duty of care of a proprietor of an amusement facility to guard one patron against assaults of other patrons. The Court rejected the proffered instruction and gave general instructions on negligence which appellant claims were insufficient. (R., p. 238; trans., p. 112.)

The law is well settled that the purpose of jury instructions is to 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). An examination of the instructions actually given by the Court shows that no instruction was given on the duty of care which the jury was to have considered in determining whether the defendant had been negligent. Specifically, Instruction No. 8 is the only instruction which seems to describe negligence to the jury. (R., p. 251.) See Addendum. This instruction is only a broad statement of the law of negligence.

The rejection of a specific instruction on duty of care and the giving of a general instruction on negligence is prejudicial error because it leaves the jury to speculate as to what

standard the defendant has violated in order to find liability in the defendant.

A similar issue was analyzed in Pearce v. Motel 6, Inc., 624 P.2d 215 (Wash. App. 1981). There, the plaintiff brought an action for a fall in a motel bathroom. The trial court rejected a specific instruction requested by the defendant concerning the duty of care of a motel owner towards patrons. Instead, the Court gave a general statement of the law of negligence to the jury. The appellate court held that a defendant is entitled to an instruction which fully advises the jury of the exact duty of care which must be found to have been breached in order to fix liability. Otherwise, a general charge of negligence has the effect of converting the defendant into a mere insurer because the jury has no real standard by which it can judge breach of the duty of care.

The general charge of negligence as given as a result of rejecting the plaintiff's specific duty of care instruction was clearly substantial error in this case. An intentional act by a patron against another in Utah falls within a specific duty of care which is different from the general duty associated with negligence. In particular, the instruction offered was based upon Gustaveson v. Gregg, 655 P.2d 693 (Utah 1982). Gustaveson held that a duty of care of a bowling alley operator to guard

against assaults by one patron against another did not extend to making the proprietor an insurer of the safety of patrons. Gustaveson explained that a proprietor must have some cause to believe that the particular individual committing the tort would so act. There, as here, the tortfeasor gave no warning of a problem until moments before he struck.

Gustaveson was not a new development in Utah law. In Gray v. Scott, 565 P.2d 76 (Utah 1977), this Court considered the duty of care of a lodge operator to protect a business visitor on the premises against a shooting by another business visitor. This Court stated that the proprietor needed to have notice of the propensity of a particular individual to assault or other evidence of a high likelihood of the willful tort occurring.

The error of rejection of Instruction No. 27 is aggravated by the giving of Instruction No. 19 without a duty of care instruction. Instruction No. 19, as given, advises the jury that the duty of care can vary according to circumstances, but no guidance is given to assist the jury in determining what duty exists under what circumstances. (R., p. 262.) As reflected by the two cases described immediately above, the duty of care of a proprietor is not always fixed and may be specific according to particular circumstances. For example, in Black v. Nelson, 532 P.2d 212 (Utah 1975), the Court considered an injury to a patron

upon premises resulting from falling down some stairs. The Court considered the location of the stairs and the activity of the plaintiff at the time of the injury. This Court stated that the duty of care of a proprietor can vary according to the dangers reasonably anticipated.

Rejected Instruction No. 27 would have fixed the element of duty for the jury's application in light of the evidence of the case. Because the plaintiff presented no evidence as to the standard of care in comparable facilities and because the only evidence plaintiff presented was that of an intentional act on the part of John Doe, a general negligence charge as given by the Court left the jury without any meaningful guidelines to consider what duty of care had been breached. Certainly, the jury could not perceive that a proprietor of an amusement facility had the specific duty of care reflected in a line of cases culminating most recently in Gustaveson.

The standard of care propounded by appellant at trial arising from the evidence that the act was intentional on the part of John Doe without reasonable warning sufficient to allow the appellant to prevent the injury was not fully before the jury for fair consideration. Timely objection was made. (Trans., pp. 67-68, 112.) Consequently, the judgment of the trial court should be reversed as the record fails to show a breach of the

correct duty of care or be remanded for a new trial upon express instructions of the elements of negligence and the specific duty of care of the proprietor/defendant in this action.

CONCLUSION

The preceding argument establishes that the judgment of the District Court should be reversed for several reasons and, at a minimum, should be reversed in part to reflect that the defendant is liable only for 25% of the judgment.

The doctrine of joint and several liability was not applicable to this action because the Liability Reform Act could properly be applied prospectively to the action. At worst, the Act adopted a procedural change which did not affect a vested right and could be retroactively applied. Further, the common law doctrine of joint and several liability is contrary to public policy and this Court should abolish the doctrine without regard to the nature of the Liability Reform Act.

Case law in effect at the time of trial suggested that any instruction on assumption of risk should be avoided. However, this sporting case appeared to not be anticipated by the direction of the case law. Accordingly, this Court could find, as a matter of law, that the doctrine of primary assumption of

risk acts as a complete bar to the plaintiff as her injury arose out of risk associated with the activity. If the rule of Jacobsen Construction is literally applied to primary assumption of risk, the Court still should have instructed the jury in accordance with the long established law concerning sporting cases.

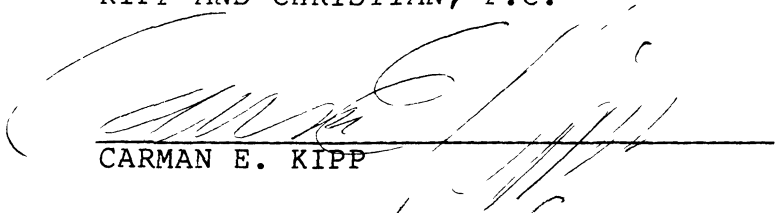
Finally, this Court could rule, as a matter of law, that the evidence presented does not show a violation of the correct duty of care of the defendant. At least, remand for a new trial is appropriate so that the jury may be properly instructed on the specific duty of care of the defendant.

The Appellant respectfully requests the Court, for the reasons stated above, to rule as a matter of law that the plaintiff is barred by the doctrine of assumption of risk or by the failure to show any breach of the correct duty of care. In the alternative, the Court is requested to reverse the judgment and order a new trial or to order the return of 75% of the judgment to the Appellant as the amount in excess of the negligence found by the jury. Additionally, should the Court order a new trial,


the Appellant respectfully requests the Court clarify the proper application of the doctrine of joint and several liability to avoid additional appeal.

DATED this 21st day of November, 1986.

KIPP AND CHRISTIAN, P.C.



CARMAN E. KIPP



GREGORY J. SANDERS

Attorneys for Appellant
Brent Henderson, d/b/a
Classic Skating Center

ADDENDUM

	<u>Page</u>
Special Verdict	A-1
Judgment on Special Verdict	A-3
Writ of Execution	A-7
§78-27-37 et seq. (Old Version)	A-12
§78-27-37 et seq. (New Version)	A-14
Court's Instruction No. 8	A-16
Court's Instruction No. 19	A-17
Court's Instruction No. 34	A-18
Defendant's Rejected Instruction No. 1	A-19
Defendant's Rejected Instruction No. 3	A-20
Defendant's Rejected Instruction No. 21	A-21
Defendant's Rejected Instruction No. 26	A-22
Defendant's Rejected Instruction No. 27	A-23

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ALL AMOUNTS PAID

IN THE FOURTH JUDICIAL DISTRICT COURT OF ~~UTAH COUNTY~~ *J*

STATE OF UTAH

JOAN F. STEPHENS,	:	
	:	
Plaintiff,	:	SPECIAL VERDICT
	:	
vs.	:	
	:	
BRENT HENDERSON, d/b/a	:	
CLASSIC SKATING CENTER,	:	
and JOHN DOE,	:	
	:	
Defendants.	:	Civil No. 68,622

We, the jury in the above-entitled action, answer the questions submitted to us as follows:

1. At the time and place of the incident in question and under the circumstances as shown by the evidence, was defendant Brent Henderson, d/b/a Classic Skating Center negligent?

Yes X No _____

2. If so, was such negligence a proximate cause of plaintiff Joan F. Stephens' injuries?

Yes X No _____

3. At the time and place of the incident in question and under the circumstances as shown by the evidence, was defendant John Doe negligent?

Yes X No _____

4. If so, was such negligence a proximate cause of plaintiff Joan F. Stephens' injuries?

Yes X No _____

5. At the time and place of the incident in question and under the circumstances as shown by the evidence, was plaintiff Joan F. Stephens negligent?

Yes _____ No X

6. If so, was such negligence a proximate cause of her injuries?

Yes _____ No X

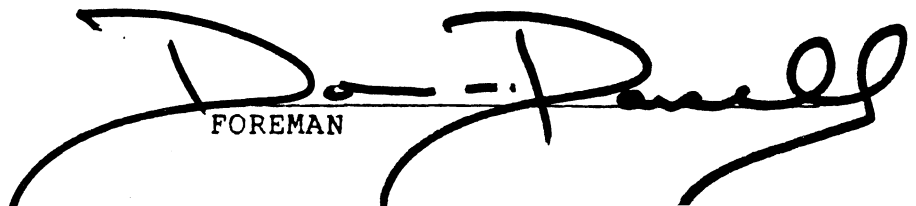
7. Considering all the negligence which caused the accident at 100 percent, which percentage of that negligence is attributable:

A. To Defendant Brent Henderson, d/b/a Classic Staking Center	<u>25</u> %
B. To Defendant John Doe	<u>75</u> %
C. To Plaintiff Joan F. Stephens	<u>0</u> %
TOTAL	<u>100</u> %

8. What sum would fairly compensate plaintiff, Joan F. Stephens, for the damages, if any, which she sustained as a result of the accident?

A. For special damages	\$ <u>5357.92</u>
B. For general damages	\$ <u>12,000.00</u>
TOTAL	\$ <u>17,357.92</u>

DATED AND SIGNED this 29 day of July, 1986.


FOREMAN

JAMES G. CLARK
42 North University Avenue
Provo, Utah 84601
(801) 375-6092

RAY HARDING IVIE
IVIE & YOUNG
48 North University Avenue
P. O. Box 672
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Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

JOAN F. STEPHENS,	:	
	:	
Plaintiff,	:	JUDGMENT ON
	:	SPECIAL VERDICT
vs.	:	
	:	
BRENT HENDERSON, d/b/a	:	
CLASSIC SKATING CENTER, and	:	
JOHN DOE,	:	
	:	
Defendants.	:	Civil No. 68,622

The above-entitled matter came on regularly for trial before a jury in the court of the Honorable Cullen Y. Christensen on the 28th and 29th of July, 1986. The plaintiff was represented by counsel James G. Clark and Ray Harding Ivie of IVIE & YOUNG. The defendant was represented by Gregory J. Sanders of KIPP AND CHRISTIAN. After hearing the evidence, the instructions of the Court, and the argument of counsel, the jury retired to

consider their answers to a Special Verdict. The jury returned a Special Verdict as follows:

We, the jury in the above-entitled action, answer the questions submitted to us as follows:

1. At the time and place of the incident in question and under the circumstances as shown by the evidence, was defendant Brent Henderson, d/b/a Classic Skating Center negligent?

Yes X No

2. If so, was such negligence a proximate cause of plaintiff Joan F. Stephens' injuries?

Yes X No

3. At the time and place of the incident in question and under the circumstances as shown by the evidence, was defendant John Doe negligent?

Yes X No

4. If so, was such negligence a proximate cause of plaintiff Joan F. Stephens' injuries?

Yes X No

5. At the time and place of the incident in question and under the circumstances as shown by the evidence, was plaintiff Joan F. Stephens negligent?

Yes No X

6. If so, was such negligence a proximate cause of her injuries?

Yes No X

7. Considering all the negligence which caused the accident at 100 percent, which percentage of that negligence is attributable:

A. To Defendant Brent Henderson, d/b/a Classic Skating Center	<u>25</u>	%
B. To Defendant John Doe	<u>75</u>	%
C. To Plaintiff Joan F. Stephens	<u>0</u>	%
TOTAL	<u>100</u>	%

8. What sum would fairly compensate plaintiff, Joan F. Stephens, for the damages, if any, which she sustained as a result of the accident?

A. For special damages	\$ <u>5,357.92</u>
B. For general damages	\$ <u>12,000.00</u>
TOTAL	\$ <u>17,357.92</u>

DATED AND SIGNED this 29th day of July, 1986.

/s/
FOREMAN

Now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

That judgment be, and hereby is, entered in favor of the plaintiff, Joan F. Stephens, and against the defendant Brent Henderson, d/b/a Classic Skating Center, for the sum of Seventeen Thousand Three Hundred Fifty-Seven Dollars and 92/100

(\$17,357.92), together with interest on special damages of eight percent (8%) per annum from the date of the occurrence of the act giving rise to the cause of action to the date of entry of judgment, for the sum of Seven Hundred and Forty-Four Dollars and 95/100 (\$744.95), together with her costs of court to be taxed hereafter. Said judgment shall bear interest at the statutory rate of twelve percent (12%) from the date of judgment until paid.

DATED AND SIGNED this 12 day of August, 1986.


BY THE COURT:


CULLEN Y. CHRISTENSEN, Judge
Fourth Judicial District

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Judgment on Special Verdict, with postage prepaid thereon this 21st day of July, 1986, to:

Gregory J. Sanders, Esq.
KIPP AND CHRISTIAN, P.C.
600 Commercial Club Building
32 Exchange Place
Salt Lake City, Utah 84111


Secretary

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FOURTH JUDICIAL DISTRICT COURT
OF UTAH

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CLERK OF COURT
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JAMES G. CLARK
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IVIE & YOUNG
48 No. University Ave.
Provo, Utah 84603

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

JOAN F. STEPHENS,

Plaintiff,

vs.

BRENT HENDERSON, d/b/a/
CLASSIC SKATING CENTER, and
JOHN DOE,

Defendants.

:

:

:

:

:

:

WRIT OF EXECUTION

Case No. 68,622

Judge: C. Y. CHRISTENSEN

TO THE SHERIFF OF UTAH COUNTY, OR TO ANY OTHER PEACE OFFICE
WITHIN THE STATE OF UTAH:

WHEREAS, Judgment was rendered by this court for Plaintiff
and against defendants HENDERSON and CLASSIC in the above-
entitled action on August 12, 1986, in the amount of \$18,102.87
and said Judgment is not satisfied;

THESE ARE THEREFORE, to command you to collect the aforesaid
judgment together with the cost of this execution, and that you
levy on and sell enough of the unexempted personal property, or
if enough unexempted personal property cannot be found, then of
the unexempted real property of the said defendants HENDERSON

and CLASSIC to satisfy the same with all legal costs accruing hereon, and this shall be your sufficient warrant for so doing, and within sixty days make due returns fore this writ with your doings in the premises hereon endorsed. WHEREOF FAIL NOT.

Given under my hand and the seal of said Court this 13th day of August, 1986.

WILLIAM HUIISH, CLERK

By:

Wayne Case
Deputy Clerk

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CLERK OF DISTRICT COURT

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Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

JOAN F. STEPHENS,	:	<u>P R A E C I P E</u>
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	
BRENT HENDERSON, d/b/a/ CLASSIC SKATING CENTER, and JOHN DOE,	:	Case No. 68,622
	:	Judge: C. Y. CHRISTENSEN
Defendants.	:	

TO THE SHERIFF OR CONSTABLE OF UTAH COUNTY:

By authority of the writ of execution issued in the above-entitled action herewith delivered to you, directing you to satisfy the judgment in said action out of the property situate in Utah County, State of Utah, belonging to defendant Brent Henderson d/b/a/ Classic Skating Center, herein named, you are hereby requested and directed, as provided by statute in such cases, to levy upon and sell all the right, title, equity and interest of said defendant, in and to the following described

property, to wit:


1. The property and contents of Classic Skating Center at 250 So. State Street, Orem, Utah; including games, equipment, all rental skates and all cash in cash registers.

You are directed to remove from the premises all skates and all money in the cash registers immediately.

2. The real property and all unexempt personal property of Brent Henderson located at 1036 So. 300 West, Orem, Utah.

You are further requested and directed to proceed with sale of said property as provided by law, when you have taken possession or control thereof, and this shall be your sufficient warrant for so doing.

Dated this 13th day of August, 1986.



JAMES G. CLARK, Attorney for
Plaintiff Stephens

nb12317

STATE OF UTAH
COUNTY OF UTAH

UTAH COUNTY CONSTABLE
PRECINCT 4
DARYL G. TUCKER
BOX 2266
PROVO, UTAH 84603

RETURN OF SERVICE

I hereby make return of service, and certify:

1. I am a duly qualified and an acting peace officer, or I am a person over the age of 21 years, and not a party to this action.
2. I received this WRIT OF EXECUTION on the date of 8-15-86 and served it on the party listed below by leaving, at the address(s) and on the date(s) shown below, a copy with the defendant or with a person of suitable age and discretion at the usual place of abode of the defendant.
3. Upon serving the same, I endorsed the date and place of service and my name on the copy served.

Defendants name and address

Date Served

CLASSIC SKATING
C/O BRENT HENDERSON
250 So. STATE

8-15-86

X OREM, UTAH
Personal service

Substitute service: by leaving a
copy with _____

D. Carter

PROCESS SERVER

FEES:

SERVICE.....\$ 15.00
MILEAGE.....\$ 10.00
OTHER.....\$ 45.00 (4 PEOPLE FOR 1 1/2 HRS)
TOTAL.....\$ 70.00 EACH

Subscribed and sworn to
before me, a NOTARY PUBLIC
residing in Utah County, Uta

P. Carter

NOTARY PUBLIC

9/4/88

My Commission Expires

I ATTACHED 900 PAIR OF SKATES &
ACCEPTED A PERSONAL FROM BRENT HENDERSON FOR \$12,132.⁸⁷/₁₀₀.
I TURNED THE CHECK OVER TO MR. JAMES CLARK ON 8/19/86.

LAWS OF UTAH 1973, CHAPTER 209
(OLD VERSION §78-27-37 et seq.)

78-27-37. Comparative negligence—Diminishment of damages—“Contributory negligence” includes “assumption of the risk.”—Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence or gross negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence or gross negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering. As used in this act, “contributory negligence” includes “assumption of the risk.”

History: L. 1973, ch. 209, § 1.

78-27-38. Separate special verdicts on damages and percentage of negligence—Reduction of damages.—The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining (1) the total amount of damages suffered and (2) the percentage of negligence attributable to each party; and the court shall then reduce the amount of the damages in proportion to the amount of negligence attributable to the person seeking recovery.

History: L. 1973, ch. 209, § 2.

78-27-39. Contribution among joint tort-feasors—Discharge of common liability by joint tort-feasor required.—(1) The right of contribution shall exist among joint tort-feasors, but a joint tort-feasor shall not be entitled to a money judgment for contribution until he has, by payment, discharged the common liability or more than his prorata share thereof.

History: L. 1973, ch. 209, § 3.

LAWS OF UTAH 1973, CHAPTER 209
(OLD VERSION §78-27-37 et seq.)
cont.

78-27-40. Settlement by joint tort-feasor—Determination of relative degrees of fault of joint tort-feasors—"Joint tort-feasor" defined.—(1) A joint tort-feasor who enters into a settlement with the injured person shall not be entitled to recover contribution from another joint tort-feasor whose liability to the injured person is not extinguished by that settlement.

(2) When there is a disproportion of fault among joint tort-feasors to an extent that it would render inequitable an equal distribution by contribution among them of their common liability, the relative degrees of fault of the joint tort-feasors shall be considered in determining their prorata shares, solely for the purpose of determining their rights of contribution among themselves, each remaining severally liable to the injured person for the whole injury as at common law.

(3) As used in this section, "joint tort-feasor" means one of two or more persons, jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them.

History: L. 1973, ch. 209, § 4.

78-27-41. Individual liability of joint tort-feasors, right of indemnity under law, and contractual right to contribution or indemnity not affected.—Nothing in this act shall affect:

(1) The common-law liability of the several joint tort-feasors to have judgment recovered, and payment made, from them individually by the injured person for the whole injury. However, the recovery of a judgment by the injured person against one joint tort-feasor does not discharge the other joint tort-feasors.

(2) Any right of indemnity which may exist under present law.

(3) Any right to contribution or indemnity arising from contract or agreement.

History: L. 1973, ch. 209, § 5.

78-27-42. Release of joint tort-feasor—Reduction of injured person's claim.—A release by the injured person of one joint tort-feasor, whether before or after judgment, does not discharge the other tort-feasors, unless the release so provides, but reduces the claim against the other tort-feasors by the greater of: (1) The amount of the consideration paid for that release; or (2) the amount or proportion by which the release provides that the total claim shall be reduced.

History: L. 1973, ch. 209, § 6.

78-27-43. Release of joint tort-feasor—Requirements for relief from liability to make contribution.—(1) A release by the injured person of one joint tort-feasor does not relieve him from liability to make contribution to another joint tort-feasor unless that release:

(a) Is given before the right of the other tort-feasor to secure a money judgment for contribution has accrued; and

(b) Provides for a reduction, to the extent of the prorata share of the released tort-feasor, of the injured person's damages recoverable against all the other tort-feasors.

(2) This section shall apply only if the issue of proportionate fault

THE LIABILITY REFORM ACT
LAWS OF UTAH 1986, CHAPTER 199
(NEW VERSION §78-27-37 et seq.)

78-27-37. Definitions.

As used in §§ 78-27-37 through 78-27-43:

(1) "Defendant" means any person not immune from suit who is claimed to be liable because of fault to any person seeking recovery.

(2) "Fault" means any actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including, but not limited to, negligence in all its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification or abuse of a product.

(3) "Person seeking recovery" means any person seeking damages or reimbursement on its own behalf, or on behalf of another for whom it is authorized to act as legal representative.

History: C. 1953, 78-27-37, enacted by L.
1986, ch. 199, § 1.

78-27-38. Comparative negligence.

The fault of a person seeking recovery shall not alone bar recovery by that person. He may recover from any defendant or group of defendants whose fault exceeds his own. However, no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant.

History: C. 1953, 78-27-38, enacted by L.
1986, ch. 199, § 2.

78-27-39. Separate special verdicts on damages and proportion of fault.

The trial court may, and when requested by any party shall, direct the jury, if any, to find separate special verdicts determining the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery and to each defendant.

History: C. 1953, 78-27-39, enacted by L.
1986, ch. 199, § 3.

78-27-40. Amount of liability limited to proportion of fault — No contribution.

Subject to § 78-27-38, the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant. No defendant is entitled to contribution from any other person.

THE LIABILITY REFORM ACT
LAWS OF UTAH 1986, CHAPTER 199
(NEW VERSION §78-27-37 et seq.)
cont.

78-27-41. Joinder of defendants.

A person seeking recovery, or any defendant who is a party to the litigation, may join as parties any defendants who may have caused or contributed to the injury or damage for which recovery is sought, for the purpose of having determined their respective proportions of fault.

History: C. 1953, 78-27-41, enacted by L.
1986, ch. 199, § 5.

78-27-42. Release to one defendant does not discharge other defendants.

A release given by a person seeking recovery to one or more defendants does not discharge any other defendant unless the release so provides.

History: C. 1953, 78-27-42, enacted by L.
1986, ch. 199, § 6.

78-27-43. Effect on immunity, exclusive remedy, indemnity, contribution.

Nothing in §§ 78-27-37 through 78-27-42 affects or impairs any common law or statutory immunity from liability, including, but not limited to, governmental immunity as provided in Chapter 30, Title 63, and the exclusive remedy provisions of Chapter 1, Title 35. Nothing in §§ 78-27-37 through 78-27-42 affects or impairs any right to indemnity or contribution arising from statute, contract, or agreement.

History: C. 1953, 78-27-43, enacted by L.
1986, ch. 199, § 7.

INSTRUCTION NO. 8

Negligence is the failure to do what a reasonable and prudent person would have done under the circumstances, or doing what such person under such circumstances would not have done. The fault may lie in acting or in omitting to act.

The person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional caution and skill are to be admired and encouraged, the law does not demand them as a general standard of conduct.

INSTRUCTION NO. 19

You are instructed that inasmuch as the amount of caution used by an ordinarily prudent person varies in direct proportion to a danger known to be involved in his undertaking, it follows that in the exercise of ordinary care the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances. To put it another way, the amount of caution involved in the exercise of ordinary care and hence required by law increases or decreases as does the danger that reasonably should be apprehended.

INSTRUCTION NO. 34

Contributory negligence will not bar recovery in an action by any person to recover damages for negligence resulting in injury to a person, if such negligence was not as great as the negligence or gross negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

INSTRUCTION NO. _____

A participant in a sports activity such as roller skating is deemed to accept the dangers involved to the extent such are or should be obvious.

*Revised
1-24-66*

INSTRUCTION NO. 3

By engaging in roller skating at the defendant's facility, the plaintiff assumed the risk of unwanted and potentially injurious accidental contacts with other skaters.

*Revised
7-24-76
cm*

INSTRUCTION NO. 2

There is a legal principle, commonly referred to by the term "assumption of risk", which is as follows:

One is said to assume a risk when he voluntarily manifests his assent to a dangerous condition or to the creation or maintenance of a dangerous condition and voluntarily exposes himself to that danger, or when he knows, or in the exercise of ordinary care would know, that a danger exists in the condition of the property and voluntarily places himself or remains within the position of danger.

If you find that Joan Stephens assumed the risks which were known by her or which should have been known by her concerning the dangers associated with roller skating, she would be guilty of negligence.

INSTRUCTION NO. D-16

In determining whether the plaintiff was comparatively negligent, you may consider whether her injuries arose as a result of the usual risk associated with roller skating which the plaintiff could reasonably anticipate.

*Revised
7-24-80*

Section 28-27-37, Utah Code Annotated, 1953
Jacobsen Construction Co., Inc. v. Structo-Lite Engineering,
Inc., 619 P.2d 306 (Utah 1980).

INSTRUCTION NO. D- 27

Should you determine that the plaintiff was deliberately knocked down, you are instructed that a roller skating proprietor has a duty to guard roller skaters against assaults by fellow roller skaters if the circumstances are such that an ordinarily prudent person might reasonably anticipate the danger of such assaults and knew or should have known of the tendency of a fellow skater to assault other patrons of the establishment.

*Referred
7-29-84
CJC*

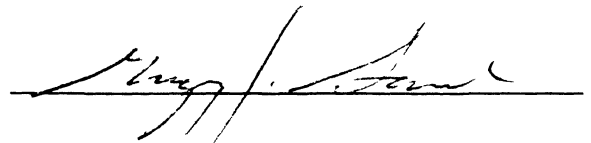
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of November, 1986, four true and correct copies (2 each) of the foregoing Brief of Appellant were mailed to:

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A handwritten signature in black ink, appearing to read "Ray H. Ivie", is written over a horizontal line.