

1979

Jacobsen Construction Company, Inc. et al v. Structo-Lite Engineering, Inc. : Reply Brief of Appellant

Utah Supreme Court

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Raymond M. Berry; H. James Clegg; Snow, Christensen & Martineau; Attorneys for Defendant and Third-Party Plaintiff-Appellant;

Arthur H. Nielsen; Nielsen, Henriod, Gottfredson & Peck; Attorneys for Plaintiffs-Respondents;

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IN THE SUPREME COURT
OF THE STATE OF UTAH

JACOBSEN CONSTRUCTION COMPANY,
INC., a corporation; JELCO, INC.,
a corporation; and CENTRAL UTAH
WATER CONSERVANCY DISTRICT,
a body corporate and politic,

Plaintiffs-Respondents,

Case No. 15200

vs.

STRUCTO-LITE ENGINEERING, INC.,
a corporation,

Defendant-Third-Party
Plaintiff-Appellant.

REPLY BRIEF OF APPELLANT

Appeal from the Judgment of the
Third District Court, Salt Lake County
The Honorable James S. Sawaya, Judge

RAYMOND M. BERRY
H. JAMES CLEGG
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant and
Third-Party Plaintiff-Appellant
700 Continental Bank Building
Salt Lake City, Utah 84101
Telephone: (801) 521-9000

ARTHUR H. NIELSEN
NIELSEN, HENRIOD,
GOTTFREDSON & PECK
Attorneys for Plaintiffs-
Respondents
410 Newhouse Building
Salt Lake City, Utah 84111
Telephone: (801) 521-3350

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ARTHUR H. NIELSEN
NIELSEN, HENRIOD,
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Attorneys for Plaintiffs-
Respondents
410 Newhouse Building
Salt Lake City, Utah 84111
Telephone: (801) 521-3350

RAYMOND M. BERRY
H. JAMES CLEGG
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant and
Third-Party Plaintiff-Appellant
700 Continental Bank Building
Salt Lake City, Utah 84101
Telephone: (801) 521-9000

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vs.

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STRUCTO-LITE ENGINEERING, INC.,
a corporation,

Defendant-Third-Party
Plaintiff-Appellant.

REPLY BRIEF OF APPELLANT

INTRODUCTION

Appellant Structo-Lite Engineering, Inc. submits this brief in reply to the brief of respondents Jacobsen Construction Company, Inc., Jelco, Inc., and Central Utah Water Conservancy District. The purpose of this brief is not to further expound on the arguments raised in appellants' original brief, but to respond to new issues raised in respondents' brief, as well as to clarify and

correct some significant mistakes of law contained in the respondents' brief.

ARGUMENT

POINT I

ASSUMPTION OF RISK AS A
COMPLETE BAR IS NOT
ELIMINATED BY COMPARATIVE
NEGLIGENCE EXCEPT AS IT
TRACKS CONTRIBUTORY NEGLIGENCE. RIGTRUP v. STRAWBERRY
WATER USERS ASSOCIATION IS
NOT CONTRARY.

Respondents go to great length in their brief to show that appellant's reliance on the case of Rigtrup v. Strawberry Water Users Association, 563 P.2d 1247 (Utah 1977) is misplaced; that rather than standing for the proposition that the defense of assumption of the risk may still operate as a complete bar in a negligence action, the opinion of the Court requires that comparative negligence be applied in assumption of risk type situations. Appellant freely admits that the language of the Court's opinion in Rigtrup is susceptible to such an interpretation. However, the opinion in Rigtrup is based upon the assumption that the trial court applied the comparative negligence statute in entering its verdict

of no cause of action against the plaintiff - Rigtrup.
Id. at 1250. While this may certainly be the case, it is equally as probable that, based upon the instructions and the answers to the interrogatories on the special verdict, the lower court in Rigtrup entered judgment based on the fact that the jury found plaintiff had assumed the risk of the damages under an instruction which stated that a finding of assumption of the risk would bar recovery if the elements of that defense were present.

As pointed out by respondents, it makes a great deal of difference in the application of the assumption of risk doctrine whether the use of the doctrine is based upon actual knowledge of the danger or merely failure to discover it. [Brief of Respondents at p. 14]. The actual knowledge or "primary type" assumption of the risk more closely tracks the issue of a defendant's duty, while the should have discovered or "secondary type" certainly equates with contributory negligence. Presumably respondents will not argue that the adoption of comparative negligence has eliminated the legal requirement that a defendant must owe a duty to plaintiff before he is liable in a negligence action. To read

Rigtrup as abrogating this requirement simply because it is couched in terms of assumption of risk may create an ideal situation for a plaintiff but appellant contends that it is clearly not the intent of the Supreme Court of this State.

Respondents further argue that even if assumption of the risk remains as a defense and bar that appellant is precluded from asserting it by appellant's failure to specify during the course of the proceedings whether appellant was relying on assumption of risk in its "primary" or "secondary" sense. Unfortunately for respondents' position, the Utah Rules of Civil Procedure only require that the defense be pled affirmatively as "assumption of risk"; no requirement of pleading by degree is stated. Rule 8(c), Utah Rules of Civil Procedure.

In the course of discovery procedures, and as a result of appellant's proposed instructions to the jury, respondents should have been aware of the fact that appellant intended to raise the doctrine as a defense at trial.

POINT II

UTAH CASE LAW ESTABLISHES THAT ASSUMPTION OF RISK IS A DEFENSE TO A CLAIM FOR BREACH OF EXPRESS WARRANTY.

Respondents argue that assumption of the risk is no defense in an action for breach of express warranty. Finding no Utah cases on point, respondents cite a Kansas case, Young & Cooper, Inc. v. Vestring, 214 Kan. 311, 521 P.2d 281 (1974) in support of its assertion. A closer reading of that opinion shows that respondents' reliance therein is misplaced. The quotation from that opinion on page 18 of respondents' brief is taken completely out of context. The language quoted, when taken with the body of the opinion, does not lay down a general rule that assumption of risk and contributory negligence are not defenses to an action for breach of an express warranty, but only that based upon the factual irregularities of that particular case the defenses were not assertible against those particular plaintiff-buyers. On the contrary, the opinion in Young & Cooper, Inc. v. Vestring reaffirms and cites the Kansas Supreme Court opinion in Huebert v. Federal Pacific Electric Co., Inc., 208 Kan. 720, 494 P.2d 1210 (1972) which concluded that assumption

of the risk is a valid defense to an action based on an express warranty. Young & Cooper, Inc. v. Vestring, 521 P.2d at 292. Respondents' own authority simply substantiates the appellant's earlier stated position.

A reasonable construction of Utah case law leads to a similar conclusion. In Vernon v. Lake Motors, 26 U.2d 269, 488 P.2d 302 (1971), the plaintiff Vernon sued defendant Lake Motors and Ford Motor Company for damages sustained when plaintiff's new automobile caught fire. The suit was based on breach of an express warranty given by the manufacturer and passed on by the dealer. Defendants asserted that plaintiff had assumed the risk of the damages sustained by using the automobile despite knowledge of a defect therein.

The Supreme Court ruled that the knowing, voluntary, and unreasonable use of a dangerous product is a recognized defense to an express warranty action. Id. at 305. Appellant realizes, and the court pointed out, that the recognized defense was the form of assumption of risk which tracks contributory negligence. However, the court did not indicate that other forms of assumption of risk are not valid defenses, the inference cer-

tainly being that they are. Vernon v. Lake Motors supports such inference since the court held that under the factual setting therein there was a jury question as to whether the use of the automobile by the plaintiff, despite knowledge of a defect, was an unreasonable or reasonable use. Cf. Leishman v. Kamis Valley Lumber Company, 19 U.2d 150, 427 P.2d 747 (1967) [without using the term assumption of the risk the court implied that use of a product with knowledge of a defect is a valid defense to an action for breach of express warranty].

If assumption of risk truly remains as a complete bar in a negligence action, the foregoing authorities dictate that it may be used to bar an action based on not only negligence but on breach of an express warranty.

POINT III

THE TRIAL JUDGE DID NOT ABUSE
HIS DISCRETION BY ALLOWING
APPELLANT TO AMEND ITS AMENDED
ANSWER AT THE TIME OF THE
TRIAL.

In their brief respondents assert that the trial court erred in allowing respondent to amend its amended

answer to set forth the defenses of assumption of risk and contributory negligence on the first day of trial. [Respondents' Brief at p. 19]. They also contend that the failure to raise assumption of the risk and contributory negligence in a responsive pleading constitutes a waiver of the defenses under Rule 12(a) Utah Rules of Civil Procedure since the exception contained in Rule 15(b) Utah Rules of Civil Procedure is inapplicable in this particular factual instance. In support respondents cite the Utah Supreme Court cases of General Insurance Company of America v. Carnicero Dynasty Corp., 545 P.2d 502 (Utah 1976) and Cheney v. Rucker, 14 U.2d 205, 381 P.2d 86 (1963).

Once again respondents' own authority undermines their argument. Under Rule 15(b), Utah Rules of Civil Procedure, any party may make a motion at any time to amend the pleadings to conform to the evidence.

The parties may, by express consent, or by the introduction of evidence without objection, amend the pleadings at will. During the trial if a party expressly requests leave to amend the conformed pleadings to the proof adduced and to reflect issues raised by either expressed or implied consent, such leave should be granted.

The first part of Rule 15(b) should be contrasted with the second part where an amendment is offered during trial in response to an objection to evidence, in such a case, the standards set forth in the second part of Rule 15(b) will apply, viz., leave may be granted in absence of prejudice, undue delay, or laches.

General Insurance Company of America v. Carnicero Dynasty Corp., 545 P.2d 502, 505-06.

Cheney v. Rucker, 14 U.2d 205, 381 P.2d 86

(1963) indicates how Rules 8(c) and 15(b) interrelate.

Plaintiff also raises the procedural point that since defendants did not plead the subsequent agreement as an affirmative defense, they should not have been permitted to rely thereon. It is true, as plaintiff insists, that Rule 8(c) U.R.C.P., requires that affirmative defenses be pleaded. It is a good rule whose purpose is to have the issues to be tried clearly framed. But it is not the only rule in the book of Rules of Civil Procedure. They must all be looked to in the light of their even more fundamental purpose of liberalizing both pleading and procedure to the end that the parties are afforded the privilege of presenting whatever legitimate contentions they have pertaining to their dispute. What they are entitled to is notice of the issues raised and an opportunity to meet them. When this is accomplished, that is all that is required.

Id. at 91. Under such rationale the court in Cheney affirmed a ruling of the lower court that the defendant be allowed to amend his pleadings; the trial court was held not to have abused the discretion it held over the amendment procedure since the complaining party was apparently unconvincing in showing how he had been disadvantaged and, further, he made no request for a continuance.

The aforecited cases clearly dispell respondents point of contention. Respondents clearly had notice of appellant's intent. The original answer raised both defenses. The amended answer pled comparative negligence which encompasses contributory negligence. Defendant could have waited until some objection was made at trial as to the evidence it sought to have admitted before moving to make the amendment. In light of the rules propounded in General Insurance Company of America and Cheney, the court would have the discretion to allow the amendment at that time as well. If per chance respondents had failed to object at trial, the defenses would be deemed tried by implied consent and thereby become a part of the pleadings.

Appellant's motion at the start of trial was made at that time rather than later during the trial to provide the Court adequate opportunity to avoid any prejudice to the other party. Respondents' argument regarding the manner in which they were prejudiced by appellant's motion was unconvincing to the lower court. It is also interesting to note that respondents did not request any continuance despite the "extremely prejudicial" effect which they alleged appellant's motion would have upon its case. In fact, respondents represented to the court that the court could reserve its ruling on the matter since it would have no effect upon its trial preparation. [R. 550-52].

In retrospect it is extremely difficult to see any way in which the court's exercise of discretion hindered respondents in the presentation of their case. Respondents own actions in the wake of appellant's motion indicate that their assertion of prejudice was clearly more one of form than substance. In light of the attendant circumstances and their application to the law, it is evident that the lower court exercised its discretion properly and that the problem was dealt with at the most

expeditious time possible.

POINT IV

THE TRIAL JUDGE PROPERLY
SUBMITTED THE ISSUES OF
ASSUMPTION OF RISK AND
CONTRIBUTORY NEGLIGENCE TO
THE JURY AND THE VERDICT
RETURNED BY THE JURORS SUB-
STANTIATES THE PROPRIETY OF
THE TRIAL JUDGE'S ACTION.

In Point IV of their brief, respondents assert that the trial judge erred in not directing the jurors, by way of instruction, that respondents had not assumed the risk of injury. In Point V, the respondents make a similar argument with respect to directing the issue of respondents' contributory negligence. On both points respondents contend that, as a matter of law, the evidence adduced at trial failed to establish either defense.

In order to properly address respondents' argument it is imperative to put it in the context of the standard to be used by a trial court in making a ruling on a request for a directed verdict. In making its ruling upon a motion for a directed verdict as to an issue or issues, the trial court is obliged to view the evidence advanced to prove the issue in a light most

favorable to the party against whom the directed verdict is sought. Anderson v. Gribble, 3 U.2d 68, 513 P.2d 432, 434 (1973). This means that the trial court must take all the testimony on point, as well as any reasonable inferences which tend to prove the case of the party against whom the directed verdict is sought, as true. It must also disregard any conflicts in the evidence which cut against the position of such party. Koer v. Mayfair Markets, 19 U.2d 339, 431 P.2d 566, 568 (1967). If after reviewing the evidence and inferences therefrom in such light, any doubts the trial court may have as to what action is appropriate are to be resolved in favor of submitting the issues to the jury. Smith v. Franklin, 14 U.2d 16, 376 P.2d 541, 544 (1962). The trial court must bear in mind its duty in a jury trial to submit to the jury any theory of the party which is supported by some evidence. Hall v. Blackham, 18 U.2d 164, 417 P.2d 664, 666 (1966). Only in the most extreme circumstances should an issue be taken from the jury.

Once the trial court exercises its on-the-spot judgment and submits the issue to a jury, its decision

to do so will only be upset by a reviewing court under the most extreme circumstances. In reviewing the trial court's decision as to a directed verdict, the Supreme Court will look at the trial court's decision in the light most favorable to the nonmoving party and will afford such party the benefit of all possible inferences which may have been considered by the lower court. Curtis v. Harmon Electronics, Inc., 575 P.2d 1044, 1046 (1978).

The trial court's decision in the present instance was shown to be justified when the jury returned its special verdict finding that not only were respondents contributorily negligent but that they had assumed the risk of the damages sustained.

Jury verdict's are not to be easily upset. In light of the jury's specific findings, any attack upon the verdict or the actions of the trial court with regard thereto must overcome the strong presumption of verity afforded such findings and actions by the reviewing court. Bezner v. Continental Dry Cleaners, Inc., 548 P.2d 897, 901 (Utah 1976).

The reviewing court is to afford the verdict of the jury all possible presumptions in its favor. The court is obliged to assume that the jury properly followed the given instructions. Brown v. Johnson, 24 U.2d 388, 472 P.2d 942 (1970). All facts are to be reviewed in favor of the verdict. Barlow Upholstery & Furniture Co. v. Emmel, 533 P.2d 900, 902 (1975). The verdict is not to be upset unless, after taking all of the evidence and inferences therefrom in the light most favorable to sustaining the verdict, it appears that the verdict is entirely without foundation and evidence and that the determinations of the jurors are so fragmentary and insubstantial no reasonable mind could have reached such a conclusion. Porter v. Price, 11 U.2d 80, 355 P.2d 66, 67 (1960); Prince v. Peterson, 538 P.2d 1325, 1329 (1975).

When the foregoing legal principles are applied to the facts herein it becomes readily apparent that the trial judge acted properly in submitting the issues of respondents assumption of the risk and contributory negligence to the jury and that the findings of the jury must be sustained on this appeal.

As to the doctrine of assumption of risk there is, at the very least, "some evidence" in the record to validate both the submission of that issue to the jury and the jury verdict. Respondent Jacobsen Construction Company felt from the outset that fiberglass was improperly specified for holding tanks of this size. [R. 752]. Various supervisors and officers visited the Structo-Lite yard during construction of the tanks and noticed various defects in the construction and also that some components were missing. [R. 843, 851, 1166-68]. And despite reports from American Testing Lab stating that the clamping procedures used by appellant were "hit and miss" [R. 986-87], Jacobsen did not require appellant to perform any tests on the tanks. [R. 903, 1170].

When delivered, the tanks still contained many of the imperfections and irregularities observed by the Jacobsen people earlier and some were not even complete at the time they were delivered. [R. 1171-72].

Hydrostatic tests run by respondent-Jacobsen's employees revealed many leaks in several of the tanks when filled with water to a depth of only three to four feet. [R. 939, 950, 1133]. Yet despite knowledge of

these wide-ranging problems and irregularities, and while also knowing that chemical alum was much heavier than water [R. 1178], the tanks were never tested with alum. [R. 914]. After the hydrostatic testing was completed and at least some of the leaks were repaired, the tanks still had visible expansion humps in various areas. [R. 1179].

Respondent Conservancy District had similar knowledge of the problems with the tanks. Never confident in the design of the tanks [R. 1082], the District never chose to run a tension test [R. 1083] while admittedly knowing that appellant wasn't running quality tests of any kind. [R. 1071]. The District also reviewed the American Testing Lab's reports detailing the "hit and miss" clamping procedures the inspector observed [R. 986] and personally observed deficiencies in the fiberglass application procedures. [R. 987].

The District was thoroughly familiar with the specifications for the tanks [R. 1056] and knew that tests would have to be made. [R. 1058]. The chief engineer for the District had visited the Structo-Lite site and observed similar irregularities to those found

by the Jacobsen inspectors. [R. 1060]. The District knew of the leaks found during the hydrostatic testing. [R. 994]. And yet while knowing that alum would be heavier than water, it too chose not to run any tests using a heavier solution prior to putting the tanks in operation.

Respondents' actions might seem unreasonable, given their choice to proceed to fill the tanks with alum despite the extent of the known defects and their admitted suspicions concerning Structo-Lite manufacturing processes. [R. 1060]. However, the respondents' actions must be put into the context of the time pressures they were working under. Respondents had experienced significant problems with getting appellant to deliver the tanks on schedule. Delays were costly and concern was mounting as to whether or not the tanks would be delivered in time to complete the roof of the building before winter arrived. [R. 1131-33]. It is at least a jury question as to whether or not respondents' actions were not entirely reasonable in accepting the tanks in an uncompleted state with the thought in mind that repairs could be made following installation and roofing. After the tanks were in and the hydrostatic testing in the

Spring revealed, once again, the defective nature of the tanks, the decision to fill the tanks with alum and commence operation of the facility without further testing may also be viewed as a reasonable choice in light of the need to put the plant in immediate operation to prepare for an anticipated serious summer drought. [R. 998-99].

Respondents' knowledge¹ of the seriously deficient nature of the planning surrounding the use of fiberglass tanks and the defects contained in the tanks themselves, when coupled with an arguably reasonable rationale for making such choice, compel a conclusion that the issue was properly given to the jury and the respondents' own proposed instructions to which, of course, respondents raise no objection.

1/ While actual knowledge is usually required before one is said to have assumed the risk of injury, an actual statement that one subjectively knew of the dangers involved is not always necessary. In order to prevent a plaintiff from eliminating his responsibility under the doctrine by merely testifying that he did not know of the risk, many cases have said, in effect, that a plaintiff is not to be believed where he says he did not comprehend a risk which must have been quite clear and obvious to him. In effect, an objective element enters the case. See W. Prosser, Law of Torts, §68 at p. 448. The case at hand certainly must fall within this category.

Respondents' contention that the jury could not possibly find them contributorily negligent upon the facts at hand not only stretches the imagination but is premised upon a misstatement of authority. Respondents allege that they were not contributorily negligent since they did not have actual knowledge that use of the tanks as fabricated was dangerous. [Respondents' Brief at p. 35]. By their argument respondents seek to equate the requirements of the defenses of contributory negligence and assumption of risk, apparently in a hope to strengthen their earlier argument that assumption of risk has been swallowed up into comparative negligence. In support of their position that one must have knowledge of a danger to be deemed contributorily negligent, respondents cite Rogalski v. Phillips Petroleum Co., 3 U.2d 203, 282 P.2d 304 (1955). In Rogalski the plaintiff was injured when he fell into a vat of caustic acid while steam cleaning his employer's truck. Testimony at trial would have allowed the jury to conclude that plaintiff did not see the vat because of the steam. Defendant appealed the verdict for plaintiff on the ground that the court should have found plaintiff guilty as a matter of law.

On appeal the Supreme Court, citing Knox v. Snow, 229 P.2d 874, 876 (1951) restated the general rule that "a plaintiff will not be held to have been guilty of contributory negligence if it appears that he had no knowledge or means of knowledge of the danger" Rogalski v. Phillips Petroleum Co., supra, at 308 [emphasis added]. The court's language is merely another way of stating the traditional "knew or should have known" bedrock test for contributory negligence. That such was the intent in Rogalski is substantiated by the court's affirmation of the trial court's verdict on the basis that it was for the jury to determine whether or not plaintiff Rogalski exercised reasonable care and caution in continuing around the truck, using the fender as a guide, while unable to see due to the cloud of steam. Id. at 308.

When applying the above-stated rule to the facts of the matter at hand it becomes apparent that even if, *arguendo*, the evidence and testimony recited above with regard to assumption of the risk is deemed insufficient to establish that defense due to, e.g., lack of knowledge, there can be little doubt that such evidence,

and the inferences to be derived therefrom, overwhelmingly corroborate the finding of the jury that respondents were contributorily negligent, i.e., that they should have been aware of the danger.

CONCLUSION

Respondents have failed in their attempts to show any reason why the verdict returned by the jury should be overturned as to the findings of assumption of risk and contributory negligence. There is certainly credible evidence in the record which, when taken with the inferences which may reasonably be derived therefrom, substantiate the jury's finding that not only were respondents contributorily negligent in using the defective fiberglass tanks, but that they accepted a calculated risk by pressing the defective tanks into use in order to meet their time table, while having knowledge of the seriously defective nature of such tanks.

It is tortured reasoning at best to suggest that the Legislature's adoption of comparative negligence abrogated the principle that there is no duty owed to a person who voluntarily subjects himself to a known danger.

Whether such action is called "primary assumption of risk", "assumption of the risk", or "lack of duty," makes no difference.

Pending a contrary decision by this Court, Rigtrup v. Strawberry Water Users Association, when viewed in light of the authorities and principles cited herein, still appears to allow a defendant to assert the defense of assumption of risk as a complete bar in not only a negligence action but, in an action for breach of express warranty as well. Appellant therefore respectfully contends that the trial court in this matter erred in its failure to grant appellant a judgment of no cause of action against respondents to which they were entitled based upon the special verdict returned by a properly instructed jury.

Respectfully submitted this 15th day of January, 1980.

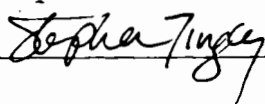
SNOW, CHRISTENSEN & MARTINEAU

By Raymond M. Berry
Raymond M. Berry

By H. James Clegg
H. James Clegg
Attorneys for Defendant Structo-
Lite Engineering, Inc.

HAND-DELIVERY CERTIFICATE

On the 15th day of January, 1980, I hand-delivered two copies of the Reply Brief of Appellant to Arthur H. Nielsen of Nielsen, Henriod, Gottfredson & Peck, Attorneys for Plaintiffs-Respondents, 410 Newhouse Building, Salt Lake City, Utah, 84111, in an envelope addressed to Mr. Nielsen.

A handwritten signature in cursive script, reading "Stephen Tingey", is written over a horizontal line.