

1979

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

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

vs.

Case No. 16208

STRUCTO-LITE ENGINEERING, INC.,
a corporation,

Defendant-Third-Party
Plaintiff-Appellant.

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BRIEF OF RESPONDENTS

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
W. WALDAN LLOYD
NIELSEN, HENRIOD, GOTTFREDSON
& PECK
410 Newhouse Building
Salt Lake City, Utah 84111
Telephone: (801) 521-3350

EDWARD W. CLYDE
CLYDE & PRATT
351 South State Street
Salt Lake City, Utah 84111
Attorneys for Plaintiffs-
Respondents

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Salt Lake City, Utah 84101
Telephone: (801) 521-9000

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W. WALDAN LLOYD
NIELSEN, HENRIOD, GOTTFREDSON
& PECK
410 Newhouse Building
Salt Lake City, Utah 84111
Telephone: (801) 521-3350

EDWARD W. CLYDE
CLYDE & PRATT
351 South State Street
Salt Lake City, Utah 84111
Attorneys for Plaintiffs-
Respondents

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	11
NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	3
ARGUMENT	11
POINT I. UNDER THE UTAH COMPARATIVE NEGLECTANCE STATUTE, THE DOCTRINE OF "ASSUMPTION OF RISK" NO LONGER CONSTITUTES A BAR TO RECOVERY.	11
POINT II. "ASSUMPTION OF RISK" IS NOT A VALID DEFENSE TO RESPONDENTS' CLAIM BASED UPON BREACH OF EXPRESS WARRANTY, AND CAN NEITHER BAR SUCH A CLAIM NOR ACT TO REDUCE RESPONDENTS' RIGHT TO RECOVERY.	17
POINT III. THE TRIAL COURT ERRED IN PERMITTING APPELLANT TO RAISE THE ISSUES OF CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK AT THE TRIAL.	19
POINT IV. THE EVIDENCE ESTABLISHES RESPONDENTS ARE ENTITLED TO A FINDING THAT, AS A MATTER OF LAW, THEY DID NOT ASSUME THE RISK OF INJURY.	26
POINT V. THE EVIDENCE ESTABLISHES RESPONDENTS ARE ENTITLED TO A FINDING THAT, AS A MATTER OF LAW, THEY WERE NOT CONTRIBUTORILY NEGLIGENCE	34
POINT VI. THE TRIAL COURT ERRED IN REFUSING TO GRANT RESPONDENTS' MOTION TO AMEND THEIR COMPLAINT TO ALLEGE AS AN ADDITIONAL GROUND FOR RELIEF THE WILLFUL AND RECKLESS CONDUCT OF APPELLANT.	42
CONCLUSION	43

CASES

<u>Becker v. Beaverton School District No. 48</u> , 551 P.2d 498 (Ore. App., 1976)	14
<u>Bezner v. Continental Dry Cleaners, Inc.</u> , 548 P.2d 898 (Utah, 1976)	21
<u>Cheney v. Reicker</u> , 14 Utah 2d 205, 381 P.2d 86 (1963) . . .	21
<u>Clay v. Dunford</u> , 121 Utah 177, 239 P.2d 1075 (1952) . . .	27
<u>General Insurance Company of America v. Carnicero Dynasty Corp.</u> , 545 P.2d 502 (Utah, 1976)	21,22,42
<u>Gregio v. Roybal</u> , 442 P.2d 585 (N.M., 1968)	20
<u>Hadley v. Wood</u> , 9 Utah 2d 366, 345 P.2d 197 (1959) . .	36,40
<u>Jenkins v. Donaldson</u> , 429 P.2d 841 (Ida., 1967)	20
<u>Larsen v. Johnson</u> , 21 Utah 2d 92, 440 P.2d 886 (1968) . .	36
<u>Lawrence v. Bamberger Railroad Co.</u> , 3 Utah 2d 247, 282 P.2d 335 (1955)	36
<u>McGinn v. Utah Power & Light Co.</u> , 529 P.2d 423 (Utah, 1974)	24
<u>Meyer v. State Board of Equalization</u> , 267 P.2d 257 (Cal., 1954)	20
<u>Peterson v. Nielsen</u> , 9 Utah 2d 302, 343 P.2d 731 (1959) . .	27
<u>Pratt v. Board of Education of the Uintah County School District</u> , 564 P.2d 294 (Utah, 1977)	21
<u>Proctor & Gamble Defense Corp. v. Bean</u> , 146 F.2d 598 (5th Cir., 1945)	20
<u>Rigtrup v. Strawberry Water Users Association</u> , 563 P.2d 1247 (Utah, 1977)	11,12,13,25
<u>Rogalski v. Phillips Petroleum Co.</u> , 3 Utah 2d 203, 282 P.2d 304 (1955)	35
<u>Super Tire Market, Inc. v. Rollins</u> , 18 Utah 2d 122, 417 P.2d 132 (1966)	27
<u>Teamsters, Chauffers, Warehousemen and Helpers, Local Union 222 v. Motor Cargo</u> , 530 P.2d 807 (Utah, 1974) . . .	20
<u>Wasescha v. Terra, Inc.</u> , 528 P.2d 802 (Utah, 1974) . . .	21

<u>Young & Cooper, Inc. v. Vestring</u> , 214 Kan. 311, 521 P.2d 281 (1974)	18
---	----

STATUTES AND RULES OF COURT

ORS 18.475/Oregon Laws 1975, Chapter 599, §5	15
UCA, §70A-2-313 (1953, as amended)	17
UCA, §78-27-37 (1953, as amended)	11,23
Utah Rules of Civil Procedure, Rule 8(c)	21
Utah Rules of Civil Procedure, Rule 12(h)	21
Utah Rules of Civil Procedure, Rule 15(b)	21,22,42
Utah Rules of Civil Procedure, Rule 54(c)	22

SECONDARY AUTHORITIES

57 <u>AM. JUR. 2d</u> , Negligence, §337	40
3 <u>MOORE'S FEDERAL PRACTICE</u> , §15.08(7) (2d Ed., 1978) . .	20,42
<u>Restatement of Torts 2d</u> , §402A	17
White & Summers, <u>Uniform Commercial Code</u> (1972 Ed.)	17

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BRIEF OF RESPONDENTS

NATURE OF THE CASE

This is an action for damages arising from the negligent construction of a fiberglass storage tank, fabricated by Appellant. Respondents claim a right to recovery on theories of negligence and breach of contract, including express warranty.

DISPOSITION IN LOWER COURT

The case was tried to a jury in October and November, 1978. Following the completion of the evidence, the trial court ruled that Appellant Structo-Lite was negligent, as a matter of law, and that such negligence was a proximate cause of the damages sustained by Respondents Jacobsen Construction Company, Inc., Jelco, Inc., and the Central Utah Water Conservancy District. At the request of Appellant, a special verdict was

submitted to the jury. The response to the question of negligence of the Appellant was directed by the court. The jury found that Appellant also breached its warranties to and its contract with Respondents. The jury responded affirmatively to the questions of contributory negligence and assumption of risk by Jacobsen and the Conservancy District, and apportioned fault among the parties as follows: Appellant Structo-Lite 70%, Jacobsen 20%, and the Conservancy District 10%. The jury answered no to Appellant's claim that Third Party Defendant Templeton, Linke and Associates was negligent. The jury assessed damages to Jacobsen in the sum of \$370,987.11 and to the Conservancy District in the sum of \$51,003.66. In keeping with the Utah Comparative Negligence Act, the trial judge extended judgment in favor of Jacobsen and against Appellant for the sum of \$296,789.69, plus interest of \$77,409.26, for a total of \$374,198.95 and in favor of the Conservancy District and against Appellant for the sum of \$45,903.29, plus interest of \$11,972.59, for a total of \$57, 875.88.

RELIEF SOUGHT ON APPEAL

On appeal Structo-Lite does not complain of the method used by the trial court in allocating the damages among the respective parties, but claims that no damages should have been awarded in favor of Respondents because of the jurys' finding on the issue of assumption of risk.

Respondents request this Court to affirm the lower court's holding that pursuant to the Utah Comparative Negligence Act, assumption of the risk is no longer a complete bar to recovery

in the State of Utah. By way of cross appeal, Respondents also seek a determination by this Court that the trial court erred in the following particulars:

(a) In permitting Appellant to amend its Answer on the morning of trial to assert the defenses of contributory negligence and assumption of risk.

(b) In refusing to find, as a matter of law, or to direct a verdict that Respondents were not contributorily negligent and that Respondents did not assume the risk.

(c) In denying Respondents' Motion to Amend their Complaint to raise as an additional ground for relief Appellant's willful and reckless conduct.

STATEMENT OF FACTS

Plaintiffs and Respondents herein, Jacobsen Construction Company, Inc. and Jelco, Inc. (hereinafter: "Jacobsen" or Respondents"), as joint venturers, were the general contractors for construction of the Jordan Water Treatment Plant located at Bluffdale, Utah. Plaintiff and Respondent Central Utah Water Conservancy District (hereinafter: "the Conservancy District" or "Respondent"), was and is the owner of the water treatment plant. Defendant and Appellant herein, Structo-Lite Engineering, Inc. (hereinafter: "Structo-Lite" or "Appellant"), was a fiberglass products fabricator which, pursuant to a subcontract with Jacobsen, supplied fiberglass products which it had fabricated, including six fiberglass tanks, for installation in the Jordan Water Treatment Plant. Third-Party Defendant Templeton, Linke and Associates were the project engineers and prepared the plans and specifications for construction of the water treatment

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plant.

In 1972 Jacobsen contracted with the Conservancy District to build a water treatment plant at Bluffdale, Utah. Plans and specifications for the plant and all other construction documents had been previously prepared by Templeton, Linke and Associates. The plans for the water treatment plant contemplated the installation of six large fiberglass tanks, approximately 12-1/2 feet in diameter and 24 feet high, on the third floor of the building which housed the main water treatment facilities. It was intended that the tanks would be used for storage of liquid alum, a chemical commonly used in the purification of culinary water. The building was designed to permit the tanks to extend through circular openings in the fourth and fifth floors. Liquid alum was to be fed into the tanks through a system of pipes extending to the fifth floor and to be drained from the tanks by means of a gravity feed system through pipes attached near the tank bases. (Exh. 3-D-21).

Shortly after the contract was awarded, Mr. David Bevan, president of Structo-Lite, telephoned Jacobsen and expressed a desire to provide all fiberglass items and materials required by the plans and specifications. (Tr. 332,333). At the first meeting between Bevan and Mr. Dick Berg, an agent for Jacobsen, Bevan presented Berg with a business card which stated: "Structo-Lite Fiberglass Engineering, Inc., David Bevan, President." (Tr. 13,335). At this initial conference Bevan represented that his company would be able to fabricate fiberglass tanks which would meet the plans and specifications prepared by Templeton,

Linke and Associates. He also outlined to Berg his qualifications and previous experience, including construction of a number of other tanks for major industries in the area, such as Kennecott Copper Corporation and Solar Salt. (Tr. 336).

Based upon Bevan's representations and verbal bid, Jacobsen prepared and delivered to Structo-Lite a standard form purchase order to purchase all of the fiberglass items required for the water treatment plant, including the six liquid alum storage tanks. (Tr. 337). The purchase order provided that Structo-Lite would supply the tanks and other items to meet all plans and engineering specifications and that they would be warranted by Structo-Lite as to quality of workmanship and materials. (Exh. P-4). Bevan read the purchase order, including the provisions covering warranty of workmanship and materials and compliance with the plans and specifications. He then signed the purchase order and returned a copy to Jacobsen. (Tr. 24-26).

As required by the purchase order, Mr. Bevan prepared on behalf of Structo-Lite several letters for submission to Jacobsen which described the fiberglass materials and in particular the liquid alum storage tanks Structo-Lite would build. In these letters Bevan again represented that all materials furnished would be "suitable and proper" for the purposes and uses intended (Exh. P-8, P-10, P-11) and warranted the quality of the materials and workmanship of the fiberglass products he had agreed to supply. As a matter of course, the letters were forwarded by Jacobsen to Templeton, Linke and Associates for their review. (Tr. 344). Bevan arranged to have

shop drawings prepared showing the construction of the liquid alum storage tanks. The drawings were delivered to Jacobsen and then forwarded to Templeton, Linke and Associates. (Tr.340). (The contract between Jacobsen and the Conservancy District provided that Jacobsen had no responsibility for review of or authority to approve shop drawings or other representations of suppliers, manufacturers or subcontractors such as "suitable and proper" statements. This responsibility and authority rested solely and exclusively with Templeton, Linke and Associates.) (Exh. 3-D-22).

In June, 1973, Structo-Lite delivered to the project the first four tanks it had manufactured. The remaining two tanks were delivered the following November. (Tr.665,668). Prior to delivery of any tanks, Mr. Harvey Wright, the project superintendent for Jacobsen, visited the Structo-Lite shop. Wright noticed that the tanks appeared to be slightly out-of-round. He conveyed this information to Mr. Hutchinson, the representative for the Conservancy District, and then verified that the areas in the water treatment building where the tanks were to be located had sufficient tolerance to permit the tanks to protrude through the holes in the floors. (Tr. 662,663). Hutchinson also visited the Structo-Lite shop. Thereafter, he contacted American Testing Laboratories and requested that they visit Structo-Lite as part of the normal inspection of suppliers and manufacturers who were providing materials for the water treatment plant. (Tr.471,472). Hutchinson received reports from American Testing

facilitites and fabricating processes. (Tr. 473). Mr. Berg also visited the Structo-Lite shop to determine when the tanks would be delivered. However, he made no inspection of the tanks or evaluation of their quality and was not qualified to do so. (Tr.348)

When the tanks arrived at the job site, Harvey Wright observed that some of the temporary supports used to maintain roundness had failed in transit, causing the tanks to appear somewhat elliptical at the open end and resulting in damage to the flanges located at the tops of the tanks. He and Harvey Hutchinson discussed the need for repairs to the top flanges and the fact that some of the tanks were missing outlets and tie-down brackets. (Tr. 667). Mr. Bevan was contacted. He indicated that he would come to the job site to make the necessary repairs and install the remaining connections. (Tr. 668).

Mr. Steve Jacobsen visited the Structo-Lite facilities after the first four tanks had been delivered to expedite delivery by Structo-Lite of the remaining two tanks. Having no experience in the manufacture of fiberglass tanks, no effort was made by him to determine the quality of the work being done by Structo-Lite. (Tr. 624,642).

The following spring (1974) and prior to the completion of the job, all of the tanks were tested for leaks. Testing was accomplished by filling the tanks with water and observing if there were any leaks. (Tr. 485). Four of the six tanks had minor water leaks, however, the tank that subsequently failed did not. (Tr.119). Structo-Lite was contacted about the leaks. It sent a crew to the job site to make the necessary repairs.

Thereafter the tanks were determined to be water-tight. (Tr.486).

Just prior to placing the plant into operation, a seven-day test of the plant facilities was conducted. The plant passed the test and was pronounced ready for operation and treatment of water commenced about the end of May 1974. Liquid alum was first delivered to the plant May 28, 1974 (Tr. 230) and was put in one of the tanks and used from that tank. On July 12, 1974, the Conservancy District began to fill the tank designated as the south center tank with liquid alum. By July 15, this tank was filled to a depth of 20 feet 6 inches. (Tr. 232,234). On July 16, while making his daily rounds, Mr. Richard Nelson, the plant operator, noticed liquid alum leaking from a small hairline sized opening near the south side of the south center tank. As he observed the leak, a second leak erupted. Becoming concerned, Nelson determined to lessen the pressure in the tank. He left the area and had just reached the floor immediately below the level of the tank when it erupted, spreading alum throughout the entire building. (Tr. 237,238).

Even though cleanup of the alum and repair work was begun immediately, the flooding of the building with liquid alum resulted in substantial damage to the heating and electrical systems in the plant. It was 13 days before the plant was made operational again, but it was almost a year before removal of the alum from the building was deemed completed. (Tr.240). However, there is still evidence of alum and corrosion in various portions of the building. (Tr.532).

This action was brought by Jacobsen and the Conservancy District to recover from Stracco, Ltd. the damages incurred as a

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result of the tank failure. Structo-Lite brought a third-party complaint against Templeton, Linke and Associates claiming that the building design and tank specifications were inadequate, thereby causing or contributing to the damages incurred.

At the conclusion of the evidence a special verdict was submitted to the jury. The court directed a verdict with respect to the negligence of Structo-Lite, having determined from the evidence that as a matter of law, Structo-Lite was negligent and such negligence was a proximate cause of the damages. In its answers to the special verdict, the jury found that Jacobsen and the Conservancy District were contributorily negligent and assumed the risk of injury to the extent 20% and 10% respectively. With respect to the claim of Structo-Lite Engineering against Templeton, Linke and Associates, the jury found that Templeton, Linke and Associates was not negligent.

Based upon the jury's answers to the special verdict, the trial court entered judgment on behalf of Jacobsen and the Conservancy District, computing the amount of the damages by applying the provisions of the Utah Comparative Negligence Statute to the damage amount determined by the jury. Structo-Lite has appealed on the theory that because Jacobsen and the Conservancy District were found to have assumed the risk, they are completely barred from recovery.

Jacobsen and the Conservancy District have cross-appealed on three issues:

1. The trial court erred in permitting Structo-Lite to raise at the trial the issues of contributory negligence and assumption of the risk;

2. The trial court erred in refusing to grant the motion of Jacobsen and the Conservancy District for a directed verdict on all of their claims and in refusing to grant a directed verdict in their favor with respect to Structo-Lite's defenses of contributory negligence and assumption of the risk; and

3. The trial court erred in denying the motion of Jacobsen and the Conservancy District to amend their complaint after completion of the testimony to assert as an additional ground for relief against Structo-Lite the willful and reckless conduct of Structo-Lite.

ARGUMENTS

POINT I. UNDER THE UTAH COMPARATIVE NEGLIGENCE STATUTE, THE DOCTRINE OF "ASSUMPTION OF RISK" NO LONGER CONSTITUTES A BAR TO RECOVERY.

In adopting the Utah Comparative Negligence Act, Utah Code Annotated, §78-27-37 (1953, as amended), the Legislature swept aside the common law doctrine theretofore followed by the Utah courts to the effect that a plaintiff who claimed injury due to the negligence of another was barred from recovery if he was in the least wise contributorily negligent or had assumed the risk of injury. The new law adopted in 1973 provides:

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."

The statutory language is straightforward. The first phrase indicates that contributory negligence is no longer a complete bar to recovery in an action based on negligence. The last sentence makes clear that for purposes of the act, "assumption of the risk" is now to be treated in the same manner as contributory negligence; namely, it shall no longer be a complete bar to recovery. No other reading or interpretation of the statute is or can be justified, the lengthy and convoluted argument in Appellant's Brief notwithstanding.

This Court has already had an opportunity to interpret the Utah Comparative Negligence Statute as it applies to the doctrine of "assumption of the risk" in the case of Rigtrup v. Strawberry

Water Users Association, 563 P.2d 1247 (Utah, 1977). In that

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action the defendant raised the defense of assumption of the risk, as well as the defense of contributory negligence. In answer to special interrogatories, the jury found the plaintiff to be 90% negligent and the defendant to be 10% negligent. Pursuant to this verdict, the trial court entered judgment for the defendant, ostensibly under the Utah Comparative Negligence Statute. On appeal the plaintiff claimed that the trial judge erred when he instructed the jury as to the defense of "assumption of the risk," having already instructed the jury on the issue of contributory negligence. The opinion of this Court discusses the general interrelationship of the two defenses:

It [assumption of the risk] has sometimes been said to be but a specialized aspect of contributory negligence in that it can be intermingled and fused with other aspects thereof in certain circumstances. It is also sometimes said to be something separate from contributory negligence as it undoubtedly can be in some circumstances. Id. at 1250.

But this Court then went on to hold that the doctrine of assumption of the risk clearly falls within the ambit of the Utah Comparative Negligence Statute:

Where there is a known danger, the risk of which is voluntarily assumed by a party, such action may well fall within the lack of due care which constitutes negligence and also may be correctly termed an assumption of risk. If such be the situation, the party should be charged with the responsibility for his conduct, by whatever term it may be called; and the comparative negligence statute quoted above should be applied as the trial court correctly did in this case. (Emphasis added) Id. at 1250.

Appellant expends a great many pages of its Brief arguing that the doctrines of "assumption of the risk" and "contributory negligence" are distinct and separate defenses. Respondents have no quarrel with Appellant on that point. Respondents merely point out that regardless of whether the defenses are separate or overlapping,

the Legislature has mooted the issue as to whether either is a complete bar to recovery by a claimant. By statute, they are now to be treated in the same manner when raised in defense to a claim of negligence. Appellant states in its Brief that "assumption of the risk" and "contributory negligence" have long been recognized in this jurisdiction as distinctly separate defenses. (Defendant's Brief at 6) Respondents submit, however, that the Legislature added the last sentence to the statute--"As used in this act 'contributory negligence' includes 'assumption of the risk'"--precisely to make it quite clear that for purposes of comparing the conduct of the respective parties, there is no longer a viable distinction. Moreover, this Court explicitly held in the Rigtrup case that, indeed, this was the intent of the Legislature in enacting the new law:

That our conclusion just stated is the correct one under our law is supported not only by the reasoning just stated and the cases cited, but is made abundantly clear by the fact that the legislature, apparently in order to avoid any misunderstanding thereon, appended the last sentence as quoted above that: As used in this act, "contributory negligence" includes "assumption of the risk." That sentence indicates a clear legislative intent to recognize the doctrine of "assumption of risk" as an aspect of contributory negligence in Utah law. (Emphasis added) Id. at 1250.

In light of the above judicial pronouncement, Respondents are frankly mystified by Appellant's temerity in baldly asserting that to read the Utah Comparative Negligence Statute as equating assumption of the risk with contributory negligence is "a conclusion not substantiated in the case law of this jurisdiction" (Appellant's Brief at 6), particularly in view of the fact that Appellant cites extensively from the Rigtrup case in its own Brief!

In an effort to find support for its position, Appellant has referred to the case of Becker v. Beaverton School District No. 48, 551 P.2d 498 (Ore. App., 1976), a decision by the intermediate appellate court of Oregon. As is evident from a reading of the opinion, the case stands alone. Prior to the decision of the appellate court but after the trial, the Oregon legislature amended the Oregon Comparative Negligence Statute so that the decision in the case would have no effect on any other factual situation.

In Becker the plaintiff was an elementary school student who was injured on a piece of playground equipment, a climbing structure made of wooden timbers. The structure had a hole in the center. Playground rules forbade students from jumping across the hole. Plaintiff was injured when, in contravention of the rules, he attempted to leap across the opening. As an affirmative defense to plaintiff's action, the defendant school district alleged specific facts by which it claimed that the plaintiff had assumed the risk of injury. The court termed the defendant's allegations as pleading assumption of the risk in its "primary sense." In this connection, the Oregon court discussed at some length the development of Oregon law with respect to "assumption of the risk" and concluded that Oregon recognizes a "primary" sense (no duty on the part of the defendant to protect plaintiff from a risk) and a "secondary" sense (a phase of contributory negligence) of "assumption of the risk." This material dichotomy is blissfully ignored by Appellant in its efforts to equate the Oregon result to Utah law. Appellant also ignores the emphasis

placed by the Oregon court on the fact that the defendant in Becker had pleaded with specificity what the court termed to be the defense in its primary sense. At no point in the case at bar has Appellant ever done more than claim generally that Respondents "assumed the risk." Appellant has made no effort to plead specifically the facts which it claims establish such a defense, nor has Appellant even bothered to set forth in its Brief whether the evidence at the trial indicated assumption of the risk in its "primary" or "secondary" sense--the key issue on which the Oregon court's decision turns. Instead, Appellant merely argues that if it pleads "assumption of the risk" and the jury so finds, it avoids the Utah Comparative Negligence Statute--a position which is not even supported by the unique decision of the Oregon Appellate Court.

In a further effort to cloud and obscure the clear meaning of the Utah law, Appellant claims a similarity between the Utah and Oregon statutes, then speculates that the Oregon Legislature must have recognized that the Oregon Comparative Negligence Statute passed in 1973 did not eliminate assumption of the risk as a complete bar because in 1975 it amended the act to provide in part that:

The doctrine of implied assumption of the risk is abolished.
(Emphasis added) ORS 18.475/Oregon Laws 1975, Chapter 599,
§5.

Appellant's speculation is unfounded, as reference to the legislative history of the 1975 amendment establishes. A memorandum to the Oregon House Judiciary Committee covering the 1975 amendments referring to the proposed statute abolishing implied assumption

Section 5⁹ abolishes the doctrine of implied assumption of the risk. Ritter v. Beals, 225 Ore. 504 (1961) subsumed under contributory negligence the form of assumption of the risk in which plaintiff voluntarily and unreasonably encounters a known risk; this type of assumption of the risk is unaffected by Section 5 and should be plead as contributory negligence. Plaintiff's reasonable assumption of the risk is unaffected by Section 5 and should be plead as contributory negligence. Plaintiff's reasonable assumption of the risk or "implied consent" is no longer a defense.¹⁰ This resolves the anomaly arguably possible under present law that plaintiff's reasonable conduct might bar recovery completely while unreasonable conduct leads to the possibility of partial recovery. (Emphasis added) Appendix G, House Judiciary Committee Memorandum, 5/25/75, at 2.

From the above statement, it is clear that the Oregon Legislature presumed, unlike both Appellant herein and the court in Becker, that "assumption of the risk" was already included under the Oregon Comparative Negligence Act. The 1975 amendment was designed only to guard against what the legislature saw as a possibility that the statute could be misconstrued--precisely as Appellant has done in its Brief herein. The Utah Comparative Negligence Act is clearly written and easily interpreted. This Court has already held in Rigtrup, supra, that assumption of the risk is included within the purview of that Act. Appellant's efforts to confuse and obfuscate the obvious meaning of the statute and the clear intention of the Utah Legislature should be rejected by this Court.

⁹The courts of Wisconsin, Minnesota, Washington, and California have abolished implied assumption of the risk as an independent doctrine. Connecticut has accomplished the same result by statute. Conn. Pub. Act. No. 73-622, Sec. 1c.

¹⁰Of course if defendant has no duty toward the plaintiff there is no liability.

POINT II. "ASSUMPTION OF RISK" IS NOT A VALID DEFENSE TO RESPONDENTS' CLAIM BASED UPON BREACH OF EXPRESS WARRANTY AND CAN NEITHER BAR SUCH A CLAIM NOR ACT TO REDUCE RESPONDENTS' RIGHT OF RECOVERY.

Respondents' Complaint raised, in addition to a claim of negligence, causes of action for the failure of Appellant to deliver tanks which conformed to the express written warranties it had provided to Respondents. As is correctly stated by Appellant in its Brief, under Utah Code Annot., §70A-2-313 (1953, as amended), an action brought upon a contract claiming failure to provide a product which complied with the contract specifications is an action for breach of express warranty. In such cases the law governing express warranty applies. Appellant, however, has incorrectly stated in its Brief what that law is.

In support of its claim that assumption of risk remains a bar to a breach of warranty action, Appellant quotes from two secondary authorities: White and Summers, Uniform Commercial Code (1972 Ed.), and Restatement of Torts 2d, §402A. Neither quotation cited by Appellant has anything to do with claims which are based on a breach of express warranty. The statement from White and Summers deals with defenses in breach of implied warranty cases as a careful reading of the remainder of that chapter and the chapter on express warranties makes clear. The quotation from the Restatement of Torts 2d comes from the section concerning "strict liability," a point of law not even in issue in the case at bar.

As to the question of whether assumption of the risk can be asserted against a claim based on breach of express warranty, Respondents have been unable to locate any decision by this Court.

However, Respondents direct the Court's attention to a decision of the Kansas Supreme Court, Young & Cooper, Inc. v. Vestring, 214 Kan. 311, 521 P.2d 281 (1974), wherein that court examined carefully the Kansas statute on express warranties which is identical to its Utah counterpart. In that case the plaintiffs were buyers of infected cattle which had been expressly warranted by the sellers to be free from disease. Finding that the lower court erred in failing to instruct on express warranty, the Kansas court succinctly stated:

Contributory negligence and assumption of risk cannot be asserted against the buyers, and the buyers are not obligated to show particular reliance upon the express warranties, since they are contractual. All the buyers are required to establish is that the express warranties were made and that they were false, thereby establishing a breach of the contract. Id. at 293.

In the instant action there is no doubt that Respondents established at trial Appellant's express warranties and Appellant's breach thereof. Appellant does not even contest that issue on appeal. The import of the above statement from the Kansas court is clear. Not only are Appellant's claims of contributory negligence and assumption of the risk of no avail against Respondents' claims for breach of contract and express warranty, such claims cannot act to reduce Respondents' damages, as is otherwise permitted in an action based on negligence. The jury having found that Appellant breached its contract and express warranties, Respondents are entitled to the full amount of the damages which were awarded. This Court should direct the trial judge to enter an order accordingly.

POINT III. THE TRIAL COURT ERRED IN PERMITTING APPELLANT TO RAISE THE ISSUES OF CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF THE RISK AT THE TRIAL.

When this action was initially filed by Jacobsen and the Conservancy District, Structo-Lite filed an Answer dated December 20, 1974, in which it alleged as separate defenses:

(a) "The rupture of the tank and the damage of which Plaintiffs complain were proximately caused or solely caused by the negligence of the Plaintiffs which was equal to or greater than Defendant's negligence, if any;" and

(b) "Plaintiffs assumed the risk of loss."

(Answer, Third Defense and Sixth Defense)

Thereafter Structo-Lite filed an Amended Answer dated August 27, 1976, in which it asserted merely that "Any recovery awarded the Plaintiffs should be reduced in the proportion of their own contributory negligence." (Amended Answer, paragraph 7) The Amended Answer did not contain the third and sixth defenses raised in the original Answer, nor did it provide that such defenses were to be considered a part of or incorporated into the Amended Answer.

It was not until the morning of the trial that Respondents became aware Structo-Lite still asserted or sought to assert the defenses of contributory negligence and assumption of risk raised in the original Answer.

At that time and over the objection of Respondents, the court permitted Structo-Lite to assert the additional defenses of contributory negligence and assumption of risk which had been deleted from Appellant's Amended Answer. (Tr. 46, 47) In granting Structo-Lite's Motion to Amend its Amended Answer on the morning of trial to include the defenses it had waived the

trial court committed prejudicial error which should be rectified by this Court on appeal.

The law with respect to the effect of an amended pleading is clear. Whenever a pleading is amended by a pleading which makes no reference to the original pleading, the result is to treat the original pleading as having no further validity. The rule has been stated thusly:

An amended pleading that is complete in itself and makes no reference to nor adopts any portion of a prior pleading supersedes the latter. . . . The superseded pleading cannot be utilized to aid a defective amended pleading. 3 MOORE'S FEDERAL PRACTICE, §15.08(7) (2d Ed., 1978)

This basic principle of procedure has been recognized as valid and previously adopted by this Court in Teamsters, Chauffers, Warehousemen and Helpers, Local Union 222 v. Motor Cargo, 530 P.2d 807 (Utah, 1974). This Court held that:

The law is overwhelming to the effect that when an amended complaint, complete in and of itself, is filed, the former complaint is functus officio and cannot be used for any purpose. Id. at 808.

The rule has been applied in other jurisdictions to amended answers, as well as amended complaints. Proctor & Gamble Defense Corp. v. Bean, 146 F.2d 598, 601 (5th Cir., 1945); Meyer v. State Board of Equalization, 267 P.2d 257, 262 (Cal., 1954); Gregio v. Roybal, 442 P.2d 585, 587 (N.M., 1968); Jenkins v. Donaldson, 429 P.2d 841, 845 (Ida., 1967).

It is evident that when Appellant amended its Answer and did not refer therein to its earlier pleading, the original Answer was no longer to be considered as having any validity or effect. It was as though it ceased to be a part of the record. Teamsters, Chauffers, Warehousemen and Helpers, Local Union 222 v. Motor Cargo, supra.

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The effect of such failure of Structo-Lite to allege in its Amended Answer the affirmative defenses of contributory negligence and assumption of the risk is to require a finding that Structo-Lite waived those defenses. Rule 8(c), Utah Rules of Civ. Proc., requires a party to plead such defenses affirmatively in a responsive pleading such as an answer:

In pleading to a preceding pleading, a party shall set forth affirmatively . . . assumption of risk, contributory negligence, . . . and any other matter constituting an avoidance or affirmative defense. (Emphasis added)

The failure to raise an affirmative defense in a responsive pleading has been held by this Court to be a waiver of the right to raise the defense. Pratt v. Board of Education of the Uintah County School District, 564 P.2d 294, 298 (Utah, 1977); Bezner v. Continental Dry Cleaners, Inc., 548 P.2d 898, 901 (Utah, 1976); General Insurance Company of America v. Carnicero Dynasty Corp., 545 P.2d 502, 504 (Utah, 1976); Wasescha v. Terra, Inc., 528 P.2d 802, 803 (Utah, 1974). See: Rule 12(h), Utah Rules of Civil Procedure.

While this Court has also stated that Rule 15(b) of Utah Rules of Civ. Proc. may operate as an exception to the waiver provision (General Insurance Company of America v. Carnicero Dynasty Corporation, supra; Cheney v. Rucker, 14 Utah 2d 205, 381 P.2d 86 (1963)), the facts in this case do not justify the granting of the amendment.

In Cheney this Court stressed that the plaintiff failed to make any representation to the trial court that he was or would be prejudiced or disadvantaged as a result of the evidence submitted by the defendant in support of an affirmative defense

which had not been raised in defendant's pleadings. Noting that Rule 54(c), Utah Rules of Civil Procedure, requires every final judgment to grant the relief to which a party is entitled, even if no such relief is requested in the pleadings, this Court agreed that if the plaintiff was not prejudiced, conforming the pleadings to the evidence was proper.

In General Insurance Company of America, supra, there was evidence adduced at the trial that there was a lack of consideration and therefore no contract as between the plaintiff and two of the defendants named Butcher. After such evidence was received without objection, Butchers moved to amend their answer under Rule 15(b) to conform to the evidence. This motion was denied by the trial judge. In reversing the action of the lower court, this Court explained that Rule 15(b) has two separate parts:

The first part provides that if issues are tried with the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

* * *

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 the absence of prejudice, undue delay, or laches. Id. at 505-506.

In his concurring opinion, Justice Crockett agreed that amendments under Rule 15(b) are subject to the court's discretion which should be exercised liberally in the interests of justice. But he cautioned that such amendments should only be permitted:

. . . in such circumstances and upon such conditions as will not place the adverse party at an undue disadvantage or result in unfairness or injustice to him. Id. at 506.

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Respondents respectfully submit that the trial judge abused his discretion when he permitted the Appellant Structo-Lite to amend its Amended Answer on the morning of the first day of trial to include defenses which Respondents had every reason to believe had been discarded by Appellant more than two years previous to that date.

Appellant's Motion to Amend was protested vigorously by Respondents, who pointed out that had they been aware Appellant intended to raise the deleted defenses, they would have altered their entire strategy in preparing their case and in aligning the parties. (Tr. 46, 47) Clearly, the trial judge's action in granting Appellant's Motion goes far beyond the standard of "undue disadvantage" and "unfairness" espoused by Justice Crockett.

The trial court's action becomes even more prejudicial to Respondents in light of the tactics used by Appellant during and after the trial and on appeal concerning Appellant's defense that Respondents assumed the risk of injury. When the trial court granted Appellant's Motion to add to its Amended Answer the two previously deleted defenses, Respondents were given to understand that the court permitted both defenses to be raised only because the Utah Comparative Negligence Statute, Utah Code Annot., §78-27-37, 1953, as amended, provided for similar treatment with respect to the defense of contributory negligence and the defense of assumption of the risk.

At no time during the trial or afterwards when Appellant submitted its proposed instructions to the jury did Appellant assert that it was claiming the doctrine of assumption of the

risk to be anything other than a defense associated with contributory negligence and subject to the provisions of the Utah Comparative Negligence Statute. In fact, Appellant's proposed special verdict form, which the court adopted and submitted to the jury, instructed the jury "to apportion by percentage the proximate contribution, if any, of each party toward the loss. (Special Verdict, Question VIII)" No effort was made or attempted in that question to distinguish between contribution toward the loss resulting from negligence and contribution toward the loss resulting from assumption of the risk. On the contrary, the jury was free to combine the conduct of the Respondents with that of the Appellant in apportioning the percentage of "proximate contribution" of each party to the total damage sustained.

Appellant never claimed until after the jury's verdict was entered that it intended the defense of assumption of the risk to be a complete bar to Respondents' right of recovery. Appellant's actions in this case constitute an effort on its part to have its pleadings conformed to fit its version of the jury's verdict. Appellant has attempted in its Brief to justify this position by claiming that it would have violated the rule of McGinn v. Utah Power & Light Co., 529 P.2d 423 (Utah, 1974), had its jury instructions apprised "the jury of the effect of the finding that plaintiff [Respondents] had assumed the risk of damage." (Appellant's Brief at 19) Respondents note, however, that Appellant is quick to argue in Point I of its Brief that this Court must hold assumption of the risk to be a complete bar

to recovery because this Court, in affirming Rigtrup v. Strawberry Water Users Association, supra, ostensibly validated jury instructions which say exactly what Appellant claims to be reversible error. (Appellant's Brief at 14, 15)

It would be extremely prejudicial and unjust to Respondents for this Court to condone the methods employed by Appellant by holding both that the trial court properly permitted Appellant to amend its pleadings and that the jury's determination of Respondents' assumption of the risk constitutes a complete bar to recovery. Appellant should be estopped by its silence throughout the entire trial and pretrial proceedings from now claiming Respondents are barred from recovery by assumption of the risk.

In any event, Respondents are entitled to a finding that the trial court abused its discretion in granting Appellant's Motion to Amend and a holding that Appellant waived the defenses of contributory negligence and assumption of the risk when it deleted them from its Amended Answer.

POINT IV. THE EVIDENCE ESTABLISHES RESPONDENTS ARE ENTITLED TO A FINDING THAT, AS A MATTER OF LAW, THEY DID NOT ASSUME THE RISK OF INJURY.

At trial Appellant failed to establish a prima facie case in support of its claim that Respondents assumed the risk of injury. As a result, Respondents were entitled, as a matter of law, to an instruction that they did not assume the risk of any injury from Appellant's conduct, which the trial court refused to give.

As submitted to the jury, the doctrine of assumption of risk was stated:

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

A company is said to assume risk when it voluntarily manifests its assent to the creation or maintenance of a dangerous condition and voluntarily exposes itself to that danger or when it knows that a danger exists in either the condition, use or operation of property and voluntarily accepts the dangerous condition and uses the dangerous product.

Analysis of this statement reveals that before a party can be found to have "assumed the risk," there must be evidence to support the following findings:

- (a) Voluntary assent, manifested in some manner, to the creation or maintenance of a dangerous condition; and
- (b) Voluntary exposure to the danger; or
- (c) Knowledge that the danger exists in the condition, use or operation of property; and
- (d) Voluntary acceptance of the danger and use of the dangerous product.

Evident from this analysis is the proposition that a party must know and appreciate what the danger is and what the possible

consequences may be before he can "assume the risk" of injury. Anything short of that cannot constitute a basis for voluntary action. It is also obvious that a party cannot be held accountable under the doctrine of assumption of the risk for latent defects or dangers, the existence of which the party has no knowledge, no matter how apparent they may be after an injury has occurred. Clay v. Dunford, 121 Utah 177, 239 P.2d 1075, 1076 (1952).

With these principles as a background, it is clear from a review of the evidence presented at trial that Appellant failed to establish any basis for the defense, much less carry the burden of proof required. Super Tire Market, Inc. v. Rollins, 18 Utah 2d 122, 417 P.2d 132 (1966); Peterson v. Nielsen, 9 Utah 2d 302, 343 P.2d 731 (1959).

Appellant made a great deal of noise at trial that Respondents knew the tanks had "a lot of defects," "many irregularities," "a lot of leaks," and that Respondents knew the tanks had been negligently manufactured and Defendant hadn't tested them. (Tr. 1181-82) While the evidence does show that Respondents knew the tanks leaked when they were water tested, the remainder of Appellant's allegations are completely without foundation.

Harvey Wright testified that while visiting the Structo-Lite shop, he observed two tanks standing in the yard in a vertical position, half of a third tank partially assembled in the yard and a quarter section on the mold in the shop. Upon examination of the completed tanks and the quarter section on the mold, he noticed that they were out-of-round. (Tr. 660, 661) Mr. Wright

did not measure the completed tanks but determined by visual inspection only that there appeared to be a difference of three to four inches in tank diameter from the high to low spot on the tank. (Tr. 662) Mr. Wright conveyed his observations to Harvey Hutchinson, the representative for the Conservancy District. He further testified that his only concern about the out-of-roundness of the tanks was whether the tanks would fit within the tolerances provided in the areas where the tanks would be located. (Tr. 663, 689)

When the first four tanks were delivered to the job site, some of the 2 X 4 supports used for bracing had apparently failed in transit, causing the tanks to appear somewhat elliptical at one end. (Tr. 666) The failure of the 2 X 4 braces in transit had caused some damage to the flanges located at the top end of the tanks. Mr. Wright observed no damage to the interior of the tanks or to the middle or lower end of the tanks. (Tr. 665, 666, 692) No evidence was presented that the out-of-roundness or damage to the top flange of the tanks observed by Mr. Wright caused him to believe or conclude that the tanks would or could fail if filled with liquid alum, nor was any evidence presented to the court to establish that the tank erupted either due to its out-of-roundness or to the damaged top flange, both of which had been repaired. On the contrary, the testimony indicated that the flange at the top of the tank was there for the sole purpose of providing a means for bolting the lid to the tank and not for the purpose of adding strength to it. Moreover, there was no pressure against the tank lid. (Tr. 105, 112, 113)

After the tanks were installed, they were cleaned and inspected by Structo-Lite. No physical damage to the tanks was observed. Mr. Bevan, the president of Structo-Lite, testified that after installation, the tanks were still as firm and secure as they had been when they left the Structo-Lite shop. (Tr. 116) It is clear from the foregoing that the observations of Mr. Wright certainly did not impart to Jacobsen information sufficient for a finding that Jacobsen was charged with knowledge of the existence of a dangerous condition which had been created in the layup and fabrication. There is no evidence that any other representative of Jacobsen noticed anything unusual with respect to the tanks.

Mr. Harvey Hutchinson, engineer for the Conservancy District at the project, testified that he observed the tanks being constructed at Structo-Lite and noticed that a hand layup method of fabrication was being used. Mr. Hutchinson observed that the tanks did not all have a smooth surface and places where apparently the woven roving was not covered by the fiberglass matting. (Tr. 551, 553) Mr. Hutchinson saw flat spots and irregularities on the tanks after they were set in the building. (Tr. 562) He testified that this caused him to be concerned about what would happen to the tanks during an earthquake. He was not concerned, however, that the irregularities and flat spots would cause the tanks to fail if filled with liquid alum. (Tr. 563) Mr. Hutchinson was the only representative of the Conservancy District who testified at the trial concerning his observations of the fiberglass tanks. Again, no evidence was adduced to establish

that the observations of Mr. Hutchinson put the Conservancy District on notice that the tanks were in danger of failing if filled with liquid alum.

Moreover, no evidence was presented that the irregularities and unevenness in the surface of the fiberglass were the cause of the tank's failure. In fact, Mr. Glen Enke, an expert produced by the Appellant, testified that the unevenness in the tank surface would not have caused increased stress at the thin spots. (Tr. 1092)

Mr. Hutchinson also testified that at his direction American Testing Laboratories made several inspections of the Structo-Lite facilities during the time the fiberglass tanks were being fabricated. (Tr. 472, 473) The first report from American Testing described the manner of hand layup and stated the tanks had the "three-eighth inch minimum wall thickness as quoted by Mr. Bevan." (Tr. 476) This report gave Mr. Hutchinson no concern because the minimum wall thickness described in the report was more than twice as thick as that called for in the specifications. (Tr. 476, 477) The second report from American Testing Laboratories reviewed the system for joining quarter sections. This also caused no concern to Mr. Hutchinson. (Tr. 477, 478) The third report from American Testing Laboratories indicated that Structo-Lite was stripping a layer of glass that did not set so that the deficient area could be reglassed. The report implied to Mr. Hutchinson that Structo-Lite was taking care of deficiencies as they proceeded with fabrication of the tanks. (Tr. 478, 479) No other evidence or testimony with

respect to the reports from American Testing Laboratories was presented. The reports clearly did not cause the Conservancy District to determine that a possibility of failure of the alum tanks existed.

The only remaining "defect" which Appellant claims could have imparted knowledge to Jacobsen and the Conservancy District was the leaks in the tanks which appeared when the tanks were filled with water.

At trial Richard Nelson, Erik Thomsen, Harvey Hutchinson, Stephen Jacobsen and Harvey Wright all testified to have either participated in the water tests conducted on the fiberglass tanks or to have observed leaks in the tanks during the water testing procedure. (Tr. 225, 441, 442, 484, 485, 626, 673, 674) No witness testified, however, and no other evidence was submitted to the trial court which indicated that anyone became concerned that the tanks could fail if filled with liquid alum as a result of the water testing and leaks. Mr. Hutchinson made it very plain that the purpose of filling the tanks with water was not to determine whether the tanks would withstand specified tensile pressures but whether the tanks had any leaks. The water test was a standard test done to all structures and reservoirs in the plant. (Tr. 485)

After the leaks were discovered, Structo-Lite was informed. Structo-Lite then sent a crew to the plant to make the necessary repairs. (Tr. 121, 122, 486) The leaks were repaired and the tanks retested, at which time it was determined that they were water tight. (Tr. 436)

No evidence was presented that the existence of the leaks in any way caused or contributed to the rupture of the fiberglass tank. In fact, Mr. David Bevan, president of Structo-Lite, testified that the tank which failed had never leaked (Tr. 119); and Mr. Glen Enke, Appellant's expert witness, testified that a hole in a tank side wall would not cause the tank to rupture. (Tr. 1094)

It is clear that Respondents did not acquire or possess the requisite knowledge that the tanks were in danger of failing because they leaked. Appellant's claim that Respondents assumed the risk because they observed leaks or irregularities or unevenness in the tanks' surface must fail because Appellant did not provide any evidence whatsoever at the trial that Respondents' observations gave rise to a knowledge in the Respondents or an appreciation by the Respondents that the tanks were otherwise defective and did not have the necessary tensile strength to hold liquid alum when filled. Without a knowledge and appreciation of the possible dangers, Respondents cannot be found to have voluntarily assumed any risks inherent in those same dangers.

Appellant also claimed at trial that in viewing all of the "defects" in the tanks, Respondents must have known that the tanks were negligently manufactured and therefore a dangerous product. However, no testimony was elicited and no evidence was produced to show that the defects and irregularities had any relationship to the defects which caused the rupture, or even that any representative of the Conservancy District or Jacobsen ever determined or concluded that the irregularities they

observed meant that the tanks were negligently or defectively manufactured and were therefore unsafe.

It is true that evidence concerning the negligent manufacture of the tanks was so overwhelming, the trial court directed a verdict with respect to that issue. However, a careful reading of the transcript reveals that the basis for the judge's decision lay not with the minor and insignificant visual imperfections in the tanks, but rather with the internal composition and construction of the walls. The evidence showed that the tank walls were poorly constructed. They did not even contain the number of layers of fiberglass material which Mr. Bevan, as president of Structo-Lite, testified would be necessary to insure safety. (Tr. 125, 221, 1257) The real problems with the tanks lay not in what could be observed by the naked eye, but within the structure of the tanks themselves. Again, no evidence was presented that Respondents had any knowledge or conception of the poor quality of the workmanship hidden within the tank walls or the resulting possible dangers. Clearly, Appellant failed even to provide sufficient evidence to the court so as to make the question one for a factual determination by the jury. Respondents did not assume, either voluntarily or with knowledge, any risk of injury. The lower court therefore erred when it permitted the question of Respondents' assumption of the risk to go to the jury for determination. That error should be corrected by this Court.

POINT V. RESPONDENTS WERE ENTITLED TO A FINDING, AS A MATTER OF LAW, THAT THEY WERE NOT CONTRIBUTORILY NEGLIGENT.

Following the close of Appellant's case, Respondents also requested the judge to rule, as a matter of law, that Respondents were not contributorily negligent. Respondents also requested the trial judge to so instruct the jury. Both requests were denied by the court, which denials were in error, as a thorough review of the transcript and evidence reveals.

At trial Appellant claimed that Respondents were negligent in the following particulars:

(a) Respondents adopted and accepted inadequate tank specifications and an improper building design.

(b) The tanks were of such poor quality that Respondents should have known this from observing the tanks.

(c) Respondents knew that Appellant did not test the tanks.

(d) Respondents failed properly to inspect or test the fiberglass tanks.

An examination of the evidence presented at trial again shows that Appellant did not establish that its claims of contributory negligence had any factual basis.

The claims of Appellant outlined in paragraph (a) are identical to the claims Appellant made against Templeton, Linke and Associates in its third-party complaint; namely, that the specifications for the storage tanks were incorrect and inadequate and that the building design was deficient. At trial Appellant claimed that Respondents were also negligent because they accepted

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Linke and Associates.

The issue of Templeton, Linke and Associate's negligence was presented to the jury, which found that Templeton, Linke and Associates was not negligent. It must be concluded therefrom that the jury could not have determined that Respondents were negligent in accepting the tank specifications and building design, having already determined that they were neither inadequate nor improper. Appellant did not appeal the jury's decision with respect to Templeton, Linke and Associates; therefore, Respondents presume that the issues of the tank specifications and improper building design are not before this Court for review.

This leaves for purposes of this appeal the questions of whether Respondents should have noticed the poor quality of the tanks and who had responsibility for making inspections. In both of these particulars Appellant failed to establish the necessary elements of contributory negligence.

As with the doctrine of assumption of the risk, before Respondents can be found to have been negligent in their acceptance and use of the tanks, Respondents must have had knowledge that it was dangerous to use the tanks for the purposes for which they were fabricated. Rogalski v. Phillips Petroleum Co., 3 Utah 2d 203, 209, 282, p.2d 304 (1955). In other words, Respondents must have realized that filling the tanks with liquid alum would cause them to fail. As has been heretofore detailed in this Brief, Appellant failed to present any evidence whatsoever that Respondents knew that the tanks could fail.

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With respect to Appellant's claim that the tanks were so

poorly constructed, Respondents should have known they would fail, Respondents point out that while the evidence at trial was overwhelming in establishing the poor quality of workmanship in the tanks, none of the evidence presented confirms Appellant's theory that the defects in the tanks were anything but latent. In considering how the tanks appeared to Respondents when they were completed and installed at the Water Treatment Plant, it must be kept in mind that the standard of care in judging negligence is based on what the law requires of an ordinary, reasonable and prudent person under the circumstance. This test is based on foresight and not what may appear obvious by hindsight. Exceptional skill, foresight and caution are admirable traits, but are not the required standard of conduct. Larson v. Johnson 21 Utah 2d 92, 440 P.2d 886 (1968); Hadley v. Wood, 9 Utah 2d 366, 345 P.2d 197 (1959); Lawrence v. Bamberger Railroad Co., 3 Utah 2d 247, 282 P.2d 335 (1955).

Reviewing the testimony and evidence presented at trial, it is clear that Appellant did not present any evidence to show that Respondents' decision to install and use the tanks after observing them was unreasonable. The tank did not rupture because of out-of-roundness, or because of an uneven or irregular outside surface, or because the lid flanges at the tops of the tanks were damaged in transit, or because some of the tanks had leaks in the bottom portions which were completely repaired by Structo-Lite. Moreover, no testimony or evidence was presented to establish that any of these were more than minor irregularities, much less "defects," which should have put Respondents on notice. Dr. Kenneth DeVries, an expert in fiberglass lamination and construction, was

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able to determine that the tanks were of poor quality by a careful visual examination after the one tank had ruptured. (TR.266). However, there is no evidence that Respondents, all of whom were unskilled and unfamiliar in fiberglass fabrication, should be held to the same ability of observation exhibited by Dr. DeVries. Moreover, the defects observed by Dr. DeVries--such failure of the resin to properly adhere, improper use of the catalyst, excessive delamination and the lack of uniformity in wall thickness--had not and could not have been observed by Respondents prior to the rupturing of the tank. (Tr. 266). The defects in the tank which actually caused it to burst--the lack of sufficient tensile strength, the improper mix of glass and resin, the insufficient layers of glass matting and woven roving--were not defects which could be observed, even by an experienced eye, but were defects of a latent nature, hidden beneath the surface of the tanks. Appellant did not submit any evidence to establish that Respondents did or should have observed such defects.

The last claim of Appellant is that Respondents knew Appellant did not test the tanks for tensile strength; therefore, Respondents were obligated to make the necessary tests. Contrary to Appellant's assertion that Respondents knew Appellant had made no tests of the tanks, there was no testimony or evidence adduced at trial to support such a claim. The trial transcript clearly reveals that none of the witnesses even discussed the matter with Structo-Lite. (Tr.222, 564,664). Turning to the final point raised by Appellant, that Respondents should have tested the tanks themselves and that hydrostatic testing was insufficient

to determine the tensile strengths of the tanks, Respondents direct this Court's attention again to the infirmity which inflicts all of Appellant's defenses: namely, Appellant failed to adduce any evidence at trial that Respondents had any duty to test the tanks or their failure to test was in any way unreasonable.

With respect to the hydrostatic testing performed by Respondents, the evidence is uncontroverted that its sole purpose was to determine whether the tanks had any leaks, not to test for tensile strength. (Tr. 484, 485)

As to the issue of whether Respondents should have tested the tanks, Respondents note that the following uncontroverted facts were adduced at trial:

1. Jacobsen, as general contractor, had no authority to conduct any tests or inspections at all on the materials or workmanship at the Jordan Water Treatment Plant. All testing, inspection and approval of materials and work was ultimately the responsibility of Templeton, Linke and Associates, the project engineer. (Exhibit 3-D-22, particularly paragraphs I.A.11--contractor to work with direction of engineer; I.A.35--engineer to give all orders and directions and to determine acceptability of materials; I.B.11--all work and materials subject to inspection by engineer; I.B.12--fabricated materials to be approved by engineer)

2. The right to select an independent testing or inspection agency was permitted to the Conservancy District. (Exhibit 3-D-22 paragraph I.A.7.)

3. In exercising its right under paragraph I.A.7. of the contract specifications, the Conservancy District arranged to

have American Testing Laboratory inspect the fabrication methods and facilities of Structo-Lite. (Tr.472).

4. Neither Jacobsen nor the Conservancy District had any previous experience with fiberglass construction. (Tr. 350, 465, 642).

5. Structo-Lite held itself out to be fiberglass engineers and knowledgeable in the construction and fabrication of fiberglass products (Tr. 4, 13, 335, 336).

6. Harvey Hutchinson of the Conservancy District made substantial efforts to determine what could be done to insure that the tanks would be satisfactory, including contacting a former supervisor in California who told him that when performance specifications were involved, testing was generally left to the fiberglass fabricator. (Tr. 556).

7. Mr. Hutchinson had no knowledge on how to perform tests on the completed tanks or how to cut samples for such tests. (Tr. 556, 557).

8. Mr. Hutchinson believed that Mr. Bevan as a fiberglass engineer would perform the necessary tests in the normal process of manufacturing the tanks. (Tr. 564).

In addition to these undisputed facts, Mr. Peter G. Russell, an expert in fiberglass fabrication with Thiokol Corporation, testified that it was common practice to deliver performance specifications to a fiberglass fabricator, obtain certification that the product would be built to specifications, then accept and use the product without having investigated the fabricator's capacity or plant (Tr. 1230, 1238). Mr. Arnold W. Coon, a consulting engineer and head of a local engineering firm, testified that it was common practice when dealing with

performance specifications to obtain a certification from the manufacturer, such as that prepared by Structo-Lite, and then rely on the expertise of the manufacturer for the end result. (Tr. 1189, 1194). The only evidence presented by Appellant at the trial relevant to the issue of testing the tanks was the testimony of Mr. Glen Enke, retired Professor of Engineering at Brigham Young University. Mr. Enke testified that because of his experience on the Utah State Board of Engineers, he would investigate the background of anyone who claimed to be an engineer (Tr. 1014, 1015, 1016), and that the project engineer (Templeton, Linke and Associates) would have breached its duty of care to the owner if it failed to determine what tests the fabricator (Structo-Lite) intended to perform on the tanks or to specify the test itself. (Tr. 960, 962, 964). At no time, however, did Appellant proffer any evidence as to the standard of care which should be applied to Jacobsen as the contractor on the project to the Conservancy District, as owner, to see that proper tests are performed, or to deal with individuals who represented themselves as engineers, when they did not have the benefit of 14 years experience on the Utah State Board of Engineers as did Professor Enke. The standard by which Respondents' acts are to be measured is the conduct of the ordinary prudent person under similar circumstances and conditions, 57 Am. Jur. 2d, Negligence 337, not a standard of exceptional skill, foresight and caution. Hadley v. Wood, Supra.

Appellant not only failed to carry its burden of proof at trial with respect to its alleged defense of contributory negligence, Appellant ~~did not~~ ^{did not} provide any evidence

foundation on which a finding of contributory negligence could be based. This Court should hold that the lower court erred in permitting the jury to determine an issue which should have been resolved as a matter of law.

POINT VI. THE TRIAL COURT ERRED IN REFUSING TO GRANT RESPONDENTS' MOTION TO AMEND THEIR COMPLAINT TO ALLEGE AS AN ADDITIONAL GROUND FOR RELIEF THE WILLFUL AND RECKLESS CONDUCT OF APPELLANT.

At the close of Appellant's case, Respondents asked the court for permission to amend their Complaint under Rule 15(b) to conform to the evidence adduced at the trial which showed that Appellant was guilty of gross negligence or willful and reckless conduct in the construction of the fiberglass tanks. This Motion was denied by the trial judge, which Respondents claim was error.

There is no doubt that under Rule 15(b), Utah Rules of Civil Procedure, if issues are tried with the express or implied consent of the parties, then at the request of a party the pleadings shall be amended to conform to the evidence. General Insurance Company of America v. Carnicero Dynasty Corp., supra. "Implied consent" is found within the meaning of the rule whenever evidence is admitted at the trial without objection from the opposing party. 3 MOORE'S FEDERAL PRACTICE, ¶15.13[2], pp. 15-168 to 15-170 (2d Ed., 1979).

Respondents submit that the testimony and evidence adduced at the trial as herein delineated was sufficient to raise an issue that Appellant was grossly negligent and acted willfully and recklessly in constructing the fiberglass storage tanks.

David Bevan, president of Structo-Lite, testified that in laying up the fiberglass tanks, the workers would know if they missed a spot. (Tr. 193) A miss, therefore, would have to be purposeful. Dr. DeVries' examination of the tanks, including the ruptured tank, clearly indicated that numerous spots on the

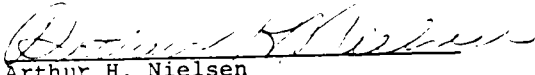
tanks were missed. (Tr. 266) Even more serious, Mr. Bevan testified that he never read the specifications prepared by Templeton, Linke and Associates; he never performed any tests on his tanks and he didn't even know what the term "tensile strength" meant. (Tr. 171, 190, 193) This did not hinder him from representing to Jacobsen that he was an expert in fiberglass or from preparing and delivering a letter to Jacobsen in which he warranted that the tanks would meet specifications he knew he had neither read nor could understand (Tr. 179; Exh. 10, 11), the specifications for construction of the tanks. Such conduct was termed by Professor Enke, Structo-Lite's own expert, "reckless." (Tr. 1055, 1067)

The defenses of contributory negligence and assumption of the risk are not available to a defendant who is guilty of gross negligence or reckless conduct. Respondents should have been granted their request to have the jury determine whether Appellant was in fact guilty of gross negligence, recklessness or willful misconduct.

CONCLUSION

Respondents respectfully urge this Court to reject Appellant's claim that Respondents are not entitled to recover, but on the contrary are entitled to recover the full amount of their damages as found by the jury, together with interest and costs.

Respectfully submitted,



Arthur H. Nielsen

W. Waldan Lloyd

NIELSEN, HENRIOD, GOTTFREDSON & PECK

400 Newhouse Building

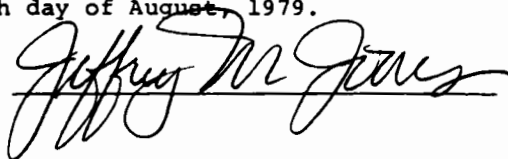
Salt Lake City, Utah 84111

Edward W. Clyde
CLYDE & PRATT
315 South State Street
Salt Lake City, Utah 84111

Attorneys for Plaintiffs-Respondents

CERTIFICATE OF SERVICE

SERVED the foregoing Brief of Respondents by delivering two copies thereof to Raymond M. Berry and H. James Clegg, Snow, Christensen and Martineau, Attorneys for Defendant and Third-Party Plaintiff-Appellant, at 700 Continental Bank Building, Salt Lake City, Utah, this 27th day of August, 1979.

A handwritten signature in black ink, appearing to read "Jeffrey M. Jones", is written over a horizontal line.