

1979

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

Utah Supreme Court

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IN THE
OF THE

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

Plaintiffs-Respondents,

vs.

STRUCTO-LITE ENGINEERING, INC.,
a corporation,

Defendant-Third-Party
Plaintiff-Appellant.

BRIEF OF APPELLANT

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

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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JACOBSEN CONSTRUCTION COMPANY,
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Plaintiff-Appellant.

- - - - -

BRIEF OF APPELLANT

NATURE OF THE CASE

This is an action for property loss and damages
arising from the eruption of a fiberglass chemical tank.

DISPOSITION IN LOWER COURT

This case was tried to a jury in October and
November of 1978. The jury returned a Special Verdict finding

plaintiffs, Jacobsen Construction Company, Inc. and Jelco, Inc., twenty percent (20%) negligent in contributing to the loss complained of. The jury further found plaintiff, Central Utah Water Conservancy District, ten percent (10%) negligent in causing the loss, and defendant, Structo-Lite Engineering, Inc., seventy percent (70%) negligent in causing the damages complained of. The jury found damages to plaintiffs, Jacobsen-Jelco, in the amount of \$370,987.11, and to plaintiff, Central Utah Water Conservancy District, in the amount of \$51,003.66. The lower court then entered judgment for the plaintiffs in the proportionate percentages as established by the comparative negligence interrogatory, plus costs.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the judgment of the lower court and an entry of judgment for defendant and against plaintiffs, no cause of action.

STATEMENT OF FACTS

At the time of the accident in question, plaintiff Jacobsen Construction Company, Inc. (hereinafter Jacobsen) and plaintiff Jelco, Inc. (hereinafter Jelco) were engaged in a joint venture for the construction of the Jordan Water Purification Plant in Salt Lake County, State of Utah, under a written contract with plaintiff Central Utah Water Conservancy District (hereinafter Conservancy District).

As part of the construction, Jacobsen and Jelco entered into a subcontract with defendant Structo-Lite Engineering, Inc. (hereinafter Structo-Lite), whereby Structo-Lite agreed to sell and deliver for installation in the project, six fiberglass chemical storage tanks to be built in accordance with the plans and specifications of the prime contract between Jacobsen-Jelco and Conservancy District.

Defendant Structo-Lite constructed and delivered the six tanks which were then installed in the prime project by Jacobsen. Following the installation and completion of project construction, the tanks were filled with chemical solutions. Thereafter, one of the tanks containing an alum solution erupted and exploded, discharging the solution throughout the building which housed said tanks and causing extensive damage to the building, contents and equipment housed therein.

Plaintiffs then brought this action alleging that defendant had caused the damage complained of through its negligent construction of the tanks; furthermore, that the tanks were not built in accordance with the agreed upon specifications in breach of the contract itself and warranties connected to the contract.

The case was tried to a jury which was instructed in standard comparative negligence concepts and also as to the

doctrine of assumption of the risk. The instructions on assumption of the risk read as follow:

INSTRUCTION NO. 17

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.

INSTRUCTION NO. 18

Distinction should be noted between the assumption of risk just described and the ordinary and necessary acceptance of common risk such as surround us all and that lie in the possibility that other persons will not perform their duties toward us. As to this latter kind of every day risk, a company will not be barred from recovery by the fact, if it be a fact, that while it is exercising ordinary care, and when there is nothing in the circumstances that either cautions it, or would caution a reasonably prudent person in like position to the contrary, it assumes that others will perform their duties of due care toward it and act on that assumption.

A Special Verdict was then submitted to the jurors. In the answer to Special Interrogatory No. VIII, the jurors apportioned the comparative negligence of the parties as follows:

Structo-Lite Engineering, Inc.	70%
Jacobsen-Jelco	20%
Conservancy District	10%
Templeton, Linke & Associates	0%
TOTAL	100%

In its answer to Interrogatory No. VI of the Special Verdict, the jury also found that plaintiffs Jacobsen-Jelco had assumed the risk of the damages complained of. The jury reached a similar finding as to plaintiff Conservancy District in the Answer to Interrogatory No. VII.

In light of such findings, defendant Structo-Lite moved the court to enter judgment of no cause of action in its favor and against plaintiffs. Said motion was denied and judgment was then entered for plaintiffs, in accordance with the percentages set out in the Special Verdict.

Defendant now takes this appeal from the entry of that judgment.

ARGUMENT

POINT I

ASSUMPTION OF THE RISK IS STILL A COMPLETE BAR TO A PLAINTIFF'S RECOVERY IN A NEGLIGENCE ACTION IN THIS JURISDICTION.

The primary issue herein concerns the present status of the doctrine known as "assumption of the risk." The trial jury was properly instructed regarding the doctrine and thereafter returned an affirmative answer to the Special Verdict Interrogatory asking whether plaintiff had assumed the risk of the damages complained of.

Prior to the enactment of the Utah Comparative Negligence Act, Section 78-27-37, Utah Code Ann. (1973), there is no question but what the jurors' verdict would have operated to

totally bar any recovery by plaintiffs. Defendant contends that the same result inures despite passage of the Comparative Negligence Act. Yet defendant admits that the actual wording of the Act is susceptible to several interpretations. The statute itself reads:

Contributory negligence shall not bar recovery in any action by any person or his legal representative, to recover damages for negligence or gross negligence resulting in death or 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 risk.'

Plaintiffs' alternative reading of the statute is that the last sentence abolishes assumption of risk as a separate defense and brings it within the ambit of comparative negligence. Consequently, the factual components of an assumption of risk defense are now to be compared with other actions of the parties to determine what percentage of fault such actions comprise.

Defendant contends that such a reading of the statute equates assumption of the risk with contributory negligence, a conclusion not substantiated in the case law of this jurisdiction. Assumption of the risk and contributory negligence have long been recognized in this jurisdiction as distinctly separate defenses, and both may be submitted to a jury if a

sufficient evidentiary basis for the defenses is established.
Kuchenmeister v. Los Angeles & S. L. R. Co., 52 Utah 116,
172 P. 725 (1918).

However, just as an accident can give rise to recovery theories based upon negligence, warranty, and contract, so may such accident have a factual basis to sustain the defenses of both assumption of risk and contributory negligence, thereby creating an area of overlapping defense. It is this last area referred to--where both defenses are applicable--that has created the confusion regarding assumption of risk.

To understand how the defenses overlap, it is first necessary to examine the distinctive characteristics of the two defenses. Dean William L. Prosser classifies the cases dealing with assumption of risk into three broad basic types of situations. The third situation described is the case at hand. In it:

[T]he plaintiff, aware of a risk already created by the negligence of the defendant, proceeds voluntarily to encounter it--as where he has been supplied with a chattel which he knows to be unsafe and proceeds to use it after he has discovered the danger. If this is a voluntary choice, it may be found that he has accepted the situation, and consented to relieve the defendant of his duty.

Prosser, The Law of Torts (4th ed. 1971) at 440 (emphasis added).

Assumption of risk, then, is a matter of knowledge of the danger and intelligent acquiescence in it. Contributory

negligence, on the the other hand, is a matter of some fault or departure from the standard of conduct of the reasonable man, however unaware, unwilling, or even protesting the plaintiff may be. As is readily seen, there will be many situations where the two doctrines intersect or overlap.

Obviously the two may co-exist when the plaintiff makes an unreasonable choice to incur the risk; but either may exist without the other. The significant difference, when there is one, is likely to be one between risks which were in fact known to the plaintiff, and risks which he merely might have discovered by the exercise of ordinary care.

Prosser, The Law of Torts, supra, at 441.

The distinction between the two defenses, as delineated by Professor Prosser, has long been established in this jurisdiction. As early as 1918, the Utah Supreme Court noted the potential overlap of the defenses and the need for distinguishing them in Kuchenmeister v. Los Angeles & S. L. R. Co., 52 Utah 116, 172 P. 725 (1918). Citing with approval the early English Common Law decision of Thomas v. Quartermain, L.R. 18, Q.B. Div., the court wrote:

But the doctrine of volenti non fit injuria [assumed risk] stands outside the defense of contributory negligence and is in no way limited by it. In individual instances, the two ideas sometimes seem to cover the same ground, but carelessness is not the same thing as intelligent choice.

Kuchenmeister v. Los Angeles & S. L. R. Co., supra, at 729
(italics omitted).

Further on in that same opinion, the court stated:

It needs no argument, therefore, to demonstrate that while in a particular case facts may be such as to justify a finding of both contributory negligence and assumption of risk, yet contributory negligence does not necessarily arise from intelligent choice, and therefore is not necessarily included in assumption of risk

Id.

The distinction continued. In Clay v. Dunford, 121 Utah 177, 239 P.2d 1075, 1077 (1952) the court noted the correctness of the converse of the proposition: "Furthermore, plaintiffs' failure to exercise ordinary care to discover the danger is not properly a matter of assumption of risk, but of the defense of contributory negligence."

Yet, however clear the distinction may appear to be in light of the aforecited authorities, it has been consistently muddled in application. Until the advent of comparative negligence, both contributory negligence and assumption of risk were complete bars to a plaintiff's recovery. In cases where both theories were applicable--the overlap area previously referred to--the resultant outcomes would be identical under either theory. As such, there was no pressing need to distinguish between the theories. Predictably, the theories were often confused. Some cases found a plaintiff to have assumed risk when he failed to use reasonable care to discover the danger. In others, a faulty assumption

of risk defense still was found sufficient to comprise contributory negligence and therefore bar recovery. In short, one man's assumption of risk became another's contributory negligence. The results were, understandably, confused and often times irreconcilable.

It is upon this backdrop that the Utah Legislature authored the Utah Comparative Negligence Act. Apparently distraught with not only the injustices wrought by the contributory negligence doctrine, but also with the chameleon-like manner in which assumption of risk became contributory negligence in many of the overlap cases, the Utah Legislature attempted to remedy the confusion. By doing so, it engendered more confusion. The question arose whether the legislature intended to totally abolish assumption of risk as a defense in this jurisdiction, or only to the extent that it tracks the doctrine of contributory negligence. If the legislature indeed intended to abolish the doctrine entirely, defendant contends that the wording of the statute would be, "Contributory negligence and assumption of risk shall not bar recovery" Defendant feels that the lumping of assumption of risk with contributory negligence in the last section of the act shows a legislative intent to recognize the distinction between the doctrines and to only pull that part of assumption of risk which truly equates with contributory negligence into the ambit and rule of

comparative fault. See Becker v. Beaverton School District No.48, 551 P.2d 498 (Or.App. 1976); Thompson v. Weaver, 560 P.2d 620 (Or. 1977), discussed infra.

Defendant readily admits that there is little evidence as to whether the legislature even recognized the distinction between the doctrine of contributory negligence and assumption of risk. The statute itself is unclear and susceptible of either interpretation. And in only one instance since the passage of the Comparative Negligence Act has the Utah Court directly dealt with this problem. In Rigtrup v. Strawberry Water Users Association, 563 P.2d 1247 (Utah 1977) the plaintiff-appellant Rigtrup contended on appeal that the trial court had erred by instructing the jury as to assumption of risk after it had adequately instructed on contributory negligence. In affirming the trial court's action, the Supreme Court stated:

Though there have been some differences in view as to the defense of assumption of risk and its relation to other aspects of contributory negligence, it has since time immemorial been regarded as a valid defense in the law of this state. It 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. However, it requires but little reflection to see that 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.

* * *

Reflection back upon the facts recited herein will reveal that there was sufficient basis in the evidence from which a jury could reasonably believe that the plaintiffs were aware of a known danger because of their inadequate wiring, and that they voluntarily persisted in assuming the risk of such an occurrence as did finally happen. Consequently, the trial court was justified in giving the instruction of assumption of risk.

Rigtrup v. Strawberry Water Users Association, supra, at 1250-51.

The Rigtrup case clearly holds that assumption of risk is still a viable defense in this jurisdiction. The issue then becomes whether the defense operates as a complete bar to a plaintiff's recovery or whether its component elements are to be weighed in the computation of comparative fault, along with the component elements previously giving rise to a contributory negligence defense. While some dicta in the opinion suggests the latter as the rule, case holdings suggest the former is correct. The Supreme Court held that the trial court in Rigtrup acted properly in issuing the assumption of risk instructions. Those instructions, attached hereto as Exhibit "A" and incorporated herein by this reference, establish assumption of risk as a complete

bar to recovery in a negligence action where a plaintiff voluntarily assumes the risk of a known danger.

This construction of the Utah Comparative Negligence Act finds further support in Becker v. Beaverton School District No.48, 551 P.2d 498 (Or.App. 1976). In Becker, the Oregon Court of Appeals held that the Oregon Comparative Negligence Statute did not bar the defense of assumption of risk absolutely. The Oregon and Utah Comparative Negligence Statutes are substantially the same. The court therein stated:

We hold that the . . . comparative negligence statute . . . applied only to assumption of the risk in its secondary sense. The wording of the statute suggests this. As noted above, the statute provided:

"Contributory negligence, including assumption of the risk, shall not bar recovery in an action . . . if such negligence contributing to the injury was not as great as the negligence of the person against whom recovery is sought"
ORS. 18.470 (1973).

The choice of the term "such negligence" in the second clause of the statute required the term "contributory negligence" or its equivalent as an antecedent. Therefore, we conclude that the phrase "including assumption of the risk" was merely used as a synonym for "contributory negligence", the words immediately preceding the phrase. See, V. Schwartz, Comparative Negligence, 160 §9.2, (1974). Since the statute did not apply to assumption of the risk in its primary sense and since defendant pleaded assumption of the risk in that sense, it would not have been proper for the trial court to give plaintiff's requested instructions on comparative negligence. Under ORS. 18.470

(1973), assumption of the risk in its primary sense remained a complete bar to a negligence action.

Becker v. Beaverton School Dist. No. 48, supra, at 502.

The reasoning of Becker applies just as readily in Utah. Utah's Comparative Negligence Statute differs from the Oregon statute only in that the inclusion of assumption of the risk within the term contributory negligence is stated in a separate sentence rather than in a clause. Otherwise the language is identical.

The Oregon statute has since been amended. It now flatly declares:

The doctrine of applied assumption of the risk is abolished.

Or.Rev.Stat. §18.475(2).

As pointed out in Thompson v. Weaver, 560 P.2d 620, 623 (Or. 1977), the new statute abolishes assumption of the risk as a basis for barring recovery. The Oregon Legislature felled the doctrine in toto. However, the passage of the amendment itself would seem to indicate that the legislature recognized that the pre-amendment statute did not abolish assumption of risk except as it overlapped contributory negligence, in accord with the reasoning of Becker.

The Becker-Thompson constructions of the Oregon Comparative Negligence Statute are clearly analogous to the case at hand. The court in Rigtrup recognized that an instruction stating that assumption of the risk in its

proper sense, may still act as a complete bar to a plaintiff's recovery is proper. The reasoning of Becker suggests that Utah's Comparative Negligence Act is as reasonably susceptible to differing interpretations as was Oregon's. While a change in Utah law may, arguendo, be beneficial, such change is to be brought about legislatively, as in the Oregon situation, and not judicially. This fact was properly recognized by the Rigtrup court.

[W]e decline the invitation to so change our law. One of the important values in our system which tends to produce confidence in and respect for the law is that the law as it is declared and known has sufficient solidarity and continuity that it can be relied on with assurance. We think that those objectives are best served by the judicial branch refraining from legislating any abrupt or dramatic changes of a substantial nature in the law and by leaving any such changes therein to the legislature, whose constitutional prerogative it is.

Rigtrup v. Strawberry Water Users Association, 563 P.2d 1247, 1250 (Utah 1977).

Until the Utah legislature chooses to abolish the defense of assumption of risk as a complete bar in a negligence action, it should be maintained and upheld by the state trial courts. The doctrine is not a confusing duplication of contributory negligence where properly analyzed, but is a distinctive legal concept. As Prosser states:

Where the plaintiff acts unreasonably in making his choice, it is said that their [sic] is merely one form of contributory negligence

which is certainly true; and from this it is argued that there is, or should be no distinction between the two defenses and that there is only useless and confusing duplication. But this is a distinctive kind of contributory negligence, in which the plaintiff knows the risk and voluntarily accepts it; and it has been held to differ from contributory negligence which merely fails to discover the danger in several minor respects. Thus assumption of risk is governed by the subjective standard of the plaintiff himself, whereas contributory negligence is measured by the objective standard of the reasonable man.

Prosser, The Law of Torts, (4th ed. 1971) at 456.

POINT II

IF ASSUMPTION OF RISK REMAINS AS A
BAR TO AN ACTION FOR NEGLIGENCE, IT
ALSO REMAINS AS A COMPLETE BAR TO
A CAUSE OF ACTION BASED IN WARRANTY.

The trial jury found defendant to have breached its warranty (or contract)¹ to plaintiff and that such breach was a proximate cause of the damages suffered by plaintiff.

Inasmuch as the jurors also found that plaintiff had assumed the risk of the damages complained of, it is necessary to determine whether the bar to recovery imposed by the assumption of risk doctrine in a negligence action,

¹Under the Uniform Commercial Code, sales by description of goods are to be treated as express warranties if made part of the basis of the bargain. Section 70A-2-313, Utah Code Ann. (1965). The description need not be by words but can be by technical specifications as in the present matter. As a result, suit brought upon the contract for failure to comply with the contract specifications is equivalent to a suit for breach of express warranty, and the law relating to cases of express warranty applies.

as discussed above, is equally applicable in an action based on warranty.

A case law survey by two of the leading authorities in the area of sales transactions finds that it is so applicable. While jurisdictions are split as to whether contributory negligence is a defense in a warranty cause of action, the "courts are in unanimous agreement that the egregious form of contributory negligence called 'assumption of the risk' bars plaintiff's recovery in strict tort and in warranty". White and Summers, Uniform Commercial Code (1972) at 336.

It is of more than passing interest that the authors of the Restatement of Torts 2d also recognized the distinction between assumption of risk and contributory negligence and felt the conceptual differences in the defenses to be great enough, and the doctrinal defense of assumption of risk important enough, that they retained assumption of risk as a complete bar and one of the few defenses to a strict liability action, yet disallowed similar treatment for contributory negligence. Comment n to Section 402A of the Restatement of Torts 2d reads in pertinent part:

Contributory negligence of the plaintiff is not a defense when such negligence consists merely of the failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand, the form of

contributory negligence which consists in involuntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

As the foregoing illustrates, not only has assumption of risk historically been a complete defense to a warranty action as well as a negligence action, but the leading authorities in the field strongly feel that it should be preserved, despite the abolition of the contributory negligence defense.

POINT III

SINCE A PROPERLY INSTRUCTED TRIAL JURY FOUND THAT PLAINTIFFS HAD ASSUMED THE RISK OF THE DAMAGES COMPLAINED OF, DEFENDANT WAS ENTITLED TO JUDGMENT ON THE VERDICT AS A MATTER OF LAW AND THE TRIAL COURT'S FAILURE TO ENTER SUCH JUDGMENT WAS ERROR.

The trial jury received proper instructions by the court concerning the doctrine of assumption of risk. As set forth in the Statement of Facts, Instruction No. 17 and Instruction No. 18 make the proper distinction between true assumption of risk cases in which the plaintiff has actual knowledge of the danger and the quasi-contributory negligence situation where the danger could have been recognized through the use of ordinary care.

It is true that the instructions do not state defendant's theory that assumption of risk, in the sense urged, is a complete bar to recovery. Such omission was intentional, for apprising the jury of the effect of the finding that plaintiff had assumed the risk of the damage would violate the rule set down in McGinn v. Utah Power & Light Co., 529 P.2d 423 (Utah 1974)--that instructing a jury as to the effect or impact that its fact-finding answers, in a Special Verdict, will have on the outcome of a comparative negligence case is prejudicial error.

Under such instructions, the jury returned a Special Verdict finding that plaintiff had indeed assumed the risk of the damages complained of.

In light of such finding the defendant was entitled to a judgment of no cause of action on the Verdict as a matter of law. The trial court's denial of defendant's motion for such a Verdict was, therefore, in error.

CONCLUSION

In light of the foregoing authorities, defendant, Structo-Lite Engineering, Inc., respectfully requests that the Verdict of the trial court in the herein matter be reversed and that a judgment of no cause of action be entered for the defendant and against the plaintiffs.

Respectfully submitted this 17th day of May, 1979.

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