

1980

Wesley Mulherin v. Ingersoll-Rand Co. : Brief of Plaintiff-Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Taylor D. Carr; Anthony M. Thurber; Attorneys for Plaintiff-Appellant;

Richard H> Moffat; John L. Young; Moffat, Welling & Paulsen; Attorneys for Defendant-Respondent;

Recommended Citation

Brief of Appellant, *Mulherin v. Ingersoll-Rand Co.*, No. 17027 (Utah Supreme Court, 1980).

https://digitalcommons.law.byu.edu/uofu_sc2/2268

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
OF THE STATE OF UTAH

WESLEY MULHERIN,)
)
Plaintiff-Appellant,)
)
vs.)
)
INGERSOLL-RAND COMPANY,)
)
Defendant-Respondent.)

Case No. 17027

BRIEF OF PLAINTIFF-APPELLANT

APPEAL FROM THE JUDGMENT AND ORDER
OF THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
HONORABLE BRYANT H. CROFT, PRESIDING

TAYLOR D. CARR and
ANTHONY M. THURBER
Attorneys for Plaintiff-Appellant
211 East Broadway, Suite 213
Salt Lake City, Utah 84111

RICHARD H. MOFFAT and
JOHN L. YOUNG
MOFFAT, WELLING & PAULSEN
Attorneys for Defendant-Respondent
261 East Broadway, Suite 300
Salt Lake City, Utah 84111

FILED

JUL 2 1980

Clk. Supreme Court, Utah

IN THE SUPREME COURT
OF THE STATE OF UTAH

WESLEY MULHERIN,)	
)	
Plaintiff-Appellant,)	
)	
vs.)	Case No.17027
)	
INGERSOLL-RAND COMPANY,)	
)	
Defendant-Respondent.))	

BRIEF OF PLAINTIFF-APPELLANT

APPEAL FROM THE JUDGMENT AND ORDER
OF THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
HONORABLE BRYANT H. CROFT, PRESIDING

TAYLOR D. CARR and
ANTHONY M. THURBER
Attorneys for Plaintiff-Appellant
211 East Broadway, Suite 213
Salt Lake City, Utah 84111

RICHARD H. MOFFAT and
JOHN L. YOUNG
MOFFAT, WELLING & PAULSEN
Attorneys for Defendant-Respondent
261 East Broadway, Suite 300
Salt Lake City, Utah 84111

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF KIND OF CASE	1
DISPOSITION IN THE LOWER COURT	1
STATEMENT OF FACTS	1
ISSUES PRESENTED	4
ARGUMENT	
POINT I: THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY WITH RESPECT TO THE APPLICATION OF THE AFFIRMA- TIVE DEFENSE OF MISUSE, AND THE SPECIAL VERDICT FORM SUBMITTED TO THE JURY REFLECTED AN INACCURATE VIEW OF THE LAW PREJUDICIAL TO PLAINTIFF'S CLAIM	5
POINT II: NEWLY DISCOVERED EVIDENCE WAS PRESENTED TO THE TRIAL COURT AFTER TRIAL, UPON WHICH APPELLANT'S MOTION FOR A NEW TRIAL SHOULD HAVE BEEN GRANTED	9
CONCLUSION	12

CASES CITED

<u>Daly v. General Motors Corp.</u> , 575 P.2d 1162 (Cal. 1978)	6, 7
<u>Hahn v. Armco Steel Co.</u> , 601 P.2d 152 (Utah 1979)	5, 6

STATUTES CITED

Utah Code Ann. § 78-27-37 (1953)	9
--	---

IN THE SUPREME COURT
OF THE STATE OF UTAH

WESLEY MULHERIN,)
)
Plaintiff-Appellant,)
)
vs.)
)
INGERSOLL-RAND COMPANY,)
)
Defendant-Respondent.)

Case No. 17027

BRIEF OF PLAINTIFF-APPELLANT

STATEMENT OF KIND OF CASE

This is a strict liability action instituted by Wesley Mulherin for damages caused by accidental activation of an air winch manufactured by Ingersoll-Rand Company.

DISPOSITION IN THE LOWER COURT

Judgment on the jury's Verdict was entered by the District Court on November 29, 1979 following trial. An Order denying plaintiff's Motion for a New Trial was entered on March 31, 1980. Plaintiff appeals from both the Judgment and the Order.

STATEMENT OF FACTS

Plaintiff-Appellant Wesley Mulherin was at the time of his accident an underground miner employed by Anaconda Copper

Company at Anaconda's Carr Fork mine near Tooele, Utah. Mr. Mulherin worked on an apparatus known as a "galloway", a multi-level device which is used in the construction of vertical mine shafts. The various decks of the galloway contain equipment used in drilling, blasting, removing debris and cementing as shaft sinking progresses. That equipment includes certain compressed air-driven winches which are used to raise and lower mucking devices which are suspended from the bottom of the galloway known as "crydermen." When in operation, the crydermen are lowered to the shaft bottom by means of a cable attached to one of the winches. When not in use, the crydermen are raised to a position directly below the bottom level of the galloway by the same means.

Immediately after Mr. Mulherin came on shift October 29, 1977 and descended to the galloway, he and another miner undertook to free a ten-inch diameter hose attached to the bottom of a large sediment tank used to allow settling of liquid pumped from the shaft bottom. The sediment tanks was located underneath one deck of the galloway and above the air winches used for raising and lowering the crydermen. When settling had occurred, water was pumped from the tank to the surface, and the remaining sediment was discharged over a side rail of the galloway by means of the hoses into the bottom of the shaft where the crydermen would later muck it into buckets for removal to the surface.

When the sediment-draining operation was not in progress, the hoses were hung to the sides of the tank by means of chains in such a manner that the tank would hold water and sediment pumped from the shaft bottom. The particular hose being detached from the side of the settling tank and maneuvered toward the galloway rail for discharge of sediment into the shaft by Mr. Mulherin and his co-worker was attached to the settling tank almost directly above one of the crydermen-raising air winches manufactured by the defendant Ingersoll-Rand. The practice of the miners who performed the sediment draining operation was to stand on the winch in order to detach chains holding the drainage hoses in place, then descend from the winch to the galloway floor at that level and maneuver the hose toward and over the rail. During that operation the hose came in contact with the winch's throttle-control handle, set the winch into operation unexpectedly, and plaintiff's injury resulted.

Mr. Mulherin filed his Complaint against Ingersoll-Rand Company on July 27, 1978 alleging that the winch, and particularly its throttle-control device, was dangerously defective as designed and manufactured by defendant. The jury returned a Special Verdict and found that: (1) The product was dangerously defective, that the defect proximately caused plaintiff's injury, and (2) the product was being misused, and that such misuse was a proximate cause of plaintiff's injury.

The trial court had determined that of the two available defenses misuse, if proven, was a complete bar to plaintiff's strict liability claim, whereas assumption of risk, if proven, was to be compared to the product defect. The court accordingly entered judgment of No Cause of Action. The jury was not allowed to compare the contribution of misuse to the product defect. There was no finding of assumption of risk.

ISSUES PRESENTED

1. Did the trial court err in its instructions and Special Verdict submitted to the jury with respect to whether findings of misuse or assumption of risk are complete bars to recovery or are to be compared with any finding of defendant's fault in designing and manufacturing a dangerously defective product which was a proximate cause of the accident?

2. Did the trial court err in refusing to grant plaintiff a new trial on the basis of newly discovered evidence, the newly discovered evidence being plaintiff's suppressed subconscious recollection of the accident sequence elicited under hypnosis following trial?

ARGUMENT

POINT I

THE TRIAL COURT IMPROPERLY INSTRUCTED
THE JURY WITH RESPECT TO APPLICATION
OF THE AFFIRMATIVE DEFENSE OF MISUSE,
AND THE SPECIAL VERDICT FORM SUBMITTED
TO THE JURY REFLECTED AN INACCURATE
VIEW OF THE LAW PREJUDICIAL TO
PLAINTIFF'S CLAIM

The recognized defenses to strict liability claims in Utah are two and only two, they being "misuse" and "assumption of risk." Hahn v. Armco Steel Co., 601 P.2d 152, 158 (Utah 1979) fn. 5. The trial court instructed the jury regarding both defenses. Unfortunately, the instructions given were not proper in their manner of application of those defenses to a strict liability case. In the trial court's jury Instruction No. 17, the defense of "misuse" was defined. In paragraphs 3 and 4 of the Special Verdict, the jury was required to answer special interrogatories concerning misuse. Both the Instruction and Special Verdict form constitute error by the trial court for the reason that there was no application of the principles of comparative fault to the defense of misuse. That such failure constitutes error is clearly seen by examining and comparing the Instructions and Special Verdict paragraphs dealing with the defense of "assumption of risk." Jury Instructions 18 and 19, along with Special Verdict paragraphs 5, 6, 7 and 8 do reflect a proper application of the principles of comparative

fault to the "assumption of risk" defense in a strict products liability case.

This court, in its opinion recognizing strict liability as the law in Utah, Hahn v. Armco Steel Co., Id., specified "misuse" and "assumption of risk" as the two strict liability defenses, and expressly declined to address the issue of application of comparative fault principles to either or both.

We need not-and do not-reach the issue here, because of the unavailability to defendant of either of these two defenses, of whether comparative principles should apply in strict products liability cases, where one of these two defenses lies, in order to diminish recovery by plaintiff, or whether proof by defendant of one of these two defenses bars recovery altogether.

601 P.2d 152 at 158, 159 (footnote omitted).

While this court has not determined whether the two defenses should be applied with comparative principles or not, clearly they should operate in tandem, not separately, as either total bars to recovery or as fault to be compared to the defect to diminish plaintiff's recovery as in other cases of comparative fault. In other words, both defenses must be total bars or both must be compared. In the instant case, "misuse" was considered by the trial court to be a bar, and "assumption of risk" was to be compared. Such an application of the defenses violates the spirit of the principal case addressing the issue, that being Daly v. General Motors Corp., 575 P.2d 1162 (Cal. 1978). The Daly case was cited favorably

by this court on other issues in Hahn, and on this issue by the respondents in their pleadings below. In Daly, the California Supreme Court stated:

If a more just result follows from [this] expansion of comparative principles, we have no hesitancy in seeking it, mindful always the fundamental and underlying purpose of Li [v. Yellow Cab Co., 532 P.2d 1126 (Cal. 1976)] was to promote the equitable allocation of loss among all parties legally responsible in proportion to their fault.

575 P.2d 1162 at 1169. The court went on to quote favorably from the proposed Uniform Comparative Fault Act:

[¶](a) In an action based on fault to recover damages for injury or death to person ... any contributory fault chargeable to the claimant diminishes proportionately the amount awarded ... but does not bar recovery [Emphasis added.]

575 P.2d 1162 at 1172.

The effect of the trial court's misapplication of comparative fault principles is clear: The jury found there was a dangerous defect that proximately caused plaintiff's injury and that plaintiff's conduct also was a proximate cause of those injuries. We therefore have a classic case for determination of comparative fault, yet, by reason of the court's Instructions and Special Verdict form, Mr. Mulherin is totally barred from recovery. The jury was not allowed to apportion fault, as it would have in the event of a finding that plaintiff assumed the risk but had not misused the product.

It can be seen by examination of the cited cases which support application of comparative fault to strict products liability that courts are concerned with apportioning fault among the parties by applying the degree of relative fault found by the trier-of-fact to the amount of plaintiff's damages. The type of plaintiff fault, whether designated "misuse" or "assumption of risk" should make no difference if the objective is to determine degrees of relative fault. Neither should the fact that plaintiff's cause of action is designated "strict liability" rather than "negligence" affect the application of comparative principles. Fault is the concern, and the name applied to either party's fault should not affect the outcome of the litigation.

By this appeal the appellant is urging upon the court application of comparative principles to all tort situations, regardless whether they arise from claims of negligence or strict liability. The defenses to strict liability, "misuse" and "assumption of risk", are too little understood in their meaning for the trial court's position to be workable. Conceivably, manufacturers could argue to a jury that if a user assumed the risk of danger of a particular product created, he was "misusing" the product because the manufacturer never foresaw that the product would be used with such knowledge of its dangerous defect. Such an argument would effectively

circumvent the spirit of application of comparative principles to "assumption of risk" by the Utah Legislature in negligence cases. Comparative Negligence Act, Utah Code Ann. § 78-27-37 (1953).

The logical answer is a uniform application of comparative principles to strict liability defenses. A contrary position is bound to create confusion and overlapping of the defenses, which would frustrate the intent of the legislature and the progressive weight and spirit of the law.

POINT II

NEWLY DISCOVERED EVIDENCE WAS
PRESENTED TO THE TRIAL COURT AFTER
TRIAL, UPON WHICH APPELLANT'S
MOTION FOR A NEW TRIAL SHOULD
HAVE BEEN GRANTED

In order for this court to appreciate the effect of the trial court's refusal to grant a new trial, certain background information must be provided.

Plaintiff was the only eyewitness to the accident in which his left leg was torn off by the accidental activation of defendant's winch. He testified at trial that, as he recalled, he had been standing on the winch working with a sediment tank drain hose and chains when the winch began to operate. As the trial progressed, it became apparent that plaintiff could not have been standing on the winch at that

time for the reasons that because of the direction of rotation of the winch he would have (a) lost the other leg and (b) come to rest on his front and not his back side. The jury's finding of misuse was based upon plaintiff's own testimony regarding his recollection of standing on the winch when the accident sequence began. It was necessary to climb on the winch to perform a part of the tank drainage task assigned to plaintiff before his accident, and plaintiff had been on the winch for that purpose at some point in time.

Following trial, plaintiff was examined in detail by a clinical hypnotist who found (see Affidavit of Charlotte Morrow, Record) that the events which preceded the accident were suppressed by plaintiff's conscious mind because of the terrible emotional trauma of watching as his leg was torn off, but that an accurate memory of those events was retained in plaintiff's subconscious. By means of relatively shallow hypnosis that memory was retrieved, and discloses that plaintiff was not standing on the winch, but had descended and was standing on the galloway floor performing another part of the tank draining task when the accident sequence began. The observations of plaintiff's co-worker, Elmer Mondragon (see Affidavit of Elmer Mondragon, Record) are consistent with plaintiff's subconscious recall of the accident sequence.

The affidavits of Morrow and Mondragon demonstrate that plaintiff's accident did not occur in the manner he

consciously thought it had and to which he testified at trial. Detailed recall of those events extracted from Mr. Mulherin's subconscious memory through recognized and scientific means makes it quite apparent that plaintiff was not standing on defendant's winch when the control mechanism was triggered. The impact of such newly discovered evidence is obvious. Should the jury have plaintiff's actual, though suppressed, subconscious memory of the accident sequence before it, it would be seen that such memory was, and the erroneous memory testified to at trial was not, consistent with the physical evidence. A finding of misuse or assumption of risk, considering that evidence, would be inconceivable.

At trial the only evidence that plaintiff was standing on the winch came from the plaintiff himself. This new evidence, which had been locked in plaintiff's subconscious mind and effectively hidden from both plaintiff and his counsel, clearly demonstrates that plaintiff's testimony at trial to that effect was the result of an imperfect conscious memory of the traumatic events he experienced. The subconscious memory is recognized as being a far more reliable repository of suppressed events. Certainly, such evidence could not have been reasonably discovered by plaintiff or his counsel. Neither had any idea that plaintiff's conscious memory was faulty until after the trial. Such critical and newly discovered evidence clearly falls within the contemplation of Rule 59(4), Utah Rules of Civil Procedure. The primary

object of our system of justice is to find the truth, and Rule 59 reflects that objective by providing, as this court has often held, that where new evidence was indeed undiscoverable and could lead to a different outcome, motions for new trial are to be granted.

CONCLUSION

Plaintiff-Appellant respectfully submits that the District Court erred prejudicially and that justice requires this court to reverse the Judgment and Order entered below and remand to the District Court for further proceedings consistent with this Honorable Court's decision.

DATED this 2nd day of July, 1980.

Respectfully submitted

ANTHONY M. THURBER
Attorney for Plaintiff-Appellant
211 East Broadway, Suite 213
Salt Lake City, Utah 84111
Telephone: (801) 533-0181

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Plaintiff-Appellant were personally served upon Moffat, Welling & Paulsen, attorneys for Defendant-Respondent, 261 East Broadway, Suite 300, Salt Lake City, Utah 84111 this _____ day of July, 1980.