

1980

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

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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

Case No. 17027

REPLY BRIEF OF PLAINTIFF-APPELLANT

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

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REPLY BRIEF OF PLAINTIFF-APPELLANT

POINT I

THE POSITION URGED BY RESPONDENT
IS DIRECTLY CONTRARY TO THE GREAT
WEIGHT OF JUDICIAL AUTHORITY

Respondent's appeal brief correctly reviews the reasoning which has led to adoption of strict liability by those states which have chosen to follow Restatement (Second) of Torts, Section 402A. Essentially, the objective is to eliminate the often insurmountable burden of proving what, if any, negligence resulted in a product being dangerously defective. The issue presented by this appeal is whether contributory causes of appellant's injuries should have been apportioned or "compared" between the parties.

By way of response to the opposition's treatment of this question in its brief, appellant would emphasize several important points. First, respondent's brief implies that its position against the application of comparative principles in strict liability cases is supported by the greater weight of judicial authority. Respondent cites three cases as support for that implication.

Shepardizing the Daly decision quickly discloses the contrary to be true. The following ten cases have expressly adopted the application of comparative principles in strict liability actions: Murray v. Fairbanks Morse, 610 F.2d 149 (D.C. V.I. 1980); Bu faud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); Kennedy v. City of Sawyer, 608 P.2d 1379 (Kan. App. 1980); Vincent v. Allen Bradley Co., 291 N.W.2d 66 (Mich. App. 1980); Busch v. Busch Construction Inc., 262 N.W.2d 377 (Minn. 1977); Thibault v. Sears, Roebuck & Co., 395 A.2d 843 (N.H. 1978); Sutter v. San Angelo Foundry & Machine Co., 81 N.J. 150, 406 A.2d 140 (1979); Baccelleri v. Hyster Co., 287 Or. 3, 597 P.2d 351 (1979); General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977); Dippel v. Sciano, 37 Wis.2d 443, 155 N.W.2d 55 (1967). These consistent decisions are in addition to the California case of Daly v. General Motors Corp., 155 Cal. Rptr. 380, 575 P.2d 1162 (1978) cited and relied upon by appellant. Respondent has cited three cases which have since followed the Daly dissent and ignored the ten which have

followed the Daly majority opinion. The position urged by respondent on the issue is plainly a minority position by a margin of over three to one.

POINT II

COMPARISON OF THE AVAILABLE DEFENSES OF "MISUSE" AND "ASSUMPTION OF RISK" AND DETERMINATION OF A PRODUCT DEFECT INVOLVE FACTUAL DETERMINATIONS OF "REASONABLENESS." SINCE REASONABLENESS OF CONDUCT IS THE TEST OF NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE, NEGLIGENCE QUESTIONS ARE ALREADY IMPLICIT IN THE STRICT LIABILITY FIELD AND NOTHING NEW OR CONFUSING WILL BE INJECTED BY APPLICATION OF COMPARATIVE PRINCIPLES IN THAT AREA

The reasoning offered by respondent in asking this Court to reject the application of comparative principles in strict liability actions is fallacious. Respondent argues that comparing a strict liability "defect" and anything sounding like "negligence" is a practical impossibility as the two are entirely different concepts. The concepts are not drastically different. The legal test of a defect for strict liability purposes is, as noted, whether the product is "unreasonably dangerous." Reasonableness of conduct is the legal test for a determination of negligence, and the same term (reasonable) appears in the strict liability definition. In all, including those few jurisdictions (three) which do not compare, the legal test of the defenses of misuse and assumption involves a determination of "reasonableness" of

the foreseeable uses of the product and of certain plaintiff's conduct. Determinations of "reasonableness", therefore, remain an integral part of our tort law concepts whether the term applied be "negligence", "strict liability", "misuse" or "assumption of risk." As the Kansas Court of Appeals noted in Kennedy v. City of Sawyer, supra: "[N]egligence is simply causative conduct to be considered in the apportionment of causal responsibility. We are satisfied this conclusion is required to avoid frustration of the purpose of the doctrine of comparative negligence." 608 P.2d at 1388 (emphasis added).

The Court might well have added that its conclusion avoided frustration of the advances represented by growing acceptance of the strict liability doctrine. Respondent is asking this Court to nullify virtually all of those advances by a return to an outmoded concept of a total bar to recovery based upon even the slightest showing of unreasonableness (falling within the "misuse" and "assumption" definitions) in the claimant's conduct. The great weight of legal authority is against that position, and rightly so.

POINT III

RESPONDENT'S RELIANCE UPON UTAH CODE ANN. § 78-15-5 IS MISPLACED

Respondent cites Utah Code Ann. § 78-15-5, a portion of the Utah Products Liability Act, as authority for its

argument against comparison. Examination of the cited statute makes it abundantly clear that the section deals only with absolute defenses (including misuse) available to the manufacturer where the product in question has been subsequently altered or modified from its original state. Respondent's attempted application to the facts of this case lacks support in the language of the statute itself, since no such modification has been alleged or proven.

POINT IV

THE 1965 COMMENTS TO RESTATEMENT
(SECOND) OF TORTS, SECTION 402A,
ARE NOT CONTROLLING IN THE FACE
OF CONTRARY CASE LAW DEVELOPMENTS
SINCE THAT TIME.

Respondent's argument that the comments to Restatement (Second) of Torts, Section 402A, dictate that there be no comparison of the "misuse" defense to the product defect is unsound. The comments cited by respondent were made in 1965, when the Restatement (Second) was published, and reflected the compiler's views as of that time. Section 467 of the very same Restatement (Second) of torts stated that contributory negligence of the plaintiff was a total bar to recovery in negligence actions. The subsequent and almost universal adoption of comparative negligence principles, either by statute or by decision, quite clearly demonstrates that the Restatement position on that subject no longer has validity.

This Court need not perpetuate archaic principles by rigorously following each fifteen-year old comment to Section 402A without regard to subsequent case law developments and their underlying social and economic reasons.

POINT V

THE QUESTIONS OF A DEFECT RENDERING THE DEFENDANT'S PRODUCT UNREASONABLY DANGEROUS TO THE USER AND PROXIMATE CAUSE HAVE BEEN JUDICIALLY DETERMINED AND ARE NOW RES JUDICATA AS BETWEEN THE PARTIES

Finally, it should be noted that respondent, by failing to cross-appeal, has accepted the jury's findings that its product was dangerously defective, and that such defect was a proximate cause of the accident. That issue is now res judicata as between the parties. In the event this Court decides to join the majority of jurisdictions following Daly and remand the matter for a determination of comparative fault, the fact of a dangerous defect existing in the product has been established and should not be an issue.

CONCLUSION

Appellant respectfully submits that for the reasons specified in his original brief, consistent with the greater weight of authority, and the persuasive reasoning supporting those decisions, this Court should reverse the Trial Court's judgment and remand the case for a determination of the relative degrees by which the product's dangerous defect

and plaintiff's causative "misuse" contributed to the accident.

DATED this 15th day of September, 1980.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing
Reply 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
15th day of September, 1980.

