1981

Wesley Mulherin v. Ingersoll-Rand Co. : Ingersoll-Rand Company's Petition for Rehearing

Utah Supreme Court

Taylor D. Carr; Anthony M. Thurber; Attorneys for Plaintiff-Appellant;
Richard H> Moffat; John L. Young; Moffat, Welling & Paulsen; Attorneys for Defendant-Respondent;

IN THE SUPREME COURT OF

THE STATE OF UTAH

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WESLEY MULHERIN,	:	
Plaintiff-Appellant,	:	INGERSOLL-RAND COMPANY'S PETITION FOR REHEARING
- vs -	:	
		Case No. 17027
INGERSOLL-RAND COMPANY,	:	
Defendant-Respondent.	:	

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The respondent, Ingersoll-Rand Company, pursuant to Rule 76(e) of the Utah Rules of Civil Procedure, hereby petitions this Court for a rehearing of the matter.

The respondent submits the following points for rehearing and its brief in support thereof:

1. The adoption of comparative principles in strict products liability should parallel the standard of comparison set forth in the Utah Comparative Negligence Act.

2. Where comparative principles are applied in strict liability cases, all of the conduct of the plaintiff that contributes to the cause of the accident should be considered.

DATED this 26th day of June, 1981.

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CERTIFICATE OF DELIVERY

The undersigned hereby certifies that on this 26th day of June, 1981, he hand delivered a true and correct copy of the foregoing Brief in Support of Petition for Rehearing to:

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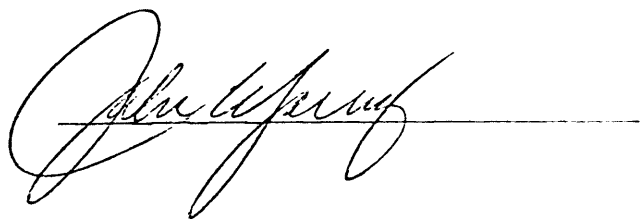

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INGERSOLL-RAND COMPANY'S BRIEF IN SUPPORT OF PETITION FOR REHEARING

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INGERSOLL-RAND COMPANY'S BRIEF IN SUPPORT OF PETITION FOR REHEARING

STATEMENT OF KIND OF CASE

The statement of kind of case is as set forth in the respondent's original brief on file herein.

DISPOSITION IN LOWER COURT

The disposition in lower court is as set forth in the respondent's original brief on file herein.

STATEMENT OF FACTS

The statement of facts is as set forth in the appellant's original brief on file herein.

ARGUMENT

POINT I

THE ADOPTION OF COMPARATIVE PRINCIPLES IN STRICT PRODUCTS LIABILITY SHOULD PARALLEL THE STANDARD OF COMPARISON SET FORTH IN THE UTAH COMPARATIVE NEGLIGENCE ACT.

In 1973, the Utah Legislature adopted the Utah Comparative Negligent Act and determined, as the basis of recovery, that:

> Contributory negligence shall not bar recovery in an action . . . to recover damages . . . if such negligence was not as great as the negligence or gross negligence of the person against whom recovery is sought . . . . [Section 78-27-37, Utah Code Annotated (Repl. Vol. 1953).]

The Utah Legislature has repeatedly refused to change this policy to the "pure comparative negligence" standard this Court has now adopted for products liability cases, as set forth in its opinion in this matter. S.B. 271, 41st Session, Utah State Legislature (1975); S.B. 123, 43rd Session, Utah State Legislature (1979). Indeed, even a change to a 50-50 comparative principle proposed in the 1981 session was not enacted. S.B. 256, 44th Session, Utah State Legislature (1981).

The repeated refusal of the Legislature to alter its policy concerning the standard of recovery in comparative negligence is a clear indication that the policy of comparative principles to be utilized in this state is as set forth in the Utah Comparative Negligence Act, supra. This standard requires that the fault or negligence of the plaintiff be less than that of the defendant before the plaintiff can recover a percentage of his damages.

Contrary to this policy, the Court adopted "pure comparative" principles in products liability cases in its opinion herein, stating that:

> The defense in a products liability case, where both defect and misuse contribute to cause the damaging event, will limit the plaintiff's recovery to that portion of his damages equal to the percentage of the cause contributed by the product defect. [Mulherin v. Ingersoll-Rand Co., No. 17027, May 4, 1981.]

The adoption of "pure comparative fault" principles in products liability cases creates a double standard in the State of Utah which not only violates the policy established by the Utah Legislature, but creates substantial conceptional problems for the courts of this state and places an unfair burden upon manufacturers and distributors of products.

Assume the following facts: John Doe, a construction worker, is about to fill his water truck by using a city fire hydrant. When he opens the water valve of the hydrant, it explodes and seriously injures him. He sues the manufacturer of the hydrant for defective product, the city for improper and negligent maintenance of the hydrant, and the contractor (not his employer) who negligently installed the hydrant. The jury determines that the plaintiff misused the hydrant in the manner in which he operated it, the contractor negligently installed it, the city negligently failed to maintain it, and the hydrant was defective in manufacture.

Suppose further, the following jury allocations of fault:

Plaintiff	40%
City	20%
Contractor	20%
Manufacturer	20%

Pursuant to this finding, the city and the contractor would not be joint tortfeasors, as defined by the Utah Comparative Negligence Act, supra, since their negligence, or gross negligence, is less than that of the plaintiff. Thus, would the plaintiff recover 60% of his damages from a manufacturer that was only 20% at fault? Or, under the specific holding set forth by this Court herein, would the plaintiff recover only 20% of his damages, which is "that portion of his damages equal to the percentage of the cause contributed by the product defect." Mulherin vs. Ingersoll-Rand Co., supra.

More importantly, however, is the question of any recovery against the manufacturer in this situation. Why should a manufacturer or distributor of a product that is less at fault than any of the other parties, including the plaintiff, be held liable for damages under this situation when the other defendants, that are equally or more at fault, are dismissed with no cause of action? This is the result of the double standard created by this Court's holding herein.

The Court stated that it would not express an opinion as to other issues created by its holding herein. However, the result

of the holding must be analyzed to illuminate the problems created by this double standard of comparative principles.

As previously noted, the Utah Legislature adopted the Comparative Negligence Act in 1973. Subsequently, the Legislature enacted the Utah Products Liability Act, Section 78-15-1, et seq., Utah Code Annotated (Repl. Vol. 1953). It is significant that the Legislature did not alter the existing comparative negligence standard whatsoever when establishing the Utah Products Liability Act. In construing legislative intent, it is a well-established principle that the Legislature is presumed to be cognizant of its prior legislative enactments and judicial decisions. Leonard v. City of Bothell, 87 Wash. 2d 847 (1976), 557 P.2d 1306; State v. Cutnose, 87 N.M. 300 (1975), 532 P.2d 889; Dept. of Revenue v. Burlington Northern, Inc., 169 Mont. 202 (1976), 545 P.2d 1083; Alter v. Michael, 50 Cal. Rptr. 553, 413 P.2d 153, 64 C.2d 480 (1966).

The refusal of the Legislature to alter its stand on the standard of comparison as set forth in the Utah Comparative Negligence Act, supra, when it adopted the Utah Products Liability Act, supra, is a clear indication that the Legislature did not intend to treat manufacturers and distributors of products differently from anyone else! To the contrary, the policy of the Legislature was to attempt to more fairly equalize the burdens of manufacturers and distributors of products.

The policy of the Legislature in adopting the Utah Products Liability Act was set forth in Section 78-15-2, Utah Code Annotate (Repl. Vol. 1953), as follows:

> Legislature findings and declarations--Purpose of act.--(1) The legislature finds and declares that the number of suits and claims for damages and the amount of judgments and settlements arising from defective products has increased greatly in recent years. Because of these increases, the insurance industry has substantially increased the cost of product liability insurance. The effect of increased insurance premiums and increased claims has increased product cost through manufacturers, wholesalers and retailers passing the cost of premiums to the consumer.
>
> Further, certain product manufacturers are discouraged from continuing to provide and manufacture such products because of the high cost and possible unavailability of product liability insurance.
>
> (2) In view of these recent trends, and for the purpose of alleviating the adverse effects which these trends are producing in the manufacturing industry, it is necessary to protect the public interest by enacting measures designed to encourage private insurance companies to continue to provide product liability insurance . . . .

Obviously, this Court's ruling herein directly contravenes this legislative statement of public policy. The manufacturer or distributor of a product may now be held liable for damages even though his "fault" is less than the "fault," "negligence" or "gross negligence" of other defendants, all of whom may be dismissed from the action because of the greater faulty conduct or misconduct on the part of the plaintiff. Such a result is grossly unfair, establishes additional "adverse effects" on the manufacturing industry

and ignores the public policy established by the Utah State Legislature.

The Supreme Court of New Hampshire, in the case of Thibault v. Sears, Roebuck & Co., 395 A.2d 843 (1978), as cited in this Court's opinion herein, was faced with the identical problem. The New Hampshire Court properly avoided the double standard that is created by adopting differing comparative principles. The New Hampshire Legislature adopted a comparative negligence statute which established that a plaintiff can recover if the jury does not find that his negligence was greater than the causal negligence of the defendant. R.S.A. 507:7-a (N.H. Supp. 1977). The Court then judicially recognized the comparative concept in strict liability cases "parallel to the Legislature's recognition." Id. at 850. In so doing, the New Hampshire Court adopted the same comparative standard for recovery for the plaintiff so long as his misconduct which contributed to the injury was not greater than that of the manufacturer.

The respondent submits that if comparative principles in products liability cases are to be applied as the law of this jurisdiction, then the policy established by the Utah Legislature as the standard of recovery should be applied here.

II

WHERE COMPARATIVE PRINCIPLES ARE APPLIED IN STRICT LIABILITY CASES, ALL OF THE CONDUCT OF THE PLAINTIFF THAT CONTRIBUTES TO THE CAUSE OF THE ACCIDENT SHOULD BE CONSIDERED.

With the adoption of comparative principles in strict products liability actions, whether by "pure" comparison or in accordance with the Utah Comparative Negligence Act, supra, it is necessary to determine questions of law relative to the defenses available to the defendant in such cases. Rule 76, Utah Rules of Civil Procedure, provides, in part, that:

> If a new trial is granted, the court shall pass upon and determine all questions of law involved in the case presented upon appeal and necessary to the final determination of the case. [Emphasis added.]

This Court, in Hahn v. Armco Steel Co., 601 P.2d 152 (Utah 1979), established only two defenses to products liability claims, namely, "(1) misuse of the product by the user or consumer . . . ; and (2) knowledge of the defect by the user or consumer, who is aware of the danger and yet unreasonably proceeds to make use of the product, i.e., assumption of the risk." Id. at 158.

The Hahn case preceded the Legislature's adoption of the Utah Comparative Negligence Act, supra, and was not an issue therein.

The Utah Comparative Negligence Act, supra, provides for the application of comparative principles to negligence, gross negligence, contributory negligence and assumption of the risk.

This Court has now adopted comparative principles in products liability cases in this matter. In products liability cases, there are generally three categories of conduct by the injured party that must be considered. They are contributory negligence, assumption of risk, and misuse or abuse of the product. There is

also the wrongful conduct of other non-manufacturer/distributor defendants to be considered. Obviously, there is a wide variety in degree of misconduct that falls into each category and, indeed, a great deal of overlapping occurs. These "labeling" difficulties were noted by this Court in two comparative negligence cases. First in Rigtrup v. Strawberry Water Users Assoc., 563 P.2d 1247 (1977), and, more recently, the distinctions between, and the intermingling of, the theories of contributory negligence and assumption of the risk were discussed by this Court in Moore v. Burton Lumber & Hardware Co., No. 16672, May 22, 1981.

The problems created by trying to make these distinctions in products liability cases have been eliminated by adoption of comparative principles in some jurisdictions. In California, where pure comparative negligence was adopted in Li v. Yellow Cab Co., 532 P.2d 1126, the Supreme Court, in Daly v. General Motors Corp., 20 Cal.2d 725, 575 P.2d 1162 (1978), adopted the comparative standard in products liability cases and, further, allowed consideration of all types of conduct by the plaintiff that contributed to the cause of the accident in determining the percentage of fault attributable to him. The Court concluded that, "plaintiff's recovery will be reduced only to the extent that his own lack of reasonable care contributed to his injury." Id. at 1168.

The California Court analyzed the problem of intermingling and overlapping of the defenses and stated:

The syllogism runs, contributory negligence was only a defense to negligence, comparative negligence only affects contributory negligence, therefore comparative negligence cannot be a defense to strict liability. [See Butaud v. Suburban Marine & Sport Goods, Inc. (Alaska 1976), 555 P.2d 42, 47. While fully recognizing the theoretical and semantic distinctions between the twin principles of strict products liability and traditional negligence, we think they can be blended or accommodated . . . . We acknowledged an intermixing of defenses of contributory negligence and assumption of risk and formally effected a type of merger . . . . Id. at 1167.

We think, accordingly, the conclusion may fairly be drawn that the terms "comparative negligence," "contributory negligence" and "assumption of risk" do not, standing alone, lend themselves to the exact measurements of amicrometer-caliper, or to such precise definition as to divert us from otherwise strong and consistent countervailing policy considerations. Fixed semantic consistency at this point is less important than the attainment of a just and equitable result. The interweaving of concept and terminology in this area suggests a judicial posture that is flexible rather than doctrinaire. Id. at 1168.

We do not permit plaintiff's own conduct relative to the product to escape unexamined, and as to that share of plaintiff's damages which flows from his own fault we discern no reason of policy why it should, following Li, be borne by others. Such a result would directly contravene the principle announced in Li, that loss should be assessed equitably in proportion to fault.

We conclude, accordingly, that the expressed purposes which persuaded us in the first instance to adopt strict liability in California would not be thwarted were we to apply comparative principles. What would be forfeit is a degree of semantic symmetry. However, in

> this evolving area of tort law in which new remedies are judicially created, and old defenses judicially merged, impelled by strong consideration of equity and fairness, we seek a larger synthesis. If a more just result follows from the expansion of comparative principles, we have no hesitancy in seeking it, mindful always that the fundamental and underlying purpose of Li was to promote the equitable allocation of loss among all parties legally responsible in proportion to their fault. Id. at 1169.

Thus, the California Court that lead the way in adopting the theory of strict products liability in Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 27 Cal. Rptr. 697, 377 P.2d 897, has now recognized the difficulty in making the distinctions between these various defenses and, therefore, has eliminated them.

Other authorities have determined that negligence on the part of the plaintiff, other than the failure to discover or guard against a defect, is recognized as a defense.

The standard of strict products liability that was adopted by this Court in Hahn v. Armco Steel Co., supra, is set forth in Restatement (2d) Law of Torts, Section 402a. As noted in comment n of that section, contributory negligence of the plaintiff is not a defense only when such negligence consists merely in a failure to discover the defect in the product or to guard against the possibility of its existence. The Restatement does not preclude other forms of contributory negligence as a defense to products liability claims.

This defense was noted in West v. Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976). The Florida Supreme Court stated that

> We recognize that contributory negligence of the user or consumer or bystander in the sense of a failure to discover a defect, or to guard against the possibility of its existence, is not a defense. Contributory negligence of the consumer or user by unreasonable use of a product after discovery of the defect and the danger is a valid defense. Prior to the adoption of the comparative negligence doctrine, a plaintiff's conduct as the sole proximate cause of his injuries would constitute a total defense. See Coleman v. American Universal of Florida, Inc., 264 So.2d 451 (Fla. Appl. 1st 1972), quoting from 2 Fumer and Friedman Products Liability, Section 16.01(3), at 3-20 to 3-31. The defendant manufacturer may assert that the plaintiff was negligent in some specified manner other than failing to discover or guard against a defect, such as assuming the risk, or misusing the product, and that such negligence was a substantial proximate cause of the plaintiff's injuries or damages. See Annot., 13 A.L.R.3d 1057, 1100-1101. The fact that plaintiff acts or fails to act as a reasonable, prudent person, and such conduct proximately contributes to his injury, constitutes a valid defense. In other words, lack of ordinary due care could constitute a defense to strict tort liability.

As noted, the Florida Court relied upon Annot., Products Liability: Strict Liability in Tort, 13 A.L.R.3d 1057, 1101, wherein the following statement appears:

> Also, the defendant may assert that the plaintiff was negligent in some specified manner other than failing to discover or guard against a defect, assuming the risk, or misusing the product, and that such negligence was a substantial, proximate cause of the plaintiff's injuries or damages.

The issue of comparison of all the conduct of the plaintiff is important in the retrial of this matter. In the trial, the jury never reached the issues of assumption of risk or other negligent conduct on the part of Mr. Mulherin. The jury was instructed to return a verdict upon a finding of misuse by the plaintiff.

Since only the issue of misuse by Mr. Mulherin has been determined relative to the available defenses, the retrial of this matter must consider other available defenses. The respondent respectfully submits that all of the negligent conduct of Mr. Mulherin, or any other person or entity that might be involved, should be considered in apportioning the relative degrees of "fault," as has been done in Daly v. General Motors Corp., supra.

CONCLUSION

The respondent respectfully submits that the policy of the State of Utah has been clearly established by the Legislature as it relates to the principles of comparative fault. This Court should not adopt a policy of pure comparative fault in products liability cases where the Legislature has repeatedly refused to adopt such a policy in relation to the Utah Comparative Negligence Act. This Court should avoid the creation of a double standard and adopt a comparative system parallel with that established by the Utah Legislature.

With the application of comparative principles to strict pr
ducts liability cases, all of the conduct of the parties should b
considered in establishing the relative degrees of fault attribu-
table to each.

Respectfully submitted this 26th day of June, 1981.

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