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Tort Law: What Defenses Are There to a Products Liability Action in Ohio?

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TORT LAW: WHAT DEFENSES ARE THERE TO A PRODUCTS LIABILITY ACTION IN OHIO?–*Bowling v. Heil Co.*, 31 Ohio St. 3d 277, 511 N.E.2d 373 (1987); *Onderko v. Richmond Mfg. Co.*, 31 Ohio St. 3d 296, 511 N.E.2d 388 (1987).

I. INTRODUCTION

Products liability actions in Ohio, having their heritage in contract and negligence actions, have emerged as a separate body of law.[1] Considering this heritage, there has been concern over the availability of contract and negligence defenses such as comparative negligence, contributory negligence and assumption of the risk. In two 1986 cases, the Ohio Supreme Court addressed these concerns. In *Bowling v. Heil Co.*[2] the court decided the issue of whether the principles of comparative negligence are applicable to products liability cases based upon strict liability in tort.[3] The Ohio Supreme Court also discussed the issues of contributory negligence and assumption of the risk.[4] In a companion case, *Onderko v. Richmond Mfg. Co.*,[5] the Ohio Supreme Court specifically discussed and applied the defense of assumption of the risk in a strict products liability action.[6] The court also discussed the use of a negligence action for a defective product case and the corresponding negligence defenses of contributory and comparative negligence.[7]

This casenote will focus on the Ohio Supreme Court's distinction between implied assumption of the risk and its dissimilarity to the doctrine of contributory negligence. This casenote will also discuss how assumption of the risk, as a complete defense to a products liability action, does not revive the doctrine of contributory negligence. Finally this casenote will discuss Ohio's express or implied assumption of the risk statute and how it affects the decisions of *Bowling* and *Onderko*, and future litigation.

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1. Bowling v. Heil Co., 31 Ohio St. 3d 277, 279, 511 N.E.2d 373, 375 (1987).

2. *Id.*

3. *Id.* at 285-86, 511 N.E.2d at 379-80 (The court decided that contribution among joint tortfeasors did not abolish the doctrine of joint and several liability and held that comparative negligence did not apply to strict products liability actions).

4. *Id.* at 282–83, 511 N.E.2d at 378.

5. 31 Ohio St. 3d 296, 511 N.E.2d 388 (1987).

6. *Id.* at 298–99, 511 N.E.2d at 390–91.

7. *Id.* at 300, 511 N.E.2d at 391.

II. FACTS AND HOLDING

A. *Bowling v. Heil Co.*

Emma K. Bowling brought a wrongful death action against the Heil Company, among others,[8] for the death of her husband.[9] David B. Bowling died when he was crushed between the chassis of a truck and the dump bed mounted on it.[10] The defendant, Heil, was in the business of manufacturing and selling dumptruck beds and hydraulic dump hoist systems which are attached to various models of trucks.[11] On April 26, 1980, an employee of Rodgers, the owner of the dumptruck, made the vehicle available to Timothy Brashear for his personal use.[12] Brashear's brother, David, knowing Mr. Bowling needed gravel for his driveway, contacted David Bowling.[13] All three men purchased five tons of gravel and returned to the Bowling residence where Timothy Brashear backed the truck into the driveway and raised the bed to spread the gravel.[14] When Brashear tried to lower the bed, it would not descend due to the fact that one of the welds for the hydraulic hoist control failed.[15] David Bowling leaned over the chassis, underneath the raised bed, to investigate the problem.[16] He grabbed the control lever on the pump valve assembly with his hand and the dump bed rapidly descended upon him, killing him instantly.[17]

Bowling's wife proceeded against Heil on negligence and strict products liability theories.[18] The jury returned a verdict in favor of Mrs. Bowling and assessed damages at $1.75 million.[19] Upon written interrogatories, the jury determined that Heil was both negligent and

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8. Other defendants named in the suit were Ralph Rodgers, owner of the dumptruck which killed David Bowling; Jake Sweeney Chevrolet, Inc., a Heil distributor who originally equipped the truck with a cable controlled hydraulic dump hoist; and Robco, Inc., another Heil distributor which replaced the cable controlled hoist system with a lever controlled hoist system. *Bowling*, 31 Ohio St. 3d at 277, 511 N.E.2d at 374. Prior to trial Robco settled with Mrs. Bowling for $100,000 and was dismissed. *Id.* at 278, 511 N.E.2d at 374. During the trial Devers also settled and was dismissed. *Id.* At the close of the evidence, Sweeney was granted a directed verdict on its crossclaim for indemnity against Heil. *Id.*

9. *Id.* at 277, 511 N.E.2d at 374.

10. *Id.*

11. *Id.*

12. *Id.* at 278, 511 N.E.2d at 374.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* The jury determined that Heil was both negligent and strictly liable and that Bowling was contributorily negligent but that he had not assumed a known risk. *Id.* They attributed the fault at forty percent to Heil, thirty percent to Bowling, and thirty percent to Robco. *Id.*

strictly liable, and that Bowling was contributorily negligent. But, the jury determined that he had not assumed a known risk.[20] After modification of the damages by the Ohio Court of Appeals, the case went to the Ohio Supreme Court upon a motion to certify the record.[21]

The Ohio Supreme Court agreed with the court of appeals that Ohio's comparative negligence statute[22] did not apply to products liability actions grounded in strict liability.[23] However, the Ohio Supreme Court disagreed with the appellate court's holding that contributory negligence, when it amounts to affirmative action as opposed to a passive failure to discover a defect in a product or to guard against the possibility of such defect, constituted a defense to a products liability action.[24] The court of appeals also had erroneously applied a pure comparative negligence principle when it apportioned the respective degrees of fault between Heil's strict liability and Bowling's contributory negligence.[25] The Ohio Supreme Court reversed both of these holdings, recognizing the differences between the policy and goals underlying negligence actions and those underlying strict products liability actions.[26]

For instance, the court of appeals construed Comment n to the Restatement (Second) of Torts Section 402A[27] and held that a plaintiff's passive contributory negligence provides no defense, but his contributorily negligent "affirmative action" does provide a defense to a products liability action.[28] The Ohio Supreme Court rejected this reasoning and held that Comment n does not recognize a middle ground which would fall between failure to discover and voluntary assumption of the risk. Instead, the court determined that Comment n covers all

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20. *Id.*

21. *Id.* at 278, 511 N.E.2d at 375. On appeal, the court of appeals affirmed the jury's verdict, but remanded the case with directions to enter judgment against Heil for only forty percent of $1.75 million or $700,000.

22. OHIO REV. CODE ANN. § 2315.19 (Baldwin Supp. 1989).

23. Bowling v. Heil Co., 31 Ohio St. 3d 277, 279, 511 N.E.2d 373, 375 (1987).

24. *Id.*

25. *Id.*

26. *Id.* Strict liability is governed by the distinct principles of strict liability in tort. *Id.* at 282, 511 N.E.2d at 377. These require liability even where a manufacturer has exercised all possible care, unlike negligence actions, which require the element of ordinary care. *Id.*

27. RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965) provides:

> Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a 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 voluntarily 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.

28. *Bowling*, 31 Ohio St. 3d at 282, 511 N.E.2d at 378.

conduct considered to be contributorily negligent.[29] Under Comment n, either a plaintiff's contributory negligence is considered a voluntary assumption of the risk or it is not. If it is, then it is a defense in a strict liability action.[30] The jury originally found Bowling was contributorily negligent but had not voluntarily assumed a known risk, therefore his contributory negligence was not a defense for Heil.[31]

After recognizing no support in existing Ohio law for the acceptance of comparative negligence as a defense in products liability actions, the Ohio Supreme Court went on to determine that comparative negligence is not a proper defense.[32] Because this issue was one of first impression, the Ohio Supreme Court looked to case law of other jurisdictions for guidance.[33] However, the case law is conflicting.[34] The Ohio Supreme Court agreed with the decision in *Kindard v. Coats Co., Inc.*,[35] which stated:

> Products liability under Section 402A does not rest upon negligence principles, but rather on the concept of enterprise liability for casting a defective product into the stream of commerce. . . . Thus, the focus is upon the nature of the product, and the consumer's reasonable expectations with regard to that product, rather than on the conduct either of the manufacturer or the person injured because the product.[36]

Upon holding that comparative negligence has no application to products liability cases, the Ohio Supreme Court reversed the reduction of Mrs. Bowling's verdict by the court of appeals.[37]

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29. *Id.* at 283, 511 N.E.2d at 378.

30. *Id.*

31. *Id.*

32. *Id.* The court reached this decision after it evaluated the public policy underlying the application of strict liability in tort to products liability cases. *Id.* at 283–85, 511 N.E.2d 378–79. The court said that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production. Those who are merchants and those engaged in manufacturing have the capacity to distribute the losses of the few among the many who purchase the products. *Id.*

33. *Id.* at 285, 511 N.E.2d at 379.

34. Comparative negligence has been applied in products liability cases by a number of courts. *See, e.g.*, Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984); Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981). Numerous courts have refused to apply comparative negligence principles to products liability cases. *See, e.g.*, Correig v. Firestone Tire & Rubber Co., 388 Mass. 342, 446 N.E.2d 1033 (1983); Young's Machine Co. v. Long, 100 Nev. 692, 692 P.2d 24 (1984); Smith v. Smith, 278 N.W.2d 155 (S.D. 1979); Seay v. Chrysler Corp., 93 Wash. 2d 319, 609 P.2d 1382 (1980).

35. 37 Colo. App. 555, 557, 553 P.2d 835, 837 (1976).

36. *Id.*

37. Bowling v. Heil Co., 31 Ohio St. 3d 277, 286, 511 N.E.2d 373, 380 (1987). The court of appeals also held that under Ohio's Contribution Among Joint Tortfeasors Act a strictly liable defendant is not jointly and severally liable for damages attributable to the negligence of another defendant. The Ohio Supreme Court held that these statutes did not abolish the longstanding

Justice Holmes dissented from the majority opinion.[38] He found Bowling's conduct, as a matter of law, to be an assumption of the risk because Bowling's conduct was wholly self-initiated and independent of any defect within the product.[39] Justice Holmes felt the majority's standard for assumption of the risk was impractical in that it required the jury to determine Bowling's subjective state of mind at the instant he reached under the truckbed.[40] Justice Holmes would hold, that if Heil were to use the defense of assumption of the risk, Heil would have to demonstrate that Bowling intentionally and unreasonably exposed himself to danger. Heil would also have to show that, though possibly created by Heil, the danger was known or should have been known to Bowling.[41] Holmes would consider the obviousness of the danger, the voluntary nature of Bowling's actions and the existence of the warning labels on the truckbed as dispositive. Holmes would hold that Bowling had unreasonably assumed a known risk.[42]

Holmes also believed that strict products liability is tied to, and based upon, negligence theory. Therefore, for Holmes, the comparative negligence defense is applicable to strict products liability as well.[43]

B. Onderko v. Richmond Manufacturing Co.

The facts of the second of the Ohio Supreme Court cases are as follows. In *Onderko v. Richmond Mfg. Co.*,[44] the plaintiff, James Onderko, was injured when an auger on a horizontal earth-boring machine allegedly lurched forward and entangled his clothing.[45] The accident caused Onderko to lose his right arm and much of his right shoulder.[46] Onderko brought suit alleging strict products liability and negligence actions against the product supplier, Syracuse Supply Company, and the named manufacturing defendant, Richmond Manufacturing Company.[47] Onderko withdrew his negligence claim during the course of the trial. The jury was instructed that, if they decided that

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common law doctrine of joint and several liability in Ohio, and therefore reversed the court of appeals.

38. *Id.* at 288, 511 N.E.2d at 382.

39. *Id.* at 289, 511 N.E.2d at 382.

40. *Id.*

41. *Id.* at 289, 511 N.E.2d at 383. The warning stated: " CAUTION: WHENEVER THE BODY IS IN ANY ELEVATED OR RAISED POSITION IT MUST BE SECURELY PROPPED OR BLOCKED SO IT CAN NOT FALL ON ANYONE." *Id.* at 290, 511 N.E.2d at 383.

42. *Id.* at 289–91, 511 N.E.2d at 383–84.

43. *Id.* at 292, 511 N.E.2d at 385.

44. 31 Ohio St. 3d 296, 511 N.E.2d 388 (1987).

45. *Id.* at 297, 511 N.E.2d at 389.

46. *Id.*

47. *Id.*

Onderko had assumed the risk, they should determine the extent to which Onderko's conduct contributed to his injury, by assigning to it a percentage of total responsibility. If Onderko's responsibility was less than fifty percent of the total, they were instructed to enter a verdict in his favor.[48] The jury returned a verdict in favor of Onderko and, in response to interrogatories, found that Onderko had assumed the risk which was a proximate cause of his injury.[49] The jury apportioned fault among the parties at sixty percent to Richmond Manufacturing Company, fifteen percent to Syracuse Supply Company and twenty-five percent to Onderko.[50] The $2,500,000 damage award was reduced twenty-five percent to $1,875,000 before it was awarded to Onderko.[51]

The Ohio Court of Appeals found no error with the trial court's instruction to the jury on comparative negligence principles in a strict products liability action and upheld the court's reduction of the award.[52] The court reasoned that principles of comparative fault should apply in strict liability cases. It stated that assumption of the risk is not a complete bar to recovery, but rather, serves only to reduce the amount of the judgment.[53] The case then went to the Ohio Supreme Court on a motion to certify the record.[54]

The Ohio Supreme Court recognized the inconsistency of the jury instruction.[55] The jury was first told that if Onderko had assumed the risk, then he was barred from recovery. The jury was later told that assumption of the risk merely reduced the judgment if the assumption of the risk constituted fifty percent or less of the total responsibility.[56] Quoting from the decision of *Bowling v. Heil Co.*,[57] which it had decided earlier that day, the Ohio Supreme Court stated that the "principles of comparative negligence or comparative fault have no application to a products liability case based upon strict liability in tort, and an otherwise strictly liable defendant has a complete defense if the plaintiff voluntarily and knowingly assumed the risk occasioned by the defect."[58]

On the subject of conflicting jury instructions, when a court states a correct rule or principle of law and also states an incorrect rule or

48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 389–90, 511 N.E.2d at 389–90.
54. *Id.* at 298, 511 N.E.2d at 390.
55. *Id.*
56. *Id.* at 298–99, 511 N.E.2d at 390.
57. 31 Ohio St. 3d 277, 511 N.E.2d 373 (1987).
58. *Onderko*, 31 Ohio St. 3d at 299, 511 N.E.2d at 390–91.

principle of law with reference to the same subject matter, no presumption arises that the correct rule was applied by the jury. The error in giving the incorrect rule will be deemed prejudicial.[59] In such a case, reversal of the jury verdict is mandated and remand for retrial is ordered where the appealing party is not clearly entitled to judgment as a matter of law.[60] The Ohio Supreme Court held that Richmond was not clearly entitled to judgment because at the time the jury instruction was given it was not clearly erroneous since *Bowling* had not yet been decided.[61] The court also held that, since the jury determined that Onderko had assumed the risk, the verdict could not stand. They remanded the case for retrial.[62]

The Ohio Supreme Court reasoned that assumption of the risk as a total bar to recovery is not as harsh as it appears. That is, foreclosure of recovery on a strict products liability theory does not deprive an injured plaintiff of all possible remedies.[63] A plaintiff injured by a product is not limited to a strict products liability action. Rather, he may also bring an action in negligence.[64] They are separate theories but are not mutually exclusive; both can be pleaded as causes of action.[65] The court reasoned that, in such instances, the plaintiff's assumption of the risk would not necessarily be an absolute bar to the negligence action, but would merely reduce his recovery, provided that the assumption of the risk is less than fifty percent of the total responsibility for the injuries incurred.[66]

Justices Sweeney and Holmes dissented.[67] Justice Sweeney believed that since Ohio has adopted a comparative negligence defense to negligence claims, Ohio is no longer an "all or nothing" jurisdiction. Therefore, in the interest of fundamental fairness, Ohio should not be an "all or nothing" jurisdiction in strict products liability cases.[68] Justice Sweeney stated that under a pure comparative fault analysis, no defense would be a total bar to recovery unless the plaintiff was one hundred percent at fault. "Thus, a defendant's liability would remain strict."[69]

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59. Bosjnak v. Superior Sheet Steel Co., 145 Ohio St. 538, 539, 62 N.E.2d 305, 306 (1945).
60. *Id.*; *see also* Westropp v. E.W. Scripps Co., 148 Ohio St. 365, 74 N.E.2d 340 (1947); Marcoguiseppe v. State, 114 Ohio St. 299, 151 N.E. 182 (1926).
61. *Onderko*, 31 Ohio St. 3d at 300, 511 N.E.2d at 391.
62. *Id.*
63. *Id.* at 300, 511 N.E.2d at 392.
64. *Id.*
65. *Id.*; *see also* 2 AMERICAN LAW OF PRODUCTS LIABILITY 3d § 16:31 (1987).
66. *Onderko*, 31 Ohio St. 3d at 301, 511 N.E.2d at 392.
67. *Id.* at 302–05, 511 N.E.2d at 393–95.
68. *Id.* at 302, 511 N.E.2d at 393.
69. *Id.* at 303, 511 N.E.2d at 393.

Justice Holmes, who also dissented in *Bowling*, agreed with Justice Sweeney that the principles of comparative negligence are warranted in the determination of the causal fault of the injuries sustained and the fair distribution of the burdens of compensation for such injuries.[70] Both Justices would have affirmed the decisions of the lower courts.[71]

III. BACKGROUND

A. *Products Liability Law in Ohio*

Products liablity law has evolved in Ohio as a separate identifiable body of law stemming from contract and negligence case law.[72] The seminal case where Ohio courts accepted strict liability in a products case was *Rogers* v. *Toni Home Permanent Co.*[73] The *Rogers* court held that the manufacturer ought to be held to strict accountability to any consumer who buys a product in reliance on representations by the manufacturer and later suffers injury because the product is defective.[74] Eight years later, in *Lonzrick* v. *Republic Steel Corp.*,[75] actions in tort based upon a theory of implied warranty were merged with the theories in the *Rogers* case. In the 1977 case of *Temple v. Wean United, Inc.*,[76] the Ohio Supreme Court adopted section 402A of the Restatement (Second) of Torts outright.[77]

Four years later in *Leichtamer v. American Motors Corp.*,[78] strict products liability protection, which had already been extended to defectively manufactured products, was extended to defectively designed

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70. *Id.* at 304, 511 N.E.2d at 394.

71. *Id.* at 304–05, 511 N.E.2d at 394–95.

72. *Id.* at 279, 511 N.E.2d at 375.

73. 167 Ohio St. 244, 147 N.E.2d 612 (1958) (A consumer injured by a defect in a product could maintain an action in tort against the manufacturer based upon express warranty, though no contractual relationship existed between them.).

74. *Id.* at 249, 147 N.E.2d at 615–16.

75. 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

76. 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977).

77. RESTATEMENT (SECOND) OF TORTS § 402A (1965) states:

1. One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if:

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

2. The rule stated in subsection one applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

78. 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981).

products.[79] *Leichtamer* recognized that the policy behind the strict liability doctrine was based on the notion that "the public interest in human life and safety [could] best be protected by subjecting manufacturers of defectively designed products to strict liability in tort when [those] products cause harm."[80] The following year, in *Knitz v. Minster Machine Co.*,[81] the Ohio Supreme Court reaffirmed the principle that the cause of action in a case involving defectively designed products is based on strict liability in tort because of consumer expectations. Finally, in *Cremeans* v. *International Harvester Co.*,[82] the Ohio Supreme Court emphasized that the focus of a products liability case is on the product and the nature of its defect, not on the conduct of the manufacturer.[83]

B. Defenses

Prior to the California Supreme Court decision in *Greenman v. Yuba Power Prods. Inc.*,[84] and the publishing of the Restatement (Second) of Torts 402A,[85] the common law doctrine of contributory negligence prevailed as a defense to products liability actions.[86] At that time, contributory negligence was removed as a total bar to recovery for strict liability in tort for defective products.[87] Comment n to the Restatement (Second) of Torts § 402A states that contributory negligence which constitutes assumption of the risk is a total bar to strict liability recovery.[88]

In Ohio law governing products liability actions there are two defenses based upon plaintiff's misconduct, assumption of the risk and

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79. *Id.* at 456, 424 N.E.2d 570. The doctrine of strict liability emerged in an effort to place liability on the manufacturer of a defective product in Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

80. *Leichtamer*, 67 Ohio St. 2d at 464–65, 424 N.E.2d at 575.

81. 69 Ohio St. 2d 460, 432 N.E.2d 814 (1982).

82. 6 Ohio St. 3d 232, 452 N.E.2d 1281 (1983).

83. *Id.* at 234–35, 452 N.E.2d at 1284. The *Cremeans* case also states that the negligence concept of ordinary care is not a part of the products liability doctrine. Instead strict products liability is governed by principles which impose liability even when the manufacturer has exercised all reasonable care. *Id.*

84. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

85. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

86. S. DARLING, OHIO CIVIL JUSTICE REFORM ACT 111 (1987).

87. *Id.*

88. *Id.* at 112. By 1974, a majority of states shifted from contributory negligence to comparative negligence as a defense. *Id.* The key decision, which was pronounced by the California Supreme Court in Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978), concluded that the "expressed purposes which persuaded us in the first instance to adopt strict liability . . . would not be thwarted were we to apply comparative principles." *Id.* at 737, 575 P.2d at 1169, 144 Cal. Rptr. at 387.

comparative negligence.[89] A strictly liable defendant has a complete defense if the plaintiff voluntarily and knowingly assumed an unreasonable risk occasioned by the defect.[90] Comment n of the Restatement (Second) of Torts Section 402A also sets out an assumption of the risk defense which was adopted by Ohio.[91]

In *Anderson v. Ceccardi*,[92] the Ohio Supreme Court merged implied assumption of the risk with the doctrine of contributory negligence for the purposes of the comparative negligence statute.[93] In *Wilfong v. Batdorf*,[94] the Ohio Supreme Court declared that the principles of comparative negligence are part of the common law of Ohio.

Concommitant with the 1987 decisions in *Bowling v. Heil Co.*[95] and *Onderko v. Richmond Mfg. Co.*,[96] Ohio established by statute the defense of assumption of the risk.[97] The statute was intended generally

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89. One defense recognized in Ohio is misuse of the product by the plaintiff in an unforseeable manner. *See* Menifee v. Ohio Welding Prods., Inc., 15 Ohio St. 3d 75, 472 N.E.2d 707 (1984). This distinct defense is not the focus of this casenote and will no longer be discussed.

90. *See* Jones v. White Motor Corp., 61 Ohio App. 2d 162, 401 N.E.2d 223 (1978); *see also* Ettin v. AVA Truck Leasing, Inc., 53 N.J. 463, 251 A.2d 278 (1969); Maiorino v. Weco Prods. Co., 45 N.J. 570, 214 A.2d 18 (1965).

91. *See supra*, note 27, and accompanying text.

92. 6 Ohio St. 3d 110, 451 N.E.2d 780 (1983).

93. *Id.* at 113, 451 N.E.2d at 783; *see* OHIO REV. CODE ANN. § 2315.19 (Baldwin 1989).

94. 6 Ohio St. 3d 100, 451 N.E.2d 1185 (1983).

95. 31 Ohio St. 3d 277, 511 N.E.2d 373 (1987).

96. 31 Ohio St. 3d 296, 511 N.E.2d 388 (1987).

97. OHIO REV. CODE ANN. § 2315.20 (Baldwin Supp. 1989).

Express or implied assumption of the risk as affirmative defense to product liability claim.

(A) As used in this section, "claimant," "harm," "product liability claim," and "supplier" have the same meanings as in section 2307.71 of the Revised Code.

(B)(1) Express or implied assumption of the risk may be asserted as an affirmative defense to a product liability claim under sections 2307.71 to 2307.80 of the Revised Code.

(2) Subject to division (B)(3) of this section, if express or implied assumption of the risk is asserted as an affirmative defense to a product liability claim under sections 2307.71 to 2307.80 of the Revised Code and if it is determined that the claimant expressly or impliedly assumed a risk and that such express or implied assumption of the risk was a direct and proximate cause of harm for which the claimant seeks to recover damages, the express or implied assumption of the risk is a complete bar to the recovery of those damages.

(3) If implied assumption of the risk is asserted as an affirmative defense to a product liability claim against a supplier under division (A)(1) of section 2307.78 of the Revised Code, section 2315.19 of the Revised Code is applicable to that affirmative defense and shall be used to determine whether the claimant is entitled to recover compensatory damages based on that claim and the amount of any recoverable compensatory damages.

(C)(1) Except as provided in division (C)(2) of this section, contributory negligence is not an affirmative defense to a product liability claim under sections 2307.71 to 2307.80 of the Revised Code.

(2) Contributory negligence may be asserted as an affirmative defense to a product liability claim against a supplier under division (A)(1) of section 2307.78 of the Revised Code. If contributory negligence is asserted as an affirmative defense to such a product liability claim, section 2315.19 of the Revised Code is applicable to that affirmative defense

to preserve the existing common law controlling contributory negligence and assumption of the risk defenses. It provides that contributory negligence is not a defense for products liability claims based on strict liability and that express or implied assumption of the risk is a total bar to recovery. The statute provides that, for a products liability action against a supplier, the comparative negligence statute controls.

IV. ANALYSIS

The Ohio Supreme Court, in rejecting the Ohio Court of Appeals' analysis of Comment n to the Restatement (Second) of Torts Section 402A in *Bowling v. Heil Co.*,[98] categorized assumption of the risk as a form of contributory negligence.[99] The literal reading of Comment n, would lead one to believe that assumption of the risk is a category of contributory negligence. The Ohio Supreme Court further held that contributory negligence that amounts to assumption of the risk is a complete defense.[100] Relying on the trial court decision that Mr. Bowling had not assumed the risk, the Ohio Supreme Court held that Heil did not have an assumption of the risk defense.[101] But, the analysis is not quite that simple. The same day that the Ohio Supreme Court decided *Bowling*, they also decided *Onderko v. Richmond Mfg. Co.*,[102] where the court stated that for assumption of the risk to be a defense the injured party must voluntarily and unreasonably assume a known risk.[103] Later in the same opinion, the court discussed the logic behind assumption of the risk as a separate defense from contributory negligence.[104] The court stated that foreclosure of recovery by assumption of the risk in a strict products liability claim does not deprive an injured plaintiff of all remedies.[105] The court held that a plaintiff injured by a product was not limited to an action in strict liability, but could also bring an action in negligence.[106] The court also stated that a plaintiff

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and shall be used to determine whether the claimant is entitled to recover compensatory damages based on that claim and the amount of any recoverable compensatory damages.

98. 31 Ohio St. 3d 277, 511 N.E.2d 373 (1987).

99. *Id.* at 283, 511 N.E. 2d at 378.

100. *Id.*

101. *Id.*

102. 31 Ohio St. 3d 296, 511 N.E.2d 388 (1987).

103. *Id.* at 299, 511 N.E.2d at 391. *See also* Digges and Billmyre, *Product Liability in Maryland: Traditional & Emerging Theories of Recovery and Defense*, 16 U. BALT. L. REV. 1, 40–41 (1986) (A defendant relying on an assumption of the risk defense must prove the plaintiff actually knew and appreciated the particular risk or danger created by the defect, the plaintiff voluntarily encountered the risk while realizing the danger, and the plaintiff's decision to encounter the known risk was unreasonable.).

104. *Onderko*, 31 Ohio St. 3d at 300–01, 511 N.E.2d at 392.

105. *Id.*

106. *Id.* A case in which the plaintiff alleges strict products liability, may also be submitted

whose recovery is barred on a strict liability claim because he assumed the risk, may still recover on a negligence theory where such negligence can be proved.[107] If assumption of the risk barred recovery under strict products liability, it would also bar recovery based on negligence if assumption of the risk was considered contributory negligence and that assumption of the risk was greater than fifty percent of the fault. Although the Ohio Supreme Court did not elaborate upon the difference between assumption of risk and contributory negligence in *Bowling*, its convictions were evident in the holding of *Onderko*.

According to the *Onderko* court, the premise underlying assumption of the risk defense is that a plaintiff who is aware of a known risk and voluntarily assumes it unreasonably, should not recover for injuries caused by the defective product.[108] This defense may be employed regardless of the plaintiff's theory of recovery.[109] In order for the defense of assumption of the risk to be used, the defendant must prove all the elements of the defense.[110] The defendant must first prove that the plaintiff knew the product was defective.[111] The mere failure to discover the defect is insufficient to establish this element, because notions of contributory negligence would be interjected into assumption of the risk. Therefore, a contributory negligence defense would be created, yet it is not a defense in strict products liability actions.[112] The defendant must then show that the plaintiff appreciated the risk, voluntarily and unreasonably took the risk presented by the defective product, and was injured as a proximate result of the defect.[113] Although the literal wording of Comment n to the Restatement (Second) of Torts 402A seems to indicate that assumption of the risk is a type of contributory negligence, the Ohio Supreme Court has recognized assumption of the risk as an independent defense.[114] Since assumption of the risk stands on its own as a defense, contributory negligence is not revived as a bar to recovery in strict products liability actions.[115]

Strict products liability is not based upon negligence principles, rather, it rests upon the concept of enterprise liability for placing a

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to the factfinder on a negligence theory.

107. *Id.*

108. *See* Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. REV. 643 (1978).

109. Digges & Billmyre, *supra* note 103, at 40.

110. *Id.*

111. *Id.* at 41.

112. *Id.*

113. *See* Hasten, *Comparative Liability Principles: Should They Now Apply to Strict Products Liability Actions in Ohio?* 14 U. TOL. L. REV. 1151 (1983).

114. *Id.* at 1160 n.26.

115. *Id.* at 1182.

defective product into the stream of commerce.[116] "[T]he focus is upon the nature of the product and the consumer's reasonable expectations with regard to that product, rather than on the conduct of either the manufacturer or the person injured because of the product."[117] Strict products liability does not look at fault;[118] however, that is exactly what the defense of assumption of the risk does. It looks to see to what extent the plaintiff assumed an unreasonable and known risk. Since the plaintiff was at "fault," he is barred from recovery. For this defense to make sense and be fair, the plaintiff should only be barred if his "fault," his assumption of the risk, is greater than the liability of the manufacturer who placed a defective product into the stream of commerce. This would create a comparative fault analysis. However, the Ohio Supreme Court rejected using a comparative negligence/fault analysis for strict products liability in *Bowling*, based on the underlying policy of protecting the consumers' expectations. If the underlying policy is to protect the consumers' expectations by not looking to the manufacturer's fault, the consumers' expectation of being protected from defective products are lessened by allowing the manufacturer to use the plaintiff's fault to prove that the plaintiff assumed the risk and therefore bar recovery. It encourages a manufacturer to worry less about defects by providing a defense of complete immunity.

The Ohio Supreme Court tried to downplay the harshness of the assumption of the risk defense as a total bar to recovery in its holding in *Onderko*. The court stated that a plaintiff could also bring an action based on negligence, and although the plaintiffs' assumption of the risk will totally bar the products liability action, it will serve only to reduce the amount of damages the plaintiff would recover under the negligence theory. There are a few problems with this logic. First, it assumes a plaintiff will have a negligence action. What about those plaintiffs that cannot establish lack of ordinary care, which is subject to the reasonable man test, by the defendant? Second, it assumes the jury will determine that the assumption of the risk by the plaintiff is less than fifty percent of the total fault, and this would require a comparative fault analysis when the jury is not supposed to consider the fault of the manufacturer. Third, although assumption of the risk is a defense of its own in a negligence action, it can be argued that assumption of the risk is just another name for contributory negligence. The facts of a case

116. Kinard v. Coats Co., 37 Colo. App. 555, 557, 553 P.2d 835, 837 (1976).

117. *Id.*

118. *But see* Note, *Loosing the Shackles of "No-Fault" in Strict Liability: A Better Approach to Comparative Fault*, 33 CLEV. ST. L. REV. 339 (1984). Since it is defectiveness of a product which underlies a strict products liability cause of action, it cannot be logically stated that such cause of action is not conceptually predicated on fault principles. *Id.* at 253–54.

will be the same for both causes of action. The activity which is classified as assumption of the risk in the products liability action based upon strict liability is readily classifiable as contributory negligence in the negligence action. This all seems like a rule of labels, but it can have a significant impact on how to approach a lawsuit and the outcome of the suit if attorneys are not careful as to which cause of action they bring.

As Justice Holmes pointed out in his dissent in *Bowling*, "[i]n such interpretation of the law, there is a vast capacity for abusive pleadings, wherein one may plead negligence merely to have the procedural right to describe his conduct before the jurors. On the other hand, one may remove the negligence count to prevent the opposing counsel from describing conduct."[119]

Justice Sweeney, in his dissent in *Onderko,* also criticized the reasoning in *Bowling*. He stated that:

> Plaintiffs' attorneys will almost always characterize their client's conduct as "contributory negligence", since assumption of the risk acts as a total bar to recovery. Defense attorneys, on the other hand, will almost always attempt to show the plaintiff's conduct constituted 'assumption of the risk' since such a defense, if successful, will prevent any recovery by the plaintiff from their clients.[120]

Another problem Justice Holmes pointed out in his dissent in *Bowling* is that of jury confusion.[121] Holmes stated that courts have a responsibility to encourage consistency in jury instructions and problems are created when the combined effects of jury instructions regarding products liability and negligence creates a morass of competing and conflicting obligations.[122] A negligence pleading allows a jury instruction for mitigation of damages and the jury must compare and balance the fault of all parties.[123] A pleading in strict liability requires an instruction for either full recovery or no recovery.[124] Justice Holmes provided an excellent example: "suppos[e] a pleading [is] framed in negligence, strict liability and/or breach of warranty, with multiple defendants who each assert various legal theories to describe the plaintiff's conduct, then juror confusion is almost a certainty."[125]

Both Justice Sweeney and Justice Holmes believe the problem of

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119. *Bowling*, 31 Ohio St. 3d at 293, 511 N.E.2d at 385.
120. *Onderko*, 31 Ohio St. 3d at 303, 511 N.E.2d at 394.
121. *Bowling*, 31 Ohio St. 3d at 293, 511 N.E.2d at 385.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 293, 511 N.E.2d at 386; *see* Hasten, *supra* note 113, at 1177; *see also* Stueve v. American Honda Motors Co. Inc., 457 F. Supp. 740, 751 (D. Kan. 1978).

classifying the plaintiff's actions as assumption of the risk or contributory negligence and the problem of no fault of the manufacturer versus the degree of fault of the plaintiff would be solved by adopting a pure comparative fault analysis in strict products liability cases.[126] Research indicates a trend toward applying comparative fault principles to strict products liability actions.[127]

Since the decisions in *Bowling* and *Onderko*, the Ohio legislature has enacted a statute specifically dealing with assumption of the risk as an affirmative defense to a products liability claim.[128] This statute was intended to preserve the existing common law controlling contributory negligence and assumption of the risk for a products liability claim.[129] The statute states, for product liability claims based on strict liability, that contributory negligence is not a defense[130] and express or implied assumption of the risk is a total bar to recovery.[131]

This statute permits an assumption of the risk defense in a negligence-based product liability claim against a supplier.[132] When a negligence claim is brought against a supplier the comparative negligence statute controls.[133] Contributory negligence and implied assumption of the risk are included in the comparative process of the comparative negligence statute.[134] It must be stressed that this section of the statute

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126. *Bowling*, 31 Ohio St. 3d at 296, 511 N.E.2d at 387; *Onderko*, 31 Ohio St. 3d at 304, 511 N.E.2d at 394.

127. *See, e.g.*, Coney v. J.L.G. Indus., Inc., 97 Ill. 2d 104, 110–14, 454 N.E.2d 197, 204–05 (1983); Suter v. San Angelo Foundry & Machine Co., 81 N.J. 150, 160–64, 406 A.2d 140, 145–47 (1979); Sandford v. Chevrolet Div. of General Motors, 292 Or. 590, 590–92, 642 P.2d 624, 624–25 (1982). It also appears to be supported in scholarly literature. *See, e.g.*, PROSSER & KEETON, LAW OF TORTS 468, 478 (5th ed. 1984); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171 (1974).

128. *See* OHIO REV. CODE ANN. § 2315.20 (Baldwin Supp. 1989). The provisions of § 2315.20 "shall apply only to product liability actions that are commenced on and after the effective date of this act and that are based upon claims for relief that arise on or after that date." *Id.*

129. A products liability claim is defined by OHIO REV. CODE ANN. § 2307.71(M) (Baldwin Supp. 1989).

> (M) "Product liability claim" means a claim that is asserted in a civil action and that seeks to recover compensatory damages from a manufacturer or supplier for death, physical injury to person, emotional distress, or physical damage to property other than the product in question, that allegedly arose from any of the following:
>
> (1) The design, formulation, production, construction, creation, assembly, rebuilding, testing, or marketing of that product;
>
> (2) Any warning or instruction, or lack of warning or instruction, associated with that product;
>
> (3) Any failure of that product to conform to any relevant representation or warranty.

130. OHIO REV. CODE ANN. § 2315.20(C)(1) (Baldwin Supp. 1989).

131. *Id.* § 2315.20(B)(2).

132. *Id.* § 2315.20(B)(3) and (C)(2).

133. *Id.* § 2315.19.

134. *Id.*

applies to a negligence-based claim of products liability and not to a strict products liability claim which does not allow contributory negligence or comparative negligence as a defense.[135]

The key to determining what defense is available is to recognize who the plaintiff is suing and on what theory of recovery. Some examples are helpful in understanding the code:

> 1. For a strict products liability claim against the manufacturer under Ohio Revised Code Section 2307.73 or against a supplier, under Section 2307.78(A)(2) or Section 2307.78(B), conduct of a plaintiff which constitutes contributory negligence but not assumption of the risk is not an affirmative defense. Conduct of a plaintiff which constitutes assumption of the risk (whether that conduct also constitutes contributory negligence or whether it constitutes assumption of the risk but not contributory negligence) is a total bar to recovery.[136]
> 2. For a negligence-based product liability claim against a supplier under Ohio Revised Code Section 2307.78(A)(1), the comparative negligence statute controls. Thus, express assumption of the risk, whether reasonable or unreasonable, is a total bar to recovery, and implied assumption of the risk, whether reasonable or unreasonable, is merged into the comparative process with contributory negligence.[137]

Had Ohio's statute on assumption of the risk as a defense to products liability claims been in effect when *Bowling* and *Onderko* were decided, the outcome of these cases would not have been changed. The facts of *Bowling* fit into the pattern of example one. Mrs. Bowling brought a strict products liability claim against the manufacturer, Heil.[138] The Ohio Supreme Court deferred to the trial court's holding that Bowling was contributorily negligent but he had not assumed a known risk.[139] Therefore, Heil could not use assumption of the risk as a defense to Mrs. Bowling's claim.[140] It should be noted that, had Ohio's assumption of the risk statute been effective when *Bowling* was decided, Mrs. Bowling, who also pleaded negligence,[141] would not have been subject to Heil's use of the statute to incorporate the comparative negligence statute because Heil was a manufacturer and not a supplier.[142] Based on Mrs. Bowling's negligence claim, however, Heil could have used Ohio's comparative negligence statute directly, as a defense for the

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135. S. DARLING, *supra* note 86, at 113.
136. *Id.* at 114.
137. *Id.*
138. Bowling v. Heil Co., 31 Ohio St. 3d 277, 511 N.E.2d 374 (1987).
139. *Id.* at 283, 511 N.E 2d at 378.
140. § 2315.20(C)(1).
141. *Bowling*, 31 Ohio St. 3d at 278, 511 N.E.2d at 374.
142. § 2315.19

negligence claim only.[143]

The facts of *Onderko* also fit into the pattern of example one. The Ohio Supreme Court remanded the case for a new trial because of conflicting jury instructions.[144] The jury found that Onderko had assumed the risk, but because of the conflicting instructions the Court felt it would not be proper to decide the case for either party.[145] If on remand the jury again finds that Onderko assumed the risk, he will be barred from recovery under a strict products liability action, but may not be barred totally under a negligence cause of action.

The ramifications of these decisions are important not only upon these cases but also future litigation. Since *Onderko* was remanded, the holdings of these cases will dictate both parties strategies. Onderko's attorney would bring both a negligence and a strict products liability action. He would try to classify Onderko's actions (of working close to the auger of the earth-boring machine), if at all, as contributory negligence rather than assumption of the risk to avoid being totally barred from recovery. Onderko may not recover on his negligence action if the jury determines that his contributory negligence was greater than fifty percent of the total fault.

Recovery under the strict products liability action will be all or nothing depending on the jury determination of whether Onderko had assumed the risk. It seems logical that if the jury determined that Onderko had assumed the risk, his contributory negligence would have exceeded fifty percent of the total fault. So there is an argument that in reality assumption of the risk is a harsh defense.

Richmond's attorney, on the other hand, would try to classify Onderko's actions as assumption of the risk. In light of the fact that Onderko had knowledge of other accidents of the same nature, it would seem that he would have a good argument to totally bar Onderko from recovery. The decision in *Bowling*, that comparative negligence principles do not apply to strict products liability actions, makes the incentive even greater to the respective parties to classify or not classify Onderko's actions as an assumption of the risk because of the all or nothing recovery. Now that the court considers the defense of assumption of the risk as not that detrimental to plaintiff's case because of the alternative negligence cause of action, it would seem that the court is more likely to agree with a jury determination that plaintiff assumed the risk. The court may then rely on negligence principles to compensate plaintiff if necessary.

143. *Id.*

144. *Onderko*, 31 Ohio St. 3d at 299, 511 N.E.2d at 391.

145. *Id.* at 300, 511 N.E.2d at 391.

Considering the facts of *Bowling* and the court's view of the harshness of the defense of assumption of the risk, it now seems likely that Bowling would be found to have assumed the risk and would be barred from recovery under a strict products liabiltiy theory. Bowling exposed himself to the danger by leaning under a raised truckbed, still loaded, to activate the hydraulic pump to lower the bed. This was coupled with the fact that there was an express warning not to lean under the bed without blocking it. Recovery may still result if it can be shown that Heil's fault of placing a defective product into the stream of commerce is greater than Bowling's fault of leaning under the truckbed. Considering the severity of the injury to Bowling and the great potential for serious injuries associated with a defective dumptruck it is reasonable to speculate that in this situation Mrs. Bowling would recover under a negligence theory. These issues, of course, are up to the jury to decide.

V. CONCLUSION

The issues of assumption of the risk, contributory negligence and comparative negligence as defenses to actions in strict products liability have caused some confusion. The issue of comparative negligence as an affirmative defense in strict products liability was expressly rejected by the Ohio Supreme Court in *Bowling v. Heil Co.*,[146] but the court added some confusion to the issues of contributory negligence and assumption of the risk. Comment n of the Restatement (Second) of Torts § 402A also seems to indicate that assumption of the risk is a subcategory of contributory negligence, thus adding to the confusion. The confusion is resolved by the Ohio Supreme Court in its holding in *Onderko v. Richmond Mfg. Co.*,[147] where it implied that assumption of the risk is a separate yet distinct defense in a strict products liability claim. In addition, the Ohio legislature enacted Section 2315.20 which also resolved the dispute.

Ohio has taken an affirmative position with respect to assumption of the risk and comparative and contributory negligence as defenses in a strict products liability action. Moreover, courts try to bring about justice between manufacturers and consumers. Whether that justice is accomplished by a comparative fault analysis, no fault analysis, assumption of the risk, contributory negligence, or comparative negligence is not a settled issue nationally and arguments exist for all views.

146. 31 Ohio St. 3d 277, 511 N.E.2d 373 (1987).

147. 31 Ohio St. 3d 296, 511 N.E.2d 388 (1987).

Whatever analysis is adopted by a jurisdiction, the goal should be to compare the plaintiff's misconduct, if any, with the defendant's defective product.

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