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Judicial Application of Ohio's Comparative Negligence Statute

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A. *Retroactive Application of Ohio's Comparative Negligence Statute*

IN THE CASE OF *Wilfong v. Batdorf*[1] the Ohio Supreme Court reexamined the issue of the retroactive application of Ohio's comparative negligence statute.[2] Ohio's statute abolishing the defense of contributory negligence in a tort action was passed with an effective date of June 20, 1980,[3] and the court faced the task of deciding whether comparative fault measurements could be used in an action arising prior to the effective date of the statute, but not coming to trial until after the effective date of the act. Previously the court had the opportunity to examine this issue in the case of *Viers v. Dunlap,*[4] but had there ruled that comparative negligence was a change in substantive rights, hence, could not be given retroactive application under the provisions of the Ohio Constitution.[5] *Wilfong* overruled *Viers,* concluding that comparative negligence modified only remedial aspects of a plaintiff's case, is procedural rather than substantive in nature, and its retroactive application is constitutionally permissable.[6]

In *Wilfong,* plaintiff, while travelling in her automobile, attempted to pass defendant, who was operating a truck, by entering the lane normally occupied by oncoming traffic. In the course of this attempt, plaintiff was struck by defendant's truck which was also moving into the lane of oncoming traffic. The resulting collision caused plaintiff's car to leave the highway and roll several times, causing plaintiff's injury.[7]

Plaintiff brought action against defendant and his employer on a theory of negligence. Defendant argued that plaintiff was contributorily negligent by failing to give an audible signal before passing another vehicle, as required under Ohio law.[8] Defendant moved for a directed verdict at the close of plaintiff's case. The trial court granted the motion finding that contributory negligence

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[1]6 Ohio St. 3d 100, 451 N.E.2d 1185(1983).

[2]OHIO REV. CODE ANN. § 2315.19 (Baldwin 1982).

[3]*Id.*

[4]1 Ohio St. 3d 173, 438 N.E.2d 881(1982).

[5]"The general assembly shall have no power to pass retroactive laws,. . ." OHIO CONST. art. II, § 28.

[6]6 Ohio St. 3d at 104, 438 N.E.2d at 1189.

[7]*Id.* at 100, 438 N.E.2d at 1186.

[8]"(A) The operator of a vehicle. . . overtaking another vehicle. . . shall,. . . signal to the vehicle. . . to be overtaken. . . ." OHIO REV. CODE ANN. § 4511.27 (Baldwin 1982).

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barred the action as a matter of law. The court of appeals affirmed the trial court, and the Supreme Court granted motion to certify the record.[9]

Justice Brown announced the judgement of the court and reasoned that the comparative negligence statute is remedial as it does not alter a defendant's liability for his negligent acts, but merely alters the computation of remedy to be awarded to the successful plaintiff.[10] As Justice Brown stated: "A concept of partial recovery based upon the degree of plaintiff's negligence has been substituted for the previous bar to any recovery by the plaintiff."[11] Justice Brown based the decision on a liberal interpretation of the state legislature's intent in codifying the concept. Ordinarily, as a rule of construction, a statute is given prospective and not retrospective operation.[12] However, by reasoning that since the defense of contributory negligence had its origins in judicially created common law,[13] the court was free to abrogate the pre-existing common law to conform with the legislature's determination of future policy and action.[14] In addition, Brown argued that such an approach rendered a determination of the procedural or substantive nature of the statute unnecessary, as retroactive effect need not be given to the statute for the court to modify the pre-existing common law to be in conformity with the legislature's enactment.[15]

Justices W. Brown, Locher and Holmes, dissented, with Justices Locher and Holmes authoring the opinions. Justice Locher based his dissent on an application of *stare decisis,* which he argued compelled the court to respect its decision in *Viers v. Dunlap.*[16] In the *Viers* case, decided just over a year before the *Wilfong* case, the court, in an opinion authored by Justice Locher, rejected the argument that the comparative negligence statute should be given retroactive effect.[17] Justice Locher reasoned in *Viers* that since comparative negligence alters the anticipated position of defendants from being absolutely protected to being partially responsible for their negligent acts, the statute cannot be given retroactive effect.[18] The effect of such a retroactive application of a substantive change in law would be to destroy certainty in planning one's affairs. Quoting an Oregon case deciding a similar issue, Justice Locher wrote:

> Certainly, no one has an accident upon the faith of the then existing law. However, it would come as a shock to someone who has estimated his

[9]6 Ohio St. 3d at 101, 438 N.E.2d at 1187.

[10]*Id.* at 104, 438 N.E.2d at 1189.

[11]*Id.*

[12]OHIO REV. CODE ANN. § 1.48 (Baldwin 1977).

[13]Contributory negligence was first ruled a complete defense in the case of *Butterfield v. Forrester,* 103 Eng. Rep. 926(1809). *See generally* Hennemuth, *Ohio's Last Word on Comparative Negligence? — Revised Code Section 2315.19,* 9 OHIO N.U.L. REV. 31 (1982).

[14]6 Ohio St. 3d at 104, 451 N.E.2d at 1189.

[15]*Id.*

[16]1 Ohio St. 3d 173, 438 N.E.2d 881.

[17]*Id.*

[18]*Id.* at 176, 438 N.E.2d at 884.

> probable liability arising from a past accident, and who has planned his affairs accordingly, to find that his responsibility therefor is not to be determined as of the happening of the accident but is also dependant upon what the legislature *might* subsequently do.[19]

Locher expanded on the point in *Wilfong* when he stated "[c]learly, no modification could be more substantive than that which imposes upon one party the obligation to compensate and grants another the right to be compensated where before neither such duty nor such entitlement existed."[20]

Of course, as the majority opinion indicated, distinquishing the procedural or substantive nature of comparative negligence is unnecessary, as the court was well within its rights to alter judicially created common law. Nevertheless, one must seriously question the court's wisdom in overturning such recently established precedent on such tenous footing.

B. *Merger of the Doctrine of Assumption of Risk with Contibutory Negligence.*

In *Anderson v. Ceccardi,*[21] the Supreme Court of Ohio held that under Ohio's newly adopted comparative negligence statute[22] the doctrine of assumption of risk merged with that of contributory negligence.[23] As a result, assumption of risk is no longer a complete bar to plaintiff's claim but will be used to reduce the damages which plaintiff might otherwise recover.[24]

In *Anderson,* the plaintiff and his family lived in rental property which was owned by the defendant. The residence had three entrances. The back and side entrances were in good condition, however there was a hole in the concrete steps in front. The plaintiff asserted during his deposition that he had repeatedly informed the landlord of this unsafe condition but that nothing was done to

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[19] *Id.* (*quoting* Joseph V. Lowery, 261 Ore. 545, 548, 495 P.2d 273, 276 (1972)).

[20] 6 Ohio St. 3d at 106, 451 N.E.2d at 1190. Similarly, Justice Holmes' opinion forcefully pinpoints the shortcomings of the majority's opinion. *Id.* at 107, 451 N.E.2d at 1191.

[21] 6 Ohio St. 3d 110, 451 N.E.2d 780 (1983). *Anderson* was one of several important decisions the Court handed down during 1983 regarding comparative negligence. *See also* Wilfong v. Batdorf, 6 Ohio St. 3d 100, 451 N.E.2d 1185 (1983); Hirschbach v. Cincinnati Gas & Electric Co., 6 Ohio St. 3d 206, 452 N.E.2d 326 (1983).

Even with the decisions of the last year, questions remain regarding OHIO REV. CODE ANN. § 2315.19 (Page 1981). For example, it remains to be seen whether the language "(i)n negligence actions" includes strict liability actions. *But see* Robinson v. Parke-Hannifin Corp., 4 Ohio Misc. 2d 6, 7, 446 N.E.2d 1084 (1982).

[22] OHIO REV. CODE ANN. § 2315.19 (A)(1) (Page 1981). For an intersting discussion of the legislative history of the comparative negligence statute in Ohio and the political dynamics involved in its passage *see* Hennemuth, *Ohio's Last Word on Comparative Negligence? — Revised Code Section 2315.19,* 9 OHIO N.U.L. REV. 31, 45-49 (1982).

Although a child of the twentieth century, comparative negligence is not as recent as might be thought. Georgia has had some form of comparative negligence for most of the century and Ohio adopted statutes around the turn of the century to allow employees to recover from employers even though they themselves were negligent. *See generally* Wade, *Comparative Negligence — Its Development in the United States and Its Present Status in Louisiana,* 40 LA. L. REV. 299, 299-307 (1980); Hennemuth, *supra* at 43-44.

[23] 6 Ohio St. 3d at 110, 451 N.E.2d at 780 (Syllabus 1).

[24] *Id.* at 113, 451 N.E.2d at 783.

repair the problem. The defendant denied any notice. In an apparent effort to make the steps safer, the plaintiff-tenant placed a board over the hole. On September 7, 1980, the steps collapsed and the plaintiff suffered personal injury.[25]

Anderson filed a complaint seeking to recover damages for his injuries. He alleged that the landlord was negligent in failing to comply with the provisions of Section 5321.04 of the Ohio Revised Code.[26] The defendant moved for summary judgment based on the pleadings, plaintiff's deposition and the defendant's affidavit, which the trial court granted.[27] The trial court found that Anderson assumed the risk of his injuries and was therefore barred from recovering.[28] The court of appeals reversed finding that summary judgment was improper as there was a jury question presented as to causation and forseeability. The court further stated that the plaintiff did not assume the risk of being injured and that the doctrines of assumption of risk and contrubutory negligence do not merge under the comparative negligence statute.[29] The Ohio Supreme Court allowed a motion to certify the record.[30]

The Ohio Supreme Court, in an opinion written by Justice Sweeney, held the defenses of assumption of risk and contributory negligence do merge under the comparative negligence statute.[31] After reviewing Ohio's historical position regarding the two defenses,[32] the majority found that:

> [c]ontinued adherence to the differentiation of the doctrines [could] lead to the anomalous situation where a defendant can circumvent the comparative negligence statute entirely by asserting the assumption of risk defense alone. We do not believe that the General Assembly intended such a result in its enactment of R.C. 2315.19, and for this reason, we must revise our prior pronouncements on the doctrine of assumption of risk in view of this statute.[33]

The court's holding applies only to so-called secondary assumption of risk. The court explicitly excluded from the merger with contributory negligence, express assumption of risk and primary assumption of risk.[34] Express assumption

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[25] *Id.* at 110, 451 N.E.2d at 780-81.

[26] *Id.*

[27] *Id.* at 110-11, 451 N.E.2d at 781.

[28] *Id.* at 111, 451 N.E.2d at 781.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 110, 113, 451 N.E.2d at 780, 783.

[32] Ohio has historically recognized contributory negligence and assumption of risk as separate and distinct defenses, which are not exclusive and may overlap. *See* Masters v. New York Cent. R.R., 147 Ohio St. 293, 70 N.E.2d 898 (1947); Wever v. Hicks, 11 Ohio St. 2d 230, 228 N.E.2d 315 (1967). The distinction between the two defenses is that contributory negligence is based on carelessness while assumption of risk is based on venturousness. Contrello v. Basky, 164 Ohio St. 41, 128 N.E.2d 80 (1955); *Masters,* 147 Ohio St. at 301, 70 N.E.2d at 903.

[33] 6 Ohio St. 3d at 113, 451 N.E.2d at 783.

[34] *Id.* at 114, 451 N.E.2d at 783.

of risk involves those situations where the individual expressly contracts away his right to sue for any future injuries negligently caused by another. Primary assumption of risk exists where the defendent owed no duty to the plaitiff such as a spectator injured at a baseball game.[35]

Justice Homes dissented on the ground that the silence of the legislature on the question of assumption of risk in the comparative negligence statute does not permit the Court to abrogate the common law defense of assumption of risk.[36] Justice Holmes argued that since the comparative negligence statute abrogates the common law of the state it must be strictly construed.[37] Therefore the silence of the statute regarding assumption of risk left the majority's "argument for merger. . . without legislative or statutory support."[38]

The majority, in support of their position looked to the case law of other jurisdictions where the doctrines have been judicially merged although faced with a statute silent on the issue.[39] They also looked to two jurisdictions where the courts have both judicially adopted comparative negligence and merged the assumption of risk defense.[40]

Similarly, the minority looked to foreign jurisdictions that treated the defenses "as separate and independent, which historically has been the case in Ohio."[41] These cases emphasize the knowing actions of the plaintiff in cases where the defense of assumption of risk is asserted. This factor makes the negligence theory inappropriate and therefore the adoption, by statue or judicial fiat, of comparative negligence should have no effect upon assumption of risk.[42]

In summary, the majority opinion in *Anderson* eliminates the defense of assumption of risk in negligence actions. This merger with contributory

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[35]*Id.* For a general discussion of the varieties of assumption of risk see Brant, *A Practioner's Guide to Comparative Negligence in Ohio,* 41 OHIO ST. L.J. 585, 607-13 (1980); Van Eman, *Ohio's Assumption of Risk: The Deafening Silence,* 11 CAP. U.L. REV. 661, 662-69 (1982). *See also* Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977).

[36]6 Ohio St. 3d at 116, 451 N.E.2d at 785 (Holmes, J., dissenting).

[37]*Id.*

[38]*Id.*

[39]*Id.* at 113-14, 451 N.E.2d 783. *See, e.g.,* Maine: Willson v. Gordon, 354 A.2d 398 (Me. 1976); Minnesota: Springrose v. Willmore, 292 Minn. 23, 192 N.W.2d 63 (1971); Montana Kopischke v. First Continental Corp., 610 P.2d 688 (Mont. 1980); North Dakota: Wentz v. Deseth, 221 N.W.2d 101 (N.D. 1974); Texas: Farley v. MM Cattle Co., 529 S.W.2d 751 (Tex. 1975); Vermont: Sunday v. Stratton Corp., 136 Vt. 293, 390 A.2d 398 (1978); Green v. Sherburne Corp., 137 Vt. 310, 390 A.2d 398 (1978); Washington: Lyons v. Redding Constr. Co., 83 Wash, 2d 86, 515 P.2d 821 (1973); Wisconsin: McConville v. State Farm Mut. Auto. Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962); Colson v. Rule, 15 Wis. 2d 387, 113 N.W.2d 21 (1962); Wyoming: Brittain v. Booth, 601 P.2d 532 (Wyo. 1979).

[40]*See* California: Li v. Yellow Cab Co. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Florida: Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977).

[41]6 Ohio St. 3d at 117, 451 N.E.2d at 785 (Holmes, J., dissenting). *See* McPherson v. Sunset Speedway Inc., 594 F.2d 711 (8th Cir. 1979) (applying Nebraska law); Arkansas: Capps v. McCarley & Co., 260 Ark. 839, 544 S.W.2d 850 (1976); Rhode Island: Kennedy v. Providence Hockey Club, Inc., 119 R.I. 70, 376 A.2d 329 (1977); South Dakota: Bartlett v. Gregg, 77 S.D. 406, 92 N.W. 2d 654 (1958); Myers v. Lennox Co-op Assn., 307 N.W.2d 863 (S.D. 1981).

[42]6 Ohio St. 3d at 117, 451 N.E.2d at 785 (Holmes, J., dissenting).

negligence, such that the plaintiff's assumption of risk will serve not to bar his claim but merely to reduce the damages he recovers, is in keeping with the spirit of comparative negligence. The dissent's point is well taken insofar as the majority's decision may not be consistent with strict rules of statutory construction. However the case appears consistent with other jurisdictions which have considered the question and is the most equitable result.

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