OAJ Products Liability Section Article August 2013

Teaching A New Dog Old Tricks:
Defeating Assumption of Risk in Product Liability Claims

By: Sean Harris, Esq.

I. Introduction

Is anything one does as part of their job truly "voluntary?" Leaving aside philosophical considerations of free will or neuroscientific analysis of subconscious decision-making processes, most people would likely answer "no," in light of recent unemployment rates and the overall state of the economy. With families to support and bills to pay, forces of economic mobility essentially compel workers to do what their employer commands. Given this reality, the defense of assumption of risk, and its attendent concept of "voluntariness," is inapposite for on-the-job injuries, even in the face of Ohio's assumption of risk statute.

II. The Statute: What it Says, and What it Doesn't

The defense of assumption of risk in product liability claims has been codified in R.C. 2307.711 as part of the business and insurance lobby's unending efforts to insulate corporate profits and protect wrongdoers from accountability to the citizens of Ohio. The statute purports to create a blanket authorization for the defense in section (B)(1). But beyond merely affirming the existence of the defense, the statue goes on to mandate a particularly draconian result. "[I]f it is determined that the claimant expressly or impliedly assumed a risk and that the 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." R.C. 2307.711(B)(2) (emphasis added).

It is important to note that the statute merely authorizes the defense as a general proposition. It states simply, "assumption of the risk may be asserted…". R.C. 2307.711(B)(1). The statute is absolutely silent, however, as to the elements necessary to establish or prove the defense. Absent

legislative enumeration, the statute leaves to the common law the task of supplying the elements and scope of the defense.

III. *Cremeans* and the Reality of Economic Compulsion

The Supreme Court of Ohio has specifically addressed assumption of risk in the context of product liability cases in *Cremeans v. Wilmar Henderson Manufacturing Co.* 57 Ohio St.3d 145 (1991). In *Cremeans*, the Court focused its analysis on the growing legal consensus that, in the post-Industrial Revolution era, forces of economic necessity compel workers to encounter dangers as part of their regular job duties, lest they risk the wrath of a spiteful employer. Workers today, therefore, have no meaningful choice but to encounter those risks as part of their employment. Whatever social policy concerns for expanding industry which might have initially supported the defense no longer justified the harsh results wrought by completely barring all recovery, the Supreme Court concluded. Concepts of voluntariness while performing required job duties, the Court reasoned, were simply legal fiction which ignored current labor trends.

Thus, the Supreme Court proclaimed,

> … the time has come for Ohio to realize that the days of laissez-faire economics are long gone, and that the industrial revolution is no longer with us. Today, an employee must either accept the dangers of his or her job or face the prospect of finding new employment in an economic setting where the supply of work has become increasingly limited. Ohio should now move into the Twentieth Century and join the ranks of the growing number of state and federal courts that have ruled on the question. The trend in this country set by the jurisdictions which have carefully analyzed the issue is that the defense of assumption of risk in the employment setting is no longer valid. …. Accordingly, common sense dictates, and we so hold, that an employee does not voluntarily or unreasonably assume the risk of injury which occurs in the course of his or her employment when he or she must encounter that risk in the normal performance of his or her required job duties and responsibilities. We realize that our holding "abolishes" assumption of risk in the employment setting in the sense that the defense of assumption of risk is unavailable for certain claims arising from work-related injuries.

Cremeans at 149 (emphasis added).

It was, to the Supreme Court, finally time for Ohio law to acknowledge the economic realities under which Ohio workers now labored.

IV. Continued Validity of *Cremeans*

Cremeans remains the law of Ohio. It has never been overruled. What's more, despite the subsequent enactment of the assumption of risk statute, the Ohio General Assembly intended *Cremeans* to remain valid law in Ohio. "It is well-established that the legislature is presumed to know the state of the law related to the subjects with which it deals. *State ex rel. Cromwell v. Myers* (1947), 80 Ohio App. 357, 368. When applying the language of a statute, it must be construed in light of the common law in force at the time of its enactment. *State ex rel. Morris v. Sullivan* (1909), 81 Ohio St. 79, 97." *In re Medure,* 7th Dist. No. 01 CO 03, 2002-Ohio-5035.

Cremeans was decided nearly 14 years before R.C. 2307.711 was enacted. The General Assembly was, therefore, fully aware of the existence of *Cremeans* as well as its import. It was free to specifically name *Cremeans* as a Supreme Court decision it intended to legislatively "overrule," as it has taken to doing of late with any number of court decisions. However, the statute is conspicuously silent regarding *Cremeans* – both in name and in substance. Had the legislature intended to supersede or modify the common law as announced in *Cremeans* to any degree, it was well-versed in how to accomplish that goal. It chose not to do so.

Furthermore, we need look no further than the Ohio Jury Instructions themselves for clear evidence that *Cremeans* remains the law of Ohio. OJI CV 403.09 sets out the defense of assumption of risk. To the surprise of a great many opposing counsel, the comment to that instruction specifically cites to *Cremeans*, stating,

> *See also, Cremeans v. Willmar Henderson Mfg. Co. (1991), 57 Ohio St.3d 145, 566 N.E.2d 1203 (an employee does not voluntarily assume the risk of injury in the course of his employment when that risk must be encountered in the normal performance of his/her required job duties and responsibilities).*

Surely, OJI would not cite to a decision that was no longer good law! Indeed, as OJI often does, when the precedential value a given holding is in doubt, such doubt is reflected in the comments. No such doubt about the validity of *Cremeans* is noted in CV 403.09.

To be sure, product manufacturers are not left defenseless under *Cremeans*. R.C. 2307.711 specifically authorizes comparative negligence as a defense in section (A). What's more, the statute is still viable and allows for assumption of the risk as a defense in non-work related cases.

V. Conclusion

Undoubtedly, much has changed in the almost 25 years since *Cremeans* was decided. However, the forces of economic compulsion and lack of employment mobility at issue when *Cremeans* was decided in 1991 have only increased and intensified since then. The importance and validity of *Cremeans* and its abolition of assumption of risk as a defense in on-the-job injuries, therefore, remains vital to victims of dangerous and defective products today.

Sean Harris
Kitrick, Lewis, & Harris Co., LPA