

Utilizing the Implied Assumption of the Risk Defense To Defeat Products Liability Claims

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I. Why It Matters

Implied assumption of risk applies to preclude product liability claims where a plaintiff consents or acquiesces in an appreciated, known, or obvious risk to his or her safety. Importantly, the implied assumption of the risk doctrine serves as a potential shield that can be used as a complete defense to a broad array of product liability causes of action. Three recent Ohio decisions demonstrate the broad applicability of the doctrine with respect to this particular area of civil litigation, and exemplify how the implied assumption of the risk defense can be deployed in litigation to dispose of an action favorably and efficiently, oftentimes without having to undergo the time, effort, and expense of fully litigating a dispute through trial.

II. Ohio Law

Under Ohio law, there are two different types of assumption of the risk, express and implied. Express assumption of the risk deals with the existence of a duty, while implied assumption of the risk deals with the proximate cause of the injury. Implied, or secondary, assumption of the risk is defined as plaintiff's consent to or acquiescence in an appreciated, known or obvious risk to plaintiff's safety. This includes risks that are so obvious that a person must have known and appreciated the risk. In essence, the doctrine of implied assumption of the risk does not mean that the defendant did not proximately cause the injury; rather it means the plaintiff's own negligence was so great it supersedes any negligence on the part of the defendant or defendants. For implied assumption of the risk to bar recovery, the defendant must establish that: (1) the plaintiff knew of the condition; (2) the condition was patently dangerous; and (3) the plaintiff voluntarily exposed himself to the condition.

Importantly, express or implied assumption of the risk may generally be asserted as an affirmative defense to a product liability claim under R.C. §§ 2307.71 to 2307.80. If express or implied assumption of the risk is asserted as an affirmative defense to a product liability claim under R.C. §§ 2307.71 to 2307.80 and it is determined that the claimant expressly or impliedly assumed the 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 doctrine acts as a complete bar to recovery of damages under R.C. § 2307.711(B)(2). Thus, contrary to general common law principles, *both* express and implied assumption of the risk operate to bar recovery entirely in the context of product liability actions.

With that said, pursuant to R.C. § 2307.711(B)(3), if implied assumption of the risk is asserted as an affirmative defense to a product liability claim against a *supplier* under R.C. § 2307.78(A)(1), R.C. §§ 2315.32 and 2315.36 are 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.

III. Applications of the Implied Assumption of the Risk Doctrine

Three recent Ohio decisions exemplify how defense practitioners can attack product liability claims by leveraging the implied assumption of the risk defense to conclusively dispose of a wide array of product liability causes of action.

In *Sankovich v. A.W. Chesterton Co.*, Cuyahoga C.P. No. 09-711659 (Feb. 1, 2011), the estate of Mark Sankovich alleged that Sankovich suffered an asbestos-related disease as a result of his exposure to asbestos-containing products attributable to Pearless Industries, Inc. In that case, the court ruled that the assumption of the risk doctrine barred the plaintiff from asserting a product liability claim arising from alleged asbestos exposure. In doing so, the court highlighted the fact that the estate's main witness testified that the witness received warnings from both his father and Sankovich that left no doubt that Sankovich was aware of the hazards of asbestos. In fact, the witness noted that his father and Sankovich were so concerned about the dangers of the dust associated with the work they were performing that they yelled at the witness and threw him out of the boiler rooms when they were performing their work. This testimony, therefore, established that Sankovich assumed the risks associated with these products allegedly containing asbestos, thereby barring the estate's claims and warranting summary judgment in favor of the defendant based on application of the implied assumption of the risk doctrine.

Likewise, in *Carnes v. Gordon Food Serv.*, 10th Dist. Franklin No. 06-CA-86, 2007-Ohio-2350, the court held that a product liability defendant was entitled to summary judgment because the plaintiff's implied assumption of the risk precluded recovery as a matter of law. In that case, Ritchie Carnes asserted a product liability cause of action against HK Systems stemming from an injury Carnes sustained when he came in contact with the underside of a moving conveyor belt and had his arm crushed between two rollers during the course of his work as a maintenance technician at a Gordon Food Services, Inc. distribution facility. At the time of the incident, Carnes was performing maintenance on the conveyor system, which had been designed and installed by HK Systems. Significantly, the maintenance that Carnes was performing at the time of his injury could have been done without moving underneath the conveyor system and without coming into direct contact with the rollers. On appeal, the court found that even assuming *arguendo* Carnes raised a triable issue of fact as to whether the HK Systems conveyor was defective in one or more ways, his implied assumption of the risk precluded him from recovering as a matter of law. In reaching this decision, the court relied on several statements made by Carnes, including his acknowledgements that: (1) belt tracking was a safe procedure and a very safe operation; (2) belt tracking could be performed without going underneath the conveyor system; (3) he placed his hand "where he shouldn't have;" (4) the accident was his fault; (5) the accident resulted from a "complete oversight" on his part; (6) he "shouldn't have done what [he] did;" and (7) he did not cross the conveyor system in a proper manner. Combined, in light of these admissions, the court found that no issue of material fact existed as to whether Carnes implicitly assumed the risk by crawling underneath the conveyor system and becoming caught in a moving roller, and that based on his own admissions, Carnes himself caused the accident to occur. As such, the court found that summary judgment in favor of the defendant was proper on Carnes' product liability design defect claim.

Finally, in *Sproles v. Simpson Fence Co.*, 99 Ohio App.3d 72, 649 N.E.2d 1297 (12th Dist. 1994), the court also held that a supplier was entitled to summary judgment a result of the plaintiff's implied assumption of the risk relating to a malfunctioning gate. In that case, Charles Sproles contracted with Simpson Fence Co. to have a fence with an electric gate installed on his property. The electrical

mechanism for operation of the gate was manufactured by Stanley Products. Approximately two months after installation, Sproles began having problems with the gate, most specifically with respect to it opening and closing unexpectedly. Approximately eight months after the installation, Sproles's wife informed him that the gate had unexpectedly begun to close while she was proceeding through it. Thus, Sproles was aware that the gate was operating in a fashion where it would open and close unexpectedly. While attempting to remedy the problem, Sproles's hand became caught in the chain and was pulled into the mechanism operating the gate, causing the tip of his finger to be severed. Sproles filed suit, alleging (among other things) that Simpson Fence failed to provide him with adequate warnings regarding the hazards of using the electric gate. On appeal, the court found that Sproles's failure to warn claim was barred as a matter of law under the implied assumption of the risk doctrine. In doing so, the court highlighted the fact that reasonable minds could only conclude that Sproles knew of the risk and the one way to absolutely avoid it; however, he elected to proceed despite that risk. Therefore, summary judgment was mandated in favor of the defendant with respect to Sproles's inadequate warning claim, as reasonable minds could only conclude that Sproles's conduct constituted a voluntary and unreasonable assumption of the risk which outweighed any negligence on the part of Simpson Fence in neglecting to fully warn and instruct Sproles of the safety hazards involved.

IV. Conclusion

As the above cases demonstrate, Ohio courts have not hesitated to apply the implied assumption of the risk defense to bar a wide range of product liability claims and actions in their entirety. Accordingly, defense practitioners must carefully analyze the potential applicability of the implied assumption of the risk doctrine at the outset of any product liability suit, as this stringent defense can serve to completely dispose of product liability claims where the doctrine applies. As a general rule of thumb, where a plaintiff readily acknowledges that he proceeded with using a product with an understanding of the risks that his course of action presented, the implied assumption of risk doctrine can be applied to conclusively defeat a product liability claim.

Where the doctrine appears to be potentially applicable, counsel should formulate an effective strategy to obtain the necessary factual evidence during discovery and depositions that will allow defense counsel to successfully utilize the defense as part of a well-supported summary judgment motion. In particular, defense counsel should seek to elicit admissions on the part of the plaintiff that he or she was aware of the risks involved with using a given product before the time of his or her injury.

Armed with the right evidence, the successful assertion of the implied assumption of risk defense via summary judgment can pay huge dividends for defense practitioners and their clients, allowing both to avoid not only the time and expense of trial, but also the payment of any settlement dollars as well. Moreover, in addition to conclusively disposing of the lawsuit altogether, the implied assumption of the risk defense can be strategically leveraged to alter the playing field and significantly reduce the overall value of a claim during settlement negotiations. As such, product liability defense practitioners are well advised to make the implied assumption of the risk defense a mainstay in their litigation tool belts, and should seek to utilize this game-changing defense whenever possible.