**RAYMOND SINE, Plaintiff v. WHITE METAL ROLLING & STAMPING CO. ET AL., Defendants, Franklin County Branch, CIVIL ACTION - LAW A.D. 1991 - 235**

*Sine v. White Metal Rolling & Stamping Co., et al.*

*Products Liability -- Assumption of the Risk -- Misuse -- Expert Testimony*

1. Assumption of the risk is a viable defense in a products liability case.

2. The defense of assumption of the risk can be charged upon by the court only if there is evidence introduced by the defendant that the plaintiff knew of the specific defect causing his injuries and appreciated the danger it involved before using the product.

3. Assumption of the risk is a defense to a strict liability case only if the injured party knows of the specific defect causing his injury and voluntarily proceeds to use the product with the knowledge of the danger caused by the defect.

4. A finding of assumption of the risk must be based on the injured person's own subjective knowledge, not upon the objective knowledge of the "reasonable man."

5. Although the issue of assumption of the risk is usually left to the jury, the court may decide the question as a matter of law where reasonable men could not differ as to the conclusion.

6. Where an allegedly defective ladder appeared to be in good shape and the alleged defect was not known to the plaintiff, defendants will be precluded from arguing to the jury the defense of assumption of the risk.

7. Misuse is not an absolute defense in a strict liability case; evidence of misuse is properly introduced to the jury when the evidence addresses the issue of causation.

8. Only unforeseeable contributory conduct by a consumer will insulate the manufacturer from strict products liability; the alleged misuse must extraordinary. For the court to allow the defendants to introduce evidence of misuse to rebut causation in a products liability case, the misuse must be unforeseeable or outrageous.

9. Defendants may introduce evidence that a plaintiff engaged in highly reckless conduct to defeat a strict products liability claim.

10. Where evidence suggests plaintiff leaned an allegedly defective ladder against a house on which he was working in order to climb to a dormer and install siding, there is no evidence of extraordinary, outrageous or reckless use of the ladder, and defendants will not be allowed to introduce evidence of misuse.

11. Failure of plaintiff to read a vague warning label on an allegedly defective ladder does not constitute misuse as defined under Pennsylvania law.

12. Where no prejudice to the defendants is shown, the court will allow plaintiffs to use a second expert, under strict conditions, even though the first expert is available to testify.

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**OPINION AND ORDER**

Walker, P.J., April 21, 1998:

**Factual Background**

Raymond Sine was injured when he fell from an extension ladder manufactured by Defendant White Metal Rolling & Stamping Co. (hereafter, "White Metal"). Mr. Sine commenced this products liability action against White Metal and other defendants and alleged, *inter alia*, that the ladder was defectively designed. Defendant B.J.C. Construction Co. (hereafter "BJC") owned the ladder at the time of the accident, and they had purchased the ladder from Defendant Sears Roebuck & Co. (hereafter "Sears").

On May 18, 1989, Mr. Sine was working as a siding subcontractor for BJC. He borrowed an extension ladder from BJC personnel at the site of the accident in order to install siding on a dormer. As he climbed the ladder to the roof of the house on which he was working, the ladder retracted and Mr. Sine fell to the ground and was injured.

The plaintiff claims that a defect in the spring mechanism of the ladder in question caused the accident. To prove his allegations at trial, Mr. Sine hired Mr. Kenneth Taber, a professional engineer who submitted an expert report in 1990 detailing his opinion that the subject ladder was designed defectively. In the fall of 1997, plaintiff's counsel informed the defendants that a new expert may be hired and subsequently submitted an expert report by Steve Fournier, another professional engineer who provided an enhanced list of deficiencies in the allegedly defective ladder. Plaintiff claims that Mr. Taber was replaced because he would not be able to testify at trial. However, Mr. Taber is not in any way indisposed or unavailable to testify at the trial in this case.

This court is called upon to decide two motions *in limine*. Plaintiff seeks to preclude evidence of assumption of the risk and misuse, while defendants seek to preclude the testimony of Steve

Fournier, the plaintiff's second expert in the case. The court will address these matters in order.

## I. Plaintiff's Motion *in Limine*

Plaintiff seeks to preclude defendants from introducing evidence at trial regarding two issues, assumption of the risk and misuse. Defendants contend that preclusion of this evidence would constitute a partial summary judgment as to these defenses. For the reasons that follow, the court will grant plaintiff's motion *in limine*.

### A. Assumption of the Risk

There is no disagreement between the parties regarding the law which governs this issue. It is clear that assumption of the risk is a viable defense in a products liability action. *Lonon v. Pep Boys, Manny Moe & Jack*, 371 Pa. Super. 291, 538 A.2d 22 (1988). However, the defense of assumption of the risk can be charged upon by the court only if there is evidence introduced by the defendant that the plaintiff knew of the specific defect causing his injuries and appreciated the danger it involved before using the product. *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975). Assumption of the risk is a defense to a strict liability case only if the injured party knows of the specific defect causing his injury and voluntarily proceeds to use the product with the knowledge of the danger caused by the defect. *Walasavage v. Marinelli*, 334 Pa. Super. 396, 483 A.2d 509 (1984). A finding of assumption of the risk must be based on the injured person's own subjective knowledge, not upon the objective knowledge of the "reasonable man." *Berkebile*, *supra*. Finally, although the issue of assumption of the risk is usually left to the jury, the court may decide the question as a matter of law where reasonable men could not differ as to the conclusion. *Lonon, supra*.

In the instant case, the defendants have failed to introduce sufficient evidence to convince this court that the defense of assumption of the risk should be presented to the jury. Defendants contend that, prior to the accident, (1) Mr. Sine used other ladders that had springs to secure the ladder and keep it from collapsing, (2) he knew that the springs on the subject ladder



were missing, and (3) he understood that the purpose of the springs was to keep the hinges in place. From the defendants' perspective, the combination of these factors creates an inference that Mr. Sine assumed the risk of a defective ladder on the day of the accident. Defendants argue that this evidence is sufficient to present an assumption of risk defense to the jury. The court disagrees.

A careful review of Mr. Sine's testimony persuades us that Mr. Sine did not have subjective knowledge of the particular defect he claims caused his injury, and he did not appreciate the risk of using the subject ladder prior to the accident. Although Mr. Sine, at his deposition of February 21, 1994, agreed with defense counsel that "ladders have springs," (Sine deposition, p. 39, lines 7-9), he also testified that,

(1) he did not inspect the ladder before he asked to borrow it (p. 43, lines 19-23);
(2) the springs in the subject ladder were not visible (p. 39, lines 18-19);
(3) he had no idea where the springs were located (p. 39, lines 10-11);
(4) this ladder was different than any ladder he had seen (p. 40, lines 24-26);
(5) he had "never" used the subject ladder prior to the accident (p. 23, lines 19-21; p. 22, lines 12-13);
(6) the ladder "looked in good shape" (p. 44, line 4), it appeared to be in fine shape (p. 99, line 12), it worked fine and there wasn't anything out of the ordinary with the ladder (p. 87, lines 3-6);
(7) he would not have used the ladder if it looked dangerous (p. 93, lines 18-19).

This testimony leads us to the conclusion that Mr. Sine did not know that the springs were missing from the ladder on the day of the accident. Further, because he did not know of the alleged defect, he could not have appreciated the danger of using the ladder. In fact, had he known the ladder was dangerous, he would not have used it. Under these circumstances the court is compelled to preclude the introduction of evidence of assumption of risk to the jury at the time of trial. Unless defendants are able to produce further evidence supporting the defense of assumption

of the risk, they will not be allowed to present the defense before the jury.

### B. Misuse

Initially, it is important to note that misuse is not an absolute defense in a strict liability case under Pennsylvania law. *Nowak v. Faberge*, U.S.A., Inc., 812 F. Supp. 492 (M.D. Pa. 1992), *affirmed* 32 F.3d 755. Evidence of misuse is properly introduced to the jury when the evidence addresses the issue of causation. *Childers v. Power Line Equipment Rentals*, 452 Pa. Super. 94, 681 A.2d 201 (1996). Even then, only unforeseeable contributory conduct by a consumer will insulate the manufacturer from strict products liability; the alleged misuse must be extraordinary. *Nowak*, *supra*. In other words, for the court to allow the defendants to use evidence of misuse to rebut causation in a products liability case, the misuse must be unforeseeable or outrageous. *Childers*, *supra*. Also, "defendants may introduce evidence that a plaintiff engaged in highly reckless conduct to defeat a strict products liability claim." *Id.* at 681 A.2d 207.

In the instant case, the court is convinced there is no evidence of record which shows that the plaintiff misused the ladder which is the subject of this action. In his deposition, Mr. Sine provided a detailed description of his actions in connection to the ladder on the day of the accident. The court gathers from his testimony that he leaned the ladder against the house on which he was working in order to climb to a dormer and install some siding on that portion of the house. He performed a cursory inspection of the ladder before using it and proceeded to climb to the roof thinking that there was nothing wrong with the ladder. There is nothing extraordinary, outrageous or reckless about the manner in which Mr. Sine used the subject ladder on the day of the accident.

Defendants contend that Mr. Sine misused the ladder because he did not follow the instructions affixed to the ladder. A label on the ladder instructed users to "[i]nspect upon receipt and before each use. Never use ladder if it is damaged or not in *1st* class condition." (Defendant's brief). This vague "warning" notwithstanding, defendants have failed to produce any evidence that Mr. Sine engaged in a misuse of the ladder as that term is defined by Pennsylvania law. The cases defendants point to are



not helpful or instructive because they deal with the issue of misuse as it has been defined by courts in Colorado and Illinois. Additionally, Mr. Sine testified that he was "particularly careful" about using the ladder because he had fallen from another ladder back in 1984. (Sine depo., p. 77, lines 22-28). This testimony and the lack of any contradictory evidence leads the court to conclude there was no misuse on the part of Mr. Sine in connection with the ladder.

Even if the court were to accept the defendants' assertion that Mr. Sine failed to follow the instructions on the ladder, this conduct would not rise to the level of outrageousness. At most, Mr. Sine was contributorily negligent, and evidence of the plaintiff's negligence is generally inadmissible in products liability cases. *See*, *Childers*, *supra*. For these reasons, the court will grant the plaintiff's motion *in limine* excluding evidence of misuse.

## II. Defendants' Motion *in Limine*

Defendants White Metal and Sears ask this court to exclude or limit the testimony of Steve Fournier, the plaintiff's second engineering expert. They argue that because the plaintiff's first expert submitted a narrative report and is available to testify at trial, Mr. Fournier should not be allowed to testify outside of the scope of Mr. Taber's report. Plaintiff's counsel contends that his client should be allowed to switch experts as long as defendants are not prejudiced by the change. Mr. Sine maintains that the defendants have known of the change of experts since last year and the trial is still months away. Under these circumstances, the defendants have sufficient time to prepare an adequate defense to the products liability claims of the plaintiff.

Although the court agrees with defendants that the plaintiff should not be allowed to substitute an expert for another who will provide a more favorable opinion where the initial expert is still available to testify, the court fails to find any significant prejudice to the defendants if the court allows a new expert to testify at trial. Defendants were made aware of the possibility that plaintiff would hire a new expert in the fall of 1997. Mr. Fournier's report was produced by the plaintiff in January of 1998. Defendants have had and will have sufficient time to prepare an adequate

defense to the new claims of defectiveness raised by Mr. Fournier in his report.

The court recognizes it would be unfair to allow the plaintiff to bring in new theories of defectiveness at this late stage in the proceedings through a new expert. It is clear to this court that Mr. Fournier's opinions go well beyond the scope of Mr. Taber's initial report, and the court disagrees with plaintiff's contention that Mr. Fournier's opinions are merely an expansion of Mr. Taber's findings. For this reason, the court will require the plaintiff to make Mr. Taber available at the time of trial in case the defendants choose to call him to challenge Mr. Fournier's testimony. Plaintiff will be responsible for bringing Mr. Taber to court on the day of trial, but he will not be able to call Mr. Taber to testify on his behalf. Any expenses incurred to produce Mr. Taber for trial will be borne by the plaintiff.

## ORDER OF COURT

April 21, 1998, in consideration of plaintiff's motion in limine and defendants' motion in limine and following oral argument on the issues involved,

It is ordered that plaintiff's motion in limine is granted.

Further, it is ordered that defendants' motion in limine is denied, and plaintiff shall make Kenneth Taber, P.E. available for trial in a manner consistent with the opinion filed herewith.