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Tort Law: The Status of Assumption of Risk in Product Liability in Ohio after *Cremans v. Willmar Henderson Mfg.*, 566 N.E.2d 1203 (Ohio 1991)

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TORT LAW: THE STATUS OF ASSUMPTION OF RISK IN PRODUCT LIABILITY IN OHIO AFTER *Cremeans v. Willmar Henderson Mfg.*, 566 N.E.2d 1203 (Ohio 1991).

I. INTRODUCTION

In *Cremeans v. Willmar Henderson Mfg.*,[1] the Ohio Supreme Court dealt a blow to manufacturers by holding 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 or responsibilities."[2] While this holding does not completely eliminate assumption of risk as a defense to strict products liability,[3] the court recognized that it " 'abolishes' assumption of risk in the employment setting in the sense that the defense . . . is unavailable for certain claims arising from work-related injuries."[4] The court's decision demonstrates the confusion and controversy that have surrounded this common law doctrine since its earliest development.[5] While this confusion is often the result of the varying forms which assumption of risk can take,[6] the *Cremeans* court made it clear that the assumption of risk

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1. 566 N.E.2d 1203 (Ohio 1991).

2. *Id.* at 1207.

3. Strict products liability holds manufacturers liable for the defective condition of their products regardless of the level of care used. Strict products liability focuses on the condition of the product, rather than the conduct of the manufacturer. 76 O. JUR. 3d. *Products Liability* § 52 (1987). Strict products liability is codified in Ohio. *See* OHIO REV. CODE ANN. §§ 2307.71-.80 (Anderson 1991).

4. 566 N.E.2d at 1207.

5. *See 2* FOWLER V. HARPER & Fleming JAMES JR. THE LAW OF TORTS 1192 (1956). Other than express assumption of risk, the defense "adds nothing to modern law except confusion," and should be abolished. *Id.* at 1191; *see also* W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 68 (5th ed. 1984) (hereinafter PROSSER AND KEETON). The defense "has been surrounded by much confusion because 'assumption of risk' has been used by the courts in several different senses [footnote omitted] which traditionally have been lumped together under the one name, often not realizing the differences exist." *Id.* at 480; *see infra* note 6 for examples of different forms of assumption of risk.

6. RESTATEMENT (SECOND) OF TORTS § 496 A cmt. c, 1-4 offers a clear illustration:

> c. *Meanings of assumption of risk.* 'Assumption of risk' is a term which has been surrounded by much confusion, because it has been used by the courts in at least four different senses, and the distinctions seldom have been made clear. These meanings are as follows:
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> 1. In its simplest form, assumption of risk means that the plaintiff has given his express consent to relieve the defendant of an obligation to exercise care for his protection, and agrees to take his chances as to injury from a known or possible risk. The result is that the defendant, who would otherwise be under a duty to exercise such care, is relieved of that responsibility, and is no longer under any duty to protect the plaintiff. As to such express assumption of risk, see § 496 B.

in question involved a plaintiff's "voluntary and unreasonable" encountering of a known risk.[7]

Cremeans involved a product liability action in which an employee sued the manufacturer of an allegedly defective front-end loader on theories of negligence and strict liability in tort.[8] The main issue confronted by the court was whether the defense of assumption of risk barred the plaintiff from recovery on his claim against the manufacturer for strict liability in tort.[9] The court also briefly discussed the applicability of Ohio's comparative negligence statute to the negligent products liability claim.[10]

This Casenote explores the scope and impact of the Ohio Supreme Court's elimination of assumption of risk in certain work-related injuries, as well as the court's refusal to apply comparative negligence to the negligent products liability claim.[11] It also examines the validity of the decision, particularly the application of relevant case and statutory

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2. A second, and closely related, meaning is that the plaintiff has entered voluntarily into some relation with the defendant which he knows to involve the risk, and so is regarded as tacitly or impliedly agreeing to relieve the defendant of responsibility, and to take his own chances. Thus a spectator entering a baseball park may be regarded as consenting that the players may proceed with the game without taking precautions to protect him from being hit by the ball. Again the legal result is that the defendant is relieved of his duty to the plaintiff. As to such implied assumption of risk, see § 496 C.

3. In a third type of situation the plaintiff, aware of a risk created by the negligence of the defendant, proceeds or continues voluntarily to encounter it. For example, an independent contractor who finds that he has been furnished by his employer with a machine which is in dangerous condition, and that the employer, after notice, has failed to repair it or substitute another, may continue to work with the machine. He may not be negligent in doing so, since his decision may be an entirely reasonable one, because the risk is relatively slight in comparison with the utility of his own conduct; and he may even act with unusual caution because he is aware of the danger. The same policy of the common law which denies recovery to one who expressly consents to accept a risk will, however, prevent his recovery in such a case. As to such implied assumption of risk, see § 496 C. As to the necessity that the plaintiff's conduct be voluntary, see § 496 E.

4. To be distinguished from these three situations is the fourth, in which the plaintiff's conduct in voluntarily encountering a known risk is itself unreasonable, and amounts to contributory negligence. There is thus negligence on the part of both plaintiff and defendant; and the plaintiff is barred from recovery, not only by his implied consent to accept the risk, but also by the policy of the law which refuses to allow him to impose upon the defendant a loss for which his own negligence was in part responsible. (See § 467).

RESTATEMENT (SECOND) OF TORTS § 496 A cmt. c, 1-4. (1965).

This fourth example of assumption of risk is the type which is considered in *Cremeans*. The prior three forms are dealt with *infra* note 28.

7. *Cremeans*, 566 N.E.2d at 1205.

8. *Id.* at 1204. Product liability suits based on negligence are distinct from suits brought under strict liability. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 402 (negligent product liability) and 402A (strict product liability) (1965).

9. *Id.* at 1205.

10. *Id.* at 1209. The issue of proximate cause is raised but not dealt with by the court. *Id.*

11. *See infra* notes 92-166 and accompanying text.

law.[12] Finally, this Casenote suggests alternatives to the court's decision on both the assumption of risk and comparative negligence issues.[13] Specifically, this Casenote proposes that comparative negligence should be applicable to both negligent and strict products liability.[14]

II. Facts and Holding

Plaintiff Michael Cremeans (Cremeans) was an employee of Sohio Chemical Company (Sohio)[15] at the time he sustained his injuries.[16] Cremeans' job duties required him to drive a front-end loader, manufactured by Willmar Henderson Manufacturing (Willmar), into fertilizer bins, remove a load of fertilizer, back out of the bin, and move the fertilizer to another location.[17] Willmar sold the front-end loader to Sohio.[18] At Sohio's request, Willmar did not equip the loader with the standard protective cage.[19] Willmar and Sohio agreed that Sohio would bear any liability that resulted from the absence of the protective cage.[20]

Cremeans was injured while operating the loader within the fertilizer bin.[21] As Cremeans was exiting the bin with a load of fertilizer, there was an avalanche of fertilizer, some of which landed on the front end and scoop of the loader.[22] As a result, the rear wheels of the loader were raised off the ground and Cremeans was wedged between the seat of the loader and either the doorway to the bin or a support bar within the bin.[23] Cremeans would not have been injured if the front-end loader had been equipped with a protective cage.[24] Cremeans knew the dangers associated with operating the loader without a safety cage but continued to operate the loader because it was his job to do so.[25]

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12. *See infra* notes 92-166 and accompanying text.

13. *See infra* notes 167-240 and accompanying text.

14. Comparative negligence is currently applicable to negligent products liability (Ohio Rev. Code Ann § 2315.19 (Anderson 1991)), however, the *Cremeans* holding severely restricts its application in cases involving work-related injuries. The scope of that holding is discussed *infra* notes 150-66 and accompanying text.

15. Sohio had previously been known as the Vistron Corporation. *Cremeans*, 566 N.E.2d at 1204.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* The loader could not have fit into the fertilizer bins with the cage affixed. *Id.*

20. *Id.*

21. *Id.* at 1204-05.

22. *Id.* at 1205.

23. *Id.*

24. *Id.*

25. *Id.*

The trial court granted Willmar summary judgment on Cremeans' claims of strict liability in tort and negligent products liability.[26] The court found that Cremeans had assumed the risk of his injury.[27] The Court of Appeals for the Third Appellate District of Ohio reversed the judgment of the trial court, finding that a genuine issue of material fact existed as to whether Cremeans assumed the risk of his injury and the extent to which Cremeans' conduct contributed to his injury.[28]

The Ohio Supreme Court affirmed the judgment of the appellate court and remanded the case for further proceedings consistent with the opinion.[29] Specifically, the Supreme Court held 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."[30] Further, the Supreme Court held that Ohio's comparative negligence statute (R.C. 2315.19) was not applicable to Cremeans' claim in negligent products liability.[31]

III. BACKGROUND

A. *Assumption of Risk and Contributory Negligence in Ohio*

As the *Cremeans* decision indicates, identifying the form of assumption of risk[32] does not necessarily reduce the confusion surrounding the defense.[33] This is because the voluntary and unreasonable encountering of a known risk is often intermittently labeled as contributory negligence or assumption of risk.[34] Whether labeled as-

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26. *Id.*

27. *Id.*

28. *Id.* The court of appeals stated that "conflicting evidence exists on the issues of whether Cremeans assumed the risk and if he did to what degree his conduct contributed to his injury. The question . . . is for the jury to decide." Cremeans v. Willmar Henderson Mfg. Co., No. 89-14-885, 1989 Ohio App. LEXIS 3345, at *5 (Ohio App. Aug. 22, 1989).

29. *Cremeans*, 566 N.E.2d at 1205.

30. *Id.* at 1207.

31. *Id.* at 1209. The court stated that assumption of risk and contributory negligence had been merged in Anderson v. Ceccardi, 451 N.E.2d 780 (Ohio 1983). Because assumption of risk was not applicable in this case, neither was contributory negligence. *Cremeans*, 566 N.E. at 1209. Comparative negligence, therefore, did not apply. *Id.* The validity of this reasoning is discussed *infra* notes 149-66 and accompanying text.

32. The various forms of assumption of risk are discussed *supra* note 6.

33. *See* PROSSER AND KEETON, *supra* note 5, § 68. "Since either [assumption of risk or contributory negligence] traditionally was sufficient to bar the action, it usually made no practical difference what the defense was called, and it is not surprising that the two have not been clearly distinguished, and are quite commonly confused." *Id.* at 481.

34. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965). It is important to recognize that contributory negligence has been confused with only that form of assumption of risk that involves voluntarily and unreasonably encountering a known risk, or what has been called implied secondary assumption of risk. Express assumption of risk and implied primary assumption of risk,

sumption of risk or contributory negligence, voluntarily and unreasonably encountering a known risk has traditionally been a complete bar to a plaintiff's recovery in negligence actions in Ohio.[35] Courts, nevertheless, labored to maintain a distinction between the defenses of assumption of risk and contributory negligence.[36] Still, most courts recognized that the defenses overlap and could both be pled under the same set of facts.[37] As the court stated in *Masters v. New York Cent. R.R. Co.*,[38] "there are situations where the defenses of assumption of risk and contributory negligence will overlap. The plaintiff's conduct in accepting the risk may itself be unreasonable, because the danger is out of all proportion to the interest which he is seeking to advance."[39] Thus,

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which are discussed *supra* at note 6, both relieve the defendant of any duty to the plaintiff. As such, the duty element of negligence cannot be proven. These are not affirmative defenses as such. Rather, they pertain to situations when the defendant has not breached a duty to the plaintiff. *See* Matthew J. Toddy, *Assumption of Risk Merged with Contributory Negligence:* Anderson v. Ceccardi, 45 OHIO ST. L.J. 1059 (1984).

Further confusion exists within the area of implied secondary assumption of risk. This defense always involves a plaintiff's voluntary encountering of a known risk, however, it can be further broken down into situations where a plaintiff's actions are either reasonable or unreasonable. *Id.* The distinct treatment of these two different situations is discussed *infra* note 44.

35. *See* Anderson v. Ceccardi, 451 N.E.2d 780 (Ohio 1983) "[T]he overlap in these doctrines posed no problems because in practice it did not matter whether the plaintiff's conduct was denominated as assumption of risk or contributory negligence, since both stood as absolute bars to a plaintiff's recovery." *Id.* at 783; *see also* DeAmiches v. Popczun, 299 N.E.2d 265 (Ohio 1973); Masters v. New York Central R.R., 70 N.E.2d 898 (Ohio 1947).

36. *See e.g.,* Masters v. New York Central R.R. , 70 N.E.2d 898 (Ohio 1947) The court stated that:

> in working out the distinction [between assumption of risk and contributory negligence] the courts have arrived at the conclusion that assumption of risk is a matter of knowledge of the dan[g]er and intelligent acquiescence in it, and that to the extent that this can be found recovery will be denied; while contributory negligence is a matter of some fault or departure from the standard of reasonable conduct, however unwilling or protesting the plaintiff may be.

Id. at 903; *see also* DeAmiches v. Popczun, 299 N.E.2d 265 (Ohio 1973). The *Popczun* court found that:

> [A]ssumption of the risk' is based upon the voluntary consent of the plaintiff to meet the risk and take her chances, while 'contributory negligence' is founded upon the failure of a plaintiff to exercise the care of a reasonable man for his own protection.

Id at 268.

37. Erie R.R. Co. v. Purucker, 244 U.S. 320 (1917) (plaintiff who was injured on a railroad track may have been negligent and assumed the risk); Schlemmer v. Buffalo, Rochester & Pittsburg R.R., 220 U.S. 590 (1911) (assumption of risk shades into areas commonly understood as negligence); Westcott v. Chicago Great Western R.R., 196 N.W. 272 (Minn. 1923) (despite the distinction between assumption of risk and contributory negligence, the facts of a case might be such that both can be pled); DeAmiches v. Popczun, 299 N.E.2d 265 (Ohio 1973) (tenant injured while walking up driveway may have been contributorily negligent and may have assumed the risk); Masters v. New York Cent. R.R., 70 N.E.2d 898 (Ohio 1947) (when plaintiff's conduct in accepting the risk is unreasonable, both assumption of risk and contributory negligence may be pled).

38. 70 N.E.2d 898 (Ohio 1947).

39. *Id.* at 903.

where the plaintiff's acts involved voluntarily and unreasonably encountering a known risk, those acts could be held to be assumption of risk, contributory negligence, or both.

The overlap between assumption of risk and contributory negligence did not cause a practical problem because both defenses customarily stood as a complete bar to the plaintiff's recovery.[40] With the adoption of comparative negligence statutes such as Ohio Revised Code section 2315.19,[41] however, the continued separation of these very similar defenses may have lead to quite different results when both were pled.[42] In *Anderson v. Ceccardi*,[43] the Ohio Supreme Court recognized this anomaly and held that "[t]he defense of assumption of risk is merged with the defense of contributory negligence under R.C. 2315.19."[44] Several jurisdictions have taken the same approach where comparative negligence was adopted either statutorily[45] or judicially.[46]

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40. Anderson v. Ceccardi, 451 N.E.2d 780, 783 (Ohio 1983).

41. OHIO REV. CODE ANN § 2315.19 (Anderson 1981), *amended by* OHIO REV. CODE ANN. § 2315.19 (Anderson 1991).

42. For example, if comparative negligence statutes are held only to apply to contributory negligence, a plaintiff may be completely barred by his assumption of risk even if he is found to be only slightly contributorily negligent. Since the merger of assumption of risk and contributory negligence in *Anderson v Ceccardi*, § 2315.19 has been amended to extend comparative fault to assumption of risk in negligence cases. OHIO REV. CODE ANN. § 2315.19 (Anderson 1991).

43. 451 N.E.2d 780 (Ohio 1983).

44. *Id.* at 783, citing OHIO REV. CODE ANN § 2315.19 (Anderson 1981), *amended by* OHIO REV. CODE ANN. § 2315.19 (Anderson 1991). *Anderson* did not specifically discuss the form of secondary implied assumption of risk which involves reasonably encountering a known risk. Many of the courts cited by *Anderson*, which have merged assumption of risk and contributory negligence, have held that reasonable assumption of risk is not a valid defense. *See* Springrose v. Willmore, 192 N.W.2d 826 (Minn. 1971)(a plaintiff's assumption of risk must under all circumstances be unreasonable); McConville v. State Farm Mut. Auto. Ins. Co., 113 N.W.2d 14 (Wis. 1962)(an automobile guest's exposure to a known risk must be unreasonable to constitute an affirmative defense); *see also* Rea v. Leadership Hous., 312 So. 2d 818 (Fla. 1975). "[T]he key concern should be whether the plaintiff exercised reasonable care; if he did, he should be allowed to recover . . . ." *Rea*, 312 So. 2d at 823 (citations omitted).

45. *See* Wenland v. Ridgefield Constr. Serv., Inc., 462 A.2d 1043 (Conn. 1983) (the comparative negligence statute was created to abolish the harsh common law complete bar of contributory negligence and assumption of risk); Wilson v. Gordon, 354 A.2d 398 (Me. 1976) (where plaintiff's conduct constitutes voluntary assumption of risk, comparative negligence will apply); Springrose v. Willmore, 192 N.W.2d 826 (Minn. 1971) (assumption of risk is to be considered a phase of contributory negligence); Farley v. M.M. Cattle Co., 529 S.W.2d 751 (Tex. 1975) (the complete bar of assumption of risk is incompatible with the reasoning behind comparative negligence and will therefore be considered under principles of contributory negligence); Lyons v. Redding Const. Co., 515 P.2d 821 (Wash. 1973) (where plaintiff acts unreasonably in making his choice, it is merely one form of contributory negligence); McConville v. State Farm Mut. Auto. Ins. Co., 113 N.W.2d 14 (Wis. 1962) (an automobile guest's willingness to proceed in the face of a known danger is no longer a defense separate from contributory negligence).

46. *See* Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975) (assumption of risk may not be a separate defense when it overlaps with contributory negligence); Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977) (there is no discernible basis to maintain a distinction between contributory negligence and assumption of risk).

In pure negligence actions, the impact of this merger was clear.[47] As the *Anderson* court stated, "[t]he conduct previously considered as assumption of risk by the plaintiff shall be considered by the trier of fact under the phrase 'contributory negligence of the person bringing the action' under R.C. 2315.19 and the negligence of all parties shall be apportioned by the court or jury pursuant to the statute."[48] In effect, contributory negligence and assumption of risk have been merged only in those situations where comparative negligence applies.[49]

Ohio has refused to expand comparative negligence to strict products liability actions.[50] As a result, assumption of risk and contributory negligence are not merged in strict products liability cases.[51] In fact, Ohio Revised Code section 2315.20 explicitly states that assumption of risk is a defense to strict products liability while contributory negligence is not.[52] Hesitancy to extend comparative negligence to products liability and changing views regarding the utility of assumption of risk may be significant factors in some jurisdictions' decisions to abolish assumption of risk.[53] A brief history of the general development of as-

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47. *Anderson* involved a negligence action brought by a tenant against his landlord for failure to maintain the steps in front of the dwelling in a safe condition. That case did not consider the applicability of comparative negligence to products liability. Anderson v. Ceccardi, 451 N.E.2d 780 (Ohio 1983). The applicability of Ohio Revised Code § 2315.19 to products liability is considered *infra* notes 185-240 and accompanying text.

48. *Anderson*, 451 N.E.2d at 783. The *Anderson* merger is limited to secondary implied assumption of risk involving voluntarily and unreasonably encountering a known risk. Express assumption of risk was explicitly excluded from the merger. *Id* at 783. Similarly, implied primary assumption of risk was not included in the merger. *Id.* at 780. As such, both defenses currently remain distinct from contributory negligence. *Id.* at 783. Implied secondary assumption of risk involving reasonably encountering a known risk is discussed *supra* note 44 and accompanying text.

49. *Anderson*, 451 N.E.2d at 783.

50. *See* Bowling v. Heil 511 N.E.2d 373 (Ohio 1987) (discussed *infra* notes 185-93 and accompanying text).

51. In *Bowling*, the court stated that "voluntarily and knowingly" assuming the risk created by the product is a defense to strict products liability. *Id.* at 377. While the court in *Bowling* does not explicitly state whether this defense is labeled contributory negligence or assumption of risk, the Ohio Revised Code clearly states that contributory negligence is not a defense to strict products liability, while implied assumption of risk is. OHIO REV. CODE ANN. § 2135.20 (B)(1) and (C)(1) (Anderson 1991).

52. *See infra* notes 162-64. This statutory distinction between assumption of risk and contributory negligence becomes relevant to the discussion of the *Cremeans* court's refusal to apply Ohio Revised Code § 2315.19 to the plaintiffs claim in products liability. That portion of the holding is discussed *infra* notes 151-66.

53. Increased criticism of assumption of risk is discussed *infra* notes 72-75 and accompanying text. Comparative fault would reduce the harshness of the complete bar of assumption of risk. As a result, courts would not look as unfavorably upon the doctrine. For example, under Ohio Revised Code § 2315.19, the plaintiff's assumption of risk would not be a complete bar unless his assumption of risk was greater than the combined negligence of all other persons from whom he seeks recovery. OHIO REV. CODE ANN. § 2315.19 (Anderson 1991).

sumption of risk may demonstrate why some courts now look unfavorably upon the defense.

B. *Overview of the History of Assumption of Risk*

Assumption of risk has gained disfavor among courts and commentators as an anachronistic concept.[54] While assumption of risk can be traced to early English common law,[55] the first "clearly distinguishable case" was in the late eighteenth century.[56] As some jurisdictions recognize, "[a]ssumption of risk is a defense which finds its roots in the employee/employer relationship."[57] Not surprisingly, assumption of risk achieved notoriety during the industrial revolution.[58] As work-related accidents increased, employers sought immunity through the defense.[59] Courts eagerly applied the defense in an effort to "insulate the employer as much as possible from bearing the 'human overhead' that is the inevitable part of the cost . . . of the doing of industrialized business . . . to give maximum freedom to expanding industry."[60] The doctrine has been called the product of laissez-faire economics.[61] Assumption of risk continued to flourish in work-related injury cases, until state legislatures began imposing statutory ceilings on recovery from employers through workers' compensation laws.[62]

Under state workers' compensation laws, workers waive their right to sue employers in exchange for statutorily determined compensation

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54. Criticism of assumption of risk is discussed *infra* notes 72-75 and accompanying text. For a thorough discussion of criticism of assumption of risk, see Jane P. North, Comment, *Employees Assumption of Risk: Real or Illusory Choice*, 52 TENN. L. REV. 35 (1984).

55. It first appeared as the maxim *volenti non fit injuria* which means that if one "knowing and comprehending the danger, voluntarily exposes himself to it, though not negligent in so doing, he is deemed to have assumed the risk. . . ." BLACK'S LAW DICTIONARY 1575 (6th ed. 1990).

56. *See* PROSSER AND KEETON, *supra* note 5, § 68 n.1; Crude v. Fentham 2 Esp. 685, 170 Eng. Rep. 496 (1799).

57. *See, e.g.*, Shahrokhfar v. State Farm Mutual Insurance Co., 634 P.2d 653 (Mont. 1981). "Its application to tortious conduct outside [the employer/employee relationship] should be narrowly construed." *Id.* at 655. *But see* Rutter v. Northeastern Beaver City, 437 A.2d 1198 (Pa. 1981) for examples of how the doctrine has been used outside the employment setting.

58. *See* North, *supra* note 54, at 38.

59. *See* North, *supra* note 54, at 38.

60. Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 59 (1943).

61. *See* North, *supra* note 54, at 41. The author contends that judicial application of assumption of risk in the workplace allowed "employers in a rapidly industrializing society. . . to be free to pursue their economic goals. . ." *Id.* at 40. "[I]nevitable work-place injuries could not be allowed to impede progress." *Id.* Assumption of risk, therefore, minimized internal restraints on business in much the same way that *laissez-faire* minimized external governmental restraints.

62. *See* North, *supra* note 54, at 41.

awards.[63] The existence of workers' compensation statutes effectively abolishes assumption of risk in all cases where these statutes apply.[64]

The federal government created its own statutory restriction on assumption of risk with the amendment of the Federal Employers Liability Act (FELA) in 1939.[65] The Supreme Court in *Tiller v. Atlantic Coast Line R.R.*[66] interpreted FELA to abolish assumption of risk in all cases where the statute applies.

As a result, state and federal statutory law rendered assumption of risk nearly useless in employment situations. Employers who are liable under workers' compensation statutes are strictly liable for the employee's injury[67] and cannot be subjected to liability at common law for the same injury.[68] Employers, therefore, do not have the opportunity or the need to raise a defense where worker's compensation statutes apply.

Despite these legislative restrictions, the courts have never completely abolished the defense.[69] Assumption of risk again became relevant when employees began suing manufacturers of allegedly defective products for strict and negligent products liability.[70] Employees attempted to circumvent the statutory ceilings of workers' compensation

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63. Ohio Revised Code § 4123.54 provides: "Every employee who is injured. . . and the dependents of an employee who is killed. . . is entitled to receive, either directly from his employer as provided in section 4123.35 of the Revised Code, or from the state insurance fund, the compensation for loss sustained on account of the injury . . . ." OHIO REV. CODE ANN. § 4123.54 (Anderson 1991).

"[E]mployers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute for any injury. . .received or contracted by any employee in the course of or arising out of his employment. . . ." OHIO REV. CODE ANN. § 4123.74 (Anderson 1991). Both sections also apply to occupational diseases and bodily conditions acquired under the same circumstances and to death that is the result of injury, occupational disease, or bodily conditions. *Id.*

64. OHIO REV. CODE ANN. § 4123.74 (Anderson 1991). Since compensation was guaranteed, and employees could not raise common law or statutory claims, assumption of risk served no purpose in employment situations.

65. Pub. L. No. 59-219, 34 Stat 232 (1906) *re-enacted,* Pub. L. No. 60-100 35 Stat. 65 (1908), *amended by* Act of Aug 11, 1939, Pub. L. No. 76-382, 53 Stat. 1404 (codified at 45 U.S.C. § 54 (1982)). FELA applies comparative negligence to injuries sustained by railroad workers.

66. 318 U.S. 54, 66 (1943). The amendment is held to apply comparative negligence where the old defenses traditionally existed. *Id.*

67. *See* OHIO REV. CODE ANN. § 4123.35 (Anderson 1991).

68. *See* OHIO REV. CODE ANN. § 4123.54 (Anderson 1991).

69. *But see supra* notes 45 and 46 for jurisdictions which have merged the doctrine with contributory negligence.

70. The Restatement (Second) of Torts provided the impetus for the return of assumption of risk. Under the Restatement "the form of contributory negligence which consists of 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." RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965)(emphasis added).

statutes by going directly after the manufacturer. Manufacturers, in turn, raised the defense of assumption of risk.[71]

With the re-emergence of assumption of risk came harsh criticism.[72] Commentators noted that the circumstances which gave rise to assumption of risk no longer prevailed.[73] As a result, the utility of the defense has been questioned.[74] In *Cremeans*, the majority contended that abolishing assumption of risk is part of a trend which recognizes the harshness of the defense.[75]

IV. ANALYSIS

The *Cremeans* court considered two major issues in its decision. The first was whether Cremeans was barred by assumption of risk from recovery on his strict product liability claim.[76] The second was whether comparative negligence applied to Cremeans' claim in negligent products liability.[77] The court's decision that neither defense was applicable will have far reaching effects on manufacturers.

The *Cremeans* holding is flawed for three reasons. First, the Ohio Supreme Court misinterpreted the substantive law surrounding the applicability of assumption of risk to products liability.[78] Second, the court misinterpreted its own holding in *Anderson v. Ceccardi*.[79] Finally, the *Cremeans* court failed to recognize the trend toward applying comparative negligence to strict products liability.[80]

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71. *See* Alexander v. Conveyors & Dumpers, Inc., 731 F.2d 1221 (5th Cir. 1984) (applying Mississippi law) (assumption of risk properly raised by manufacturer in wrongful death action based on strict products liability brought on behalf of an employee killed while performing maintenance work); Moomey v. Massey Ferguson, Inc., 429 F.2d 1184 (10th Cir. 1970) (applying New Mexico law) (jury instruction on assumption of risk was correct where employee brought strict products liability action against manufacturer for work-related eye injury); Caterpillar Tractor Co. v. Ford, 406 So. 2d 854 (Ala. 1981) (manufacturer properly raised defense of assumption of risk in strict products liability action brought against manufacturer on behalf of employee who was killed in a strip mining accident).

72. *See* North, *supra* note 54, at 45.

73. *See* North, *supra* 54 at 45-51. Commentators recognized that assumption of risk was derived from theories of individualism and *laissez-faire* economics which are no longer controlling concepts. FOWLER V. HARPER & FLEMING JAMES JR., THE LAW OF TORTS § 21.3 at 1174-75 (1956). *But see* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977).

74. *See* North, *supra* note 54, at 45-51.

75. Cremeans v. Willmar Henderson Mfg., 566 N.E.2d 1203, 1207 (Ohio 1991). It must be reiterated that *Cremeans* did not abolish assumption of risk; it merely limited its application. The court was influenced by jurisdictions which had or purported to have abolished the defense.

76. *Id.* at 1205.

77. *Id.*

78. Substantive law application is discussed *infra* notes 92-166 and accompanying text.

79. 451 N.E.2d 780 (Ohio 1983). *Anderson* is discussed *supra* at notes 43-49 and accompanying text. The *Cremeans* majority's faulty interpretation of *Anderson* is discussed *infra* notes 151-59 and accompanying text.

80. The trend to apply comparative negligence to strict products liability is discussed *infra* notes 185-240 and accompanying text.

One commentator recognized a distinction between the application of assumption of risk to products liability claims that arise out of employment and those that do not.[81] The distinction is based on the voluntariness with which an employee encounters known risks in the workplace.[82] Clearly, employees are subject to a certain amount of "economic compulsion"[83] when they perform work-related functions.[84] Employees may perform dangerous tasks out of fear of losing their jobs. Further, courts and commentators agree that the economic situations giving rise to assumption of risk are no longer prevalent.[85] As a result, the application of assumption of risk to work-related situations in particular has been questioned.[86]

Nearly eliminating manufacturers' defenses for work-related injuries was not the answer. While states have taken responsibility away from employers,[87] *Cremeans* now has removed responsibility from employees. Manufacturers are now accountable for not only the condition of their products but also the actions of both employees and employers.[88] The *Cremeans* decision fails to provide sufficient support for holding manufacturers solely liable for many work-related injuries. The decision also ignores other options that would reduce the harshness of assumption of risk to employees, while offering manufacturers an opportunity to reduce their liability.[89] Applying comparative negligence to strict products liability is in accord with the majority of jurisdictions.

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81. *See* North, *supra* note 54, at 49. "The most telling criticism of [assumption of risk] relates less to its general theoretical foundations than to the illusory nature of the doctrine's voluntariness requirement in the employment context." *Id.*

82. *See, e.g.*, Beacham v. Lee-Norse, 714 F.2d 1010 (10th Cir. 1983) (worker injured while using a roof bolting machine had not assumed the risk of his injuries because there was no evidence that his conduct was voluntary); Rhoads v. Service Machine Co., 329 F. Supp. 367, 381 (E.D. Ark. 1971) ("[t]he 'voluntariness' with which a worker assigned to a dangerous machine in a factory setting 'assumes the risk of injury' from the machine is illusory."); Brown v. Quick Mix Co., 454 P.2d 205, 208 (Wash. 1969) ("It could never be said as a matter of law that a workman whose job requires him to expose himself to a danger, voluntarily and unreasonably encounters the same.").

83. North, *supra* note 54, at 49. Economic compulsion provides that an employee who is concerned with retaining employment does not act voluntarily when performing job functions and therefore can not *voluntarily* assume the risk. *Id.*

84. This Note does not dispute the potential unfairness of assumption of risk as it applies to work-related injuries. The Note does, however, dispute the *Cremeans* court's method of dispensing with the problem.

85. *Supra* notes 72-75 and accompanying text.

86. *Supra* notes 72-75 and accompanying text.

87. *Supra* notes 63-68 and accompanying text.

88. A careful reading of the Restatement (Second) of Torts § 496 E would indicate that employers are responsible for an employee's non-volition, but *Cremeans* has placed that responsibility on manufacturers. RESTATEMENT (SECOND) OF TORTS § 496 E (1965). *See infra* notes 128-42 and accompanying text.

89. Other options are discussed *infra* notes 167-240 and accompanying text.

The minority would remove assumption of risk from most work-related accidents.[90] Furthermore, comparative negligence is more moderate in its application than the holding of *Cremeans*.[91]

A. Scope of the Court's Decision

1. Assumption of Risk in Strict Products Liability

In Ohio, prior to *Cremeans*, a "voluntary and unreasonable assumption of a known risk posed by a product" constituted "an absolute bar to recovery in a products liability action based upon strict liability in tort."[92] This rule finds support in the Restatement (Second) of Torts,[93] and has been statutorily adopted in Ohio.[94] The majority in *Cremeans*, in restricting assumption of risk, misinterpreted the relevant law in this area.

The *Cremeans* majority fully acknowledged the existence of assumption of risk as a defense to products liability in Ohio.[95] Its decision is not a complete abrogation of the defense. Rather, the court determined that "an employee does not voluntarily and unreasonably assume the risk of injury which occurs . . . in the normal course of his or her

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90. Applying comparative fault to strict products liability is discussed *infra* notes 185-240 and accompanying text.

91. *Cremeans* goes to the extreme of practically eliminating a manufacturer's defenses to strict products liability. Under Ohio Revised Code § 2315.19, a manufacturer will be liable only if the plaintiff's fault was equal to or less than the manufacturer's. Similarly, a plaintiff will only be barred if his fault is greater than the manufacturer's. OHIO REV. CODE ANN. § 2315.19 (Anderson 1991).

92. Onderko v. Richmond Mfg. Co., 511 N.E.2d 388, 391 (Ohio 1987). *See also* Bowling v. Heil, 511 N.E.2d 373, 375 (Ohio 1987)(comparative negligence does not apply to strict products liability and assumption of risk is therefore a complete bar); Jones v. White Motor Corp., 401 N.E.2d 223 (Ohio Ct. App. 1978) (a consumer who discovers defect and unreasonably proceeds to use product is completely barred from recovery).

93. RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965). This comment to § 402A provides: "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. . . ." *Id.*

94. OHIO REV. CODE ANN. § 2315.20 (Anderson 1989):

> (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 risk is asserted as an affirmative defense to a product liability claim under sections 2307.71 to 2307.80 of the Revised Code, and it 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.

While assumption of risk and contributory negligence were merged under Anderson v. Ceccardi, 451 N.E.2d 780 (Ohio 1983), assumption of risk remains a separate defense in strict products liability.

95. Cremeans v. Willmar Mfg., 566 N.E.2d 1203, 1205 (Ohio 1991).

required job duties and responsibilities."[96] Therefore, the holding should be restricted to those situations where an employee is carrying out normal job-related functions. While not completely abolishing the defense, the court leaves manufacturers little recourse when an employee brings a strict products liability suit.[97]

By removing job-related duties from the sphere of voluntary and unreasonable behavior, the court purported to "move into the twentieth century and join the growing number of state and federal courts that have ruled on the question."[98] While several jurisdictions have recognized the harshness of assumption of risk,[99] few courts have restricted it to the extent that the *Cremeans* majority does.[100]

For example, in *Williamson v. Smith*,[101] the New Mexico Supreme Court did not completely abolish assumption of risk as the *Cremeans* majority suggests.[102] Rather, the court in *Williamson* recognized the inherent confusion between assumption of risk and contributory negligence.[103] The court held that "the ground formerly occupied by the doctrine of assumption of risk will be covered by the law pertaining to negligence and contributory negligence."[104] The court continued:

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96. *Id.* at 1207. The court does not define the exact duties and responsibilities which would preclude an assumption of risk defense. Its holding, however, appears to be broadly applicable to the "employment setting." *Id.* This broad restriction of assumption of risk can be contrasted with Suter v. San Angelo Foundry & Machine Co., 406 A.2d 140 (N.J. 1979), discussed *infra* notes 122-25 and accompanying text. In *Suter*, the New Jersey Supreme Court eliminated assumption of risk in employment situations, but restricted its holding to the "employee in an industrial setting." *Id.* at 53.

97. Since the court in *Cremeans* did not consider the issue of unforeseeable misuse by plaintiffs, that defense is still apparently available. *See* Bowling v. Heil Co., 511 N.E.2d 373 (Ohio 1987) (unforeseeable misuse is one of the two affirmative defenses based on plaintiff's misconduct which are available in defective products cases); Menifee v. Ohio Welding Products Inc., 472 N.E.2d 707 (Ohio 1984) (defendants were entitled to summary judgment where plaintiff's use of product could not be reasonably anticipated).

98. *Cremeans*, 566 N.E.2d at 1207.

99. *See* North, *supra* note 54, at 49 (citing cases recognizing the harshness of assumption of the risk).

100. The *Cremeans* majority cites several cases in support of its position: Williamson v. Smith, 491 P.2d 1147 (N.M. 1972); Johnson v. Clark Equip. Co., 547 P.2d 132 (Or. 1976); Brown v. Quick Mix Co., 454 P.2d 205 (Wash. 1969). *Cremeans*, 566 N.E.2d at 1206-07. These cases are discussed *infra* notes 101-22 and accompanying text. *But see* Beacham v. Lee-Norse, 714 F.2d 1010 (10th Cir. 1983).

101. 491 P.2d 1147 (N.M. 1972).

102. *Cremeans*, 566 N.E.2d at 1206. *Cremeans* did not abolish assumption of risk either, however, *Cremeans* has restricted assumption of risk to a greater extent than *Williamson*.

103. *Williamson*, 491 P.2d at 1148-51.

104. *Id.* at 1152. (similar to Ohio Supreme Court's finding in Anderson v. Ceccardi, 451 N.E.2d 780 (Ohio 1983)); *see also supra* note 44, and accompanying text.

> "[W]e do not mean to infer that a given state of facts which would heretofore have constituted a valid defense on the basis of assumption of risk will no longer prevail. To the contrary, such a set of facts, if properly pleaded and proven, will be as efficacious as formerly. It will however henceforth be regarded as contributory negligence and governed by the principles pertaining to that doctrine.[105]

Assumption of risk, therefore, remains a viable defense, but under a different name.

The *Cremeans* majority implied that the Oregon Supreme Court, in *Johnson v. Clark Equip. Co.*,[106] held that an employee carrying out his duties necessarily acted reasonably.[107] This is a strained reading of the *Johnson* decision. The court in *Johnson* remanded the case because the trial court failed to instruct the jury that the reasonableness standard "related to the quality of the plaintiff's decision to encounter the danger."[108] The trial court's instructions pertained to whether the product was unreasonably dangerous and whether the plaintiff's manner of operating the machine was unreasonable.[109] The *Johnson* court did not come to the conclusion that the *Cremeans* majority contends. Rather, the court in *Johnson* was merely correcting the lower court's jury instruction.[110] The *Johnson* court proceeded to define the necessary elements of assumption of risk[111] and the proper jury instruction.[112] The court in *Johnson* further found that juries should determine the reasonableness of a plaintiff's actions by looking at the "circumstances surrounding that decision . . . ."[113] The court did not make a blanket

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105. *Williamson*, 441 P.2d at 1148-51. *Williamson* is further distinguishable from *Cremeans* in that *Williamson* involves assumption of risk as it applies to a negligence action. *Id. Cremeans*, conversely, is concerned with the application of assumption of risk in strict products liability. *Cremeans*, 566 N.E.2d 1203. Furthermore, assumption of risk and contributory negligence have been merged in negligence actions in Ohio. *See supra* notes 44-49 and accompanying text. That merger did not preclude assumption of risk from remaining as a distinct defense in strict products liability. *See infra* notes 163-64.

106. 547 P.2d 132 (Or. 1976). In *Johnson*, an employee brought a strict products liability action against the manufacturer of a forklift when his arms were severed in an accident. *Id.*

107. *Cremeans*, 566 N.E.2d at 1207.

108. *Johnson*, 547 P.2d at 139 n.7. The court in *Johnson* asserted that the employee's decision to encounter the danger must be unreasonable to permit an assumption of risk defense. *Id.* Assumption of risk does not require a showing that the *manner* in which plaintiff used the product was unreasonable. *Id.* (emphasis added).

109. *Id.* The distinction between the trial court's instruction and the instruction that the Oregon Supreme Court would give was that the trial court's instruction related to the way in which the plaintiff used the machine. *Id.* According to the Oregon Supreme Court, the concern was whether the plaintiff's choice to use the machine at all was reasonable. *Id.* at 139 n.8.

110. *Id.* at 138-39.

111. *Id.* at 139 n.8.

112. *Id.* at 140.

113. *Id.* at 140.

statement that employees necessarily act reasonably while performing job-related duties.[114]

In *Brown v. Quick Mix Co.*,[115] the Washington Supreme Court stated that "[i]t could never be said as a matter of law that a workman whose job requires him to expose himself to a danger, voluntarily and unreasonably encounters the same."[116] The court, however, allowed a jury instruction on assumption of risk.[117] The court's statement merely indicates that the question of the voluntariness of an employee's conduct must be determined by a jury. It is still possible that an employee acting within the scope of his duties is acting voluntarily, depending on the circumstances. Therefore, the jury instruction on assumption of risk was proper in this case.[118]

While *Williamson, Johnson*, and *Brown* recognized the potential unfairness of assumption of risk, none of these decisions purported to abolish the defense when an employee is injured while acting within the scope of his duties. *Williamson* merely merged assumption of risk and contributory negligence to avoid the confusion of keeping these defenses separate.[119] Both *Johnson* and *Brown* involved jury instructions about assumption of risk[120] and indicated that jury instructions regarding assumption of risk were proper.[121] At least one jurisdiction may have achieved a similar result to *Cremeans*. In *Suter v. San Angelo Foundry & Machine Co.*,[122] the New Jersey Supreme Court held that "an employee engaged at his assigned task on a plant machine . . . has no meaningful choice."[123] The court continued, "[i]rrespective of the rationale that the employee may have unreasonably and *voluntarily* encountered a known risk, we hold as a matter of policy that such an employee is not guilty of contributory negligence."[124] Thus, even if an employee's conduct met the standard of assumption of risk, under *Suter*, the plaintiff would not be barred from recovery.

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114. While the court in *Johnson* did state that working conditions are a relevant factor to determine reasonableness, the court's decision was merely that juries should take this factor into consideration when determining reasonableness. *Id.* at 140-42.

115. 454 P.2d 205 (Wash. 1969).

116. *Id.* at 208.

117. *Id.*

118. *Id.*

119. *See supra* note 105.

120. *See supra* notes 106-18 and accompanying text.

121. *See supra* notes 106-18 and accompanying text.

122. 406 A.2d 140 (N.J. 1979). In *Suter*, a sheet metal worker brought a products liability action against the manufacturer of an industrial sheet metal rolling machine for injuries sustained by the worker when his hand was caught in the machine. *Id.* at 141.

123. *Id.* at 148.

124. *Id.* (emphasis added).

The decision in *Suter* is distinguishable from *Cremeans* in two ways. First, the *Suter* court limits its holding to employees "in an industrial setting."[125] Second, in *Suter*, an employee in an industrial setting may act voluntarily and unreasonably; as a matter of policy, however, the court will not hold that the employee assumed the risk. Conversely, the *Cremeans* court held that an employee cannot act voluntarily while performing his job-related functions. Despite the differences, *Suter* and *Cremeans* achieve a similar result with respect to employees in a factory-machine setting. In such a situation, while performing their job-related functions, employees cannot be found to have assumed the risk of their injuries.

Cremeans and *Suter* signal a departure from most jurisdictions.[126] It is clear that most courts recognize the unique situation employees face when encountering dangerous conditions in the course of their job-related functions.[127] None of these jurisdictions, however, have found as a matter of law that an employee acting in the course of job-related functions is acting involuntarily.

Along with the court's misinterpretation of case law, the majority in *Cremeans* offered a strained reading of section 496 E of the Restatement (Second) of Torts to support its holding. Section 496 E provides:

> (1) A plaintiff does not assume a risk of harm unless he voluntarily accepts the risk.
> (2) The plaintiff's acceptance of the risk is not voluntary if the *defendant's* tortious conduct has left him no reasonable course of conduct in order to
> (a) avert harm to himself or another, or
> (b) exercise or protect a right or privilege of which the defendant has no right to deprive him.[128]

A plaintiff's actions are not voluntary if the defendant's actions (Sohio in *Cremeans*) have left him no reasonable alternative.

Since Sohio, the employer, and not Willmar, the manufacturer, created the compulsion of the circumstances, the plaintiff was acting voluntarily with respect to Willmar. The majority contended that no distinction should be made between employers and manufacturers for purposes of Restatement (Second) section 496 E.[129] The Restatement

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125. *Id.* at 153. Specifically, *Suter* is restricted to "the employer-factory machine setting." *Id.* at 154 (Clifford, J., concurring).

126. *See supra* notes 106-18 and accompanying text. Courts have recognized the harshness of assumption of risk in the employment setting, but, unlike the majorities in *Suter* and *Cremeans*, are reluctant to decide the issue as a matter of law. *Id.*

127. *See supra* notes 106-25 and accompanying text.

128. RESTATEMENT (SECOND) OF TORTS § 496 E (1965) (emphasis added).

129. Cremeans v. Willmar Henderson Mfg., 566 N.E.2d 1203, 1208 (Ohio 1991).

makes clear that the defendant's conduct must make the plaintiff's actions involuntary in order to nullify the defense. The majority in *Cremeans* stated that "Cremeans encountered the risks associated with the use of the Willmar loader because he was *required to do so in the normal performance of his job duties and responsibilities.*"[130] That statement indicates that Sohio, the employer, and not defendant Willmar, the manufacturer, placed Cremeans in an involuntary situation. The court did not bar Cremeans on his strict product liability claim "regardless of the fact that it was Cremeans' employer, and not Willmar, who required Cremeans to perform the particular job duty which resulted in the injury."[131]

The Restatement affirmatively states that a plaintiff is acting voluntarily when the compulsion to act is created by someone other than the defendant. Comment b of the Restatement section 496 E provides: "The plaintiff's acceptance of the risk is to be regarded as *voluntary* even though he is acting under the compulsion of the circumstances, *not created by the tortious conduct of the defendant,* which have left him no reasonable alternative."[132] An employee who is acting under the compulsion of his employer is, therefore, acting voluntarily with respect to the manufacturer.

The facts of the case indicate that, while Cremeans was acting under a compulsion of the circumstances, that compulsion was created by Sohio, the employer, and not Willmar, the manufacturer. The court, however, concluded that Willmar's conduct did have some effect on Cremeans' lack of choice.[133] The court reasoned that by selling the loader to Sohio, Willmar's conduct was at least a factor in placing Cremeans at risk.[134] Because Cremeans was "compelled by economic pressures" to encounter the risk, it would be inconsistent to allow the manufacturer to assert the assumption of risk defense and to disallow

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130. *Id.* at 1208 (emphasis added).

131. *Id.* at 1208.

132. RESTATEMENT (SECOND) OF TORTS § 496E cmt. b (1965) (emphasis added).

133. *Cremeans,* 566 N.E.2d at 1208. The Court reasoned:

> Willmar sold the loader to Cremeans's employer without protective structures or a protective cage. The loader could not have been used by Cremeans in the performance of his job duties had the protective structures or cage been attached to the loader. Thus, Cremeans was put at risk either solely as a result of the product defect, or by the combination of the defect and the conduct of Cremeans' employer, Sohio. In either event, the economic pressures associated with the reality of today's work place inevitably came to bear on Cremeans' decision to encounter the risk. As such, we believe it would be incongruous to conclude that the defense of assumption of risk should be available to Willmar and not to Cremeans' employer when the decision to encounter the risk was equally involuntary regardless of who commissioned the employee to perform his or her job duty.

Id.

134. *Id.*

the defense to the employer.[135] Employers, however, are protected by workers' compensation statutory ceilings.[136] But, it is equally inconsistent to provide employers with a protection that is not provided to manufacturers.

To defeat an assumption of risk defense, the plaintiff must prove that the defendant claiming the defense caused the employee's lack of choice.[137] Thus, where the employer causes an employee to act involuntarily, the employer should be held to have created the compulsion of the circumstances, not a third party. Employers are in a position to bargain for safe products which are placed in the workplace.[138] In *Cremeans*, Sohio, the employer, requested that the safety cage not be attached to the front-end loader.[139] The court's decision leads to an incongruous result in which the employer, who created the involuntary situation and bargained for the defective product, is liable only to the extent of the workers' compensation statutes.[140] The manufacturer, acting pursuant to the employer's specification, becomes an absolute insurer of its product.[141] An injured employee is certainly entitled to compensation for his injuries. Removing a manufacturer's defenses, though, defeats the deterrence goal of strict products liability.[142]

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135. *Id.*

136. *See supra* notes 63-65 and accompanying text.

137. This statement is supported by the Restatement (Second) of Torts which was specifically adopted in Ohio by Temple v. Wean United, Inc., 363 N.E.2d 267 (Ohio 1977). While products liability is now codified in Ohio, the Restatement should be given great deference as it was the impetus for products liability in Ohio. *See, e.g.*, Bowling v. Heil, 511 N.E.2d 373, 378 (Ohio 1987). In *Bowling*, the Ohio Supreme Court deferred to the Restatement to determine the proper application of assumption of risk in strict products liability. *Id.*

138. In *Cremeans*, Sohio advised Willmar that the loader could not be operated in the area with the protective structure attached and agreed to accept responsibility for injuries resulting from the lack of a protective cage. *Cremeans*, 566 N.E.2d at 1204.

139. *Id.*

140. *See supra* notes 63-65 and accompanying text.

141. It may be argued that this is the rationale behind strict liability. *See* PROSSER AND KEETON, *supra* note 5, at 693. (the manufacturer is more capable than the consumer to absorb or spread the costs of injuries caused by the manufacturers products). This rationale, however, recognizes that manufacturers should be entitled to defenses. The manufacturer's protection from an employee's failure to act reasonably is as much a part of strict liability as the concept of risk spreading. *See* OHIO REV. CODE ANN. § 2315.20 (Anderson 1991) which explicitly defines assumption of risk as a defense to strict products liability.

142. *See* PROSSER AND KEETON, *supra* note 5, at 693 (advocates of strict products liability believed that strict liability would deter the manufacture of unsafe products); *see also* Daly v. General Motors Corp., 575 P.2d 1162, 1170-71 (Cal. 1978)(comparative negligence is not in conflict with the theory of deterrence which underlies strict products liability). For a discussion of the applicability of comparative negligence to strict products liability, see *infra* notes 185-240 and accompanying text.

An employer's incentive to provide a safe work place for employees has been diminished by workers' compensation.[143] After *Cremeans*, employees, similarly, have less incentive to take responsibility for their actions. This, too, is in conflict with the deterrence goal of products liability.[144]

It has been argued that the threat of reduced tort compensation will not deter an employee from taking increased precautions for his safety.[145] In employment situations where economic coercion is concededly present, however, an employee may act against his survival instinct in order to maintain his job.[146] It is under these circumstances that the incentive to act contrary to one's safety is high; thus a counter inducement is vital.[147] If employees are not responsible for their actions in these situations, the probability increases that they will encounter the risk. By removing responsibility from employees for their actions, the court increases the likelihood that employees will act in a manner contrary to their safety. The goal should be to encourage both employees and manufacturers to create a safe working environment. This result can be achieved by holding both parties responsible for their actions through comparative negligence.[148]

2. Applicability of Comparative Negligence to Cremeans' Claim in Negligent Products Liability.

Holding manufacturers solely responsible for work-related strict products liability actions is no more just than completely barring an employee from recovery. The decision in *Cremeans*, however, increases

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143. *See supra* notes 63-68. Statutory caps on recovery reduce an employer's incentive to take injury-reducing precautions. *See* Theodore F. Haas, *On Reintegrating Workers' Compensation and Employers' Liability*, 21 GA. L. REV. 843, 849 (1987)(Deterrence under workers' compensation is weaker than deterrence under tort law. Because of the possibility of higher compensation awards available in tort law, employers are more likely to take precautionary measures to avoid employee injury under a tort system than a workers' compensation system).

144. *See supra* note 143.

145. *See* North, *supra* note 54, at 48. "For most, the risk avoidance instinct is predicated on the avoidance of pain rather than cost." *Id.*

146. *Id.* The author argues that economic compulsion reduces an employee's ability to act voluntarily. "Men will sign any sort of waiver or agreement in order to obtain employment." *Id.* (citing *Amending the Federal Employers' Liability Act: Hearings on S.1708 Before a Subcomm. of the Senate Judiciary Comm.*, 76th Cong., 1st Sess. 33-34 (1939) [hereinafter Hearings] (statement of Senator Neely)) *quoted in* Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 61-62 n.12 (1943).

147. North, *supra* note 54, at 48. The comment argues that economic coercion will induce an employee to act contrary to his safety. *See also* Hearings, *supra* note 146. It follows from this reasoning that the economic threat of reduced tort compensation will induce an employee to act in a careful manner.

148. Applicability of comparative negligence to strict products liability is discussed *infra* notes 185-240 and accompanying text.

a manufacturer's potential liability through the court's refusal to apply Ohio's comparative negligence statute[149] to Cremeans' claim in negligent products liability.[150]

The court in *Cremeans* recognized that assumption of risk merged with contributory negligence under Ohio's comparative negligence statute in *Anderson v. Ceccardi*.[151] The court easily skirted the issue by stating that "since the defense of assumption of risk is unavailable in the case at bar, so too is the defense with which it has been merged . . . ."[152] Revised Code section 2315.19 was therefore held inapplicable. This holding is at odds with both *Anderson* and the statute.

In holding that contributory negligence and assumption of risk[153] merged, the *Anderson* court stated: "[t]he conduct previously considered as assumption of risk by the plaintiff shall be considered by the trier of fact under the phrase 'contributory negligence of the person bringing the action under R.C. 2315.19 . . . .' "[154] The court, in effect, said that where assumption of risk previously applied, it is now labeled contributory negligence and is subject to comparative fault apportionment whenever Revised Code section 2315.19 is applicable.[155]

The *Cremeans* majority read *Anderson* as holding that comparative negligence applies only where assumption of risk applies.[156] This reading, however, ignores the existence of contributory negligence outside of that which was formerly called assumption of risk. For example, the Restatement differentiates between the form of contributory negligence that is the same as assumption of risk and contributory negligence which "consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence."[157] Only the former type of contributory negligence, that which is merged with assumption of risk, is a defense to strict products liability actions.[158] Both

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149. OHIO REV. CODE ANN. § 2315.19 (Anderson 1991).

150. Cremeans v. Willmar Henderson Mfg., 566 N.E.2d 1203, 1209 (Ohio 1991).

151. 451 N.E.2d 780 (Ohio 1983). Since *Anderson*, the statute has been amended to explicitly include both contributory negligence and implied assumption of risk. OHIO REV. CODE ANN. § 2315.19 (Anderson 1991).

152. *Cremeans*, 566 N.E.2d at 1209.

153. The assumption of risk involved does not include express or primary implied assumption of risk. *See supra* note 6.

154. *Anderson*, 451 N.E.2d at 783.

155. This holding is limited to negligence actions. Discussion of applicability of comparative negligence to products liability is contained *infra* notes 185-240 and accompanying text.

156. *Cremeans*, 566 N.E.2d at 1209.

157. RESTATEMENT (SECOND) OF TORTS § 402 A cmt. n (1965).

158. In Bowling v. Heil, 511 N.E.2d 373 (Ohio 1987), the Ohio Supreme Court stated: [E]ither a plaintiff's contributory negligence amounts to a voluntary assumption of a known risk, or it does not. If it does, then that conduct provides an otherwise strictly liable defendant with a complete defense. If it does not, the contributory negligent of the defendant provides no defense. *Id.* at 378.

the former type of contributory negligence, voluntary and unreasonable encountering of a known risk, and the latter type, failing to discover the defect or to guard against its existence, are available in negligent product liability actions.[159]

The conclusion that a form of contributory negligence exists outside of voluntary and unreasonable encountering of a known risk can also be drawn from a careful reading of section 2315.20 of the Ohio Revised Code.[160] The code separates defenses available under strict products liability and negligent products liability.[161] Under strict products liability, only express and implied assumption of risk operate as a bar to recovery.[162] Under negligent products liability, the code distinguishes between the defense of implied assumption of risk[163] and contributory negligence.[164]

Both defenses are available under the statute and are subject to comparative fault under section 2315.19.[165] The current version of section 2315.20 came into effect long after the Ohio Supreme Court merged assumption of risk and contributory negligence in *Anderson v. Ceccardi*.[166] If no difference remained between implied assumption of

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159. *See* OHIO REV. CODE ANN. §§ 2315.20 (B)(3) and 2315.20(C)(2) (Anderson 1991).

160. OHIO REV. CODE ANN. § 2315.20 (Anderson 1991).

161. *Id.*

162. *Id.* §§ 2315.20 B(1) and (2).

163. *Id.* § 2315.20 (B)(3) which states:

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 upon that claim and the amount of any recoverable damages.

164. *Id.* § 2315.20 (C)(1) and (C)(2) which state:

(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 . . .

(C)(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 product liability claim, 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 damages.

165. *See supra* notes 163-64.

166. 451 N.E.2d 780 (Ohio 1983). Section 2315.20 became effective January 5, 1988. There is no indication that the statute overruled *Anderson*. *Anderson* merged contributory negligence and assumption of risk to clear up the confusion in the areas where both were pled. *Id.* at 782-84. Specifically, the court in *Anderson* intended to clarify the situation where the plaintiff voluntarily and unreasonably exposed himself to danger. *Id.* at 780-81. Similarly, the Revised Code clears up the confusion between assumption of risk and contributory negligence. Voluntary and unreasonable assumption of risk, often labeled contributory negligence, is a defense to negligent products liability. OHIO REV. CODE ANN. § 2315.20(B)(3) (Anderson 1991). Contributory negligence, which entails failure to recognize or guard against a known risk, is also a defense.

risk and contributory negligence, then the legislature would not have separated the two defenses. The legislature must have recognized that only the form of contributory negligence which entails voluntarily and unreasonably encountering a known risk was merged with assumption of risk. In short, there is a form of contributory negligence, failure to recognize or guard against a risk, which is not equivalent to implied assumption of risk and remains applicable in negligent products liability actions.

To say that contributory negligence cannot apply where assumption of risk does not apply ignores both the decision in *Anderson* and Ohio statutory law. Because the *Cremeans* court purports to accept *Anderson's* merger of the two defenses, it should also accept that court's characterization of the merger.

Until the subject is again raised in the Ohio Supreme Court, or the Ohio General Assembly takes action, the majority in *Cremeans* has effectively abolished assumption of risk in most strict and negligent products liability actions arising in the workplace. The Ohio Supreme Court has also abolished comparative negligence in negligent products liability actions where assumption of risk does not apply. Since the situations where assumption of risk would apply are minimal, so too are the areas where comparative negligence would apply. As a result, if *Cremeans* is read literally, manufacturers will be entitled to little relief when employees are injured and either strict or negligent products liability is proven.

C. Alternative Options

1. The Minority in *Cremeans*

In order to protect employees from the harshness of assumption of risk, and to protect manufacturers from the unreasonable acts of employees and employers, Ohio should apply comparative negligence principles to strict products liability.[167] The *Cremeans* majority's severe restriction on assumption of risk is an attempt to provide employees with adequate relief when they are injured.[168] In the process, the decision places a tremendous burden on manufacturers who sell products for use in the workplace. This burden is significantly greater than that of manufacturers who supply products within the normal stream of commerce.

OHIO REV. CODE ANN. § 2315.20(C)(2) (Anderson 1991). This is the same result that *Anderson* achieved.

167. Ohio has statutorily adopted comparative fault. OHIO REV. CODE ANN. § 2315.19 (Anderson 1991).

168. *See* Cremeans v. Willmar Henderson Mfg., 566 N.E.2d 1203, 1207 (Ohio 1991).

Since *Cremeans* is limited to work-related injuries,[169] the statutory defenses to strict and negligent products liability remain available for products distributed outside the work force. Thus, a manufacturer's liability depends not only on the product sold but also on to whom it was sold.[170] The concurring and dissenting opinions offer several alternatives, but none of these alternatives would greatly reduce the harshness of the absolute bar of assumption of risk.[171]

In his concurring opinion, Justice Wright contended that the trend recognized by the majority is really just a trend to submit the issue of assumption of risk to a jury, rather than to decide the issue as a matter of law.[172] Justice Wright would maintain the assumption of risk defense[173] but solely as a question for the jury.[174] While this rule would significantly ease the burden on the manufacturer, there is still the possibility that the plaintiff's claim would be completely barred.[175]

Similarly, Justice Holmes, in his dissent, questioned the majority's abrogation of assumption of risk when the defendant did not create the compulsion of circumstances.[176] Justice Holmes contended that the majority in *Cremeans* misinterpreted section 496 E of the Restatement.[177] Furthermore, Justice Holmes stated that since "this court has never held that economic necessity can nullify an employer's use of the de-

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169. *Id.*

170. Section 2307.71 of the code, concerning products liability, defines a claimant as "[a] person who asserts a product liability claim, or on whose behalf the claim is asserted." OHIO REV. CODE ANN. § 2307.71(A)(1). The statute makes no distinction between claimants within the work force and those in the general public. Liability should be based upon the condition of the product and the behavior of the claimant, not on the origin of the claimant.

171. *See infra* notes 172-84 and accompanying text.

172. *Cremeans*, 566 N.E.2d at 1212.

173. Justice Wright states that the rule should be:

> Where a plaintiff is an employee injured on the job by a defendant manufacturer's product and the plaintiff is not under the defendant's control, then the defendant may assert as a defense that the plaintiff knowingly, voluntarily, and unreasonably assumed the risk posed by the product and is therefore barred from recovery.

Id.

174. *Id.*

175. Justice Wright's concurrence does not alter the impact of a finding of assumption of risk. He merely states that the trend is to allow juries to decide the issue, taking into account an employee's working conditions in determining whether the employee's acts were "knowing, voluntary, and unreasonable." *Id.* In fact, Justice Wright suggests that the complete bar of assumption of risk is not severe because an employee may still have a suit in negligence. *See infra* notes 179-84 and accompanying text.

176. *Cremeans*, 566 N.E.2d at 1214. *See* Hedgepath v. Freuhauf Corp., 634 F. Supp. 93 (S.D. Miss. 1986) (tractor trailer driver was barred from recovery from the manufacturer despite clear evidence that he was acting under compulsion from employer); Ralston v. Illinois Power Co., 299 N.E.2d 497, 499 (Ill. Ct. App. 1973) (an order from a superior does not make exposure to risk created by a dangerous product involuntary).

177. *Cremeans*, 566 N.E.2d at 1214. See *supra* notes 128-42 and accompanying text for a discussion of the majority's interpretation of the Restatement.

fense of assumption of risk, it is wholly inappropriate to extend the concept to negate the defense when it is raised by a manufacturer."[178] He did not, however, offer an alternative to the complete bar of assumption of risk.

Justice Wright's concurrence touched upon an area that could protect both employees and manufacturers in strict products liability actions. In recognizing that assumption of risk is "harsh in its application,"[179] he contended that employees also have the option to sue in negligent product liability.[180] Under negligence, assumption of risk would be only a partial bar to recovery.[181] This theory, however, has two flaws. First, negligence is often more difficult to prove than strict product liability and may not always be available.[182] Second, after *Cremeans,* comparative fault can only apply in negligence actions if assumption of risk is available in strict liability.[183] In employment situations, this is rarely the case.[184] So in one instance, the employee may be completely barred because he has no claim; in another, the manufacturer has no recourse.

2. Applying Comparative Negligence to Strict Products Liability

Both sides could be protected from harsh treatment if Ohio would extend comparative negligence principles, available in negligent products liability, to strict products liability. The Ohio courts and General Assembly currently refuse to do so. In *Bowling v. Heil,*[185] the Ohio Supreme Court held that "principles of comparative negligence or comparative fault have no application to a products liability case based upon strict liability in tort."[186] In addition, Ohio statutory law does not

178. *Cremeans*, 566 N.E. 2d at 1213.

179. *Id.* at 1211.

180. *Id.* at 1211-12. (citing Justice Douglas in Onderko v. Richmond Mfg. Co., 511 N.E.2d 388, 392 (Ohio 1987)).

181. *See* OHIO REV. CODE ANN. § 2315.20(B)(3) (Anderson 1991).

182. Negligence requires proof of a lack of ordinary care. *See* Mobberly v. Sears, Roebuck & Co., 211 N.E.2d 839 (Ohio Ct. App. 1965). Strict liability, conversely, may be applied where ordinary care has been exercised. *See* Temple v. Wean United Inc., 364 N.E.2d 267 (Ohio 1977). Furthermore, if an employee's fault is great enough, she may still be barred from recovery. OHIO REV. CODE ANN § 2315.19(A)(2) (Anderson 1991). The statute provides that plaintiffs' recoveries will be barred if their negligence is greater than the defendants.

183. *See supra* notes 151-66 and accompanying text.

184. *See supra* notes 95-100 and accompanying text. *Cremeans* provides that an employee can not assume the risk of injuries attained while in the course of her employment.

185. 511 N.E.2d 373 (Ohio 1987).

186. *Id.* at 380. *See also* Bailey v. V & O Press Co., Inc., 770 F.2d 601 (6th cir. 1985) (applying Ohio law). In determining that the issue had never been decided before in Ohio, the court held that Ohio would not apply comparative fault to strict products liability. *Id.* at 606.

provide for comparative negligence to be applied to strict liability actions.[187]

In *Bowling*, the majority stated that liability is not based "on the conduct either of the manufacturer or of the person injured because of the product."[188] As stated by the *Bowling* court, the liability issues are as follows: "was the product or its design faulty, did the defendant inject the defective product into the stream of commerce, and did the defect cause the injury?"[189] Ohio, however, statutorily adopted the defense of assumption of risk which clearly takes the plaintiff's conduct into consideration.[190] It follows that if an employee's conduct can bar her from recovery, it would not be unjust for the employee's conduct to be compared with the manufacturer's conduct merely to reduce recovery.

The *Bowling* majority contended that strict products liability is not fault-based but, rather, is founded on policy which "seeks to spread the loss among all users of the product."[191] Courts have countered this logic by determining that strict liability, while not based on moral fault, is based on legal or "quasi fault."[192] Therefore, the theoretical

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187. OHIO REV. CODE ANN. § 2315.20(B)(2) (Anderson 1991) (implied or express assumption of risk provide an absolute bar to strict product liability actions). Section 2315.20(C)(1) states that contributory negligence is not applicable to strict products liability. *Id.* § 2315.20(C)(1).

188. *Bowling*, 511 N.E.2d at 380.

189. *Id.* The court in *Bowling* recognized that Ohio adopted the Restatement (Second) § 402A in Temple v. Wean, 364 N.E.2d 267 (Ohio 1977). The Restatement rule is as follows:

> (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 . . . 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 ithout substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his products, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

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

Products liability has since been codified in Ohio. OHIO REV. CODE ANN. §§ 2307.71-80 (Anderson 1991).

190. OHIO REV. CODE ANN. § 2315.20(B)(1) (Anderson 1991).

191. *Bowling*, 511 N.E.2d at 380.

192. *See* Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1975)(applying Mississippi law) (it was a proper jury instruction to consider the defendant's fault in a strict products liability case); Daly v. General Motors Corp., 575 P.2d 1162 (Cal. 1978) (underlying purpose of the adoption of strict products liability was that loss should be assessed in proportion to fault); Suter v. San Angelo Foundry and Mach. Co., 406 A.2d 140, 146 (N.J. 1979) (fault is inherent in the concept of strict liability); Sanford v. Chevrolet Div. of General Motors, 642 P.2d 624 (Or. 1982) (manufacturer's fault lies in putting the defective product on the market). *See also* Daniel J. Voelker, *The Application of Comparative Negligence to Strict Products Liability*, Coney v. J.L.G. Industries, Inc., 59 CHI-KENT L. REV. 1043 (1985) (citing Dominic P. Carestia, *The In-*

argument that comparative fault is antithetical to strict liability has no practical basis.[193]

Ohio's position on the applicability of comparative negligence to strict products liability is inconsistent with a majority of states.[194] Several states which have adopted comparative negligence either statutorily or judicially have applied these principles to actions based on strict products liability.[195] These states have applied comparative negligence to products liability through various statutory and judicial innovations. Some states have adopted statutes which expressly provide for comparative principles to apply to strict products liability.[196] Other state laws provide for comparative principles to apply to actions based on fault and expressly include strict products liability within the definition of a fault based action.[197] Still other statutes broadly apply to "any action to recover damages for personal injury, injury to property, or wrongful death."[198] Courts have interpreted comparative statutes with this type of language to apply to strict products liability.[199]

An Ohio court seeking to extend comparative fault to strict products liability faces significant statutory obstacles. The Ohio compara-

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teraction of Comparative Negligence and Strict Products Liability — Where Are We?, 47 INS. COUNS. J. 53 (1980)).

193. Voelker, *supra* note 192, at 1054.

194. *See supra* note 186.

195. States that have extended comparative fault to strict product liability by statute include: ARIZ REV. STAT. ANN. § 12-2509(C) (Supp. 1991); COLO. REV. STAT § 13-21-406 (1990); CONN. GEN. STAT. ANN. § 52-5720(1) (West 1991); FLA. STAT. ANN. § 768.81 (West Supp. 1992); IDAHO CODE § [6-1404] 6-1304 (2)(B) (1990); IOWA CODE ANN. § 668.1 (West 1987); KY. REV. STAT. ANN § 411.182 (Baldwin 1991); MICH. COMP. LAWS ANN. § 600.2945 (West 1980); TEX. CIV. PRAC. & REM. CODE § 33.001 (1992); UTAH CODE ANN. § 78-27-37(2) (1987). Other states have extended the concept judicially; they include: Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1975) (applies to misuse and voluntary and unreasonable assumption of risk); W.M. Bashlin Co. v. Smith, 643 S.W.2d 526 (Ark. 1982); Daly v. General Motors Corp., 575 P.2d 1126 (Cal. 1978); Hao v. Owens Illinois, Inc., 738 P.2d 416 (Haw. 1987); Coney v. J.L.G. Industries, Inc., 454 N.E.2d 197 (Ill. 1983); Kennedy v. Sawyer, 608 P2d 1379 (Kan. Ct. App. 1980), *rev'd in part*, 618 P.2d 788 (Kan. 1980); Austin v. Raybestos-Manhattan. Inc., 471 A.2d 280 (Me. 1984); Zahrte v. Sturm, Ruger & Co., 661 P.2d 17 (Mont. 1983); Marchese v. Warner Communications, Inc., 670 P.2d 113 (N.M. Ct. App. 1983); Mauch v. Manufacturers Sales & Service, Inc., 345 N.W.2d 338 (N.D. 1984); Sanford v. Chevrolet Div. of General Motors, 642 P.2d 624 (Or. 1982); Klein v. R.D. Werner Co., 654 P.2d 94 (Wash. 1982); Fischer v. Cleveland Punch & Shear Works Co., 280 N.W.2d 280 (Wis. 1979).

196. *See, e.g.*, IDAHO CODE § 6-1304 (1990); MICH. COMP. LAWS ANN. § 600.2949 (West 1986); NEB. REV. STAT. § 2521.185 (1989)

197. *See, e.g.*, COLO. REV. STAT. ANN. § 13-21-406 (West 1989); IOWA CODE ANN. § 668.1 (West 1989); MINN. STAT. ANN. § 604.01(1)(a) (West 1988); WASH. REV. CODE ANN. § 4.22.015 (West 1988).

198. N.Y. CIV. PRAC. L. & R. § 1411 (McKinney 1976).

199. *See* Austin v. Raybestos-Manhattan, Inc., 471 A.2d 280 (Me. 1984) (interpreting ME. REV. STAT. ANN. tit. 14, § 156 (West 1980)); Fiske v. Macgregor, Div. of Brunswick, 464 A.2d 719 (R.I. 1983) (interpreting R.I. GEN. LAWS § 9-20-4 (1970)).

tive negligence statute, on its face, applies only to negligence claims.[200] Similarly, the Ohio products liability statute provides that assumption of risk is a complete bar to recovery under strict liability,[201] and that contributory negligence is not applicable to strict products liability.[202]

Jurisdictions with statutes similar to Ohio's have reached one of three conclusions regarding the applicability of comparative negligence statutes to strict products liability actions. Courts have:

(1) held that the statute is directly applicable to products-liability actions;[203]
(2) adopted comparative negligence despite finding that the statute does not apply to strict products liability;[204]
(3) held that the statute does not apply to strict products liability and have refused to judicially apply comparative negligence to strict products liability.[205]

Courts holding comparative negligence statutes like Ohio's directly applicable to strict products liability have done so either by considering strict products liability to be a form of negligence per se[206] or by looking beyond the language of the statute to the purpose or spirit of the statute.[207] The latter approach is generally more accepted than the former.[208]

In *Suter v. San Angelo Foundry & Machine Co.*,[209] the New Jersey Supreme Court reasoned that the state comparative negligence statute, while on its face limited to negligence actions, was "subsumed within the concept of tortious fault."[210] The court found that restricting the statute to negligence actions was at odds "with the spirit" and the general legislative history of the act.[211] The court further stated that,

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200. OHIO REV. CODE ANN § 2315.19(A)(1) (Anderson 1991).
201. *Id.* § 2315.20(B)(1) and (2).
202. *Id.* § 2315.20(C)(1).
203. *See infra* notes 209-12 and accompanying text.
204. *See infra* notes 213-17 and accompanying text.
205. *See infra* notes 218-20 and accompanying text.
206. Dippel v. Sciano, 155 N.W.2d 55 (Wis. 1967). In *Dippel*, the Wisconsin Supreme Court simultaneously expanded the state warranty statute to include strict products liability and applied the Wisconsin comparative negligence statute to the strict product liability action. *Id.* at 62-63. The court reasoned that strict product liability is akin to liability imposed for negligence per se and the comparative negligence statute is therefore applicable. *Id.* at 64-65.

This analysis has received criticism and little support. *See* Murray v. Fairbanks Morse, 610 F.2d 149, 157 (3d Cir. 1979) (applying Virgin Islands law); Butand v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 45 (Alaska 1976); Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854, 857 (W. Va. 1982).
207. *See infra* notes 209-12 and accompanying text.
208. *See infra* notes 209-12 and accompanying text.
209. 406 A.2d 140 (N.J. 1979).
210. *Id.* at 145.
211. *Id.*

absent statutory authority, "comparative negligence could be judicially adopted in strict liability cases."[212]

Several courts that refuse to read strict products liability into the comparative negligence statute[213] have judicially adopted comparative negligence in strict products liability actions.[214] In *Thibault v. Sears, Roebuck and Co.*,[215] the New Hampshire Supreme Court refused to apply the state comparative negligence statute to strict products liability because the statute was facially restricted to negligence.[216] The court did, however, judicially apply comparative negligence to strict liability, stating that "strict liability is a judicially created doctrine to which the principle of comparative causation will be applied . . . ."[217]

Some jurisdictions have refused to read products liability application into comparative negligence statutes and have also refused to judicially adopt the doctrine.[218] In *Melia v. Ford Motor Co.*,[219] the district court noted that the Nebraska comparative negligence statute was, on its face, limited to negligence and refused to provide a jury instruction that some form of comparative fault should be applied.[220]

Despite the apparent statutory obstacles, an Ohio court could follow the lead of several other jurisdictions and either interpret the Ohio comparative negligence statute as applicable to strict products liability,[221] or judicially apply comparative negligence to strict products lia-

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212. *Id.* at 146 n.3.

213. It should be reiterated that this section is concerned with comparative negligence statutes which are on their face limited to negligence. Statutes which explicitly apply to strict products liability, or are not expressly limited to negligence actions, are discussed *supra* notes 196-99 and accompanying text.

214. *See infra* notes 216-18 and accompanying text.

215. 395 A.2d 843 (N.H. 1978).

216. *Id.* at 850.

217. *Id.* at 848. *See also* Zahrte v. Sturm, Ruger & Co., 498 F. Supp. 389 (D. Mont. 1980) (applying Montana law). The district court judicially adopted comparative negligence to strict liability but would not apply the Montana statute stating "[i]f the Montana Legislature wishes to apply § 27-1-702, MCA to strict liability actions, that is within their province." *Id.* at 392. The Montana Legislature subsequently enacted code section 27-1-719(5)-(6) applying comparative negligence to strict products liability. MONT. CODE ANN. § 27-1-719(5)-(6) (1991). *See also* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984). The Texas Supreme Court stated that the statutory limitation of the state comparative negligence statute to negligence actions, "does not . . . preclude this court from fashioning a common law comparative apportionment system for strict products liability cases." *Id.* at 427.

218. *See infra* notes 220-21 and accompanying text.

219. 534 F.2d 795 (8th Cir. 1976) (applying Nebraska law).

220. *Id.* at 802. It should be noted that the Nebraska Legislature has since amended its comparative negligence statute to include strict liability. NEB. REV. STAT. § 25-21,185 (1985); *see also* Kinard v. Coats Company, Inc., 553 P.2d 835 (Colo. 1976); Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974). Like Nebraska, the Colorado legislature subsequently adopted comparative negligence in strict products liability. COLO. REV. STAT. ANN. § 13-21-406 (West 1989).

221. *See supra* notes 209-12 and accompanying text.

bility despite the contrary statutory provision.[222] Similarly, the Ohio Legislature could follow the lead of several other jurisdictions and either expressly provide for strict liability application,[223] or expand the language of the comparative negligence statute to include more than negligence.[224]

Most jurisdictions favor applying comparative negligence to strict products liability because comparative negligence is not inconsistent with the underlying theory of strict liability.[225] Moreover, comparative negligence does not affect the underlying goals of strict products liability.[226] As the California Supreme Court recognized in *Daly v. General Motors Corp.*,[227] one such goal is to relieve plaintiffs of the burden of proving negligence.[228] As the *Daly* court stated, "[p]laintiffs will continue to be relieved of proving that the manufacturer . . . was negligent in the production, design, or dissemination of the article in question. Defendant's liability . . . remains strict."[229]

A second goal recognized by the *Daly* court was to protect consumers and provide incentives for manufacturers to provide safe products.[230] The court confronted this goal by stating that comparative fault will not remove a manufacturer from liability. In fact, it may hold the manufacturer liable when the plaintiff's claim would have otherwise been barred by assumption of risk.[231] Furthermore, manufacturers do not anticipate that a consumer's conduct will relieve the manufacturer of liability.[232]

A third goal of strict products liability, spreading the cost away from the injured party to society in general,[233] may be furthered or deterred depending on the extent to which comparative negligence is applied.[234] Ohio can make its law consumer or manufacturer protective.

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222. *See supra* notes 213-17 and accompanying text.
223. *See supra* note 197 and accompanying text.
224. *See supra* notes 198-99 and accompanying text.
225. *See supra* notes 191-93 and accompanying text.
226. *See infra* notes 228-35 and accompanying text.
227. 575 P.2d 1162 (Cal. 1978).
228. *Id.* at 1168.
229. *Id.*
230. *Id.* at 1169.
231. *Id.* As a result, a manufacturer's incentive may actually increase.
232. *Id.*
233. *Id.*
234. In Ohio, for example, if comparative negligence is applied only to those defenses already available in strict products liability (i.e., assumption of risk, misuse), then the cost is further removed from consumers because traditional bars to recovery will now only be partial bars. If Ohio chooses to apply all of the defenses that are encompassed by the statute (i.e., contributory negligence, assumption of risk), or otherwise expands the types of misconduct which could reduce a plaintiff's recovery, the consumer, while less likely to be barred from recovery, does bear a greater risk that his conduct will reduce his recovery.

Comparative negligence will provide a system that is fair to both parties. Applying comparative negligence to strict products liability is less harsh to employees than applying assumption of risk. Comparative negligence is less harsh to manufacturers than practically eliminating the most substantial defense to strict products liability. As one court stated:

> [While] it is true [that] the manufacturer's exposure to liability will be lessened to the extent the victim's conduct contributed to the injury . . . it is also true [that] the manufacturer's exposure may be increased when a normally-barred plaintiff is allowed some recovery as a consequence of the defendant's manufacture of a dangerous product.[235]

Thus, comparative negligence can properly balance the competing interests of both the employee and the manufacturer.

The majority in *Cremeans* would prefer that both comparative negligence and assumption of risk be inapplicable.[236] The majority in *Cremeans* failed to notice that the trend towards applying comparative negligence to strict products liability is at least as pronounced as the trend condemning assumption of risk.[237] This is significant because both trends are based upon a desire to reduce the harshness of the complete bar of assumption of risk.[238]

Since products liability is based on policy, it is a better policy to provide a system protecting all of the participants. The purpose behind the emergence of products liability has been characterized as "protection against dangerous and defective products for an increasingly vulnerable *consumer* . . . ."[239] Without judicial foresight, consumers would not have legal security against dangerous products. It will take similar judicial foresight to see that, where assumption of risk has been severely restricted, manufacturers have little or no recourse from employees who choose to use dangerous products despite their awareness of such danger. It is time for Ohio to truly "move into the Twentieth

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For an example of the consumer protective application, see Busch v. Busch Constr., Inc., 262 N.W.2d 377, 394 (Minn. 1977) (comparative negligence statute shifts some of the risk of loss away from the plaintiff). For an example of the second manufacturer protective situation, see *Daly*, 575 P.2d at 1169 (Cal. 1978) (recognizing that the cost to the manufacturer of compensating the victim is reduced by applying comparative negligence to strict products liability).

235. Stueve v. American Honda Motors Co., Inc., 457 F. Supp. 740, 754 (D. Kan. 1978) (applying Kansas law).

236. Cremeans v. Willmar Henderson Mfg., 566 N.E.2d 1203, 1209 (Ohio 1991).

237. *See supra* note 195.

238. Voelker, *supra* note 192, at 1046. Since the majority in *Cremeans* was concerned with protecting the employee, it is significant that comparative negligence is largely being adopted to protect consumers, not manufacturers.

239. Jerome F. Leavell, *The Return of Caveat Venditor as the Law of Products Liability*, 23 ARK. L. REV 355, 356 (1969) (emphasis added).

Century"[240] and either judicially or statutorily extend comparative negligence principles to strict products liability.

V. Conclusion

Cremeans v. Willmar Henderson Corp. is a step backwards for Ohio in the area of products liability. Assumption of risk clearly was harsh in its application to employees. This harshness, however, does not justify going to the opposite extreme and providing manufacturers with virtually no defense to products liability suits that arise in the workplace. The court has reduced the applicability of comparative fault by practically excluding its use in workplace injuries. This result is antithetical to the trend that is emerging in jurisdictions throughout the country.[241] The trend is to extend comparative negligence to strict products liability and to resolve the confusion and severity that result from strict application of assumption of risk. In jurisdictions that have stringently adhered to the complete bar of assumption of risk, employees will benefit from the change. In jurisdictions where assumption of risk has been severely limited, manufacturers will benefit. Extending comparative fault to all cases of strict products liability is the only way to protect both parties.

Samuel R. Guelli

240. *Cremeans*, 566 N.E.2d at 1211. (Brown, J., concurring).
241. *See supra* note 195 and accompanying text.