IN THE SUPREME COURT OF THE STATE OF NEVADA

AIMEE NICOLE NATAPU, INDIVIDUALLY, AS THE SPECIAL ADMINISTRATOR OF THE ESTATE OF ROMNEY NATAPU, AND AS THE NATURAL MOTHER AND GUARDIAN OF KINSLEE LASUSULU-SALAFAL NATAPU, A MINOR; ARIA ESTELLE MANAMEA NATAPU, A MINOR; ARLIE TALALELE NATAPU, A MINOR; KING AAIFOU-TOA NATAPU, A MINOR, Appellant, vs. CATERPILLAR, INC., A DELAWARE CORPORATION, Respondent.	No. 85841
AIMEE NICOLE NATAPU, INDIVIDUALLY, AS THE SPECIAL ADMINISTRATOR OF THE ESTATE OF ROMNEY NATAPU, AND AS THE NATURAL MOTHER AND GUARDIAN OF KINSLEE LASUSULU-SALAFAL NATAPU, A MINOR; ARIA ESTELLE MANAMEA NATAPU, A MINOR; ARLIE TALALELE NATAPU, A MINOR; KING AAIFOU-TOA NATAPU, A MINOR, Appellant, vs. CATERPILLAR, INC., A DELAWARE CORPORATION, Respondent.	No. 86010

FILED

JAN 16 2025

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER REVERSING (DOCKET NO. 85841), VACATING (DOCKET NO. 86010), AND REMANDING

25-02376

These are consolidated appeals from a district court defense judgment on a jury verdict in a wrongful death case and a post-judgment order awarding costs. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.

Appellant Aimee Natapu, as administrator for the estate of Romney Natapu and mother and guardian of the Natapu children, filed a wrongful-death action under a strict products liability theory, alleging that respondent Caterpillar, Inc., manufactured a defectively designed the 2009 R1600G LDH underground mining loader that rolled over Romney, causing his death. Safety protocols apparently required loader operators to set the parking brake and chock the wheels, among other steps. Aimee maintained that the loader should have a system to automatically engage a parking brake when operators are not in the machine, irrespective of safety protocols.

Aimee brought two motions in limine before trial. One motion sought to exclude conclusions in the Mine Safety and Health Administration's (MSHA) report attributing the cause of Romney's death to the failure to follow safety protocols. The other motion sought to exclude evidence and argument of contributory negligence, misuse, and assumption of the risk because that evidence, according to Aimee, could only prove contributory negligence, which is not a defense in strict products liability. The district court denied the motion seeking to exclude the MSHA report. It also allowed evidence of alleged misuse and failure to follow safety protocols, but disallowed evidence and argument that Romney was comparatively at fault. The jury was provided a special verdict form, asking three questions, all of which it answered affirmatively in finding that the evidence showed that (1) the loader was defective, (2) Romney used the

loader in a reasonably foreseeable manner, but (3) Romney assumed the risk of injury or death in the manner of his use of the defectively designed loader, which was the proximate cause of his death. Based on its answer to the assumption-of-the-risk question, the special verdict form directed the jury to leave unanswered the remaining questions about whether the defect was the proximate cause of death and the extent of damages. Thereafter, the court entered judgment on the verdict, dismissing the action accordingly, with the estate taking nothing. It later awarded Caterpillar costs.

On appeal, Aimee challenges the admission of assumption-of-the-risk evidence and the MSHA report. As explained below, we perceive no abuse of discretion in the district court's decision to allow Caterpillar to proceed with an assumption-of-the-risk defense. We agree, however, that the MSHA report was unfairly prejudicial under NRS 48.035, such that exclusion of the evidence might reasonably have led to a different result at trial. And for that reason, we reverse and remand for a new trial.

Evidence, argument, and instruction on assumption of the risk

Preservation

As a threshold issue, we are not persuaded by Caterpillar's argument that Aimee failed to preserve a challenge concerning the admissibility of the evidence on assumption of the risk. By way of her motion in limine, Aimee properly preserved this issue for appeal. Motions in limine can preserve an issue for appeal, so long as the "objection has been fully briefed, the district court has thoroughly explored the objection during a hearing on a pretrial motion, and the district court has made a definitive ruling." *Richmond v. State*, 118 Nev. 924, 932, 59 P.3d 1249, 1254 (2002). In such an instance, "the alleged error at trial is the same as the error

alleged in the ruling on the motion," thus preserving the issue for appeal. *Bayerische Motoren Werke Aktiengesellschaft v. Roth*, 127 Nev. 122, 136-37, 252 P.3d 649, 659 (2011).

Aimee's motion in limine asserted that "the record is devoid of any evidence to show that Romney actually knew and appreciated the risk and danger posed by the Loader without the presence of" an automatic brake and Caterpillar's evidence showed "only that decedent was guilty of contributory negligence." In ruling on the motion, the district court excluded "[e]vidence (i.e., argument) that" Romney "was comparatively at fault" but allowed "[e]vidence of alleged misuse and failure to follow safety protocols." Just as she did below, Aimee argues on appeal that the court improperly admitted contributory negligence evidence under the guise of assumption-of-the-risk evidence. Because this issue was fully briefed below, was fully explored by the district court in a pretrial hearing and the district court ultimately made a definitive ruling, we conclude Aimee properly preserved the assumption-of-the-risk issue. *Richmond*, 118 Nev. at 932, 59 P.3d at 1254; *Landers v. Anchorage*, 915 P.2d 614, 617 (Alaska 1996) (rejecting argument that "a party loses his right to challenge on appeal an adverse ruling on a motion *in limine* by not subsequently objecting to a jury instruction which reflects the adverse ruling").

Assumption-of-the-risk evidence

This court "review[s] a district court's decision to admit or exclude evidence for abuse of discretion." *M.C. Multi-Fam. Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008). The affirmative defense of assumption of the risk is available in strict products liability actions; contributory negligence and comparative fault are not. *Young's Mach. Co. v. Long*, 100 Nev. 692, 694, 692 P.2d 24, 25 (1984);

Restatement (Second) of Torts § 402A (Am. Law Inst. 1965). A successful assumption-of-the-risk defense to a product-defect claim requires the defendant to show: "(1) that the plaintiff actually knew and appreciated the particular risk or danger created by the defect, (2) that the plaintiff voluntarily encountered the risk while realizing the danger, and (3) that the plaintiff's decision to voluntarily encounter the known risk was unreasonable." *Cent. Tel. Co. v. Fixtures Mfg. Corp.*, 103 Nev. 298, 300, 738 P.2d 510, 512 (1987). These elements are viewed through a subjective lens. *Campbell v. Nordco*, 629 F.2d 1258, 1262 (7th Cir. 1980); *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 119 (3rd Cir. 1992).

In contrast, "[c]ontributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause," alongside the defendant's negligence, "in bringing about the plaintiff's harm." Restatement (Second) of Torts § 463 (Am. Law Inst. 1965). In strict products liability, evidence of a failure to discover a defect suggests the plaintiff was contributorily negligent. *Gen. Elec. Co. v. Bush*, 88 Nev. 360, 366, 498 P.2d 366, 370 (1972) (explaining that a plaintiff's "failure to discover the defect in the eyebolt or to guard against the possibility of its existence" would constitute contributory negligence). Assumption of the risk, on the other hand, requires evidence that "plaintiff *actually knew and appreciated*" the particular risk created by the defect and unreasonably proceeded to encounter a known danger, as opposed to evidence that the plaintiff negligently failed to discover the defect. *Cent. Tel. Co.*, 103 Nev. at 300, 738 P.2d at 512 (emphasis added). Though contributory negligence and assumption of the risk are distinct defenses, the same evidence may theoretically support both. *Taylor v. Burlington N. R.R. Co.*, 787 F.2d 1309,

1316 (9th Cir. 1986) ("Although there is some overlap between assumption of risk and contributory negligence, generally the two defenses are not interchangeable."); Restatement (Second) of Torts § 496A cmt. d (Am. Law Inst. 1965) ("The same conduct on the part of the plaintiff may thus amount to both assumption of risk and contributory negligence . . . .").

Evidence of Romney's experience and training

Aimee challenges the court's decision to allow Caterpillar to present its misuse and assumption-of-the-risk defenses through evidence of Romney's experience, training, and familiarity with the at-issue loader and its safety features, arguing that such evidence pertains to contributory negligence, which is not permitted under her theory of liability. We are not persuaded by Aimee's argument, as this type of evidence is permissible in an assumption-of-the-risk defense. *See Holt v. Deere & Co.*, 24 F.3d 1289, 1294-95 (10th Cir. 1994) (holding that evidence showing the mechanic was experienced, worked on the grader before, and had familiarity with the allegedly defective neutral start switch was sufficient to submit assumption of the risk to the jury). Moreover, circumstantial evidence of knowledge is particularly probative in a wrongful death action, where the decedent's subjective awareness of the specific design defect cannot be ascertained with direct evidence or the decedent's testimony. *See Campbell*, 629 F.2d at 1259-63 (holding that evidence showing "decedent had been instructed on the proper method of operating the lift," the employer's rules requiring the use of stabilizers to avoid injuries, and the truck's written warning providing the same was properly considered for assumption of the risk). Therefore, we cannot say the district court abused its discretion by admitting evidence of Romney's training, experience, and familiarity with the allegedly defective loader such that assumption of the risk should have

been unavailable to Caterpillar's defense. The jury was properly permitted to consider the evidence and weigh it in considering whether Caterpillar proved that Romney "actually knew and appreciated" that the loader lacked the automatic parking brake, thereby assuming the risk.[1] *Cent. Tel. Co.*, 103 Nev. at 300, 738 P.2d at 512.

Admission of the MSHA report

Aimee also argues the district court abused its discretion by admitting the MSHA report under Nevada's public-record hearsay exception statute because the report contained legal conclusions about causation and NRS 51.155's plain language allows only factual findings. Alternatively, Aimee argues the MSHA report was "substantially more prejudicial than probative," warranting exclusion.

We agree with Aimee that the district court abused its discretion in admitting the MSHA report. The plain language of NRS 51.155 allows for the admission of factual findings contained in public records—not legal conclusions. And we have long recognized that a conclusion in a public record that speaks to an ultimate issue in the case should be excluded, especially when the author of that record is unavailable to testify about a contested issue. *Lee v. Baker*, 77 Nev. 462, 467-68, 366 P.2d 513, 515-16 (1961) (excluding a police accident report where the report's author did not witness the accident and made conclusions bearing on negligence and proximate causation that were sharply contested by the other party); *Frias v. Valle*, 101 Nev. 219, 221 698 P.2d 875, 876 (1985)

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[1]We do not address Aimee's argument that the assumption-of-the-risk evidence contravenes Nevada public policy, as she failed to raise this argument below. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (declining to consider on appeal an issue not raised in the trial court).

(excluding a police officer's accident report containing conclusions bearing on legal causation because "[i]t is the function of the trier of fact to decide who and what caused the accident"). MSHA's conclusion that Romney caused his own death amounted to a conclusion bearing on legal causation—an ultimate issue in the case as described in jury Instruction No. 20. If there is standalone probative value in MSHA's conclusion that Romney's conduct was the factual cause of his own death, the risk remains that the jury used it to infer legal causation and thus assumed the validity of Caterpillar's assumption-of-the-risk defense. Therefore, the district court abused its discretion by denying Aimee's motion in limine and admitting the MSHA report because it contained a conclusion bearing on an ultimate issue in the case without any opportunity for Aimee to cross-examine the report's author.

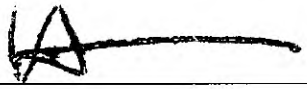
We also conclude this error warrants reversal. The jury heard repeatedly throughout trial that federal investigators agreed with Caterpillar's conclusion that Romney caused his own death. Though the district court gave a limiting instruction stating that MSHA did not consider whether the loader was defective, that alone did not cure the prejudice created by the report's admission. So long as the jury concluded Romney assumed the risk of the defect and proximately caused his own death, Caterpillar's liability did not depend on whether the defect existed. No doubt, there is a "reasonable probability of a different result" had the district court excluded the MSHA report because the jury may have found in its absence that Romney's assumption of the risk was not the proximate cause of his death. *Hallmark v. Eldridge*, 124 Nev. 492, 495, 189 P.3d 646, 648 (2008). Therefore, we conclude the estate is entitled to a new trial.

Scope of new trial and instructions on remand and costs award

Given our conclusion that the jury may have reached a different verdict had the report been excluded, we reverse and order a new trial with instruction that the district court conduct the relevant analysis and exclude any inadmissible portions of the MSHA report. In light of our decision to reverse the judgment challenged in Docket No. 85841, we vacate the costs award challenged in Docket No. 86010.

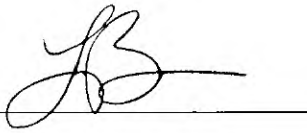
Accordingly, we

ORDER the judgment of the district court REVERSED (Docket No. 85841), VACATED (Docket No. 86010), AND REMAND this matter to the district court for proceedings consistent with this order.



_____, C.J.
Herndon

_____, J.
Lee



_____, J.
Bell

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