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Recent Developments: S & S Oil, Inc. v. Jackson:  
The Circuit Court's Failure to Present the Jury with  
a Separate Written Question for the Affirmative  
Defenses of Contributory Negligence and  
Assumption of the Risk on the Special Verdict  
Sheet Constituted Reversible Error

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## RECENT DEVELOPMENT

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### ***S & S OIL, INC. V. JACKSON: THE CIRCUIT COURT'S FAILURE TO PRESENT THE JURY WITH A SEPARATE WRITTEN QUESTION FOR THE AFFIRMATIVE DEFENSES OF CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF THE RISK ON THE SPECIAL VERDICT SHEET CONSTITUTED REVERSIBLE ERROR.***

**By: Errin K. Roby**

The Court of Appeals of Maryland held that the affirmative defenses of assumption of the risk and contributory negligence did not address the same legal question, and therefore must be independently listed on a jury verdict sheet. *S & S Oil, Inc. v. Jackson*, 428 Md. 621, 625, 53 A.3d 1125, 1127 (2012). The court further held that the verdict sheet used at trial did not allow the jury to adequately consider the defense of assumption of the risk, and therefore, the trial court committed reversible error. *Id.* at 625, 53 A.3d at 1127.

On June 21, 2007, Elaine Jackson (“Jackson”) visited a gas station owned by S & S Oil, Inc. (“S & S Oil”). The flooring in the station store was under renovation. Jackson entered the station store, made a purchase, and then re-entered the store a second time to buy a soda for her granddaughter. During this second visit, while walking towards the soda machine, Jackson twisted her knee when she stepped onto an uneven part of the floor.

In 2008, Jackson filed a negligence suit against S & S Oil in the Circuit Court for Prince George’s County. At the close of the trial, the judge gave oral instructions to the jury regarding the defense of assumption of the risk. The trial judge directed the jury to return its verdict by answering written questions on a special verdict sheet. S & S Oil objected to question three on the verdict sheet, which read: “Did Plaintiff Elaine Jackson assume the risk of her injury, or was she contributorily negligent, in the incident of June [21], 2007?” S & S Oil requested a separate question for assumption of the risk and contributory negligence. Reasoning that assumption of the risk was a type of negligence, the trial judge removed the reference to assumption of the risk from question three, stating that the term “negligent” adequately covered both defenses. The jury returned a verdict in favor of Jackson with damages in the amount of \$143,416.41.

S & S Oil appealed the judgment to the Court of Special Appeals of Maryland. In an unreported opinion, the intermediate appellate court affirmed the circuit court’s decision not to include a question as to the

affirmative defense of assumption of the risk. The Court of Appeals of Maryland granted S & S Oil's petition for a writ of certiorari.

The Court of Appeals of Maryland examined the appeal using the abuse of discretion standard. *Jackson*, 428 Md. at 629, 53 A.3d at 1130. The court emphasized that it would only overturn the circuit court's decision regarding the verdict sheet if the circuit court committed an error that prejudiced a party's case. *Id.*

The court began its analysis by stating that assumption of the risk and contributory negligence are two distinct defenses. *Jackson*, 428 Md. at 631, 53 A.3d at 1131. A trial judge is permitted to combine these two defenses into a single contributory negligence question, but only when all reasonable jurors would conclude that the risk assumed by the party is unreasonable and, thus by definition, negligent. *Id.* The court defined an unreasonable risk as one in which the risk of danger to a person is greater than the interest the person is trying to protect. *Id.* at 632-33, 53 A.3d at 1132 (citing *Schroyer v. McNeal*, 323 Md. 275, 280-81, 592 A.2d 1119, 1122 (1991)).

The court determined that reasonable jurors could differ on whether the risk faced by Jackson was reasonable in order to protect her interest, which was fulfilling her granddaughter's request for a soda. *Jackson*, 428 Md. at 633-34, 53 A.3d at 1132. According to the court, the jury could have reasonably concluded that Jackson assumed the risk of her injuries without finding her contributorily negligent. *Id.* at 634, 53 A.3d at 1132-33. By omitting assumption of the risk from the verdict sheet, the trial court did not allow the jury to properly consider the defense. *Id.* at 634-35, 53 A.3d at 1133.

The court established that the omission of the assumption of the risk defense confused the jury because it conflicted with explicit oral instructions given by the trial judge. *Jackson*, 428 Md. at 635, 53 A.3d at 1133. The oral instructions informed the jury that S & S Oil should not be held liable if Jackson was contributorily negligent or assumed the risk of her injuries. *Id.* The trial judge then instructed the jury to use the verdict sheet as a guide when considering the facts of the case. *Id.* at 636, 53 A.3d at 1134. However, the verdict sheet ultimately given to the jury did not mention the assumption of the risk defense. *Id.* Therefore, the jury had no opportunity to address the assumption of the risk defense when completing the written verdict sheet. *Id.*

Having determined that the circuit court failed to adequately present the jury with the defense of assumption of risk, the Court of Appeals of Maryland determined whether this failure constituted reversible error. *Jackson*, 428 Md. at 640, 53 A.3d at 1136. According to the court, an improper instruction constitutes an error when a defense was omitted that should have been presented to the jury. *Id.* (citing *Consol. Waste Indus.*,

*Inc. v. Standard Equip. Co.*, 421 Md. 210, 225, 26 A.3d 352, 361 (2011)). The court explained that a party has a right to present a legal theory to the jury if it meets three conditions: the theory must be a correct statement of the law, the law is supported by the facts of the case, and the requested instruction is not covered by an existing jury instruction. *Jackson*, 428 Md. at 640, 53 A.3d at 1136 (citing *Wietzke v. Chesapeake Conference Ass'n*, 421 Md. 355, 371-72, 26 A.3d 931, 941 (2011)).

Applying that framework to the instant case, the court found the first condition satisfied because Jackson never argued that S & S Oil requested an incorrect statement of the law. *Jackson*, 428 Md. at 641, 53 A.3d at 1137. The court also found the third condition fulfilled because the difference between the oral instructions and the written verdict sheet meant that assumption of the risk was not adequately presented to the jury. *Id.* at 641-42, 53 A.3d at 1137.

As to the second condition, the Court of Appeals of Maryland determined that the evidence was sufficient to support the jury's consideration of the defense of assumption of risk. *Jackson*, 428 Md. at 642, 53 A.3d at 1137. The court pointed out that, in denying S & S Oil's motion for judgment of acquittal, the trial judge specifically noted that whether Jackson assumed the risk was an issue for the jury to decide. *Id.* at 642, 53 A.3d at 1138. In addition, S & S Oil had presented evidence of a warning sign and caution tape, which would allow a reasonable juror to make such a conclusion. *Id.* at 643, 53 A.3d at 1138. Although Jackson testified that she did not see any warning sign, the jury was free to reject her statement during deliberations. *Id.* at 644, 53 A.3d at 1138-39. Based on these facts, the court concluded that the evidence presented at trial was sufficient for the defense of assumption of the risk to be presented to the jury. *Id.* at 647-48, 53 A.3d at 1141.

Finally, the court held that the failure to include assumption of the risk on the verdict sheet prejudiced S & S Oil's case. *Jackson*, 428 Md. at 648, 53 A.3d at 1141. If the jury had found that Jackson had assumed the risk of her injuries, S & S Oil would not have been held liable for damages, as assumption of risk is a defense that completely bars a plaintiff from any recovery. *Id.* (citing *Crews v. Hollenbach*, 358 Md. 627, 640, 751 A.2d 481, 488 (2000)).

In *Jackson*, the Court of Appeals of Maryland reaffirmed that both assumption of the risk and contributory negligence are fact-specific defenses and cannot always be combined together. Practitioners must be sure to present facts of each defense clearly to the jury or face reversal of a trial judgment. The court system cannot function properly if a defendant cannot argue all the legal theories that apply to his case. Looking beyond the individual defendant in this case, public policy

demands that every defense, if supported by the evidence, be presented to the jury without exception.