Comparative Fault and the Structural Work Act: Simmons v. Union Electric Company

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I. INTRODUCTION

With the Illinois Supreme Court’s 1983 decision in Coney v. J.L.G. Industries, Illinois joined a growing number of states that apply comparative negligence to offset damages in strict products liability actions. Although Illinois only recently became a comparative negligence state, the court’s extension of the doctrine to strict liability actions followed the lead of the most progressive courts in the area of comparative negligence.

1. 97 Ill. 2d 104, 454 N.E.2d 197 (1983).


3. The Illinois Supreme Court adopted comparative negligence in Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981). The decision to adopt comparative negligence was foreshadowed by one of the court’s prior decisions, Skinner v. Reed-Prentice Div. Package Mach. Co., 70 Ill. 2d 1, 374 N.E.2d 437 (1978), cert. denied, 436 U.S. 946 (1978). In Skinner, the court abandoned the previous rule in Illinois, that prohibited contribution between joint tortfeasors, and allowed a manufacturer of a product to seek contribution from the plaintiff’s employer. The supreme court stated, “equitable principles require that ultimate liability for plaintiff’s injuries be apportioned on the basis of the relative degree to which the defective product and the employer’s conduct proximately caused them.” Id. at 14, 374 N.E.2d at 442.

4. Alaska, California, and Florida are generally considered to be the most progressive states in the area of comparative negligence; these states were also among the first states to apply comparative negligence in strict liability actions. See Butaud v. Suburban Marine & Sporting Goods, 555 P.2d 42 (Alaska 1976); Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976).
court carefully analyzed the policies that underlie the doctrines of comparative negligence and strict products liability, and concluded that comparative negligence could be applied in strict products liability actions without frustrating those policies.5

In contrast to the Coney decision, in Simmons v. Union Electric Co.6 the Illinois Supreme Court declined to extend comparative negligence to strict liability claims under the Illinois Structural Work Act (SWA).7 The SWA provides a statutory cause of action for workers who are injured on construction sites. Defendants in SWA actions may include owners, contractors, subcontractors, and other persons in charge of the construction work. Unlike the situation in Coney, the Simmons court did not have the guidance of other state decisions in determining whether comparative negligence was applicable to the SWA.8 While the Coney decision should have provided a relevant analytical framework, the Simmons court refused to apply that rationale. Further, the Simmons court improperly treated the doctrine of comparative negligence as if it were the same as the doctrine of contributory negligence. The Simmons court based its determination that SWA defendants could not raise comparative negligence to offset damages solely on older cases that barred the use of contributory negligence to reduce damages in SWA cases.

This Note analyzes the Simmons decision. First, this Note examines the history of the SWA and the doctrine of comparative negligence in Illinois. Second, this Note criticizes the court's analysis in Simmons and proposes an alternative analysis that is consistent with the Coney decision. Finally, this Note assesses the impact that the Simmons decision will have on employers, owners, and contractors, as well as on the future of the SWA and comparative negligence in Illinois.

II. BACKGROUND

A. Illinois Structural Work Act

The Illinois Structural Work Act (SWA)9 was enacted in 1907.10 The SWA
provided for “the protection and safety of persons in and about the construction, repairing, alteration, or removal of buildings, bridges, viaducts, and other structures, and to provide for enforcement thereof.” The SWA contains sections that delineate the safety requirements for scaffolds, ladders, joists, pipes, towers, flooring, and elevators. The last section of the SWA sets forth criminal and civil sanctions for violations of the safety requirements. Criminal penalties include fines of up to $1,000 and imprisonment for up to one year. Wilful violations of the SWA may also support private causes of action to compensate the injured parties.

The SWA has no recorded legislative history. The purpose of the SWA can nevertheless be determined by analogizing the act to common law industrial injury actions that existed at the time that the SWA was adopted. The act was passed in response to the emerging workplace hazards of industrial development at the turn of the century, and is substantially the same now as when it was first enacted. Common law remedies in tort did


Although most state occupational safety statutes are silent about whether an injured party can sue an employer, several state courts have ruled that violations of the statute constitute negligence per se. See Short v. State Compensation Ins. Fund, 52 Cal. App. 3d 104, 125 Cal. Rptr. 15 (1975); Hyde v. Russell & Russell, Inc., 176 Cal. App. 2d 578, 1 Cal. Rptr. 631 (1959); Baer v. Schaap, 97 N.W.2d 207 (Neb. 1959); Johnson v. Weborg, 142 Neb. 516, 7 N.W.2d 65 (1942). Other states have held that violations of such statutes are merely evidence of negligence. See Balma v. Tidewater Oil Co., 214 A.2d 560 (Del. 1965); Roberts v. Barclay, 369 P.2d 808 (Okla. 1962). In most states, scaffold acts such as the SWA are not actively litigated because they have been superseded by worker’s compensation acts. See, e.g., Roberts v. Barclay, 369 P.2d 808 (Okla. 1962).

10. Act of June 3, 1907, 1907 Ill. Laws 312.
11. Preamble to the Structural Work Act, 1907 Ill. Laws 312.
13. Id.
14. Id. § 61.
15. Id. § 64.
16. Id.
17. Id. § 65.
18. Id. §§ 66-67.
19. Id. § 69.
21. Id. § 1005-8-3(a)(1).
23. 1 A. Larson, The Law of Workmen’s Compensation § 4 (1985). Larson stated that, “[t]he necessity for workmen’s compensation legislation arose out of the coincidence of a sharp increase in industrial accidents attending the rise of the factory system and a simultaneous decrease in the employee’s common-law remedies for his injuries.” Id.
not adequately protect workers\textsuperscript{25} because the injured worker frequently was required to allege and prove negligence.\textsuperscript{26} Many such actions failed because workers could not prove that employers had breached a duty of due care.\textsuperscript{27} The SWA eased the worker's burden of proving negligence by setting forth the employer's standard of care in the first eight sections of the SWA. To establish the defendant's breach of duty, the worker was required only to demonstrate that the defendant had failed to comply with the statute.

Shortly after the General Assembly enacted the SWA, Illinois also adopted its first Worker's Compensation Act (WCA).\textsuperscript{28} Under the WCA, injured employees surrendered their private causes of action to their employers in return for a guaranteed disability payment.\textsuperscript{29} The surrender provision of the WCA precluded virtually all actions under the SWA. In 1952, however, the Illinois Supreme Court declared that the surrender clause was unconstitutional.\textsuperscript{30} This decision opened the door for employees to sue owners, contractors, and other third parties under the SWA.\textsuperscript{31}

\textsuperscript{25} A. Larson, \textit{supra} note 23, \S 4.50.

\textsuperscript{26} See, e.g., F.J. McCain v. Kingsley, 126 Ill. App. 165 (1st Dist. 1906) (ironworker's negligence action failed because employer had no duty to keep construction site in safe condition at all times); Angus v. Lee, 40 Ill. App. 304 (1st Dist. 1891) (bricklayer injured by falling brick must allege and prove all elements of negligence action); Heyer v. Salsbury, 7 Ill. App. 93 (4th Dist. 1880) (employer only liable if negligent in providing material or failing to warn employee, but not required to make machinery absolutely safe). See generally I. T. Angerstein, \textit{Illinois Workmen's Compensation} §§ 2-3 (rev. ed. 1952) (discussing tort system prior to worker's compensation).

\textsuperscript{27} The law only required employers to exercise reasonable care to avoid exposing employees to unnecessary danger. Sweircz v. Illinois Steel Co., 231 Ill. 456, 83 N.E. 168 (1907). See also Alton Paving, Bldg. & Fire Brick Co. v. Hudson, 176 Ill. 270, 52 N.E. 256 (1898) (employer owes duty to employee to make reasonable provisions against injury to employee); Consolidated Coal Co. v. Haenni, 146 Ill. 614, 35 N.E. 162 (1893) (employer has duty to inform employee of known defects or hazards incident to employment). \textit{But see} Chicago, R. I. & Pac. Ry. v. Clark, 108 Ill. 113 (1883) (no liability for failure to warn employee when employer does not actually know of danger).

However, breach of this general standard was often difficult for injured employees to establish. See, e.g., Stover Mfg. Co. v. Millane, 89 Ill. App. 532 (2d Dist. 1900) (whether absence of customary safety device on elevator constitutes negligence is question for jury); McCarthy v. Muir, 50 Ill. App. 510 (1st Dist. 1893) (court denied recovery to employee injured by falling trestle, because employee could not establish that employer failed to exercise reasonable care, even if trestle was defective).


\textsuperscript{29} Ill. Rev. Stat. ch. 48, \S 138.5(b) (1951).

\textsuperscript{30} Grasse v. Dealer's Transp. Co., 412 Ill. 179, 106 N.E.2d 124 (1952). The WCA provided that employees who were injured by third parties in the course of their employment transferred any actions against a third party to their employer if the third party was also covered by the WCA. If the third party was not covered by the WCA, the injured employee could sue the third party directly. This classification was held to violate the equal protection clauses of the federal and state constitutions.

\textsuperscript{31} The WCA still restricts employees' actions against their employers. Ill. Rev. Stat. ch. 48, \S 138.5(a) (1983).
To succeed in an action under the SWA, an injured employee must be a member of the class intended to be protected by the act, and the defendant must owe the plaintiff a duty under the act. In addition, the plaintiff must show that the defendant wilfully violated the SWA and that the plaintiff's injury was caused by that wilful violation. Most appellate decisions concerning the SWA center on the definition of a covered device and structure, the definition of a "wilful violation," and the scope of the defendant class under the act. The second and third issues have the most direct bearing on the Simmons case.

The SWA enables injured parties to sue "for any injury . . . occasioned by any wilful violations of this Act, or any wilful failure to comply with any of its provisions." In Schultz v. Henry Ericsson Co., an early case under the SWA, the Illinois Supreme Court defined wilfulness as mere knowledge. In Schultz, a construction worker fell from a scaffold and sued his employer. The plaintiff, Schultz, alleged both common law negligence and a SWA violation in his complaint. The employer argued that Schultz failed to show that the employer wilfully violated the statute. The court held that a wilful violation occurred when a defendant knew of the dangerous condition. The court interpreted the SWA in view of the statute's purpose.

32. The plaintiff must be engaged in an occupation covered by the SWA. See Crafton v. Lester B. Knight, 46 Ill. 2d 533, 263 N.E.2d 817 (1970) (SWA not intended to cover all construction related injuries); Wright v. Synergistics, 52 Ill. App. 3d 233, 367 N.E.2d 466 (1st Dist. 1977) (SWA does not cover plaintiff who fell from scaffold when plaintiff was not engaged in construction work). In addition, the plaintiff must establish that a covered device was involved. See Long v. City of New Boston, 91 Ill. 2d 456, 440 N.E.2d 625 (1982) (SWA not applicable to any device except those used in covered activities); Ashley v. Osman & Assoc., 114 Ill. App. 3d 293, 448 N.E.2d 1011 (1st Dist. 1983) (elements of SWA action include covered device used in covered activity); see also Ring, The Scaffold Act: Its Past, Present and Future, 64 Ill. Bar. J. 666 (1976).

33. The defendant must be an owner, contractor, subcontractor, architect, or foreman in charge of the work. See infra notes 65-91 and accompanying text.

34. See infra notes 38-54 and accompanying text. A wilful failure to comply with a provision of the SWA is also a violation.


38. 264 Ill. 156, 106 N.E. 236 (1914).

39. Id. at 160, 106 N.E. at 237-38. Schultz was transporting bricks and mortar in wheelbarrows along a five-foot scaffold on a building under construction. Id.

40. Id. at 158, 106 N.E. at 237.

41. Id. at 166, 106 N.E. at 240.
of preventing injuries.\textsuperscript{42} The court announced that the SWA imputes knowledge of a dangerous condition to defendants whenever they know of the condition of the structure.\textsuperscript{43} The court placed a corresponding duty on the employer to know the condition of the structure.\textsuperscript{44} Thus, employers were presumed liable if the conditions of their construction sites were dangerous, regardless of any action, inaction, or knowledge on their part.\textsuperscript{45}

The court reconsidered the \textit{Schultz} definition of "wilful violation" in 1958, in \textit{Kennerly v. Shell Oil Co.}\textsuperscript{46} \textit{Kennerly} was decided shortly after the WCA was held not to preclude SWA claims.\textsuperscript{47} In the course of the opinion, the court affirmed the \textit{Schultz} definition of wilfulness.\textsuperscript{48} A strong dissent by Justice Klingbiel, however, noted that under the \textit{Schultz} test, knowledge of a condition is equated with wilfulness.\textsuperscript{49} Justice Klingbiel asserted that the \textit{Schultz} standard of wilfulness amounted to "mere negligence."\textsuperscript{50} He argued that this standard was not a proper construction of a statute that also provided for criminal sanctions and required wilful violations for liability.\textsuperscript{51} Despite Justice Klingbiel's arguments, the court has not reconsidered its position on the wilfulness standard.\textsuperscript{52}

42. \textit{Id.} at 164, 106 N.E. at 239. The court stated, "[t]he object to be attained by this statute was to prevent injuries to persons employed in this dangerous and extra-hazardous occupation." \textit{Id.}

43. \textit{Id.} at 163, 106 N.E. at 239. The defendant argued that if this standard applied, then Schultz could not recover because he also knew of the danger and therefore assumed the risk. \textit{Id.} The court did not directly address this point, but by allowing Schultz to recover, the court apparently rejected this argument.

44. \textit{Id.} at 166, 106 N.E. at 240.

45. The Court also held that whether a dangerous condition existed was a question of fact for the jury. \textit{Id.}


47. \textit{Id.} at 436-37, 150 N.E.2d at 137-38. Although \textit{Schultz} was decided after the passage of the first Workmen's Compensation Act, \textit{see supra} note 29, the injury occurred prior to the WCA's passage. Because of the WCA's surrender clause, the SWA was dormant for many years. \textit{See supra} note 29 and accompanying text.

48. \textit{Id.} at 439, 150 N.E.2d at 139. The majority also rejected a constitutional challenge to the SWA. Shell argued that the SWA violated due process because it was incomplete and vague, and failed to establish a clear standard of liability. The court rejected this argument, relying on an earlier case, \textit{Arms v. Ayer}, 192 Ill. 601, 61 N.E. 851 (1901), which involved the Fire-escape Act of 1897. In \textit{Arms}, the court declared that "to establish the [judicial] principle that whatever the legislature may do it shall do in every detail or else it shall go undone, would be almost to destroy the government." \textit{Id.} at 611, 61 N.E. at 854. Therefore, the \textit{Kennerly} court found the SWA to be constitutional.

49. 13 Ill. 2d at 442-43, 150 N.E.2d at 139 (Klingbiel, J., dissenting).

50. \textit{Id.} at 443, 150 N.E.2d at 139 (Klingbiel, J., dissenting). Justice Klingbiel stated that "[t]he majority opinion] announces the proposition that a wilful violation is present whenever the defendant, by the exercise of reasonable care, could have discovered the condition of the scaffold. This is the test of mere negligence, not of willfulness." \textit{Id.}

51. \textit{Id.}

Other litigation has centered on what parties may be liable under the SWA's language. The SWA places a duty on "[a]ny owner, contractor, subcontractor, foreman or other person having charge of" the structure. Initially, it was unclear whether the statute placed liability on owners, contractors, subcontractors, and foremen who did not have charge of the structure. In 1911, shortly after the passage of the SWA, the Illinois Supreme Court suggested in Claffy v. Chicago Dock & Canal Co. that the SWA would not impose liability on an owner unless he retained control over the structure. In 1923, the court decided in John Griffiths & Son Co. v. National Fireproofing Co. that a contractor who was liable under the SWA could seek indemnity from another party whose negligence actually caused the injury for which the contractor was liable. The court rejected the argument that the SWA placed a non-delegable duty on owners and contractors.

The Claffy and Griffiths cases remained the law throughout the dormant period of the SWA. However, the Illinois Supreme Court distinguished these cases and changed its position on the issue in Kennerly. In that case, a welder named Kennerly fell from a scaffold erected by his employer, Foster Wheeler; Kennerly sued Shell Oil, the owner of the structure, under the

54. 249 Ill. 210, 94 N.E. 551 (1911).
55. Id. at 221, 94 N.E. at 554. The issue in Claffy was whether an owner who retained some control over a construction site could avoid liability if another party also had some control over the construction. The court held that § 66 of the SWA put the burden of compliance on both owner and contractor. Id. at 222, 94 N.E.2d at 555. The court relied on a New York case, Rooney v. Brogan Constr. Co., 194 N.Y. 32, 86 N.E. 814 (1909), which involved a similar statute. 249 Ill. at 221, 94 N.E. at 554.
56. 310 Ill. 331, 141 N.E. 739 (1923).
57. Id. at 342, 141 N.E. 743. John Griffiths & Son was the general contractor that constructed the Lytton building in Chicago. Griffiths subcontracted the fireproofing work to National Fireproofing Co. Id. at 332, 141 N.E. 739. Slaughter, a construction worker who worked on an adjoining building, was injured when a fireproof tile fell from a scaffold and struck him in the head. Slaughter brought an action against Griffiths, National Fireproofing, the building owner, and others. National Fireproofing settled with Slaughter, who pursued his action against Griffiths and the others. National Fireproofing refused to defend the action, which resulted in the jury returning a verdict for Slaughter. Id. at 333-34, 141 N.E. at 739-40. Griffiths then brought this action against National Fireproofing to enforce the indemnity clause in their contract.

58. 310 Ill. at 336, 141 N.E. at 741. As discussed above, the SWA was dormant for most of the first half of the twentieth century. After the Illinois Supreme Court reopened the door to SWA suits, the Griffiths holding was revived as precedent. See, e.g., Schmid v. United States, 154 F. Supp. 81 (E.D. Ill. 1957).
SWA. After a questionable examination of precedent, notably Claffy and Griffiths, the Kennerly court concluded that the SWA placed a non-delegable duty on owners, regardless of whether the owners were actually in charge of the site.60

The Kennerly standard, however, lasted only a few years before the court reverted to its original position. In Gannon v. Chicago, Milwaukee, St. Paul, & Pac. Ry.,61 the supreme court overruled Kennerly and held that an owner or contractor actually has to be in charge of the site to be liable under the SWA.62 In Gannon, the plaintiff was a bricklayer working for the general contractor, who was constructing a loading dock on the railway's property.63 Gannon fell from a scaffold on the site, and initially sued both his employer and the railway. The employer, however, was dismissed because the WCA barred worker's suits against employers.64 The jury returned a verdict of $45,000 for Gannon. The appellate court reversed, holding that an owner was only liable under the SWA if the owner was actually in charge of the work.65

In its review of the appellate decision, the Illinois Supreme Court reexamined the issue of whether an owner of a construction site had to be in charge of the work to be liable under the SWA for worker injuries. The court determined that the Claffy and Griffiths cases were not controlling,66 and looked instead to the legislative intent behind the SWA67 as construed in the Schultz decision.68 The Gannon court concluded that the Illinois General Assembly did not intend to impose absolute liability on owners

59. 13 Ill. 2d 431, 150 N.E.2d 134 (1958). The plaintiff, Kennerly, worked for Foster Wheeler Corporation, which was constructing a distillery on Shell's property. The lower court found Shell liable. Shell appealed the judgment, contending that the SWA only imposed liability on an owner when he was in charge of the work. Id. at 433, 150 N.E.2d at 136.

60. Id. at 434-37, 150 N.E.2d at 136. Justice Klingbiel dissented from the decision and argued that the decisions relied on by the majority did not support the imposition of liability upon an owner, per se. Id. at 441-42, 150 N.E.2d at 140 (Klingbiel, J., dissenting). Justice Klingbiel also argued that the language of the statute limited liability to “such owner, contractor, sub-contractor, foreman, or other person violating any of the [SWA's] provisions” and warranted a contrary decision because the “such” referred to “having charge of” in the preceding clause. Id. at 440, 150 N.E.2d at 140 (Klingbiel, J., dissenting).

An explanation for the court’s decision in Kennerly may be found by examining another decision decided the same day. In Gannon v. Chicago, M. St. P. & Pac. Ry., 13 Ill. 2d 460, 150 N.E.2d 141 (1958), the court held that § 5(a) of the Workmen’s Compensation Act prevented an employee from suing his employer under the SWA. Id. at 462, 150 N.E.2d at 143. Had this holding been applied to the Kennerly fact situation, it would have prevented Kennerly from suing his employer.

61. 22 Ill. 2d 305, 175 N.E.2d 785 (1961).
62. Id. at 321, 175 N.E.2d at 793.
63. Id. at 307, 175 N.E.2d at 786.
65. 22 Ill. 2d at 309, 175 N.E.2d at 787.
66. Id. at 315-16, 175 N.E.2d at 790-91.
67. Id. at 317, 175 N.E.2d at 791.
68. Id.
because the SWA did not impose absolute liability on any other party.\textsuperscript{69} In addition, absolute liability was a disfavored doctrine at the time that the SWA was passed.\textsuperscript{70} The court also observed that the language of the statute was disjunctive,\textsuperscript{71} and therefore concluded that the plaintiff must demonstrate that an owner was in charge of the work in order to recover damages from the owner.

After the \textit{Gannon} decision, lower courts in Illinois groped for a definition of the phrase "having charge of," which appears in the SWA to describe the potentially liable class.\textsuperscript{72} The Illinois Supreme Court clarified the issue in \textit{Larson v. Commonwealth Edison Co.}.\textsuperscript{73} The \textit{Larson} trial court gave the jury an instruction that equated "having charge of" with retaining control and supervision over the construction work.\textsuperscript{74} The supreme court rejected this instruction; yet, the court did acknowledge that control and supervision of a site might be factors in determining whether the defendant has charge of the work.\textsuperscript{75} The supreme court noted that neither the SWA nor the \textit{Gannon} rationale required that a defendant retain control and supervision over the work to be liable.\textsuperscript{76} The court also rejected the argument that the phrase "having charge of" had to be defined for the jurors. The court stated:

69. \textit{Id.} at 319, 175 N.E.2d at 792.
70. \textit{Id.} The \textit{Gannon} court noted that the WCA was upheld only because it was considered a reasonable regulation of the employment relationship. \textit{Id.}
71. \textit{Id.} at 319-20, 175 N.E.2d at 792-93. The court examined § 69, which reads in pertinent part:

Any owner, contractor, sub-contractor, foreman or other person having charge of the erection, construction, repairing, alteration, removal or painting . . . shall comply with all the terms [of the SWA].

ILL. REV. STAT. ch. 48, § 69 (1983) (emphasis added). The court noted that the effect of \textit{Kennerly} was to construe "or" as "and." 22 Ill. 2d at 319-20, 175 N.E.2d at 792-93.

In a dissent, Justice Hershey urged that \textit{Kennerly} be upheld. Justice Hershey argued that if the supreme court construed a statute once, then that construction became part of the statute and only the legislature could alter the construction. \textit{Id.} at 325, 175 N.E.2d at 795 (Hershey, J., dissenting). He was joined in this dissent by Chief Justice Schaefer, who had authored the \textit{Kennerly} opinion.

72. See, e.g., \textit{Larson v. Commonwealth Edison Co.}, 48 Ill. App. 2d 349, 199 N.E.2d 265 (1st Dist. 1964) (upholding jury instruction that equated "in charge of" with control and supervision), rev'd, 33 Ill. 2d 316, 211 N.E.2d 247 (1965); \textit{Melvin v. Thompson}, 39 Ill. App. 2d 413, 188 N.E.2d 497 (1st Dist. 1963) (affirming summary judgment for defendant-owner where evidence was conflicting as to whether owner supervised the work).
73. 33 Ill. 2d 316, 211 N.E.2d 247 (1965).
74. The complete instruction was:

The Court instructs the jury that the plaintiff is not entitled to recover damages under the provisions of the Structural Work Act unless he has proven by a preponderance, or greater weight of the evidence, that the defendant, Commonwealth Edison Company, had charge of the work by retaining control and supervision of such work being performed by Paschen Contractors, Inc.

\textit{Id.} at 320-21, 211 N.E.2d at 250.
75. \textit{Id.} at 322, 211 N.E.2d at 251.
76. \textit{Id.}
It is well established that the meaning of words, used in their conventional sense, need not be defined or explained in giving instructions to the jury. The term "having charge of" is one of common usage and understanding, and it is our opinion that further attempt at definition can only lead to confusion and error."

The court concluded that the references to control and supervision should not be included in the instruction because it placed a higher burden of proof on the plaintiff.78

After Larson, lower courts continued to struggle with the statutory phrase "having charge of." Appellate and trial courts were repeatedly called upon to determine what type of facts were required to prove that a defendant was in charge of the work.79 The Illinois Supreme Court again attempted to clarify the issue in McGovern v. Standish.80 To determine whether an architect was liable under the SWA for a worker's injuries, the McGovern court traced the history of the phrase "having charge of," as interpreted in the Larson case and other cases that followed. The court concluded that "a determination [of having charge] must rest upon an assessment of the totality of the circumstances."81 Although McGovern has been criticised for its holding that the architect in question was not in charge,82 the Illinois Supreme

77. Id. at 323, 211 N.E.2d at 252 (citations omitted). The Gannon and Larson decisions hinted that more than one person could be in charge of the work. This position is reflected in the Illinois Pattern Jury Instruction, Civil, No. 180.02 which reads:

Under the [SWA], it is possible for more than one person to "have charge of" the work. One or more persons can have charge of the overall work, and other persons can have charge of the phase of the work in connection with which an injury occurs. In that event, all of them would "have charge of" the work within the meaning of the [SWA].

Who had charge of the work under the particular facts of this case is for you to decide.

This instruction was affirmed by the Illinois Supreme Court in Emberton v. State Farm Mut. Auto. Ins. Co., 71 Ill. 2d 111, 373 N.E.2d 1348 (1978); see also Crotty v. High-Low Foods, Inc., 78 Ill. App. 2d 237, 223 N.E.2d 442 (1st Dist. 1966) (liability under SWA extends to all who were in charge of site, not limited to persons who erected the used scaffold).

78. 33 Ill. 2d at 322-23, 211 N.E.2d at 251.


80. 65 Ill. 2d 54, 357 N.E.2d 1134 (1976). McGovern was an ironworker for a construction company who fell from a scaffold while working on a hospital addition. Standish was the architect hired by the hospital. Id. at 57, 357 N.E.2d at 1136.

81. Id. at 68, 357 N.E.2d at 1141 (emphasis added). McGovern argued that under Miller v. DeWitt, 37 Ill. 2d 273, 226 N.E.2d 630 (1967), an architect was in charge if he had the right to stop the work. The court rejected this argument and formulated the "totality of circumstances" standard. 65 Ill. 2d at 68, 357 N.E.2d at 1141.

Court reaffirmed the validity of the totality of circumstances approach in Norton v. Wilbur Waggoner Co. In Norton, which involved an owner as the defendant, the court used the totality of circumstances test to determine if the owner was sufficiently in charge of the construction site. Since Norton, Illinois courts have regularly used the totality of circumstances test. However, the test lends itself to uneven application in particular factual situations.

Once the elements of an SWA violation are established, a defendant is automatically liable. The statute does not state whether common law defenses apply to SWA actions, but the supreme court has construed the statute to abrogate the defenses of contributory negligence and assumption of risk. Therefore, to avoid liability, a defendant must successfully argue that one of the following elements of an SWA action is not present: (1) there is no structure; (2) there is no wilful violation; or (3) the defendant did not have charge of the work.

B. Comparative Negligence

The Illinois Supreme Court definitively adopted the doctrine of contributory negligence in 1885. Under this doctrine, the plaintiff had to be

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83. 76 Ill. 2d 481, 394 N.E.2d 403 (1979).
84. Norton worked for the R & R Construction Company, a general contractor that constructed a new school. Norton was injured when a crane operator lowered a crane ball onto his back while he was disconnecting hoisting straps from construction materials. Norton sued the architect, the subcontractor, and the school district. The architect and subcontractor were dismissed, and a jury returned a verdict for Norton against the school district. The appellate court reversed on the ground that the school district was not in charge of the site. Id. at 484-85, 394 N.E. 2d at 404.
85. For a listing of factors various appellate courts have used to determine whether defendant is in charge, see Chance v. City of Collinsville, 112 Ill. App. 3d 6, 445 N.E.2d 39 (5th Dist. 1983).
87. See, e.g., Carlton v. Verplaetse, 120 Ill. App. 3d 795, 458 N.E.2d 584 (3d Dist. 1983) (fact that plaintiff disregarded instruction to stop working not defense if plaintiff establishes elements of SWA action); Basden v. Kiefner Bros., 92 Ill. App. 3d 218, 414 N.E.2d 951 (5th Dist. 1980) (reference to plaintiff’s experience in carpentry was improper introduction of the issue of contributory negligence); Beebe v. Commonwealth Edison Co., 45 Ill. App. 3d 43, 358 N.E.2d 1343 (3d Dist. 1977) (once wilful violation shown to be a proximate cause, evidence of plaintiff’s standard procedures was improper as evidence of contributory negligence).
89. Contributory negligence was developed in England in Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (K.B. 1809). In Illinois, the doctrine was initially adopted in Aurora Branch R.R. v. Grimes, 13 Ill. 585 (1852), but was replaced six years later by comparative
completely free of negligence in order to recover damages. If the plaintiff in any way failed to exercise reasonable care or due diligence, the claim was totally barred. Contributory negligence was the law in the majority of jurisdictions during the first half of the twentieth century. Yet, because of the doctrine's inherent harshness on plaintiffs, it was often modified by exceptions such as the last clear chance doctrine. Such exceptions, nevertheless, were narrowly drawn and did not vary the basic rule of contributory negligence.

The practice of comparing the relative fault of parties developed long before the doctrine of contributory negligence. Admiralty courts used comparative fault principles to allocate damages among defendants as far back as the Middle Ages. Comparative negligence was developed to alleviate the harshness of contributory negligence. Under comparative negligence, the effect of the plaintiff’s negligence on the resulting injury is compared under some formula with the defendant’s negligence. Courts have developed


90. See James, Contributory Negligence, 62 Yale L.J. 691 (1953); Malone, The Formative Era of Contributory Negligence, 41 Ill. L. Rev. 151 (1946).

91. Under the last clear chance doctrine, a plaintiff’s claim was not barred by his negligence if the defendant had the last chance to avoid the accident. W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 66 (1984) [hereinafter cited as Prosser & Keeton]. The last clear chance doctrine was never adopted in Illinois. Specht v. Chicago City Ry., 233 Ill. App. 384 (1st Dist. 1924); Bushman v. Calumet & S. Chi. Ry., 214 Ill. App. 435 (1st Dist. 1919).

92. The origins of comparative negligence are in dispute. At least one commentator claims that the doctrine can be traced to Roman law. Mole and Wilson, A Study of Comparative Negligence, 17 Cornell L.Q. 333, 337 (1932). Another commentator claims that comparative negligence originated in the admiralty courts of the middle ages, where the fault of the various parties was compared. Turk, Comparative Negligence on the March, 28 Ch.[-]Kent L. Rev. 189, 221 (1950). In any event, the doctrine was adopted by statute in most of the civil law nations of Europe and in England. See generally C. Heft & C. Heft, Comparative Negligence Manual §§ 2.10-.30 (1978) [hereinafter cited as C. Heft]; V. Schwartz, Comparative Negligence § 1.3 (1974); H. Woods, The Negligence Case: Comparative Fault §§ 1:9-10 (1978).

In the United States, comparative negligence was first adopted in the Federal Employers’ Liability Act, 45 U.S.C. §§ 51-60 (1982), and was subsequently codified in other federal statutes. See C. Heft, supra, §§ 2.50, 3.20; V. Schwartz, supra, § 1.4. Comparative negligence was adopted sporadically by the states into the common law during the first half of this century; it has been adopted widely during the last twenty years. V. Schwartz, supra, §§ 1.4-1.5; H. Woods, supra, § 1.11; Wade, Comparative Negligence—Its Development in the United States and Its Present Status in Louisiana, 40 La. L. Rev. 299 (1980). For a state-by-state analysis of the status of comparative negligence, see C. Heft, supra.

93. As used in this Note, comparative negligence refers to the practice of comparing the plaintiff's negligence, or fault, with that of the defendant’s.

94. Turk, supra note 92, at 221.

95. Procedurally, the trier of fact assigns each party’s negligence a percentage, with the
several methods by which to compare negligence. Under the “pure” form of comparative negligence, the plaintiff can only recover that portion of the damages attributable to the defendant’s negligence. With pure comparative negligence, plaintiffs can theoretically be ninety-nine percent at fault and still recover one percent of their damages from a defendant who is one percent negligent.

Another method of comparing negligence is the modified form. There are two types of modified comparative negligence: the fifty percent and the forty-nine percent type. Under fifty percent modified comparative negligence, a plaintiff can recover damages so long as the plaintiff’s negligence is not greater than the defendant’s negligence. If the plaintiff’s negligence is greater than the defendant’s, then the plaintiff is barred from recovery. As in the pure form, however, if the plaintiff’s negligence is not greater than the defendant’s negligence, then the plaintiff’s recovery is reduced by the percent of the plaintiff’s negligence. Under forty-nine percent modified comparative negligence, plaintiffs can only recover if their negligence is not as great as the defendant’s negligence. If a plaintiff’s negligence is as great as a defendant’s, then the plaintiff’s negligence completely bars recovery. If a plaintiff’s negligence is less than a defendant’s, then the plaintiff can recover, but the recovery is reduced as in the pure form.

State courts gradually adopted comparative negligence as a means of lessening the harshness of contributory negligence. The primary reasons that support the adoption of comparative negligence are: one, the doctrine is more equitable to plaintiffs, and two, juries naturally tend to practice comparative negligence by finding for the plaintiff while lowering the award.

total equalling 100%. For example, the jury could find that the plaintiff was 25% negligent, and that one defendant was 40% negligent while another defendant was 35% negligent.

96. Using the figures in note 95, if the damages were determined to be $20,000, the plaintiff would be entitled to receive 75% [40% plus 35%] of the damages, which equals $15,000.

97. A plaintiff can recover if he is 50% negligent—hence the term 50% modified comparative negligence.

98. In numerical terms, a plaintiff can recover as long as his negligence is 49% or less. For a discussion of both forms of modified comparative negligence, see C. Heft, supra note 92, § 1.40; V. Schwartz, supra note 92, § 3.5; H. Woods, supra note 92, §§ 4:3-4.

99. Coney v. J.L.G. Indus. Inc., 97 Ill. 2d 104, 454 N.E.2d 197 (1982). Thus, in the above example, the plaintiff could seek to recover the full amount, $15,000, from either defendant. A few states have determined that comparative negligence abrogates the doctrine of joint and several liability. See H. Woods, supra note 92, § 13:4.

100. In this example, the plaintiff would be entitled to receive 75% of the damages, which equals $15,000.
for damages.\textsuperscript{99} The gradual movement to the doctrine of comparative negligence has accelerated during the last twenty years.\textsuperscript{100}

In \textit{Maki v. Frelk},\textsuperscript{101} a 1968 decision, the Illinois Supreme Court declined to replace contributory negligence with comparative negligence. The \textit{Maki} court concluded that such a far-reaching change in the law should be made by the Illinois General Assembly.\textsuperscript{102} However, in 1981 the supreme court reversed itself and adopted pure comparative negligence in \textit{Alvis v. Ribar}.\textsuperscript{103} The \textit{Alvis} court traced the history of both contributory and comparative negligence, and noted that thirty-six states had adopted some form of comparative negligence.\textsuperscript{104} The court determined that application of the doctrine of comparative negligence produced a more just result than the doctrine of contributory negligence.\textsuperscript{105} Furthermore, the court rejected the argument that juries would find comparative negligence difficult to administer because so many states had already successfully applied the doctrine.\textsuperscript{106} While the defendant in \textit{Alvis} urged that the \textit{Maki} decision be followed, the court noted that contributory negligence was a judicially created doctrine which could be altered by the court.\textsuperscript{107} The court decided that it was necessary

\begin{itemize}
\item \textsuperscript{99} See \textit{Alvis v. Ribar}, 85 Ill. 2d 1, 19, 421 N.E.2d 886, 894 (1981); Hoffman v. Jones, 280 So. 2d 431, 437 (Fla. 1973).
\item \textsuperscript{100} See supra note 92.
\item \textsuperscript{101} 40 Ill. 2d 193, 239 N.E.2d 445 (1968).
\item \textsuperscript{102} \textit{Id.} at 196, 239 N.E.2d at 447. Other courts have also maintained that the decision to adopt comparative negligence belongs to the legislature. See Golden v. McCurry, 392 So. 2d 815 (Ala. 1980); Krise v. Gillund, 184 N.W.2d 405 (N.D. 1971); Baab v. Shockling, 61 Ohio St. 2d 55, 399 N.E.2d 87 (1980); Peterson v. Culp, 255 Or. 269, 465 P.2d 876 (1970); Bridges v. Union Pacific R.R., 26 Utah 2d 281, 488 P.2d 738 (1971). For a discussion of the merits of judicial versus legislative adoption see James, Kalven, Keeton, Leflar, Malone, and Wade, \textit{Comments on Maki v. Frelk—Comparative Negligence v. Contributory Negligence: Should the Court or Legislature Decide}, 21 VAND. L. REV. 889 (1968).
\item \textsuperscript{103} 85 Ill. 2d 1, 19, 421 N.E.2d 886 (1981).
\item \textsuperscript{104} \textit{Id.} at 11-14, 421 N.E.2d at 890-91.
\item \textsuperscript{105} \textit{Id.} at 15, 421 N.E.2d at 892.
\item \textsuperscript{106} \textit{Id.} at 17, 421 N.E.2d at 893. The defendant also argued that adoption of comparative negligence would contribute to an increased number of claims, a reduction in settlements, and a jamming of court dockets. \textit{Id.} at 19, 421 N.E.2d at 894. The court was not persuaded by this argument:

\begin{quote}
We believe that the defendants' fears concerning the judicial administrative problems attendant upon the adoption of comparative negligence are exaggerated. But were defendants' fears well founded, we could nevertheless not allow contributory negligence to remain the law of this State in the face of overwhelming evidence of its harsh and unjust results.
\end{quote}
\textit{Id.} at 20, 421 N.E.2d at 894 (citations omitted).
\item \textsuperscript{107} \textit{Id.} at 22, 421 N.E.2d at 895. The Illinois Defense Counsel, in an amicus brief, argued that the legislature was better equipped to adopt comparative negligence. The Defense Counsel stated that judicial adoption of the doctrine would result in a piecemeal approach that would leave many related issues unresolved. The court responded to this argument by stating that most states' comparative negligence statutes are very broad and leave the resolution of most legal issues to the courts. Therefore, waiting for the General Assembly would not result in a better comparative negligence law in Illinois. \textit{Id.} at 24, 421 N.E.2d at 895.
\end{itemize}
to step in and end the stalemate between the legislature and judiciary, and accordingly the court adopted comparative negligence.\textsuperscript{108}

In the years following \textit{Alvis}, the Illinois Supreme Court issued a number of decisions that defined the scope of comparative negligence.\textsuperscript{109} In 1983, the court applied comparative negligence to strict products liability actions in \textit{Coney v. J.L.G. Industries}.\textsuperscript{110} Illinois had already adopted the strict liability standard of section 402A of the Second Restatement of Torts\textsuperscript{111} in \textit{Suvada v. White Motors Co.}\textsuperscript{112} Since the \textit{Suvada} decision, the defenses to strict liability actions in Illinois had been severely limited. Contributory negligence was not a defense in products cases unless the plaintiff's conduct amounted to misuse of product or assumption of risk.\textsuperscript{113} The misuse of product defense barred recovery to a plaintiff who used a product for a purpose that the manufacturer could not foresee.\textsuperscript{114} Assumption of risk,
which also barred recovery, applied if a plaintiff expressly or impliedly consented to the risk created by the product.\(^{115}\) The misuse of product and assumption of risk defenses were total bars to recovery in products liability actions in Illinois.

The *Coney* court considered the policy that supported strict products liability. The court noted that strict liability was imposed on manufacturers because they invite and solicit the use of their products, create the risk, and reap the benefits.\(^{116}\) The court rejected the plaintiff's argument that applying comparative negligence to strict liability actions would defeat this policy. The court observed that eighteen of twenty-three states that had addressed the issue allowed the defense.\(^{117}\) Adoption of comparative negligence, the court reasoned, would not countermand this policy because the plaintiff's burden of proof was still eased and the defendant was still strictly liable. Thus, the court held that comparative negligence could be used to reduce plaintiff awards in strict products liability actions. The court also stated that the old defenses of misuse of product and assumption of risk were no longer total bars to recovery. Instead, such conduct should be compared to the defendant's fault and used to reduce the plaintiff's damages.\(^{118}\)

The key to understanding *Coney*, and the other cases that have applied comparative negligence to strict liability actions, is to appreciate the distinction between the doctrines of contributory and comparative negligence. Contributory negligence is a defense against liability; it operates to relieve the defendant of all liability. Thus, contributory negligence was not a defense to SWA actions or other actions based on strict liability. Comparative negligence, however, is not a defense against liability; it is a doctrine for apportioning damages. Therefore, comparative negligence is not a defense to strict liability. Instead, comparative negligence operates to reduce the damages paid by a strictly liable defendant.

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\(^{116}\) 97 Ill. 2d at 110-11, 454 N.E.2d at 200 (citing Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182, 186 (1965)).

\(^{117}\) Id. at 112-14, 454 N.E.2d at 201.

\(^{118}\) Id. at 116, 454 N.E.2d at 202.
III. The Simmons Decision

The site of the accident in Simmons v. Union Electric Co. was a decommissioned power plant in Cahokia, Illinois, that was owned by Union Electric. Union Electric contracted with Sachs Electric Company (Sachs) to install an electrical system that would furnish electricity to portions of the plant, and to maintain and repair the electrical system when problems arose. Sachs did not maintain any regular personnel at the plant, but Union Electric employees or security personnel were always present to apprise Sachs of any problems.

Edward Simmons worked for Sachs as a journeyman electrician. On December 19, 1978, Simmons went to the Cahokia plant with another Sachs employee in response to a trouble call. Upon arrival, they discovered that an ash pit had flooded. Simmons determined that the temporary and permanent sump pumps located in the ash pit had malfunctioned. After Simmons bailed out the ash pit, he decided that the temporary pump had to be removed for repairs. To reach the temporary pump, Simmons climbed down a ladder attached to the pit wall; he slipped from the rungs, and fell approximately fifteen feet to the bottom of the pit.

Simmons brought an action against Union Electric under the SWA and under common law negligence. Union Electric filed a third-party complaint against Sachs that sought indemnity or contribution from Sachs. Sachs then filed a counterclaim against Simmons, seeking either indemnity or contribution. At a bench trial, Union Electric employees testified that the rungs of the ladder might have been slippery due to oil that may have been left by the flood waters. The trial judge found in favor of Simmons on the SWA count and in favor of Sachs on Union Electric's third party complaint.

The Illinois Appellate Court for the Fifth District affirmed the judgment for Simmons against Union Electric. However, it reversed the trial court's decision on the third party complaint and found for Union Electric. The appellate court allowed Union Electric to seek common law indemnity from Sachs because Union Electric's conduct was merely passive, while Sachs was actively negligent. After the appellate court determined that Union Electric was entitled to indemnity from Sachs, it had to decide whether Sachs could

119. 121 Ill. App. 3d 743, 748, 460 N.E.2d 28, 32 (5th Dist. 1984). The facts are taken from the appellate court's decision where they are set out in more detail.
120. Id. at 749, 460 N.E.2d at 32.
121. Id.
122. Id. at 750, 460 N.E.2d at 32. At the trial, Simmons testified that he slipped on oil on the ladder. In a deposition taken prior to trial, he testified that he did not know why he slipped. Id.
123. Id. at 748, 460 N.E.2d at 31.
124. Id. at 755, 460 N.E.2d at 36. A Union Electric engineer testified that on a previous occasion, Union Electric hired a clean-up company to remove oil after a flood. Id.
125. Id. at 761, 460 N.E.2d at 40.
126. Id.
127. Id. at 759, 460 N.E.2d at 39.
seek indemnity from Simmons. Sachs argued that Simmons was liable for indemnity to Sachs under the SWA because Simmons was a foreman. The court rejected this argument, and stated that the precedent in support of Sachs' claim involved injured parties who were themselves independent legal entities. Therefore, the court held that Simmons was not liable to Sachs.

The appellate court did not address the issue of whether comparative negligence applied to the SWA. The Illinois Supreme Court, however, agreed to resolve the issue even though it was not raised below. The court decided that in order to affect the General Assembly's intent behind the SWA, an injured worker's conduct should not be a factor that reduces the worker's recovery under the SWA.

Before the court addressed the applicability of comparative negligence to SWA actions, it first had to determine whether Union Electric was liable under the SWA. The court concurred with the trial court that Union Electric was in charge of the plant and concluded that the ash pit was a structure.

128. Because the trial court found for Sachs, it did not decide whether Sachs had to indemnify Union Electric.

129. 121 Ill. App. 3d at 762, 460 N.E.2d at 40-41. Sachs relied on Brown v. Village of Shipman, 89 Ill. App. 3d 162, 411 N.E.2d 569 (4th Dist. 1980), and National Oats Co. v. Volkman, 29 Ill. App. 3d 298, 330 N.E.2d 514 (5th Dist. 1975). In Brown, an owner was allowed to seek indemnity against the plaintiff, who was an individual contractor in charge of the work. The court said:

[A]llowing the counterclaim against [plaintiff] for indemnity would permit his contributory negligence to indirectly nullify any cause of action. However . . . he was a contractor in charge of the work and subject to the liabilities of the Structural Work Act. He did not have the . . . status of "a protected person within the meaning of the Act."

89 Ill. App. 3d at 166, 411 N.E.2d at 572. Similarly, in National Oats, the owner was allowed to seek indemnity from the subcontractor. The subcontractor was a partnership, and the plaintiff decedent was a general partner. The appellate court allowed the defendant to seek indemnity even though the court recognized that the decedent's estate would share in any judgment against the partnership. 29 Ill. App. 3d at 303, 330 N.E.2d at 517.

To distinguish these cases, the appellate court relied on Flora v. Home Fed. Sav. & Loan Ass'n, 685 F.2d 209 (7th Cir. 1982), in which Brown and National Oats were examined. The Flora court held that the SWA protected a person who was injured while working for a separate agency. However, the plaintiff cannot recover when he is personally in charge of the work and the active tortfeasor. Id. at 211. Therefore, because Simmons worked for a separate agency, he was not subject to liability under the SWA. 121 Ill. App. 3d at 762, 460 N.E.2d at 40-41.

130. 104 Ill. 2d at 451, 473 N.E.2d at 949. The appellate court held that Simmons was not liable to Sachs, but it ruled on indemnity grounds, rather than on comparative negligence. See supra note 129. The Supreme Court decided the issue pursuant to Supreme Court Rule 318(a), which reads:

In all appeals, by whatever method, from the Appellate Court to the Supreme Court, any appellee, respondent, or co-party may seek and obtain any relief warranted by the record on appeal without having filed a separate petition for leave to appeal or notice of cross appeal or separate appeal.

ILL. REV. STAT. ch. 110A, § 318(a) (1983). The Supreme Court used this rule in conjunction with Rule 366(a), which allows any Illinois court, on appeal, to issue any order and to decide any issue raised by any party that is warranted by the record. Id. § 366(a).

131. The court found that Union Electric was in charge of the site based on the totality of
under the SWA. The court applied the Schultz test of wilful violation, and decided that because Union Electric knew that an oily residue had been left on the ladder after prior floods, Union Electric knew about the dangerous conditions on this occasion. Therefore, Union Electric was found to be liable under the SWA.

Having determined that Union Electric was liable under the SWA and entitled to indemnification from Sachs, the court then considered the effect of the plaintiff's conduct on his ability to recover damages. To determine whether comparative negligence applied in the case, the court examined the policy behind the SWA. The court analogized the SWA to the Road Construction Injuries Act (RCIA), which the court had previously construed in Vegich v. McDougal Hartmann Co. The Vegich court noted that liability under a statute was not equivalent to liability under common law. The purpose of the RCIA, the Vegich court reasoned, was not to compensate victims, but to prevent accidents from occurring. Thus, the application of contributory negligence to reduce damages in an RCIA case was inconsistent with that statute's purpose. The Simmons court concluded that because the RCIA and the SWA both had the same purpose—to prevent occupational injuries—the policy arguments raised against contributory negligence in the Vegich case also applied to the Simmons case. The court therefore held that comparative negligence was not applicable to claims brought under the SWA.

the circumstances: Union Electric inspected and had final acceptance of Sachs's work, Union Electric employees were present, and Sachs's employees were not present until requested by Union Electric. Union Electric argued that because Simmons was injured while repairing a sump pump—which is not a structure—the SWA did not apply. The court followed Navlyt v. Kalinich, 53 Ill. 2d 137, 290 N.E.2d 219 (1972), in which a sewer trench was held to be a structure within the SWA. The Court reasoned that because the ash pit retained the sump pump, the pit was within the purview of the act.

The Court rejected Sachs's claim and ordered Sachs to indemnify Union Electric. The Court noted that under Sachs' contract with Union Electric, Sachs was responsible for supplying all safety equipment, lighting, and directions needed for repairs, while Union Electric was required only to notify Sachs and inspect their work. Union Electric argued that because Union Electric was in charge of the ash pit, Union Electric was actively negligent and therefore not entitled to indemnity from Sachs. The court, in response, suggested that the Contribution Act, Ill. Rev. Stat. ch. 70, §§ 301-305 (1983), preempted common law active-passive indemnity. Because neither party raised that issue, however, the court applied active-passive indemnity.

The Court noted that under Sachs' contract with Union Electric, Sachs was responsible for supplying all safety equipment, lighting, and directions needed for repairs, while Union Electric was required only to notify Sachs and inspect their work. 104 Ill. 2d at 454, 473 N.E.2d at 951. The court declared, "[m]erely having charge of the work is not dispositive on the issue of which of two tortfeasors is actively negligent. Thus, Union Electric can be found to be both in charge of the work and passively negligent." Therefore, Sachs had to indemnify Union Electric.

The court supported its position further by noting
IV. ANALYSIS AND CRITICISM OF THE SIMMONS DECISION

While at first glance the court’s reasoning in Simmons is persuasive, a closer examination of the opinion reveals flaws in the court’s reasoning. The Simmons court relied heavily on the Vegich decision to support its conclusion that comparative negligence did not apply in SWA actions. However, there are two problems with using Vegich to support the Simmons decision: (1) Vegich was decided before comparative negligence was adopted in Illinois; and (2) the Vegich court’s construction of the RCIA was itself influenced by other statutes, including the SWA. The court also purportedly examined the legislative intent behind the SWA and found that it was in accordance with the Vegich analysis of the RCIA. Contrary to the court’s assertions, however, the General Assembly’s purpose behind the SWA is unclear and may be undeterminable. Because of the uncertainty over the General Assembly’s intent, to determine whether comparative negligence should apply to SWA actions judicial construction of the SWA should be scrutinized. As will be shown, judicial construction has gradually converted the SWA into a strict liability statute. Therefore, the Simmons court should have examined the Coney v. J.L.G. Industries decision—a strict liability case—to determine whether the comparative negligence doctrine should apply to SWA actions.

In Vegich, a passenger and a driver were injured in a car accident; both parties sued the contractor in charge of repairing a state highway, alleging that the defendants had violated the RCIA. The trial court dismissed their complaints because they failed to plead that they were free from contributory negligence. In addition, the trial court ruled that they were contributorily negligent as a matter of law. The appellate court reversed the trial court’s decision and remanded, and the supreme court affirmed the appellate court.

that the SWA must be construed liberally so as to effectuate the legislature’s intent. Id. at 459, 473 N.E.2d at 953 (citing Halberstadt v. Harris Trust & Sav. Bank, 5 Ill. 2d 121, 302 N.E.2d 64 (1973)). Sachs’ final contention was that Simmons was a foreman and therefore liable under the SWA to Sachs. The court rejected this argument, holding that the SWA did not impose liability on a foreman who was also the injured party. 104 Ill. 2d at 461-62, 473 N.E.2d at 954.

141. See infra notes 164-67 and accompanying text.
142. 97 Ill. 2d 104, 454 N.E.2d 197 (1983).
143. 104 Ill. 2d at 464, 419 N.E.2d at 919. Kawolsky, the driver, was killed in the accident. His widow brought an action under the RCIA.
144. The civil action clause reads in pertinent part:

Any contractor . . . who knowingly and wilfully violates any provision of this Act, shall be responsible for any injury to person or property occasioned by such violation, and a right of action shall accrue to any person injured for any damages sustained thereby . . .

ILL. REV. STAT. ch. 121, § 314.6 (1983).
145. 64 Ill. 2d at 464, 419 N.E.2d at 919.
146. Id. Apparently, Kawolsky and Vegich had been drinking in a bar for several hours before the accident.
147. 84 Ill. App. 3d 354, 405 N.E.2d 859 (3d Dist. 1980).
148. 84 Ill. 2d 461, 419 N.E.2d 918 (1981).
The Vegich court looked to the General Assembly's purpose in passing the RCIA to determine whether applying contributory negligence would defeat that purpose. The court determined that because the RCIA was a safety statute and had wilfulness as the standard of liability, the General Assembly did not intend for contributory negligence to be a defense to RCIA actions. The court also drew analogies to other statutes that included wilfulness as the standard of liability: the Coal Mining Safety Act, the Child Labor Law, and the Structural Work Act. Since contributory negligence was not a defense to those statutes, the Vegich court reasoned that the defense was also not available in RCIA actions.

The Simmons court's use of the Vegich holding is flawed in two ways. First, Vegich was decided before the court adopted comparative negligence in Alvis v. Ribar. Prior to the Alvis decision, contributory negligence operated as a complete bar to a plaintiff's action. The Vegich court concluded that allowing a plaintiff's conduct to act as a total bar would defeat the purpose of the RCIA. For the same reason, Illinois courts refused to allow contributory negligence as a defense to strict liability actions or actions under the SWA. However, with Illinois' adoption of pure comparative negligence, this fear was alleviated; the plaintiff's conduct no longer totally barred an action against a liable defendant. The Coney court reasoned that application of the comparative negligence doctrine to strict liability cases still allowed plaintiffs to recover some damages, and that the doctrine was therefore consistent with the cost-shifting philosophy of strict liability. Accordingly, because comparative negligence is a doctrine distinct from contributory negligence, the reasoning of the Vegich case is not relevant to the issue concerning the application of comparative negligence. Therefore, the Simmons court should not have followed the Vegich decision.

The second problem with the supreme court's reliance on the Vegich decision is that the Vegich court itself relied on analogies to the SWA to construe the RCIA. After the Vegich court decided that the RCIA and the

149. The supreme court observed that the RCIA did not mention contributory negligence. Id. at 464, 419 N.E.2d at 919.
150. Id. at 465, 419 N.E.2d at 919.
151. Id. at 465-66, 419 N.E.2d at 919-20.
152. ILL. REV. STAT. ch. 96 1/2, § 1007 (1983).
154. Id. §§ 60-69.
155. 84 Ill. 2d at 466-67, 419 N.E.2d at 920. The court rejected McDougal's contention that violations of the RCIA are analogous to violations of the Public Utilities Act, ILL. REV. STAT. ch. 111 2/3, § 77 (1983), which allows contributory negligence. The court noted that the Public Utilities Act does not limit liability to wilful acts, but instead grants a cause of action for any violation. Therefore, the court concluded that the statutes that used a wilful standard were controlling. 84 Ill. 2d at 467-68, 419 N.E.2d at 920-21.
156. 85 Ill. 2d 1, 421 N.E.2d 886 (1981). See supra notes 103-08 and accompanying text.
157. See supra notes 113-15 and accompanying text.
158. See supra notes 87-88 and accompanying text.
SWA served similar purposes, it reasoned that, because contributory negligence was not allowed under the SWA, it should not be allowed under the RCIA. By relying on the Vegich case, the Simmons court engaged in circular logic: no contributory negligence under the SWA led to no contributory negligence under the RCIA, which then led to no comparative negligence under the SWA. The Simmons court should not have rested its decision on an analogy to the Vegich case.

If any analogy was in order, the Simmons court should have analogized to statutory actions that are similar to the SWA, in which the applicability of comparative negligence had been addressed. For example, the court could have looked to the RCIA to determine whether comparative negligence applied, and then analogized the result to the SWA. However, because the court has not addressed these issues, it would not be useful to draw analogies to the RCIA. The court has also not determined whether comparative negligence applies to other remedial statutes. To determine the applicability of comparative negligence, the Simmons court should have examined the SWA itself.

There are two alternative analyses that could be used to determine whether the comparative negligence doctrine should apply to SWA actions. First, the language of the SWA could be examined to determine whether the General Assembly intended for comparative negligence to apply. Second, the SWA and the doctrine of comparative negligence could have been examined together, as the Coney court compared strict liability and comparative fault, to determine the applicability of comparative negligence in reducing damages in SWA cases. This second approach is preferable because it is more in accordance with the supreme court's approach in the Alvis and Coney decisions.

Both analyses require a thorough examination of the statute. The SWA itself is silent regarding whether any defenses are available to SWA defendants. Thus, the General Assembly's purpose behind the statute should be examined to determine what, if any, defenses the legislature intended to allow.

Schultz v. Henry Ericsson Co. is the leading case that interprets the purpose underlying the SWA. All courts that have considered the SWA's purpose have either relied on the Schultz decision or on subsequent cases that used Schultz as precedent. As the Schultz court stated, "[t]he object

160. See supra notes 87-88 and accompanying text.
161. 84 Ill. 2d at 466-67, 419 N.E.2d at 920.
162. The supreme court has not yet ruled on the applicability of comparative negligence to other similar statutes.
163. Although the RCIA was not at issue in Simmons, the impact of the Simmons case on the RCIA can be predicted. Since the court analogized to the RCIA, it would probably use the Simmons case as precedent in future cases concerning the RCIA. Thus, for all practical purposes, comparative negligence is not a defense to actions brought under the RCIA.
164. 264 Ill. 156, 106 N.E. 236 (1914); see supra notes 38-45 and accompanying text.
165. See, e.g., Bounougias v. Republic Steel Corp., 277 F.2d 726 (7th Cir. 1960) (relying on
to be attained by this statute was to prevent injuries to persons employed in this dangerous and extra hazardous occupation, so that negligence on their part in the manner of doing their work might not prove fatal. However, the court gave no authority for this statement; the court cited nothing from the legislative record. Rather, the Schultz court analogized to the Mining Act of 1899.

The Schultz court’s reliance on previous Mining Act decisions is unsound. Although the Mining Act of 1899 included language on liability identical to the language used in the SWA civil action clause, the background and legislative history of the Mining Act is quite different from the SWA. The Mining Act was passed because the Illinois Constitution required the General Assembly to pass laws protecting miners. Thus, the legislative intent is clearly seen by examining both the history of the Mining Act and the

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Another line of cases rests on an earlier case, Claffy v. Chicago Dock & Canal Co., 249 Ill. 210, 94 N.E. 551 (1911), for authority regarding the SWA’s purpose. In Claffy, the widow of a plumber who was killed when he fell through an elevator opening sued a building contractor under the SWA. Mrs. Claffy alleged that the contractor had violated § 66 of the SWA, which set out requirements for enclosing openings to hoists and elevators. *Id.* at 214, 94 N.E. at 552. The defendant challenged the constitutionality of § 66, on the ground that it singled out elevators and hoists used in the construction of buildings, but not in the alteration, repair, or destruction of buildings. The court rejected this argument. The court examined the SWA and concluded that the legislature intended for § 66 to cover all elevators and hoists; the section was therefore constitutional. *Id.* at 220, 94 N.E. at 553-54.

Other courts have relied on Claffy as authority for the purpose of the SWA. Yet, the Claffy court actually only decided what the purpose of § 66 was. See, e.g., Gannon v. Chicago, M. St. P. & Pac. Ry., 22 Ill. 2d 305, 175 N.E.2d 785 (1961) (relying on Claffy); Kennerly v. Shell Oil Co., 13 Ill. 2d 431, 150 N.E.2d 134 (1958) (relying on Claffy and Griffiths); John Griffiths & Son Co. v. National Fireproofing Co., 310 Ill. 331, 141 N.E. 739 (1923) (relying on Claffy); Kobus v. Formfit Co., 56 Ill. App. 2d 449, 206 N.E.2d 477 (1st Dist. 1965) (relying on Gannon and Claffy). But see Kennerly, 13 Ill. 2d at 441, 150 N.E.2d at 140 (Klingbiel, J., dissenting) (criticizing widespread misconstruction of Claffy).

166. 264 Ill. at 164, 106 N.E. at 239.
167. *Id.*

TheMining Act reads in pertinent part:

For any injury to person or property, occasioned by any willful violations of this act, or willful failure to comply with any of its provisions, a right of action shall accrue to the party injured for any direct damages sustained thereby.

Act of April 18, 1899, § 33, 1899 Ill. Laws 300, 325.

169. The relevant provision in the Illinois Constitution states:

It shall be the duty of the general assembly to pass such laws as may be necessary for the protection of operative miners, by providing for ventilation, when the same may be required, and the construction of escapement-shafts, or such other appliances as may secure safety in all coal mines, and to provide for the enforcement of said laws by such penalties and punishments, as may be deemed proper.

**ILL. CONST. OF 1870, art. IV, § 29. See E. BECKER, A HISTORY OF ILLINOIS LABOR LEGISLATION 290-91 (1920) (discussing the history of the constitutional provision). The Mining Act of 1899 was a revision and consolidation of various mining laws that had been enacted in the previous 27 years. *Id.* at 294-95.
constitutional debates. The SWA lacks such clear statements regarding its purpose. Therefore, the court erred by applying the construction of the Mining Act to the SWA.\textsuperscript{170}

Unfortunately, there is no independent expression of the General Assembly’s intent in enacting the SWA other than the Schultz court’s assertion.\textsuperscript{171} Also, there is no other indication as to whether the General Assembly intended for any defenses to be available for SWA defendants. The supreme court, however, has held consistently that contributory negligence and assumption of risk were not defenses in SWA actions.\textsuperscript{172} Those holdings are based on the same passage in Schultz that set forth the purpose of the SWA.\textsuperscript{173} Again, the court gave no authority for this statement.\textsuperscript{174} In addition, the Schultz court’s statement about the effect of employee negligence on damages under the SWA is dicta. The defendant in Schultz did not argue that Schultz’ conduct should bar his recovery.\textsuperscript{175} In spite of this, the Schultz court’s statement on the law has been followed faithfully.\textsuperscript{176}

While the authority of Schultz is doubtful, it is unquestionably the rule in Illinois that assumption of risk and contributory negligence are not defenses to SWA actions. Even if such a rule were founded on solid precedent, it would not assist in the examination of whether comparative negligence should apply to SWA actions. However, the Simmons court effectively followed this approach when it relied on Vegich to deprive SWA defendants of recourse to comparative negligence. This approach is contrary to the authority of the Alvis and Coney cases,\textsuperscript{177} and it should not have been used to determine the applicability of comparative negligence to any tort.

Thus, an examination of the SWA does not provide guidance as to whether comparative negligence should apply to assess damages. The statute and legislative history are silent about which defenses may be used in SWA actions. Also, the case law concerning the applicability of common law tort

\textsuperscript{170} The Schultz court also noted that the wording of the SWA was mandatory. The court inferred that the statutory language mandated a construction of wilful violation to mean knowing violation. 264 Ill. at 164-65, 106 N.E.2d at 239-40.

\textsuperscript{171} One commentator suggested that, as a practical matter, the Worker’s Compensation Act superceded the SWA. Krause, Statutory Torts in Illinois, 1967 U. Ill. L.F. 1, 5-6 (1967); see also Comment, supra note 36, at 504 (arguing that the SWA has evolved beyond the intent of legislature).

\textsuperscript{172} See supra notes 87-88 and accompanying text.

\textsuperscript{173} The court construed the SWA as follows: “The object to be attained by this statute was to prevent injuries to persons employed in this dangerous and extra hazardous occupation, so that negligence on their part in the manner of doing their work might not prove fatal.” 264 Ill. at 164, 106 N.E. at 239.

\textsuperscript{174} See supra note 169 and accompanying text.

\textsuperscript{175} The supreme court listed the issues for review in Schultz. The effect of the plaintiff’s conduct was not one of the issues, and apparently was not raised by the defendant. Id. at 157-58, 106 N.E. at 237.

\textsuperscript{176} For example, in the Gannon opinion the Court declared that “it was held [in Schultz], therefore, that the doctrine of assumed risk and contributory negligence had no application to the [SWA].” 22 Ill. 2d at 318, 175 N.E.2d at 792 (emphasis added).
defenses in SWA cases rests on questionable authority. Even if such authority were persuasive, it is not relevant to the issue of whether comparative negligence applies to the SWA.

The Coney court proposed a much better method for determining whether comparative fault should apply to particular strict liability causes of action. Under the Coney approach, a court decides whether the application of comparative negligence would frustrate the policy behind the cause of action. In Simmons, the court either should have looked to the General Assembly’s intent behind the SWA, or analogized to other, similar tort actions in which the applicability of comparative negligence has been applied. Because the court declared that “[t]he object to be attained by this statute was to prevent injuries to persons employed in this dangerous and extra hazardous occupation,” the issue should have been whether applying comparative negligence would make the occupation less safe.

The doctrine of comparative negligence is not inconsistent with the purposes of the SWA. If comparative negligence applied, owners, contractors, and other persons in charge of construction sites would still have an incentive to ensure that scaffolds, ladders, and other covered devices are safe. If a worker was injured solely through the worker’s own fault, then the worker’s recovery should and would in fact be denied. However, if a scaffold was unsafe, the owner, contractor, or other person in charge would be liable for the worker’s injuries regardless of the worker’s conduct. Comparative negligence would only reduce damages by the amount that the plaintiff’s conduct contributed to the injury. Thus, when a worker exercises reasonable care, the owner, contractor, or other person in charge remains liable for the full amount of damages.

It could be argued that allowing comparative negligence might reduce the degree of safety at construction sites, presumably because owners, contractors, and other persons in charge would take no precautions to make sites safer and instead rely on comparative negligence to relieve them of some liability. A similar concern was raised and addressed in Coney. The Coney court declared that a consumer’s “unobservant, inattentive, ignorant or awkward failure to discover or guard against [an unsafe condition] should not be compared as a damage reducing factor.” This same limitation

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177. See supra notes 103-18 and accompanying text.
179. See, e.g., Beebe v. Commonwealth Edison Co., 45 Ill. App. 3d 42, 358 N.E.2d 1343 (3d Dist. 1977) (upholding jury verdict for defendant when plaintiff’s conduct was sole cause of injury). See also Comment, supra note 36, at 504.
180. 97 Ill. 2d at 110, 454 N.E.2d at 201.
181. Id. at 118, 454 N.E.2d at 204.
should be applied to comparative negligence in SWA actions. Only the injured party's affirmative misconduct that contributes to his injury should be balanced against the defendant's liability.¹⁸² A worker's mere failure to notice a dangerous condition would not reduce an injured worker's recovery. However, when a worker's actions amount to misconduct and the actions contribute to the worker's injury, then the recovery would be reduced by the portion of the damages associated with the misconduct.¹⁸³ In contrast, defendants would not be able to rely on a slight amount of worker negligence to relieve them of part of their liability. Thus, application of comparative negligence to SWA actions would not defeat the General Assembly's purpose behind the SWA.

An examination of the Illinois Supreme Court's construction of the SWA also supports the conclusion that comparative negligence should apply in actions under the SWA. The effect of the court's interpretation of the statute converts the SWA into a strict liability statute. Therefore, for the same reasons that comparative negligence applies to strict liability actions, the doctrine should apply to SWA actions.

Although the SWA creates a cause of action only for "wilful violations," the *Schultz* court defined the "wilful violation" requirement broadly.¹⁸⁴ The defendant's mere knowledge that a scaffold or similar device is used at an employer's site constitutes a wilful violation by the defendant if the scaffold turns out to be unsafe.¹⁸⁵ This construction has turned the SWA into a strict

¹⁸². *Id.* at 119, 454 N.E.2d at 204.
¹⁸³. *Smith v. Georgia Pac.* Corp., 86 Ill. App. 3d 570, 408 N.E.2d 117 (3d Dist. 1980), provides an excellent example of behavior that may be categorized as misconduct. In *Smith*, the plaintiff, a painter, was injured when he "jumped" the ladder on which he was working so that he could paint the section under the ladder. *Id.* at 572, 408 N.E.2d at 119. After the jury could not reach a verdict, the trial court entered directed verdicts for the defendants. *Id.* The appellate court reversed, holding that there was evidence that a wilful violation of the SWA caused the accident. *Id.* at 573-74, 408 N.E.2d at 120. Therefore, the decision of whether the plaintiff's conduct was the sole cause of the injury was a question for the jury, and the trial court consequently abused its discretion when it directed verdicts. *See also* Lindsey v. Dean Evans Co., 11 Ill. App. 3d 432, 297 N.E.2d 8 (4th Dist. 1973) (negligence by plaintiff in moving scaffold not relevant if defendant wilfully violated SWA).

If comparative negligence had been used in *Smith*, the hung jury might have been avoided. The jury could have found that the plaintiff's negligence was not the sole cause of the injury, but a contributing cause that should diminish his recovery. Thus, the injustice of either ignoring plaintiff's conduct or ignoring the defendant's violation of the SWA is avoided.

¹⁸⁴. *See supra* notes 41-45 and accompanying text.
¹⁸⁵. *See e.g.*, Banwart v. Okesson, 83 Ill. App. 3d 222, 403 N.E.2d 1234 (2d Dist. 1980) (fact that owner knew scaffold was used and gave instructions regarding placement sufficient to find wilful violation); Burke v. Illinois Power Co., 57 Ill. App. 3d 498, 373 N.E.2d 1354 (1st Dist. 1978) (fact that owner knew crane was near power line sufficient to support finding of wilful violation); Jackson v. H.J. Friedlich & Sons, Inc., 1 Ill. App. 3d 381, 274 N.E.2d 189 (5th Dist. 1971) (when defendant was in charge of erecting scaffolding, plaintiff's testimony that plank slipped sufficient to find a wilful violation).
liability statute. Injured workers may file SWA claims if (1) they were engaged in an occupation covered by the statute and they were injured while working on scaffolding or other covered devices, (2) the defendants were in charge of the structure, (3) the defendants knew that a covered device was being used and knew of or could have discovered the dangerous condition, and (4) the worker's injuries were caused by the dangerous condition of the device. When a plaintiff has been injured, juries tend to find the existence of a dangerous condition even in the absence of direct evidence. The requirements under the SWA are analogous to the elements for a successful strict products liability suit.

186. See Barthel v. Illinois Cent. Gulf R.R., 74 Ill. 2d 213, 384 N.E.2d 323 (1978). In Barthel, the Illinois Supreme Court stated, "[t]he courts have found a legislative intent to impose strict liability in several Illinois statutes, such as . . . the Structural Work Act." Id. at 220, 384 N.E.2d at 327. Several commentators have also noted that the SWA has become a strict liability statute. See, e.g., Maher, The Construction Injuries Act: Another Structural Work Act and Possibly More, 70 Ill. B.J. 388, 391 (1981) (discussing Vegich and noting that both the RCIA and SWA are strict liability statutes); Note, supra note 37, at 410 (SWA imposes "virtually absolute liability"); C. GREGORY & H. KALVEN, CASES AND MATERIALS ON TORTS 724 (2d ed. 1969) (SWA imposes strict liability on owner who knows scaffolding will be used).

187. Workers constitute the majority of plaintiffs under the SWA. However, other persons also have standing to sue under the SWA. See, e.g., Quinn v. L.B.C. Inc., 94 Ill. App. 3d 660, 418 N.E.2d 1011 (1st Dist. 1981) (allowing city inspector to recover under SWA); Bennett v. Musgrave, 130 Ill. App. 2d 891, 261 N.E.2d 128 (5th Dist. 1970) (invitee of defendant owner was protected person under SWA). But see Grant v. Zale Constr. Co., 109 Ill. App. 3d 545, 440 N.E.2d 1043 (1st Dist. 1982) (firefighter injured while rescuing construction worker not covered by SWA).

188. Plaintiffs not working on a structure must show that a structure and activity covered by the SWA were involved. See, e.g., Long v. City of New Boston, 91 Ill. 2d 456, 440 N.E.2d 625 (1982) (volunteer worker hanging Christmas lights was engaged in alteration of structure); Grant v. Zale Constr. Co., 109 Ill. App. 3d 545, 440 N.E.2d 1043 (1st Dist. 1982) (firefighter not engaged in covered activity).

189. See supra notes 61-63 and accompanying text.

190. The defendant's mere knowledge of the use of scaffolding constitutes a wilful violation of the SWA. See supra notes 41-45 and accompanying text.

191. To defend against an SWA claim, a defendant can introduce evidence that the injury was caused by the plaintiff's conduct. Although contributory negligence is not a defense, the plaintiff cannot recover if the plaintiff's conduct was the sole cause of the accident. See Kochan v. Commonwealth Edison Co., 123 Ill. App. 3d 844, 463 N.E.2d 921 (1st Dist. 1984); Smith v. Georgia Pac. Corp., 86 Ill. App. 3d 570, 408 N.E.2d 117 (3d Dist. 1980); Beeve v. Commonwealth Edison Co., 45 Ill. App. 3d 43, 358 N.E.2d 1343 (3d Dist. 1977).

Other commentators have listed a different set of requirements for a SWA action. One commentator suggested the following elements: (1) the device must be one covered by the act; (2) the device must be used in the erection or alteration of a building; (3) the device must be unsafe; (4) there must be a wilful violation; and (5) the violation must be the proximate cause of the injury. Comment, supra note 36, at 503; see also Ring, supra note 32, at 670. However, these requirements differ only facially from those set out in the text above, which combine the technical requirements with the case law interpreting the SWA.

192. Courts tend to employ reasoning analogous to that used in res ipsa loquitur, under which the occurrence of an accident proves the existence of a dangerous condition. See, e.g., Jackson v. H.J. Friedich & Sons, Inc., 1 Ill. App. 3d 381, 274 N.E.2d 189 (5th Dist. 1971)
To succeed in a strict product liability action, the plaintiff must prove that the injury was caused by a product that was sold or manufactured by the defendant, and that was in a defective condition unreasonably dangerous when it left the defendant's control.\textsuperscript{193} Thus, both SWA actions and strict liability suits require: (1) that a specific item be involved; (2) that the defendants exercise some control of the item; (3) that the item be dangerous; and (4) that the dangerous condition contribute to the plaintiff's injury. Therefore, it is correct to assert that the SWA is presently construed as a strict liability statute.

In addition to having a similar set of requirements, the cause of action created by the SWA is similar in purpose to the strict products liability doctrine proposed in section 402A of the Second Restatement of Torts. The purpose of the SWA is to protect workers from unsafe work conditions by placing the legal burden of employee safety on owners, contractors, or other persons in charge of the work.\textsuperscript{194} These parties are in the best position to provide for the worker's safety, and they are best able to bear the costs of injuries that occur.\textsuperscript{195} This is the same rationale given in support of section 402A.\textsuperscript{196} Because the Illinois Supreme Court has effectively turned the SWA into a strict liability statute, the rules that apply to strict liability actions should also logically apply to SWA actions. Also, the effect of the doctrine on the plaintiff's burden is the same because both reduce the proof problems previously encountered.\textsuperscript{197} Therefore, because the court applied comparative principles to strict liability in \textit{Coney}, it would have been sensible for the court to have applied those same principles to the SWA.

Had the defendant Sachs been allowed to raise comparative negligence in the \textit{Simmons} case, the result would probably have been the same. The employee’s only conduct that arguably contributed to his injury was his failure to discover the oil on the ladder. However, this is precisely the type of conduct that the \textit{Coney} court decided should not be compared and used to mitigate damages. Only if the defendant had engaged in affirmative misconduct, such as jostling the ladder\textsuperscript{198} or drinking excessively on the job,\textsuperscript{199} would the defendant's negligence have been used to mitigate damages.

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\textsuperscript{193} Coney v. J.L.G. Indus., Inc., 97 Ill. 2d 104, 109, 454 N.E.2d 197, 200 (1983); Suvada v. White Motors, 32 Ill. 2d 612, 210 N.E.2d 182 (1965); \textit{Restatement (Second) of Torts} § 402A (1966).

\textsuperscript{194} See supra notes 164-72 and accompanying text.

\textsuperscript{195} See Comment, \textit{supra} note 36, at 517-18.

\textsuperscript{196} Suvada v. White Motors, 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

\textsuperscript{197} See \textit{supra} note 28 and accompanying text.

\textsuperscript{198} See \textit{supra} note 183.

\textsuperscript{199} See Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978) (driver’s intoxication was proper factor to consider in applying comparative negligence to strict liability).
V. Impact of the Simmons Decision

The supreme court's analysis in Simmons creates uncertainty about when the doctrine of comparative negligence should be applied in future cases. It has not yet been determined whether comparative negligence applies in several areas of tort law—particularly worker's compensation and nuisance actions. Prior to Simmons, lower courts presented with these issues could proceed under a Coney type of analysis and be confident that the Illinois Supreme Court would affirm their reasoning. After Simmons, however, lower courts are presented with conflicting methods by which to analyze comparative fault; there is no guidance as to whether the Coney or Simmons analysis should be followed.

Under the Illinois Worker's Compensation Act (WCA), an injured worker can recover damages from an employer for any "injuries arising out of and in the course of employment." Contributory negligence has never been a defense to actions under the WCA because the right to recover is not based on the negligence or fault of either the employer or employee. Not to apply contributory negligence to worker's compensation is consistent with the purpose of the WCA, which is to provide financial protection for employees in the event of disability. The Illinois Supreme Court has not addressed whether comparative negligence should apply to WCA actions. Under the analysis used in Coney, the policies of the WCA would be examined to determine whether comparative negligence defeats those policies. Unlike the SWA and strict products liability, the WCA is an insurance act. According to this analysis, the conduct of the injured party should not be a factor in awarding compensation because application of comparative fault principles in such cases would defeat the purpose of the WCA. If the analysis in Simmons were used to determine whether comparative negligence should apply to the WCA, then the decision is easier to reach: because contributory negligence was not a defense to liability under the WCA, comparative negligence should not be used to reduce the injured employee's recovery. Thus, under either analysis, comparative negligence would not apply to WCA actions.

201. This characteristic of the WCA was noted by the supreme court: "[U]nder the Workmen's Compensation Act the right to compensation exists without reference to the fault of the employer or the care of the employee." Imperial Brass Mfg. Co. v. Industrial Comm'n, 306 Ill. 11, 14, 137 N.E. 411, 412 (1922).
203. Strict liability appears to make the manufacturer an insurer of the product. However, the supreme court has made it clear that this interpretation of strict products liability is incorrect. The court stated that "imposition of strict liability was not meant to make the manufacturer an absolute insurer." Coney v. J.L.G. Indus., Inc., 97 Ill. 2d 104, 110, 454 N.E.2d 197, 200 (1983). If the court were to change its position on the effect of strict liability on products liability, it also would have to reconsider the Coney decision.
Private nuisance actions, like WCA actions, are not based on the negligence of the parties. A private nuisance is an intentional interference with another's land that results in an unreasonable and substantial interference with the use or enjoyment of that land. In Illinois nuisance actions, the negligence of parties is not an element of liability. Also, Illinois does not recognize the defense of coming to the nuisance, which bars actions by new residents against ongoing activity. If the Simmons approach were used to determine whether a plaintiff's coming to the nuisance, a concept related to comparative negligence, should reduce damages, comparative negligence would not apply because contributory negligence has never historically been applied. If the Coney analysis were used, then the historical purpose behind allowing actions for nuisance would be assessed. Nuisance damage actions are designed to protect a plaintiff's enjoyment of property rights. This purpose would then be examined to determine whether it is consistent with comparative negligence.

The Simmons opinion indicates that the supreme court might reconsider its decisions in Alvis and Coney. In Coney, the Illinois Supreme Court aligned itself with those progressive courts that applied comparative negligence broadly, in defiance of older, contrary decisions. Because the supreme court interpreted Coney narrowly in the Simmons case, the court may be in the process of limiting the Coney holding to a narrow doctrine of damage mitigation in only extreme cases.

204. PROSSER & KEETON, supra note 91, § 87.
205. "Ordinarily neither the negligence of the defendant nor the contributory negligence of the plaintiff is involved in an action with respect to nuisance." Belmar Drive-In Theatre Co. v. Illinois State Toll Highway Comm'n, 34 Ill. 2d 544, 548, 216 N.E.2d 788, 791 (1966).
206. See, e.g., Menolascino v. Superior Felt & Bedding Co., 313 Ill. App. 557, 40 N.E.2d 813 (1st Dist. 1942) (fact that defendant was operating business prior to plaintiff moving to premises does not relieve defendant of liability). Some states have held that a plaintiff's willingness to move ("come") to the site of a nuisance will serve to relieve the defendant of some or all liability. See PROSSER & KEETON, supra note 91, § 88B.
207. See PROSSER & KEETON, supra note 91, § 87.
208. The Illinois Supreme Court's recent decision in Simpson v. General Motors Corp., 108 Ill. 2d 146, 483 N.E.2d 1 (1985), further supports the notion that the court is retreating from its Coney position. In Simpson, the plaintiff's decedent was killed while driving an earth scraper manufactured by General Motors (GM). Simpson v. General Motors Corp., 118 Ill. App. 3d 479, 480, 455 N.E.2d 137, 139 (1st Dist. 1983). The plaintiff brought a wrongful death action based on strict liability against GM and the distributor of the scraper. Id. GM raised assumption of risk and contributory negligence as defenses. The trial court ruled that both defenses were improper and refused to give a jury instruction offered by GM on those defenses. Id. Instead, the trial court gave the jury two special interrogatories. The first asked whether the decedent was guilty of assumption of the risk. Id. The second interrogatory asked the jury to allocate the fault of the parties if the first interrogatory was answered affirmatively:

Assuming that 100% represents the combined fault of the plaintiff's decedent and of the defendant that contributed as a proximate cause of plaintiff's decedent's death, what proportion of such combined fault is attributable to the plaintiff's decedent on the one hand and what proportion is attributable to the defendant on the other hand?
The Simmons decision may also have the effect of prompting the General Assembly to take action. Several bills have been introduced in the General Assembly that would reform the SWA. Two of these bills would repeal the SWA outright. Although repeal has been attempted in previous years, the Simmons decision may prompt formerly neutral legislators to reevaluate the SWA as it has been judicially construed by the Illinois Supreme Court. Another bill would codify the Simmons decision by adding a section to the

Answer: ‘to plaintiff’ ___%  
‘to defendant’ ___%

Id. at 481, 455 N.E.2d at 139. The jury responded by attributing 5% of the total fault to the decedent. Therefore, the trial court reduced the total verdict by 5%. Id.

On appeal, the Illinois Appellate Court for the First District held that after the Coney decision, assumption of risk and misuse of product were no longer total bars to recovery. Id. at 481, 455 N.E.2d at 139-40.

GM appealed to the Illinois Supreme Court. GM argued that the trial court improperly limited consideration of the plaintiff’s conduct to assumption of risk and misuse of product and failed to consider the plaintiff’s contributory negligence, defined as the “lack of due care for one’s own safety as measured by the objective reasonable-man standard,” 108 Ill. 2d at 150, 483 N.E.2d at 2-3, should not be considered in a strict liability case. Id. at 152, 483 N.E.2d at 4.

See also Pell v. Victor J. Andrew High School, 123 Ill. App. 3d 423, 462 N.E.2d 858 (1st Dist. 1984). In Pell, the appellate court upheld the trial court’s refusal to give a comparative negligence instruction. Id. at 432, 462 N.E.2d at 865. The appellate court interpreted Coney as holding that assumption of risk and misuse of product were no longer total bars to recovery. Id. at 431, 462 N.E.2d at 865. Rather, when a plaintiff’s conduct rises to the level of assumption of risk or misuse of product, then that conduct will be compared with the defendant’s fault and reduce damages. However, “ordinary contributory negligence” will not operate to reduce damages. Id. at 432, 462 N.E.2d at 865. This is a narrow reading of Coney. In Coney the supreme court noted the statement in Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970), that “contributory negligence of the plaintiff is not a defense when such negligence consists merely of a failure to discover the defect in the product or to guard against the possibility of its existence.” 97 Ill. 2d at 114, 454 N.E.2d at 203-04. The Coney court adopted this statement, noting that a “consumer’s unobservant, inattentive, ignorant, or awkward failure to discover or guard against a defect should not be compared as a damage-reducing factor.” Id. at 118, 454 N.E.2d at 204. Based on the Coney language, the appellate court concluded that there are two levels of contributory negligence: conduct that amounts to assumption of risk or misuse of product, and anything less than such conduct. Conduct of the latter sort is not compared; unless the defendant can show that plaintiff’s conduct reached the level of assumption of risk or misuse of product, no instruction on comparative negligence should be given. 123 Ill. App. 3d at 431, 462 N.E.2d at 865.

Coney can also be read to establish three levels of contributory negligence: (1) failure to discover or guard against a defect; (2) contributory negligence that is not such a failure, but does not rise to the level of assumption of risk or misuse of product; and (3) conduct that amounts to assumption of risk or misuse of product. As noted in Coney, negligence of the first sort should not be compared. However, the other two types of negligence should reduce damages. See also West v. Caterpillar Tractor Co., 336 So. 2d 80, 90 (Fla. 1976) (failure to use ordinary care, other than failure to discover or guard against a defect, is a defense in strict liability actions).

SWA that would exclude comparative negligence as a defense.\textsuperscript{210} A fourth bill would overrule Simmons and allow the plaintiff's award to be reduced by the plaintiff's own negligence.\textsuperscript{211} All of these bills have been sent to committees and no action has yet been taken.

Additional pressure to alter the present status of the SWA will come from the insurance companies. Several commentators note that the SWA has caused liability insurance rates for Illinois contractors to rise to the highest in the nation.\textsuperscript{212} Application of the comparative negligence doctrine to SWA actions would help reduce the liability insurance burden on contractors. However, the Simmons decision has temporarily foreclosed any judicial relief in this area.

**CONCLUSION**

Since the Illinois Supreme Court adopted comparative negligence, the court has struggled to determine the situations in which comparative negligence should apply.\textsuperscript{213} The decision in Coney v. J.L.G. Industries Inc. to extend comparative negligence to strict liability cases suggested that the court would apply comparative negligence broadly in many tort cases. After a careful examination of the policies behind comparative negligence and strict liability, the Coney court determined that the doctrine of comparative negligence applies to strict liability. Thus, it guided the lower courts about how to determine whether comparative negligence should apply in other settings.

In Simmons v. Union Electric Co., the Illinois Supreme Court held that comparative negligence did not apply to actions brought under the Illinois Structural Work Act. The Simmons court examined the status of other common law defenses to both the SWA and other similar statutes. The court ignored the analysis that it had previously delineated in Coney v. J.L.G. Industries Inc. The supreme court concluded that because there was no defense of contributory negligence under the SWA, there could not be a defense of comparative negligence. The progressive, modern analysis of

\textsuperscript{210} H.B. 225, 84th Ill. Gen Assembly, 1985 Sess., which was introduced on Feb. 14, 1985 by Representative Curran, would add section 69.1 to the SWA. This section would read:

The doctrine of comparative fault is not applicable to any case arising under this Act.

\textit{Id.} § 1.

\textsuperscript{211} S.B. 127, 84th Ill. Gen Assembly, 1985 Sess., which was introduced on Feb. 10, 1985 by Senator Collins, would add a paragraph to the end of section 69, which would read:

However, failure of an employee to use ordinary care for his own safety shall result in a reduction of damages for the injuries sustained in an amount proportionate to the percentage of negligence by the employee. Contributory negligence shall not be a bar to recovery of damages as established in the Act.

\textit{Id.} § 1.

\textsuperscript{212} See Comment, \textit{supra} note 38 at 520; Note, \textit{supra} note 38, at 410.

Coney was forsaken. If the Simmons court had applied the Coney approach, it would most likely have concluded that comparative negligence should apply to the SWA. When it did not apply the Coney analysis, the court reached a decision that creates uncertainty about the future of comparative negligence in Illinois.

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