IN THE MISSOURI SUPREME COURT

CHILDREN'S WISH FOUNDATION INTERNATIONAL, INC.,	)	
	)	
Appellant,	)	
	)	
v.	)	**Case No. SC90944**
	)	
MAYER HOFFMAN McCANN, P.C., ET AL.,	)	
	)	
Respondents.	)	

ON APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI SIXTEENTH JUDICIAL CIRCUIT Honorable Robert M. Schieber

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from an action in the Circuit Court of Jackson County by Plaintiff Children's Wish Foundation International, Inc. involving claims of auditor negligence against Defendants Mayer Hoffman McCann, P.C. and CBIZ Accounting, Tax & Advisory of Kansas City, Inc. The Circuit Court entered judgment following a jury verdict for Defendants. Plaintiff filed a timely motion for new trial which was denied by the Circuit Court and Plaintiff then filed its timely notice of appeal. Following issuance of an opinion by the Western District of the Missouri Court of Appeals, this Court granted transfer of this action pursuant to Rule 83.04.

STATEMENT OF FACTS[1]

This case involves a claim for professional negligence by Children's Wish Foundation, International, Inc. ("CWF") against Mayer Hoffman McCann, P.C. ("Mayer Hoffman") and CBIZ Accounting, Tax & Advisory of Kansas City, Inc. ("CBIZ"). (LF 21-31).

CWF is a charitable organization that grants wishes to children who are terminally or seriously ill and that sends gifts including toys, dolls and books to hospitals and to Ronald McDonald Houses throughout the country. (TR 4-5). One of the activities that CWF engages in is handling gifts-in-kind. (TR 223). A gift-in-kind is a donation to a charitable organization that is in the form of property rather than money. The gifts-in-kind that CWF handled were excess merchandise that was provided to CWF by two companies that obtained surplus goods, such as books or toys, from wholesalers. (TR 197, 243-44). CWF would pay an administrative fee to these companies and these companies would ship the gifts-in-kind to CWF. (TR 223, 243-44, 276, 308). CWF would then distribute these gifts-in-kind to hospitals and Ronald McDonald Houses. (TR 223-33, 240, 750).

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[1] References to the Legal File are designated by page number as follows: "LF __." References to the Transcript are designated by page number as follows: "TR __."

During the course of 1999 CWF had taken in a large number of gifts-in-kind and had distributed a large number of gifts-in-kind to hospitals and Ronald McDonald Houses. (TR 86, 228-231, 241-43). One of the jobs of CWF's auditors was to audit these transactions. (TR 144-46, 153, 197-98, 204, 283, 286-88).

With respect to the gift-in-kind transactions that CWF handled in 1999, there was an error in CWF's records. The records showed that seventeen pallets of a particular book had come into CWF when, in fact, only seven pallets of that particular book had come into CWF. (TR 224-25, 245, 277). CWF's auditors failed to catch this error and, as a result, erroneous figures were provided in CWF's tax filings. (TR 98, 148, 226-27, 259-60). As a result of this error, and the associated inclusion of erroneous information in CWF's tax filings, the State of Pennsylvania opened an investigation of CWF and charged CWF with accounting errors involving overstating gifts-in-kind. (TR 39-40, 42-43). In its action against Mayer Hoffman and CBIZ, CWF sought damages for the cost of defending itself in the Pennsylvania action and for the damage to its reputation that resulted from the Pennsylvania action. (LF 21-31).

After the State of Pennsylvania opened its investigation, CWF conducted its own investigation and discovered the error regarding seventeen versus seven pallets of books being received by CWF. (TR 96-97, 221-25, 277).

CWF kept the records regarding gifts-in-kind that were provided to its auditors and CWF calculated and recorded the numbers listed in those records. (TR 94, 244-48, 752, 757-61). Although CWF did its best to keep adequate records, those records were not always complete. (TR 96, 221, 292). In particular, CWF erroneously told its auditors that its records regarding gifts-in-kind were accurate when, in fact, those records contained the error regarding seventeen versus seven pallets of books. (TR 96, 223-33, 266, 295, 312-14). In connection with that same error, CWF's shipping records regarding those books were also in error. (TR 96, 223-33, 266, 295, 312-14). CWF's auditors audited these statements that CWF had made regarding gifts-in-kind. (TR 818-19).

CWF's auditors were aware, at the time of the 1999 audit, that CWF did not have well kept records regarding gifts-in-kind. (TR 292, 786). Furthermore, CWF's auditors took independent steps, by checking with third parties other than CWF, to confirm that CWF had actually received the seventeen pallets of books that were referenced in CWF's records. (TR 298-99, 306-11, 314-15, 333-34, 337-39, 772-74, 779, 825-26). However, despite their recognition of the need to verify the information in CWF's records, including the specific information regarding the seventeen pallets of books, CWF's auditors failed to take sufficient steps to uncover the error in CWF's records. (TR 98, 148, 226-27, 259-60).

The case was presented to the jury by two separate verdict directors. The verdict director with respect to Mayer Hoffman read as follows:

INSTRUCTION NO. 9

Your verdict must be for plaintiff Children's Wish Foundation International, Inc., if you believe:

First, defendant Mayer Hoffman McCann, P.C., either:

a) Proposed and made inaccurate entries on Plaintiff's books and records leading to Defendant Mayer Hoffman McCann, P.C.'s preparation of Plaintiff's financial statements which contained material misstatements, or

b) In its audit of Plaintiff's financial statements failed to adhere to generally accepted auditing standards and, as a result, failed to detect material misstatements, or

c) Failed to obtain sufficient evidential matter to support the amount of gifts made to Ronald McDonald Houses and, as a result, Plaintiff's schedule of gifts to Ronald McDonald Houses was overstated, and

Second, Defendant Mayer Hoffman McCann, P.C., in any one or more of the respects submitted in paragraph First, was thereby negligence, and

Third, as a direct result of such negligence Plaintiff Children's Wish Foundation International sustained damage, unless you believe plaintiff is not entitled to recover by reason of Instruction Number 11.

(LF 86). The verdict director with respect to CBIZ read as follows:

INSTRUCTION NO. 10

Your verdict must be for plaintiff Children's Wish Foundation International, Inc., and against defendant CBIZ Accounting, Tax & Advisory of Kansas City, Inc., if you believe:

First, defendant CBIZ Accounting, Tax & Advisory of Kansas City, Inc., prepared Plaintiff's IRS Form 990 with an inaccurate schedule of gifts to Ronald McDonald Houses, and

Second, defendant CBIZ Accounting, Tax & Advisory of Kansas City, Inc., was thereby negligent, and

Third, as a direct result of such negligence plaintiff Children's Wish Foundation International, Inc., sustained damage,

unless you believe plaintiff is not entitled to recover by reason of Instruction Number 11

(LF 87).

The contributory negligence instruction, referenced in both of the verdict directors, read as follows:

INSTRUCTION NO. 11

You must find plaintiff contributorily negligent if you believe:

First,

plaintiff erroneously stated to defendant Mayer Hoffman McCann, P.C. that its accounting records reflected the gifts-in-kind plaintiff had received, or

plaintiff provided to defendants Mayer Hoffman McCann, P.C. and CBIZ Accounting, Tax & Advisory of Kansas City, Inc. erroneous shipping records to Ronald McDonald House, and

Second, plaintiff, in one or more of the respects submitted in Paragraph First, was thereby negligent, and

Third such negligence of plaintiff directly contributed to cause its injury.

The term "negligent" or "negligence" as used in this instruction means the failure to use that degree of care that an ordinarily careful person would use under the same or similar circumstances.

(LF 88). The contributory negligence instruction was given at the request of Defendants. (LF 63).

During the instruction conference, CWF objected to the contributory negligence instruction, stating as follows: "We object to the submission of Instruction No. 11 because contributory negligence should not be submitted in an economic damages only negligence case." (TR 1030). The instruction was given over CWF's objection. (TR 1031). The jury subsequently returned a verdict for Defendants and the Circuit Court entered judgment for Defendants on November 20, 2008. (LF 94).

CWF renewed its objection to the contributory negligence instruction in its Motion for New Trial and Suggestions in Support, which were filed on December 19, 2008. (LF 95-109A). Specifically, CWF argued that contributory negligence is not properly submitted "in a professional negligence case in which only economic loss is sustained." (LF 104). On January 27, 2009, the Circuit Court issued its order denying CWF's Motion for New Trial. (LF 118). CWF filed its Notice of Appeal on February 2, 2009. (LF 119).

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GIVING A CONTRIBUTORY NEGLIGENCE INSTRUCTION BECAUSE THE GIVING OF A CONTRIBUTORY NEGLIGENCE INSTRUCTION WAS CONTRARY TO BOTH THE LETTER AND THE POLICY OF MISSOURI LAW IN THAT CONTRIBUTORY NEGLIGENCE DOES NOT OR SHOULD NOT APPLY TO A NEGLIGENCE CLAIM INVOLVING ONLY ECONOMIC DAMAGES AND CHILDREN'S WISH FOUNDATION WAS PURSUING A NEGLIGENCE CLAIM INVOLVING ONLY ECONOMIC DAMAGES.

Missouri Pacific Railroad Co. v. Whitehead & Kales Co., 566 S.W.2d 466 (Mo. banc 1978)

Gustafson v. Benda, 661 S.W.2d 11 (Mo. banc 1983)

Dalton & Marberry, P.C. v. Nationsbank, N.A., 982 S.W.2d 231 (Mo. banc 1999)

ARGUMENT

I. THE TRIAL COURT ERRED IN GIVING A CONTRIBUTORY NEGLIGENCE INSTRUCTION BECAUSE THE GIVING OF A CONTRIBUTORY NEGLIGENCE INSTRUCTION WAS CONTRARY TO BOTH THE LETTER AND THE POLICY OF MISSOURI LAW IN THAT CONTRIBUTORY NEGLIGENCE DOES NOT OR SHOULD NOT APPLY TO A NEGLIGENCE CLAIM INVOLVING ONLY ECONOMIC DAMAGES AND CHILDREN'S WISH FOUNDATION WAS PURSUING A NEGLIGENCE CLAIM INVOLVING ONLY ECONOMIC DAMAGES.

"To reverse on grounds of instructional error, the party claiming instructional error must establish that the instruction at issue misdirected, mislead, or confused the jury. Additionally, prejudice must have resulted from the instructional error." Sorrell v. Norfolk Southern Railway Co., 249 S.W.3d 207, 209 (Mo. banc 2008).

In this case, it was instructional error for the trial court to give the contributory negligence instruction offered by Defendants and to give the verdict directing instructions that referred to the contributory negligence instruction. Specifically, it was error to give the contributory negligence instruction because contributory negligence does not or should not apply to any negligence claim,

including negligence claims involving only economic damages. Furthermore, the giving of the contributory negligence instruction resulted in prejudice to CWF because it imposed a standard of care on CWF that was not applicable and because it resulted in a verdict for Defendants.

A. The Development Of Comparative Fault Under Missouri Law.

In Missouri Pacific Railroad Co. v. Whitehead & Kales Co., 566 S.W.2d 466 (Mo. banc 1978), this Court addressed the then current law of liability between joint tortfeasors which held that, pursuant to the doctrine of active/passive negligence, only the "active" tortfeasor was held accountable with the "passive" tortfeasor being relieved of all liability. Id. at 470. In rejecting this doctrine, this Court noted the underlying fallacy of such analysis:

> This is not a sensible way to fix responsibility in indemnity. It comes about by attempting to find a formula by which to excuse one of two joint or concurrent tortfeasors completely when as a practical matter they both are to blame, the true difference between them being only a matter of degree or relativity of fault.

Id. at 471. This Court further noted that it makes no sense to distinguish between the negligence of different parties: "Negligence is negligence. There is no such

thing as 'good' negligence and 'bad' negligence, or some kind of negligence which should be overlooked and another kind which should not." Id. at 472.

This Court concluded that the only fair system of joint liability was a system of comparative fault: "A principled right to indemnity should rest on relative responsibility and should be determined by the facts as applied to that issue. . . . The two concurrent tortfeasors should be treated according to their respective fault or responsibility." Id. at 472. This Court noted that a system of comparative fault removed the inequity of placing the entire burden of liability upon one of two negligent parties while letting the other negligent party go free. Id. at 473. This Court further noted that "[t]he principle of fairness imbedded within our law compels this adoption of a system for the distribution of joint tort liability on the basis of relative fault." Id. at 474.

In Gustafson v. Benda, 661 S.W.2d 11 (Mo. banc 1983), this Court expanded the application of comparative fault, as recognized in Whitehead & Kales, by generally adopting the doctrine of comparative fault in all negligence actions. Id. at 15. This Court noted that its decision to expand application of comparative fault was based upon the same reasoning set forth in earlier decisions including Whitehead & Kales. Id. This Court further noted that it was expanding the prior limited application of comparative fault because its "experience with a limited application of comparative fault fully demonstrates that fairness and justice

can best be achieved through a broader application of that doctrine. It is workable and will fulfill the needs of our complex modern society." Id. In that regard, this Court observed that "[e]xpansion of comparative fault as first enunciated in Whitehead & Kales is in the best interest of all litigants." Id. In adopting comparative fault, this Court indicated that it was "supplant[ing] the doctrines of contributory negligence, last clear chance, and humanitarian negligence with a comprehensive system of comparative fault . . .." Id. at 16.

In Gustafson, this Court indicated that the Uniform Comparative Fault Act ("UCFA") should be looked to as a model for comparative fault analysis. Id. This suggestion caused some confusion among the lower courts, and this Court subsequently clarified the significance of the UCFA in Lippard v. Houdaille Industries, Inc., 715 S.W.2d 491 (Mo. banc 1986**)**,[2] stating as follows:

> There has been confusion because annotated sections of the Uniform Comparative Fault Act were appended to the Gustafson opinion, as a guide to proceedings in comparative fault cases. It was not the purpose of Gustafson to enact that model act as a virtual statute of the

[2] This Court's primary holding in Lippard – that comparative fault does not apply in strict liability actions – was subsequently superseded by the legislature in R.S.Mo. § 537.765. However, this statutory change does not affect the Court's discussion of the UCFA and its limited effect in Missouri.

> state of Missouri, to establish substantive principles controlling cases not then before the Court. Much less was there any purpose of giving special authority to the annotations and commissioners' comments. The direction in the opinion was simply to apply the **procedures** of the Uniform Comparative Fault Act "insofar as possible."

Id. at 492-93 (emphasis added). In so stating, this Court recognized that the UCFA only serves as a procedural guide for comparative fault analysis and does not create substantive law in Missouri.

In opinions subsequent to Gustafson, this Court has indicated that the doctrine of comparative fault applies generally to all negligence cases. For example, in Lippard this Court observed that the Gustafson opinion "abolished contributory negligence as a bar to the plaintiff's recovery in negligence cases." Id. at 492. In a more recent case, Gramex Corp. v. Green Supply, Inc., 89 S.W.3d 432 (Mo. banc 2002), this Court observed that "[u]ntil 1983, a plaintiff's recovery in a negligence action was subject to the doctrine of contributory negligence," clearly implying that contributory negligence is no longer a defense in a negligence action. Id. at 439.

This Court has also continued to emphasize that the adoption of comparative fault is based upon considerations of fairness and equity:

> In 1983 Missouri adopted a comprehensive system of comparative fault. The key to this system is that a jury decides the issues of relative fault and assesses appropriate percentages. Comparative fault is based upon the principle of fairness, and is more "equitable and just."

Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104, 107 (Mo. banc 1996) (internal citations omitted).

B. The Intermediate Appellate Courts In Missouri Have Held That Contributory Negligence Still Acts As A Complete Bar To Recovery In A Negligence Action Involving Only Economic Damages.

The Eastern and Southern Districts of the Missouri Court of Appeals have previously held that contributory negligence continues to act as a complete bar to recovery in a negligence action involving economic damages only. Chicago Title Insurance Co. v. Mertens, 878 S.W.2d 899, 902 (Mo. App. 1994); Murphy v. Springfield, 738 S.W.2d 521, 529-30 (Mo. App. 1987). However, both the Eastern District and the Southern District have reached this conclusion based upon the erroneous assumption that they are substantively bound by the UCFA.

In Chicago Title Insurance Co., the court held that comparative fault does not apply in a negligence action involving only economic damages because the UCFA provides that the Act covers "damages for injury or death to person or harm to property." Chicago Title Insurance Co., 878 S.W.2d at 902. In Murphy, the court held that comparative fault does not apply in a negligence action involving only economic damages, again relying on the provision of the UCFA which indicates that the Act covers "damages for injury or death to person or harm to property." Murphy, 738 S.W.2d at 530.

Both Chicago Title Insurance Co. and Murphy fail to properly heed this Court's direction in Lippard that the UCFA serves only as a procedural guide and does not create substantive law in Missouri. Lippard, 715 S.W.2d at 492-93. More important, neither Chicago Title Insurance Co. nor Murphy gives any weight to the fundamental considerations of fairness and equity that served as the basis for this Court's opinions in Whitehead & Kales and Gustafson.

The Western District had not previously ruled upon the issue of whether comparative fault applies in a negligence action involving only economic damages. The Western District addressed that issue for the first time in this case and joined the Eastern and Southern Districts in holding that comparative fault does not apply in a negligence action involving only economic damages. In its analysis of this issue, the Western District acknowledged that the UCFA has not been adopted by

Missouri in its entirety and that the UCFA does not create substantive law in Missouri. However, the Western District then proceeded to rely upon a number of opinions, including Chicago Title Insurance Co. and Murphy, which are based upon the assumption that the UCFA does create substantive law in Missouri.

The Western District also sets forth two policy arguments in support of its rejection of comparative fault in negligence actions involving only economic damages. First, the Western District suggests that comparative fault should not be applied in negligence actions involving only economic damages because such actions frequently involve persons who are parties to a contractual relationship. The Western District explains that, because parties to a contract have already bargained for allocation of risks and duties, it would be inappropriate to apply comparative fault to alter that allocation. The Western District further suggests that applying comparative fault in such cases would allow the jury to weigh fault without giving regard to the parties' negotiations or discussions regarding allocation of risks and duties.

The primary problem with the Western District's "contractual relationship" argument is that it ignores the fact that contractual relationships may also exist in negligence actions that involve personal injuries or damage to property. For example, if you contract with a person to perform a task for you, and that person negligently performs that task, thereby causing personal injury to you or damage to

your property, you would be entitled to bring a negligence action against that person and that person would be entitled to raise comparative fault as a defense in that negligence action.

Given that comparative fault applies in negligence actions that involve contractual relationships when there are physical injuries or property damage, it makes no sense to distinguish negligence actions that involve contractual relationships when the injuries are economic. In both instances there is a contractual relationship between the parties. The only difference is the nature of the damage sustained by the plaintiff.

The Western District's concern that a jury may weigh fault without considering the parties' negotiations or discussions regarding allocation of risk is also unfounded. The jury is entitled to consider a wide array of evidence regarding the issue of comparative fault, and the jury could be informed of the contractual negotiations and discussions and take those facts into account in weighing fault. Indeed, in the instant case the jury was fully informed regarding the nature of the contractual relationship between CWF and the Defendants.

The second policy consideration noted by the Western District is the difficulty that arises in comparing the fault of parties who have different duties of care. In this regard, the Western District notes that negligence actions involving only economic damages frequently involve the alleged negligence of a

professional. The Western District further observes that in such actions the defendant will be held to a different (generally higher) standard of care than the plaintiff.

While the Western District is correct in observing that professional negligence actions may involve differing standards of care, it does not follow that this difference warrants an exception from the broad application of comparative fault. To the contrary, comparative fault applies in a wide variety of circumstances in which the plaintiff and the defendant are subject to different standards of care. For example, Missouri law imposes the highest standard of care upon an operator of a motor vehicle. Syn, Inc. v. Beebe, 200 S.W.3d 122, 133 (Mo. App. 2006). However, the fault of a pedestrian, who is subject to a duty of ordinary care, may still be compared to that of a driver. See, e.g., Berra v. Danter, 299 S.W.3d 690 (Mo. App. 2009).

It is also important to note that the Western District's proposed remedy for the disparity in standards of care in professional negligence cases is self contradictory. The Western District notes that in professional negligence cases the defendant will frequently be subject to a higher standard of care than the plaintiff. The Western District then proposes that, because of this disparity, the contributory negligence rule should continue to apply in such cases. In doing so, the Western

District ignores the fact that it is the defendant who is subject to the higher standard of care in such cases.

If contributory negligence is applied in professional negligence cases, then the defendant can escape all liability by establishing that the plaintiff was negligent in any small degree. Thus, the party who is subject to the higher standard of care (i.e. the defendant) is more easily relieved from his obligation of care. That result is counterintuitive. If any party is to be relieved of its liability, it should be the party who is subject to the lower standard of care (i.e. the plaintiff). However, as previously discussed, the more fair and equitable solution is to compare the fault of both parties as opposed to letting either party escape liability based solely upon the negligence of the other.

C. This Court Has Not Directly Addressed The Issue Of Whether Contributory Negligence Continues To Act As A Complete Bar To Recovery In A Negligence Action Involving Only Economic Damages.

Although the intermediate appellate courts have addressed the issue of whether contributory negligence continues to act as a complete bar to recovery in a negligence action involving only economic damages, this Court has not directly addressed that issue.

In Blackstock v. Kohn, 994 S.W.2d 947 (Mo. Banc 1999), this Court addressed a claim of professional negligence against an attorney. The plaintiffs asserted that the trial court had erred in submitting a contributory negligence instruction, arguing that contributory negligence is not a defense in professional negligence cases and that comparative fault applies in such cases. Id. at 951. This Court considered, but declined to reach plaintiffs' argument, finding that the instruction in question was not actually a contributory negligence instruction. Id. Thus, this Court was not able to reach the issue of whether contributory negligence continues to be a complete bar to recovery in a negligence action involving only economic damages. The problem with the instruction that prevented this Court from addressing this issue in Blackstock is not present in this case.[3]

Although this Court has not directly addressed the issue of whether contributory negligence continues to act as a complete bar to recovery in a negligence action involving only economic damages, this Court indirectly

[3] The Western District recognized in its opinion that the instruction at issue in this case was modified in the very manner suggested by this Court in Blackstock to assure that the instruction directly presented the issue of whether contributory negligence continues to be a complete bar to recovery in a negligence action involving only economic damages.

addressed this issue in Dalton & Marberry, P.C. v. Nationsbank, N.A., 982 S.W.2d 231 (Mo. banc 1999).

In Dalton & Marberry, P.C., this Court addressed a negligence claim of an accounting firm against a bank for failing to inquire about an employee's authority to present checks drawn on the accounting firm's account. Id. at 232. Over a four-and-one-half-year period the employee had embezzled $130,334 from the accounting firm by making 93 separate withdrawals, and the bank had not inquired about the employee's authority to make any of these withdrawals. Id. The trial court refused to allow the bank to present evidence in support of a defense of contributory negligence and the bank challenged that ruling on appeal. Id. at 233. This Court held that the trial court had properly ruled that contributory negligence did not act as a complete bar to recovery. Id. However, this Court further held that principles of comparative fault should be applied in such an action and that the trial court had erred in wholly excluding evidence of comparative fault. Id. at 236-37. In this regard, this Court stated as follows:

> Upon remand, the jury may be instructed to apportion the losses by determining how much of the total loss was caused by the bank's breach of its duty, if the jury does find negligence, and what losses were the result of the customer's own conduct. The excluded evidence, which will be available in a new trial, as to the practice of reasonable

and prudent bank customers may be helpful to the jury in making this determination.

Id. at 237.

The "losses" that were addressed by this Court in Dalton & Marberry, P.C., were economic losses only. Thus, this Court implicitly recognized that contributory negligence does not apply to bar recovery in a negligence action involving economic damages only and that comparative fault applies in such an action.

D. Contributory Negligence Does Not Or Should Not Apply To Negligence Actions That Involve Only Economic Damages.

CWF contends that, pursuant to this Court's ruling in Gustafson, contributory negligence no longer serves as a complete bar to recovery in negligence actions involving only economic damages.

As previously noted, when this Court adopted comparative fault in Gustafson, this Court indicated that it was "supplant[ing] the doctrines of contributory negligence, last clear chance, and humanitarian negligence with a comprehensive system of comparative fault . . .." Gustafson, 661 S.W.2d at 16. In subsequent opinions, this Court has indicated that the doctrine of comparative fault applies generally to all negligence cases. Lippard, 715 S.W.2d at 492 (Noting that

the Gustafson opinion "abolished contributory negligence as a bar to the plaintiff's recovery in negligence cases."); Gramex Corp., 89 S.W.3d at 439 (Noting that "[u]ntil 1983, a plaintiff's recovery in a negligence action was subject to the doctrine of contributory negligence.").

Pursuant to Gustafson, and subsequent cases such as Lippard and Gramex, it appears that this Court has already determined that comparative fault applies in all types of negligence actions and that contributory fault no longer serves as complete bar to recovery in any type of negligence action, including negligence actions that involve only economic damages. However, in the event that this Court determines that Gustafson does not sufficiently address this issue, CWF contends that this Court should expressly hold that contributory negligence no longer serves as a complete bar to recovery in negligence actions involving only economic damages. CWF suggests that such a holding is supported by (1) this Court's prior opinions, (2) policy considerations, and (3) legal trends in other jurisdictions. CWF further suggests that the UCFA does not contradict such a holding in that the UCFA does not directly address the question of whether contributory negligence should serve as a complete bar to recovery in negligence actions involving only economic damages.

1. This Court's opinions in Whitehead & Kales and Gustafson support the conclusion that contributory negligence no longer serves as a complete bar to recovery in negligence actions that involve only economic damages.

As previously noted, in Whitehead & Kales this Court recognized that the active/passive negligence doctrine was not sensible because it ignored the reality that when more than one party is negligent, the difference in their negligence is only a matter of degree. Whitehead & Kales, 566 S.W.2d at 471. This Court recognized that, given this reality, it made no sense to apply a doctrine which let one negligent party off the hook while causing another negligent party to bear the full burden of its negligence. Id.

The same considerations apply to the determination of whether contributory negligence should apply in a negligence action involving only economic damages. Because contributory negligence is a complete bar to recovery, application of contributory negligence has the same inequitable effect as the active/passive negligence doctrine in that one negligent party (i.e. the defendant) is let off the hook for its negligence, while the other negligent party (i.e. the plaintiff) is forced to bear the full burden of its negligence. This inequitable result would apply even if the plaintiff's negligence were minimal in comparison to the defendant's negligence.

Just as it was inequitable to hold an "actively" negligent party fully liable, while letting a "passively" negligent party off the hook, it is also inequitable to hold the plaintiff in a negligence action involving only economic damages accountable for his negligence while letting the defendant completely off the hook. There is no rational basis for treating the negligence of the two parties differently. As this Court recognized in Whitehead & Kales, "[t]here is no such thing as 'good' negligence and 'bad' negligence, or some kind of negligence which should be overlooked and another kind which should not." Whitehead & Kales, 566 S.W.2d at 472. To the contrary, "two concurrent tortfeasors should be treated according to their respective fault or responsibility." Id. Indeed, this Court recognized that this principle was a matter of fundamental fairness, noting that "[t]he principle of fairness imbedded within our law compels this adoption of a system for the distribution of joint tort liability on the basis of relative fault." Id. at 474.

In Gustafson, this Court expanded the doctrine of comparative fault, noting that the analysis of Whitehead & Kales should be broadly applied. Gustafson, 661 S.W.2d at 15. This Court noted that it was expanding the application of comparative fault because its "experience with a limited application of comparative fault fully demonstrates that fairness and justice can best be achieved through a broader application of that doctrine. It is workable and will fulfill the needs of our complex modern society." Id. This Court further noted that

"[e]xpansion of comparative fault as first enunciated in Whitehead & Kales is in the best interest of all litigants." Id.

This Court's statements in Gustafson clearly indicate an intention for the doctrine of comparative fault to be applied broadly, consistent with the policy considerations noted in Whitehead & Kales. Indeed, this Court's statement that application of the comparative fault principle recognized in Whitehead & Kales "is in the best interest of **all litigants**" supports the conclusion that the doctrine should be applied to litigants in a broad spectrum of cases, including negligence actions that involve only economic damages.

2. Policy considerations.

In both Whitehead & Kales and Gustafson, this Court emphasized that the adoption of comparative fault, and the associated abandonment of contributory negligence, was based upon fundamental considerations of fairness. Since Gustafson, this Court has continued to recognize that the doctrine of comparative fault is based on considerations of fairness and equity. Rodriguez, 936 S.W.2d at 107. In this case, fundamental considerations of fairness and equity require application of comparative fault in negligence actions that involve only economic damages.

Under Missouri law, a plaintiff can recover damages for a very minor physical injury even if that injury healed quickly and caused no permanent damage. Furthermore, this would be true even if the plaintiff was ninety-nine percent at fault for his injury. The same analysis holds true for very minor damage to property. In contrast, if contributory negligence continued to serve as a complete bar to recovery in negligence actions that involve only economic damages, then a plaintiff who suffered millions of dollars in financial losses as a result of the negligence of a defendant would be completely barred from obtaining any recovery if the plaintiff was negligent in any minute degree.

The above-noted comparison illustrates the problem with attempting to draw lines between different types of damages when applying comparative fault. It is simply not reasonable to conclude that a plaintiff who sustained a very minor physical injury can recover for that injury even if he was overwhelmingly at fault, while a plaintiff who suffers catastrophic financial losses is barred from obtaining any recovery if he was negligent in any small degree. There is nothing inherent in the nature of the different types of injury which warrants such a distinction.

It is also important to consider that professional negligence cases frequently involve only economic damages. In such cases, the plaintiff is generally relying upon the professional to use his expertise to assist the plaintiff in preventing injury, and the professional is generally in a much better position to protect the plaintiff

than the plaintiff is to protect himself. In fact, in many instances it could be said that the professional is being retained to protect the plaintiff from his own negligence. Under such circumstances, it is unconscionable to hold that the plaintiff may be prevented from recovering for economic damages caused by the professional's negligence if the plaintiff was negligent in any small degree.

In short, there is no good reason to apply contributory negligence in negligence actions that involve only economic damages when contributory negligence is not applied in other types of negligence cases. The fact that some types of negligence result in physical injury while other types result in economic injury does not warrant different treatment of the negligent parties. To the contrary, an excellent argument can be made that the negligence of the plaintiff in a professional negligence action should have less impact than the negligence of a plaintiff in a standard personal injury action. This is so because the plaintiff in a professional negligence action depends upon the defendant/professional to use his/her expertise to protect the plaintiff from various sources of injury including the plaintiff's own negligence.

3. Legal trends in other jurisdictions support the conclusion that contributory fault should not serve as a complete bar to recovery in negligence actions that involve only economic damages.

Given the differences in other jurisdictions regarding the manner in which comparative fault has been adopted and the mechanics of applying comparative fault, it is difficult to make direct comparisons to Missouri law. However, a review of statutory and common law across the nation indicates a trend toward recognizing that comparative fault applies in all types of negligence actions, including negligence actions that involve only economic damages.

"A number of jurisdictions have been presented with the question of whether cases involving only economic loss should be subject to comparative negligence principles. The prevailing view is that comparative negligence does apply in such cases." Shields v. Cape Fox Corp., 42 P.3d 1083, 1090 (Alaska 2002).

At least one jurisdiction – Kansas – has a comparative fault statute that specifically recognizes that comparative fault applies in cases involving only economic loss. The pertinent statute reads as follows:

> The contributory negligence of any party in a civil action shall not bar such party or such party's legal representative from recovering damages for negligence resulting in death, personal injury, property

> damage or **economic loss**, if such party's negligence was less than the causal negligence of the party or parties against whom claim for recovery is made, but the award of damages to any party in such action shall be diminished in proportion to the amount of negligence attributed to such party.

K.S.A. § 60-258a. Similarly, Arizona courts have interpreted Arizona's comparative fault statutes as specifically applying in cases involving only economic loss. Standard Chartered PLC v. Price Waterhouse, 945 P.2d 317, 353-54 (Ariz. App. 1996). A number of other jurisdictions have reached the same conclusion as a matter of common law.

In Robinson v. Poudre Valley Federal Credit Union, 654 P.2d 861 (Colo. App. 1982), the court held that the applicable comparative fault statute applied to cases involving only pecuniary loss. Id. at 863. The court reached this conclusion even though the language of the statute indicated that it applied to "damages for negligence resulting in death or in injury to person or property." C.R.S. § 13-21-111.

In Williams Ford, Inc. v. The Hartford Courant Co., 657 A.2d 212 (Conn. 1995), the court considered whether comparative fault applied to a claim for purely commercial (i.e. economic) damages arising from negligent misrepresentation. Id. at 222. In that regard, the court noted that the applicable comparative fault statute

applied only to "damages resulting from personal injury, wrongful death or damage to property." Id. at 223. The court concluded that commercial damages were not included in this list and, therefore, were not covered by the statute. Id. at 223-24. However, the court went on to hold that because the statute did not expressly exclude commercial damages, the court was free to apply comparative fault to a claim for commercial damages as a matter of common law. Id. at 224-25. Accordingly, the court held that comparative fault applied to a claim for purely commercial damages. Id. at 225.

In Gilchrist Timber Co. v. ITT Royonier, Inc., 696 So.2d 334 (Fla. 1997), the court held that comparative fault applied to a negligent misrepresentation claim that involved only economic damages. Id. at 339. The action involved a claim of negligent misrepresentation regarding the zoning restrictions on property that was sold to the plaintiff. Id. at 336.

In Pastor v. Lafayette Building Assoc., 567 So.2d 793 (La. App. 1990), the court held that comparative fault applies to a negligent misrepresentation claim involving only economic loss. Id. at 796. The action involved claims by a second mortgage holder against a first mortgage holder in connection with misrepresentations made by the first mortgage holder.

In Florenzano v. Olson, 387 N.W.2d 168 (Minn. 1986), the court considered whether comparative fault applied to a negligent misrepresentation claim involving

only economic damages. Id. at 175-76. Noting that the concept of comparative fault should be broadly applied, the court held that comparative fault did apply in negligent misrepresentation actions. Id. at 176.

In In re River Oaks Furniture, Inc. v. BDO, 276 B.R. 507 (N.D. Miss. 2001), the court addressed Mississippi's comparative fault statute which states in pertinent part as follows:

> In all actions hereafter **brought for personal injuries, or where such injuries have resulted in death, or for injury to property**, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured or the owner of the property or the person having control over the property.

Id. at 546 (emphasis added). The defendant argued that, pursuant to this statute, contributory negligence continued to be a defense in actions involving only economic loss. Id. The court rejected that argument, finding that Mississippi had previously recognized that contributory negligence was not a defense in actions such as fraud which involve only economic damages. Id. The court held, based on

this analysis, that "Mississippi does indeed apply comparative negligence principles in matters involving purely economic loss." Id.

In H. Rosenblum, Inc. v. Adler, 461 A.2d 138 (N.J. 1983), the court held that the applicable comparative fault statute would apply to a negligence action against an auditor seeking purely economic damages. Id. at 152. The court reached this conclusion even though the language of the statute indicated that it applied to "damages for negligence resulting in death or injury to person or property." N.J.S.A. § 2A:15-5.1.

In ESCA Corp. v. KPMG Peat Marwick, 959 P.2d 651 (Wash. 1998), the court considered application of a comparative fault statute to a negligent misrepresentation claim. The claim was brought by a bank against an accounting firm, alleging negligent misrepresentations of the accounting firm that had resulted in an economic loss to the bank. Id. at 823-25. The comparative fault statute at issue stated as follows:

> In an action based on fault seeking to recover damages for **injury or death to person or harm to property**, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

Id. at 830 (emphasis added). Despite the fact that this statute speaks in terms of "injury or death to person or harm to property," the court held that this statute nonetheless applied to claims involving purely economic damages. Id. at 831.

In Marchese v. Nelson, 809 F.Supp. 880 (D. Utah 1993), the court held that Utah's comparative fault statute applied to a negligent misrepresentation claim seeking only economic damages. Id. at 896. The action involved claims brought by investors against a stockbroker in connection with misrepresentations made by the broker.

The above-referenced cases illustrate a broad trend toward recognizing that comparative fault should apply in negligence cases that involve only economic damages.

It is also significant that a number of the above-referenced cases dealt with comparative fault statutes which stated that comparative fault applies to actions seeking damages for personal injury or damage to property. Despite this statutory language, the courts held that comparative fault extended to cases involving only economic loss.

Although comparative fault is a common law doctrine in Missouri, to the extent that Missouri courts have looked to the UCFA as a model for comparative fault, and to the extent that the UCFA is similar to a statute, the above-referenced cases are persuasive. A number of jurisdictions have addressed comparative fault

statutes that only refer to cases involving personal injury and property damages, and have concluded that comparative fault nonetheless applies in cases that involve only economic damages. Thus, to the extent that the UCFA includes language which references only personal injury and property damage, this Court may nonetheless conclude that comparative fault applies in cases involving only economic damages. This is particularly true given that the comments to the UCFA specifically indicate that the UCFA takes no position on this issue (as discussed below).

4. The UCFA does not directly address the issue of whether contributory negligence should serve as a complete bar to recovery in negligence actions involving only economic damages.

As previously noted, the opinions of the intermediate appellate courts have tended to focus upon the language of the UCFA, which indicates that comparative fault applies to actions involving "damages for injury or death to person or harm to property." UCFA § 1(a). However, the UCFA has not been adopted as substantive law in Missouri. As this Court noted in Lippard: "It was not the purpose of Gustafson to enact that model act as a virtual statute of the state of Missouri, to establish substantive principles controlling cases not then before the Court. . . . The

direction in the opinion was simply to apply the procedures of the Uniform Comparative Fault Act 'insofar as possible.'" Lippard, 715 S.W.2d at 492-93.

Given that the UCFA is only used as a guide to procedure, and has not been adopted as substantive law in Missouri, CWF contends that the UCFA is not determinative on the issue of whether comparative fault applies in cases involving only economic damages.[4] Furthermore, to the extent that the UCFA is used as a guiding authority in determining whether comparative fault should apply in cases involving only economic damages, it is apparent that the UCFA does not take a position on that issue. In this regard, the comments to the UCFA state as follows:

> **Harms Covered.** The specific application of the principle, as provided for in this Act, is confined to physical harm to person or property. But it necessarily includes consequential damages deriving from the physical harm, such as doctor's bills, loss of wages or costs of repair or replacement of property. It does not include matters like

[4] This Court has previously recognized that it is not bound by the language of the UCFA in determining whether comparative fault applies to a specific type of action. For example, in Lippard this Court held that comparative fault does not apply to strict liability actions even though the UCFA includes strict liability within the scope of actions that are covered by comparative fault. Lippard, 715 S.W.3d at 491.

> economic loss resulting from a tort such as negligent misrepresentation, or interference with contractual relations or injurious falsehood, or harm to reputation resulting from defamation. But **failure to include these harms specifically in the Act is not intended to preclude application of the general principle to them if a court determines that the common law of the state would make the application.**

UCFA § 1, Commissioners' Comment (emphasis added).[5]

The closing sentence of the Comment to Section 1 of the UCFA indicates that the UCFA does not intend to take a position with respect to whether comparative fault should be applied in cases involving only economic damages. Rather, it is the intent of the UCFA to leave this issue to the courts in light of state common law. Thus, in determining whether comparative fault applies in cases involving only economic damages, this Court should be guided by common law and not by the language of the UCFA.

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[5] For the convenience of this Court a copy of the UCFA is included in the Appendix. Of course, the UCFA was also appended to the Gustafson decision which is referenced throughout this Brief.

E. Giving The Contributory Negligence Instruction Resulted In Prejudice.

As CWF has explained in the previous sections, it was error to give the contributory negligence instruction because contributory negligence does not or should not apply in a negligence action involving only economic damages. It is also clear that this error resulted in prejudice to CWF.

"Instructional error is presumed prejudicial when the verdict is in favor of the party at whose instance the instruction is given." Karnes v. Ray, 809 S.W.2d 738, 742 (Mo. App. 1991); see also Steenrod v. Klipsch Hauling Co., Inc., 789 S.W.2d 158, 164 (Mo. App. 1990); Grindstaff v. Tygett, 655 S.W.2d 70, 74 (Mo. App. 1983). In this case, Defendants requested the contributory negligence instruction and the jury returned a verdict in favor of Defendants. Therefore, instructional error should be presumed.

Instructional error should also be presumed in this case because the contributory negligence instruction had the effect of placing a burden upon CWF that should not have been imposed. "Prejudice is ordinarily presumed when a jury instruction imposes upon a party a standard of care greater than that required by law." Lopez v. Three Rivers Electric Coop., 26 S.W.3d 151, 158 (Mo. banc 2000); see also Syn, Inc., 200 S.W.3d at 134; Root v. Mudd, 981 S.W.2d 651, 656 (Mo. App. 1998). While the contributory negligence instruction did not directly address

CWF's standard of care, the contributory negligence instruction did effectively impose the burden upon CWF of establishing that it was not negligent to any degree. As CWF has explained herein, that burden was inconsistent with Missouri law and general principles of fairness. Therefore, instructional error should be presumed.

F. A New Trial Should Be Granted On The Basis Of Instructional Error.

As CWF has explained herein, it was error to give the contributory negligence instruction because contributory negligence does not or should not apply in a negligence action involving only economic damages. Moreover, this instructional error resulted in prejudice to CWF which should be presumed. Therefore, this Court should expressly hold that contributory negligence does not apply to a negligence action involving only economic damages and this Court should grant a new trial on the basis of instructional error regarding the contributory negligence instruction.

CONCLUSION

For all of the reasons stated herein, the judgment in favor of Defendants should be reversed and this matter should be remanded for a new trial.

By:_____

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