

IN THE MISSOURI SUPREME COURT

CHILDREN'S WISH FOUNDATION)
INTERNATIONAL, INC.,)
)
Appellant,)
)
v.)
)
MAYER HOFFMAN McCANN, P.C.,)
ET AL.,)
)
Respondents.)

Case No. SC90944

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

APPELLANT'S SUBSTITUTE REPLY BRIEF

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COMMENT REGARDING RESPONDENTS' STATEMENT OF FACTS

Respondents, Mayer Hoffman McCann, P.C. and CBIZ Accounting, Tax & Advisory of Kansas City, Inc. ("Defendants"), offer an alternative Statement of Facts that is intended to establish negligence on the part of Children's Wish Foundation International, Inc. ("CWF"). It should be noted that these facts are not relevant to the issue before this Court because the issue on appeal is not whether CWF was negligent, but whether the negligence of CWF can or should act as a complete bar to recovery pursuant to the contributory negligence doctrine.

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.

Before addressing the specific arguments that Defendants raise in their Brief, it is important to note one glaring omission in Defendants' Brief. Defendants do not address the basic inequity of allowing contributory negligence to serve as a complete bar to claims involving only economic damages when contributory negligence does not apply to claims involving other types of damages. The closest Defendants come to offering any rationale for this disparate treatment is to argue that cases that involve economic damages also frequently involve an underlying contract. CWF addresses that point below. But the fact remains that Defendants do not address the basic inequity of applying contributory negligence to cases

involving only economic damages. In fact, Defendants essentially agree in their own Brief that this disparate application of contributory negligence is unfair.

In their Brief, Defendants address the inequity of comparing a client's negligence to that of the auditor it hires, stating as follows:

[I]f a client engages an accountant to perform an audit, it would be unfair to compare the client's negligence in keeping its records to the professional's negligence in auditing them, unless the client's negligence caused the problem with the professional's work.

(Respondents' Brief, p. 24). This admission is telling because this sentence describes the situation that is before this Court in the instant case. Thus, Defendants admit that, under the factual scenario currently before this Court, it would be "unfair" to compare the negligence of CWF to Defendants. Yet, Defendants argue that it is acceptable to allow CWF's negligence to completely bar CWF's claim.

If it would be unfair to even compare CWF's negligence to that of its auditors, then how can it be fair to allow that negligence to completely bar CWF's claim? Defendants do not provide an answer to that question in their Brief.

A. This Court’s Prior Decisions Support Application Of Comparative Fault To Negligence Claims Involving Only Economic Damages.

Defendants devote little attention to the actual analysis or language in this Court’s decisions in Missouri Pacific Railroad Co. v. Whitehead & Kales Co., 566 S.W.2d 466 (Mo. banc 1978) and Gustafson v. Benda, 661 S.W.2d 11 (Mo. banc 1983). This is understandable, given that the analysis and language in these decisions provides little support for Defendants’ position.

In Whitehead & Kales, this Court recognized that “[n]egligence 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.” Whitehead & Kales, 566 S.W.2d at 472. This Court further observed that “concurrent tortfeasors should be treated according to their respective fault or responsibility” and 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 472, 474.

In Gustafson, this Court noted that “[e]xpansion of comparative fault as first enunciated in Whitehead & Kales is in the best interest of all litigants” and 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 15-16.

Defendants do not explain how this language could be read as indicating that this Court intended to adopt a narrow doctrine of comparative fault that only applies to certain types of negligence actions. Instead, Defendants argue that contributory negligence applies to negligence actions involving only economic damages because that is how Missouri's intermediate appellate courts have interpreted this Court's opinions.

Obviously, this Court is not bound by the manner in which Missouri's intermediate appellate courts have interpreted this Court's opinions. To the contrary, it is appropriate for this Court to clarify the scope of comparative fault as adopted in this Court's Gustafson decision. Furthermore, given that this Court has not directly addressed the issue of whether contributory negligence continues to serve as a complete bar to negligence actions that involve only economic damages, this Court is free to make its own determination regarding that question.

Defendants also argue that the Uniform Comparative Fault Act ("UCFA") supports their position. However, as Defendants acknowledge in their own Brief, the drafters of the UCFA did not take a position on whether comparative fault should apply in cases involving only economic damages, but instead left this issue to development by common law. (Respondents' Brief, p. 13).

This case addresses the development of the comparative fault doctrine under Missouri's common law, as foreseen by the drafters of the UCFA. Thus, the

UCFA neither supports nor forecloses the application of comparative fault in negligence actions that involve only economic damages. To the extent that Missouri's intermediate appellate courts have read the UCFA as taking a position on this issue, those opinions are in error and should be overruled by this Court.

B. This Court May Properly Address The Scope Of The Common Law Doctrine Of Comparative Fault.

Defendants argue that any extension of comparative fault to negligence actions that involve only economic damages must be made by the legislature. However, the basic premise of Defendants' argument – that CWF is seeking an “extension” of comparative fault – is erroneous. CWF is merely asking this Court to interpret the doctrine of comparative fault which has already been adopted as a matter of common law by this Court.

Although this Court judicially adopted comparative fault in 1983, this Court has never directly addressed whether comparative fault applies in negligence actions that involve only economic damages. Thus, it is entirely proper for CWF to ask this Court to clarify a legal doctrine that has already been adopted by this Court.

There is nothing improper about an appellate court addressing a legal doctrine that has already been adopted as a matter of common law. Indeed, the

cases from the intermediate appellate courts that Defendants rely upon in their own Brief have done exactly that. Defendants presumably believe it was proper for the intermediate appellate courts to address the question of whether comparative fault applies in negligence actions that involve only economic damages. Thus, Defendants are inconsistent in suggesting that it would be improper for this Court to address this issue also.

Finally, to the extent that there is an unanswered question regarding whether comparative fault applies in negligence actions that involve only economic damages, that question should be answered by this Court. Defendants argue that there is no need for this Court to answer that question because the Missouri legislature has exhibited its willingness to address issues of comparative fault. However, the question regarding the scope of comparative fault that is addressed in this appeal has been in existence for twenty-seven years, since this Court's adoption of comparative fault in Gustafson. Thus, the legislature has not exhibited any inclination to address this particular aspect of comparative fault. Given the legislature's consistent failure to address this question, it is appropriate for this Court to clarify this aspect of comparative fault.

C. The Mere Fact That The Parties Relationship Involves A Contract Does Not Make Comparative Fault Inapplicable.

The only rationale that Defendants offer for applying contributory negligence to actions that involve only economic damages, when contributory negligence does not apply to other types of negligence actions, is the fact that negligence actions that involve only economic damages frequently arise from a contractual relationship. This rationale does not hold up to close scrutiny.

First, there is a partial disconnect between Defendants' purported rationale and the rule that Defendants propose. As Defendants implicitly acknowledge in their own Brief, not all negligence actions that involve economic damages arise from contractual relationships. Thus, a rule that applies to all negligence actions that involve economic damages is not well-suited to addressing the concern raised by Defendants because that rule will encompass cases that do not involve contractual relationships.

The second, and more significant deficiency in Defendants' 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.

D. National Authorities Indicate A Trend Toward Abolishing Contributory Negligence As A Complete Defense In Negligence Actions That Involve Only Economic Damages.

Defendants argue that there is no national trend toward applying comparative fault in negligence actions that involve only economic damages. In so arguing, Defendants attempt to distinguish the cases cited in CWF's initial Brief on the basis that those cases address different factual scenarios. However, Defendants do not deny that the cases cited in CWF's initial Brief do, in fact, hold that contributory negligence no longer serves as a complete defense in negligence actions that involve only economic damages. Nor do Defendants cite any cases which support a contrary trend.

CWF did not present its summary of national authorities on this issue for the purpose of establishing that the authorities cited therein dealt with precisely the same factual scenario. To the contrary, as Defendants acknowledge in their own Brief, CWF presented these authorities for the purpose of establishing a “broad trend toward recognizing that comparative fault should apply in negligence cases that involve only economic damages.” (Respondents’ Brief, p. 25). The authorities that CWF cites do establish such a broad trend. Defendant does not identify any authorities that contradict that trend.

E. Prejudice Resulted From The Giving Of The Contributory Negligence Instruction.

Defendants make two arguments regarding prejudice: (1) that there is no prejudice because the evidence supports a finding of CWF’s negligence, and (2) that CWF failed to offer an alternative instruction in conjunction with its objection to the contributory negligence instruction. (Respondents’ Brief, p. 28). Neither of these arguments is well-founded.

Defendants’ first argument – that the evidence supports a finding of CWF’s negligence – ignores the issue that is before this Court. CWF is arguing that negligence on its part should not act as a complete bar to CWF’s claim against Defendants. Thus, it makes no difference whether there was evidence to support a

finding of CWF's negligence, because it was still error to instruct the jury that CWF's negligence acted as a complete bar to CWF's claim.

Defendants' second argument – that CWF failed to offer an alternative instruction – is not supported by the law or the facts.

Although Defendants argue that CWF was required to offer an alternative instruction in order to preserve its claim of instructional error, that argument is not supported by Missouri law. The standard for preserving a claim of instructional error is set forth in Rule 70.03, which states in pertinent part as follows:

Counsel shall make specific objections to instructions considered erroneous. No party may assign as error the giving or failure to give instructions unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

Mo.R.Civ.P. 70.03. Rule 70.03 does not require a party to submit an alternative instruction in order to preserve a claim of instructional error. Indeed, Rule 70.03 makes no reference to alternative instructions.

Even if Missouri law did require a party to offer an alternative instruction in certain cases, this would not be one of those cases. CWF argued at trial that the contributory negligence instruction should not be submitted **at all** because contributory negligence was not a proper defense. Thus, CWF was not arguing for

a different instruction, but was instead arguing for no instruction whatsoever. Under those circumstances it makes no sense to argue that CWF should have submitted an alternative instruction.

Contrary to Defendants' arguments, it is reasonable to presume that prejudice arose from the improper submission of a defense of contributory negligence. Under Missouri's instructional scheme, the parties have no way to know precisely why the jury returned a verdict for a defendant because the jury returns a general verdict. Thus, when a complete defense has been improperly submitted to the jury, and the jury then returns a verdict for the defendant, it is proper to presume that the erroneous submission of the defense resulted in the verdict for the defendant. It would be unreasonable to require the plaintiff to definitively establish that the improper submission of the defense resulted in the verdict for the defendant because, under Missouri's instructional scheme, it would never be possible to definitively establish that fact.

CONCLUSION

For all of the reasons stated in this Reply Brief and in Appellant's initial Brief, the judgment in favor of Defendants should be reversed and this matter should be remanded for a new trial.

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