

Summary of SC90944, *Children's Wish Foundation International, Inc. v. Mayer Hoffman McCann, P.C., et al.*

Appeal from the Jackson County circuit court, Judge Robert M. Schieber
Argued and submitted Oct. 19, 2010; opinion issued Feb. 8, 2011

Attorneys: The foundation was represented by Michael W. Blanton of the Law Office of Michael W. Blanton in Leawood, Kan., (913) 323-4553; and Mayer Hoffman and CBIZ were represented by John C. Aisenbrey, Russell J. Keller and Robin K. Carlson of Stinson Morrison Hecker LLP in Kansas City, (816) 842-8600.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A charitable foundation appeals the judgment against it in a professional negligence suit it brought against its auditor and accountant. In a unanimous decision written by Judge Richard B. Teitelman, the Supreme Court of Missouri reverses the trial court's judgment and remands (sends back) the case. The trial court erred in submitting to the jury an instruction that improperly permitted the jury to find that any contributory negligence on the foundation's part barred it from any recovery. The contributory negligence rule was abrogated in many cases in 1983 and replaced by a comprehensive system of comparative fault in which the jury decides the relative fault of the parties and assesses damages accordingly. The comparative fault rule applies not only in cases involving personal injury but also in cases, such as this one, alleging only economic loss from professional negligence. The foundation was prejudiced because the contributory negligence instruction given here improperly permitted the jury to find that any negligence on the foundation's part barred the foundation from any recovery.

Facts: Children's Wish Foundation International Inc. is a charitable organization that provides gifts to terminally ill children. It procured gifts in kind – donations of property to the charity – from two companies that would ship the gifts to the foundation, which then distributed the gifts to hospitals and Ronald McDonald houses. Foundation employees handled and documented the inventory of gifts in kind on a spreadsheet. The foundation hired Mayer Hoffman McCann PC to audit its financial statements and opine about the accuracy of its financial statements, including records pertaining to the gifts in kind. The audit engagement letter required the foundation to provide complete, accurate information and records to Mayer Hoffman. Mayer Hoffman discovered that, in the year before the audit, the foundation had a tenfold increase in gifts in kind and that the foundation already had distributed many of these gifts. Mayer Hoffman consulted outside sources to determine the fair market value of the gifts in kind, concluded the fair market value provided by the foundation was accurate, determined the foundation's financial statements fairly represented the foundation's financial position in accordance with generally accepted accounting principles, and forwarded the foundation's financial statements to CBIZ Accounting, Tax & Advisory of Kansas City Inc., which prepared the foundation's 1999 tax return. The foundation's financial statements, however, were inaccurate. They showed the foundation had received 17 pallets of a particular book when, in fact, it had received only seven pallets. Mayer Hoffman assumed the beginning number on the spreadsheet of each gift in kind was the quantity of the item the foundation received, when in fact it was the quantity of the item the foundation had ordered. This resulted in a \$1.31 million overstatement of the value of the gift in kind contributions on the foundation's financial statements. Although the foundation gave Mayer

Hoffman its inventory spreadsheets, it did not provide the records showing what had been shipped to the foundation. It is not clear whether these additional records would have revealed the discrepancy between the quantity of a gift in kind item ordered versus the quantity shipped and received. In October 2000, Pennsylvania began an investigation into the foundation related, in part, to the overstated value of the gift in kind contributions shown on its 1999 tax return. The foundation then conducted its own internal investigation and discovered the erroneous records. It subsequently filed a professional negligence action in Missouri against both Mayer Hoffman and CBIZ. Over the foundation's objection, the defendant companies submitted a contributory negligence instruction to the jury, which returned verdicts in favor of Mayer Hoffman and CBIZ. The foundation appeals.

REVERSED AND REMANDED.

Court en banc holds: The trial court erred in submitting the contributory negligence instruction to the jury. Because Mayer Hoffman requested the erroneous instruction and the jury found in its favor, it has failed to overcome the presumption that prejudice resulted from the erroneous instruction. The foundation was prejudiced because the instruction improperly permitted the jury to find that any negligence on the foundation's part barred the foundation from any recovery.

The contributory negligence rule provided that a plaintiff cannot recover damages if the plaintiff's own negligence directly contributed in any way to the injuries sustained. Even if the defendant's conduct was the primary cause of the plaintiff's injury, the defendant could escape all liability under the contributory negligence rule. The all-or-nothing allocation of fault under contributory negligence ignored the fact that the parties to a negligence action generally are held to some standard of care and that, in some cases, the injury was caused by a breach of the standard of care by both parties. To ameliorate the shortcomings of the contributory negligence rule, *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. banc 1983), abrogated contributory negligence in favor of a comprehensive system of comparative fault, in which the jury decides the relative fault of the parties and assesses damages accordingly. *Gustafson* and subsequent cases have established that the application of comparative fault in Missouri is informed by the uniform comparative fault act, which provides that contributory fault chargeable to the plaintiff diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the plaintiff's contributory fault but does not bar recovery. The uniform act expressly leaves open the possibility that comparative fault can apply to economic loss cases if consistent with state common law. Missouri cases subsequent to *Gustafson* have been inconsistent in whether to apply comparative fault in economic loss cases. This Court now holds that the comparative fault rule established in *Gustafson* applies to claims of economic loss caused by professional negligence. There is no compelling reason to limit the application of comparative fault based on the nature of the injury; consistency dictates that comparative fault apply regardless of whether the plaintiff's injury is a bodily injury in an accident or the loss of money due to professional negligence.

The fact that the parties here had a contractual relationship does not preclude application of comparative fault. Further, the foundation's cause of action is not premised on the contract but rather on the legally recognized professional duty arising from the accountant-client relationship. Finally, the prevailing view in other jurisdictions is that comparative negligence applies in negligence actions involving only economic loss.