IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 43, 443

PHILIP FRANCIS HOFFMAN, JR., and PAV-A-WAY CORPORATION, a Florida corporation,

Petitioners,

vs.

HAZEL J. JONES, as Administratrix of the Estate of WILLIAM HARRISON JONES, JR., deceased,

Respondent.

BRIEF OF PETITIONERS

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PREFACE

This is an appeal involving two circuit court cases which were consolidated for purposes of trial and appeal. Petitioners were the defendants in the trial court and the Appellees before the Fourth District Court of Appeal. Respondents were the plaintiffs and Appellants in the respective courts. Herein the parties will be referred to as they stood in the lower court. The following symbols will be used:

(R) - Record-on-Appeal in Case No. 71-554

(RA) - Record-on-Appeal in Case No. 71-553

(T) - Transcript of Testimony

STATEMENT OF THE CASE AND FACTS

The consolidated actions arose out of a car-truck collision resulting in the death of one William Harrison Jones, Jr. One case concerned a wrongful death action by the Plaintiff-wife in her individual capacity as widow. The other case was maintained by the Plaintiff-wife as administratrix of the estate of her deceased husband. In both cases, the Plaintiff-wife alleged that Defendant Hoffman had been negligent in operating a truck, owned by Defendant Pav-A-Way Corporation, resulting in the death of her husband (R1-4, RA 1-3). In both cases, Defendants filed a general denial and asserted the defense of contributory negligence (RA1-3). At the trial of the consolidated law suits, the trial court denied the Plaintiff-wife's requested instruction on comparative negligence (T281), giving an instruction on contributory negligence (T373). The jury returned verdicts in favor of Defendants and against the Plaintiff-wife in both cases (T381). Final Judgments were entered pursuant to the jury verdicts on June 3, 1971 (R24-25, RA 51-52). The Plaintiff-wife's Motions for New Trial were denied by Orders of June 3, 1971 (R24-25, RA 51-52).

On appeal to the Fourth District Court of Appeal, the Plaintiff-wife contended that the trial court had erred in instructing the jury on the doctrine of contributory negligence and refusing to instruct the jury on the doctrine of comparative negligence. The District Court, in an opinion

dated February 8, 1973, held that "contributory negligence should not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, but any damages allowed shall be diminished in proportion (percentage) to the amount of the negligence attributable to the person bringing such action or on behalf of whom such action is maintained."

The Fourth District certified to this Court the following question as being one of great public interest:

> "WHETHER OR NOT THE COURT SHOULD REPLACE THE CONTRIBUTORY NEGLIGENCE RULE WITH THE PRINCIPLE OF COMPARATIVE NEGLIGENCE?"

Defendants' Petition for Rehearing filed February 21, 1973 was denied by Order of the District Court of Appeal of February 22, 1973.

QUESTION CERTIFIED

WHETHER OR NOT THE COURT SHOULD REPLACE THE CONTRIBUTORY NEGLIGENCE RULE WITH THE PRINCIPLE OF COMPARATIVE NEGLIGENCE?

ARGUMENT

There can be no dispute that under Florida law prior to the decision under review, a plaintiff must have been free from contributory negligence in order to recover, and that contributory negligence of a deceased was a bar to a recovery under our wrongful death statute. In the present case, the trial court followed such law. On appeal to the Fourth District Court of Appeal, however, that court adopted the pure form of comparative negligence. The Fourth District's opinion represented the opinion of one judge of that court, having been concurred in by an associate judge, with one judge dissenting.

Defendant would submit that the Fourth District erred in judicially adopting comparative negligence. The majority of states have not adopted a comparative negligence rule in regard to general negligence actions, either by statute or court decision. Only the Commonwealth of Puerto Rico and seven states had adopted a form of comparative negligence.[1] Of these seven states, only two have chosen to do so by judicial decision.[2] The other states, like Florida, have preferred to allow the legislature to initiate any needed reform.

The following judicial declarations, are illustrative of the view which disfavors the judicial abolition of the

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1. Arkansas, Georgia, Mississippi, Nebraska, South Dakota, Tennessee, and Wisconsin.
2. Georgia and Tennessee

contributory negligence rule and its replacement by a system of comparative negligence. Maki v. Frelk (1968) 40 Ill2d 193, 239 NE2d 445 involved a death action stemming from an automobile collision in which the plaintiff in one count sought to recover for the defendant's negligence on the ground that "if there was negligence on the part of the plaintiff or plaintiff's decedent, it was less than the negligence of the defendant, when compared." The Illinois Supreme Court reversed the decision of the intermediate appellate court, which had held that the plaintiff's allegation was sufficient to state a cause of action in that contributory negligence should no longer bar recovery if it was not as great as the negligence of the defendant, but that any damages allowed should be diminished in proportion to the amount of negligence attributable to the plaintiff. The court held that such a far-reaching change as the intermediate appellate court sought to impose should be made by the legislature rather than by the court, since the legislature was the department of government to which the Constitution had entrusted the power of changing the laws. The court explained that where it was clear that the court had made a mistake, it would not decline to correct it even though such rule may have been reasserted and acquiesced in for a long time, but that when a rule of law had once been settled, contravening no statute or constitutional principle, such rule ought to be followed unless it could be shown that serious detriment would thereby likely

arise prejudicial to the public interest. The court thus concluded that the rule of stare decisis was founded upon sound principles in the administration of justice, and rules long recognized as the law should not be departed from merely because the court was of the opinion that it might decide otherwise were the question a new one. The court stated:

> "...[w]e believe that on the whole the considerations advanced in support of a change in the rule might better be addressed to the legislature. As amici have pointed out, the General Assembly has incorporated the present doctrine of contributory negligence as an integral part of statutes dealing with a number of particular subjects... and the legislative branch is manifestly in a better position than is this court to consider the numerous problems involved. We recently observed, with regard to a contention that exculpatory clauses in residential leases ought to be declared void, that "In our opinion the subject is one that is appropriate for legislative rather than judicial action." (O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill.2d 436, 441, 155 N.E.2d 545, 547). We think the same must be said with respect to the change urged in the case at bar.

In Irizarry v. People (1954) 75 Puerto Rico 740, a case which held that a minor injured in handling certain explosives was not contributorily negligent, Mr. Justice Fernandez in a concurring opinion expressed the view that a rule of comparative negligence could not be adopted by mere judicial fiat, in that the rule's desirability had nothing to do with the impropriety of its applicability. The judge

said that such a judicial adoption would impinge on the functions and powers of the legislative branch, and would not be authorized unless legislation was established setting forth standards governing the consequences of a judicial determination that the cause of the damages was a concurrence of fault.

In Haeg v. Sprague, Warner & Co. (1938) 202 Minn 425, 281 NW 261, the Minnesota Supreme Court held a motorist guilty of contributory negligence as a matter of law for entering a right-angle intersection when he saw to his right another automobile approaching the intersection at such a high speed that it was evident that the other driver did not intend to slacken his speed or yield the right of way and that a collision was imminent. The court stated that although it would be hard to imagine a case more illustrative of the truth that in operation the rule of comparative negligence would serve justice more faithfully than that of contributory negligence, it had no option but to enforce the contributory negligence law so long as the legislature refused to substitute the rule of comparative for that of contributory negligence. The court explained that it appreciated the hardship of depriving the plaintiff of his verdict and of the right to collect damages from the defendant, but added that, through no fault of its own, the rule of contributory negligence remained in the law and gave the court no alternative other than to hold that the defendant was entitled to judg-

ment notwithstanding the verdict.

The court in Henthorne v. Hopwood (1959) 218 Or 336,338 P2d 373, reh den 218 Or 342, 345, P2d 249, held that a plaintiff's decedent who crossed a street in violation of a jaywalking ordinance was contributorily negligent as a matter of law and that therefore the plaintiff was not entitled to recover against a defendant who negligently struck the decedent by driving at an unreasonable rate of speed and by not keeping a proper lookout. In a concurring opinion, Justice O'Connell, quoting from the earlier case of Haeg v. Sprague, Warner & Co., supra, expressed the view that while the idea that a negligent plaintiff should bear the entire loss caused principally by the defendant's negligence was not appealing to one's sense of justice, the contributory negligence doctrine was too firmly established for it to be eliminated by judicial decision.

Defendants would submit that Florida courts, as the above courts, have also indicated an unwillingness in the past to judicially adopt a comparative negligence rule. The adoption by the Florida Legislature in 1887 of a statute identical to the Georgia Comparative Negligence Statute (Section 768.06 F.S.--later held unconstitutional) was preceded by a railroad case involving contributory negligence. Louieville Nashville Railroad v. Yniestra 21 Fla.700 (1886). Unlike the Georgia Court, his Court considered itself bound by the strict contributory negligence doctrine as set out in

Butterfield v. Forester 11 East 59, 103 Eng.Rep.926(K.B.1809), which the court cited as authority in denying recovery to a contributorily negligent pedestrian run down by an engine backing without a rear light. In the opinion the Court speaking through Chief Justice McWhorter, refused to judicially adopt the comparative negligence doctrine, but rather called upon the Florida legislature to provide for apportionment of damages. As a result, a statute patterned after the Georgia Statute was enacted at the next session of the Florida legislature.

As other types of cases involving industrial and, later, automobile accidents came to the fore, however, the Florida Courts, less inclined toward judicial legislation than its sister state toward the north, refused to extend the Comparative Negligence Statute beyond the railroad cases specifically covered by it, and the contributory negligence defensne remained available in all other cases. MacAsphalt Corporation v. Murphy (Fla.1953) 67 So.2d 438; J. G. Christopher Company v. Russell (Fla.1912) 58 So.45; Petroleum Carrier Corporation v. Robbins (Fla.1951) 52 So.2d 666. See also Florida Motor Lines Inc. v. Ward (1931) 102 Fla. 1105, 137 So. 163.

In Florida Motor Lines v. Ward, supra, the comparative negligence rule applicable in an action against railroads were held by this Court inapplicable in an action for death resulting from a collision between the two motor vehicles.

In J.G. Christopher Company v. Russell, supra, this Court again declined to judicially adopt and enforce a comparative negligence rule other than that set forth by the statute. In that case an action was brought by Russell against the Christopher Company to recover damages for personal injuries. In discussing contributory negligence, the Court stated as follows:

> "If the negligence of an injured person contributes in any appreciable degree to the injury received by him as a result of another's negligence, damages cannot be recovered for the injury under the principles of the common law; and these principles have not been changed by statute in this state, except as to injuries to persons and property caused by the running of the locomotive, cars, and machinery of railroad companies."

Without hesitation this Court again indicated what, Defendants would submit is a lack of inclination toward judicial legislation in this area in Petroleum Carrier Corporation v. Robbins, supra, and MacAsphalt Corporation v. Murphy, supra.

Another case, which Defendants would submit, is still a further indication that this Court has been unwilling to judicially adopt a general comparative negligence rule is the very case in which the Railroad Comparative Negligence Statute was held unconstitutional, Georgia Southern and Florida Railway Company v. Southern 7-Up Bottling Company of South East Georgia (Fla.1965) 175 So.2d 39. In that case, this Court compared the dangerous character of a train to

that of a motor vehicle. This Court reasoned that since a comparative negligence rule did not apply to an instrument equally as dangerous,(i.e.), the motor vehicle, application of the comparative negligence statute to railroads discriminated against the railroad company, and thus violated due process and equal protection. It can be inferred from such holding that this Court, once again, did not feel that a general rule of comparative negligence should be judicially adopted, or it would have done so.

One final case, which is ironically relied upon by the Fourth District in its opinion, is Connolly v. Steakley (Fla.1967) 197 So.2d 524. That case, if anything, would perhaps be authority for not judicially adopting comparative negligence rather than adopting it. The opinion expressed by Justice O'Connell in a specially concurring opinion actually set forth his personal preference for statutory (not judicial) adoption of comparative negligence. Moreover, this opinion in regard to adopting comparative negligence was not concurred in by any other judge, and hence does not represent the majority opinion of this COurt.

Thus, it can be seen that in 1886 this Court called upon the legislature to adopt a comparative negligence rule in regard to railroads, but refused to indulge in judicial legislation. Later in the Russell case, supra, this Court indicated that it would continue to apply the doctrine of contributory negligence in those cases where the doctrine had

not been abrogated by statute. Again, as late as 1965, this same Court, in Georgia Southern, stated that a railway was no more dangerous than a motor vehicle, and thus held the Railroad Comparative Negligence Statute unconstitutional, rather than seeing fit to adopt a general rule of comparative negligence.

Defendants would submit that the above cases reveal that not only did this Court feel bound by the doctrine of contributory negligence back in 1886 and refuse to judicially adopt a comparative negligence rule; but also this Court has, over the years, also refused to extend the Railroad Comparative Negligence Statute, while in force, to automobile and other accidents, again feeling bound by the common-law doctrine of contributory negligence in such cases.

The Fourth District's opinion in the present case relies upon language in Gates v. Foley (Fla.1971) 247 So.2d 40, wherein this Court held that the recent changes in the legal and societal status of women in our society forced the Court to recognize a change in women's rights to secure damages for loss of consortium. However, the fact that this Court chose to overrule unsound precedent in that case, is clearly no authority for this court's adoption of a comparative negligence rule in this case. First, in the Gates case this court merely stated that where old common law rules were contrary to Florida's constitutional and statutory provisions, they could be judicially overturned. This court went

on to find that the denial to a wife of the right to seek damages for loss of consortium was a denial of equal protection and violated the U.S. and Florida Constitutions. In the present case, unlike that case, the common-law doctrine of contributory negligence does not conflict with either statutory or constitutional provisions.

Secondly, judicial adoption of comparative negligence goes much beyond recognition of an element of damages, such as in the Gates case. Rather, here we are essentially concerned with recognizing recovery in an action wherein recovery has previously been barred. Simply speaking, this is not the Gates v. Foley-type case, and comparative negligence does not lend itself toward judicial adoption. The ramifications of judicial adoption of any form of comparative negligence and the questions to be answered are many.

First, there are four distinct forms of comparative negligence, with variation of these. There is the pure form, which is evidently what the Fourth District had adopted in the present case; the modified form; the slight and gross negligence theory; and the remote contributory negligence theory. Those states which have adopted one of these forms have found certain aspects of their particular form of comparative negligency undesirable and/or unworkable. Thus, the very determination of which form of comparative negligence should be adopted, if any, should be made only after information has been gathered

and studies made to determine how the particular plans are working in other states, and which features we would care to incorporate, and which we would care to omit. The legislature is clearly more suited for such a task. Such would present a more logical approach to adoption of comparative negligence than a mere judicial determination of which is the better form.

Another reason that comparative negligence does not lend itself toward judicial adoption is that there are so many collateral or peripheral questions which must be answered in order to have a workable comparative negligence law. First, there is the question of what is to become of our last clear chance doctrine? In Florida, last clear chance is applicable only to the situation where a plea of contributory negligence would otherwise have been established. Does doing away with contributory negligence likewise do away with last clear chance? In most of the state or federal cases presenting a last clear chance situation in a jurisdiction or under a statute where the doctrine of comparative negligence and apportionment of damages is the rule, there has apparently been no contention that the two doctrines are inconsistent in any way, and the courts have apparently assumed that, upon proper evidence, the party shown to have had the last clear chance to avoid the injury could be held solely liable for all the resulting damages. Lovett v. Sandersville R. Co. (1945) 72 Ga. App.642, 34 S.E.2d 664.

However, although there is little decisional authority in the United States for the proposition that under comparative negligence statutes or rules, the doctrine of last clear chance is no longer necessary or applicable, legal writers have frequently taken the view that the last clear chance doctrine, although enunciated in terms of proximate cause, is essentially a comparative negligence device which has no further meaning where contributory negligence of the plaintiff no longer bars his recovery. See Prosser, Torts §52. Arkansas also provides such by statute. Ark.Stat.Anno.27-1744.1.

The question must be asked, in connection with the difficulty of accurate apportionment, what if the jury in a particular case finds it impossible to establish different degrees of fault. The Canadian statutes provide in such case that the liability shall be apportioned equally. What result would obtain in Florida?

It also must be determined whether our assumption of the risk doctrine will be applicable or inapplicable. In Mississippi, which has a "pure" form of comparative negligence, and Wisconsin, which has a modified form, assumption of the risk constitutes a complete bar to recovery. Shell and Bufkin, Comparative Negligence in Mississippi, 27 Miss. L.J.105 at 108-9 (1956); Campbell, Ten Years of Comparative Negligence (1941) Wis.L.Rev 289 at 291-2.

Also it must be asked what is to be the result where the Defendant is guilty of gross negligence. In Wisconsin, a

diminution of damages is not required where the defendant has been guilty of gross negligence. Campbell, Ten Years of Comparative Negligence, (1941) Wis.L. Rev 289 at 297-301. In Georgia, if the plaintiff has the last clear chance, he is completely barred from recovery, even if the defendant has been guilty of gross negligence. Oast v. Mopper (1959) 96 Ga.App.771, 101 S.E.2d 603.

Another problem in the administration of the comparative negligence rule is the reliability of jury verdicts in cases in which the plaintiff's injuries are of a sort likely to evoke excess sympathy from the jury. One method of controlling the jury is the special verdict. It protects defendant from an overly sympathetic jury that might be so impressed by the plaintiff's injuries as to assess the entire damages against the defendant. If liability is to be based on comparison of fault, the special verdict can be a useful tool for assuring that damages will be apportioned on that basis. The jury can be required to state the amount of the plaintiff's damages and the percentage of the total negligence attributable to him and to the defendant. The judge can then make the apportionment. Approval of the comparative negligence doctrine in Wisconsin, as contrasted with the criticism leveled at the Mississippi legislation, has been attributed to the fact that special verdicts are used in the application of the doctrine in Wisconsin, whereas Mississippi retains the general verdict. On the other hand, Arkansas, apparently found the special

verdicts unwieldy, and the Arkansas legislature did away with the compulsory special verdict after only two years of operation under it.

The determination of the percentage of negligence attributable to each party will in many cases be difficult to determine and imprecise. The difficulties in apportionment faced by a jury are of course multiplied if the trial involves multiple parties and the jury is required to determine the respective percentages of negligence attributable to each party. The critics may be correct in suspecting that in these cases some juries simply add up the number of acts of negligence and use this figure as the basis of apportionment.

The problem of apportionment among multiple parties becomes further complicated if contribution among joint tortfeasors is not allowed. Comparative negligence determines and allocates liability for damages in proportion to the contribution of negligence causing the damage, based upon the theory that every person should be responsible for the damage inflicted on another to the extent that he caused that damage. As a corollary, the liability percentage should be used in fixing the amount of contribution to be paid as between tortfeasors. For example, if a plaintiff recovers a jury verdict of $25,000 and Defendant A is found to be 5% negligent whereas Defendant B is found to be 95% negligent, Defendant A should be permitted to pay 5% in

contribution or $1,250.00. Requiring Defendant A to be liable for the entire amount of the verdict when he is only 5% negligent conflicts with the very basis of comparative negligence.

There are many arguments which can be made that comparative negligence should not be adopted, either judically or legislatively: that the doctrine of last clear chance, relaxation of theories of negligence per se and allowing recovery where the defendant's conduct is wilful, wanton or reckless are but a few methods utilized to ameliorate whatever harshness is encompassed in application of the doctrine of contributory negligence, along with, of course, compromised verdicts of juries; that comparative negligence does not encourage settlements because the plaintiff is more likely to recover something even in doubtful cases and the cost of insurance and defense will thereby increase; that the art of the trial specialists will be as much in demand under comparative as contributory negligence; that cases now considered to be of highly questionable liability are more likely to be filed and tried under comparative negligence, thereby creating further congestion in the courts; that the contributory negligence rule should be retained for its deterrent effect; that comparative negligence would be so complicated to administer that the average jury would be unable to apply it and would simply bring in a compromise verdict; that comparative negligence

approaches liability without fault, etc.

However, in conclusion, Defendant would submit that, even assuming arguendo that this Court determines that comparative negligence is the better course, it is imminently clear that the legislative process, with its deliberateness through use of such technigues as study commissions and drafting bureaus, is more particularly suited to promulgate a carefully planned system of comparative negligence which would foresee the problems likely to arise and prescribe rules and procedures to insure the proper administration of the system. In addition to whether a system of comparative negligence should allow a proportionate recovery to a plaintiff more at fault than the defendant, a workable system of general application should and must consider the many questions posed above. A court, which ordinarily must decide one narrow issue at a time and then wait for new litigation to resolve related questions, without any assurance that the questions will be presented in any logical order, does not appear to be as well-suited as a legislative body for the complex task of replacing the contributory negligence rule with a system of comparative negligence.

The argument that adoption of a comparative negligence law by whatever means is better than none at all is more that erroneous. Piece-meal determination of an area of law through litigation can only lead to years of confusion,

uncertainty, and bewilderment and can only result in an over abundance of appeals in an attempt to discern just what the law is. In Stewart v. Gilliam, Case No. 71-785, 4th DCA, opinion filed December 12, 1972, (an opinion written by the same judge as in the present case, again concurred in by an associate judge, with one judge dissenting), Judge Reed dissented from the majority opinion which receded from precedent stating:

> "This case poses the familiar problem of preserving the separation of powers between branches of government on the one hand and doing justice in specific cases on the other. The facts so ably dealt with in the majority opinion clearly make an appealing claim for the recovery of damages and for the deviation from precedent. However, a rule which would permit recovery in the present case without creating a plethora of problems for future courts and litigants must take into account that which is socially desirable in a number of similar, but distinguishable human situations. The creating of such a rule involves more than simply a logical extension of or minor deviation from judicial precedent. It involves a detailed law-making process which has the potential for far reaching consequences. This is not for the courts, but the legislature. When the judiciary becomes involved in the process of law making, representaive government is abandoned and so is the protection of the checks and balance system established by our state constitution. To illustrate the latter, if the legislature exceeds its police power by the adoption of unreasonable legislation, a citizen may turn to his court system for protection. Where may he go, however, for such protection in the case of equally arbitrary judge-made law?" (emphasis added)

CONCLUSION

Based upon the foregoing, the Fourth District Court of Appeal erred in adopting comparative negligence and in reversing the judgments of the lower court. Defendants respectfully submit that the opinion of the Fourth District should be quashed and the final judgments rendered in these causes should be reinstated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Sammy Cacciatore, 525 Harbor City Boulevard, Melbourne, Florida, Attorney for Respondent, by mail, this 22nd day of March, 1973.

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