IN THE SUPREME COURT 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.

ON A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

BRIEF OF THE RESPONDENT

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PREFATORY STATEMENT

The Respondent in the present appeal was the Plaintiffs in the trial court and will be referred to in the Brief as the Plaintiff. The Petitioners herein were the Defendants below and will be referred to in this Brief as the Defendants.

The symbol "R" will be used in this Brief to indicate the Record on Appeal in the Administratrix's cause of action (which was Case No. 71-554 in the Fourth District Court of Appeal); the symbol "RA" will be used in this Brief to denote the Record on Appeal in the wrongful death cause of action (which was Case No. 71-553 in the Fourth District Court of Appeal); and the symbol "TT" will be used in reference to the transcript of the trial testimony.

STATEMENT OF THE CASE

The Plaintiff, Mrs. Hazel J. Jones, as widow of William Harrison Jones, Jr., sued the Defendants in the Circuit Court of Brevard County, Florida, for the wrongful death of her husband. [RA 1-4; R 5-6] The administratrix of the Estate of William Harrison Jones, Jr., also filed a survival cause of action against the Defendants in the Brevard County, Florida, Circuit Court. [R 1-3; 5-6] The Defendants answered each of these lawsuits. [R4, 9, 17] The trial court consolidated the two lawsuits and the cause of action proceeded on to trial

before the Honorable William G. Akridge, Circuit Judge, on May 3, 1971. [TT 1]

At the conclusion of the evidence in the case, the Court held a jury charge conference. [TT 276] The Plaintiff had requested Plaintiff's Requested Instruction No. 7, which was a charge on comparative negligence as follows:

> "If you find from the evidence that Philip Francis Hoffman, Jr., was negligent in the operation of the truck he was driving, and you also find that the Plaintiff's decedent, William Harrison Jones, Jr., was also negligent so as to contribute to the accident, thus causing death, then the Plaintiff Hazel J. Jones is still entitled to recover, but the damages would be diminished in the exact proportion that he was negligent; that is, if the Defendant Philip Francis Hoffman, Jr., and the Plaintiff's decedent, William Harrison Jones, Jr., were equally negligent, then the Plaintiff Hazel J. Jones would be entitled to recover only one-half of her damages, or if the Defendant contributed to the causing of the accident by 75%, and the Plaintiff's decedent by 25%, then the Plaintiff Hazel J. Jones would be entitled to recover 75% of her verdict." [R 12-50]

The Court denied the Requested Instruction and refused to give it. [TT 281] The Defendants filed a Requested Instruction on contributory negligence in keeping with Florida Standard Jury Instruction 3.8, to which the Plaintiff objected. [TT 278, 279] The Court thereupon instructed the jury as follows, which in essence told them that if they found the Plaintiff's decedent guilty of any negligence, it would bar the Plaintiff's recovery:

> "If, however, the greater weight of the evidence does support the claims of Hazel J. Jones, individually, and Hazel J. Jones as Administratrix of the estate of William Harrison Jones, Jr., then you shall consider the defense raised by Philip Francis Hoffman, Jr., and Pav-A-Way Corporation.

> "On the defense, the issues for your determination are: whether William Harrison Jones, Jr., was himself negligent and, if so, whether such negligence was a contributing legal cause of the injury or damage complained of, thus barring recovery on the claims of Hazel J. Jones, individually, and Hazel J. Jones as Administratrix of the estate of William Harrison Jones, Jr. If the greater weight of the evidence supports the defense of the Defendants, then your verdict shall be for the Defendants. If, however, the greater weight of the evidence does not support the defense of the Defendants and the greater weight of the vidence does support the claims of the Plaintiff, then your verdict shall be for the Plaintiff." [TT 373]

The jury returned a verdict in favor of the Defendants. [R 11] The Plaintiff moved for a new trial, or alternatively, for a judgment non obstante veredicto. [RA 18-23] This motion was denied by the trial court on June 3, 1971. [R 51, 52; RA 24, 25] It is from this verdict and final judgment that appeal was taken to the Fourth District Court of Appeal.

STATEMENT OF THE FACTS

This appeal arises out of a car-truck collision between a small Volkswagen Karmann Ghia and a 14-wheel mack dumptruck weighing approximately 25,000 lbs. [TT 19, 71, 82]

The accident occurred on the morning of May 24, 1967, on U.S. Highway #1 a few miles north of Eau Gallie, Florida, in Brevard County. U.S. Highway # 1 at that location is a 4-lane north-south highway having a grass median. At the point of the collision, South Wickham Road Extension is a dirt marle road which intersects U.S. Highway # 1 from the west side. [Exhibit 17] The speed limit on U.S. Highway # 1 is 65 mph

[TT 47] and traffic on U. S. Highway # 1 had the right of way. [TT 36] The intersecting dirt road, South Wickham Road Extension, is only 25 feet wide and traffic on it approaching U. S. Highway # 1 is controlled by a stop sign. [TT 22, 23 27]

At the time of this accident, the Defendant, Philip Francis Hoffman, Jr., was an employee of the Defendant, Pav-A-Way Corporation, and as such was driving the mack truck previously described, which was owned by the Defendant, Pav-A-Way Corporation. [TT 19] The Plaintiff's decedent on this tragic morning was driving the small Karmann Ghia.

The Defendant driver was both familiar with the area of the accident, having driven it many times before, and familiar with the truck he was driving. [TT 19] The Defendant driver had left the Florida Hot Mix Plant, which was on South Wickham Road Extension just west of U. S. Highway # 1, unloaded. [TT 21, 22] He was planning to proceed east to U. S. Highway # 1 and then turn south on it to pick up another load. [TT 21, 22]

The following is a description of what happened at the time of the accident by Mr. Winfred Guthrie Groover, Jr., who was travelling north on U. S. Highway # 1 and saw the accident as it occurred:

> "...I was heading north on U. S. 1 approximately 8:10 in the morning in the lane nearest the divider strip when I noticed a Corvette coming up to pass a Karmann Ghia. Just behind the Karmann Ghia I noticed a Mustang. The cars were headed south. The Corvette was in the lane headed south, in the lane next to the divider strip. The Karmann Ghia was in the lane next to the shoulder of the road. Behind him was the Mustang. I saw this truck come on to the highway. I expected the truck

to come straight across but it made a right turn. I started slowing down and told my wife, 'Look.' About that time the Karmann Ghia went out of sight behind the truck. I saw sand fly and the Corvette skidded to the left and stopped in the median strip. The Mustang skidded to the right and stopped off the shoulder of the road. I stopped at the intersection, jumped out, went back and give first aid until the ambulance arrived to the driver of the Karmann Ghia, giving him heart massage, etc."

Q "Now, Mr. Groover, did you see the truck at any time while it was on Wickham Road or Wickham Road extension?

A "No, sir.

Q "Where was the truck the first time you saw it?

A "Coming on to the highway.

Q "Was it stopped or moving?

A "Moving.

Q "When you saw it coming on to the highway had the front wheels gotten on to the highway yet?

A "Not yet, no sir.

Q "But it was moving?

A "Yes, sir.

Q "And from the time that the truck came onto the highway until the accident occurred, do you know, sir, approximately how much time elapsed?

A "My estimate from the time I saw the truck approaching onto the highway till the impact was 3 or 4 seconds." [TT 82, 83]

Mr. Groover further stated that the truck crossed the right hand southbound lane and entered into the left hand southbound lane, pre-empting both lanes. [TT 84, 85]

Mr. Groover indicated there were two other motor vehicles at the scene of the accident: one a Mustang, the other a Corvette. [TT 82] In pointing out the relative positions of the motor vehicles, Mr. Groover stated that the Corvette was blocking in the Karmann Ghia, keeping it from changing from the right hand lane to the left hand lane:

> Q "Did the Corvette -- was it passing the Karmann Ghia at the time the accident occurred?
>
> A "It was in the left rear fender trying to pass the Karmann Ghia."
>
> * * *
>
> Q "Mr. Groover, I know it's been some time ago but do you recall seeing the Karmann Ghia make any movement in any direction before this accident occurred?
>
> A "Just north of the intersection the Karmann Ghia was attempting to come into the left lane and he didn't never cross the center line and he saw the truck as I saw the truck."
>
> * * *
>
> Q "...Just tell exactly what you saw the Karmann Ghia do because you don't know what the driver saw. That's a conclusion.
>
> A "I saw the Karmann Ghia attempt to come to the left lane, which he couldn't do on account of the Corvette was attempting to pass. He went back into his lane to go past the truck on the right hand side in his lane."
>
> * * *
>
> A "There was three cars headed south, a Corvette in the left lane; just in front of it was a Karmann Ghia in the right lane. In the same lane behind the Karmann Ghia, in the right lane, was a Mustang. The Karmann Ghia veered to the left as if to cross the center line, which at the time --"

* * *

Q "... Did it look like to you the Karmann Ghia was starting to go across the center line?

A "That's right, sir.

Q "Did it go across the center line?

A "No, sir.

Q "Was there anything to the left of the Karmann Ghia across the center line?

A "The Corvette was attempting to pass.

Q "What did the Karmann Ghia do?

A "Stayed right in its lane; continued straight down the highway.

Q "At that point was the truck over into the other lane, the left southbound lane?

A "At the point of impact it had come back.

Q "No, sir, at the point where the Corvette was starting to pass the Karmann Ghia, just as the Karmann Ghia started over the center line, where was the truck?

A "The truck was crossing into the left lane.

Q "Into the southbound lane?

A "Right."

* * *

Q "When the Corvette started or was gaining upon -- got to the rear of the Karmann Ghia, had the Karmann Ghia, if you know sir, started to pull to the left?

A "Yes, sir.

Q "And when it started to pull to the left, if you know, sir, where was the Corvette?

A "Approximately the left rear fender.

Q "All right, sir. Now then, what, if anything, did the Karmann Ghia do?

A "Veered slightly back to the right, staying in the right-hand lane.

Q "Now, at that point when he first veered back -- I'm talking about the Karmann Ghia -- which lane was the truck in, just at the point where this happened?

A "He was still approximately half way across the center line.

Q "In which direction was he heading?

A "South.

Q "And was he in the left lane or center line or where was he?

A "Partially I would say half way.

Q "In other words, he was in both lanes?

A "Both lanes.

Q "And he was making the sweep you marked over here?

A "The righthand turn.

Q "And what was the next thing you heard or saw?

A "I spoke to my wife as I saw the truck turn to the right, 'Look.' Then I could not see the car because it had gone behind the truck and disappeared.

Q "Let me ask you one other question, Mr. Groover. When you first saw the truck start out into the road did you think the truck was going to continue all the way across the road?

A "That was my first opinion because I hit my brakes." [TT 86-91]

The driver of the Mustang, Mr. Terry Redden, testified that when he first saw the dump truck it was in the left southbound lane [TT 241]

and that he was approximately a quarter of a mile behind the Karmann Ghia at that time. He, like Mr. Groover, indicated that the accident happened very quickly -- "3 or 4 seconds". [TT 243] It was Mr. Redden's estimate that when he first saw the Karmann Ghia, it was 5 or 6 car lengths back of the truck.

The investigating Highway Patrolman found the initial gouge marks on the pavement 54 feet south of the South Wickham Road Extension intersection. [TT 176-177, 183] Debris was located on the roadway from 10 to 15 feet closer to the intersection, [TT 183-184] making the initial point of impact some 39 to 44 feet south of the intersection.

CERTIFIED QUESTION

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

ARGUMENT

I

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

It was the purpose of the appeal in the present case to the District Court of Appeal of the State of Florida, Fourth District, to seek a reconsideration of the anachronistic and archaic rule of law that contributory negligence is a complete bar to recovery to an injured party in a negligence case; to overturn this doctrine; and replace it with the common law form of comparative negligence which is more fair, humanitarian and, above all, just. The Courts of the State of Florida have never shirked their responsibility in reconsidering former precedent in the area of tort law; e. g., Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969) and Gates v. Foley, 247 So. 2d 40 (Fla. 1971). In the present case, the District Court of Appeal, Fourth District, did reconsider the doctrine of contributory negligence. It decided that contributory negligence should not bar recovery and that the common law doctrine of "pure" comparative negligence should be followed in Florida.[1] It is respectfully submitted

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[1]The Petitioner in its brief states that the opinion of the District Court represented only one judge of that Court but fails to realize that the dissenting judge stated in the first sentence of the dissenting opinion: "I concur with the view that the doctrine of contributory negligence is fully deserving of the criticism leveled toward it, that replacing the doctrine with the

that the Court was correct and that this Court should answer the certified question in the affirmative.

A

CONTRIBUTORY NEGLIGENCE IS A JUDICIALLY CREATED DOCTRINE OF THE COMMON LAW AND CAN BE JUDICIALLY REPLACED BY THE DOCTRINE OF COMPARATIVE NEGLIGENCE.

Florida became a territory of the United States in 1822 by Congressional enactment. This act vested the legislative powers in a governor and a Legislative Council of 13 resident citizens appointed by the President of the United States.[2] The Council then passed a Territorial Act adopting the common law and general statutory law of England in effect prior to March 23, 1607.[3] The Act of 1822 was replaced by the Florida Territorial Act of June 29, 1823, which adopted the common and statute law of England prior to July 4, 1776. This was again enacted in 1829.[4] These provisions have continued to be the foundation of the Florida

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principle of comparative negligence would in most cases reach a more equitable result, and that such a change can be accomplished by the judicial branch of government in view of the fact that the doctrine of contributory negligence was judicially created." The dissenting judge's only disagreement was that he felt that the Supreme Court should accomplish the change. Jones v. Hoffman, 272 So. 2d 529, 533 (Fla. 4th Dist. Ct. App. 1973)

[2] 3 STAT. 654 (1822).

[3] FLA. TERR. ACT of September 2, 1822.

[4] FLA. TERR. ACT of November 6, 1829.

common law to the present. The present law is embodied in Florida Statute Section 2.01, which reads as follows:

> "The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state."

On July 4, 1776, and before, the doctrine of contributory negligence did not exist. Contributory negligence as a bar to recovery by an injured party originated in England in 1809, in the case of Butterfield v. Forrester, 11 East p. 60, 61; 103 Eng. Rep. 926 (K. B. 1809), where the Court stated that the plaintiff could not recover "if he did not use common and ordinary caution to be in the right."[5] It was from this decision that the doctrine spread into our jurisprudence. It can then be seen that contributory negligence was not part of the common law of England adopted by our Reception Statute and that it was a judicially created doctrine.

The common law is not static; it keeps pace with changes in our society; that is its beauty. Stare decisis is not an iron mold which has been cast in the history of the past, but a viable and pliable doctrine which shifts to conform to the needs of society. The most fundamental principle of our common law is: "When the reason for any rule of law

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[5] Prosser, "Comparative Negligence", 51 Mich. L. Rev. 468 (Feb. 1953).

ceases, the rule should be discarded." Ripley v. Ewell, 61 So. 2d 420 (Fla. 1952). This beauty can be seen in several landmark cases of our jurisprudence.

In Randolph v. Randolph, 1 So. 2d 480 (Fla. 1941), this Court was faced with the common law doctrine giving fathers a superior right to the custody of children, even over the children's mother. After discussing the history of this rule, this Court had no problem setting aside the doctrine stating at p. 481:

* * *

> When the reason for any rule of law ceases, the rule should be discarded.....

* * *

In Banfield v. Addington, 104 Fla. 661, 140 So. 893 (1932), this Court was faced with the common law exemption of a married woman from causes of action which were based on contract or mixed contracts and tort. This Court reasoned that because of social changes and modern society the reason for the rule had failed, so the rule had failed and held a married woman owner of a beauty parlor liable to a customer for the wrong of one of her employees.

Again in Waller v. First Savings & Trust Company, 103 Fla. 1025, 138 So. 780 (1931), this Court was faced with a principle of the common law that an action for personal injuries was abated upon the death of the tortfeasor. This principle was considered antiquated by the changes

in society and inconsistent with the laws of this state. This Court held that rules of the old English common law not a part of the common law of Florida.

The common law rule of municipality immunity originated in an English decision of 1788 some 12 years after our reception date in Fla. Stat. § 2.01 (July 4, 1776).[6] This rule had been steadfastly followed by our courts until 1957. In 1957, a plaintiff, Mrs. Hargrove, asked this Court to reconsider and recede from this common law rule. This Court analyzed the inception of the rule, its history and considered the changes which had occurred in our society; and then receded from the common law. It held municipalities liable for the torts of its employees. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957). In so holding the Court stated at pp. 132-133:

* * *

> "The appellee here contends that any recession from the rule of immunity should come about by legislation rather than judicial decree. It is insisted that the immunity rule is a part of the common law which we have adopted and that therefore its abolition should come about only by statute. We are here compelled to disagree.
>
> "Assuming that the immunity rule had its inception in the Men of Devon case, and most legal historians agree that it did, it should be noted that this case was decided in 1788,

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[6]The history of common law municipality immunity having come about some 12 years after July 4, 1776, is closely analogous to the situation in the present case where the common law principle of contributory negligence did not come into being until 1809 or some 33 years after our common law reception date.

some twelve years after our Declaration of Independance. Be that as it may, our own feeling is that the courts should be alive to the demands of justice. We can see no necessity for insisting on legislative action in a matter which the courts themselves originated."

* * *

"We have mentioned these incongruities in the application of the immunization doctrine in Florida merely to justify the position, which we here take, that the time has arrived to face this matter squarely in the interest of justice and place the responsibility for wrongs where it should be. In doing this we are thoroughly cognizant that some may contend that we are failing to remain blindly loyal to the doctrine of stare decisis. However, we must recognize that the law is not static. The great body of our laws is the product of progressive thinking which attunes traditional concepts to the needs and demands of changing times. The modern city is in substantial measure a large business institution. While it enjoys many of the basic powers of government, it nonetheless is an incorporated organization which exercises those powers primarily for the benefit of the people within the municipal limits who enjoy the services rendered pursuant to the powers. To continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the Twentieth Century upon an Eighteenth Century anachronism. Judicial consistency loses its virtue when it is degraded by the vice of injustice." [Emphasis added]

That judge-made law (the common law) is subject to being judge-changed is still the law. More recently, this same Court has had occasion to recede from another antiquated common law principle. In 1952 in Ripley v. Ewell, supra, this Court recognized the right and duty of our judiciary to change or recede from common law principle where the underlying reasons no longer existed, but refused to allow a wife to recover for the loss of consortium for her husband's injuries. But, in 1971, this Court again reconsidered the problem in Gates v. Foley, supra,

After noting the changes in our society, this Court through Mr. Justice Adkins held that a wife had a right to recover for the loss of consortium as a result of her husband's injuries stating at p. 43:[7]

> "The law is not static. It must keep pace with changes in our society, for the doctrine of stare decisis is not an iron mold which can never be changed. Holmes, in his The Common Law (1881), p. 5, recognizes this in the following language:
>
> > 'The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the customs, belief, or necessity disappear, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and centers on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.'
>
> "It may be argued that any change in this rule should come from the Legislature. No recitation of authority is needed to indicate that this Court has not been backward in overturning unsound precedent in the area of tort law. Legislative action could, of course, be taken, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule." [Emphasis supplied]

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[7] The Petitioner has attempted to distinguish the Gates v. Foley case, supra, by stating that opinion is limited to old common law rules contrary to Florida's constitutional and statutory law (Brief of Petitioner, p. 13), but fails to note the language of the quoted above in the text of this Brief.

Also the Petitioner urges that the Gates case was only decided on the constitutional ground of denial of equal protection. A reading of the decision does not disclose such a conclusion since much time is spent in discussing the common law and changes in our society.

It is therefore respectfully submitted that as a judicially created doctrine, coming into being some 33 years after the reception date for the common law by Fla. Stat. § 2.01, contributory negligence is subject to being judicially reconsidered.

B

COMPARATIVE NEGLIGENCE IS A MORE FAIR AND HUMANE PRINCIPLE WHICH SHOULD REPLACE CONTRIBUTORY NEGLIGENCE

The concept of right and wrong is the basis of our jurisprudence. Mr. Justice Terrell in Strauss v. Strauss, 3 So. 2d 727 (Fla. 1941), said at p. 728:

* * *

> "Every system of law known to civilized society generated from or had as its complement one of the three well known systems of ethics, pagan, stoic, or Christian. The common law draws its subsistence from the latter, its roots go deep into that system, the Christian concept of right and wrong or right and justice motivates every rule of equity. It is the guide by which we dissolve domestic frictions and the rule by which all legal controversies are settled."

The first judicial declaration of contributory negligence in Florida was in Louisville and Nashville Railroad Company v. Yniestra, 21 Fla. 700 (Fla. 1886). Then the Court speaking through Mr. Chief

Justice McWhorter applied the principle of contributory negligence[8] but also pointed out its inequities at pp. 737-738:

> "I feel constrained to say in conclusion that in my opinion, and speaking for myself individually, the operation of the principal of contributory negligence is unjust and inequitable. By the law, as it unquestionably stands, no matter how negligently or with what amount of care trains are run, if a person injured by one of them has failed to exercise care on his part, he cannot recover. As it happens in nearly every instance of collision, if not all, that the person on the track is alone injured or killed, the train receiving no damage, there is no present incentive of personal safety on the train hands to use caution, nor a fear of being compelled to make pecuniary compensation when they can rely upon being absolved from their admitted negligence by some careless act of the plaintiff. The law says you were both at fault, and draws from that premise the conclusion that one alone must bear all the damage, provided that one is the plaintiff. If that damage were in some instances inflicted on the train, and in some on the person on the track, and not as is almost invariably the case on the latter, the hardship would not be so apparent, and railroad companies would not have as they do now, a monopoly of the defence called contributory negligence.
>
> "Various reasons have been given by judges and commentators in justification of this, to my mind, narrow rule--that it is required by the public policy, that the injury was of the plaintiff's own producing, and that the 'law has no scales to determine in such cases whose wrong doing weighed most in the compound that occasioned the mischief.' In another branch of jurisprudence these reasons have not been found potent, its 'scales' seem better adjusted, and from the same premises of both plaintiff and defendant being in fault is drawn

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[8] In reading the Petitioner's Brief, it would appear that the Court in Yniestra actually considered the adoption of comparative negligence; but reading the assignments of error, the arguments of counsel and the opinion fails to disclose this to be a fact. Mr. Chief Justice McWhorter was only voicing his dissatisfaction with contributory negligence.

> the more rational conclusion that the damages must be equally apportioned between them. This rule in admiralty courts has so commended itself that by act of Parliament, (36 and 37 Victoria) it is made the rule of the other courts in like case, where it used not to be. The law, in cases at least where human life is concerned, certainly needs legislative revision." [Emphasis supplied]

The doctrine that the contributory negligence of the injured party is a bar to recovery originated in England in 1809, in the case of Butterfield v. Forrester, supra, where the Court stated that the plaintiff could not recover "if he did not use common and ordinary caution to be in the right." It is from this decision that the doctrine has spread into nearly all common law jurisdictions.

England, the mother of this doctrine, has now rejected it.[9] Along with Great Britain, the common law countries of New Zealand,[10] Western Australia[11] and all of the Canadian provinces[12] have rejected

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[9] Law Reform Act of 1945, 8 and 9 Geo. 6, c. 28.

[10] New Zealand Statute (1947) No. 3, p. 29.

[11] Western Australia Statute (1947) No. 23.

[12] Alberta Rev. Stat. (1942) c. 116; British Columbia Rev. Stat. (1936) c. 52, amended by Rev. Stat. (1948) c. 68; Manitoba R. S. M. (1940) c. 215; New Brunswick Rev. Stat. (1927) c. 143; Nova Scotia Stat. (1926) c. 3; Ontario Rev. Stat. (1937) c. 115; Prince Edward Island Stat. (1938) c. 5; Saskatchewan Stat. (1944) c. 23; Quebec, under a principle of civil law, divides damages without a statute, Nichols Chemical Co. v. Lefebvre, 42 Can. S. C. Rep. 402 (1909).

contributory negligence as a complete bar. The last vestige of this complete defense disappeared long ago from Continental Europe, which divides the damages between the parties.[13] The United States is the last stronghold of contributory negligence.

The earliest attempts at a comparative negligence approach was to divide the damages equally between the negligent parties. This was the method developed about 1700, by the English Admiralty Courts,[14] which rule, although no juries were involved, was strongly influenced by international rules derived from the civil law. This rule is at present followed by the American State and Federal Courts enforcing admiralty law in collision and maritime personal injury cases.[15]

Apart from Admiralty practice, there was little change in the common law rule in the United States before 1908 and the passage of the Federal Employer's Liability Act.[16] Undoubtedly, this Court is aware that the statute was designed to apply to all negligence actions in Federal or State courts for personal injuries to railroad employees engaged in

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[13] See generally, Turk, "Comparative Negligence on the March", 28 Chi-Kent L. Rev. 189, 238-244 (1950).

[14] Marsden, "A Treatise on the Law of Collisions at Sea", 8 ed. 135 (1923).

[15] Prosser, "Comparative Negligence", 51 Michigan L. R. 476 n. 47 (1953); Kermarec v. Compagnie Generale Transatlanique, 358 U.S. 625, 629 (1959)

[16] 35 Stat. L. 65 (1908); 45 U.S.C. § 51-60.

interstate commerce. The statute was incorporated by reference into the Jones Act and the Merchant Marine Act enacted respectively in 1915 and 1920.[17] This is the "pure" form of comparative negligence, wherein "...the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion by the amount of negligence attributable to such employee." This means that a defendant guilty of one percent of the total negligence is liable for one percent of the plaintiff's total damages.

This type of provision was later adapted to labor legislation in various States and as of 1955 there were twenty-six jurisdictions which had adopted the "pure" comparative negligence rule in various types of employee-employer actions, such as intra-state railroading and certain specified occupations, usually hazardous, such as mining or lumbering. In substance nearly all of these statutes[18] make plaintiff's contributory

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[17] 38 Stat. L. 1185; 41 Stat. L. 1007.

[18] Arizona -- Ariz. Code Ann. (1939) §56-801, § 56-803, § 56-805
Arkansas -- Ark. Stat. Ann. (1947), § 81-1201, § 81-1202, § 81-1203, § 81-1208, § 73-914 to 919
California -- Calif. Labor Code (Deering) (1953) § 2801
Colorado -- Colo. Rev. Stat. (1953) § 116-14-1 to § 116-14-9
District of Columbia -- D. C. Code (1951) § 44-402
Florida -- Fla. Stat. (1953) § 769.01 to § 769.06, § 768.06
Georgia -- Ga. Code Ann. § 66-401 to § 66-404
Iowa -- Iowa Code Ann. § 479.124 to § 479.125
Kansas -- Kansas Gen. Stat. Ann. (1949), § 66-237 to § 66-240
Kentucky -- Ky. Rev. Stat. (1953), § 277.310, § 277.320
Massachusetts -- Mass. Ann. Laws, Chap. 299, § 2, § 2a
Michigan -- Mich. Comp. Laws (1948) § 419.15 to § 419.54
Minnesota -- Minn. Stat. Ann. (1949), § 219.77, § 219.79, § 219.80

negligence a factor diminishing his damage recovery by the proportion of total negligence attributable to the plaintiff.

Apart from the selected employee/employer relationships, concepts of comparative negligence have been made applicable to general negligence actions.

In the United States, seven states have so adopted a form of comparative negligence. These states are Wisconsin, Nebraska, South Dakota, Mississippi, Georgia, Arkansas and Tennessee.[19] Puerto Rico has also adopted a comparative negligence rule of its own.[20]

Montana -- Mont. Rev. Laws (1947), § 72-648 to § 72-650
Nebraska -- Neb. Rev. Stat. (1943), § 25-1150, § 74-703 to § 74-705
Nevada -- Nev. Comp. Laws (1929), § 9197 to § 9199
North Carolina -- N. C. Gen. Stat. (1943), Chap. 60-66 to 60-71
North Dakota -- N. D. Rev. Laws (1943), § 49-1602 to § 49-1605
Ohio -- Ohio Gen. Code Ann. (Page), § 9017, § 9018, Ohio Gen. Code Ann. (Page 1945 Replacement Volume)
Oregon -- Ore. Rev. Stat. § 654.305 to § 654.335
South Carolina -- S. C. Code (1952), § 58-1231 to § 58-1234, § 58-1238
South Dakota -- S. D. Code (1939), § 52.0945
Tennessee -- Tenn. Code.Ann. (Williams 1934), § 2628-30
Texas -- Tex. Civ. Stat. Ann. (Vernon) Arts. 6439 to 6442
Virginia -- Va. Code Ann. (1950), § 8-641 to § 8-644, § 56-416
Wyoming -- Wyo. Comp. Stat. Ann. (1945), § 65-501 to § 65-504

[19] Wisconsin -- Wisc. Stat. § 331.045; Nebraska -- Neb. Rev. Stat. § 35-1151; South Dakota -- S. D. Code, § 47.0304-1; Mississippi -- Miss. Code § 1454; Georgia -- Ga. Code § 94-703, § 105-603; Arkansas -- Ark. Stat. Ann., Art. 191 (1955) and Ark. Code Ann. § 27-1730.1 and § 27-1730.2; Tennessee has no specific statutory authorization, but has adopted the principle as a matter of common law, Louisville & Nashville R. R. v. Cheatham, infra.

[20] P. R. Laws Ann. Title 31, Sec. 5141 (1957 Supp.) provides: "A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done. Concurrent imprudence of the party aggrieved does not exempt from liability but entails a reduction of the indemnity."

Even though quite a few of these states have adopted comparative negligence by statute, some have initiated the application of the doctrine by judicial decision. Georgia adopted it as early as 1858 in Macon and Western R. Co. v. Winn, 26 Ga. 250 (1858), and Macon and Western R. Co. v. Davis, 27 Ga. 113 (1859). Another southern state has comparative negligence with no specific statutory authorization. The Courts of Tennessee adopted the principle as a matter of law in Louisville & Nashville RR v. Cheatham, 118 Tenn. 160, 100 SW 902.

Apart from the convenience of latching onto maxims, there has been much speculation as to why the rule of contributory negligence as a complete bar originally found acceptance in the United States.[21] The explanation most appealing to writers seems to be that in the crucial years of industrial development of the early Nineteenth Century, the courts found in this defense a convenient instrument by which the liabilities of rapidly growing infant industries were curbed and kept within bounds.[22]

This can hardly be applicable public policy in this day and age in Florida, for the identical principle of protection of infant industries

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[21] See Bohlen, "Contributory Negligence", 21 Harv. L. Rev. 233 (1908); Lowndes, "Contributory Negligence", 22 Georgetown L. J. 674 (1934); Green, "Contributory Negligence and Proximate Cause", 6 N. C. L. Rev. 3 (1927); Prosser, op. cit., p. 468.

[22] Turk, op. cit., p. 198; Malone, "The Formative Era of Comparative Negligence", 41 Ill. L. R. 151 (1946); Malone, "Comparative Negligence -- Louisiana's Forgotten Heritage", 6 La. L. Rev. 125 (1945); Illinois Judicial Conference Report of Committee Studying Comparative Negligence (1960)

was obviously a factor behind the common law privity requirement in order to hold a manufacturer liable to a third person who sustained injury by the manufacturer's product. Later, the "inherently", "normally" and "imminently" dangerous exceptions to the no privity situation were carved out. Most recently this Court has effectively recognized the coming of age of commerce and industry by doing away with the entire concept of privity as a bar to recovery by a third person -- the user of a manufacturer's product.[23] The insurance industry is equally of age.[24]

It appears that the only discernible reason or purpose underlying the rule of contributory negligence as a complete bar no longer exists. It is grossly unfair that in this day and age the maimed and broken man who has sustained injury but was partly at fault should bear the entire financial responsibility for the loss, while the admittedly negligent tortfeasor goes scot-free. Clearly, when one tortfeasor, the plaintiff, is prevented from recovering his loss from his own wrong, you necessarily allow the other tortfeasor, the defendant, who is not compelled to pay, to profit from his wrong.

As a basic question of policy, the injustice (and inhumanity) of a complete bar to recovery is obvious; why visit the entire loss created

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[23] W. E. Johnson Equipment Co. v. United Airlines, Inc., 238 So. 2d 98 (Fla. 1970); Green v. American Tobacco Co., 391 F. 2d 97 (5th Cir., Fla. 1968); Toombs v. Ft. Pierce Gas Co., 208 So. 2d 615 (Fla. 1968).

[24] Shingleton v. Bussey, supra.

by the fault of two parties on one of them alone and that being the injured victim? Why should the unanticipated consequences of injury be distributed so unevenly? Why should the injured victim have to suffer and assume the entire loss while his opponent in the court of law, who may have been by far more negligent, is free to leave the courthouse boasting that he is not liable for damages for a wrong that he has committed or contributed substantially to committing? By the law's application of the doctrine of contributory negligence, only the blameless accident victim is entitled to find refuge in the law; however, the law has demonstrated her willingness to forgive wholly the defendant. This is plainly and simply unequal forgiveness which is unjustified in this or any other age.

In urging the quashing of the District Court of Appeal's decision in the present case, the Petitioners have cited Mac Asphalt Corporation v. Murphy, 67 So. 2d 438 (Fla. 1953); J. G. Christopher Company v. Russell, 58 So. 45 (Fla. 1912); Petroleum Carrier Corporation v. Robbins, 52 So. 2d 666 (Fla. 1951); Florida Motor Lines, Inc. v. Ward, 102 Fla. 1105, 137 So. 163 (1931), as all refusing to adopt comparative negligence in place of contributory negligence. A careful reading of these cases fails to show that to be the case. Each of these cases did apply contributory negligence, but in none of them was the Court asked to reconsider the doctrine and replace it with the doctrine of comparative negligence.

The case of Georgia Southern and Florida Railway Company v. 7-Up Bottling Company of South East Georgia, 175 So. 2d 39 (Fla. 1965),

merely held Fla. Stat. § 768.06 to be invalid under the due process clause and the equal protection clause of the Federal Constitution and our State Constitution. The Court there was not asked to apply comparative negligence as a general principle of law replacing contributory negligence. In fact, under the posture of that case, the Respondent submits that it is questionable whether the Court could have done that.

The Petitioners have also raised several "red herring" issues claiming the adoption of comparative negligence is a legislative function. These issues were all answered and posed no problems to juries, trial courts and appellate courts when comparative negligence was applicable to railroad cases in Florida or when Florida courts are trying cases arising under admiralty jurisdiction or the Federal Employees Liability Act. The pure form of comparative negligence has been in use for many centuries.[25] Juries are the best judges of the degree of fault of each party. They are reflective of the feeling and attitudes of our society. It is submitted that there is no valid reason for the concern raised by the Petitioners.

The Petitioners would make it seem that the law is a static and staid institution. But the contrary is in fact true. Any history of the common law shows that it is dynamic, changing and ever moving to meet the needs of the people which it serves. This can best be exemplified by

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[25] Mole and Wilson, "A Study of Comparative Negligence", 17 Cornell L. Q. 333. See: Justinian's Dig. 1, XVII 203; Dig. Book 50, Tit. 17, Rule 203.

the history of comparative/contributory negligence. Prior to 1809 and the decision in Butterfield v. Forrester, supra, the rule of comparative negligence was applicable, but to meet the crucial needs of industrial development and later the industrial revolution, contributory negligence benefited society by limiting the liabilities of the rapidly growing infant industries. Just as the law was dynamic and met this need in the early 19th century, the law today should be just as dynamic and meet the needs of the public, which would be best benefited by a comparative negligence rule. Not only does the law need to meet the needs of today's people in this regard, but the underlying explanation for the rise of the doctrine of contributory negligence no longer exists.

Mr. Justice O'Connell in a very erudite and scholarly concurring opinion in Connolly v. Steakley, 197 So. 2d 524 (Fla. 1967) pointed out that contributory negligence was a primitive device for achieving justice between parties where both were at fault. On page 537 of his concurring opinion, he states:

> "I close with one last observation, which is solely my view and is not agreed to by Justice Roberts who concurs in the remainder of this opinion. Although I have stated herein that the last clear chance doctrine is intended to mitigate the harshness of the rule of contributory negligence, I do not suggest that it does so adequately or that it produces a just result. The real fact is that the contributory negligence rule and the doctrine of last clear chance are both equally primitive devices for achieving justice as between parties who are both at fault. All either does is to place the burden of an accident on one of the parties in the face of evidence that both are to blame.
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> "A better way to achieve justice in such cases is by the comparative negligence principle. See Maloney, 11 Univ. of

Florida L. Rev. 135 (1958); Prosser, 51 Mich. L. Rev. 465 (1953); Institute of Judicial Administration, Comparative Negligence (1955). It has been suggested that one function of the last clear chance doctrine is to get cases to the jury that would otherwise end in directed verdicts for the defendants, thereby permitting the juries, in violation of their duty to apply comparative negligence principles in handing down compromise verdicts. If this is one of its practical functions, and it might well be, the doctrine ought to be abandoned in favor of a rule which can be forthrightly used by juries.

"After nearly three-quarters of a century of urging, see opinion by Chief Justice McWhorter in Louisville & N. Railroad Co. v. Yniestra, 1886, 21 Fla. 700, it is time for Florida to face this problem squarely. Our legislature has attempted to do so at least once. Both houses of the 1943 Legislature passed a comparative negligence statute, S. B. 267. However, the bill was vetoed by the governor, and the legislature refused to override the veto. See Senate Journal, Regular Session, 1943, pp. 716-717. A comparative negligence statute, with appropriate safeguards for the interest of the parties in the form of mandatory special verdict procedures, would improve the degree to which justice is obtainable in negligence cases in which both parties are at fault.

Judge Dekle See EXHIBIT C

"As exhausting as this opinion has been to prepare, and will be to read, it will be worthwhile if it serves to focus the attention of the bar, the bench, and the legislature on this problem and bring about action to eradicate 'one of the worst tangles known to law'."

It is time that this Court undo "one of the worst tangles known to law". History has changed; our culture has changed; the backgrounds behind every single case cited by the Petitioners has changed. The courts of Florida have never shirked their responsibilities of overturning the precedent in the area of tort law; e. g., Shingleton v. Bussey, supra, and Gates v. Foley, supra.

In the case at bar a review of the facts clearly shows that the Defendant driver was guilty of negligence. He was entering a major through highway from a side dirt road. There was a clearly marked stop sign at that intersection for him to stop and yield to the traffic on U. S. Highway # 1. The Plaintiff's decedent was approaching the intersection at the lawful rate of 60 mph [TT 313] and the speed limit was 65 mph. The Plaintiff's decedent may have been negligent in not reacting timely and doing all that he could have to avoid this accident and this is obvious from the verdict. However, we come back to the basic proposition and that is that it was the Defendant's negligence that brought about the circumstances of this accident and it is respectfully submitted that the negligence on the part of the Defendant far exceeds the negligence of the Plaintiff's decedent. The jury should have had an opportunity to weigh the relative fault of each of the parties and then, in keeping with the Plaintiff's Requested Instruction on comparative negligence, returned a verdict for that percentage of the damages which would equal the percentage that the Defendants were at fault.

The Florida Legislature has continuously abdicated its function in the field of contributory negligence versus comparative negligence in that any bill filed in the Legislature is quickly killed in committee and the people of the state of Florida have not had the opportunity to have their representatives discuss and vote on this matter of great concern on the floor of each of the Chambers.[26] It seems that the only place that the

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[26] Comparative negligence legislation has been considered by the legislature from time to time without success. The decision in Connolly v.

citizens of this state have an opportunity to get a full, fair hearing on this matter is in the courts.[27] Contributory negligence is a judge-made law (Butterfield v. Forester, supra) and as judge-made law, this Court has the authority to reconsider and change it. Again the language of Justice Adkins in Gates v. Foley becomes most apropos wherein he said that "the rules of old English common law, if contrary to the Florida customs, institutions, and intendments of constitutional and statutory provisions, are not part of the Florida common law."

Steakley, supra, reflects what transpired in 1943. Two bills were introduced in the 1972 legislative session: Senate Bill 691, which died in committee, and House Bill 4264, which failed to pass. In 1971, four bills suffered similar fates: Senate Bills 254 and 294 and House Bills 548 and 2131.

[27] As in Dade County Classroom Teachers Association, Inc. v. The Legislature of the State of Florida, 269 So. 2d 684 (Fla. 1972), where this Court stated at p. 688:

> "The Legislature, having thus entered the field, we have confidence that within a reasonable time it will extend its time and study into this field and, therefore, judicial implementation of the rights in question would be premature at this time. If not, this Court will, in an appropriate case, have no choice but to fashion such guidelines by judicial decree in such manner as may seem to the Court best adapted to meet the requirements of the constitution, and comply with our responsibility."

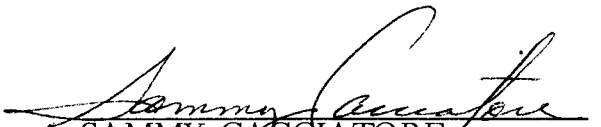
But the Legislature has dilly-dallied with the principle of comparative negligence since 1886 when Mr. Chief Justice McWhorter first asked the Legislature to rectify the inequity of contributory negligence.

CONCLUSION

It is respectfully requested and urged that this Court answer the Certified Question in the affirmative, reconsider the doctrine of contributory negligence, after consideration of the matter affirm the decision of the District Court of Appeal, Fourth District, adopting comparative negligence which would be a more fair rule of law and provide a better system of justice for the citizens of Florida, and discharge the Writ of Certiorari.

Respectfully submitted,

LAW OFFICES OF
NANCE & CACCIATORE



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I HEREBY CERTIFY that copy hereof has been furnished, by mail, to Edna Caruso, Esquire, Post Office Box 149, West Palm Beach, Florida; Ausley, Ausley, McMullen, McGehee & Carothers, Post Office Box 391, Tallahassee, Florida; Frank C. Amatea, Esquire, Post Office Box 1879, Tallahassee, Florida; Kenneth L. Ryskamp, Esquire, 401 City National Bank Building, Miami, Florida; and William B. Killian,

Esquire, 1400 First National Bank Building, Miami, Florida, this 30th day of March, 1973.

Sammy Cacciatore, Esquire