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

REPLY BRIEF OF THE RESPONDENT

LAW OFFICES OF
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PREFACE

Pursuant to the offer of leave to file a Reply Brief made to the Respondent by Mr. Chief Justice Vassar B. Carleton during the oral arguments in this appeal on April 11, 1973, the Respondent respectfully submits this Reply Brief.

STATEMENT OF THE CASE

The Respondent hereby adopts and incorporates by reference the Statement of the Case as set forth in its main Brief.

STATEMENT OF THE FACTS

The Respondent hereby adopts and incorporates by reference the Statement of the Facts as set forth in its main Brief.

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?

In the Brief and Reply Brief of the Petitioner, as in the various amici briefs, several questions concerning the ramifications of comparative negligence are posed. The Respondent in this Reply Brief responds to each of these questions.

A

LAST CLEAR CHANCE

The doctrine of "last clear chance" had its origin in 1842 in the English case of Davies v. Mann, 10 M&W 546. It developed as a way of mitigating the harshness of the rule of contributory negligence. Connolly v. Steakley, 197 So. 2d 524 (Fla. 1967). This Court held that the doctrine of last clear chance passes away with the adoption of comparative negligence in Loften v. Nolin, 86 So. 2d 161 (Fla. 1956). It is therefore respectfully submitted that "last clear chance" would no longer be applicable if this Court were to adopt comparative negligence.

B

ASSUMPTION OF THE RISK

The first clearly distinguishable case applying the defense of assumption of the risk was in 1799 in Cruden v. Fentham, 2 Esp. 685. This defense involves an awareness of the danger of the Plaintiff and then voluntarily placing himself in a position of peril or voluntarily encountering the danger. The defense has as its bedrock actual knowledge and appreciation of the danger and a voluntary assumption of the danger. Prosser, TORTS, 3d Ed. (1964) p. 454. See: Jones v. Crews, 204 So. 2d 24 (Fla. 4th Dist. Ct. App. 1967) and Lora v. Maule Industries, Inc., 235 So. 2d 743 (Fla. 3d Dist. Ct. App. 1970). Because this nature of assumption of the risk (knowledge, appreciation and voluntary exposure) together with it being historically an older doctrine than contributory negligence, it is respectfully submitted that it should continue to be a defense even is comparative negligence is adopted.

C

SPECIAL VERDICTS

The matter of the type of verdicts is clearly a procedural matter solely under the jurisdiction of this Court. See: Rule 1.481, Florida

Rules of Civil Procedure. When comparative negligence was in force in this State in railroad cases under § 768.06, Florida Statutes and in F. E. L. A. cases being tried in state courts, general verdicts have proven themselves workable and have caused no problems. However, if this Court feels that special verdicts would best suit the adoption of comparative negligence, then this Court may do so under its rule-making power. A suggested form for a special verdict would be as follows:

> We, the Jury, find for the Plaintiff and assess his total damages as $_____. We further find that the Plaintiff was _____% negligent and that the Defendant was _____% negligent.
>
> SO SAY WE ALL.

D

GROSS NEGLIGENCE

It is respectfully suggested that gross negligence would pose no problem in the adoption of comparative negligence. The juries will have heard all of the evidence relating to the degree of negligence of each of the parties and then make their finding upon that evidence taking into account the grossness or slightness of the negligence of each of the parties. However, if the Defendant's negligence was such as to be wilful

and wanton misconduct so that the defense of contributory negligence would not have applied, then the jury could be instructed not to reduce the award of the Plaintiff. See: Johnson v. Rinesmith, 238 So. 2d 659 (Fla. 2d Dist. Ct. App. 1970) and National Car Rental System, Inc. v. Holland, 269 So. 2d 407 (Fla. 4th Dist. Ct. App. 1972).

E

CONTRIBUTION

The Respondent fails to see the concern of the Petitioner over contribution since under the present case law there is no contribution allowed in Florida. At the present time the Plaintiff may sue any or all of several tortfeasors. Instruction 6.11, Florida Standard Jury Instruction, and Stembler v. Smith, 242 So. 2d 472 (Fla. 1st Dist. Ct. App. 1970). Even if one of the Defendants contributed 1% to the occurrence he may be included among the named Defendants.

However, the principles and merit of the argument for comparative negligence also tends to accentuate the harshness of the common law rule of no contribution between joint tortfeasors. New York recently by judicial decision abrogated the rule against contribution in March, 1972. Dole v. Dow Chemical Company, 30 N. Y. 2d 143, 282 N. E. 2d 288 (N. Y. Ct. App. 1972). New York previously had a procedural statute (CPLR 1401) allowing a Defendant to sue another post judgment for contribution.

This was limited by case law to contribution from an actively negligent tortfeasor to a passively negligent tortfeasor. In the Dole decision, the Court allowed a Defendant to file a third party complaint seeking contribution. The Court held that the jury would then determine the relative amounts owed by each of the Defendants to the Plaintiff.

In keeping with the purpose of comparative negligence -- fairness and justice -- it is respectfully submitted that contribution should be allowed between joint tortfeasors. If comparative negligence were adopted, the parties or the Court under our liberal joinder rules could bring all Defendants into the action that are subject to being served; then the jury could hear all of the evidence and set the amount the Plaintiff is entitled to from each Defendant. If by happenstance a joint tortfeasor is not subject to being served, we would have to revert to the former law and the Plaintiff would be entitled to all of his damages from those Defendants made a part of the action.

We have here attempted to answer some of the questions posed, With these questions answered, comparative negligence would bring to the citizens of Florida a workable, fair and just method of handling negligence actions. Legal scholars, professors, practioners (both defense and plaintiff) and most of all the bench have universally called for comparative negligence as being much fairer than 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,

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I HEREBY CERTIFY that copy hereof has been furnished, by mail, to Edna Caruso, Post Office Box 149, West Palm Beach, Florida; Ausley, Ausley, McMullen, McGehee & Carothers, Post Office Box 391, Tallahassee, Florida; Frank C. Amatea, Post Office Box 1879, Tallahassee, Florida; Kenneth L. Ryskamp, 401 City National Bank Building, Miami, Florida; William B. Killian, 1400 First National Bank Building, Miami, Florida; Raymond Ehrlich, 1530 American Heritage

Life Building, Jacksonville, Florida; and Harrison, Greene, Mann, Davenport, Rowe & Stanton, Tenth Floor, First Federal Building, St. Petersburg, Florida, this 12th day of April, 1973.

SAMMY CACCIATORE