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.

REPLY BRIEF OF PETITIONERS

Howell, Kirby, Montgomery,
D'Aiuto, Dean and Hallowes
P. O. Box 149
West Palm Beach, Florida
Attorneys for Petitioners

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CITATION OF AUTHORITIES

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

Defendants hereby adopt and incorporate by reference the Statement of the Case and Facts as set forth in its main brief. However, Defendants would like to point out to the Court that Plaintiff's Statement of the Facts completely ignores the testimony given at trial by both Terry Redden and James Hammond, the drivers of the only other two cars going south on U.S. #1 in the near vicinity of the truck and Karmann Ghia. Their testimony directly contradicts the facts as set forth in Plaintiff's Statement of the Facts to this Court. These witnesses testified that the deceased had plenty of time to take evasive action, if necessary, but did not attempt to stop, or veer to the right or left.

The testimony of Redden, the driver of the Mustang going south in the right-hand lane, and the testimony of Hammond, the driver of the Corvette going south in the left-hand lane, revealed that they were both well to the rear of the truck and Karmann Ghia when the collision occurred (T 315-16;322-13; 325). They testified that the truck had turned south onto the highway (T 241;306), staying completely in the right(outer-most or westernmost) lane (T 241-2; 306), and had proceeded approximately 50 feet down the highway when the accident occurred (T 302). When they first noticed the truck and Karmann Ghia, the Karmann Ghia was six or seven car lenghts behind the truck (T 272).

They also testified that the truck did not go over into the left-hand southbound lane (i.e.) it did not pre-empt both lanes (T 241-2; 306); that the Corvette was not blocking the Karmann Ghia in and keeping it from changing from the right to the left hand lanes (T 252; 308) and; that the Karmann Ghia had plenty of room to go both right or left (T 252), but that they did not see the Karmann Ghia attempt to move either way (T 243; 308). They further testified that they did not see evidence that the deceased applied his brakes (T 243; 308-9), and that the deceased simply took no evasive action (T 267) and ran right into the rear end of the truck (T 261-2). They both stated that the time of the collision they did not skid off the highway, but rather came to normal stops behind the accident and slowly pulled off the highway (T 243; 267; 307; 319-21).

QUESTION CERTIFIED

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

ARGUMENT

Plaintiff cites Shingleton v. Bussey (Fla.1969) 223 So. 2d 713 for the proposition that this Court has stated that it will not refuse to reconsider old and unsatisfactory court-made law. However, there is clearly a distinction between the Shingleton case and the present case. In that case the court found that since insurance had taken on such an important position in the modern world and since the procurring of insurance had connotations extending to the general public, insurance was amenable to the third party beneficiary doctrine. However, the court bottomed its decision on an interpretation of F.R.C.P. 1.210 in regard to the definition of "parties" and its rule-making power under the constitution. In contradistinction, the present case is dealing with substantive law rather than procedural law.

The cases cited on page 14-16 of Plaintiff's brief for the proposition that old common law rules may be judicially receded from where the reason for the rule no longer exists clearly do not approach the scope of the present decision. Randolph v. Randolph (Fla.1941) 1 So.2d 480 and Banfield v. Addington (Fla.1932) 104 Fla. 661, 140 So.893 merely concerned the evolution of equal rights and liabilities on the part of women. The Waller case, relied upon by Plaintiff at 138 So. 780, held that the common rule that an action for personal injuries was abated upon the death of the tortfeasor constitutionally conflicted with or was contrary to

Section 4 of our Declaration of Rights which provided that "every person for any injury done him...shall have a remedy ...". In the present case, unlike the Waller case and the Gates v. Foley case at 247 So.2d 40 the doctrine of contributory negligence does not conflict with any of our constitutional provisions.

The Hargrove decision at (Fla.1957) 96 So.2d 130, relied upon by Plaintiff at page 15 of her brief, merely recognized the fact that in the Twentieth Century a modern city is in substantial measure a large business institution which is an incorporated organization exercising govermental powers primarily for the benefit of the people within the municipal limit and hence should not be endowed with sovereign immunity. It is easily seen that the ramifications of the Hargrove decision are few in comparison with the effect upon our negligence law which the present decision has.

It should be noted that Respondent has not even attempted to meet the problems posed in Defendants' brief which will arise as a result of judicial legislation of comparative negligence. Respondent merely wished to refer to the many collateral issues involved as "red herring" issues. Defendants can simply state that they wish that the problem was so simple.

Plaintiff states at page 30 of her brief that in the present case although the decedent was negligent, the negligence on the part of Defendant far exceeded the negligence of the decedent. However, we would submit that Plaintiff is

merely relying upon the testimony she wishes to believe, completely overlooking the testimony of the only two eye witnesses (set forth in our Statement of the Facts) which would support the conclusion that Defendant was not negligent at all, or if he was, very slightly so.

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 6th day of April, 1973.

Edna L. Caruso

EDNA L. CARUSO OF
Howell, Kirby, Montgomery, D'Aiuto,
Dean and Hallowes
P. O. Box 149
Attorneys for Petitioners