

SUPREME COURT OF FLORIDA
Case No. SC02-709

Lower Tribunal Case Numbers: 00-13811, 00-13986

AMERICAN HOME ASSURANCE
COMPANY,

Appellant,

vs.

NATIONAL RAILROAD PASSENGER
CORPORATION, ETC., ET AL.

Appellees.

**REPLY BRIEF OF AMERICAN HOME ASSURANCE
COMPANY ON THE FIRST CERTIFIED QUESTION
FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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ARGUMENT

The Eleventh Circuit Court of Appeals has certified the following question to this court.

Should a vicariously liable party have the negligence of the active tort feisor apportioned to it under Florida Statute § 768.81 such that recovery of its own damages is reduced concomitantly.

National Railroad Passenger Corp. v. Rountree Transport and Rigging, Inc., 268 F.3d 1233 at 1258 (11th Cir. 2002). (A-1-55)

At its most basic level, this Court is being asked, should the Plaintiff/Appellant (AMERICAN HOME) who has been adjudged to have zero fault and zero negligence by the trial court, have its vicarious liability applied against it to reduce its own damages? Here, AMERICAN HOME, the subrogated cargo insurer for Stewart & Stevenson, is seeking to recover its damages suffered for the destruction of its cargo due to the negligence as determined by the court of ROUNTREE TRUCKING, CSX and NRPC. AMERICAN HOME is merely seeking to recover its damages from the negligent parties. The court has ruled that ROUNTREE'S liability is limited to one million dollars (A-8) and AMERICAN HOME is seeking he rest from the negligent Defendant/Appellee railroads.

It is AMERICAN HOME'S position that this question should be answered in the negative and that the vicarious liability of a party does not equate to negligence and therefore the vicarious liability should not be apportioned to it as a percent of negligence to reduce its own damages.

The railroads (NRPC and CSX) and their co-appellees (KUA and FMPA) have combined to support the position that AMERICAN HOME should receive from the railroads less than the railroads' proportionate share of the damages, even though AMERICAN HOME and Stewart & Stevenson were innocent parties that the trial court found to be without fault. The railroads are seeking to pay less than their share of damages. The railroads have a combined negligence of 41% of the damages. (A-2-2). If the railroads were to pay their proportionate share of the damages, they would pay a total of \$1,851,822.40. (41% of the total damages of \$4,546,640.00.) (A-2-4).

What the trial court has done, is to have held that the railroads do not even have to pay their entire 41% of the damages but would receive a setoff or a windfall of one million dollars based upon the judgment against ROUNTREE of one million dollars. (A-2-4). Therefore not only are these economic damages assessed against the railroads not held to be joint and several, nor are the railroads even required to pay their proportionate share but they, the railroads, were assessed their proportionate fault

and then they received a setoff of ROUNTREE'S judgment on top of that amount. Clearly that double setoff is against Florida law.

AMERICAN HOME is seeking only to recover their damages without having ROUNTREE'S negligence apportioned against it under Florida Statute § 768.81. It is seeking that ROUNTREE'S payment should not be setoff against the negligence of the railroads, doubly reducing AMERICAN HOME'S damages.

The Eleventh Circuit has recognized the conflict between the terms "negligence" and "vicarious liability". The trial court had combined these two terms as they apply under Florida Statute § 768.81 and equated vicarious liability with fault, and reduced AMERICAN HOME'S damages by the amount of ROUNTREE'S percentage of fault and then further reduced the damages by subtracting ROUNTREE'S judgment against the damages owed by the railroad.

The damages sought by AMERICAN HOME are economic damages. Therefore, under Florida Statute § 768.81, as it was in effect at the time this cause of action accrued, the plaintiff is entitled to recover the total amount of its damages.

Florida law only permits joint and several liability under the limited circumstances set forth by Statute § 768.81(3), (4), (5). Metropolitan Dade County v. Frederic, 698 So.2d 291 (Fla. 3rd DCA 1997). Under § 768.81(3), "Joint and several liability for economic damages will be imposed only if each defendant's comparative

fault exceeds the fault attributable to the plaintiff.” Frederic, 698 So.2d at 292. The key phrase is that “comparative fault exceeds the fault attributable to the plaintiff.” (Emphasis added.) The word is “fault”, not “attributable” or “chargeable” as the defendants would focus on, but the word “fault”. The question is whether fault is a matter of vicarious liability or is it a matter of negligence. AMERICAN HOME’S insured, Stewart & Stevenson, (as well as co-defendant General Electric) were found to be without fault by the court. (A-4, A-5).

This matter of AMERICAN HOME’S “fault” has already been settled as the trial court found that the plaintiffs were without fault. A three-week jury trial in which all parties were present, including Stewart & Stevenson, and the court found that these parties were without fault. (A-3, A-4). No where have the Appellees shown that vicarious liability equals fault. Fault is something to be determined by the jury or the trier of fact as a cause of the accident or event. Here, no such finding was made by the court.

The Appellees have focused on the word “chargeable”. But under § 768.81(2) this statement is “any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and non-economic damages... .” (Florida Statute § 768.81(2)).

The appellees have chosen to focus on the word “chargeable”. However the key phrase is “contributory fault”, not “chargeable”. There was no contributory fault on the part of Stewart & Stevenson. The trial court had determined this. Certainly if the trial court had found contributory fault or negligence on the part of Stewart & Stevenson, then it would be attributable or “chargeable” to Stewart & Stevenson and to the claimant AMERICAN HOME. Here however there was no “contributory fault” which was “chargeable” to the claimant (AMERICAN HOME). The question is not whether contributory fault is chargeable, the question is whether vicarious liability is contributory fault.

Appellees have focused on the word chargeable, deliberately missing the point that vicarious liability is not contributory fault to be chargeable to a claimant. The railroads tried to reargue the fault of Stewart & Stevenson in their brief. However, this is something which was heard by the trial court who ruled as a matter of law that Stewart & Stevenson was not at fault and, in fact, the court found that there was a failure to introduce any evidence that either GE or Stewart & Stevenson had committed any acts of negligence. (A-5, A-6).

In fact, the court found that GE and Stewart & Stevenson were “innocent parties who were vicarious liable for damages which are wholly the fault of ROUNTREE”. (A-7-22). Appellees in their brief seem to be rearguing the claims

against Stewart & Stevenson in order to come up with contributory fault “chargeable” against AMERICAN HOME. That issue has already been settled. It is merely vicarious liability which this court is considering.

Appellee railroads in their brief make an argument stating that “AMERICAN HOME would shed its mantel of comparative fault so that it may recover in full from all other active tortfeasors, without diminution based on relative fault.” (Please see Appellee’s Answer Brief, page 24.) Again, the railroads are overlooking the fact that there is no comparative fault on behalf of Stewart & Stevenson or AMERICAN HOME. In fact, it is the railroads that are seeking to go below their comparative fault by seeking a ruling which would place their liability below the 41% as ruled by the trial court. (A-3). At its most basic level, the railroads were judged the 41% negligent and yet are seeking to pay below the proportionate share of their negligence. They have made no argument to support why they should pay less than their percentage of fault, let alone pay the full amount of damages, in all or part, with joint and several liability. By contrast, AMERICAN HOME, who has no fault, is seeking merely to recover its damages.

The railroads’ public policy argument is based on its rearguing of the facts and prior rulings so as to state that even though Stewart & Stevenson was found to be wholly without fault, the railroad is trying to attribute some fault to them so as to

bolster its argument that there is fault which is chargeable to AMERICAN HOME. In short, they are rearguing the dangerous instrumentality doctrine again, after having lost the argument to have it placed directly against Stewart & Stevenson. At trial, Stewart & Stevenson was a defendant. The trial court ruled on November 20, 1996 that Stewart & Stevenson as a matter of law had no direct negligence claims. (A-4, A-5). While articulately made, this attempt to reargue Stewart & Stevenson's liability has little bearing on the question before the court, does vicarious liability equal comparative fault under Florida Statute § 768.81.

The arguments relied on by the railroads ignore their own liability and yet reargue claims which the trial court dismissed against Stewart & Stevenson. But the simple fact remains that Stewart & Stevenson was not found to be negligent, and the two railroad were found to be respectively 33% (CSX) and 8% (NRPC). (A-3).

Florida Statute § 768.81(3) states that

In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.

Stewart & Stevenson was found not to be negligent. (A-4). The railroads were found to be a total of 41% negligent. (A-2, A-3). Liability attributed to Stewart & Stevenson was vicarious based on ROUNTREE'S actions. (A-6, A-7). The liability of the railroads was of their own direct negligence and that they were active tortfeasors directly responsible for this collision. (A-2, A-3).

The Appellees in their brief raise the question of public policy and fairness. Following that argument, the question should be, whether a party (AMERICAN HOME on behalf of Stewart & Stevenson) who the trial court stated were "innocent parties" (please see A-7-22) should be penalized in favor of Defendants/Appellees CSX and NRPC who were found to be directly negligent themselves and that those directly negligent Appellees/Defendants should be liable for less than their proportionate share of liability. To use the words of the Appellees' attorneys, "it blinks at reality" that the railroads should pay less than their proportionate share of liability for their direct negligence to an innocent party.

The statute speaks solely of fault. Vicarious liability is not a question of fault, but only a party's liability to other claimants. Vicarious liability is liability without fault as this court held in Nash v. Wells Fargo Guard Services, 678 So.2d 1626 (Fla. 1996) when it specifically differentiated vicarious liability from fault.

As the Florida legislature has not set forth in this statute that fault and vicarious liability are the same thing, but rather that a plaintiff must only have his own fault assessed against him, therefore a plaintiff, such as AMERICAN HOME, should be able to recover the full extent of its damages in accordance with the Florida Statute as set forth by the legislature. The statute speaks only of fault. This makes sense in that a party should have its own fault or negligence based on its own actions assessed against it to reduce its damage award. Vicarious liability and fault are two separate concepts and should not be commingled to come forward with an order suitable for the railroads.

This court stated that:

We are convinced that § 768.81 was enacted to replace joint and several liability with a system that requires each party to pay for non-economic damages only proportionate to the percentage of fault by which the defendant contributed to the accident. Fabre v. Marin, 623 So.2d 1182 at 1185 (Fla. 1993).

Here, in order to determine fault, all parties, including Stewart & Stevenson, were included as defendants and the court found that Stewart & Stevenson had no comparative fault. (A-4).

This court has further stated that:

In Fabre, this court interpreted § 768.81(3), Florida Statutes (Supp. 1988), to mean that each defendant should pay for

non-economic damages only in proportion to the percentage of fault by which that defendant contributed to the accident. In order to do this, it is necessary to determine the percentage of fault for all entities who contributed to the accident regardless of whether they were joined as defendants. Wells v. Tallahassee Mem'l Reg'l Med. Ctr. 659 So.2d 249, 251 (Fla. 1995).

It could be further argued that § 768.81 Florida Statutes, and Fabre are limited to incidents involving joint tortfeasors. See, J. R. Brooks & Son, Inc. v. Quiroz, 707 So.2d 861 (Fla. 3d DCA 1998). In J. R. Brooks & Son, Inc., the court stated that since a corporation's liability for an accident was purely vicarious in nature for the acts of its driver, rather than joint and several, then § 768.81 did not apply. 707, So.2d 861 at 863. The court clearly differentiates vicarious liability from comparative fault as it recognizes that the vicariously liable of the corporation is different that the comparative fault of the driver. While this case deals with the liability of defendants, the analysis is that vicarious liability is different than comparative fault.

The District Court of Appeals in J. R. Brooks, clearly differentiates vicarious liability from fault and, in fact, puts a defendant's vicarious liability outside of the comparative fault statute, § 768.81, as if one is vicariously liable, one is not a joint tortfeasor. Under Brooks, the plaintiff would receive the full amount of his damages. See, J.R. Brooks & Sons v. Quiroz, 707 So.2d 861 at 863 (Fla. 3rd DCA 1998).

Applied to this action, the railroads would pay the full amount of the damages (minus the amount which ROUNTREE was responsible for under its judgment).

This court has not made a direct ruling as to whether vicarious liability is the same as comparative fault. However, this court, and others, have recognized the differences and while not directly addressing this issue, have recognized enough differences so that vicarious liability should not be applied against the plaintiff in seeking the full extent of his damages. See, Nash v. Wells Fargo Guard Services, Inc., 678 So.2d, 1262, 1264 (Fla. 1996), Mercury Motors Express, Inc. v. Smith, 393 So.2d 545, 549 (Fla. 1981) Fabre v. Marin, 623 So.2d 1182, 1185 (1993), Wells v. Tallahassee Memorial Regional Medical Center, Inc., 659 So.2d 249 (Fla. 1995).

In each of these cases, this court has recognized differences between vicarious liability and fault. This court should further clarify this issue and rule that vicarious liability does not equal comparative fault and the plaintiff should be allowed to receive the full extent of its damages.

If this court finds that vicarious liability can be apportioned just as if it were active negligence, then the railroads should have a judgment rendered against them for their full 41% of the negligence and not 41% minus a setoff for ROUNTREE'S judgments. Such a setoff, as the trial court has made, would reduce their liability to well below their proportionate share of the damages which would be owed to an

innocent party. If vicarious liability is to be assessed against AMERICAN HOME, then the railroads should still be responsible for their proportionate share. (Not merely paying their proportionate share of the damages minus the judgment against ROUNTREE.)

Therefore, the Appellant, AMERICAN HOME ASSURANCE COMPANY, respectfully requests this court to answer the first certified question in the negative and issue a ruling that vicarious liability attributed to an otherwise non-negligent plaintiff, should not be apportioned to that plaintiff in the form of comparative negligence under Florida Statute § 768.81 and reduce its damages. The Appellant would further request that this court instruct the United States Court of Appeals for the Eleventh Circuit that under Florida law, AMERICAN HOME ASSURANCE COMPANY, who has been adjudged to have zero fault and zero negligence by the trial court, should not have vicarious liability applied against it to reduce its damages and it should receive the full extent of its economic damages in accordance with Florida law.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to all counsel of record on the attached Service List on June _____, 2002.

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Appellant certifies that this brief complies with the size and fonts requirements of Rule 9.210(a)(2) of the Florida Rules of Civil Procedure.

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