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NO. 93076-7

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

DILLON SMELSER, individually AND DERRICK SMELSER,
individually

Petitioners,

vs.

JEANNE PAUL, individually

Respondent

and

RONALD SMELSER, individually

Defendant

RESPONDENT'S BRIEF IN ANSWER TO AMICUS

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I. INTRODUCTION

Amicus premises its argument here on the supposed “right of a child to obtain recovery undiminished by parental fault,” which it contends exists under common law and statute. In fact, the current law under the Tort Reform Act of 1986 provides that the right to recover of any plaintiff can and will be “diminished” by the fault allocation scheme of RCW 4.22.070. Under this scheme, unknown to prior common or statutory law, a plaintiff may not recover the share of fault allocated to any immune entity, or to “empty chairs” which are empty because the plaintiff has chosen not to join their occupants or has released them, and often bears the burden of insolvency of defendants who are held liable.

This is the clear Legislative intent, and does not conflict with RCW 4.22.020, which is a very narrow statute and does not by its terms apply to this case, or codify the common law rule of non-imputation of fault from one family member to another. Amicus’ strained reading of RCW 4.22.020, which actually involves reading language out of the statute, would prevent fault allocation to negligent spouses and parents in all cases brought by their injured spouses and children, and would unjustly saddle other defendants with their shares of fault in contravention of the core tenets of Tort Reform.

I. ARGUMENT IN ANSWER TO AMICUS

A. RCW 4.22.020 Has No Application to an Action By Minor Child for His Own Injuries

Although Amicus Washington State Association for Justice Foundation (“Amicus”) periodically refers to the common law rule of not imputing parental negligence to children, developed long ago in the era of contributory negligence as a complete bar to a tort action for the child’s injuries, as being pertinent to the current case, its actual argument is based solely on RCW 4.22.020.

It contends that section .020 embodies the common law rule and conflicts with the expansive 1986 Tort Reform scheme of allocation of fault to all “entities” contained in RCW4.22.070, so that the two statutes must be “harmonized,” and if that is not possible, section .020 must prevail. (Amicus Brief, pages 4-5) Amicus argues that RCW 4.22.020 prevents any damages-reducing allocation of fault to a negligent parent in a minor child’s action for his injuries caused by both the parent and a concurrent tortfeasor[s], since this would amount to forbidden “imputation” of fault.

This argument is not well taken, because section .020, by its express terms, does not apply to any action by a child for his own injuries. While the statute as it currently exists is confusingly written, its history and a reasonably

careful reading of its actual language make this result clear.

Amicus' recitation of the rationale and history of the common law rule of parent/ child non-imputation is accurate, until we get to 1973. At that point in time, the rule was well-established in the case law, along with the corresponding rule that negligence of one spouse could not be imputed to the other spouse to bar recovery in an action for injury to the non-negligent spouse. In 1973, neither rule was embodied in any statute.

RCW 4.22.020 was first enacted in 1973 when the Legislature adopted the rule of Comparative Negligence, Laws of 1973, 1st ex. sess., ch. 138, sec. 1-4. The basic comparative negligence rule was stated in section 1, which became RCW 4.22.010. Section 2 became RCW 4.22.020:

"NEW SECTION, Sec. 2. The negligence of one marital spouse shall not be imputed to the other spouse to the marriage so as to bar recovery in an action by the other spouse to the marriage, or his legal representative, to recover damages from a third party caused by negligence resulting in death or injury to the person."

As can be seen, this section stated the common law rule of spousal non-imputation. It covered any action for damages for death or personal injury to either spouse. As can be further seen, the section made no reference whatsoever to parent/ child imputation of negligence.

Then in 1981, the Legislature embarked on the first phase of "Tort

Reform" (Laws of 1981, ch. 27, secs. 1- 15) "to enact further reforms in tort law to create a fairer and more equitable distribution of liability among parties at fault." (sec. 1) It enacted statutory Products Liability law (sec. 2-7), substituted the concept of "fault" for "negligence" (secs. 8-9), and retained the traditional rule joint and several liability, but added a right of contribution among jointly liable tortfeasors. (secs. 11-15) All of the others sections of Chapter 27 were new, but section 10 "amended" RCW 4.22.020, as delineated in the 1981 Session Laws:

"Sec.10. Section 2, chapters 138, Laws of 1973 1st ex. Sess. and RCW 4.22.020 are each amended to read as follows:

The ~~((negligence))~~ contributory fault of one ~~((marital))~~ spouse shall not be imputed to the other spouse or the minor child of the spouse to ((the marriage so as to bar)) diminish recovery in an action by the other spouse ~~((to the marriage))~~ or the minor child of the spouse, or his or her legal representative, to recover damages ~~((from a third party))~~ caused by ~~((negligence))~~ fault resulting in death or injury to the person or property, whether separate or community, of the spouse. In an action brought for wrongful death, the contributory fault of the decedent shall be attributed to the claimant in that action."

This was a complete re-write of the initial version of the statute and made significant changes. As re-written, it no longer stated the common law rule of spousal non-imputation, nor did it state the rule of common law parent/ child non-imputation of fault. It did add "the minor child of the [at

fault] spouse” as a potential plaintiff to whom fault was not to be imputed, but then restricted that non-imputation rule to actions by the spouse or child for injury to the person or property of the [at fault] spouse/ parent. [emphasis added]. This first major revision would leave the statute covering basically the spouse or child’s loss of consortium and wrongful death/ survival actions, but the last sentence then carved out wrongful death actions for required imputation of fault, further restricting the reach of the statute. The reasons for these major changes are not apparent in the context of the 1981 Act.

Finally, as relevant here, in 1987, the Legislature put together an amalgam of “Civil Actions and Procedures – Revisions” as Chapter 212 of the Laws of 1987, which included section 801, amending RCW 4.22.020:

“Sec.801. Section 2, chapters 138, Laws of 1973 1st ex. sess., as amended by section 10, chapter 27, Laws of 1981 and RCW 4.22.020 are each amended to read as follows:

The contributory fault of one spouse shall not be imputed to the other spouse or the minor child of the spouse to diminish recovery in an action by the other spouse or the minor child of the spouse, or his or her legal representative, to recover damages caused by fault resulting in death or in injury to the person or property, whether separate or community, of the spouse. In an action brought for wrongful death or loss of consortium, the contributory fault of the decedent or injured person shall be attributed to the claimant in that action.”

The addition of “loss of consortium” as a further restriction on the

now limited “rule” of non-imputation was obviously made in response to the decision in Christie v. Maxwell, 40 Wn.App. 40, 696 P.2d 1256 (1985). The court in Christie had held that, under RCW 4.22.020, no fault of the injured spouse could be imputed to the plaintiff spouse in a loss of consortium case, in part because in the 1981 amendment to section .020 the Legislature had added the requirement that fault be imputed in the conceptually similar action for wrongful death, but did not do the same for loss of consortium. The Christie court felt that, while it may be “basically unfair” to allow full recovery in a loss of consortium case when the wife’s recovery would have been reduced by imputation of the husband’s substantial fault had the case been a wrongful death action instead, it was “constrained by...rules of statutory construction” that “[the] court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or inadvertent omission.” Id. at 48. The Legislature obviously disagreed with the Christie result, and promptly amended the statute accordingly.

At page 9 of its brief, Amicus truncates, and thereby completely misstates the language of the current statute pertinent to this appeal. Shorn of excess verbiage for readability, but leaving in the applicable restrictive language (underscored in the passage below), in fact the pertinent statutory

language is:

“The contributory fault of one spouse...shall not be imputed to ... the minor child of the spouse...to diminish recovery in an action by...the minor child...to recover damages caused by fault resulting in death or injury to the person or property... of the spouse. In an action brought for wrongful death or loss of consortium, the contributory fault of the decedent or injured person shall be imputed to the claimant in that action.”

As the statute exists today, whatever may be left of the provision for non-imputation of fault between spouses/ domestic partners or from parents to minor children, RCW 4.22.020 most certainly does not apply in an action by a minor child for his own injuries. The statute clearly only applies to actions by the other spouse or child for injuries “to the person...of the spouse.” While the reach of the statute has been significantly narrowed, almost to non-existence, by requiring imputation of fault in wrongful death and loss of consortium cases, by far the most common of such actions, it still has some meaning, for instance, forbidding imputation in an action by the spouse or child to recover medical expenses paid by them on behalf of the injured, at fault spouse/ parent.

When the statute is read as written-- that it only applies to actions for injuries to the negligent spouse/ parent-- the Legislature’s use of the term “contributory fault” of the spouse (added in 1981), meaning failure to

exercise care for one's own safety, to describe what is "not imputed" is perfectly logical and sensible. Amicus' argument in footnote 1, page 9, of its brief that "contributory" fault must also mean failure to exercise care for the protection of others or the statute becomes nonsensical is not well taken, since no action for the negligent spouse/ parent's injury to "another," such as a child or spouse, " is within the coverage of the statute.

Finally, Amicus argues (brief, page 7-8) that Anderson v. Akzo Nobel Coatings, 172 Wn.2d 593, 260 P3d 857 (2011) has accepted its view that, despite its actual language, RCW 4.22.020 codifies the common law that the negligence of the parent may not be imputed to the child. (This view is also erroneously included in the Comment to WPI 11.04, although the authors did note that "RCW 4.22.020 may have been abrogated by RCW 4.22.070 ...enacted as part of the 1986 Tort Reform Act.")

In fact, the Akzo court merely made a cryptic citation to section .020 in its dictum at page 615 of that opinion. The Court's actual holding was that at the early, pre-discovery closing stage of the proceedings below, the trial court did not err in denying plaintiff's Summary Judgment motion to dismiss defendant's affirmative defense that the plaintiff had been contributorily at fault/ assumed the risk for her own injuries by refusing to wear a respirator.

In that context, the Court noted that if the comparative fault claim proceeded to trial after remand, care would have to be taken as to how the matter was presented to the jury, concluding “see e.g: RCW 4.22.020 (negligence of the parent may not be imputed to the child.)”

Neither party in Akzo discussed or even cited to RCW 4.22.020 in their briefing, and the application of that statute was not before the Court for decision. The Court did decide that the matter of the plaintiff mother’s failure to exercise care for her own safety (“contributory fault”) was a potentially appropriate defense in her action for her own injuries. It was in that situation that the Court correctly expressed concern that the jury be informed that her negligence should not be imputed to the child in the case for the minor’s own injuries. This is the appropriate use of WPI 11.04, which states that simple principle. The fact that the Comment to the WPI erroneously cites to RCW 4.22.020 as embodying the common law rule (which as fully discussed above, it does not), may well be the source of reference to the statute in Akzo.

B. The Express Terms of RCW 4.22.070(1) Require That Fault Be Allocated to All Entities Causing an Injury, and This Does Not Result in Any “Imputation” of Fault From One Entity to Another

Common law “imputation” of negligence from one spouse to the other or from a parent to a child was based on the notion that the marital

community or the family unit were a single entity for tort purposes, both economically and morally. Since negligence by the claiming party was an absolute bar to his recovery for his own injury, the courts would not allow the negligent spouse or parent to “profit” from his wrongdoing by allowing recovery for injuries to a spouse or child, however personally innocent. Therefore, the negligence of the spouse or parent was deemed to be the negligence of the claiming spouse or child. See generally: Ostheller v. Spokane & I.E.R., 107 Wash. 678, 182 Pac. 630 (1919) This was the harsh result that was rejected when the courts developed the rules of non-imputation.

This “right,” not to be artificially saddled with the negligence of a spouse or parent, still exists. Under modern tort law, each actor in an injury producing event is held to the consequences of his own actions only. The allocation of percentages of fault for purposes of several-only and modified joint and several liability created by RCW 4.22.070 was a totally new concept in 1986, and has nothing to do with the prior common law notions of imputation of fault from one party to another.

Amicus argues at length that RCW 4.22.070 conflicts with RCW 4.22.020, and that the two statutes must be reconciled. As discussed above,

section .020 has no applicability to a case such as this one, for injuries to the child caused in part by the negligence of his parent, so there is no need to engage in any such exercise. Moreover, even if Amicus' reading of section .020 were correct, the allocation scheme of RCW 4.22.070 does not conflict with the rule—be it common law or statutory—that the negligence of a parent not be “imputed” to his child, nor that the negligence of a spouse not be “imputed” to the other spouse. These are “two distinctly different matters.” Sisk, Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform, 16 University of Puget Sound Law Review 1, 54-58. (1992).

Sisk's analysis, discussed in Respondent's Supplemental Brief, pages 7-8 bears repeating here for the convenience of the court:

“This kind of result [.070 allocation] has been criticized as effectively imputing the negligence of the parents to the child. This is not the case. No negligence is imputed to the child, nor is the child limited in his or her ability to recover from a third-party to the full extent of the third party's fault. The third-party simply will not be held liable for the share of the harm caused by another party...[I]t is not apparent why another party should be held responsible for the parent's proportionate responsibility simply because of the fortuitous circumstance that one of the culpable parties was the parent of the injured plaintiff.” Id. at 54

RCW 4.22.070 is unambiguous in its requirement that the percentage of fault of every "entity" causing an injury be determined, and that judgment be entered in accordance with such determination. A plaintiff's own fault, if any, reduces his recovery, but no fault of any other entity is assigned or "imputed" to him. If he is fault-free, he remains so after fault has been allocated to others, and can take advantage of the statutory "modified" joint and several liability. If he is partially at fault, his share is not increased by the percentage of fault assigned to any other entity. Plaintiff is simply restricted to recovery from each defendant in proportion to that party's percentage of the total fault.

Particularly, allocation of fault to immune entities does not have the effect of imputing that entity's fault to the plaintiff. It is true that plaintiff cannot recover the share of fault allocated to an immune entity, but that is simply part of the over-arching statutory scheme of Tort Reform. There is no basis in the statute or sound reason why a party defendant should shoulder the share of an immune entity, whether parent or any other, so that a plaintiff's recovery not be "diminished." In fact, the legislative intent is clearly to the contrary: that plaintiffs not recover for the share of fault attributable to immune entities. Humes v. Fritz Companies, 125 Wn.App. 477, 491, 105 P.

3d 1000 (2005).

Johnson v. Recreational Equipment, Inc., 159 Wn.App.939, 247 P.3d 18 (2011), discussed extensively by Amicus (brief, pages 13-16) is not at all on point in this matter. That court's refusal to allow a retailer to allocate fault to the manufacturer of a store-branded product was based on a specific provision of the 1981 Product Liability Act, RCW 7.72.040(2), which creates a statutory vicarious liability between such a manufacturer and retailer: "[a] product seller...[has] the liability of a manufacturer." Id. at 947.

This provision has the effect of rendering the manufacturer and branding retailer a single entity for allocation of fault purposes. It is the equivalent of the vicarious liability provisions incorporated in RCW 4.22.070 (1)(a) for ordinary tort actions: that a "party shall be responsible for the fault of another" in the case of parties "acting in concert" and of principal and agent or master and servant. Id. at 950. This is in no way comparable to a defendant tortfeasor allocating fault to an immune entity such as a parent; they are clearly two separate "entities," each of whose separate acts contributed causally to the plaintiff's injury.

C. Even if There Were a Conflict, RCW 4.22.070 Prevails Over Any Contrary “Rule” Regarding Imputation of Fault

Since as argued above, any existing rule that the fault of a parent not be imputed to a child, or the fault of a spouse not be imputed to the other spouse in any action is not statutory, but remains a strictly common law concept, the precedence of RCW 4.22.070 is clear. The 1986 Tort Reform Act expressly made radical changes in many areas of common law, particularly the allocation of fault to all responsible entities and the resulting several-only and modified joint and several liability scheme. See: Washburn v. Beatt Equipment, 120 Wn.2d 246, 294, 840 P.2d 860 (1992), where the Court discussed the full extent of the changes that the Legislature intended to and did make to the prior common law, particularly the elimination of “pure” joint and several liability, replacing it with fault apportionment.

To the extent that RCW 4.22.020 could be interpreted as applying its rule of non-imputation of fault from parent to child or spouse to spouse in an action by the child or innocent spouse for his or her own injuries (as opposed to what the statutory language actually says), and that this conflicts with the fault allocation required by RCW 4.22.070, the latter statute must prevail. It is both the most recent and the more specific and comprehensive. See: State v. J.P., 149 Wn.2d 444, 69 P.3d 318 (2003); Sisk, supra, at 56, fn. 235.

As to timing, it was enacted in 1986, versus 1981 for the current version of RCW 4.22.020. The 1987 amendment to section .020 is not relevant to this analysis, since it did no more than add loss of consortium claims to the exception requiring imputation for wrongful death actions, nor is the 2008 amendment which was simply a “housekeeping” amendment to import “domestic partners” into all statutes relating to spouses.

As noted above, RCW 4.22.070 was sweeping change to the concepts of fault and liability in tort actions. It applies to “all actions involving the fault of more than one entity,” and requires that fault “shall” mandatorily be apportioned to all such entities, including immune entities. See: Clark v. Pacificorp, 118 Wn.2d 167, 181, 822 P.2d 162 (1991) Any existing statute that would conflict with this broad mandate must be disregarded in favor of the overriding scheme of Tort Reform.

D. Amicus’ Reading of RCW 4.22.070 Would Produce an Absurd Result That Would Do Significant Harm to the Allocation of Fault Scheme Central to the 1986 Tort Reform Act

Amicus attempts to argue that its reading of RCW 4.22.020 can be used as a scalpel to address the specific issue here and carve out only an immune parent in a suit by his child from the required allocation of fault to all entities under RCW 4.22.070. However, reading section .020 as Amicus

posits it must be read would instead cut a huge swath through the overall allocation of fault scheme and reallocate fault to non-family defendants in a large number of cases unrelated to parental immunity.

If RCW 4.22.020 actually applies to any action by a spouse or minor child for his or her own injuries involving the negligence of the other spouse or parent along with another tortfeasor, and if the direction that the spouse/parent's negligence not be "imputed" actually means that no fault may be allocated to that spouse/parent under section .070, this would lead to an absurd result in cases well outside the parental immunity context. It would mean that no negligent spouse or parent could ever be allocated fault in any case involving injury to the other spouse or child. This would take a huge group of negligent actors outside the reach of section .070, in ordinary and common accidents, leaving co-tortfeasor defendants to pay the spouse/parent's share of damages.

Many actions in which negligence of a parent causes injury to a child, and all actions in which negligence of a spouse injures the other spouse, do not involve immunity. Freehe v. Freehe, 81 Wn.2d 183, 500 P.2d 771 (1972) abolished inter-spousal immunity in all cases. Parental immunity from suit by a child only applies to injuries caused by negligent supervision; all other

actions by the child, such as automobile injuries, injuries in business activities, or any other injury arising outside the “parental capacity” are subject to suit under ordinary negligence rules. See: Zellmer v. Zellmer, 164 Wn2d 147, 155, 188 P.3d 497 (2008).

In such an action, if the plaintiff child or spouse were fault-free, this would implicate modified joint and several liability under RCW 4.22.070(1)(b). The most common such scenario would be the parent/ spouse driving a car in which the injured child and/or other spouse was a passenger, and an accident caused by the combined negligence of the parent/spouse and another driver. If RCW 4.22.020 precludes the other tortfeasor defendant from allocating fault to the parent/ spouse driver in a suit by the child or other spouse, the defendant driver would be required to pay 100% of the damages, regardless of how miniscule his own fault might be. Even in a case where the plaintiff child or other spouse was contributorily at fault, so that liability is several only, if the non-family defendant could not allocate fault to the negligent parent/ spouse, he would still probably end up paying more than his proper share, since the parent/ spouse’s fault has to “go somewhere” in the 100% fault calculation.

Surely this result was not intended by the Legislature. Why should the

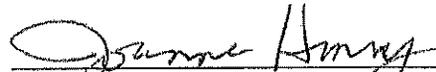
non-family defendant be held responsible for the other driver's share of the fault "simply because of the fortuitous circumstance that one of the culpable parties was the parent [or spouse] of the injured plaintiff"? See: Sisk, supra at 54. This would be an absurd result that can and should be avoided by reading RCW 4.22.020 exactly as written by the Legislature, not as posited by Amicus.

III CONCLUSION

RCW 4.22.020 and RCW 4.22.070 do not conflict, and RCW 4.22.070 must be applied as written to require allocation of fault to a negligent parent, whether immune or not, in an action by his child for injury caused by the parent and another tortfeasor. The Court of Appeals decision affirming the trial court was a correct reading of an unambiguous statute, and should be affirmed.

Respectfully submitted this 3rd day of November, 2016.

SLOAN BOBRICK, P.S.


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AMENDED DECLARATION OF FILING AND SERVICE

I certify that on the 3rd day of November, 2016 I caused to be filed with the Supreme Court of the State of Washington a copy of the RESPONDENT'S BRIEF IN ANSWER TO AMICUS, to which this certificate is attached by e-mail to supreme@courts.wa.gov and served this Response by e-mail, by consent, to counsel for Petitioners and Amicus:

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Dear Clerk:

Attached for filing is the Respondent's Brief in Answer to Amicus. By consent of counsel, this Brief is being served by e-mail.

Please acknowledge receipt of this filing.

Thank you.

Joanne Henry, WSBA #6798
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