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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

SUPPLEMENTAL BRIEF OF RESPONDENT

SLOAN BOBRICK, P.S.
By: Joanne Henry, WSBA #6798
Attorneys for Respondent Paul
4810 Pt. Fosdick Drive NW, #83
Gig Harbor, WA 98335
(253) 627-5626

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I. INTRODUCTION

The issue in this case is whether the Legislature meant precisely what it said in 1986 when it enacted the sweeping "Tort Reform" allocation of fault provisions codified in RCW 4.22.070, requiring that fault in a negligence action be apportioned to every at-fault entity, including entities immune from liability, and again in 1993 when it amended that section to exclude from the allocation formula only entities with immunity under the Industrial Insurance Act. Petitioners' argument that parents who have common law immunity from liability to their children for negligence should also be excluded from the allocation formula must be rejected as clearly at variance with the Legislature's intent.

Petitioners are certainly dissatisfied with the policy choices made by the Legislature 30 years ago, and modified only once in the ensuing years, which radically changed and restricted the way injured plaintiffs may recover tort damages and from whom they may recover them. However, if any change to that policy is to be made, it must come from the Legislature, and not from this Court.

This matter has been thoroughly briefed by the parties, in the Court of Appeals and in the Petition for Review and Answer. Respondent will use this Supplemental Brief to address a few points which could perhaps benefit from

some additional discussion, and in doing so will endeavor to avoid undue repetition.

II. SUPPLEMENTAL ARGUMENT

A. “Immune” Parents, Along With All Other “Immune” Entities, Are Included in the Allocation Formula of RCW 4.22.070(1), and There is No Authority to Suggest that This Inclusion Was Unintended

Petitioners primarily rely on a Law Review article by Professor Cornelius Peck, published shortly after the enactment of the 1986 Tort Reform Act, (Washington’s Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability, 62 Wash. Law Rev. 233 (1987)) to argue that in its haste to provide relief to partially at-fault tort defendants, the Legislature inadvertently swept too broadly by providing that all “entities immune from liability to the claimant” be allocated a share of the 100% fault for each injury. Without any supporting argument or authority, from Legislative history or otherwise, Peck posits that “[a]llocating fault to parents...will produce what were probably unanticipated results and complications.” Id. at 235. From this, petitioners argue that the statute is ambiguous and evinces a “lack of legislative intent” to include parents among “all” immune entities. (Petition, page 3)

It is clear that Peck disagrees with the wisdom of including immune parents in the statute’s allocation mix, but even he recognizes that that is in

fact what the statute as written provides:

“Although the primary purpose of the provision permitting allocation of fault to an entity with immunity was to provide relief for defendants in workers’ compensation third party tort actions, the provision [is] not limited in its application to those cases. It will instead be applicable to any other ‘entity’ which has an immunity from tort liability to the plaintiff. Parents, for example, [who] have a general immunity from liability to their children for failure to properly instruct them and supervise their activities.”
Peck at 245 [emphasis added]

Petitioners’ argument here: that with respect to suits by their children, parents are neither “entities” nor encompassed within the ordinary meaning of the term “immune” as both are used in section .070 is not supported by even Peck’s analysis. In fact, it was Peck who, after complaining that the statute did not contain a definition of “entity,” supplied the very definition ultimately adopted by the Court (citing to his article) in Price v. Kitsap Transit, 125 Wn.2d 456, 461, 886 P.2d 556 (1994): a “juridicial (sic) being capable of fault, and ... not includ[ing] inanimate objects or forces of nature.” 62 Wash. Law Rev. at 243. Peck also stated without hesitation that the term “will include...parents with a defense to suit by children.” Id. at 244.

Note also that Peck does not share petitioners’ confusion as to jurisprudential nature of parents’ common law freedom from liability to their children, describing the status of parents in 1987 as a “general immunity from

liability” in suits by their children, as opposed to a lack of duty or lack of capacity to be “negligent.” Id. at 245. This is not surprising, since the Supreme Court had very recently reaffirmed this principle in three decisions published in January 1986: Baughn v. Honda Motor Co., 105 Wn.2d 118, 712 P.2d 293 (1986); Talarico v. Foremost Ins. Co., 105 Wn.2d 114, 712 P.2d 294 (1986); and Jenkins v. Snohomish County P.U.D., 105 Wn.2d 99, 713 P.2d 79 (1986), stating that the “rule of parental immunity [applies] where the parent may have been negligent but was not engaged in willful misconduct...” Jenkins at 105. (All reaffirmed in Zellmer v. Zellmer, 164 Wn.2d 147, 188 P.3d 497 (2008))

Peck’s 1987 musings that the Legislature’s inclusion of parents among the immune entities to whom fault must be allocated was unintended have not been borne out by subsequent events. As previously argued, (Answer to Petition, page 9), when the Supreme Court ruled in Clark v. Pacificorp, 118 Wn.2d 167, 822 P.2d 162 (1991) that the clear and unambiguous language of RCW 4.22.070(1) required that Industrial Insurance immune employers were among the “every entity” to which fault must be allocated, affecting the Department’s lien on workers’ third party tort recoveries, the Legislature acted promptly to amend the statute to change that result by removing Title 51 immune entities from the allocation mix. The

Peck article was discussed extensively in Clark, so the Legislature must have been aware of his criticisms of applying section .070 to allocate fault to “immune” parents, but did not act on that criticism to change that result. This omission is a strong indicator of Legislative intent, which must be respected.

B. RCW 4.22.020 is Not Applicable and Does Not Conflict With RCW 4.22.070

Petitioners argue that “construction” of the (clearly unambiguous) language of section .070 is nonetheless necessary to “harmonize” it with prior common law and with RCW 4.22.020. Of course, the fault allocation/ proportional liability scheme of section .070 cannot be harmonized with the prior common law rule of joint and several liability. (See: Respondent’s COA Brief, page 18) The common law concept that the negligence of a parent cannot be “imputed” to his child apparently retains some viability, but RCW 4.22.020 does not codify this “rule,” as is plain from its language and history.

RCW 4.22.020, as originally enacted as part of the new comparative negligence scheme in 1973, simply imported the common law rule that the fault of one “marital spouse” was not to be imputed to the other spouse. (Laws of 1973, 1st ex. sess. c.138, sec. 2). It was reworked as part of the first iteration of “Tort Reform” in 1981 to its current format, adding that the negligence of a spouse was not to be imputed to the other spouse or a minor

child in an action for injury to the negligent spouse. (Laws of 1981, c.27, sec. 10)¹ Petitioners' argument to the contrary, (Petition, page 14) section.020 has not been "consistently interpreted" as stating the general rule of non-imputation of negligence from parent to child. In fact, it has only once even been mentioned in this context, in dictum in Anderson v. Akzo Nobel Coatings, 172 Wn.2d 593, 615, 260 P.3d 857 (2011),

However, even if section .020 could be read as argued by petitioners, there is no conflict and no need to "harmonize" it with section .070 for two reasons: First, the appropriate rule of construction is that, in the event of an apparent conflict between two statutes, the more recent and more specific act prevails. See: State v. J.P., 149 Wn.2d 444, 69 P.3d 318 (2003), thoroughly discussing this rule. In applying that rule, the Court in J.P. noted that even if one "may wish that the Legislature had not said what it did say, we cannot simply wish away the Legislature's specific statement" in the later statute. Id. at 457. Section .070's explicit and mandatory requirement that fault be allocated to "every entity" is both more recent (1986) and more specific than the general language of section .020, and must prevail. See: Sisk, Interpretation of the Statutory Modification of Joint and Several Liability:

¹ The statute was amended in 1987 and 2008 in particulars not relevant to the current argument: to add imputation of fault in loss of consortium cases and to include domestic partners along with spouses. (Laws of 1987, c. 212, sec 801, Laws of 2008, c.6, sec 401) .

Resisting the Deconstruction of Tort Reform, 16 University of Puget Sound Law Review 1, 56. fn. 235 (1992).

Second, as Sisk notes, there is in fact no conflict because “[t]he allocation of fault to all responsible entities mandated by RCW 4.22.070 and imputation of one individual’s negligence to another are two distinctly different matters.” Id. at 56-57.

“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

Finally, Sisk points out that the allocation scheme does not mean that negligence of the parent is actually imputed to a young child (or the negligence of a spouse imputed to a fault free spouse, such as an automobile passenger). If it were, the plaintiff child or spouse would no longer be “fault free,” and Tort Reform “joint and several” liability under section .070(1)(b) would not be available at all. Id. at 58. Instead, the plaintiff retains his or her fault-free status and can recover jointly and severally from all defendants against whom judgment is entered.

There is simply no conflict between sections .070 and .020, and the unambiguous terms of .070 apply here to require allocation of fault to petitioners' father, Ronald Smelser.

C. Plaintiffs Were Not Entitled to a Judgment Against Ronald Smelser Because They Made No Claim Against Him

This issue is governed by the rule stated in Mailloux v. State Farm, 76 Wn.App. 507, 887 P.2d 449 (1995), and Adcox v. Children's Hospital, 123 Wn.2d 15, 864 P.2d 921 (1993). As in those two cases, plaintiffs made a deliberate choice to not make a claim of fault against another party to the litigation, here, their father Ronald Smelser, and therefore cannot claim the benefit of fault allocated to him at the behest of defendant Paul.

Mailloux's theory of his case at UIM arbitration was that only one of two other drivers in the collision was at fault. When the arbitrator found fault on the part of the second driver, Mailloux's judgment against the other driver was reduced by that percentage of fault, and the two drivers could not be jointly and severally liable to the benefit of Mailloux's insurer. Children's Hospital's theory of its case at trial was that no one, including itself and two settling doctors, was at fault. When the jury found it at fault, the Hospital was not entitled to have fault also allocated to the settling doctors after the fact for the purpose of reducing its judgment. The Smelser plaintiffs' theory

of their case at trial was that only Jeanne Paul was at fault. When the jury found both Ronald and Jeanne Paul at fault based on Paul's affirmative defense, Derrick could only recover the portion of his damages allocable to the party he had claimed against. All of these results were correct under RCW 4.22.070, which is "not self-executing." The party seeking the benefit of fault allocation must assert that claim and prove it. Adcox, supra at 25.

When the court ruled that Paul validly raised an "empty chair" defense that Ronald Smelser should be allocated fault in the accident despite his parental immunity, plaintiffs did indeed face a choice of abandoning their claim that only Paul was at fault or electing to also make a claim against their father. They did amend their Complaint to add Ronald as a party, (CP 329-332) and they argue (Petition, page 16) that this Complaint stated a claim for negligence against him. Assuming for the sake of argument that this is correct, (although the only factual allegations of duty of care and breach of duty, in paragraphs 3.1 - 3.3 of the Amended Complaint, refer to "operat[ing] her [Paul's] vehicle" as the sole proximate cause of the accident), this allegedly pleaded claim was never pursued.

When Ronald defaulted to the Amended Complaint, and thereby arguably waived his parental immunity, which would have allowed his sons to recover against him, plaintiffs neither requested entry of a Default

Judgment pre-trial nor requested that their “claim” against him be submitted to the jury. In the course of settling the jury instructions, when asked whether a claim was being made against Ronald, plaintiffs’ counsel plainly stated on the record that Ronald was not negligent and the plaintiffs were not claiming that he was. (RP 1596-1598, 1600-1602.) They agreed to the Court’s jury Instruction No. 12 (CP 1632-1633) that only Paul was alleging Ronald Smelser’s negligence and that it was an affirmative defense on which she had the burden of proof. (RP 1642, 1653). In their closing argument to the jury, plaintiffs repeatedly argued that Ronald Smelser was not negligent and that Jeanne Paul was 100% at fault. (CP 1616-1617, RP 1725, 1811, 1814)

This was a strategic decision on plaintiffs’ part, just as the claimant did in Mailloux and the defendant Hospital did in Adcox. For whatever reasons, even if he had effectively waived his parental immunity, the Smelser sons did not want to take a Judgment against their father. They gambled that they could persuade the jury to apportion 100% of the fault to defendant Paul and thereby recover fully from her, and they lost. It is neither inconsistent with the statutory scheme of fault allocation and limited joint and several liability, nor is it unjust, to hold them to the results of their choice.

III. CONCLUSION

RCW 4.22.070 is unambiguous that parents who are immune from liability to their children for negligence are among the entities to whom fault must be allocated in a tort action for injuries to the children, and there is no authority to support petitioners' argument that this inclusion was unintended and needs to be "construed" away. Neither is RCW 4.22.070 in conflict with RCW 4.22.020, and even if it were and construction were required, as the later, more specific statute, section .070 must prevail over the earlier, more general enactment.

The Court of Appeals decision here was a correct reading of an unambiguous statute. Allocation of fault to immune parents in suits by their children is fully consistent with the public policy of Tort Reform, as expressed by the Legislature: that non-immune defendants pay only their proportionate share of a claimant's damages. Furthermore, even if an otherwise immune entity has waived his immunity, in order for a claimant to allocate fault for purposes of a "joint and several" judgment, the claimant must make a claim against that party and prove fault.

Any quarrel that petitioners have with the clear language and policy of the applicable Tort Reform statutes must be addressed to the Legislature, and not this Court.

Respectfully submitted this 30th day of September, 2016.

SLOAN BOBRICK. P.S.

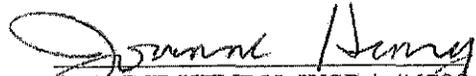

By: JOANNE HENRY, WSBA #6798
Of Attorneys for Respondent Paul

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I certify that on the 5th day of October, 2016 I caused to be filed with the Supreme Court of the State of Washington a copy of the SUPPLEMENTAL BRIEF OF RESPONDENT, to which this certificate is attached by e-mail to supreme@courts.wa.gov and served this Brief by e-mail, by consent, to counsel for Petitioners:

Ben F. Barcus
Paul A. Lindenmuth
ben@benbarcus.com
paul@benbarcus.com

DATED October 5, 2016 at Tacoma, Washington


JOANNE HENRY, WSBA #6798
Of Attorneys for Respondent Paul

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Dear Clerk:

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Joanne Henry, WSBA #6798
Attorney for Respondent Paul