

CONSTITUTIONALITY OF NON-PARTY APPORTIONMENT IN JURY CHARGES TO DETERMINE DAMAGES

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The practice of permitting jurors to consider and apportion responsibility to non-parties in a civil action and having that responsibility represent a percentage of liability for damages violates the substantive and procedural due process rights of the parties to the action and the non-parties. Such conduct should be abrogated in the interest of rights of the parties and policy considerations of the public as a whole.

THE PLIGHT OF THE INNOCENT PLAINTIFF

In September of 1988, R.M., a Native-American child, was placed in a foster home with Dennis and Martha Kuipers.¹ Dennis Kuipers is also a Native-American and therefore received special deference in the placement of the young R.M.² She was four-years-old; this was her seventh foster placement.³

On October 2, 1988, just a few short weeks after being placed with the Kruipers, R.M. was beaten by Dennis Kuipers in their family van outside the Rax Restaurant in Bozeman, Montana.⁴ “She had black marks on her cheeks...[, had] a fixed stare as though she were in shock...[, and]...looked like a zombie.”⁵ The little girl was beaten, in the view of restaurant patrons, because she had “wet her pants.”⁶ The incident was reported to the Department of Family Services by responding officers and the Department conducted a “very limited” investigation.⁷ Apparently, Mr. Kuipers had a conversation with the placement supervisor

¹ Newville v. State Dept. of Family Services 883 P.2d 793, 796.

² Id.

³ Id.

⁴ Id.

⁵ Id.

⁶ Id.

⁷ Id. at 798.

wherein he denied ever hitting the four-year-old girl.⁸ This conversation “minimized the seriousness of the incident.”⁹

Less than a month later, on November 1, 1988, R.M. was hospitalized as a result of another brutal beating at the hands of Dennis Kuipers.¹⁰ As a result of this beating, R.M. was “in a coma,” had “bruises over most of her body,” suffered from frequent seizures, was “paralyzed on one side of her body,” and suffered “irreversible” brain damage.¹¹ The four-year-old “was hospitalized for two weeks.”¹²

Jeannine Newville and Damon Gannett were appointed guardians ad litem for the young R.M.¹³ Exhausting every possible remedy for the young girl’s deplorable plight, they brought suit against Dennis Kuipers, Martha Kuipers, Edna Goodwin (the Kuiper’s counselor), the Department of Family Services, and the placement supervisor.¹⁴ The trial court dismissed the claim against the placement supervisor, likely under qualified immunity.¹⁵ Dennis Kuipers and his counselor Edna Goodwin settled prior to trial and both were dismissed from the case.¹⁶

Despite this settlement, the Department presented a special verdict form including Edna

⁸ Newville v. State Dept. of Family Services 883 P.2d 793, 798.

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ This appointment is not in the opinion. The fact that it occurred can be inferred from the caption of the case.

¹⁴ Newville v. State Dept. of Family Services 883 P.2d 793, 798.

¹⁵ Under Barr v. Matteo, (360 U.S. 564, (1959)) the Supreme Court held that federal executive officers have an absolute immunity from common law tort liability for “discretionary functions.” If the conduct has “some reasonable relation to and connection with” the defendant’s duties, the executive official is immune. Williams v. Collins, 728 F.2d 721, 727 (5th Cir. 1984). State courts applied this *Barr* doctrine in a various number of ways; however, some provide state officers only with qualified immunity for discretionary functions so long as fraud, malice, or intentional conduct is not involved. See: Elder, David A. Privacy Torts § 2:16. It is important to note the strategy of dismissal pursuant to qualified immunity. Defense counsel for the Department likely moved to dismiss the charges against the Supervisor in order to prevent the Supervisor from cross-claiming against the Department, under a theory of respondeat superior, for contribution for any apportionment of liability the jury attributes to the Supervisor for failing to conduct an investigation into the Kuipers. This is a convenient strategy to allow the Department to limit its exposure only to apportionment for errors in procedural policies. If the Supervisor were a party to the case, apportionment of responsibility for his conduct would be subject to contribution by the Department. Because he is dismissed, no such responsibility will be attributed to the Department by way of contribution pursuant to Respondeat Superior.

¹⁶ Newville v. State Dept. of Family Services 883 P.2d 793, 798.

Goodwin.¹⁷ The jury was instructed to apportion liability among the respective defendants and the non-party.¹⁸ Due to the inclusion of the non-party, Edna Goodwin, the faultless and innocent R.M. had her award of \$637,480.00 in damages reduced by 35%, the apportioned fault of Edna Goodwin.¹⁹

The plaintiffs appealed, asserting that the inclusion of a non-party in apportionment of liability and damages was unconstitutional.²⁰ The Supreme Court of Montana righted the wrong of the trial court and ruled as every jurisdiction should hold: “[Montana’s non-party apportionment statute] unreasonably mandates an allocation of percentages of negligence to nonparties without any kind of procedural safeguard. As a result, plaintiffs may not receive a fair adjudication of the merits of their claims.”²¹

THE RISE OF COMPARATIVE NEGLIGENCE

Non-party apportionment of damages is a policy that grew out of the proliferation of comparative negligence. To see the abridging effect non-party apportionment has on constitutional protections, we have to first examine the rise of the doctrine of comparative negligence. In so doing we will see how a policy to protect the slightly negligent plaintiff became a catalyst for wide-spread pro-defendant tort reform that circumvents joint and several liability by judicial and legislative action.

At common law, a Plaintiff was contributorily negligent if he failed to use reasonable care in protecting himself.²² As Lord Ellenborough stated in a British opinion in 1809, “a party is not to cast himself upon an obstruction which has been made by the fault of another, and avail

¹⁷ Newville v. State Dept. of Family Services 883 P.2d 793, 798.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 795.

²¹ *Id.* at 803.

²² See: Restatement (2d), Torts, § 464

himself of it, if he do not himself use common and ordinary caution to be in the right.”²³ Accordingly, if a defendant proves a plaintiff’s contributory negligence, then the plaintiff is barred from recovery.²⁴ Concerns of negligent plaintiffs exploiting coincidental peril is not an antiquated concept. Well into the 20th century scholars revered the doctrine of contributory negligence as being “a necessary—indeed virtually the only – means of exercising some limited judicial control.”²⁵ Supreme Court Justice Powell continues in his 1957 article, “with all its theoretical faults, [contributory negligence] does maintain a degree of balance between judge and jury which would be lost entirely under comparative negligence.”²⁶

Despite the pleas of legal scholars, contributory negligence has been replaced with some form of comparative negligence in nearly every jurisdiction.²⁷ Some jurisdictions took Mississippi’s lead in adopting the principles of comparative negligence by statute.²⁸ Other jurisdictions abrogated contributory negligence by judicially adopting a comparative negligence standard.²⁹ In either case, “the central reason for adopting a comparative negligence system lies in the inherent injustice of the contributory negligence rule.”³⁰ Contributory negligence is “inequitable in its operation because it fails to distribute responsibility in proportion to fault.”³¹

Comparative negligence is a misnomer. The doctrine requires that the fact-finder compare the “responsibility” of the parties.³² The restatement specifically uses the language of

²³ Butterfield v Forrester 103 E.R. 926 (1809).

²⁴ Contributory Negligence is not a completely abrogated doctrine in certain circumstances. See: Breezevale Ltd. v. Dickinson, 759 A.2d 627, 634 (D.C. 2000) (stating in pertinent part that, “in [the] medical malpractice context, contributory negligence is a valid defense...”)

²⁵ Powell, Jr., Lewis F. Contributory Negligence: A Necessary Check on the American Jury, 43 A.B.A.J. 1005, 1062 (1957).

²⁶ *Id.*

²⁷ Comparative Negligence Manual (3d ed.) Appx III.

²⁸ See: Miss. Code § 11-7-15, enacted in 1910.

²⁹ E.g. Hoffman v. Jones, 280 So.2d 431, 436 (Stating in dicta: “we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.”)

³⁰ Kaatz v. State, 540 p.2d 1037, 1048

³¹ Li v. Yellow Cab Company, 13 Cal.3d 804, 810

³² See: See: Restatement (3d), Torts, § 7

“responsibility” and not “negligence”, “fault”, or “causation.”³³ If the jury were to apportion liability and damages based on the parties’ comparative “negligence” as opposed to their “responsibility”, the jury would have to consider independent duties, independent causation, and independent resulting damages. “Responsibility,” on the other hand, is “a general and neutral term.”³⁴ This allows the fact-finder to consider the actions of both parties in tandem when apportioning liability. In determining the responsibility of each party, the jurors are charged with considering both “the nature of the person's risk-creating conduct ...” and “the strength of the causal connection between the person's risk-creating conduct and the harm.”³⁵

Apportionment of responsibility is merely the determination of liability, not the determination of damages.³⁶ However, most comparative negligence jurisdictions apply the restatement which allows for a reduction in the plaintiff's recovery “in proportion to the share of responsibility the factfinder assigns to the plaintiff.”³⁷ This allows the jury to determine the responsibility of the parties, attribute that responsibility to a portion of liability, and award damages based on each party’s respective liability thereto.

Comparative negligence does not automatically abrogate joint and several liability in situations of multiple tortfeasors.³⁸ However, “the underlying principle of comparative negligence is founded on attaching liability in direct proportion to the respective fault of each person whose negligence caused the damage. The logical extension of this doctrine would apply it as among multiple tortfeasors as well as between plaintiff and defendant.”³⁹ For this reason many states have limited or abrogated entirely joint and several liability in conjunction with their

³³ See: See: Restatement (3d), Torts, § 8, Comment A.

³⁴ Id.

³⁵ Restatement (3d), Torts, § 8(a-b).

³⁶ See: Kaatz v. State, 540 p.2d 1037, 1050-51. (Requiring a new trial on damages as the standard of liability had been changed to comparative negligence.)

³⁷ Restatement (3d), Torts, § 7.

³⁸ Restatement (3d), Torts, § 10.

³⁹ Laubach v. Morgan, 1978 OK 5, 588 P.2d 1071, 1075 (Okla. 1978).

transition to a comparative negligence standard.⁴⁰ Therefore, in determining the apportionment of responsibility and consequently the liability for damages in a case with multiple defendants, apportionment of responsibility for damages applies to each defendant. Only after the apportionment of responsibility is made do the doctrines of joint and several liability, contribution, and indemnity apply.

THE CONCERNS OF NON-PARTY APPORTIONMENT

This apportionment of damages in accordance with a party's apportionment of responsibility is of significant concern when non-parties are a factor in the case. Some jurisdictions prohibit the inclusion of non-parties in the apportionment question.⁴¹ In Fact, the Supreme Court of Iowa opined:

“The requirement that a third-party defendant's fault may not be considered in the apportionment of aggregate fault unless the plaintiff has a viable claim against that party is not a mere mechanical rule. It is based on policy considerations...[that]...the presence of a third-party defendant in an action may siphon off a portion of aggregate fault from the defendant against whom the plaintiff is claiming. This can result in the plaintiff receiving a lesser recovery than if the third-party defendant were not in the case.”⁴²

Despite this, most jurisdictions allow the jury to consider the responsibility of a non-party in determining responsibility, liability, and damages.⁴³ As the Oklahoma Supreme Court eloquently states:

⁴⁰ See: Alaska Stat. § 9.17.080; Ariz. Rev. Stat. § 12-2506A; Conn. Gen. Stat. § 52-572h; Fla. Stat. § 768.81; Ind. Code § 34-51-2-8; Kan. Stat. Ann. § 60-258a.; Ky. Rev. Stat. § 411.182; LSA-C.C. Art. 2324; N. M. Stat. § 41-3A-1-2; Utah Code §§ 78-27-38; Vt. Stat. Tit.12 § 1036; and, Wyo. Stat. § 1-1-109(d).

⁴¹ See: Benner v. Wichman, 874 P.2d 949, 956 (Alaska Supreme Court case holding that courts may vindicate the “duties that nonlitigants owe plaintiffs by authorizing joinder of those nonlitigants”); Pepper v. Star Equipment, Ltd. 484 N.W.2d 156 (Iowa Supreme Court case preventing the introduction of evidence of fault of non-parties absent proof of a claim by the Plaintiff to the non-party).

⁴² Pepper v. Star Equipment, Ltd. 484 N.W.2d 156, 158.

⁴³ See: Ariz. Rev. Stat. § 12-2506B; Scott v. County of Los Angeles, 27 Cal.App.4th 125, 136 (1994) (holding in relevant part that “a defendant may be found liable for noneconomic damages only in proportion to the total fault of all persons whose acts were a legal cause of the plaintiff's injuries, whether or not all such persons have appeared in the action...”); Colo. Rev. Stat. § 13-21-111.5; Fabre v. Martin, 623 So. 2d 1182 (Fla. 1993)(holding that “defendant is not liable for the entire damage caused by defendant and the unknown driver”); O.C.G.A. § 51-12-33(d); Ind. Code §§ 33-4-33.5, 33-4-33.6; Mont. Code §27-1-703(b); Bartlett v. New Mexico Welding Supply, 98 N.M. 152,

“To limit the jury to viewing the negligence of only one tortfeasor and then ask it to apportion that negligence to the overall wrong is to ask it to judge a forest by observing just one tree. It cannot, and more important should not, be done.”⁴⁴

“Ay, there’s the rub.”⁴⁵ If we are to consider the forest and not the individual trees when apportioning responsibility, liability, and damages, how do we protect the plaintiff’s rights? What about the non-party? Does the defendant get to blame the “one-armed-man”⁴⁶ and consequently limit his liability to the plaintiff? If a defendant asserts that a non-party is liable to the plaintiff for the injuries he sustains, the plaintiff could recover nothing under non-party apportionment comparative negligence principles.

A Wisconsin Supreme Court case illustrates these concerns well. Mrs. Jacobs, a grandmother, boarded a bus owned and operated by the Milwaukee Suburban and Transportation Corporation in the spring of 1965.⁴⁷ The bus stopped, allowed Ms. Jacobs, her granddaughter, and a few other patrons to enter, and it began to pull away.⁴⁸ Shortly after the bus began its departure, a red car operated by an unknown driver cut off the bus and the bus driver slammed on his brakes to avoid a collision.⁴⁹ This abrupt stop caused Ms. Jacobs to fall and suffer \$500.00 in medical damages.⁵⁰

At trial, Milwaukee Suburban and Transportation Corporation presented evidence that 1) Ms. Jacobs did not use the handrails and that 2) the mysterious red car driver was partially

159 (“the jury must ascertain the percentage of negligence of all of the participants to the occurrence”); Angel v. Cornell Constr. Co., 841 P.2d 1163(Oklahoma Supreme Court case supporting “ghost tortfeasor liability”); Mcintyre v. Balentine, 833 S.W. 2d 52 (Tenn. 1992); Utah Code §§ 78-27-38; Wash. Rev. Code §4.22.070.; Miller v. Monogahela Power Co., 184 W. Va. 663, 670 (holding “in order to obtain a proper assessment of the total amount of the plaintiff’s contributory negligence ... it *must* be ascertained in relation to *all of the parties whose negligence contributed to the accident*, and not merely those defendants involved in the litigation.”)

⁴⁴ Paul v. N. L. Industries, Inc. 624 P.2d 68, 70.

⁴⁵ Hamlet Act III, Scene 1.

⁴⁶ See: The Fugitive. If not for the reference, for Harrison Ford’s unmitigated handsomeness.

⁴⁷ Jacobs v. Milwaukee & Suburban Transport Corp. 41 Wis.2d 661, 664

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Id. at 663.

responsible for Ms. Jacobs's injuries.⁵¹ As a result, the jury "apportioned the causal negligence 12 percent to the bus driver, 19 percent to Mrs. Jacobs, and 69 percent to the unknown driver of the red automobile."⁵²

Ms. Jacobs' complaint was dismissed because her negligence in not holding the handrail exceeded Milwaukee Suburban and Transportation Corporation's negligence.⁵³ The unknown driver of the red car was never found.⁵⁴ Ms. Jacobs was left to pay her own injury out of pocket even though her negligence did not exceed that of the defendant and the non-party together. In reviewing the apportionment of damages, Chief Justice Hallows of the Supreme Court of Wisconsin states:

"While it can be argued 'but for' the bus driver's prior negligence in not seeing the red auto sooner no injury would have happened, it can also be argued that 'but for' Mrs. Jacobs' subsequent negligence there would have been no injury."⁵⁵

What is alarming in this decision is not that the state of Wisconsin expects an elderly woman to carefully use the handrails when navigating the interior of a public bus. It is slightly alarming that the Wisconsin Supreme Court expects an injured grandmother to exit the bus, pursue the driver of the red car, and exchange identification and insurance information with that person so she can protect herself from any non-party apportionment arguments the negligent bus operator may pose at trial. But the most alarming concern resulting from the *Jacobs* opinion is this language used in the quotation supra by Chief Justice Hallows.

In a 1969 article, prior to the *Jacobs* decision, Chief Justice Hallows notes that "contributory negligence as a complete bar can no longer be justified on any grounds of social

⁵¹ *Jacobs v. Milwaukee & Suburban Transport Corp.* 41 Wis.2d 661, 664

⁵² *Id.*

⁵³ *Id.* at 664.

⁵⁴ *Id.*

⁵⁵ *Id.* at 164-165.

justice.”⁵⁶ He continues, in support of comparative negligence, stating “one should be liable to the extent of his fault and should be allowed to recover for the fault of another to the extent of that person’s fault and to the extent of his own freedom from fault.”⁵⁷ He further states that “barring a plaintiff from recovery for his injuries because he is at least as negligent as the defendant is as outdated as governmental charitable, religious and parental immunity, and as unjust as contributory negligence in its full force.”⁵⁸

And yet the quote from the *Jacobs* case, *supra*, allows comparative negligence to have the same unjust effect. The ‘but for’ justification for refusing to reconsider the apportionment of damages, despite the impossibility of ascertaining the identity of the driver of the red car, smacks of Lord Ellenborough’s 160-year old argument supporting contributory negligence. Further, Chief Justice Hallows bars Ms. Jacobs from recovering for her injuries to the extent that the Milwaukee Suburban and Transportation Corporation was negligent.⁵⁹ Chief Justice Hallows decision in the *Jacobs* case directly contradicts the position he takes in an article published the same year. To put it in his own words, barring Ms. Jacobs from recovery from a negligent defendant because of non-party apportionment in comparative negligence cannot be “justified on any grounds of social justice.”⁶⁰ And yet, Chief Justice Hallows still does.

Comparative negligence, a doctrine which was designed to alleviate the injustice of contributory negligence that concerned Chief Justice Hallows, is the same doctrine he uses to be just as unjust. A doctrine intended to resolve the inequity of contributory negligence became just as callous as its predecessor through non-party apportionment.

CONSTITUTIONAL CHALLENGES TO NON-PARTY APPORTIONMENT

⁵⁶ Chief Justice Hallows, *Comparative Negligence—Is It the Answer?* 19 Federation Ins Coun Q 71, 75. (1969).

⁵⁷ *Id.* at 77.

⁵⁸ *Id.* at 77-78.

⁵⁹ *Jacobs v. Milwaukee & Suburban Transport Corp.* 41 Wis.2d 661, 667.

⁶⁰ Chief Justice Hallows, *Comparative Negligence—Is It the Answer?* 19 Federation Ins Coun Q 71, 75. (1969).

The *Newville* case of little four-year-old Native-American R.M. in Montana ameliorates some of the harm that non-party apportionment causes. Constitutional principles of substantive due process are ultimately what permit the paralyzed, brain-damaged R.M. to recover from the Department of Family Services.⁶¹ We will see that the “procedural safeguards” the Supreme Court implements to protect substantive due process in Montana are not enough, though. The substantive due process rights of the plaintiff and the non-party are so heavily compromised by non-party apportionment, to continue its practice in the majority of U.S. jurisdictions is to do a grave injustice to our founding principles.

THIRD PARTY STANDING

In any Constitutional challenge to a statute, the plaintiff must prove he has standing.⁶² In so doing, the plaintiff must show that he is “entitled to have the court decide the merits of the dispute or of particular issues.”⁶³ Not even the High Court of our country can “pronounce any statute, either of a state or of the United States, void, because [it is] irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.”⁶⁴ Essentially, the parties to the action must have a “personal stake in the outcome of the controversy” so that our Constitution does not become muddled with interpretations of hypothetical violations of the rights the document extends.⁶⁵

A plaintiff asserting that a non-party apportionment statute is unconstitutional faces a threshold problem of standing. The plaintiff cannot assert violations of the Constitutional rights of the non-party; only the non-party would have standing for those claims.⁶⁶ For cases where

⁶¹ *Newville v. State Dept. of Family Services* 883 P.2d 793,802.

⁶² *Elk Grove Unified School Dist. v. Newdow* 542 U.S. 1, 11.

⁶³ *Warth v. Seldin* 422 U.S. 490, 498.

⁶⁴ *Liverpool, N.Y. & P.S.S. Co. v. Emigration Com'rs* 113 U.S. 33, 39

⁶⁵ *Baker v. Carr* 369 U.S. 186, 204

⁶⁶ *Singleton v. Wulff* 428 U.S. 106, 115 (“Federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation.”)

third-party standing is asserted, the Supreme Court considers “the relationship of the litigant to the person whose right he seeks to assert” and “the ability of the third party to assert his own right.”⁶⁷

There are serious procedural due process concerns for the non-party with regard to apportionment of responsibility to him in a civil suit. Under the doctrine of Res Judicata, “a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.”⁶⁸ Therefore, the jury’s apportionment of responsibility, liability, and damages becomes public record subject to claim preclusion under the principles of Res Judicata.

In an action to enforce the apportionment of damages to the non-party, the plaintiff can file a motion to take judicial notice of the previous court proceedings, as they are public record.⁶⁹ This immediately puts the non-party on the defense. In order to avoid summary judgment⁷⁰, the non-party would have to fight the factual legitimacy of a trial in which he never participated. Seventh Amendment rights to civil trial and protections from double jeopardy become a major concern.⁷¹ Furthermore, hearsay would not save the non-party from being bound by the previous adjudication.⁷² If the court, in its discretion, takes judicial notice of the findings of fact of the jury which apportioned responsibility to the non-party, the non-party may be stuck with an enforceable judgment against him, regardless of the lack of procedural due process afforded him under the Fifth and Fourteenth Amendments.

⁶⁷ Singleton v. Wulff 428 U.S. 106, 115-116.

⁶⁸ Federated Dept. Stores, Inc. v. Moitie 452 U.S. 394, 398

⁶⁹ Fed. R. Ev. 201(2). (note: for most of the procedural and evidentiary concerns raised in this paper, references to the Federal Rules of Evidence and the Federal Rules of Civil Procedure will be used. Many State courts depart from some of these procedural rules; however, generally speaking, their principles are recognized to some degree in every jurisdiction.)

⁷⁰ Fed. R. Civ. P. 12(b)(6).

⁷¹ Note: the Seventh Amendment to the U.S. Constitution has not been incorporated to the states through the Fourteenth Amendment.

⁷² Fed. R. Ev. 801(d)(1).

These concerns cannot be raised by the plaintiff in challenging the constitutionality of non-party apportionment. These rights are those of the non-party alone and they are not related to the plaintiff. Only the non-party would be able to assert the constitutional violation; furthermore, he can only do so after enforcement of the judgment is adjudicated.

However, the financial harm suffered by the plaintiff as a result of non-party apportionment can be asserted by the plaintiff in order to establish standing.⁷³ As we have seen in both the case of R.M. in Montana⁷⁴ and Ms. Jacobs in Wisconsin,⁷⁵ the result of non-party apportionment is to severely diminish the financial recovery of the plaintiff. This “financial stake in the outcome” of determining the constitutionality of non-party apportionment allows the plaintiff to assert that his own constitutional rights have been violated as a result of its practice.⁷⁶

“PROCEDURAL SAFEGUARDS”

Though the outcome of *Jacobs* was bleak, the case of young R.M. provides a good starting place for challenging the constitutionality of non-party apportionment. In that case, plaintiffs argued that:

“there is no reasonable basis to require any plaintiff to prepare a defense at the last minute for nonparties whom defendants seek to blame for the injury, but who have not been joined as defendants; and that there is no reasonable basis for requiring plaintiffs to examine jury instructions, marshal evidence, make objections, argue the case, and examine witnesses from the standpoint of unrepresented parties, particularly when they do not know until the latter part of the trial that defendants will seek to place blame on unrepresented persons.”⁷⁷

⁷³ Singleton v. Wulff 428 U.S. 106, 121 (Stevens, J., concurring) (“the plaintiff-physicians have a financial stake in the outcome of the litigation... they therefore clearly have standing to bring this action”)

⁷⁴ See: Newville v. State Dept. of Family Services 883 P.2d 793,798 (“Plaintiffs correctly argued that their own potential economic loss gives them standing to assert the rights of third parties.”)

⁷⁵ See Generally: Jacobs v. Milwaukee & Suburban Transport Corp. 41 Wis.2d 661 (non-party apportionment results in dismissal of action).

⁷⁶ Singleton v. Wulff 428 U.S. 106, 121

⁷⁷ Newville v. State Dept. of Family Services 883 P.2d 793,802.

The court agreed, stating that the Montana non-party apportionment statute “unreasonably mandates an allocation of percentages of negligence to nonparties without any kind of procedural safeguard.”⁷⁸

The court notes procedural safeguards other states have implemented in order to avoid this “unreasonable... allocation of percentages of negligence to non-parties.”⁷⁹ The Court mentions that “Colorado...allows the inclusion of nonparties when apportioning fault, but only when notice has been given by the defendant within 90 days of commencement of the action.”⁸⁰ This procedural safeguard protects against surprise defenses at trial. Furthermore, it allows the plaintiff a reasonable amount of time to prepare an argument against the negligent conduct of the non-party presented by the defendant.

The court goes on to discuss the protections implemented by Indiana in Ind.Code § 34-4-33-10 (1985). *Newville* explains that “Indiana requires a defendant to assert a nonparty defense and to bear the burden of proof of that defense if the defense is asserted as part of an answer filed more than 45 days prior to the running of the statute of limitations on a claim against a nonparty.”⁸¹ This safeguard does several things which protect the procedural rights of the plaintiff.

First, Indiana’s non-party apportionment statute⁸² shifts the burden of the defense away from the plaintiff. The assertion of the conduct of another person is not an affirmative defense.⁸³ Therefore, under normal circumstances the defendant asserting such a defense would *not* have to prove the negligence of the non-party. Rather, the burden would still rest with the plaintiff to

⁷⁸ *Newville v. State Dept. of Family Services* 883 P.2d 793,802.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Ind.Code § 34-4-33-10 (1985)

⁸³ For a non-exhaustive list of affirmative defenses in Federal Court, see Fed. R. Civ. P. 12.

disprove the negligent conduct of the non-party in order to attain a full recovery for his loss. Under Indiana's statute, the burden is on the defendant to prove the fault of the non-party.

Second, the plaintiff's claim of right to recovery is still preserved. If the statute of limitations runs on the plaintiff's right to recover from the non-party; or, if there is insufficient 45-day notice to the plaintiff of the defense of comparative negligence of a non-party, the defendant is precluded from presenting such a defense. This prevents the defendant from asserting the defense in an untimely manner and, in so doing, preventing the full and complete adjudication of the claims the plaintiff has against the defendant and possible defendants.

The Supreme Court of Montana, in *Newville*, additionally mentions that Indiana and Kansas both put the burden on the defendant to plead additional parties whom may be liable to the plaintiff.⁸⁴ This is especially significant because both Indiana⁸⁵ and Kansas⁸⁶ have abolished joint and several liability. Essentially, though "holding a defendant tortfeasor, who is [not completely] at fault, liable for entire amount of damages is obviously inconsistent with the equitable principles of comparative negligence,"⁸⁷ the defendant has the burden of reaping the benefit of the abrogation of joint and several liability. In fact, a failure to plead a non-party in Kansas precludes the introduction of evidence of that non-party's fault at trial.⁸⁸

Several states have taken these procedural safeguards to heart. For example, Georgia permits the jury to consider "all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party in

⁸⁴ *Newville v. State Dept. of Family Services* 883 P.2d 793,802.

⁸⁵ Ind. Code § 34-51-2-8

⁸⁶ See: Kan. Stat. Ann. § 60-258a(d)

⁸⁷ *Laubach v. Morgan*, 1978 OK 5, 588 P.2d 1071, 1075 (Okla. 1978)(Oklahoma Supreme Court case holding "Joint and several liability then will only exist where, for some reason, damages cannot be apportioned by the jury. " Note: superseded by statute).

⁸⁸ See: See: Kan. Stat. Ann. § 60-258a(d) (no mention of apportionment of liability to non-parties. Under principles of *Expressio unius*, the failure to expressly state the permissibility of apportioning liability to a non-party precludes the ability to do so).

the suit.”⁸⁹ However, to permit the consideration of a non-party in the apportionment of damages, the defendant is required that to plead notice to that effect, stating “the nonparty’s name and last known address, or best identification of the nonparty which is possible under the circumstances.”⁹⁰ This notice must be plead no “later than 120 days prior to the date of trial.”⁹¹ The “procedural safeguards” that *Newville* advocates are present. How does that affect the adjudication of the plaintiff’s claims?

In 2006, a 17-year-old boy named Christopher Sarvis was in a car accident with Jeremi Bath.⁹² Jeremi was drunk.⁹³ Sarvis sued Bath and, under Georgia’s Dram Shop Liability Statute,⁹⁴ Cavalier Convenience, Inc. and Ken’s Supermarkets, Inc. for serving intoxicating liquors to Bath.⁹⁵ The pre-trial order stated that an issue for jury determination was “Damages (including apportionment).”⁹⁶ Sarvis objected, noting a lack of fault or responsibility on his part and the lack of necessity to apportion liability among the multiple tortfeasors.⁹⁷ The trial court agreed; the Georgia Court of Appeals did not.⁹⁸ Certiorari to the Georgia Supreme Court was granted on January 18, 2011.

Why is apportionment appropriate? The grounds for a cause of action against the two shops that sold intoxicating liquors to the defendant could have been pursued without naming the drunk driver as a defendant. The basis for liability for all three parties was independent.⁹⁹ The

⁸⁹ O.C .G.A. § 51-12-33(c).

⁹⁰ O.C .G.A. § 51-12-33(d)(2).

⁹¹ O.C .G.A. § 51-12-33(d)(1).

⁹² Cavalier Convenience, Inc. v. Sarvis 699 S.E.2d 105

⁹³ *Id.*

⁹⁴ O.C .G.A. § 51-1-40(b)(A person who sells, furnishes, or serves alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury, death, or damage caused by or resulting from the intoxication of such person, including injury or death to other persons..”)

⁹⁵ Cavalier Convenience, Inc. v. Sarvis 699 S.E.2d 105

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Sarvis has a claim for 1) negligent operation of a motor vehicle against Bath; 2) negligent sale of intoxicating beverages resulting in an injury to a person by the consumer of those intoxicating beverages against Cavalier

Court of Appeals states that “given the “if any” clause so placed in ... O.C.G.A. § 51–12–33(b)..., it is clear from that subsection's plain language that the legislature did not intend for apportionment to be limited to those cases wherein the plaintiff was to some degree at fault.”¹⁰⁰

The Court of Appeals rejects Sarvis’ argument that a statutory construction of Georgia’s apportionment statute¹⁰¹ which permits apportionment in all circumstances regardless of the fault of the plaintiff renders moot Georgia’s contribution statute¹⁰².¹⁰³ However, Sarvis’ argument holds water. If apportionment is to be done in all circumstances regardless of the fault of the plaintiff, why have a statute permitting contribution among the joint-tortfeasors? It seems as though Sarvis is correct in arguing that “a statute must be construed in relation to other statutes of which it is a part, and all statutes relating to the same subject-matter, briefly called statutes “*in pari materia*,” are construed together, and harmonized wherever possible, so as to ascertain the legislative intent and give effect thereto.” The Court of Appeals fails to agree and apportionment operates as an absurdity¹⁰⁴ in the way of determining damages once again.

Mr. Sarvis’ case illustrates how pervasive apportionment is, how it interferes with other statutes, and the problems that even the procedural safeguards can create. Furthermore, and surprisingly, the decision of the Court of Appeals of Georgia denies Cavalier Convenience and Ken’s Supermarkets any right to contribution they may have against the negligent driver, Bath. This case, however, is not about non-party apportionment. A Florida case illustrates the pitfalls of non-party apportionment despite the procedural safeguards.

Convenience Inc.; and, 3) an identical, yet independent cause of action for a separate sale of intoxicating beverages resulting in an injury to a person by the consumer of those intoxicating beverages against Ken’s Supermarkets, Inc.

¹⁰⁰ Cavalier Convenience, Inc. v. Sarvis 699 S.E.2d 106

¹⁰¹ O.C.G.A. § 51–12–33(b)

¹⁰² O.C.G.A. § 51-12-32

¹⁰³ Cavalier Convenience, Inc. v. Sarvis 699 S.E.2d 106

¹⁰⁴ This is not actual absurdity but rather statutory absurdity. The effect of the statutory construction is to render meaningless substantial portions of existing legislation making the other statutes as a whole ridiculous.

Ann Marin was a passenger in her husband's vehicle when Mrs. Fabre negligently changed lanes and caused Mr. Marin to veer his vehicle into a guardrail.¹⁰⁵ Mrs. Marin filed suit against Mr. and Mrs. Fabre and Mrs. Marin's uninsured motorist carrier.¹⁰⁶ The Fabres asserted that Mr. Marin was comparatively negligent.¹⁰⁷ The jury awarded a final judgment of \$357,750 and found that Mr. Marin was 50% at fault.¹⁰⁸ Ms. Marin appealed on the issue of apportionment, namely because she is barred from recovering from her own husband. The Supreme Court affirmed the apportionment of liability and reduced Mrs. Marin's noneconomic damages judgment by 50% in accordance with the findings of the trial jury.¹⁰⁹

Again we see an incomplete award of damages to the plaintiff, a disregard of the defendant's right to contribution from other parties, and the doctrine of spousal immunity compromised by non-party apportionment. The problem is that, despite the best efforts of judges and legislators, comparative negligence does so much damage to the individual causes of action and rights of recovery of parties and non-parties alike, no "procedural safeguard" can reasonably anticipate the multifarious violations of rights that are bound to occur. Overriding the entire practice of non-party apportionment by attacking its constitutionality wholly is the only way to preserve justice.

ABROGATING NON-PARTY APPORTIONMENT IN THE INTEREST OF PRESERVING CONSTITUTIONAL JUSTICE

In challenging the constitutionality of any statute we need to first look at whether or not the state has the right to legislate in the way that it has. With non-party apportionment, states

¹⁰⁵ Fabre v. Marin 623 So.2d 1182, 1183 (receded from on other grounds in Wells v. Tallahassee Memorial Regional Medical Center, Inc. 659 So.2d 249)

¹⁰⁶ Fabre v. Marin 623 So.2d 1182, 1183

¹⁰⁷ Id.

¹⁰⁸ Id.

¹⁰⁹ Id. at 1187

have every right to create procedural rules on how it adjudicates claims that arise under state law.¹¹⁰ To say that the legislative authority to create non-party apportionment does not rest with the state is to remove any purpose for state law. That would be ridiculous.

Where non-party apportionment runs into serious problems is the means it uses to accomplish a particular purpose. The state's purpose in creating non-party apportionment has already been articulated, *supra*. The abrogation of the harsh rule of contributory negligence requires the implementation of comparative negligence. Comparative negligence principles require that juries weigh and apportion the responsibility of every person causally connected to a cause of action. However, the means used by the state, non-party apportionment, abridges a plaintiff's right to contract, a defendant's right to contribution, and a non-party's right to a trial by jury. Because these rights are abridged by the practice of non-party apportionment, it has no rational basis under the Fourteenth Amendment to the United States Constitution.

THE PLAINTIFF'S RIGHT TO CONTRACT

Article I §10 of the Constitution states in relevant part that "No State shall... pass any... Law impairing the Obligation of Contracts." Many challenges have been made pursuant to the Fourteenth Amendment to enforce this clause against the states.¹¹¹ Despite these efforts, "The economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."¹¹² In excising its police power, however, the state must show that "the legislation is addressed to a legitimate end and [that] measures

¹¹⁰ See: U.S.C.A. Const. Amend. X

¹¹¹ See generally: Allgeyer v. Louisiana, 165 U.S. 578 (1897), Lochner vs. New York, 198 U.S. 45 (1905), Adkins v. Children's Hospital, 261 U.S. 525 (1923), Muller v. Oregon, 208 U.S. 412 (1908); Compare: West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

¹¹² Home Bldg. & Loan Ass'n v. Blaisdell 290 U.S. 398, 437

taken are reasonable and appropriate to that end” when creating legislation which interferes with an individual person’s right to contract.¹¹³

Settlements are executed by contract. In the Montana case of R.M., her assailant foster father and Edna Goodwin, the assailant’s counselor, both settled their causes of action with the guardians ad litem of R.M.¹¹⁴ This settlement presumably would include a “hold harmless” clause wherein the guardians of R.M. would not pursue the cause of action against the settling parties. In order to justify interfering with the operation of this clause, the state would have to show that it has a legitimate interest in doing so under its police power of the Tenth Amendment.

The state cannot meet this burden. To the contrary, settlements benefit the state. Settlements facilitate the swift adjudication of causes of action without requiring the parties to avail themselves of the adversary system. In the interest of preserving state resources, the state should prefer that individuals freely contract to settle claims which arise between them. Holding that non-party apportionment can attribute a percentage of responsibility, liability, and damages to a person who has settled with the plaintiff is to interfere with a contract to such a degree so as to decrease the efficiency of the judicial system. Because the state has no legitimate interest in policing the actions of settling parties, it has no rational basis to interfere with those parties’ right to do so.

THE DEFENDANT’S RIGHT TO CONTRIBUTION

“Contribution in tort is the right of one who has paid a common liability to recover a portion of the payment from another tortfeasor who shares in that common liability.”¹¹⁵ A right to contribution arises only after the defendant has paid more than his equitable share of the

¹¹³ Home Bldg. & Loan Ass'n v. Blaisdell 290 U.S. 398, 438.

¹¹⁴ Newville v. State Dept. of Family Services 883 P.2d 793, 798.

¹¹⁵ Kottler v. State 136 Wash.2d 437, 439

damages to the plaintiff. In an action to recover for contribution, the defendant¹¹⁶ should be entitled to recover “the amount paid by him in excess of his pro rata share.”¹¹⁷

The compromising effect on the right to contribution is best illustrated by the case of *Cavalier Convenience v. Sarvis*, supra. Though it was merely an apportionment issue and not non-party apportionment, the ability of the seller of intoxicating liquors to recover under any cause of action against the drunk driver is precluded under apportionment of damages principles.

The real issue with the defendant’s right to contribution is how much this right severely diminishes any rational basis the state may have in continuing to practice non-party apportionment. Where there is a right to contribution, the defendant’s ability to bring a whole new cause of action against the non-party precludes the necessity of the jury in the original trial to consider the non-party’s fault. Essentially, the plaintiff can assert his cause of action against the defendant, a judgment can be entered against that defendant, and then the defendant can pursue contribution from the non-party. There is no reasonable purpose to require a jury to apportion fault to a person who, not only is not there to defend himself, but is subject to an independent cause of action pending the conclusion of the trial. To permit contribution *de jure* and then remove it *de facto* is to make the legislature circular, inefficient, and cumbersome.

THE NON-PARTY’S RIGHT TO A TRIAL BY JURY

As mentioned previously, the right to a civil trial by jury has not been incorporated to the states through the Fourteenth Amendment. However, no state may “deny to any person within its jurisdiction the equal protection of the laws.”¹¹⁸ States which permit a trial by jury and cross-examination of witnesses in essence deny the non-party these essential rights by permitting non-party apportionment. As mentioned previously, the binding nature of a judgment of liability to a

¹¹⁶ Plaintiff in the contribution action

¹¹⁷ Gerling Konzern Allgemeine Versicherungs AG v. Lawson 693 N.W.2d 149, 153

¹¹⁸ See: U.S.C.A. Const. Amend. XIV

non-party could be recognized by judicial notice in any jurisdiction where such procedure is permitted. The opportunity of the non-party to have his voice heard in a court of law, prior to such adjudication, is wholly denied by the continuation of this practice. No state interest, however compelling, can trump the right of an individual to exercise every opportunity to exonerate himself at law.

CONCLUSION

We have seen the courts and the legislatures remedy contributory negligence because of its injustices. We have seen the courts and the legislatures remedy joint and several liability because of its injustices. And in the end, the remedies these law-makers have implemented have violated the core of our legal system. States have no rational basis to continue the practice of non-party apportionment. “We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us.”¹¹⁹ They have extended an unwarrantable jurisdiction over plaintiffs, defendants, and most significantly: non-parties. Non-party apportionment of damages is unconstitutional, and should be abridged, so our liberty will not be.

¹¹⁹ Jefferson, Thomas The Declaration of Independence