

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
(Wilder, P.J., and Zahra and Kelly, J.J.)

DAVID ROMAIN and JOANN ROMAIN,

Plaintiffs-Appellees,

Supreme Court No. 135546
Court of Appeals No. 278591
Wayne CC: 05-512147-NO

v

FRANKENMUTH MUTUAL INSURANCE
COMPANY and IAQ MANAGEMENT, INC,

Defendants,

and

INSURANCE SERVICES CONSTRUCTION
CORPORATION,

Defendant-Appellant.

**BRIEF OF AMICUS CURIAE MICHIGAN ASSOCIATION OF JUSTICE
IN SUPPORT OF PLAINTIFFS/APPELLEES**

Submitted by:

Debra Garlinghouse (P56856)
Lee B. Steinberg PC
3000 Town Ctr Ste 2510
Southfield, MI 48075
(248) 352-7777

Gary P. Supanich (P45547)
Gary P. Supanich PLLC
116 E. Washington, Suite 220
Ann Arbor, MI 48104
(734) 276-6561

Attorneys for Amicus Curiae
Michigan Association of Justice

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INTEREST OF AMICUS CURIAE

The Michigan Association for Justice (“MAJ”) is an organization of Michigan lawyers whose members are engaged primarily in civil litigation on behalf of personal injury victims. Comprised of more than 1,600 attorneys, the MAJ is the Michigan affiliate of the American Association for Justice, which was founded in 1946. The MAJ is dedicated to promoting justice and fairness for injured persons. This case involves a jurisprudentially significant issue of the construction of the term “proximate cause” in MCL 600.6304 when deciding whether the Legislature intended to impose a legal duty as a requirement for allocating fault under MCL 600.6304 and MCL 600.2957. The resolution of this issue is important to civil jurisprudence in Michigan and will have a direct and substantial impact on MAJ members’ current and future clients.

ARGUMENT

THE CIRCUIT COURT PROPERLY GRANTED PLAINTIFF-APPELLEE’S MOTION TO STRIKE DEFENDANT-APPELLANT’S NOTICE OF DEFENDANT IAQ MANAGEMENT, INC. AS A NONPARTY AT FAULT.

Before 1996, Michigan tort actions were generally governed by the common-law doctrine of joint and several liability. Under that concept, if two or more tortfeasors were held responsible at trial for a single injury, the plaintiff could seek recovery of the entirety of the judgment amount against any one of these tortfeasors. *Gerling Konzern A.V. v. Lawson*, 472 Mich 44, 49; 693 NW2d 149 (2005); *Department of Transportation v Thrasher*, 446 Mich 61; 521 NW2d 214 (1994). Under a joint and several liability system, trials were limited to a determination of the liability of the named defendants remaining at the time of trial. Thus, the allocation of fault as to a co-tortfeasor who was not named as a party was of no consequence in joint and several liability system since that allocation would not affect the remaining named defendants’ liability.

In 1996, the Michigan Legislature made sweeping changes to Michigan tort law, replacing the doctrine of joint and several liability among multiple tortfeasors with the doctrine of several liability in virtually all personal injury actions. *Smiley v Corrigan*, 248 Mich App 51, 53; 638 NW2d 151 (2001). As a result, the Michigan Legislature, through its enactment of two statutes, MCL 600.2956 and MCL 600.2957, adopted a “fair share liability” system whereby each tortfeasor is responsible for a portion of the total damage award according to their percentage of fault. Specifically, MCL 600.2956 provides that “in an action based on tort or another legal theory seeking damages for personal injury, property damage or wrongful death, the liability of each defendant for damages *is several only and is not joint.*” (Emphasis added.) In pertinent part, MCL 600.2957 provides as follows:

(1) In an action based on tort or another legal theory seeking damages for personal injury, property damage or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person’s percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

These statutory provisions in § 2956 and § 2957 are complemented by the parallel provisions of MCL 600.6304. Specifically, MCL 600.6304(1)(b) provides that in personal injury actions involving the fault of more than one person, the trier of fact must specifically determine the plaintiff's total damages and the percentage of fault attributed to all persons involved, “regardless of whether the person was or could have been named as a party to the action.” As stated by MCL 600.6304(2),

(2) In determining the percentage of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and damages claimed.

MCL 600.6304(4) further states:

(4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6), a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1). . .

As explained by MCL 600.6304(8),

(8) As used in this section, “fault” includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party.

A. “Fault” requires an act or omission involving responsibility for wrongdoing or failure.

In analyzing the issues under consideration, it must be underscored that the definition of “fault” set forth in MCL 600.6304(8) focuses on conduct and proximate cause, specifying that fault “includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party.”¹ For a defendant to prove the *fault* of a nonparty, what is minimally required is some act or omission that contains some degree of blameworthiness. Black’s Law Dictionary (abridged 6th ed) defines “fault” in the following terms:

Fault. Negligence; an error or defect of judgment or of conduct; any deviation from prudence, duty or rectitude; any shortcoming, or neglect of care or performance resulting from inattention, incapacity, or perversity; a wrong tendency, course, or act; bad faith or mismanagement; neglect of duty. Under general liability principles, is a breach of a duty imposed by law or contract. The term connotes an act to which blame, censure, impropriety, shortcoming or culpability attaches.

Wrongful act, omission or breach. U.C.C. § 1-201(16).

¹ At first glance, by its own terms, the text of § 6304(8), however, does not apply to other sections of the Revised Judicature Act that relate to nonparty fault, most notably § 2957(1), which specifies that the liability of each person shall be allocated by the trier of fact “in direct proportion to the person’s percentage of *fault*.” (Emphasis added.)

See also Negligence; No fault; Pari delicto; Tort.

As defined by Webster's Third New International Dictionary, "fault" includes "responsibility for wrongdoing or failure" or "the wrongdoing or failure attributable to a particular inadequacy, flaw or failure."²

Placed in proper context, the text of § 6304(8) simply restates the Michigan Legislature's requirement that nonparty fault be premised on some fault, i.e., "responsibility for wrongdoing or failure." Specifically, § 6304(8) declares that the fault giving rise to apportioned liability may take many forms; it can be fault based upon a specific act or omission; it may also be based upon intentional conduct, a breach of warranty or a breach of an alleged legal duty; it may also be reflected in conduct that would otherwise result in strict liability in appropriate cases. Whatever form the nonparty's conduct takes, however, § 6304(8) requires one essential ingredient: fault. See *Lamp v Reynolds*, 249 Mich App 591; 645 NW2d 311 (2002) (describing § 6304(8) as reaching "all at-fault conduct").³ Thus, what the Legislature required under § 2956, § 2957 and § 6304 was that a jury assess the liability of all tortfeasors, i.e., all wrongdoers who contributed to the plaintiff's injury. Cf *Barnett v Hidalgo*, 478 Mich 151, 170; 732 NW2d 472 (2007) (describing the operation of the post-1996 tort statutes as allowing the jury to "hear

² The concept of fault is a central precondition for apportioning liability among tortfeasors. This is also found in MCR 2.112(K), which governs the procedure by which nonparty claims are raised. The applicable court rule requires a defendant to file a notice identifying that nonparty "together with a brief statement of the basis for believing the nonparty is *at fault*." MCR 2.112(K)(3)(b) (Emphasis added).

³ Such a reading of § 6304(8) is also consistent with the primary case from this Court construing that provision, *Shinholster v Annapolis Hospital*, 471 Mich 540; 685 NW2d 275 (2004). In that case, this Court had to consider the impact of § 6304(8) on the fault attributable to the plaintiff. Repeatedly in the *Shinholster* decision, the Court treated the plaintiff's "fault" as synonymous with another familiar tort term, comparative negligence. 471 Mich at 449, 551-554. Thus, the *Shinholster* decision fully supports the view that § 6304(8) does not somehow abrogate a party's obligation to prove some degree of wrongdoing on the part of any party or nonparty allocated a percentage of responsibility for a personal injury.

evidence regarding every alleged *tortfeasor*"); *Smiley, supra*. 248 Mich App at 58, n 7 (describing nonparties named under § 2958 and § 2959 as *tortfeasors*).

Accordingly, under § 6304(8), "fault" cannot be defined in such a way as to eliminate any requirement of negligence or wrongdoing on the part of a nonparty. Specifically, what this means is that there is no place for the concept of "faultless fault" in interpreting § 6304(8). Under the concept of "faultless fault," a defendant could argue that the jury should be free to ascribe some percentage of fault against a certain nonparty solely based upon the fact that the nonparty was responsible for acts or omissions that contributed to the plaintiff's injuries, regardless of whether these acts or omissions were negligent or contained any degree of fault. In other words, under this view, "fault" would not be an essential requirement under § 6304(8) that a defendant must prove a nonparty to be with fault.

Were § 6304(8) construed to allow for the concept of "faultless fault," the entire foundation of negligence liability in Michigan would be eradicated by that single provision. That is because the scope of § 6304(8) as it applies to a nonparty tortfeasor holds that any definition of "fault" derived from this statutory provision must apply with equal force to all potential tortfeasors, including all defendants. This is clear from the text of § 6304(1)(b), which includes in its coverage all persons who contributed to plaintiff's injuries. Thus, any argument asserting that § 6304(8) defines "fault" in such a way as to eliminate any requirement of negligence or wrongdoing on the part of a nonparty would apply equally to any defendant under § 6304(1). But accepting the notion that § 6304(8) provides for the concept of "faultless fault" logically entails that a plaintiff can prevail in what was heretofore a negligence action simply by proving that a defendant engaged in an act or omission that resulted in injury to the plaintiff. This consequently produces the result that a plaintiff would no longer have to prove negligence to succeed on a

claim against the defendant. In effect, Michigan would become a strict liability state, one in which liability is premised only on an action and a resulting injury.

However, it is clear that Michigan Legislature did not eliminate all forms of negligence liability in 1996 by substituting in its place a system of compensation in which fault has no part. Accordingly, this Court should reject any reading of § 6304(8) that embraces the idea of “faultless fault.” Rather, for a defendant to show that a nonparty is at fault, it must be established through some act or omission that is wrongful or blameworthy that is a proximate cause of injury party’s damages.

B. “Proximate cause” is a legal term of art, with a well-entrenched meaning in common-law negligence.

“As a matter of statutory interpretation, statutes in derogation of the common law must be strictly construed; such statutes will not be extended by implication to abrogate an established rule of common law.” *Wesche v Mecosta County Rd Comm*, 480 Mich 75, 95 (2008). Thus, courts are to read the language of a statute in light of previously established rules of common law. *Nummer v Dep’t of Treasury*, 448 Mich 534, 544; 533 NW2d 250 (1995); *B & B Investment Group v Gitler*, 229 Mich App 1, 7; 581 NW2d 17 (1998). Accordingly, a word or phrase that has acquired a certain meaning at common law is interpreted to have that same meaning when used in interpreting a statute involving the same subject. *People v Riddle*, 467 Mich 116, 125-126; 649 NW2d 30 (2002); *Pulver v Dundee Cement Co*, 445 Mich 68, 75; 515 NW2d 728 (1994).

By defining “fault” under MCL 600.6304(8) in terms of “proximate cause,” the Legislature provides an analysis of liability that is the product of the traditional concepts of tort law. As defined in MCL 600.6304(8), the concept of “fault” is thus interchangeable with the concept of liability for allocating damages as a consequence of negligent conduct that proximately causes

damages. That is so because “fault” is being used to identify defendants who deserve to be held liable because they have done something wrong and are responsible for the victim’s injury.

As explained by William Prosser, *Law of Torts*, Chapter 7, § 41, p 236 (1971), “proximate cause” is an essential element in the plaintiff’s cause of action for negligence.

“Proximate cause” – in itself an unfortunate term – is merely the limitation which the courts have placed upon the actor’s responsibility for the consequences of his conduct. . . . As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.

The term “proximate cause” is applied by the courts to those more or less undefined considerations which limit liability even when the fact of causation is clearly established.

In Prosser’s view, what stands out most prominently is the relation of proximate cause to duty:

It is quite possible, and often helpful, to state every question which arises in connection with “proximate cause” in the form of a single question: *was the defendant under a duty to protect the plaintiff against the event which did in fact occur?* Such a form of statement does not, of course, provide any answer to the question, or solve anything whatever; but it does serve to direct attention to the policy issues which determine the extent of the original obligation and of its continuance, rather than to the mechanical sequence of events which goes to make up causation in fact. ***The question becomes particularly helpful in cases where the only issue is in reality one of whether the defendant is under any duty to the plaintiff at all – which is to say, whether he stands in any such relation to the plaintiff as to create any legally recognized obligation of conduct for his benefit.*** Or, reverting again to the starting point, whether the interests of the plaintiff are entitled to legal protection at the defendant’s hands against the invasion which has in fact occurred. Or, again reverting, whether the conduct is the “proximate cause” of the result. The circumlocution is unavoidable, since all of these questions are, in reality, one and the same. (Footnotes omitted). [*Id.* at § 42, Proximate Cause: Scope of the Problem, pp 244-245.] (Emphasis added.)

This state's jurisprudence likewise recognizes the close relationship between proximate cause and duty. In *Moning v Alfonso*, 400 Mich 425, 439-440; 254 NW2d 759 (1977), the Michigan Supreme Court, relying upon Prosser, provided this explanation of the relationship between the two elements:

Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person. Proximate cause encompasses a number of distinct problems including the limits of liability for foreseeable consequences. In the *Palsgraf* case, the New York Court of Appeals, combining the questions of duty and proximate cause, concluded that no duty is owed to an unforeseeable plaintiff.

The questions of duty and proximate cause are interrelated because the question whether there is the requisite relationship, giving rise to a duty, and the question whether the cause is so significant and important to be regarded a proximate cause both depend in part on foreseeability whether it is foreseeable that the actor's conduct may create a risk of harm to the victim, and whether the result of the conduct and intervening causes were foreseeable. (Emphasis added.)

See also *Haliw v Sterling Hts*, 464 Mich 297, 310; 627 NW2d 581 (2001) (noting that proximate cause, like duty, depends in part upon foreseeability). Under the common law, then, proximate cause is inextricably bound up with the question of duty. Simply put, proximate cause does not exist in the absence of an actionable legal duty.

C. Jones correctly decided that the elements of negligence, including proof of duty, must be established before fault can be apportioned and allocated under MCL 600.2957 and MCL 600.6304.

Accordingly, the Court of Appeals in *Jones v Enertel, Inc*, 254 Mich App 432; 656 NW2d 870 (2002), which addressed the nonparty at fault issue presented in this case, rightly concluded

that “a party adjudicated to be without fault may not have fault allocated to him under the guise of the doctrine of several liability.” *Id* at 437. As the *Jones* Court correctly explained,

Fundamental principles of tort law require that the following be established to prove a prima facie negligence claim: (1) a duty; (2) breach of that duty; (3) proximate cause; and (4) damages. *Case v Consumer Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000); *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96, n 10; 485 NW2d 676 (1992). “It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff.” *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997). Consequently, a duty must first be proved before the issue of fault or proximate cause can be considered.

When addressing the issue of comparative negligence, the Supreme Court noted:

“In a common law negligence action, before a plaintiff's fault can be compared with that of the defendant, it obviously must first be determined that the defendant was negligent. It is fundamental tort law that before a defendant can be found to have been negligent, it must first be determined that the defendant owed a legal duty to the plaintiff.” *Riddle, supra* at 99, quoting *Ward v K-Mart Corp.*, 136 Ill 2d 132, 145; 143 Ill Dec 288; 554 NE2d 223 (1990) .]

The Court in *Riddle* further noted that the adoption of a comparative negligence doctrine does not act to create negligence where none existed before. *Riddle, supra* at 98, n. 12. Similarly, a party adjudicated to be without fault may not have fault allocated to him under the guise of the doctrine of several liability. Such a result would be contrary to the basic principles of tort law. [*Id.* at 436-437].

Consequently, for fault or negligence to be apportioned and allocated under MCL 600.2957 and MCL 600.6304, there must be a showing that a party owed a duty recognized by law to the injured plaintiff, a breach of that legal duty, proximate cause, as understood under common-law principles, and damages. Thus, without owing a duty to the injured party or establishing a breach of that legal duty, an alleged negligent actor cannot be considered to have proximately caused the injury and thus cannot be held to be at “fault” for purposes of MCL 600.2957 and MCL 600.6304.

D. *Kopp v Zigich* was incorrectly decided and is inapplicable to the present case.

(1) *Kopp was wrongly decided because an employer does not have an actionable duty to train its employees.*

In *Jones, supra*, this Court explicitly held that if a party owed no legal duty to the plaintiff, it could not be a “nonparty at fault.” However, in *Kopp v Zigich*, 268 Mich App 258, 707 NW2d 601 (2005), the Court of Appeals held that a plain reading of the comparative fault statutes does not require proof of a duty before fault can be apportioned and liability allocated. Amicus disagrees with Plaintiff-Appellee’s contention that these cases are harmonious.

In *Kopp*, the plaintiff slipped on dog feces while delivering a hot tub for his employer to a purchaser’s home. He sued the homeowner on a premises liability theory. The defendant sought to add the plaintiff’s employer as a nonparty at fault, for failing to train the plaintiff to avoid dog feces.

The trial court held that, because the plaintiff’s claim was barred by the exclusive remedy provision of MCL 418.131(1), the employer could not be named as a non-party at fault. The Court of Appeals reversed.

[The employer’s] alleged failure to train plaintiff may have contributed to plaintiff’s injury as a “but for” cause in fact because plaintiff may not have been sufficiently aware that pet feces is a potential hazard. Further, the WDCA recognizes the employer’s responsibility for its employee’s work-related injuries, regardless of fault. . . . Thus, [the employer] could be a proper nonparty at fault even though . . . as plaintiff’s employer, [it] could not be sued for negligence in its training or failure to properly train plaintiff because of the exclusive remedy provision of the WDCA. [268 Mich App 261. Emphasis supplied.]

Amicus asserts that *Kopp* was wrongly decided. MCL 418.131(1) provides that “[t]he only exception to this exclusive remedy is an intentional tort.” The plain language of the statute provides that the only viable cause of action an injured employee has against his employer is for an intentional tort. An employee cannot sue his employer for improper training because an

employer does not owe the employee a duty to train.

In *Kopp*, therefore, there the employer did not breach any recognized duty to the plaintiff. In the absence of a duty, there can be no fault, per *Jones, supra*. The plaintiff's employer, then, could not have been a nonparty that was "at fault" for the plaintiff's injuries and the homeowner defendant should not have been allowed to name the employer as a nonparty at fault.

(2) *Kopp* does not apply to the present case.

The Legislative intent of MCL 600.2957 and MCR 2.112(K)(3)(c) is to place plaintiffs on notice that another person or entity may be wholly or partially liable for their injuries and to afford them an opportunity to add the nonparty to the action. MCR 2.112(K)(3)(b) specifically provides that the notice must contain a brief statement explaining the basis for believing that the nonparty is at fault. If the named nonparty cannot be added to the lawsuit, due to a lack of duty, and there can be no fault without a breach of a recognized duty, what would be the basis for believing that the nonparty is at fault?

In this case, the nonparty was not found to not owe a duty to the plaintiff, per *Fultz v Union-Commerce Assoc*, 470 Mich 460 683 NW2d 587 (2004). Thus, even if *Kopp* was correctly decided, it is not applicable in this case. *Jones, supra*, is controlling. Because IAQ owed no legal duty to plaintiff, it could not be a nonparty "at fault" and the trial court properly granted plaintiffs' motion to strike the notice of nonparty fault.

This Court should affirm.

CONCLUSION

For all the reasons stated above, this Court should affirm the order of Wayne Circuit Court granting Plaintiffs' motion to strike the notice of Defendant IAQ Management, Inc. as a non-party at fault.

Respectfully submitted,

Dated: January 20, 2009

By: /s/ Debra Garlinghouse

Debra Garlinghouse (P56856)
Lee B. Steinberg PC
3000 Town Ctr Ste 2510
Southfield, MI 48075
(248) 352-7777

Gary P. Supanich (P45547)
Gary P. Supanich PLLC
116 E. Washington, Suite 220
Ann Arbor, MI 48104
(734) 276-6561

Attorneys for Amicus Curiae
Michigan Association of Justice

PROOF OF SERVICE

I certify that I served this document on this date by enclosing two copies in sealed envelopes with first class postage prepaid, addressed to all counsel of record as listed below, and by depositing them in the United States mail:

Kevin T. Kennedy (P40672)
Rebecca S. Austin (P53919)
Christopher W. Bowman (P68772)
Blake, Krichner, Symonds, Larson,
Kennedy & Smith, P.C.
535 Griswold St., Ste 1400
Detroit, MI 48226
Attorneys for Plaintiffs-Appellees

Anthony F. Caffrey III (P60531)
Cardelli, Lanfear & Buikema, P.C.
125 Ottawa Ave. NW, Ste. 370
Grand Rapids, MI 49503
Attorneys for Defendant-Appellant

John A . Braden (P29645)
5519 Taylor Dr.
Fremont, MI 49412
Detroit, MI 48207
Amicus Curiae

Phillip J. DeRosier (P55595)
Dickinson Wright, PLLC
500 Woodward Ave., Ste. 4000
Detroit, MI 48226
Amicus Curiae Michigan Defense Trial
Counsel

David D. Grande-Cassell (P49359)
Kristin B. Bellar (P69619)
Clark Hill PLC
212 East Grand River Ave.
Lansing, MI 48906
Amicus Curiae Michigan Manufacturers
Association

I declare that the statements above are true to the best of my information, knowledge, and belief.

Dated: January 20, 2009

/s/ Liisa R. Speaker

Liisa R. Speaker