2193

JAN 22 2003

IN THE SUPREME COURT OF THE STATE OF OREGON

WILLIAM R. LYONS and BARBARA A. LYONS, Co-Personal Representatives of the Estate of Scott Alan Lyons, Deceased, Appellants-Petitioner on Review, vs. WALSH & SONS TRUCKING CO., LTD., an Oregon Corporation, Respondent-Respondent on Review	S.C. No. S49907 Multnomah County Circuit Court No. 98-06-04337 CA A110332
WALSH & SONS TRUCKING CO., LTD., Third Party Plaintiff, vs. JAMES EUGENE MAY, JR., Third Party Defendant.	

BRIEF OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION

Helen T. Dziuba, OSB #87210
Law Office of Helen T. Dziuba, PC
765 A Avenue
Lake Oswego, OR 97034
Telephone: 503-534-5020

Attorney for *Amicus Curiae*
Oregon Trial Lawyers Association

Franklin Hunsaker, OSB #72131
Richard J. Whittemore, OSB #82451
BULLIVANT HOUSER, et al.
888 SW 5th Avenue, suite 300
Portland, Oregon 97204
Telephone: (503) 499-4472
Attorneys for Respondent on Review

Meagan A. Flynn, OSB #92307
PRESTON BUNNELL & STONE, LLP
1100 SW 6th Avenue, suite 1405
Portland, Oregon 97204
Telephone: (503) 227-5445
Attorney for Petitioner on Review

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Brief of Amicus Curiae, Oregon Trial Lawyers Association

Introduction and Statement of Purpose

At the urging of defendant, Walsh Trucking, the court of appeals adopted a reading of ORS 18.470(5) that writes out of existence the prohibition against comparing the fault of immune persons contained in ORS 18.470(2). In the guise of permitting Walsh to prove that Sgt. Rector, the decedent's co-worker and an immune person, was the sole and exclusive cause of the decedent's death, the trial court negated the explicit provisions of ORS 18.470(2).

Amicus Curiae, Oregon Trial Lawyers Association (OTLA), writes to assist the court in determining the interplay between ORS 18.470(2) and (5) and the necessary predicate for triggering ORS 18.470(5).

Relevant Facts

For purposes of this brief, the following facts are taken from the court of appeals opinion and are undisputed. The decedent, an Oregon state police officer, was killed in a collision between the Oregon state police vehicle in which he was riding and a Walsh truck. Immediately prior to the collision, the state police vehicle driven by Lyons' co-worker, Sgt. Rector, made a U-turn in front of the Walsh truck. Plaintiff sought recovery from Walsh based on its employee's negligent operation of his tractor and trailer.

Pursuant to ORS 18.470 and OEC 403, plaintiff sought to exclude evidence describing the fault, if any, of Sgt. Rector. The trial court refused plaintiff's motion in limine, deciding instead to permit defendant to offer expert and other testimony concerning the alleged fault of Sgt. Rector. (Tr. 172-173, 180) Walsh was thus

permitted to introduce evidence regarding an "improper left U-turn" and Sgt. Rector's role as "the principal contributing factor" to the crash. The trial court recognized the need to give a precautionary instruction to the jury in light of the prohibition contained in ORS 18.470(2) and initially recited an instruction it would give regarding the "sole and exclusive" standard contained in ORS 18.470(5). After defendant objected, arguing the instruction somehow shifted a burden of proof to it, the trial court agreed and declined to give its own precautionary instruction and declined each of three such instructions offered by plaintiff.

Questions Presented

1. Of what import is the prohibition in ORS 18.470(2) regarding comparisons of fault with an immune person?

2. If a party successfully triggers ORS 18.470(5), how does the trial court apply all of the provisions of ORS 18.470 in a manner that implements the legislative dictates contained there?

3. Is the application of ORS 18.470(5) triggered where a party asserts that someone else's conduct is the "principal" cause of death or injury?

The Significance of ORS 18.470(2)

Prior to the enactment of ORS 18.470, contributory negligence was a bar to a plaintiff's recovery. Together with ORS 18.480, enacted in 1975, ORS 18.470 permits a comparison of the fault of only the plaintiff and a person against whom the plaintiff seeks recovery. Mills v. Brown, 303 Or 223, 226-227, 735 P2d 603 (1987). After hearing the evidence, the jury allocates fault totaling 100%. Id.

In Mills, this court explicitly rejected the interpretation of ORS 18.470(2) by the court of appeals (an interpretation strikingly similar to the interpretation of that court in this case). The error committed by the court of appeals in Mills, and here, is that it ignored the dictates of ORS 18.470(2) and permitted the jury to broadly consider and to decide what the court termed "the causation issues" – "who did what to whom, who was to blame and how is any joint blame to be allocated". 303 Or at 226. The court of appeals erred in Mills because it allowed the jury to consider the fault of an absent party. 303 Or at 226-227.

ORS 18.470 requires the jury to "assess and quantify fault". Sandford v. Chevrolet Division of General Motors, 292 Or 590, 606, 642 P2d 624 (1982); cited in Mills, 303 Or at 229. By its explicit terms, ORS 18.470(2) prohibits any assessment or quantification of fault for an immune person like Sgt. Rector: "there shall be no comparison of fault with any person: (a) Who is immune from liability to the claimant;". ORS 18.470(2)(a).

In Mills, this court specifically rejected the assertion that the jury could sort out all possible sources of fault and then, after the verdict was rendered, the court could allocate damages. That approach is inconsistent with both the plain language and with the intent of ORS 18.470. Mills, 303 Or at 230

A prohibition against comparing causation with an immune person is meaningful only to the extent the trial court enforces the prohibition throughout the trial, including in the inclusion or exclusion of evidence, the subject matter of argument and the eventual judgment in the case. This court has already said that ORS 18.470 is not just a statute

that governs whose name appears on the verdict form but rather that it governs the jury's entire comparative fault decision making. Mills, 303 Or at 231.

Here, the court of appeals endorsed the liberal allowance of opinion evidence of Sgt. Rector's relative fault and justified it based on a need to tell the complete story. The court of appeals opinion dismisses outright any objection to relative fault evidence finding justification in the need for the jury to look at causation. The error of the opinion is its willingness to interchange concepts of causation and fault. Causation typically includes two elements, causation in fact and legal causation. Fault addresses not only the conduct of an actor but also creates certain judgments about that conduct (i.e. witnesses might describe an intentional act, the party's recklessness, a negligent act or failure to act, or a professional's failure to meet a specified standard of care.) Causation on its own contains none of those judgments or qualitative descriptions. Causation can be measured in terms of a party's actions without any characterization of that conduct. State ex rel Sam's Texaco & Towing, Inc. v. Gallagher, 314 Or 652, 660, 842 P2d 383 (1992).

The opinion justifies its deviation from the restrictions imposed by ORS 18.470(2) by its desire to show the jury the whole movie. (183 Or App at 85) That might be desirable in the entertainment context and even in the law, **except that** the legislature has specifically prohibited the comparative analysis of an immune party's role in the plot. This court already rejected that approach in Mills when it rejected the court of appeals' view that it should have a jury decide the "who did what to whom, who was to blame and how is any joint blame to be allocated". 303 Or at 227.

In the absence of ORS 18.470, a jury would get to consider the relative fault of the plaintiff, of defendants still in the case and any other person who may have had

something to do with an accident. A defendant could escape or reduce its liability by proving that someone else is totally or partially to blame. However, these parties and this court do not begin with a clean slate but rather with the strict prohibitions of ORS 18.470.

The list of prohibited persons in ORS 18.470(2) was added by the legislature in response to Mills v. Brown. Because the legislature has chosen to prohibit the comparison of fault of immune persons, this court and trial courts must give that provision meaning. For immune persons, that provision was never intended to counter the rule of Mills v. Brown and thus the prohibition must be enforced.

Both ORS 18.470(2) and ORS 18.470(5) must be given meaning. The conduct of this trial and the view advocated by defendant, Walsh, would read ORS 18.470(2) out of existence simply because a defendant raised an issue about the causal connection between an absent, immune party's conduct and the accident. Defendant suggests the only significance of ORS 18.470(2) in that instance is to keep the immune party off the verdict form. That conclusion would be contrary to the plain language of ORS 18.470(2) and to Mills.

The holding by the court of appeals that:

"ORS 18.470(2) and (5) do not somehow render inadmissible evidence of an immune actor's conduct that is relevant to determining whether a defendant's conduct was a substantial factor in causing an injury" cannot be reconciled with the plain meaning of the statutes, particularly the strict prohibition of (2) that there be "no comparison of fault with any [immune] person". The argument that defendant could show that an immune person's behavior was "a substantial factor" is also contradicted by (5) which applies **only if** a party asserts that someone else has "the sole and exclusive fault" for the

injury or death. To say a party was "a substantial factor", is not the same as "sole and exclusive" and therefore an assertion that an immune person was even the "principal" cause does not open the door to testimony or argument like that permitted here.

This court must decide whether the prohibition against a comparison of fault with the immune person is a rule of evidentiary exclusion, a prohibition against arguing about relative causation, a rule prohibiting the appearance of an immune person on the verdict form for computing relative fault, or all of the above. The correct rule is that it is all of the above, subject only to the narrow exception in ORS 18.470(5).

Defendant's position (and that adopted by the trial court) is that the **only** significance of ORS 18.470 is to keep the immune person off the verdict form. That position is untenable, however, in light of the specific prohibition of any comparison of fault by the jury. Because any fault short of 100% is not relevant, evidence that the immune person was partially at fault is inadmissible evidence, inappropriate argument and insufficient to trigger ORS 18.470(5).

ORS 18.470(5) was never triggered

From the beginning, defendant sought to introduce, and plaintiff sought to exclude, testimony about Sgt. Rector's negligence or his conduct as the "principal" cause of the death of Lyons. By its terms, ORS 18.470(5) only applies where there is an allegation that another party's fault is "sole and exclusive". Because defendant never alleged that Sgt. Rector's fault was "sole and exclusive", this court need not reach the question of the meaning of ORS 18.470(5).

Whether a mere allegation of someone else's conduct as the "sole and exclusive" fault causing an accident or injury triggers ORS 18.470(5) is a question left for another day.

To establish fault in a negligence case, a party must establish both causation in fact and a judgment that the conduct is negligent. Those two elements are separate and both are necessary. Brennen v. City of Eugene, 285 Or 401, 405, 591 P2d 719 (1979) Fault thus combines concepts of both causation in fact, legal causation and a judgment about standards of behavior. It is axiomatic that for there to be "sole and exclusive fault", there must be "sole and exclusive" causation, not merely that an actor's conduct be the "principal factor", a significant cause or something else short of "sole and exclusive". According to Webster's Dictionary, "exclusive" means "undivided". Thus, sole and exclusive fault would leave no room for others and must represent 100%.

Under normal circumstances, where the conduct of two parties coincides to produce a plaintiff's injury, courts and juries are unable to dissect that conduct with mathematical certainty: "Once it is assumed, however, that two or more distinct causes had to occur to produce an indivisible injury, we doubt that the purpose of the proportional fault concept is to subject the combined causation to some kind of vector analysis, even in the rare case of simultaneous, physically commensurable forces." Sandford, 292 Or at 602. However, by its terms, ORS 18.470(5) is triggered only by a party's allegation that "the injury or death was the sole and exclusive fault of a person who is not a party". Therefore, if a party wants to employ that provision to establish the relevance of the conduct of the other person it must establish causation and fault equaling 100% - i.e., sole and exclusive.

If defendant wants to argue that it is entitled to provide context for its behavior and if the court of appeals is correct that the jury should know the circumstances, why wouldn't it be enough to stipulate that the collision occurred after the car in which the decedent was riding was a state police vehicle that made a U-turn to respond to an emergency. Why would it be appropriate to permit expert and other opinion testimony about the "fault" of the driver when ORS 18.470(2) specifically prohibits the jury from considering the issue. The factual predicate and the circumstances can be described without any value judgment or characterization of the absent actor's conduct. Sam's Texaco & Towing, 314 Or at 660.

ORS 18.470(2) is specific in prohibiting a comparison of the fault of the listed parties. ORS 18.470(5) does not override that provision. One reasonable interpretation of ORS 18.470(5) is that it applies to non-parties **other than** the list contained in ORS 18.470(2). Thus, this court could determine that the legislature meant to exclude evidence of the fault of immune persons for all purposes and that ORS 18.470(5) would permit Walsh to allege that someone other than Sgt. Rector was solely and exclusively at fault.

Whatever interpretation of the two provisions the court reaches, a trial court may not ignore the specific dictates of ORS 18.470(2) but rather must police the receipt of evidence and the instruction of the jury to fulfill the legislative policy choice. Because that was not done here, reversal is warranted.

Conclusion

ORS 18.470(2) makes evidence of fault by an immune person irrelevant and highly prejudicial. Because the provision of ORS 18.470(5) was never triggered, this case should be remanded for a new trial.

Respectfully submitted this 22nd day of January, 2003

Helen T. Dziuba, OSB# 87210
Law Office of Helen T. Dziuba, PC

For *Amicus Curiae* OTLA

CERTIFICATE OF SERVICE

I hereby certify that I served the forgoing Brief of Amicus Curiae on:

Franklin Hunsaker, OSB #72131
Richard J. Whittemore, OSB #82451
BULLIVANT HOUSER, et al.
888 SW 5th Avenue, suite 300
Portland, Oregon 97204
Telephone: (503) 499-4472

Meagan A. Flynn, OSB #92307
PRESTON BUNNELL & STONE, LLP
1100 SW 6th Avenue, suite 1405
Portland, Oregon 97204
Telephone: (503) 227-5445

On January 22, 2003, by mailing to said individuals a correct copies thereof, contained in sealed envelopes, with postage prepaid, by first class mail, at the addresses above stated.

Helen T. Dziuba, OSB 87210
Attorney for Amicus Curiae
Oregon Trial Lawyers Assoc.