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Pa. Superior Court Ruling Opens Door for Plaintiffs to Avoid Fair Share Act Application, Attorneys Say

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The Fair Share Act does not apply in situations where a plaintiff is not comparatively at fault for his or her injuries, the Pennsylvania Superior Court has ruled in a case that some attorneys say marks a shift in how courts have typically been applying the statute, which calls for apportionment of judgments among defendants.

A three-judge Superior Court panel, in a case largely upholding a $13 million judgment, said that a plain reading of the Fair Share Act shows that the recovery regime only applies in situations where plaintiffs are comparatively at fault.

Where there is no liability against a plaintiff, the court said, then courts must apply the common-law principles of joint and several liability that had been in place before Act 17 of 2011, often referred to as the Fair Share Act, took effect.

The case is captioned Spencer v. Johnson. The opinion was handed down March 18.

"We decline to disregard the plain language of the statute. The Fair Share Act concerns matters where a plaintiff's own negligence may have or has contributed to the incident; that set of circumstances does not apply to the present matter," President Judge Jack Panella said in the court's 87-page opinion. "While this case involved multiple tortfeasors, it would have been improper to apply a statute that addresses the scenarios where a claimant may have contributed to the accident and the possible preclusion of recovery based on a plaintiff's own negligence."

Under the Fair Share Act, defendants are only responsible for the percentage of damages for which they have been found liable, and can only be made to pay a full award if they are found more than 60% responsible for the injuries. Before the Fair Share Act took effect, joint and several liability applied across the board, making it so a defendant found liable for any percentage of an incident could be made to pay the entire award.

According to Schmidt Kramer attorney Scott Cooper, who focuses on representing plaintiffs, the ruling "blows a hole" in the Fair Share Act by limiting it solely to instances where a plaintiff is partially at fault for his or her injuries. Although Cooper, who was not involved in the case, said he has been raising the issue for years, the ruling in Spencer represents a big shift in how courts and attorneys have been almost universally applying its recovery scheme in cases where comparative negligence was not an issue, he said.

"They've all been applying the Fair Share Act, and people have been litigating cases based on the Fair Share Act, even if their client did nothing wrong," Cooper said. "Everyone assumed it applied."

White and Williams attorney Wesley Payne, who represents defendants and was also not involved in the case, said the court's analysis "opened a can of worms" that could cause headaches for judges and litigators trying to draft jury questions, especially when it comes to issues like products liability.

He said he understands how the court got to the conclusion it reached, "but if you take a step back and look at all the rest of the issues, you might not want to do it this way. It opens multiple cans of

worms you don't want to deal with."

The case stems from an incident where the plaintiff, Keith Spencer, was hit by a trade union vehicle that was being driven by an intoxicated, non-union employee. According to court papers, Spencer was crushed while crossing the street by a 2009 Ford Escape that Philadelphia Joint Board Workers United owned and provided to union worker Tina Gainer Johnson. Gainer Johnson's husband, Cleveland Johnson, had been driving the car.

The Philadelphia jury that heard the case ultimately determined that Gainer Johnson was 19% liable, Johnson was 36% at fault and the union was 45% liable, and awarded a total of $12.9 million to Spencer.

According to Panella, the general rules outlined in the Fair Share Act that discuss its application focus on scenarios involving comparative negligence. Then the act proceeds to subsection a.1, which starts with the phrase "where recovery is allowed against more than one person."

That language, plus the history of the Comparative Negligence Act, which the Fair Share Act replaced, indicated that the General Assembly enacted the new provisions only to "modify which parties bear the risk of additional losses in cases where the plaintiff was not wholly innocent" and did not intend to do away with common-law principles of joint and several liability, Panella said.

"There is no indication the legislature intended to make universal changes to the concept of joint and several liability outside of cases where a plaintiff has been found to be contributorily negligent," Panella said.

Messa & Associates principal Joseph Messa, who is representing Spencer, noted that the ruling also bolsters case law holding that liability of employees and employers can be stacked for the purposes of piercing the 60% threshold.

"We are certainly happy for the decision," Messa said.

However, Messa said he did not see the ruling as a significant shift, but rather "I see it as a jurist who has taken the time to do an analysis of the language of the act."

"I think it's a fair reading of the plain language of the statute. I think it's what is supposed to be done when the statute doesn't specifically repeal the common law," he said.

Kline & Specter's Shanin Specter, who did not handle the case, offered similar sentiments.

"The Superior Court's natural reading of the plain words of the act prohibits a defendant from undermining the common law doctrine of joint liability in most cases," he said.

Cooper, however, said attorneys with open cases where multiple defendants are involved might want to review their case files to see whether they should argue that the Fair Share Act shouldn't apply. Attorneys, he said, should take an especially close look at cases involving passengers and tractor-trailers.

"This is really going to impact those cases," he said.

Payne, however, said that, while the analysis might present a change in how courts view the issue, the issue itself should only come up in limited circumstances since defendants can almost always seek to find at least 1% comparative liability against plaintiffs.

Further, he said it would make sense for the defense to seek an appeal, especially since the ruling essentially came from a two-judge panel, with Judge Daniel McCaffery joining Panella and Judge Maria McLaughlin, who was assigned to the panel, not participating.

Cipriani & Werner attorney Mary Ellen Conroy, who is representing the union in the case, did not return a call seeking comment, and David White of Marshall Dennehey Warner Coleman & Goggin, who is representing Gainer Johnson, declined to comment.