INTRODUCTION

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Contributory negligence continues as a barrier to justice for the citizens of North Carolina and only three other states, having been discredited by legal scholars and abandoned by 46 states.[i] Contributory negligence is an arcane doctrine which must be abandoned. Three principal reasons compel this conclusion.

First, contributory negligence is a harsh, patently unfair doctrine because a careless person avoids all responsibility for the injuries they cause. When an injured citizen is denied recovery regardless of the degree to which they are at fault, it erodes public confidence in the fairness of our courts. North Carolina law should trust our citizen juries to proportion responsibility between the parties by adopting the more equitable rule of comparative negligence.

Secondly, the historic rationale for contributory negligence no longer applies. North Carolina adopted contributory negligence because it was the majority rule at that time. However, the overwhelming majority of jurisdictions, have now rejected it and no sound rationale justifies its continued support.

Finally, comparative negligence promotes the more efficient use of our judicial resources by eliminating common law doctrines that have created their own difficulties; the avoidance of a contributory negligence bar by proving gross negligence and last clear chance. Both of these doctrines developed as exceptions to the harsh rule of contributory negligence. The elimination of the need for instructions on gross negligence and last clear would simplify trials and reduce appellate issues.

I. CONTRIBUTORY NEGLIGENCE IS A HARSH RULE WHICH HAS BEEN ABANDONED BY THE OVERWHELMING MAJORITY OF JURISDICTIONS

The vast majority of jurisdictions within the United States have rejected contributory negligence in favor of comparative negligence because the overwhelming opinion of legal scholars and authorities recognize the basic concepts of fairness and justice embraced by comparative negligence.[ii] Four neighboring states, (Tennessee, South Carolina, Kentucky and West Virginia) have abandoned contributory negligence and adopted comparative negligence by judicial decision.[iii] The time has come for our Supreme Court to do the same.[iv]

B. Contributory Negligence is Unjust.

Negligence cases represent a significant portion of the trial courts' dockets. The public, therefore, has a significant interest in having these cases resolved in a manner that is fair, just and reasonable. Contributory negligence has been widely and thoroughly criticized for many years because of its lack of fundamental fairness.[v] There are no defenders of contributory negligence in modern legal scholarship or judicial opinions. Contributory negligence is inherently unfair because it forces an injured person to bear the entire loss, even though the loss is caused in part by the wrongdoing of another. The injured party is forced to bear the entire burden of both parties' conduct, despite being the one least able to do so. The defendant is able to completely avoid personal responsibility for causing an injury. A half century ago, William L. Prosser observed that "No one ever has succeeded in justifying that as a policy, and no one ever will." [vi]

Decisions from other States' Supreme Courts that have abandoned contributory negligence reiterate this criticism. The West Virginia Supreme Court referred to contributory negligence as an "obvious injustice."[vii] In Langley v. Boyter, Chief Judge Sanders, writing for the Court of Appeals of South Carolina, stated:

> To paraphrase John Locke, there is nothing less powerful than an idea whose time has gone. In our opinion, the Doctrine of Contributory Negligence is an idea whose time has gone in South Carolina. It is extinct almost everywhere it once existed. It no longer exists in England, the country of its birth. It survives only in parts of this country, where it is threatened and endangered.

> Indeed the Doctrine of Contributory Negligence exists today as the Ivory-billed Woodpecker of the common law.
>
> The continued existence of the Doctrine of Contributory Negligence as presently applied in South Carolina cannot be justified on any logical basis. It is contrary to the basic premise of our fault system allowing a defendant, who is at fault in causing an accident, to escape bearing any of its costs, while requiring a plaintiff, who is no more than equally at fault or less at fault to bear all of its costs. As our Supreme Court has observed, 'there is no tenet more fundamental in our law than liability follows the tortious wrongdoer'.[viii]

One wonders how long we will have to wait to read such an enlightened position articulated by our Supreme Court.

C. <u>The Harshness of Contributory Negligence Undermines the Public's Confidence in the Fairness of our Courts.</u>

Contributory negligence erodes public confidence in our courts and their ability to impart justice to persons in need of help. It has been widely recognized that juries, in order to avoid the harshness of contributory negligence, will find the defendant liable, ignore the plaintiff's contributory negligence, and then reduce the damages.[ix] Such motivation on the part of a jury, as laudable and understandable as it may be in terms of doing justice in an individual case, is harmful to the rule of law for three reasons:

> (1) It invites a jury to disregard the court's instructions and to engage in their attempt to be fair and just without appropriate guidance from the court.
>
> (2) Jurors who disregard the law to reach a fair result have less faith and trust in their judicial system and the rule of law.
>
> (3) Jurors who follow the judge's instructions regarding contributory negligence will feel as though they have not rendered a "just" decision.

Variations in jury response to contributory negligence result in inconsistent applications of the law. Such justified reactions to the outdated doctrine of contributory negligence causes citizen jurors to distrust the judicial system's ability to provide them, their families, and neighbors with fair resolution of future problems. The civil law in a democratic society must always be rational and just and thereby earn the respect and confidence of its consumers--the citizens. Our Supreme Court should welcome the

opportunity to examine these important issues after full briefing, debate and consideration of the public interest.

II. THERE IS NO SOUND RATIONALE FOR THE CONTINUED ADHERENCE TO THE DOCTRINE OF CONTRIBUTORY NEGLIGENCE

A. Brief History of Contributory Negligence in North Carolina

Our state Supreme Court is cited as having adopted the doctrine of contributory negligence as a complete bar to a plaintiff's recovery, essentially in dicta, in an 1869 opinion, Morrison v. Cornelius.[x] In Morrison, the plaintiff sued for value of cattle that died after drinking poisonous liquid left behind when the defendants abandoned a saltpetre manufacturing plant to escape from Union troops. Although this case is cited as the origin of our contributory negligence rule, the Court concluded in Morrison that under the facts, the defendants owed no duty to the cattle owner and therefore the question of negligence was not properly submitted to the jury. In dicta, this Court briefly discussed the rationale for contributory negligence: "[w]e have examined with care some of the leading American and English authorities and in the midst of various conflicting views, we think they establish some general uniform rules on the subject."[xi]

Contributory negligence was therefore adopted in North Carolina because it was the "generally uniform" rule at the time of the Morrison decision. Our Supreme Court has never examined the rationale for following the doctrine of contributory negligence. The initial reason for its adoption (that it was the majority rule) ceased to be true long ago and our Court should recognize this and join the other 46 states that have already adopted comparative negligence. As stated by Chief Judge Sanders, writing for the South Carolina Court of Appeals, in Langley v. Boyter:[xii]

> The doctrine [of contributory negligence] has long since been abandoned virtually everywhere it was once recognized, including in England, the country of its birth. Prosser, Comparative Negligence 466-467.

B. The Historical Reasons for Contributory Negligence are no longer valid.

The apparent rationales offered by some early North Carolina cases no longer justify the doctrine of contributory negligence. The three historical rationales for contributory negligence are: (1) the injured party brought the injury upon himself, (2) there were no rules for apportioning the damages when multiple parties were at fault, and (3) the rule was apparently followed by a majority of jurisdictions at that time.[xiii]

These reasons no longer justify the continued application of contributory negligence in light of changes that have occurred in society and in the law since Morrison v. Cornelius. There is no logical rationale for depriving an injured plaintiff of any recovery simply because of some slight negligence, while allowing the other negligent party to avoid responsibility completely. Such a rule is contrary to the principal of personal responsibility.

The success of comparative negligence in other states now provides a wealth of experience and guidance with which to evaluate the relative fault and to assess damages fairly. Well-recognized rules exist for apportioning damages to reflect comparative fault and our state's trial courts are already called upon to apply the doctrine of comparative negligence in some situations. A plaintiff in North Carolina seeking redress under the Federal Employer's Liability Act,[xiv] or under Admiralty Law does not face a complete bar if found to be negligent. Both of those federal statutes have embraced the doctrine of comparative negligence. Additionally, claims are sometimes tried in which another state's law regarding comparative negligence must be applied.[xv]

And finally, Forty-six states have now recognized this obvious truth. *Stare Decisis* does not justify the continued injustice of the doctrine.

C. Our Supreme Court has the Authority to Abolish Contributory Negligence Because it is a Doctrine of Common Law.

Since contributory negligence is a doctrine of common law that has not been codified, it may be changed by the North Carolina Supreme Court. This has been discussed

in two prominent rulings in the North Carolina Court of Appeals, Bosley, *supra* and Bowden *supra.* Judge Wynn, writing for the court in Bosley, stated,

> From the outset, we recognize that there are serious questions regarding the validity of the doctrine of contributory negligence as evidenced by the fact that forty-six states have abandoned the doctrine in favor of comparative negligence... We first further acknowledge that the United States Supreme Court has described contributory negligence as a 'discredited doctrine which automatically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight.' Pope and Talbert, Inc. v. Hawn, 346 U.S. 406, 409, 74 S.Ct. 202, 205, 98 L.Ed. 143, 150 (1953). ***The doctrine of contributory negligence, which is a creature of common law followed in this State since Morrison v. Cornelius,63 N.C. 346 (1869), remains the law of this State until our Supreme Court overrules Morrison.*** (emphasis added) See Corns v. Hall, 112 N.C. App. 232, 435 S.E.2d 88 (1993); see also Cannon v. Miller, 313 N.C. 324, 327 S.E.2d 88 (1985). It is also clear that although there is no statutory basis for the doctrine of contributory negligence in North Carolina, the General Assembly, in the face of inaction by our Supreme Court, could chose to adopt a system of comparative negligence.[xvi]

D. *Stare Decisis* Should Never Impede Improvements in Law.

Stare Decisis does not prevent legal reform when experience and reason propel our court to conclude that reform is needed. The North Carolina Supreme Court has said "nothing is settled until it is settled right."[xvii] Nor should our Supreme Court apply *Stare Decisis* "when it results in perpetuation of error or grievous wrong."[xviii] Justice Southerland, writing for the United States Supreme Court in 1933 said:

> To say that the courts of this country are forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time, is to deny to the common law in the place of its adoption a 'flexibility and capacity for growth and adaptation' which was 'the peculiar boast and excellence' of the system in the place of its origin.[xix]

In recognition of the principal that *Stare Decisis* should never impede the evolution of justice, the Supreme Courts of South Carolina, Tennessee, West Virginia, Kentucky, Florida, Iowa, Montana, Michigan, New Mexico, Illinois, California and Alaska have all abandoned the common law doctrine of contributory negligence and embraced the more just doctrine of comparative negligence.[xx]

The Supreme Court of Kentucky, adopting comparative negligence, stated:

> But the doctrine of *Stare Decisis* does not commit us to the sanctification of ancient fallacy... '*Stare Decisis* does not preclude the change. That principle does not require blind imitation of the past or adherence to a rule...we must reform common law doctrines that are unsound and unsuited to present conditions'.[xxi]

III. ADOPTION OF COMPARATIVE NEGLIGENCE WOULD CONSERVE JUDICIAL RESOURCES

Comparative negligence would eliminate the tremendous waste of judicial resources spent on interpreting and applying the patchwork of exceptions to contributory negligence. Courts have reacted to the harshness of contributory negligence by creating exceptions to avoid its application. This approach further complicates the law, increases the appellate case load, and results in the unfair treatment of similarly situated plaintiffs. For example, North Carolina courts have long recognized that contributory negligence is not a bar to recovery when the defendant's conduct rises to the level of gross negligence. This exception essentially allows juries to compare the relative negligence of the parties: when the defendant's conduct is particularly egregious, the plaintiff is not barred from recovery.

However, the doctrine of gross negligence remains an "all or nothing" proposition which often fails to achieve a fair and equitable result, unless the jury chooses to ignore the law as given by the court. Although the doctrine may allow a plaintiff to overcome the bar of contributory negligence, it still does not permit the jury to weigh and balance the respective negligence of the parties in awarding damages. A defendant who is grossly negligent pays for all of the plaintiff's damages, even when those damages were caused in part by the plaintiff's negligence.

Another common law doctrine created to avoid contributory negligence is "last clear chance." Our own Court of Appeals has acknowledged the criticism of last clear chance as a cumbersome and complicated method to avoid the harshness of contributory negligence. Judge Lewis, writing for the Court of Appeals of North Carolina in Bowden v. Bell, recognized this criticism:

> We note from the outset that the doctrines of contributory negligence and last clear chance have been sharply criticized. In fact, forty-six states have abandoned the doctrine of contributory negligence in favor of comparative negligence. Bosley v. Alexander, 114 N.C. App. 470, 471, 442 S.E.2d 82, 83 (1994). In this state, in 1981, the Legislative Research Commission recommended to the General Assembly that it abolish the doctrines of contributory negligence and last clear chance by enacting the Commission's Proposed Statute on Comparative Fault. *North Carolina Legislative Research Comm'n Rep. to the 1981 General Assembly of North Carolina, Laws of Evidence and Comparative Negligence* (1981). The Commission noted that 'general agreement exists that courts have utilized special devices, such as last clear chance,...primarily to mitigate against the harshness of the contributory negligence rule.' Id. at 6. See also W. Page Keeton, et al., Prosser and Keeton on the Law of Torts, §66, at 463-64 (5th Ed. 1984) ("no very satisfactory reason for the rule [of last clear chance] ever has been suggested... The real explanation would seem to be a fundamental dislike for the harshness of the contributory negligence defense.")[xxii]

Prosser has concluded that this exception has resulted in enormous confusion among and within the various states.[xxiii]

As long as our courts continue to apply this outdated and criticized barrier to justice, our citizens who have been injured by the carelessness of others will suffer an uncertain fate when going to court. Some will have a jury disregard the law and apply a type of comparative negligence of the jury's unguided creation in their effort to be fair. Others will leave with no help from the halls of justice. It is our mission to continue to fight this doctrine and regain the public's confidence in our courts.

i. The four states which continue to recognize contributory negligence as a complete bar to recovery are Alabama, Maryland, North Carolina and Virginia. See Henry Woods, Comparative Fault, §1.11(2nd Ed. 1987 and cum. supp. 1994).

ii. See Steven Gardner, Contributory Negligence, Comparative Negligence, and Stare Decisis in North Carolina, 18 Campbell L. Rev. 14 (1996); William L. Prosser, Comparative Negligence, 51 Mich. L. Rev. 465 (1953); Robert E. Keeton, Creative Continuity in the Law of Torts, 75 Harv. L. Rev. 463 (1962), Fleming and Gray, Four, The Law of Torts, §22.1(2nd ed. 1986 and cumm. supp. 1993).

iii. McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992), Nelson v. Concrete Supply Co., 339 S.E.2d 783 (S.C. 1991), Hilen v. Hays, 673 S.W.2d 713 (Ky. 1994), Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W.Va. 1979).

iv. The North Carolina Supreme Court recently heard an appeal in Yancey v. Lea, 354 N.C. 48, 550 S.E.2d 155(2001), on the issue from the dissent in the Court of Appeals, 139 NC App 76, 532 S.E.2d 560, on the failure of the trial court to instruct on gross negligence to overcome contributory negligence. In that case, plaintiff (William S. Mills as counsel) requested the trial judge to give a jury instruction on comparative negligence, which was denied. The Court of Appeals opinion stated that despite what their personal opinions may be, they were compelled to follow the law as established by the Supreme Court and affirmed. The Supreme Court, despite the fact that a mandatory appeal existed on the failure to give the gross negligence instruction, denied the petition for discretionary review on the failure to give the comparative negligence instruction. 352 N.C. 683, 545 S.E.2d 729 (2000) This is the most recent opportunity declined by our Supreme Court to move our State into the majority of jurisdictions.

v. See Steven Gardner, Contributory Negligence, Comparative Negligence, and Stare Decisis in North Carolina, 18 Campbell L. Rev. 14 (1996), Fn 2.

vi. See William L. Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 469 (1953).

vii. See Bradley, *supra.* at 883.

viii. 325 S.E.2d 550, 562 (1984). The Langley opinion is an excellent review of the history of contributory negligence, its flaws and the damage it has caused to jurisprudence. It likewise traces the history of comparative negligence and analyzes its strengths. When the South Carolina Supreme Court adopted comparative negligence in Nelson v. Concrete Supply Co., 399 S.E.2d 783 (1991), in a one-page opinion Chief Justice Gregory writing for the South Carolina Supreme Court simply made reference to Langley v. Boyter for "an exhaustive analytical discussion of the history and merits of comparative negligence." Nelson at 784.

ix. See Robert E. Keeton, Creative Continuity in the Law of Torts, 75 Harv. L. Rev. 463, 505 (1962); Prosser, note 7 at 469; Comments on Maki v. Frelk - Comparative versus Contributory Negligence: Should the Court or Legislature Decide?, 21 Vand. L. Rev. 889 (1968).

x. 63 N.C. 346 (1869). See, e.g., Bowden v. Bell, 116 N.C. App. 64, 67, 446 S.E.2d 816, 819 (1994), Bosley v. Alexander, 114 N.C. App. 470, 471, 442 S.E.2d 82, 83 (1994) (citing Morrison as the case that adopted contributory negligence in North Carolina).

xi. Id. at 345.

xii. 325 S.E.2d 550, 556 (1984).

xiii. *See, e.g.,* Manly v. Wilmington and Weldon Railroad, 74 N.C. 655, 659 (1876) ("the injured party must be taken to have brought the injury upon himself" and noting that there was no rule to determine how to apportion damages when both parties are at fault), Walker v. Reidsville, 96 N.C. 382, 384 (1887) ("no rule can be devised to determine how much of the damage is attributable to the one party and how much to the other.")

xiv. 45 U.S.C.A. §51. An example is Keith v. Norfolk Souther Railway Co., 9 N.C. App. 198, 175 S.E.2d 778 (1970).

xv. See McFarland v. Cromer, 117 N.C. App. 678, 453 S.E.2d 527 (1995); Bondreau v. Baughman, 332 N.C. 331, 368 S.E.2d 849 (1988).

xvi. Bosley, 114 N.C. App. 470, 471, 442 S.E.2d 82, 83.

xvii. Sidney Spitzer and Co. v. Commissioners of Franklin County, 186 N.C. 30, 32, 123 S.E.2d 636, 638 (1924).

18. See Wiles v. R. Welparnel Construction Co., Inc., 295 N.C. 81, 85, 243 S.E.2d 756, 758 (1978).

xix. Funk v. United States,290 U.S. 371, 54 S.Ct. 212, 216, 78 L.Ed. 369 (1933).

xx. Kaatz v. Slate, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 532 P.2d 1226 (Calif. 1975); Hoffman v. Jones, 280 So.2d 431 (Fla. 1973); Alvis v. Ribar, 421 N.E.2d 886 (Ill. 1981); Goetzrnan v. Wichern, 327 N.W.2d 742 (Iowa 1982); Hilen v. Hayes, 673 S.W.2d 713 (Ky. 1984); Placek v. City of Sterling Heights, 275 N.W.2d 511 (Mich. 1979); Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983); Scott v. Rizzo, 634 P.2d 1234 (N.M. 1981); McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992); Nelson v. Concrete Supply Co., 399 S.E.2d 783 (S.C. 1991); Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W.Va. 1979).

xxi. Hilan v. Hayes, 673 S.W.2d 713, 717, quoting in part Goetzrnan v. Wichern, 327 N.W.2d 742 (Iowa 1983).

xxii. Bowden v. Bell, 116 N.C. App. 64, 67, 446 S.E.2d 816, 819 (1994)

xxiii. W. Prosser, Law of Torts, §66 at 428; Langley, *supra* at 554.