No. 15-0943

IN THE SUPREME COURT OF IOWA

SHARI KINSETH AND RICKY KINSETH, co-executors of the estate of LARRY KINSETH, deceased,
Plaintiffs-Appellees/Cross-Appellants,

v.

WEIL-MCLAIN,
Defendant-Appellant/Cross-Appellee,

and

STATE OF IOWA, ex. rel., CIVIL REPARATIONS TRUST FUND,
Intervenor.

Appeal from the Wright County District Court,
District Court No. LACV 022887,
The Honorable Stephen P. Carroll, presiding

REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The Kinseths state the following issue for review on their cross-appeal:

1. Did the district court err in allowing Weil-McLain to apportion fault to bankrupt entities?

Baker v. City of Ottumwa, 560 N.W.2d 578 (Iowa 1997)

Baldwin v. City of Waterloo, 372 N.W.2d 486 (Iowa 1985)

Godbersen v. Miller, 439 N.W.2d 206 (Iowa 1989)

Hagen v. Texaco Ref. & Mktg., Inc., 526 N.W.2d 531 (Iowa 1995)

Jamieson v. Harrison, 532 N.W.2d 779 (Iowa 1995)

Mulhern v. Catholic Health Initiatives, 799 N.W.2d 104 (Iowa 2011)

Pepper v. Star Equipment, Ltd., 484 N.W.2d 156 (Iowa 1992)

Peterson v. Pittman, 391 N.W.2d 235 (Iowa 1986)

Reese v. Werts Corp., 379 N.W.2d 1 (Iowa 1985)

Schwennen v. Abell, 430 N.W.2d 98 (Iowa 1988)

Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854 (Iowa 1994)

ARGUMENT

In response to the Kinseths' argument that bankrupt entities Hercules and Johns-Manville should not have been allocated fault at trial, Weil-McLain contends that these entities were properly on the verdict form as "released parties." In support of this argument, Weil-McLain urges the Court to rely on the language in the Iowa Comparative Fault Act, Chapter 668. An examination of the statutory language—and the legislative intent—shows that bankrupt entities are *not* properly considered released parties for purposes of allocating fault.

In interpreting the Iowa Comparative Fault Act, the Court's mission is to ascertain the legislature's intent. *Mulhern v. Catholic Health Initiatives*, 799 N.W.2d 104, 113 (Iowa 2011). Legislative intent is determined through examination of both the statutory language and the legislative history. *See id.* This Court has observed that, "[i]n construing our comparative fault act, 'we seek a reasonable construction that will accomplish the purpose of the legislation and avoid absurd results.'" *Id.* (quoting *Hagen v. Texaco Ref. & Mktg., Inc.*, 526 N.W.2d 531, 542-43 (Iowa 1995)).

Generally speaking, the purpose of replacing contributory negligence with comparative fault was to "'make defendants pay in proportion to their fault'" and to "'prevent[] a plaintiff from being compensated for fault that he or she should fairly bear.'" *Id.* (quoting *Godbersen v. Miller*, 439 N.W.2d 206, 208 (Iowa 1989)).

The Iowa Comparative Fault Act does define "party" to include, *inter alia*, "[a] person who has been released pursuant to section 668.7." Iowa Code § 668.2. The type of release contemplated by Section 668.7 is "[a] release, covenant not to sue, or similar agreement entered into by a claimant *and a person liable* . . . ." Iowa Code § 668.7 (emphasis added). When such a release exists, "the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, as determined [by the court or the jury as provided] in section 668.3, subsection 4." Iowa Code § 668.7.

The language, history, and purpose of the Iowa Comparative Fault Act indicate that a bankrupt entity, including an asbestos bankruptcy trust, is not a "released party" within the meaning of

the Act. Because the Iowa Comparative Fault Act is based on the Uniform Comparative Fault Act, this Court "has relied on the drafter's comments to the Uniform Act in construing the Iowa act." *Mulhern*, 799 N.W.2d at 115 (citing *Baldwin v. City of Waterloo*, 372 N.W.2d 486, 493 (Iowa 1985)). Iowa Code § 668.7, titled "Effect of release," is an almost verbatim adoption of Section 6 of the Uniform Act. The drafter's comments to Section 6 specifically address the problem of a "wrongdoer entitled to legal immunity." Comments, Unif. Comparative Fault Act § 6. The Comments note that if an immune party is treated like a released tortfeasor, and his equitable share is subtracted from the claimant's recovery, "this would unfairly cast the whole loss on the claimant." *Id.* The Comments observe that this unfairness "might be adjusted by spreading the immune party's obligation among all of the parties at fault, including the claimant," but that "this same result is also accomplished by leaving the immune party out of the action altogether; a far easier and simpler solution." *Id.* The Comments conclude that, "[t]his Act therefore makes no provision for immunities." *Id.*

Iowa's own Comparative Fault Act similarly makes no provision for immunities. As in the Uniform Act, it only considers releases between a claimant and a "liable" party, *i.e.*, a party liable in the tort system. Iowa Code § 668.7. Bankrupt entities such as Hercules and Johns-Manville are, of course, immune from tort liability under the automatic stay provisions of the U.S. Bankruptcy Code. 11 U.S.C. § 362. While Weil-McLain contends that Hercules and Johns-Manville were "named defendants," that is incorrect as these entities cannot be sued in the tort system and were not sued in this case. (App. 1-4).

Consistent with the language and intent of the Iowa Comparative Fault Act, this Court has consistently recognized that there should be no allocation of fault to those immune from suit. As set forth in the Brief for Appellees/Cross-Appellants, this Court has previously found that fault should not be apportioned to a bankrupt entity, or an asbestos bankruptcy trust, because there is no viable tort claim against them. *See Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 863 (Iowa 1994); *Pepper v. Star Equipment, Ltd.*, 484 N.W.2d 156, 158 (Iowa 1992). Other types of

immunities from suit have also been found to preclude allocation of fault. *See Baker v. City of Ottumwa*, 560 N.W.2d 578, 584 (Iowa 1997) (fault could not be allocated to a city that was immune from suit under an exemption to municipal liability for claims related to swimming pools); *Schwennen v. Abell*, 430 N.W.2d 98, 103 (Iowa 1988) (fault could not be allocated to spouse who was immune from his wife's loss of consortium suit); *Reese v. Werts Corp.*, 379 N.W.2d 1, 6 (Iowa 1985) (fault could not be allocated to an employer immune from suit under the exclusivity provision of the workers' compensation act). These cases are governed by the principle that "it [i]s improper to bring parties into an action for purposes of ascertaining their degree of fault in the absence of some claim for affirmative relief against those parties." *Pepper*, 484 N.W.2d at 157 (citing *Peterson v. Pittman*, 391 N.W.2d 235, 238 (Iowa 1986)).

There are important policy reasons for Iowa's rule that tort defendants cannot seek to apportion fault to those immune from suit. This Court has consistently recognized that apportioning fault to an immune party will unfairly reduce the plaintiff's

recovery by "siphoning off" a portion of the aggregate fault to a party that is not liable to the plaintiff. *Baker*, 560 N.W.2d at 584; *Spaur*, 510 N.W.2d at 863; *Pepper*, 484 N.W.2d at 158. It is therefore the defendant, rather than the plaintiff, that should bear the loss occasioned by a wrongdoer immune from suit. *Baker*, 560 N.W.2d at 584. Specifically in the case of an asbestos bankruptcy trust, this Court has determined that "the potential insolvency of a codefendant should be borne by the solvent defendants, not by the plaintiffs." *Spaur*, 510 N.W.2d at 863.

The district court erroneously concluded that Plaintiffs should bear the loss resulting from the apportionment of fault to bankrupt entities that cannot pay their share of fault. (App. 807-08). The district court's policy analysis is directly contradicted by this Court's instruction that plaintiffs should be protected from this type of fault siphoning, even when requiring the trial defendant to assume this liability may seem "harsh and unjust." *Spaur*, 510 N.W.2d at 863.

Not only are Hercules and Johns-Manville immune from suit, they are also not released parties in any meaningful sense.

Plaintiffs' acceptance of small payments from those bankruptcy trusts is not comparable to releases in the tort system. This is borne out by the jury's determination that Hercules and Johns-Manville were collectively responsible for $1 million of Plaintiffs' damages (25% of $4 million compensatory damages award), but Plaintiffs received only $4,690 from the Hercules bankruptcy trust and $26,250 from the Manville Trust. The amount of the payments from the bankruptcy trusts is not the result of negotiated settlements, but simply the product of the trusts' scheduled values for mesothelioma claims. *See* S. Todd Brown, *How Long is Forever This Time? The Broken Promise of Bankruptcy Trusts*, 61 Buffalo L. Rev. 537, 553 (May 2013).

Although Hercules and Johns-Manville are not released parties, and should not have been allocated fault by the jury, Weil-McLain is not without recourse. Iowa law provides that when the fault of certain parties falls outside the comparative fault statute, the pro tanto credit rule is applied. *See Jamieson v. Harrison*, 532 N.W.2d 779, 781 (Iowa 1995). Under this rule, Weil-McLain is entitled to a dollar-for-dollar credit for the payments Plaintiffs

received from asbestos bankruptcy trusts. *See id.* This is the legal solution that Plaintiffs proposed to the district court. (App. 586-89).

In light of the district court's error in allowing the jury to apportion fault to Hercules and Johns-Manville, if the judgment is reversed and a new trial is granted, Plaintiffs ask that the Court correct this error and instruct that fault may not be apportioned to bankrupt entities and that instead the pro tanto credit rule should be applied to payments from asbestos bankruptcy trusts.

CONCLUSION

Plaintiffs urge the Court to affirm the judgment of the district court. However, in the event that the Court reverses and orders a new trial, Plaintiffs ask the Court to instruct that bankrupt entities may not be apportioned fault at trial.

Respectfully submitted,

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CERTIFICATE OF COST

Pursuant to Appellate Rule 16.1221, the Reply Brief for Appellee/Cross-Appellant was filed and served electronically via the EDMS system. The cost of duplication was $0.

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July 8, 2016
Date

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/s/Lisa W. Shirley — July 8, 2016
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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on July 8, 2016, the above and foregoing Reply Brief of Appellees/Cross-Appellants was electronically filed with the Clerk of Court for the Supreme Court of Iowa using the EDMS system and electronically served on the following:

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