Missouri Law Review

Volume 46
Issue 4 *Fall 1981*

Article 9

Fall 1981

Settling Joint Tortfeasor Can Sue for Contribution from Nonsettling Joint Tortfeasor

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SETTLING JOINT TORTFEASOR CAN SUE FOR CONTRIBUTION FROM NONSETTLING JOINT TORTFEASOR

Stephenson v. McClure[1]

Stephenson (P) was a passenger in a car driven by Killian (D1). This car collided with one driven by McClure (D2). P sued D1[2] and D2, alleging eleven negligent acts by each;[3] each defendant denied negligence in his answer. D2 then cross-claimed against D1, alleging that if both were liable to P, D1 would be liable to D2 "'by way of contribution' for such part of the judgment as the jury may determine to have resulted from the negligence of . . . [D1]."[4]

P later dismissed her claim against D1. P and D2, however, executed a settlement agreement. In compliance with this agreement, P released all

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1. 606 S.W.2d 208 (Mo. App., S.D. 1980).

2. Missouri has no guest statute. Kennedy v. Dixon, 439 S.W.2d 173, 175 (Mo. En Banc 1969); Griggs v. Riley, 489 S.W.2d 469, 472 (Mo. App., St. L. 1972). Guest statutes normally limit the liability of owners and operators of motor vehicles, with respect to the injuries suffered by nonpaying passengers in the same vehicles, to acts of gross negligence and willful misconduct. *See, e.g.*, IND. CODE ANN. § 9-3-3-1 (Burns 1980). In recent years, the guest statutes of a number of states have been declared unconstitutional on equal protection grounds. *See, e.g.*, Brown v. Merlo, 8 Cal. 3d 855, 882, 506 P.2d 212, 231, 106 Cal. Rptr. 388, 407 (1973); Henry v. Bauder, 213 Kan. 751, 762, 518 P.2d 362, 371 (1974). *Contra*, Cannon v. Oviatt, 520 P.2d 883, 889 (Utah), *appeal dismissed for want of substantial federal question*, 419 U.S. 810 (1974). *See generally* Annot., 66 A.L.R.3d 532 (1975).

3. Among the alleged negligent acts were charges of humanitarian negligence against each defendant. 606 S.W.2d at 209. The "humanitarian" doctrine is the Missouri version of the "last clear chance" doctrine. For an explanation of the humanitarian doctrine, see Coulson, *Last Clear Chance-Humanitarian Doctrine in Missouri*, 6 K.C. L. REV. 235 (1938); Gaines, *The Humanitarian Doctrine in Missouri*, 20 ST. LOUIS L. REV. 113 (1935); McCleary, *The Bases of the Humanitarian Doctrine Reexamined*, 5 MO. L. REV. 56 (1940); Rich, *The Humanitarian Doctrine* Re-Examined, 26 J. MO. B. 38 (1970).

The humanitarian doctrine would become obsolete if Missouri were to adopt comparative negligence, a move the Missouri Supreme Court has not yet been willing to make. *See* Steinman v. Strobel, 589 S.W.2d 293, 294 (Mo. En Banc 1979); Epple v. Western Auto Supply Co., 557 S.W.2d 253, 254 (Mo. En Banc 1977).

4. 606 S.W.2d at 210.

of her claims against D2.[5] D2 then amended his cross-claim and sought contribution "'for all or such part, portion or percentage of the amount paid to . . . [P] as corresponded to the part, portion or percentage of fault for the collision in question as the jury may determine to have resulted from an act or omission by . . . [D1]."[6] D1's administratrix filed a motion to dismiss for failure to state a cause of action. The trial court sustained the motion, but did not explain its decision.

Although the Missouri Court of Appeals for the Southern District affirmed the judgment, the court held that a settling tortfeasor could seek contribution from another joint tortfeasor.[7] D2, however, could not seek contribution from D1, an alleged joint tortfeasor, because D2 did not plead his own liability in the petition.[8]

In extending the right of contribution to the settling tortfeasor, the court took another step away from the traditional common law rule on contribution. The traditional rule that was applied in this country prohibited contribution among joint tortfeasors.[9] Each joint tortfeasor was

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5. *Id.* The court of appeals treated this release as a general release, which discharged anyone's liability to P arising from the incident. At common law, a release of one joint tortfeasor released all joint tortfeasors. *See, e.g.*, Hubbard v. St. Louis & M.R.R.R., 173 Mo. 249, 255, 72 S.W. 1073, 1074 (1903). To circumvent this rule, attorneys developed the covenant not to sue, by which the plaintiff did not surrender his cause of action, but merely agreed not to enforce it. W. PROSSER, LAW OF TORTS 301-03 (4th ed. 1971).

Missouri allows a partial release without releasing all joint tortfeasors. RSMO § 537.060 (1978). The portion of the statute dealing with releases was enacted after the *Hubbard* case. *See* 1915 Mo. Laws 268 § 1. Any partial release, however, must be expressed clearly and unmistakably; otherwise, it will be treated as a general release. Swope v. General Motors Corp., 445 F. Supp. 1222, 1225-26 (W.D. Mo. 1978); Liberty v. J.A. Tobin Constr. Co., 512 S.W.2d 886, 890 (Mo. App., K.C. 1974). *See also* Anderson & O'Brien, *Recent Developments in Missouri: Tort Law*, 48 U.M.K.C. L. REV. 660, 660-70 (1980).

6. 606 S.W.2d at 210.

7. *Id.* at 213. The court defined "joint tortfeasor" to "include tortfeasors whose separate but concurrent negligent acts constitute a cause of the injury in question." *Id.* at 211 n.5. *See also* W. PROSSER, *supra* note 5, at 291-99. The court defined "contribution" as the right of one party who had satisfied the claim of a third party to seek partial reimbursement from another party. 606 S.W.2d at 210-11.

8. 606 S.W.2d at 213.

9. The rule had its origins in the English case of Merryweather v. Nixan, 101 Eng. Rep. 1337 (K.B. 1799). *Merryweather* denied contribution between intentional tortfeasors charged with conversion, but American courts mistakenly applied the rule to negligence cases as well. Missouri Pac. R.R. v. Whitehead & Kales Co., 566 S.W.2d 466, 469 (Mo. En Banc 1978); W. PROSSER, *supra* note 5, at 306; Reath, *Contribution Between Persons Jointly Charged for Negligence—* Merryweather v. Nixan, 12 HARV. L. REV. 176, 177 (1898); Comment, *Con-*

jointly and severally liable; the plaintiff could recover his full award against any one tortfeasor,[10] even if the plaintiff received a joint judgment against more than one tortfeasor but chose to execute against only one.[11] That tortfeasor could not recover any of his payment from any other tortfeasor.

By statute, Missouri allowed contribution after the plaintiff secured a judgment against jointly sued tortfeasors,[12] but it followed the common law rule forbidding a sued tortfeasor from seeking contribution from a joint tortfeasor that the plaintiff had chosen not to sue. In 1978, the Missouri Supreme Court handed down the landmark decision of *Missouri Pacific Railroad v. Whitehead & Kales Co.*,[13] abrogating the traditional common law rule. Missouri thereby followed the majority of states in expanding the opportunities for a joint tortfeasor to obtain contribution, but it did so by case law rather than the more common method of statutory change.[14]

Whitehead & Kales, using a rationale of fairness,[15] held that a joint tortfeasor could implead a third party tortfeasor to obtain contribution, even if the plaintiff had not sued the third party.[16] The trier of fact then would determine the relative degree of fault among the alleged tortfeasors. After judgment, the plaintiff still could recover the full amount of the judgment from any or all joint judgment debtors, thus maintaining several liability.[17] *Whitehead & Kales*, however, allowed the tortfeasor paying the

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tribution In Missouri—Procedure and Defenses Under the New Rule, 44 MO. L. REV. 691, 693 (1979); *Missouri Pacific Railroad v. Whitehead & Kales Co.: Uncertain Renovations*, 48 U.M.K.C. L. REV. 54, 55 (1979).

10. Joint and several liability has been and still is the rule in Missouri. *See* Missouri Pac. R.R. v. Whitehead & Kales Co., 566 S.W.2d 466, 474 (Mo. En Banc 1978); Rogers v. Rogers, 265 Mo. 200, 209, 177 S.W. 382, 384 (1915); Murphy v. Wilson, 44 Mo. 313, 322 (1869). For a discussion and suggested modifications of the rule of joint and several liability in Missouri, see Parks v. Union Carbide Corp., 602 S.W.2d 188, 198-201 (Mo. En Banc 1980) (Welliver, J., dissenting).

11. Berry v. St. Louis, M. & S.E.R.R., 214 Mo. 593, 598, 114 S.W. 27, 29 (1908).

12. RSMO § 537.060 (1978). The harshness of the common law rule has been condemned almost universally by commentators. W. PROSSER, *supra* note 5, at 307.

13. 566 S.W.2d 466 (Mo. En Banc 1978).

14. The statutes on contribution in the various states are compiled in Comment, *supra* note 9, at 694 n.18.

15. 566 S.W.2d at 474. *See also* Parks v. Union Carbide Corp., 602 S.W.2d 188, 192-95 (Mo. En Banc 1980) (Welliver, J., dissenting).

16. 566 S.W.2d at 474. The plaintiff retains his freedom to sue whomever he chooses. *Id.* The Missouri rule on impleader is MO. R. CIV. P. 52.11. *See* Comment, *supra* note 9, at 699-701.

17. 566 S.W.2d at 474. *Accord*, American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 586-89, 578 P.2d 899, 903-07, 146 Cal. Rptr. 182, 186-90

award a right of contribution for any amount greater than his relative share. The court also stated in dictum that co-defendants could cross-claim against each other for contribution.[18] The basis for computing the distribution of joint liability was relative fault.[19]

Whitehead & Kales established two new rights for tortfeasors in Missouri: (1) a tortfeasor could bring other tortfeasors not sued by the plaintiff into the same lawsuit, and (2) the trier of fact could determine relative fault at the initial trial of the plaintiff's cause of action. The trial judge, however, could order separate trials for the plaintiff's action and the relative fault question.[20]

(1978). Kansas, unlike Missouri and California, has abandoned joint and several liability. Each tortfeasor is liable to the plaintiff only for his proportionate share of fault. Brown v. Keill, 224 Kan. 195, 204, 580 P.2d 867, 874 (1978).

18. 566 S.W.2d at 473. The Missouri rule on cross-claims is MO. R. CIV. P. 55.32(f).

19. 566 S.W.2d at 473. Relative fault permits the trier of fact to allocate the percentage of fault among joint tortfeasors, based on the blameworthy conduct of each tortfeasor. *See, e.g.*, American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 598, 578 P.2d 899, 912, 146 Cal. Rptr. 182, 195 (1978); Tolbert v. Gerber Indus., Inc., ____ Minn. ____, ____, 255 N.W.2d 362, 367 (1977); Bielski v. Schulze, 16 Wis. 2d 1, 7, 114 N.W.2d 105, 107 (1962). Other states use an equal share system, in which any loss is divided evenly among all tortfeasors, regardless of relative fault. *See, e.g.*, Moore v. St. Cloud Utils., 337 So. 2d 982, 984 (Fla. Dist. Ct. App. 1976); Celotex Corp. v. Campbell Roofing & Metal Works, Inc., 352 So. 2d 1316, 1319 (Miss. 1977). The defendants are still jointly and severally liable to the plaintiff under either approach. *See generally* note 10 *supra*.

UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2(4) (1939 version) [hereinafter cited as 1939 UNIFORM ACT] provides an optional section permitting either approach. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2 (1955 version) [hereinafter cited as 1955 UNIFORM ACT] adopts the equal share approach. For a listing of which states adopt which approach, see Comment, *supra* note 9, at 694 n.18. *See generally* Annot., 53 A.L.R.3d 184 (1973).

20. 566 S.W.2d at 474. *Whitehead & Kales* left unclear whether a tortfeasor who failed to use the procedural tools available to obtain contribution in the original action could bring a contribution suit later. A federal district court, applying Missouri law, has held that the tortfeasor may bring a separate suit. *See* Federated Mut. Ins. Co. v. Gray, 475 F. Supp. 679, 681 (E.D. Mo. 1979). Other states have split on this issue. *See, e.g.*, Consolidated Freightways Corp. v. Osier, ____ Mont. ____, ____, 605 P.2d 1076, 1079 (1979) (defendant cannot use impleader to bring in third party for contribution; no right to contribution unless there has been joint judgment); Lipson v. Gewirtz, 70 Misc. 2d 599, 604, 334 N.Y.S.2d 662, 665 (1972) (separate action may be brought by tortfeasor).

An argument in favor of allowing a subsequent suit is that the alleged joint tortfeasor still has an opportunity to litigate the issue of negligence, the same argument accepted by the *Stephenson* court for the settling tortfeasor. *See* note 26 and accompanying text *infra*. An argument against allowing a subsequent contribution suit by a judgment tortfeasor is that it "adds to the burden of already

Although the right of a joint tortfeasor to seek contribution was intended to extend beyond the facts of *Whitehead & Kales*,[21] several problems with the application of the new contribution doctrine were not discussed. For example, the opinion did not indicate a solution to the contribution problem when one alleged joint tortfeasor settles with the plaintiff.

In *Stephenson*, the Missouri Court of Appeals for the Southern District suggested a solution to this problem and discussed two major issues.[22] The

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crowded courts, creates the possibility of inconsistent verdicts in the two actions and makes more difficult the assessment of equitable shares in multi-party situations in which one of three or more wrongdoers is not joined in the initial action." Meckley v. Hertz Corp., 88 Misc. 2d 605, 609, 388 N.Y.S.2d 555, 557 (1976).

The 1955 UNIFORM ACT, *supra* note 19, § 3(a) allows contribution to be sought in a subsequent suit. The 1939 UNIFORM ACT, *supra* note 19, § 7(3) would allow contribution in an independent action only when there was no opportunity to bring the joint tortfeasor into the original suit. "[T]he vast majority of states which allow contribution allow it to be brought either in the original plaintiff's action or in an indpendent action." Appel & Michael, *Contribution Among Joint Tortfeasors in Illinois: An Opportunity for Legislative and Judicial Cooperation*, 10 LOY. CHI. L.J. 169, 193 (1979).

21. 566 S.W.2d at 474.

22. A third issue mentioned briefly by the court was the distinction between contribution and indemnity. Contribution is normally considered to be a claim for partial reimbursement; indemnity is a claim for full reimbursement. 606 S.W.2d at 210-11. The theoretical origins of the two are distinct. Contribution is based on the purely equitable consideration of sharing a loss jointly caused; indemnity is based on either a contractual theory or a difference in kind or quality of the acts of the parties. W. PROSSER, *supra* note 5, at 310-13. The most common indemnity situation involving a difference in quality of the acts of the parties is the right of the employer who is vicariously liable to seek indemnity from his employee for any judgment rendered against the employer. *See* State *ex rel.* Algiere v. Russell, 359 Mo. 800, 803, 223 S.W.2d 481, 483 (En Banc 1949); Elzea v. Hammack, 241 Mo. App. 1070, 1083, 244 S.W.2d 594, 603 (St. L. 1951).

Another form of noncontractual indemnity used by Missouri courts was the active-passive negligence test, which allowed a "passively" negligent tortfeasor to seek indemnity while denying indemnity to the "actively" negligent tortfeasor. *See* Missouri Pac. R.R. v. Whitehead & Kales Co., 566 S.W.2d at 470 (cases cited). The test, devised as a method to alleviate the rule against contribution among joint tortfeasors, was abandoned in *Whitehead & Kales*. The court found the test depended more on "characterization" than on equitable fairness between the parties. *Id.* at 472. *Accord,* Dole v. Dow Chem. Co., 30 N.Y.2d 143, 148-49, 282 N.E.2d 288, 292, 331 N.Y.S.2d 382, 387 (1972). The court's ruling did not affect the right to contractual indemnity or indemnity by reason of vicarious liability. 566 S.W.2d at 468 n.2. *Cf.* Parks v. Union Carbide Corp., 602 S.W.2d 188, 190 (Mo. En Banc 1980) (terms of contract not sufficiently clear to show intent to indemnify). For a general discussion of the active-passive test, see Comment, *Products Liability—Non-contractual Indemnity—The Effect of the Active-Passive Negligence Theory in Missouri*, 41 MO. L. REV. 382, 385-91 (1976).

first major issue that the court addressed was the right of the settling tortfeasor to seek contribution. Allowance of this right encourages the settlement of cases, and public policy favors settlement.[23] The usual reasons given for this policy are that settlement avoids the costs of litigation, prevents congestion in the court docket, and allows a mutually agreeable solution to be obtained by the parties.[24] The denial of contribution to a settling tortfeasor could discourage the impetus to settle. The tortfeasor would be more likely to await a judgment, hoping for a judgment in his favor or seeking contribution if he was found liable.

An argument that has been made against allowing the settling tortfeasor contribution is that it is fundamentally unfair to hold a third party tortfeasor liable for part of a settlement over which he had no control.[25] The *Stephenson* court rejected that argument, stating:

> A joint tortfeasor thus called upon to discharge his equitable responsibility to his cotortfeasor who has settled the common liability with the injured person is not prejudiced by the fact that judgment has not first been entered in favor of the person injured. The joint tortfeasor from whom contribution is sought will still have his day in court to defend against liability and the reasonableness of the amount paid in settlement of the existing claim.[26]

Although not explicitly stated, *Stephenson* may require the settling tortfeasor to grant a general release before he can seek contribution. In assuming that P's release was a general release, the court avoided the question of what the result would be if there were only a partial release or covenant not to sue.[27]

The requirement of a general release would avoid a number of potential problems. First, to allow a settling tortfeasor to seek contribution from one who has not been released would put the other tortfeasor in the unenviable position of potentially defending two suits: one for contribution and

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23. *See, e.g.*, Liberty v. J.A. Tobin Constr. Co., 512 S.W.2d 886, 890 (Mo. App., K.C. 1974); State *ex rel.* State Highway Comm'n, 483 S.W.2d 783, 785 (Mo. App., St. L. 1972); Mateer v. Missouri Pac. Ry., 105 Mo. 320, 354, 16 S.W. 839, 848 (En Banc 1891).

24. *See* Comment, *Settlements in Multiple Tortfeasor Controversies—Texas Law*, 10 ST. MARY'S L.J. 75, 75-76 (1978).

25. 606 S.W.2d at 212.

26. *Id.* (quoting 18 AM. JUR. 2d *Contribution* § 51 (1965)). *See* Brockman Mobile Home Sales v. Lee, 98 Idaho 530, ____, 567 P.2d 1281, 1283 (1977); Samuelson v. Chicago, R.I. & Pac. R.R., 287 Minn. 264, 270, 178 N.W.2d 620, 624 (1970); Swartz v. Sunderland, 403 Pa. 222, 226, 169 A.2d 289, 291 (1961).

27. 606 S.W.2d at 210 n.1. The language the court quotes implies that a general release is required: "'[O]ne of several tortfeasors . . . may in good faith enter into a compromise with the injured person and satisfy the *entire liability* . . . . A joint tortfeasor . . . who has settled the *common liability* is not prejudiced by . . . [the absence of a judgment].' " 606 S.W.2d at 212 (quoting 18 AM. JUR. 2d *Contribution* § 51 (1965) (emphasis added)).

the other against the plaintiff for the original injury.[28] This result defeats the *Whitehead & Kales* justification for contribution: fairness.[29]

A second problem that might arise without a general release would be determining each joint tortfeasor's share. A joint tortfeasor can recover only payments over his proportionate share of the joint liability.[30] Without a general release, the liability amount could not be determined until the plaintiff brought suit against the co-tortfeasor,[31] gave a general release, or allowed the statute of limitations to run.[32]

The Uniform Contribution Among Tortfeasors Act (1955 version)[33] solves these potential problems by requiring a general release before contribution can be sought by the settling tortfeasor.[34] Under the Act, the set-

28. *See, e.g.*, Lubbock Mfg. Co. v. International Harvester Co., 584 S.W.2d 908, 912 (Tex. Civ. App. 1979) (denying contribution to settling tortfeasor in absence of general release).

29. 566 S.W.2d at 472.

30. *Id.* at 474. *See* note 19 *supra.*

31. A problem arising when the plaintiff sues one joint tortfeasor after settlement with another joint tortfeasor concerns the effect of the settlement on the plaintiff's subsequent judgment against the second tortfeasor. Some states provide a dollar-for-dollar reduction in the plaintiff's judgment against the nonsettling tortfeasor. *See, e.g.*, American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 604, 578 P.2d 899, 916, 146 Cal. Rptr. 182, 199 (1978); Bradley v. Appalachian Power Co., ____ W. Va. ____, ____, 256 S.E.2d 879, 887 (1979). This approach has been criticized as inequitable by one Missouri judge who would reduce the subsequent judgment by the proportion of the fault of the settling tortfeasor. *See* Parks v. Union Carbide Corp., 602 S.W.2d 188, 203-04 (Mo. En Banc 1980) (Welliver, J., dissenting). *Accord,* Cartel Capital Corp.,v. Fireco, 81 N.J. 548, 569, 410 A.2d 674, 685 (1980).

32. The Missouri statute of limitations for tort actions is five years. RSMo § 516.120(4) (1978). It has been held in contribution cases that the statute of limitations begins to run in Missouri at the time of settlement, not at the time of the original accident. *See* Federated Mut. Ins. Co. v. Gray, 475 F. Supp. 679, 681 (E.D. Mo. 1979). *Accord,* Evans v. Lukas, 140 Ga. App. 182, 184, 230 S.E.2d 136, 138 (1976); State Farm Mut. Auto. Ins. Co. v. Schara, 56 Wis. 2d 262, 264-65, 201 N.W.2d 758, 759 (1972). *Cf.* Simon v. Kansas City Rug Co., 460 S.W.2d 596, 600 (Mo. 1970) (statute begins to run when judgment entered against one joint tortfeasor and he has paid more than his proportionate share of joint judgment). The result is that a contribution suit conceivably could be brought after the statute would have run for the plaintiff's original action. The *Gray* holding has been criticized in Zpevak, *Beware: New Dangers of Partial Settlements in Multiple Defendant Cases,* 36 J. MO. B. 235, 237, 240 (1980). In order to prevent contribution suits long after the incident causing the liability, the 1955 UNIFORM ACT, *supra* note 19, would apply a one year statute of limitations for these suits after judgment on the plaintiff's claim, *id.* § 3(c), or agreement to settlement a pending claim, *id.* § 3(d)(2).

33. *See* note 19 *supra.*

34. A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability

tling tortfeasor is discharged from liability for contribution to any other tortfeasor, regardless of the type of release.[35] Thus the plaintiff retains his cause of action against other tortfeasors if he chooses not to give a general release; at all times the settling tortfeasor is protected from claims for contribution. In the case of a general release, any other joint tortfeasors are protected from suit by the plaintiff, while still having the opportunity in the contribution suit to contest their negligence and the reasonableness of the settlement.[36] In the case of a nongeneral release, any other tortfeasors would be immune from contribution to the settling tortfeasor.

The second major issue in *Stephenson* was the pleading requirement to obtain contribution. The new requirement established that a settling tortfeasor must plead his own liability to have a cause of action for contribution.[37] The court reasoned that contribution requires a joint liability of tortfeasors to the plaintiff, but when there has been a settlement, no judicial determination of the liability of the settling tortfeasor is possible. To meet the requirement of joint liability, the settling tortfeasor must ad-

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for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

1955 UNIFORM ACT, *supra* note 19, § 1(d).

While most states that have adopted either the 1939 or 1955 version of the uniform act hold that the release must be general before the settling tortfeasor can seek contribution, *see, e.g.*, Best Sanitary Disposal Co. v. Little Food Town, Inc., 339 So. 2d 222, 226 (Fla. Dist. Ct. App. 1976); Bartels v. City of Williston, 276 N.W.2d 113, 122 (N.D. 1979), there is authority for the view that contribution may be obtained in one instance under the uniform act by a settling tortfeasor who has received only a partial release: when damages in the subsequent judgment against the other joint tortfeasor are for less than the settlement figure. The liability of the other joint tortfeasor to the plaintiff, therefore, has been extinguished by the settlement. *See* Mong v. Hershberger, 200 Pa. Super. Ct. 68, 72-73, 186 A.2d 427, 429 (1962).

35. 1955 UNIFORM ACT, *supra* note 19, § 4(b). This rule has been suggested for adoption in Missouri; the rationale is to encourage settlement. *See* Parks v. Union Carbide Corp., 602 S.W.2d 188, 202 (Mo. En Banc 1980) (Welliver, J., dissenting). *Contra*, Bisaccio v. Brown, 366 So. 2d 510, 511 (Fla. Dist. Ct. App. 1979) (general release does not absolve either party from proportionate liability to third party).

Missouri courts have not yet ruled on whether the settling tortfeasor may be liable for contribution. The problem has been addressed by several commentators. *See* Anderson & O'Brien, *supra* note 5, at 664-66; Milholland, *Settle by Covenant to Sue?*, 35 J. MO. B. 168 (1979); Zpevak, *More on Settle by Covenant to Sue?*, 35 J. MO. B. 323 (1979); Zpevak, *supra* note 32; Comment, *supra* note 9, at 716-19; U.M.K.C. L. REV., *supra* note 9, at 61-64.

36. The burden of proving the reasonableness of the settlement usually is placed on the settling tortfeasor. *See, e.g.*, W.D. Rubright Co. v. International Harvester Co., 358 F. Supp. 1388, 1392 (W.D. Pa. 1973); Young v. Steinberg, 53 N.J. 252, 255, 250 A.2d 13, 14 (1969).

37. 606 S.W.2d at 213.

mit his liability.[38] This admission also has been required in other jurisdictions.[39]

Because of the *Stephenson* decision, Missouri's pleading requirements for a settling joint tortfeasor differ from those for a joint tortfeasor whose liability will be determined by judgment. The settling tortfeasor must plead his own liability to seek contribution.[40] When the trier of fact determines relative fault at the same time the plaintiff's action is tried, however, the alleged tortfeasor need not plead his own liability. Instead, he may plead that the trier of fact make a determination of relative fault only after finding the alleged tortfeasors jointly liable.[41] In other words, the tortfeasor may plead in the alternative if the contribution issue is determined by the same trier of fact hearing the plaintiff's case.[42]

The settling tortfeasor in *Stephenson* argued that to plead his own liability would prejudice his defense in other actions arising from the same accident. The court held this was an unavoidable risk attendant to the right of contribution:[43] The danger in pleading liability is that an admission in a pleading in one action may be received in evidence against the

38. *Id. Cf.* Lane v. Geiger-Berger Assocs., 608 F.2d 1148, 1151 (8th Cir. 1979) (relative fault instruction not applicable in suit involving construction contract where subcontractor and structural engineer were not joint tortfeasors).

39. *See, e.g.*, Allied Mut. Cas. Co. v. Long, 252 Iowa 829, 835, 107 N.W.2d 682, 685 (1961); Paisley v. United Parcel Serv., Inc., 38 Mich. App. 450, 455-56, 196 N.W.2d 813, 815-16 (1972).

40. *See* notes 37 & 38 and accompanying text *supra*.

41. The *Stephenson* court implicitly recognized this point by contrasting Allied Mut. Cas. Co. v. Long, 252 Iowa 829, 107 N.W.2d 682 (1961) with Fane v. Hootman, 254 Iowa 241, 117 N.W.2d 435 (1962). *See* 606 S.W.2d at 213-14. In *Fane,* the Iowa Supreme Court held that a defendant seeking contribution when the principal case was pending was required to plead only that contribution be permitted if the trier of fact found both defendants joint tortfeasors. 254 Iowa at 246-47, 117 N.W.2d at 438. The *Stephenson* court, while following the *Long* rule in requiring a pleading of liability by the settling tortfeasor, did not reject the rule in *Fane.* Instead *Fane* was distinguished factually. 606 S.W.2d at 214.

42. MO. R. CIV. P. 55.10 permits pleading in the alternative. If there is to be a separate trial for contribution after a judicial determination of liability to the plaintiff, *see* note 20 and accompanying text *supra,* the tortfeasor seeking contribution logically should be required to plead his own liability. A statement of common liability in the pleading would do no further damage to the tortfeasor seeking contribution since judgment already has been rendered against him. It would make it clear to the trier of fact in the second trial that the party seeking contribution is a tortfeasor. Common liability to the original plaintiff is a requisite for contribution. *See* Martinez v. Lankster, 595 S.W.2d 316, 318 (Mo. App., E.D. 1980).

43. 606 S.W.2d at 213. Pleading his own liability benefits the settling tortfeasor in one sense; he does not have to offer any evidence of his own negligence in the contribution action. *See* Samuelson v. Chicago, R.I. & Pac. R.R., 287 Minn. 264, 269, 178 N.W.2d 620, 624 n.9 (1970).

pleader in another action as the admission of a party opponent.[44] Thus, a settling tortfeasor, in choosing whether to seek contribution, should consider whether there is any potential liability to persons who have not yet brought any legal action.

Another area of concern, pertaining to contribution after either settlement or judgment, is that the plaintiff must have a cause of action against the alleged joint tortfeasor from whom contribution is sought. Missouri courts have denied contribution when an immunity doctrine would bar direct action by the plaintiff against the alleged joint tortfeasor.[45] Thus, the settling tortfeasor's opportunity to seek contribution will be denied if an immunity doctrine protects the other tortfeasor.

Stephenson clarifies an important aspect of the expanding Missouri law on contribution by its explicit holding that a settling tortfeasor can seek contribution if he pleads his own liability. The case leaves unclear whether a general release is required before contribution can be sought. Such a requirement could avoid several potential problems.[46] The requirement to plead liability may have future consequences of which the practicing attorney should be aware.[47] *Stephenson* solves only one of many problems of the post-*Whitehead & Kales* era: the settling tortfeasor who seeks contribution. In Missouri, a state abandoning a traditional common law rule by judicial decision, each new situation must be considered in light of the general principles of fairness enunciated in *Whitehead & Kales*.

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44. *See* Ross v. Philip Morris & Co., 328 F.2d 3, 14-15 (8th Cir. 1964); Simmons v. Kansas City Jockey Club, 334 Mo. 99, 107, 66 S.W.2d 119, 122 (1933); Littell v. Bi-State Transit Dev. Agency, 423 S.W.2d 34, 39 (Mo. App., St. L. 1967); Bowman v. Globe Steam Heating Co., 80 Mo. App. 628, 636 (St. L. 1899).

45. *See* Missouri Pub. Serv. Co. v. Henningsen Steel Prods. Co., 612 F.2d 363, 367 (8th Cir. 1980) (workmen's compensation immunity from tort liability); State *ex rel.* Maryland Heights Concrete Contractors, Inc. v. Ferriss, 588 S.W.2d 489, 490 (Mo. En Banc 1979) (same); Kohler v. Rockwell Int'l Corp., 600 S.W.2d 647, 650 (Mo. App., W.D. 1980) (parental immunity would bar contribution); Renfrow v. Gojohn, 600 S.W.2d 77, 79 (Mo. App., W.D. 1980) (spousal immunity); Martinez v. Lankster, 595 S.W.2d 316, 318 (Mo. App., E.D. 1980) (same). *But see* MFA Mut. Ins. Co. v. Howard Constr. Co., 608 S.W.2d 535, 538 (Mo. App., W.D. 1980) (parental immunity ends at death; defendant could seek contribution from estate of deceased parent of plaintiff). *Cf.* Potter v. St. Louis-S.F. Ry., 622 F.2d 979, 981 (8th Cir. 1980) (permitting contribution claim against spouse of plaintiff for accident occurring in Missouri; applying Michigan law, which abolished spousal immunity in conflict of laws case).

46. *See* notes 27-36 and accompanying text *supra*.

47. *See* note 44 and accompanying text *supra*.