DOES THE FAIR SHARE ACT APPLY TO FAULTLESS PLAINTIFFS? A DEFENSE POSITION IN THE WAKE OF *SPENCER V. JOHNSON*

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Last March the Pennsylvania Superior Court issued an alarming decision for defendants related to the Pennsylvania Fair Share Act in the case of *Spencer v. Johnson*, 249 A.3d 529 (Pa. Super. 2021). While the implications from the decision have yet to be seen, some commentators argue the Court signaled a return to traditional joint and several liability in cases involving a plaintiff who is assessed no comparative fault.

Prior to the passage of the Fair Share Act, the traditional rule of joint and several liability applied. This meant any defendant found to be even 1% liable for an accident could be required to pay the entire verdict. When this would occur, the only recourse for the minimally culpable, "deep-pocketed" defendant was to seek reimbursement of its excess payment from any of the other liable co-defendants. The fundamental unfairness of requiring such a minimally culpable defendant to pay an entire verdict brought about changes to traditional joint and several liability in the form of the Fair Share Act in 2011. 42 Pa. C.S. § 7102. The Act provides that in cases involving multiple defendants, each defendant is only responsible for paying the percentage of the verdict corresponding to the fault attributed to them.

vSeveral exceptions are included in the Fair Share Act, which allow for traditional joint and several liability in certain situations. These include cases involving intentional misrepresentation, intentional torts, release of a hazardous substances, and violations under the Liquor Code. The final exception applies traditional joint and several liability for a defendant found to be 60% or more liable as apportioned by the jury. In the absence of the above exceptions, since the passage of the Fair Share Act in 2011, defendants were only required to pay their respective percentage of apportioned negligence. Courts and practitioners alike have interpreted the Fair Share Act as a repeal of traditional joint and several liability. This paradigm has now come into question following the Superior Court's decision in *Spencer*.

By way of background, the *Spencer* case arose out of a motor vehicle versus pedestrian accident in which the defendant was driving under the influence of alcohol. The vehicle operated by the defendant was owned by the employer of defendant's wife. Plaintiff asserted negligent entrustment against defendant's wife and her employer. At trial, the jury found in favor of the plaintiff and apportioned 36% of negligence to the defendant, 19% to the defendant's wife, and 45% to the wife's employer. The jury did not find plaintiff comparatively negligent.

Following post-trial motions and appeals, the Superior Court held that the verdict should be molded by combining the negligence of the driver's wife and the wife's employer under a vicarious liability theory. The combined negligence of the two was molded to total 64%, thus surpassing the 60% exception mark under the Fair Share Act, and permitting traditional joint and several liability.

The *Spencer* court then delved further into a hypothetical concerning what they may have done had they not molded the verdict. The court pronounced, via dicta, that traditional joint and several liability still would have applied because the plaintiff's comparative negligence was not at issue. In particular, the *Spencer* court stated, "[f]or the Fair Share Act to apply, the plaintiff's negligence must be an issue in the case" and that the Fair Share Act only "concerns matters where a plaintiff's own negligence may have or has contributed to the incident." *Spencer*, 249 A.3d at 559. Essentially, the court implied that the Fair Share Act is inapplicable and traditional joint and several liability remains the law in Pennsylvania if the case involves a plaintiff who is attributed no comparative negligence. Although dicta, the *Spencer* decision represents the first appellate decision to express such an interpretation of the Fair Share Act.

The *Spencer* case settled prior to Supreme Court review. For the time being, the decision remains as published and precedential case law. Plaintiffs will undoubtedly cite it in future cases to support joint and several liability. Indeed, the potential ramifications of the *Spencer* decision are significant. Depending on future judicial treatment, it could signal a complete return to the pre-Fair Share Act days of traditional joint and several liability in any case where a plaintiff is attributed no percentage of negligence. A defendant found to be only 1% at fault for causing an accident may again be called upon to satisfy the entire verdict and thereafter seek reimbursement from co-defendants.

There are several noteworthy pieces of information for defense attorneys to keep in mind when handling argument on the *Spencer* case. First, as mentioned above, the problematic portion of the *Spencer* decision relative to joint and several liability is dicta, as it was unnecessary to Court's holding. The *Spencer* case was also decided by a two-judge panel.

In addition, the legislative history of the Fair Share Act cuts against the *Spencer* court's interpretation. Legislative efforts to reform traditional joint and several liability date back to 2002. In 2002 and 2006, a prior version of the Fair Share Act passed the State House and Senate, but was later vetoed. The successful 2011 version of the Fair Share Act continued prior discussions from these previous bill efforts. Congressional discussions related to the 2002, 2006, and 2011 Fair Share Act bills all had one thing in common -- a clear understanding that the Fair Share Act would be a complete repeal of traditional joint and several liability. The following discussions

during floor debate are particularly germane:

> (The Fair Share Act) "in effect, has a de facto repeal of joint and several liability."
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> "If you look at the bill itself, and all of the bills, what they do is repeal joint and several liability and then provide certain exceptions."

-Senator Greenleaf; Pennsylvania Senate Journal, 2011 Reg. Sess. No. 42.

> "What this amendment would do is essentially eliminate the doctrine of joint and several liability…"

-Senator Leach, Pennsylvania Senate Journal, 2011 Reg. Sess. No. 42.

Based upon the above, it would appear the Fair Share Act was meant to do away with traditional joint and several liability in full, except for certain enumerated exception situations, which do not include faultless plaintiffs. The exceptions section of the Act was heavily debated and was the primary reason the Act failed the first two times it came to the floor. None of the prior general assembly debates addressed an exception in situations where a plaintiff is not at fault.

Prior congressional discussions also touched on the *Spencer* Court's interpretation that the Fair Share Act "merely sought to modify which parties bear the risk of additional losses in cases where the plaintiff was not wholly *innocent*". *Spencer*, 249 A.3d at 559. However, the legislative intent behind Fair Share Act appears to apply equally in situations where a plaintiff is determined to be *innocent* or *not at fault*:

> "What this bill does, if we repeal joint and several liability, is now, instead of long-standing decades of policy where we favor the victim--*they are not at fault*. They are the ones who were injured, and so we have always, in Pennsylvania, given the advantage to the plaintiff."

-Senator Greenleaf, Pennsylvania Senate Journal, 2011 Reg. Sess. No. 42.

> "…the individual defendants who have been found to be neglectful or are responsible for committing a tort against an *innocent* victim…"

-Senator Costa, Pennsylvania Senate Journal, 2011 Reg. Sess. No. 42.

> "Historically, we have said that it is better for a guilty party, a tortfeasor, a party who has done wrong, to bear the risk of an imperfect result of a defendant who is unable to pay than it is for an *innocent*, injured victim to bear the risk."

-Senator Leach, Pennsylvania Senate Journal, 2011 Reg. Sess. No. 42.

The floor debates also contained a series of hypothetical situations involving plaintiff passenger children involved in motor vehicle accident lawsuits. *See e.g.,* Senator Orie, Pennsylvania Senate Journal, 2011 Reg. Sess. No. 42. These discussions were had based on an unsuccessful attempt to include an exception in Section 3 for minor children, where traditional joint and several liability would remain. As innocent vehicle passengers, minor children would have no percent of negligence attributed to them in such cases. Because of this, the exact scenario involving potential "innocent" or faultless plaintiffs appears to have been contemplated and discussed by the legislature. Had the legislature intended for the Fair Share Act not to apply to "innocent" plaintiffs as the *Spencer* Court has suggested, there would have been no reason for multiple Senators to raise the issue and demand an exception for minors involved in motor vehicle accidents as passengers. If the *Spencer* Court's legislative interpretation is correct, the Fair Share Act would never have been applicable from the outset in such cases because the minors were innocent, faultless passengers. However, the senators raised the issue because they understood that the passage of the Fair Share Act meant that traditional joint and several liability was no more, including situations where plaintiffs, such as faultless minors, were determined to be "innocent" or without fault.

In sum, defense counsel and carriers have a valid basis upon which to argue that the "innocent" plaintiff portion of the *Spencer* opinion appears to be nonbinding dicta and an advisory opinion by the Superior Court on the scope of the Fair Share Act. The legislative history of the Fair Share Act also supports an argument that no exception was intended for situations where plaintiff is not apportioned any fault.