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William Mitchell Law Review

Volume 13 | Issue 3 Article 7

1987

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Koziol, Michael A. (1987) "Minnesota Applies Comparative Fault to Negligent Misrepresentation [Florenzano v. Olson, 387 N.W.2d 168 (Minn. 1986)]," *William Mitchell Law Review*: Vol. 13: Iss. 3, Article 7.
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MINNESOTA APPLIES COMPARATIVE FAULT TO NEGLIGENT MISREPRESENTATION

[*Florenzano v. Olson*, 387 N.W.2d 168 (Minn. 1986)]

INTRODUCTION

In *Florenzano v. Olson*,[1] the Minnesota Supreme Court held that Minnesota's Comparative Fault Act[2] applies to claims for negligent misrepresentation.[3] A plaintiff who is injured by a combination of a negligent misrepresentation and the plaintiff's own negligence will now[4] have his tort recovery reduced by the percentage of fault attributed to the plaintiff.[5] The Minnesota Supreme Court sees no reason to distinguish negligent misrepresentation from the wide variety of other claims to which comparative fault applies.[6]

This Comment will examine the *Florenzano* decision by summarizing the facts and issues of the case as well as the applicable law. Particular emphasis will be placed upon the majority opinion's rationale and the concurring opinion, which urges a broader application of the *Florenzano* holding. This Comment concludes that the basic holding of the case is correct but the suggestion to extend comparative fault to other forms of misrepresentation is not.

I. LEGAL FRAMEWORK

The supreme court held that negligent misrepresentation claims are subject to comparative fault. In order to analyze the court's decision, a brief summary of Minnesota's comparative fault law and Minnesota's misrepresentation law will be provided. Specifically, the scope of application of the Comparative Fault Act and the distinction between intentional and unintentional misrepresentation will be overviewed.

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1. 387 N.W.2d 168 (Minn. 1986).
2. MINN. STAT. § 604.01, subd. 1 (1986).
3. For a discussion of negligent misrepresentation, see *infra* notes 25-29 and accompanying text.
4. Prior to the *Florenzano* decision, contributory neglience was a complete bar to recovery under a negligent misrepresentation theory. *See* Florenzano v. Olson, 358 N.W.2d 175 (Minn. Ct. App. 1984). The court of appeals spoke in terms of unreasonable reliance rather than contributory negligence, but the effect of either was to completely bar plaintiff's recovery. *See id.* at 176.
5. *See infra* note 76 and accompanying text.
6. *Florenzano*, 387 N.W.2d at 176.

A. Comparative Fault: Scope of Application

Under common law, a plaintiff who was found to be contributorily negligent was barred from recovering in tort against the defendant.[7] This bar occurred even though the plaintiff suffered considerable injuries and the defendant was also in some measure negligent.[8] Conversely, if the plaintiff was not found to be contributorily negligent, the plaintiff recovered *all* of his tort damages despite the fact that he may have contributed to the injury just short of the point at which a finding of contributory negligence would be justified. Thus, both the defendant and the plaintiff were faced with an undesirable "all-or-nothing" situation under the contributory negligence rule. In essence, the plaintiff may recover all of his damages in situations where such a result is unfair to the defendant or, alternatively, the plaintiff may recover nothing in situations equally unfair to the plaintiff.

In 1969, the Minnesota legislature responded to the harshness and rigidity of the contributory negligence rule by enacting Minnesota's first comparative negligence statute.[9] The new statute avoided the "all-or-nothing" problem by reducing rather than barring the plaintiff's recovery. The factfinder apportions fault among the various parties and the plaintiff's recovery is then reduced by his share of the fault.[10] Under the current version of the statute, plaintiff's recovery continues to be completely barred only if plaintiff's share of fault exceeds the fault of the party "against whom recovery is sought."[11]

As originally enacted, the comparative negligence statute only applied to causes of action sounding in negligence.[12] The statute's

7. The elements of contributory negligence are want of ordinary care on the part of the injured person and proximate cause. *See* Hacker v. Berkner, 263 Minn. 278, 284, 117 N.W.2d 13, 18 (1962); Strong v. Shefveland, 249 Minn. 59, 69, 81 N.W.2d 247, 253 (1957); Ballweber v. Kleist, 248 Minn. 102, 113-14, 78 N.W.2d 671, 677 (1956); *see also* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS § 65 (5th ed. 1984). The most commonly accepted modification of the rule concerning contributory negligence is the doctrine of last clear chance. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS § 65 (5th ed. 1984); *see, e.g.*, Gill v. Minneapolis, St. Paul, Rochester & Dubuque Elec. Traction Co., 129 Minn. 142, 143, 151 N.W. 896, 897 (1915) (if defendant had last clear opportunity to avoid the harm, plaintiff's negligence is not the proximate cause of injury).

8. *See, e.g.*, Wolfson Car Leasing Co. v. Weberg, 200 Neb. 420, 264 N.W.2d 178 (1978) (opinion indicates that both parties were in some measure at fault).

9. Act of May 23, 1969, ch. 624, § 1, 1969 Minn. Laws 1067, 1069 (formerly codified at MINN. STAT. § 604.01, subd. 1 (1971)); *see infra* note 12 for text of statute.

10. Minnesota currently has a modified comparative fault act in which recovery is precluded only if the plaintiff's fault exceeds the fault of the party against whom recovery is sought. *See* MINN. STAT. § 604.01, subd. 1 (1984); *see also* Steenson, *The Fault With Comparative Fault: The Problem of Individual Comparisons in a Modified Comparative Fault Jurisdiction*, 12 WM. MITCHELL L. REV. 1, 3 (1985).

11. *See* MINN. STAT. § 604.01, subd. 1 (1986).

12. The original statute provided:

Contributory negligence shall not bar recovery in an action by any person or

scope of application has since been significantly expanded. The Minnesota Supreme Court and the Minnesota legislature have accomplished this in three ways. First, the supreme court has applied the statute to certain claims which are not traditional negligence actions. Specifically, the court has held that comparative negligence applies to *strict liability* under section 402A of the Restatement (Second) of Torts,[13] and to actions based upon statutory violations or "negligence per se."[14] Second, and more significantly, the legislature amended the statute in 1978[15] and changed the "comparative negligence" statute to a "comparative fault" statute. A broad definition of "fault" was adopted which includes a wide variety of culpable conduct as well as negligence.[16] Third, the legislature has made certain statutory causes of action expressly subject to the act. One example of this is Minnesota's Dram Shop Statute.[17]

Despite the trend in Minnesota toward applying comparative fault to an increasingly wide range of conduct,[18] comparative fault has

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> his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering . . . . When there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each, provided, however, that each shall remain jointly and severally liable for the whole award.

MINN. STAT. § 604.01, subd. 1 (1969) (amended by Act of Apr. 5, 1978, ch. 38, 1978 Minn. Laws 836).

13. Busch v. Busch Constr. Inc., 262 N.W.2d 377, 393 (Minn. 1977) (comparative fault applies to a products liability action under the Restatement (Second) of Torts § 402A).

14. *See, e.g.*, Scott v. Independent School Dist. No. 709, 256 N.W.2d 485 (Minn. 1977) (court allows jury to apportion fault where plaintiff's fault is ordinary negligence and defendant's fault is based upon non-absolute statutory liability). *But see* Trail v. Village of Elk River, 286 Minn. 380, 175 N.W.2d 916 (1970) (if plaintiff's injury is caused by precisely the type of conduct the statute prohibits and if the plaintiff is a member of the class for whom the statute's protection is intended, comparative negligence and contributory negligence do not apply).

15. Act of Apr. 5, 1978, ch. 738, § 7, 1978 Minn. Laws 836, 839-40 (codified as amended at MINN. STAT. § 604.01, subd. 1a (1986)).

16. The 1978 version of the Act provided:

> "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Act of Apr. 5, 1978, ch. 738, § 7, 1978 Minn. Laws 836, 840 (codified as amended at MINN. STAT. § 604.01, subd. 1a (1984)).

17. *See* MINN. STAT. § 340A.801, subd. 3 (1986).

18. *See supra* notes 9-17 and accompanying text.

consistently been held inapplicable to intentional torts.[19] The traditional rationale for this rule is that intentional conduct is *qualitatively* different from contributory negligence and, therefore, an intentional wrongdoer should not be permitted to pass a portion of the loss on to a plaintiff/victim who is merely negligent.[20] Although this absolute rule and its rationale is currently under criticism,[21] Minnesota continues to follow it.[22] The *Florenzano* opinion reaffirms this rule by stating, in dicta, that comparative fault would not apply to an intentional fraud.[23]

B. *Misrepresentation*

Minnesota recognizes many forms of actionable misrepresentation. An exhaustive discussion of each variety is beyond the scope of this Comment. Since, however, comparative fault is not applied to intentional torts,[24] the various forms of misrepresentation will be characterized as either intentional or unintentional for purposes of considering the comparative fault question.

There is no ambiguity regarding the unintentional nature of negligent misrepresentation.[25] Negligent misrepresentation focuses on the misrepresenter's *objective behavior*[26] and not upon the mis-

19. *See, e.g., Florenzano*, 387 N.W.2d at 175; Kelzer v. Wachholz, 381 N.W.2d 852 (Minn. Ct. App. 1986); Schulze v. Kleeber, 10 Wis.2d 540, 103 N.W.2d 560 (1960).

20. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 402 (1941); 38 AM. JUR. *Negligence* § 178, at 855 (1941); *see also* Dear & Zipperstein, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations*, 24 SANTA CLARA L. REV. 1, 9-11 (1984).

21. *See, e.g.*, Dear & Zipperstein, *supra* note 20, at 11-20.

22. *See supra* note 19 and accompanying text.

23. *Florenzano*, 387 N.W.2d at 175. Specifically, the court stated "[w]ithout question, principles of comparative negligence would not apply to an intentional tort; we have never so applied them." *Id.*

24. *See supra* note 19.

25. *Florenzano*, 387 N.W.2d at 176.

26. RESTATEMENT (SECOND) OF TORTS § 552 (1977). The Restatement sets out the elements of negligent misrepresentation as follows:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
> > (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
> > (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give the information

representer's state of mind. Plaintiff must establish that the defendant *acted unreasonably* in either obtaining or communicating the information contained in the representation.[27] Minnesota adopted the Restatement (Second) of Torts[28] formulation of negligent misrepresentation in *Bonhiver v. Graff*.[29]

Intentional misrepresentation or "fraud",[30] on the other hand, focuses on the misrepresenter's subjective knowledge of the truth of his statement.[31] Proof of "scienter" or a "fraudulent intent" is a necessary element of intentional misrepresentation.[32] The Minnesota Supreme Court, in *Davis v. Re-Trac Manufacturing Corp.*,[33] identified two situations in which a fraudulent intent is present: "The

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> extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Id. The comments to this section state that "[t]he reason a narrower scope of liability is fixed for negligent misrepresentation than for deceit is to be found in the difference between the obligations of honesty and of care . . . ." *Id.*, comment a. Negligent misrepresentation speaks in terms of "care" which is based upon an objective evaluation of conduct where as "honesty" requires an examination of the misrepresenter's subjective state of mind. *See id.*; *cf. infra* note 31 and accompanying text (which focuses on intentional misrepresentation or "fraud").

27. RESTATEMENT (SECOND) OF TORTS § 552 (1977).

28. *Id.*

29. 311 Minn. 111, 121-22, 248 N.W.2d 291, 298-99 (1976).

30. "The terms 'fraud' and 'misrepresentation' have been used interchangeably in Minnesota law. In general terms, 'fraud' is used when there is an intentional misrepresentation, whereas 'misrepresentation' may be used when the misrepresentation is unintentional." J.I.G. III at 407 (1986).

31. The Minnesota Supreme Court requires that plaintiffs make the following showing in order to establish fraud:

> 1. There must be a representation;
> 2. That representation must be false;
> 3. It must have to do with a past or present fact;
> 4. That fact must be material;
> 5. It must be susceptible of knowledge;
> 6. The representer must know it to be false, or in the alternative, must assert it as of his own knowledge without knowing whether it is true or false;
> 7. The representer must intend to have the other person induced to act, or justified in acting upon it;
> 8. That person must be so induced to act or so justified in acting;
> 9. That person's action must be in reliance upon the representation;
> 10. That person must suffer damage;
> 11. That damage must be attributable to the misrepresentation, that is, the statement must be the proximate cause of the injury.

Davis v. Re-Trac Mfg. Corp., 276 Minn. 116, 117, 149 N.W.2d 37, 38-39 (1967) (citing Hanson v. Ford Motor Co., 278 F.2d 586, 591 (8th Cir. 1960)). The sixth element requires the plaintiff to establish a certain subjective state of mind on the part of the misrepresenter. This subjective state of mind is referred to as either "fraudulent intent" or "scienter". *See Florenzano*, 387 N.W.2d at 173, n.2.

32. *Florenzano*, 387 N.W.2d at 173 (citing Humphrey v. Merriam, 32 Minn. 197, 198, 20 N.W. 138, 138 (1884)).

33. 276 Minn. 116, 149 N.W.2d 37 (1967).

representer must know [the statement] to be false, or in the alternative, must assert [the statement] as of his own knowledge without knowing whether it is true or false."[34] The *Davis* court's formulation of fraudulent intent parallels the Restatement (Second) of Torts.[35]

Thus, under *Davis*, actual knowledge of the falsity is not necessarily a requirement for a fraudulent intent. A fraudulent intent is present if the misrepresenter knows that he is ignorant of the truth or falsity of the statement.[36] This situation presented the *Florenzano* court with some difficulty. Justice Simonett wrote a concurring opinion in which he suggested that comparative fault should also apply to this category of fraudulent misrepresentation. A problem arises between this suggestion and the rule that comparative fault should not be applied to intentional torts. This problem is examined below.

II. FLORENZANO V. OLSON

A. Facts

In 1973, the Florenzanos purchased a home.[37] "They were twenty-six year old college graduates, in good health, with one small child . . . . Soon after the purchase of their home, the Florenzanos received a postcard from Olson, an agent of Bankers Life Company, offering a free gift for the opportunity to meet with them and discuss mortgage insurance."[38] Their first meeting took place in June 1973.[39] They discussed mortgage insurance in the form of life insur-

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34. *Id.* at 117, 149 N.W.2d at 39.

35. The Restatement of Torts provides the following formulations of fraudulent intent or scienter:

> Conditions Under Which Misrepresentation Is Fraudulent (Scienter) A misrepresentation is fraudulent if the maker
> (a) knows or believes that the matter is not as he represents it to be,
> (b) does not have the confidence in the accuracy of his representation that he states or implies, or
> (c) knows that he does not have the basis for his representation that he states or implies.

RESTATEMENT (SECOND) OF TORTS § 526 (1977). The comments go on to state:

> In order that a misrepresentation may be fraudulent it is not necessary that the maker know the matter is not as represented. Indeed, it is not necessary that he should even believe this to be so. It is enough that being conscious that he has neither knowledge nor belief in the existence of the matter he chooses to assert it as a fact. Indeed, since knowledge implies a firm conviction, a misrepresentation of a fact so made as to assert that the maker knows it, is fraudulent if he is conscious that he has merely a belief in its existence and recognizes that there is a chance, more or less great, that the fact may not be as it is represented.

Id., comment b.

36. *Davis*, 267 Minn. at 117, 149 N.W.2d at 39.

37. *Florenzano*, 387 N.W.2d at 171.

38. *Id.*

39. *Id.*

ance for Joe Florenzano.[40] At a second meeting with Olson, the Florenzanos purchased a life insurance policy.[41]

At the second meeting, the Florenzanos also provided Olson with extensive financial information.[42] The information was needed for a financial analysis, which Olson was preparing for them.[43] The financial analysis was offered free of charge as a sales tool to gain the trust and confidence of prospective clients.[44] Olson needed to obtain the Florenzanos' social security earnings records to prepare the analysis, but he had forgotten the necessary authorization forms, so he met with them a third time in September.[45]

The misrepresentations took place at this third meeting. Olson advised Judie Florenzano that she should take advantage of an opportunity to withdraw from her employer's social security program.[46] Olson advised Florenzano that this was a "once-in-a-lifetime" opportunity and that they would be "fools" to choose anything but total withdrawal from the social security program.[47] Olson explained to them that if Judie Florenzano withdrew, she would still be covered by her husband's social security contributions.[48] This statement turned out to be wrong and it became the basis for the Florenzanos' suit against Olson.[49]

In 1977, Judie Florenzano became totally disabled by multiple sclerosis.[50] Neither she nor her two minor children were eligible for any social security benefits due to her withdrawal from the program.[51] She brought suit against Olson to recover the present value of the lost benefits.[52]

B. *The Lower Courts' Holdings*

The Florenzanos' suit was presented to the jury on an intentional misrepresentation theory.[53] In returning the verdict, the jury answered "yes" to all questions needed to establish Olson's liability under an intentional theory.[54] A special verdict form was also

40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 172.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 170.
52. *Id.* at 171.
53. *Id.* at 175.
54. *Id.*

presented to the jury in which they determined that Florenzano was 62.5% negligent and that Olson was only 37.5% negligent.[55]

The trial court independently determined that the basis of the Florenzanos' suit was negligent, rather than intentional, misrepresentation.[56] Accordingly, the trial judge applied comparative fault to the claim and denied recovery to the Florenzanos because their fault exceeded the fault of the defendant.[57] The Florenzanos appealed on the ground that they had pled and proven intentional misrepresentation and that comparative fault should not have been applied to an intentional tort.[58]

The court of appeals reversed the trial court's determination that comparative fault applies to negligent misrepresentation and remanded the case for a new trial.[59] The basis for the remand was the jury's inconsistent and irreconcilable responses to the special verdict form in which they found the Florenzanos' reliance reasonable, yet apportioned to them 62.5% of the fault.[60] Both parties appealed the court of appeals' decision.[61] Florenzano appealed the remand for a new trial on liability for intentional fraud.[62] Olson and Bankers Life appealed the decision that comparative fault did not apply to the case.[63]

The Minnesota Supreme Court reversed the court of appeals and reinstated the judgment of the trial court.[64] Since the jury found the Florenzanos more at fault than Olson—62.5% vs. 37.5%—they recovered nothing.[65]

C. *The Supreme Court's Analysis*

Much of the supreme court's opinion was devoted to the facts of the case and to a general discussion of fraud.[66] The court agreed with the trial court that, as a matter of law, the evidence only supported a claim of negligent, rather than intentional, misrepresentation.[67] The court also reaffirmed the general rule that comparative

55. *Id.* at 170.

56. *Florenzano*, 358 N.W.2d at 176.

57. *Florenzano*, 387 N.W.2d at 170. *See also supra* note 10 (recovery barred by Minnesota Statutes section 604.01 if plaintiff's fault exceeds defendant's).

58. *Florenzano*, 387 N.W.2d at 170.

59. *Florenzano*, 358 N.W.2d at 176-77.

60. *Id.* at 176.

61. *Florenzano*, 387 N.W.2d at 170.

62. *Id.*

63. *Id.*

64. *Id.* at 176.

65. *Id.*

66. *See id.* at 172-74.

67. *Id.* at 175.

fault would not apply to intentional misrepresentation.[68]

The Minnesota Supreme Court reversed the court of appeals' decision not to apply comparative fault.[69] The opinion of the court of appeals was rejected, and the supreme court concluded that applying comparative fault to negligent misrepresentation is consistent with Minnesota's practice of applying the comparative fault device expansively.[70]

III. ANALYSIS

A. *Basic Holding*

The supreme court's decision to extend comparative fault to negligent misrepresentation is consistent with Minnesota's liberal use of the comparative fault device.[71] This should be evident by looking at the development of Minnesota's comparative fault law.[72] A contrary result, however, was reached by the Minnesota Court of Appeals. The court of appeals held that comparative fault should not apply to negligent misrepresentation.[73] Their decision was based upon two arguments.

First, the court of appeals held that applying comparative fault to negligent misrepresentation was unnecessary.[74] Contributory negligence in the misrepresentation context could only take the form of unreasonable or unjustified reliance upon the misrepresentation. Since reasonable reliance is an element of any misrepresentation claim, the court held that a jury question on contributory negligence would serve no useful purpose:[75]

To establish liability for fraud, a plaintiff must prove justifiable reli-

68. *Id.*
69. *Id.* at 176.
70. *Id.*
71. *See supra* notes 12-17 and accompanying text.
72. *Id.*
73. *Florenzano*, 358 N.W.2d at 176.
74. *Id.*
75. "Reasonable" or "justified" reliance is an element of both intentional and negligent misrepresentation. *See supra* notes 31, 35. This requirement would preclude recovery in the situation where, for example, the statement is made by a well-known habitual liar or where the statement contains obvious exaggerations. Thus, the reasonable reliance requirement places some burden on the recipient of a false statement to recognize its falsity and to avoid relying on it.

Since intentional misrepresentation is an intentional tort, contributory negligence is not a defense and the jury will be asked the reasonable reliance question but not the contributory negligence question. But with negligent misrepresentation, the jury will be asked the reasonable reliance question and also receive an instruction asking them to apportion fault among all parties, including the plaintiff. Since the jury is asked to examine the plaintiff's conduct at two different points—reliance and apportionment of fault—the potential for conflicting and irreconciliable responses is apparent. *But see Florenzano*, 387 N.W.2d at 178, n.6 (suggesting that justified reliance

> ance. [Citation omitted] Whether a plaintiff in a fraud action reasonably relied is tantamount to whether a plaintiff in a fraud action was negligent. A question to the jury relating to plaintiff's reliance obviates the need for a separate question relating to plaintiff's fault.[76]

Although the court's observation of the overlap between contributory negligence and justifiable reliance is interesting, it confuses contributory negligence with comparative fault. The court seems to have misconstrued the issue to be the application of contributory negligence rather than comparative fault. While there is considerable overlap between the justifiable reliance requirement and the contributory negligence rule, there is no overlap between justifiable reliance and comparative fault. Contributory negligence and comparative fault have different functions.

Contributory negligence, much like the reasonable reliance requirement, focuses on the plaintiff's conduct. If the plaintiff is contributorily negligent, the defendant is not liable to the plaintiff and the plaintiff recovers nothing. Similarly, if the plaintiff's reliance upon the misrepresentation is not reasonable, the defendant is not liable to the plaintiff and plaintiff's recovery is zero. Conversely, if the plaintiff's reliance *is* reasonable and if the plaintiff is *not* guilty of contributory negligence, the plaintiff will recover *all* of his or her damages. This is the "all-or-nothing" problem which comparative fault addresses[77] and which contributory negligence and the justifiable reliance requirement do not. A question to the jury relating to plaintiff's reliance may obviate the need for a question relating to contributory negligence but it does not obviate the need to apply comparative fault.

The court of appeals' second assertion for not applying comparative fault to negligent misrepresentation is based upon the kind of *damages* typically involved in misrepresentation claims. The court borrowed language from a California appellate court decision[78] stating: "application of comparative fault principles, designed to mitigate the often catastrophic consequences of personal injury, would only create unnecessary confusion and complexity in [business]

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and contributory negligence focus on different issues). The potential confusion is apparent in the instant case. *See supra* note 60 and accompanying text.

The confusion created when negligent misrepresentation, along with an instruction on comparative fault, is sent to the jury could be avoided by deleting the reasonable reliance requirement from the elements of negligent misrepresentation. The jury will examine the plaintiff's culpability when it is asked to apportion fault. In such instances, a separate question as to reliance is duplicative and potentially confusing.

76. *Id.*

77. *See supra* note 12.

78. Carroll v. Gava, 98 Cal. App. 3d 892, 898, 159 Cal. Rptr. 778, 781 (1980).

transactions."[79] Thus, the appellate court seems to urge that comparative fault not be applied where the damages are based upon pecuniary rather than physical harm.

Although this position finds some support in the Restatement (Second) of Torts,[80] Minnesota has, in the past, applied comparative fault to claims involving only pecuniary harm.[81] The supreme court refuses to apply comparative fault to losses based upon a breach of contract in which plaintiff has lost the benefit of the bargain.[82] "[I]f the case [is] essentially based on a contract theory, fault should not have been allocated, and an instruction to the contrary would constitute reversible error."[83]

The plaintiffs in *Florenzano* were not suing to recover something they bargained for and did not receive. They were suing for losses caused by a misrepresentation made *after* their contract had been created.[84] The misrepresentation, therefore, could not have been the source of their contractual expectations or the basis of their bargain.

The supreme court rejected the court of appeals' holding and held that comparative fault applies to negligent misrepresentation, at least on these facts. This decision appears consistent with the current state of the law.

B. Extending Comparative Fault to "Reckless Misrepresentation"

Justice Simonett writes a concurring opinion in which he argues that comparative fault should also apply to "reckless misrepresentation."[85] The concurrence defines a "reckless misrepresentation" as one in which "the representer asserts a fact as of his own knowledge without knowing whether it is true or false."[86] The argument is based upon the definition of "fault" in the Comparative Fault Act[87]

79. *Florenzano*, 358 N.W.2d at 176-77.

80. A comment to the Restatement (Second) of Torts states:

> With respect to physical harms caused by negligence, the old rule that contributory negligence is a complete bar to liability based on negligence is yielding to a trend toward comparative negligence. It is debatable whether this development should affect liability for pecuniary harm as well. Precedents to date have not made this extension.

RESTATEMENT (SECOND) OF TORTS § 522A comment b (1977).

81. *See, e.g.*, Lesmeister v. Dilly, 330 N.W.2d 95 (Minn. 1983) (comparative fault applied to consequential damages in contract claim; plaintiff's failure to mitigate its damages was treated as contributory negligence); Mike's Fixtures, Inc. v. Bombard's Access Floor Systems, Inc., 354 N.W.2d 837 (Minn. Ct. App. 1984) (definition of "fault" in comparative fault statute does not apply generally to contract actions).

82. *See Lesmeister*, 330 N.W.2d at 102.

83. *Id.*

84. *See Florenzano*, 387 N.W.2d at 171.

85. *Id.* at 176-79.

86. *Id.* at 177, n.2.

87. *See* MINN. STAT. § 604.01, subd. 1a (1984).

and upon policy considerations.

The concurring opinion correctly points out that the statutory definition of "fault" includes acts or omissions which are "in any measure negligent or *reckless*."[88] Comparative fault, then, should apply to reckless misrepresentation. Although this argument works on the surface, it is based upon a very questionable use of the term "reckless." If "reckless" is the wrong term, the fact that the Comparative Fault Act expressly includes reckless acts is irrelevant.

The kind of misrepresentations which the concurring opinion refers to as "reckless" have been previously characterized by the supreme court as intentional. Under Minnesota law, the presence of a fraudulent intent or scienter makes the misrepresentation an intentional tort.[89] In *Davis v. Re-Trac Manufacturing Corp.*,[90] the supreme court noted that a fraudulent intent is present when the misrepresenter either knows the statement is false *or* knows that he does not know whether it is true or false.[91] This second formulation of fraudulent intent is exactly what the concurring opinion now calls recklessness. Under *Davis*, then, there is strong support for the position that the so-called reckless misrepresentation is really an intentional misrepresentation. Attaching the label of "reckless" should not control the issue.

Since the definitions are not dispositive, the question should be approached by looking at the *nature* of the so-called reckless misrepresentation. If the reckless misrepresentation is really more akin to an intentional tort, comparative fault should not apply.[92]

The concurrence argues that "deceit" is the only "true" intentional misrepresentation.[93] Deceit involves a misrepresentation in which the misrepresenter *knows* the statement is false.[94]

> In my view, comparative responsibility would apply to both reckless and negligent misrepresentation but not to deceit. The dividing line is the "intent to deceive" which distinguishes deceit from the other two torts and which makes deceit a true, not a fictional, intentional tort.[95]

The concurrence is arguing that an "intent to deceive" makes a misrepresentation an intentional tort. When the misrepresenter does

88. *See Florenzano*, 387 N.W.2d at 177, n.4 (emphasis added); *see also* MINN. STAT. § 604.01, subd. 1a (1984).

89. *Florenzano*, 387 N.W.2d at 173 (citing *Humphrey*, 32 Minn. at 198, 20 N.W. at 138 (1884)).

90. 276 Minn. 116, 149 N.W.2d 37 (1967).

91. *Id.* at 117, 149 N.W.2d at 39.

92. *See supra* note 19 and accompanying text (comparative fault does not apply to intentional torts).

93. *See Florenzano*, 387 N.W.2d at 177.

94. *Id.* at 177, n.1.

95. *Id.* at 177.

not *know* the statement is false, strictly speaking, there can be no intent to deceive. Since the reckless misrepresenter does not know the statement is false,[96] there is no intent to deceive and the tort is not intentional.

This argument ignores one aspect of the reckless misrepresention. Not only does the reckless misrepresenter make a statement without knowing whether it is true, but he also "asserts it as of his own knowledge."[97] Thus, the reckless misrepresenter makes a statement *knowing* it may well be false, *and also* asserts it as if he knows it to be true. He, therefore, "intends to deceive" the plaintiff as to his level of confidence in the statement. There is a deliberate and affirmative act of deception which should indicate that "reckless" is a misnomer and that this kind of misrepresentation should properly be characterized as an intentional tort.

Finally, the concurrence draws on policy considerations to support its position:

> [A] deceiver's conduct is different in kind from the reckless or negligent misrepresentation, more reprehensible, and it would be 'bad policy' to let the deceiver ameliorate his deception by urging that his victim should share the harm which the deceiver alone chose to create.[98]

The concurrence continues by stating: "The same policy arguments against applying comparable responsibility do not apply to reckless and negligent misrepresentations."[99]

It is true that there is a slight difference between deceit and reckless misrepresentation but the difference is insignificant. It is not at all clear *why* the policy arguments against applying comparative fault to one are not equally relevant to the other. Both involve deliberate deception,[100] both require scienter,[101] and, in both cases, the elements of proof focus on the defendant's subjective state of mind. The only difference is the misrepresenter's certainty regarding the falsity of the statement.[102] If it is bad policy to allow the deceiver to ameliorate his deception by urging the victim to share the harm, it is also bad policy to allow the "reckless" misrepresenter to do the same.

As previously mentioned, there are writers currently criticizing the rule that comparative fault should not apply to intentional torts.[103]

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96. *See id.* at 177, n.2.
97. *See id*; *see also Davis*, 276 Minn. at 117, 149 N.W.2d at 39.
98. *Florenzano*, 387 N.W.2d at 178.
99. *Id.*
100. *See supra* text accompanying note 97.
101. *See supra* note 87 and accompanying text.
102. *See supra* note 97 and accompanying text.
103. *See supra* note 21 and accompanying text.

The criticism is limited to certain kinds of intentional torts and, generally speaking, it appears the position is in a developmental stage.[104] Rather than arguing that intentional torts are *qualitatively* different from negligent acts, these writers take the position that the difference is only one of *quantitative* degree.[105] If it is desireable to apply comparative fault to intentional misrepresentation, the debate should focus on this underlying issue and not upon attempts to recharacterize certain forms of misrepresentation as unintentional to achieve the application of comparative fault.

Conclusion

With the Minnesota Supreme Court's decision in *Florenzano v. Olson*, Minnesota courts will now be applying comparative fault to claims for negligent misrepresentation. Only when plaintiff's percentage of fault exceeds the defendant's, will contributory negligence defeat plaintiff's recovery. The decision is consistent with Minnesota's expansive use of the comparative responsibility device and with Minnesota's pronouncements regarding the nature of negligent misrepresentation.

As the law currently stands, comparative fault should not apply to any misrepresentation made with scienter. The supreme court's previous statements regarding fraudulent intent, and general considerations of public policy argue against any further application of comparative fault in the area of misrepresentation. There is no reason to further confuse the area of fraud and misrepresentation by creating new distinctions between the various forms of intentional misrepresentation.

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104. *Id.*
105. *Id.*