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Negligence - The Unit Rule and North Dakota's Comparative Negligence Statute

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NEGLIGENCE—THE UNIT RULE AND NORTH DAKOTA'S COMPARATIVE NEGLIGENCE STATUTE

On February 21, 1983, Mark Beaudoin, an employee of Wood Wireline, was preparing to conduct a pressure gradient check on an oil well owned by Texaco, Inc. (Texaco).[1] As Beaudoin was uncoiling wire from a large spool, the end of the wire struck him causing him to become legally blind in the left eye.[2] On March 29, 1985, Beaudoin brought a negligence action against Texaco in United States District Court for the District of North Dakota alleging that Texaco failed to provide proper lighting and supervision.[3] Beaudoin also contended that Texaco was negligent by requiring the work to commence at an hour which necessitated

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1. Beaudoin v. Texaco, Inc., 653 F. Supp. 512, 512 (D.N.D. 1987). Texaco hired Wood Wireline to conduct a pressure gradient check on Texaco's oil well, CM Loomer #13, near Keene, North Dakota. *Id.*

2. *Id.* at 512-13. It was dark when Beaudoin and a co-worker uncoiled the wire because they were required to arrive at the site before dawn to prepare the equipment. *Id.* at 512. John Spain, an employee of Texaco, arrived after the incident to supervise the work. *Id.* at 513.

3. *Id.* Beaudoin brought his action against Texaco under North Dakota's comparative negligence statute, § 9-10-07. *Id.; see* N.D. CENT. CODE § 9-10-07 (1987) (suspened from July 8, 1987 through June 30, 1993). Section 9-10-07 of the North Dakota Century Code provides in relevant part:

> Contributory negligence does not bar recovery in any action by any person or 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*.... When there are two or more persons who are jointly liable, contributions to awards must 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....

Id. (emphasis added). This statute has been suspended by a sunset law adopted by the 1987 North Dakota Legislature. *See* Act approved April 9, 1987, ch. 404, 1987 N.D. Laws 989 (codified at N.D. CENT. CODE § 32-03.2-02 (Supp. 1987)). Section 32-03.2-02 is a new comparative fault law which repealed joint and several liability and adopted several liability for multiple tortfeasors. *Id.* In addition, § 32-03.2-02 compares the plaintiff's fault to the combined fault of all persons who contributed to the injury. *Id.* Furthermore, the law is prospective and, therefore, does not apply to claims arising before the effective date of § 32-03.2-02, which was July 1, 1987. *Id.* For a more detailed discussion on the prospective application of the new comparative fault law, see *infra* notes 84-95 and accompanying text.

that the equipment be erected in the dark.[4] Upon conclusion of the trial, the jury awarded damages of $44,057.04 and apportioned the negligence causing the injury as follows: sixty percent to employer Wood Wireline, which was not a defendant in the action; thirty percent to Beaudoin; and ten percent to Texaco.[5] The narrow question before the federal district court was whether, in cases involving a negligent plaintiff and more than one negligent defendant, North Dakota's comparative negligence law compares the plaintiff's negligence to the defendants individually, or compares it to the defendants in the aggregate, in determining whether the plaintiff was barred from recovery pursuant to section 9-10-07 of the North Dakota Century Code.[6] Section 9-10-07 provides that a plaintiff in a negligence action must be less negligent than the defendant in order to recover damages.[7] The court determined that Beaudoin's negligence ought to be compared

4. *Beaudoin*, 653 F. Supp. at 513. Texaco denied any negligence on its part and alleged that Beaudoin negligently handled the wire. *Id.*

5. *Id.* Wood Wireline was immune from liability pursuant to § 65-04-28 of North Dakota's Worker's Compensation Law. *Id.; see* N.D. CENT. CODE § 65-04-28 (1985). Section 65-04-28 provides in relevant part:

> Employers who comply with the provisions of this chapter shall not be liable to respond in damages at common law or by statute for injury to or death of any employee, wherever occurring, during the period covered by the premiums paid into the fund.

Id.

6. *Beaudoin*, 653 F. Supp. at 513; *see* N.D. CENT. CODE § 9-10-07 (1987) (suspended from July 8, 1987 through June 30, 1993) (contributory negligence shall not bar recovery in any action if such negligence was not as great as the negligence of the person against whom recovery is sought). *Beaudoin* was a case of first impression in North Dakota because the issue of whether the individual or unit rule should be applied in North Dakota had not been decided. *Id.* Actions that arise after July 1, 1987, are governed by North Dakota's new comparative fault law. *See* N.D. CENT. CODE § 32-03.2-02 (Supp. 1987). For a discussion of § 32-03.2-02, see *supra* note 3. The new comparative fault law has adopted the unit rule. *Id.* Unit rule jurisdictions find that public policy and statutory construction favor comparing the plaintiff's negligence to the combined fault of all the defendants as a unit, rather than individually, in determining whether the plaintiff will be barred from recovery. *See, e.g.*, Mountain Mobile Mix, Inc. v. Gifford, 660 P.2d 883, 890 (Colo. 1983). In *Mountain Mobile*, the Colorado Supreme Court applied the unit rule to Colorado's forty-nine percent comparative negligence law when it allowed a plaintiff with apportioned fault of one-third to recover from two defendants who also had negligence apportioned at one-third each. *Id.* The court found the combined comparison approach provided better results in the vast majority of cases. *Id.* at 888. The court stated that the unit rule does not base the plaintiff's recovery on the fortuitous circumstance of how many defendants caused the injury, but rather financial responsibility for an injury is divided according to fault as long as the plaintiff is less than fifty percent negligent in a not as great as (forty-nine percent) modified comparative negligence jurisdiction. *Id.* Thus, the plaintiff and defendant are ultimately treated more fairly since their rights and obligations are determined according to their actual degree of fault. *Id.* However, jurisdictions that compare the plaintiff's fault to that of each defendant individually follow the individual (Wisconsin) rule. *See* Odenwalt v. Zaring, 102 Idaho 1, ____, 624 P.2d 383, 394 (1980) (Idaho Supreme Court applied the individual rule in barring Odenwalt from recovering from a less negligent codefendant). For a discussion of *Odenwalt*, see *infra* notes 46-54 and accompanying text.

7. *See* N.D. CENT. CODE § 9-10-07 (1987) (suspended from July 8, 1987 through June 30, 1993) (contributory negligence shall not bar recovery in any action if such negligence was not as great as the negligence of the person against whom recovery is sought).

to the combined negligence of Wood Wireline and Texaco.[8] Therefore, the court *held* that since Beaudoin's negligence was not as great as the combined negligence of Wood Wireline and Texaco, and because North Dakota's comparative negligence law provided for joint and several liability, Texaco was liable to Beaudoin for seventy percent of his damages.[9] *Beaudoin v. Texaco, Inc.*, 653 F. Supp. 512 (D.N.D. 1987).

Comparative negligence arose as a means to correct the harshness of contributory negligence.[10] The common-law doctrine of contributory negligence precluded a plaintiff's recovery if the plaintiff contributed to the happening of the event that injured the plaintiff.[11] Although contributory negligence was at first well received in the United States,[12] the harshness of the doctrine soon initiated the implementation of ameliorative devices such as comparative negligence.[13] Comparative negligence apportions

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8. *Beaudoin*, 653 F. Supp. at 517.

9. *Id.* at 518. The court stated that Texaco was liable for Wood Wireline's negligence because in North Dakota, a joint tortfeasor is liable for the share of negligence attributable to a statutorily immune employer. *Id.* For a discussion of this rule, see *infra* notes 122-24 and accompanying text.

10. *See* Bartels v. City of Williston, 276 N.W.2d 113, 120 (N.D. 1979) (comparative negligence act was enacted to eliminate the inequities under contributory negligence which permitted no recovery if the plaintiff was merely one percent contributorily negligent).

11. *See* C. HEFT & C. HEFT, COMPARATIVE NEGLIGENCE MANUAL § 1.10, at 3 (rev. ed. 1986) (contributory negligence prohibits one guilty of any degree of negligence from recovering for his damages or injury). Contributory negligence originated in England in 1809. *See* Butterfield v. Forrester, 11 East 60, ____, 103 Eng. Rep. 926, 927 (1809). In *Butterfield,* the plaintiff left a pub at dusk and began riding his horse at a fast speed. *Id.* at ____, 103 Eng. Rep. at 926-27. Soon thereafter the horse and plaintiff ran into a pole placed across the road by the defendant. *Id.* at ____, 103 Eng. Rep. at 927. A witness observed that the plaintiff could have avoided the pole if he was not riding at a rapid pace. *Id.* Lord Ellenborough of the King's Bench held that a plaintiff cannot receive damages for injuries that arose from a defendant's negligence if the plaintiff did not use ordinary care to avoid the result of the defendant's negligence. *Id.* Thus, the plaintiff in *Butterfield* could not recover for his damages arising from the collision with the pole because his excessive speed on the horse at dusk showed a lack of ordinary care. *Id.*

One of the first American cases that applied contributory negligence was decided in 1824. *See* Smith v. Smith, 19 Mass. (2 Pick.) 621, 624, 13 Am. Dec. 464, 464 (1824). In *Smith* the plaintiff's agent drove a horse and wagon belonging to the plaintiff over a wood pile that was left lying on the road. *Id.* at 622, 13 Am. Dec. at 464-65. The Massachusetts Supreme Judicial Court held that the defendant was negligent in leaving the wood pile on the highway. *Id.* at 622, 13 Am. Dec. at 465. The court stated, however, that the plaintiff could recover his damages only if he showed that his agent used ordinary care in driving the horse drawn wagon. *Id.* at 623, 13 Am. Dec. at 465. At the trial level the agent was found to have lacked the ordinary care to avoid the accident because he negligently drove the wagon down the hill, at night, instead of walking the horse and wagon slowly down the steep incline. *Id.* at 622-23, 13 Am. Dec. at 465. Thus, the court affirmed the jury's verdict for the defendant. *Id.* at 624, 13 Am. Dec. at 467.

12. *See* Turk, *Comparative Negligence on the March* 28 CHI.[-]KENT L. REV. 189, 198-99 (1950). Turk contends that contributory negligence was favorably received in the United States because of the economic conditions and an apparent breakdown in the jury system during the early to middle 1800s. *Id.*

13. *See id.* at 203. Turk explains that courts have tried many devices to lessen the harsh result of contributory negligence, including disallowing its application when the defendant's actions were willful, wanton, or reckless. *Id.* at 203-04. Turk contends that comparative negligence is the device most widely used to decrease the unfair results of contributory negligence. *See id.* at 206. Another exception to contributory negligence developed in the form of the last clear chance doctrine. *See* Davies v. Mann, 10 M. W. 546, 546, 152 Eng. Rep. 588, 589 (1842). In *Davies,* the plaintiff shackled

liability for damages in proportion to the fault of each contributor causing the injury or damages.[14]

The first sign of comparative negligence arose either in the sea laws of the late Middle Ages or during the Roman Era.[15] These laws initially apportioned the loss arising from collisions equally, but later developed into a scheme that apportioned the loss according to fault.[16] It was, however, the railroad acts of the early 1900s that had the greatest impact in the United States on comparing the fault of the parties.[17]

One of the first railroad acts to adopt comparative negligence was the Federal Employer's Liability Act (FELA) of 1908 which diminished the recovery allowed in railroad accidents according to the employee's fault.[18] FELA rejected the equal division of liability rule pursuant to admiralty law and instead adopted a "pure" comparative negligence apportionment scheme.[19] The

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the feet of his donkey so it could graze next to the highway. *Id.* at 546, 152 Eng. Rep. at 588. The defendant's servant drove the defendant's horse and wagon into the plaintiff's donkey. *Id.* at 546, 152 Eng. Rep. at 588. The court stated that the plaintiff's abandonment of the donkey close to the highway was not the immediate cause of the injury, but rather the defendant's servant caused the accident by driving the wagon at a negligently fast speed. *Id.* at 548, 152 Eng. Rep. at 589. Thus, the court formed what has become known as the last clear chance doctrine by stating that a plaintiff can recover, even if negligent, when the defendant had the last clear chance to avoid the injury, but failed to do so because of his negligent act. *Id.* at 548, 152 Eng. Rep. at 589.

14. *See* C. HEFT & C. HEFT, *supra* note 11, at 2. Heft explains that comparative negligence in its simplest terms means that every person should be responsible to another to the extent he or she caused the injury. *Id.*

15. *See* Turk, *supra* note 12, at 220. According to Turk, the sea laws declared that damages arising from a returning ship colliding with an anchored ship should be halved if the masters and mariners of the ships were willing to swear that the accident occurred without their fault and intent. *Id.* at 220-21. Mole and Wilson state, however, that it was under the ancient law of Rome that the first signs of comparative fault arose. *See* Mole & Wilson, *A Study of Comparative Negligence,* 17 CORNELL L.Q. 333, 337 (1932). According to Mole and Wilson, Justinian's Digest on Roman Law provided that a party chargeable with an accident should assume damages in proportion to his fault. *Id.* Mole and Wilson's interpretation of Justinian's Digest as it relates to comparative negligence has led to much debate among legal scholars. *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE 9 (2d. ed. 1986) (the debate on the origin of comparative negligence focuses on the interpretation of Justinian's Digest). Nevertheless, whether comparative negligence started in the Roman Era or the Middle Ages, comparative negligence is not a modern idea. *See id.* at 8.

16. *See* Turk, *supra* note 12, at 220-23. Although the sea laws initially apportioned the damages 50/50, they soon developed an apportionment scheme where the entering vessel compensated the other ship only for such part of the damages as experts might determine to be proper. *Id.* at 223. Under Mole and Wilson's interpretation of Justinian's Digest, Roman law always apportioned liability according to fault. *See* Mole & Wilson, *supra* note 15, at 337.

17. *See* Turk, *supra* note 12, at 334. Turk contends it was the hazardous conditions under which railroad employees were working that did the most to stimulate the growth of comparative negligence in the United States. *Id.*

18. *See* Federal Employer's Liability Act, ch. 149, § 1, 35 Stat. 65 (1908) (current version at 45 U.S.C. § 51 (1982)). The Federal Employer's Liability Act (FELA) provides in relevant part: "Every common carrier by railroad while engaging in commerce between any of the several States...shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce...." *Id.* Mole and Wilson state the FELA adopts a system based on comparative negligence whereby the carrier is exonerated from the proportionate part of the damages which correspond to the amount of negligence attributable to the employee. *See* Mole & Wilson, *supra* note 15, at 359-60.

19. *See* Federal Employer's Liability Act, ch. 149, § 1, 35 Stat. 65 (1908) (current version at 45 U.S.C. § 51 (1982)) (every common carrier by railroad engaged in commerce between the states is

adoption of FELA set off a flood of labor legislation that abolished the defenses of fellow-servant, assumption of risk, and contributory negligence.[20] As one example, the Merchant Marine (Jones) Act of 1920 adopted the FELA comparative negligence rule in actions brought by seamen or their representatives for damages against their employers in injury and wrongful death cases.[21] Consequently, based on its growing popularity, comparative negligence soon spread beyond the labor field into other areas.[22] It was not until the 1960s, however, that comparative negligence was adopted by the majority of state legislatures.[23]

States that have decided to adopt comparative negligence have chosen one of five forms: pure; modified — "not as great as" (forty-nine percent); modified — "not greater than" (fifty percent); slight-gross; and remote.[24] Under pure comparative

liable to its employee for injury or death according to the proportion of negligence attributed to the carrier); Mole and Wilson contend that, as under the pure comparative negligence form, all that is necessary under FELA is the amount of negligence of the carrier and employee because the carrier's liability will be reduced by the negligence apportioned to the employee. *See* Mole & Wilson, *supra* note 15 at 360-61. For a discussion on pure comparative negligence, see *infra* notes 25-26 and accompanying text.

20. *See* Mole & Wilson, *supra* note 15, at 605. According to Mole and Wilson, the individual states, inspired by FELA, proceeded to adopt laws in the area of worker's compensation which abolished the common-law doctrine of contributory negligence. *Id.*

21. *See* Merchant Marine (Jones) Act, ch. 153, § 20, 38 Stat. 1185 (1920) (current version at 46 U.S.C. § 688 (1982)) (a seaman who suffers personal injury may maintain an action for damages at law and in such actions the rule applied to railroad injuries governs); *see also* Lindgren v. United States, 281 U.S. 38, 41 (1930) (seamen's administrator brought action against the United States for the wrongful death of the decendent resulting from a sudden release of a lifeboat which threw the decedent down onto the dock). The United States Supreme Court in *Lindgren* stated that the Merchant Marine Act incorporated FELA and its pure apportionment method in comparative negligence cases. *Id.; see* Merchant Marine (Jones) Act § 20, 46 U.S.C. § 688 (1982) (rule applied to railroad injuries applies to injuries suffered by seamen); Federal Employer's Liability Act § 1, 45 U.S.C. § 51 (1982) (railroad carriers are liable for injury or death to an employee according to the railroad's apportioned fault).

22. *See, e.g.,* Death on the High Seas Act, ch. 111, § 6, 41 Stat. 537 (1920) (current version at 46 U.S.C. § 766 (1982)) (contributory negligence shall not bar recovery but relief shall be reduced by decedent's negligence). The Death on the High Seas Act allows a cause of action to arise when a fatal injury accrues to a person while at sea. *See id.*

23. *See* V. SCHWARTZ, *supra* note 15, at 12. Schwartz believes that one reason for the delay in adoption of comparative negligence by the states was the lobbying efforts of major corporate defendants and insurance companies who contended that the adoption of comparative negligence in any form would be too costly. *Id.* at 13-14. According to Dean Prosser, some comparative negligence legislation did arise prior to World War II when automobile accidents compelled consideration of the uncompensated victim. *See* Prosser, *Comparative Negligence,* 51 MICH. L. REV. 465, 466 (1953). Although some states such as Wisconsin did adopt comparative negligence prior to World War II, Prosser contends that the comparative negligence legislation in many states was put on hold because of the decreased use of automobiles during World War II. *Id.* Apparently the pressure for comparative negligence laws that existed before World War II did not spring up after the war because comparative negligence systems did not catch on until the 1960s. *See* V. SCHWARTZ, *supra* note 15, at 12 (most states were hesitant to apply comparative negligence actions until the 1960s).

24. *See* V. SCHWARTZ, *supra* note 15, at 45-72. Schwartz contends that the change away from contributory negligence did not necessarily require a division of the damages between the plaintiff and defendant, but may permit full recovery by the plaintiff notwithstanding his or her contributory negligence. *Id.* at 29 (citing Prosser, *supra* note 23, at 465 n. 2). Schwartz argues, however, that the comparative negligence systems in the United States do not operate in that precise a manner; rather, they involve some method of dividing damages when both the plaintiff and defendant have been negligent. *Id.*

negligence, a plaintiff may recover against the defendant notwithstanding the level of his own negligence, but damages are decreased by the amount of his or her apportioned fault.[25] This form is viewed by some scholars as the most equitable method of allocating damages in negligence actions because it is the only form of comparative negligence which truly distributes responsibility according to the fault of the respective parties.[26]

Under the first modified form of comparative negligence, the "not as great as" (forty-nine percent) form, the plaintiff's contributory negligence does not bar his claim if it is less than that of the defendant, but the plaintiff's damages will be reduced by the percentage of his fault.[27] The "not greater than" (fifty percent)

25. *See, e.g.*, Li v. Yellow Cab Co., 13 Cal. 3d 804, ____, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975). In *Li*, an accident occurred when Nga Li turned left across a southbound lane of an intersection in front of a taxi owned by the Yellow Cab Company of California (Cab Company) and driven by Robert Phillips. *Id.* at ____, 532 P.2d at 1229, 119 Cal. Rptr. at 861. Although Phillips was driving at a negligently fast speed, Li was denied recovery by the trial court because she was contributorily negligent in turning across the intersection. *Id.* at ____, 532 P.2d at 1229-30, 119 Cal. Rptr. at 861-62. The Supreme Court of California, however, reversed the trial court and adopted the pure comparative negligence form because the court found that this form furthered the fundamental purpose of comparative negligence — to assign responsibility for damages in direct proportion to the fault of the parties. *Id.* at ____, 532 P.2d at 1243-44, 119 Cal. Rptr. at 875-76. Therefore, Li could recover against the Cab Company because pure comparative negligence assigns responsibility and liability in direct proportion to the amount of negligence of each of the parties. *Id.* at ____, 532 P.2d at 1243, 119 Cal. Rptr. at 875.

Schwartz maintains that the pure comparison method is the simplest form of comparative negligence. V. SCHWARTZ, *supra* note 15, at 47-48. For example, if a jury determines that the plaintiff is ten percent negligent and the defendant ninety percent negligent, the plaintiff will recover $9,000 of his total damages of $10,000 from the defendant. *See id.* at 48. In addition, under the pure form, a plaintiff may recover whether he is one percent negligent or ninety-nine percent negligent. *See* C. HEFT & C. HEFT, *supra* note 11, § 1.50, at 16. The pure form of comparative negligence was introduced into the individual states when Mississippi adopted it in 1910. *See* Comparative Negligence Act, ch. 135, 1910 Miss. Laws 125 (codified at MISS. CODE ANN. § 11-7-15 (1972)) (plaintiff's contributory negligence will not bar recovery, but damages will be diminished according to the plaintiff's fault).

26. *See* V. SCHWARTZ, *supra* note 15, at 363 (the modified comparative negligence systems distort the idea of comparative negligence because they do not distribute liability purely on the basis of fault). Some authorities view pure comparative negligence as too liberal and as unjustly rewarding the contributing plaintiff whose negligence could be the major cause of his own injury. *See* C. HEFT & C. HEFT, *supra* note 11, at 16-17. Heft contends that a big flaw in pure comparative negligence is that the party who recovers the most is the one with the most damages, whether or not he is guilty of the far greater fault. *Id.* at 18. For example, if A is found to be ninety percent negligent and suffers injury to the extent of $25,000, A is permitted to recover $25,000 less ninety percent of $25,000, which results in an ultimate recovery of $2,500. *Id.* at 19. Suppose also that B is attributed with ten percent of the fault and is damaged to the extent of $1,000; B can recover $900 ($1,000 less ten percent) of his damages. *Id.* Thus, A, even though more at fault than B, recovers a greater amount of money. *Id.*

27. *See* N.D. CENT. CODE § 9-10-07 (1987) (suspended from July 8, 1987 through June 30, 1993) (contributory negligence does not bar a plaintiff's claim if such negligence was not as great as the negligence of the person against whom recovery is sought). For the text of § 9-10-07, see *supra* note 3. Wisconsin, in 1931, first adopted the forty-nine percent modified comparative negligence form statutorily by allowing a plaintiff's claim only if he was less negligent than the defendant. *See* Comparative Negligence Act, ch. 242, 1931 Wis. Laws 550 (1931) (contributory negligence shall not bar recovery if such negligence was *not as great as* the negligence of the person against whom recovery is sought) (emphasis added). Wisconsin, however, changed to the fifty percent modified form in 1971. *See* Act of June 23, 1971, ch. 47, 1971 Wis. Laws 50 (codified as amended at WIS. STAT. ANN. § 895.045 (West 1983)) (contributory negligence shall not bar recovery if such negligence was *not greater than* the negligence of the person against whom recovery is sought) (emphasis added).

form is substantially similar to the "not as great as" (forty-nine percent) form except that it allows a plaintiff to recover if his or her apportioned negligence is fifty percent or less.[28] The difference between the two modified forms of comparative negligence is not minor because juries commonly apportion fault equally between parties when their causal negligence is close.[29] Consequently, if the

Schwartz states that the "not as great as" comparative negligence form denies a plaintiff a recovery only if his or her apportioned negligence is fifty percent or more. *See* V. SCHWARTZ, *supra* note 15, at 69. Schwartz maintains that the forty-nine percent comparative negligence form arose judicially well before Wisconsin's statutory adoption in 1931. *Id.* at 67. He asserts that Georgia, through a series of judicial opinions, adopted the forty-nine percent form in the 1800s. *Id.; see* Macon & W. R.R. v. Davis, 27 Ga. 113, 119 (1859); Flanders v. Meath, 27 Ga. 358, 362-63 (1859). In *Macon,* a train collided with a buggy owned by the plaintiff and driven by his slave. *Macon,* 27 Ga. 113, 113-14. The court allowed the plaintiff to recover for damages to the buggy and loss of the slave even though the slave was contributorily negligent in driving the buggy in front of the train. *Id.* at 124-25. The court held that in a suit against a railroad company, if it appears that there was mutual fault on the part of the plaintiff and defendant, the party guilty of the greater wrong or negligence must be regarded as an original aggressor. *Id.* at 119; *see also* Flanders v. Meath, 27 Ga. 358, 362-63 (1859). In *Flanders,* the Georgia Supreme Court upheld its decision in *Macon* by denying recovery to a plaintiff for the injuries sustained by his daughter when she flung herself in front of the defendant's buggy. *Id.* at 362-63. The court stated that when both the defendant and plaintiff are at fault, the fault of the plaintiff may go to mitigate damages if the defendant is the most at fault. *Id.* at 362. Since the plaintiff's daughter was the most at fault, the plaintiff was denied any recovery. *Id.* The forty-nine percent modified comparative negligence form was finally explicitly adopted by Georgia in a 1904 case. *See* Christian v. Macon R.R. & Light Co., 120 Ga. 314, ____, 47 S.E. 923, 923 (1904) (if the plaintiff and defendant are both negligent, the plaintiff can recover unless his negligence is equal to or greater than the negligence of the defendant).

28. *See* V. SCHWARTZ, *supra* note 15, at 70. In a situation in which the plaintiff has suffered $10,000 in damages and both the plaintiff and defendant are apportioned fifty percent of the fault, the fifty percent comparative negligence form allows the plaintiff to recover $5,000. *Id.* at 71. The reason the plaintiff is allowed to recover is because the plaintiff's negligence is not greater than the negligence of the person against whom recovery is sought. *Id.; see* WIS. STAT. ANN. § 895.045 (West 1983) (contributory negligence will not bar recovery if the negligence of the person is not greater than the defendant). Under the forty-nine percent modified comparative negligence rule, however, the plaintiff would be denied recovery because before recovery is allowed, the plaintiff's apportioned negligence must be not as great as the negligence of the defendant. *See* N.D. CENT. CODE § 9-10-07 (1987) (suspended from July 8, 1987 through June 30, 1993) (contributory negligence does not bar a plaintiff's claim if such negligence was not as great as the negligence of the defendant). For the text of § 9-10-07, see *supra* note 3.

29. *See* V. SCHWARTZ, *supra* note 15, at 32. Schwartz contends that attorneys who have litigated comparative negligence feel that juries are inclined to return verdicts finding the parties both fifty percent at fault when both parties substantially contributed to the damages sustained by the plaintiff. *Id.*

The modified forms of comparative negligence have been justified by the Supreme Court of West Virginia on the basis that a person should not recover damages when he is more at fault than the defendants. *See* Bradley v. Appalachian Power Co., 256 S.E.2d 879, 885 (1979). In *Bradley,* the West Virginia Supreme Court of Appeals, in determining whether to adopt pure or modified comparative negligence in West Virginia, held that the forty-nine percent modified form of comparative negligence is the most equitable rule. *Id.* The court believed that a party should not recover, as allowed under the pure form, when he or she substantially contributed to the damages. *Id.*

Although the argument that a party who substantially contributes to his or her own injury should not recover is strong, modified comparative negligence has been found to be impractical and confusing in application. *See* Prosser, *supra* note 23, at 491. Prosser maintains that appeals have multiplied under the modified comparative negligence forms because the courts are constantly being asked to determine whether the particular conduct of the plaintiff amounts to negligence at least equal to that of the defendant's. *Id.* Prosser also contends that modified comparative negligence can only be justified on grounds of political compromise. *Id.* at 484. Prosser asserts that the modified forms of comparative negligence arose by compromises in the state legislatures which went part of the way to apportionment, but stopped short when compromise with the groups contesting the change from contributory negligence could be reached. *Id.*

jury apportions fault on a fifty-fifty basis, a plaintiff will be denied recovery under the "not as great as" (forty-nine percent) form but not under the "not greater than" (fifty percent) form.[30]

The two other modified comparative negligence forms adopted by the states, slight-gross and remote, are not widely followed.[31] The slight-gross rule allows a plaintiff to recover when his or her negligence was slight in comparison with the negligence of the defendant, but no recovery is allowed if the plaintiff's negligence is found to be the direct cause of the harm.[32] The remote rule declares that a plaintiff's negligence will not bar recovery if his negligence is remote, but the damages recoverable will be reduced in proportion to his fault.[33] The confusion created by these two comparative negligence rules, like all modified rules, has led to numerous appeals.[34]

Once the decision is made to adopt modified comparative negligence, the focus of the courts and legislatures is whether to apply the combined negligence rule, commonly referred to as the unit rule, or the individual rule, to multitortfeasor comparative

30. *See* V. SCHWARTZ, *supra* note 15, at 71.

31. *Id.* at 61. Schwartz maintains that Nebraska and South Dakota are the only states that follow the slight-gross comparative negligence rule. *Id.* at 61. He also states that the remote rule is followed only by Tennessee. *Id.* at 60; *see also* Bejach v. Colby, 141 Tenn. 686, ____, 214 S.W. 869, 871 (1919) (Tennessee Supreme Court held that decedent's estate may recover in its wrongful death action if decedent's negligence was a remote cause of the car accident).

32. *See* NEB. REV. STAT. § 25-21,185 (1985) (plaintiff's negligence shall not bar recovery when it is slight in comparison with the negligence of the defendant); S.D. CODIFIED LAWS ANN. § 20-9-2 (1987) (plaintiff's negligence shall not bar recovery when the contributory negligence of the plaintiff was slight and defendant's negligence was gross in comparison). The comparison between the plaintiff and defendant under the slight-gross method is to be made in each particular case, rather than in the abstract ideal such as the reasonable prudent man theory. *See* Crabb v. Wade, 84 S.D. 93, ____, 167 N.W.2d 546, 549 (1969). In *Crabb*, the plaintiff's negligence in walking alongside a highway in the evening was determined to be slight when compared to defendant's negligence of being intoxicated while driving, even though courts would usually find walking alongside a highway at night to be highly negligent. *Id.* at 549. As with modified and pure comparative negligence, the plaintiff's damages were reduced under the slight-gross rule by the percentage of total negligence attributable to the plaintiff. *Id.*

33. *See* Bejach v. Colby, 141 Tenn. 686, ____, 214 S.W. 869, 870 (1919). In *Bejach*, the decedent's chauffeur drove a car, in which the decedent was riding, through an intersection. *Id.* at ____, 214 S.W. at 869. The defendant drove her car into the intersection at about 40 miles per hour. *Id.* at ____, 214 S.W. at 869. A collision resulted which killed the decedent. *Id.* at ____, 214 S.W. at 869. The court held that the chauffeur's negligence in proceeding into the intersection in front of defendant was remotely connected to the accident because defendant's speeding precluded her from using ordinary skill and care to avoid the accident. *Id.* at ____, 214 S.W. at 871. Schwartz suggests that Tennessee's remote comparison rule is similar to the last clear chance doctrine because the plaintiff's negligence is remote if the defendant had a clear chance to avoid the accident. *See* V. SCHWARTZ, *supra* note 15, at 60.

34. *See* Prosser, *supra* note 23, at 489. According to Prosser, the slight-gross rule leads to confusion and excessive appeals because of the vague meaning of "slight" and "gross." *Id.* In addition, Schwartz states that the Tennessee courts have had their share of difficulty in applying the remote rule. *See* V. SCHWARTZ, *supra* note 15, at 60. To illustrate the confusion Tennessee courts have experienced in applying the remote form of comparative negligence, Tennessee defines a remote cause as "that which may have happened and yet no injuries have occurred notwithstanding that no injury could have occurred if it had not happened." *See, e.g.*, DeRosset v. Malone, 34 Tenn. App. 451, 475, 239 S.W.2d 366, 377 (1951) (remote cause is that which is not the procuring, efficient or predominant cause).

negligence actions.[35] The unit rule emerged from Arkansas in the 1962 case of *Walton v. Tull*.[36] In *Walton*, Luther Tull was riding in the right front seat of a car driven by Richard Walton.[37] As Walton was passing a car driven by D.A. Brigham, Brigham started to turn left, which caused a minor side to side collision.[38] When Tull opened the door to exit the car, after the cars had stopped on the left shoulder of the road, Henry Glenn, who was driving his car from the other direction, hit Tull's door causing Tull's leg to be seriously injured.[39] Tull brought a negligence action against all three drivers and the jury apportioned the negligence causing Tull's injury as follows: sixty percent to Glenn; twenty percent to Walton; ten percent to Tull; and ten percent to Brigham.[40] Tull contended on his cross-appeal that the trial court erred in refusing to allow him to recover from Brigham simply because they were equally at fault.[41]

The Supreme Court of Arkansas held that Tull could recover from Brigham because Arkansas' forty-nine percent comparative negligence statute allows Tull's negligence to be compared against the combined negligence of all the defendants in determining whether Tull is barred from recovery.[42] The court believed that the Arkansas Legislature intended to deny a plaintiff his or her

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35. *See* Steenson, *The Fault With Comparative Fault: The Problem of Individual Comparison in a Modified Comparative Fault Jurisdiction*, 12 WM. MITCHELL L. REV. 1, 3 (1985). Steenson states that courts usually decide which rule to adopt based on legislative intent and public policy. *Id.*

36. 234 Ark. 882, 356 S.W.2d 20 (1962).

37. Walton v. Tull, 234 Ark. 882, ____, 356 S.W.2d 20, 21 (1962). Tull furnished the car because the vehicle belonged to a company in which Tull was president and a substantial stockholder. *Id.* at ____, 356 S.W.2d at 21.

38. *Id.* at ____, 356 S.W.2d at 21. As to the collision between Walton and Brigham, the jury apportioned sixty-six percent of the negligence to Walton and thirty-four percent to Brigham. *Id.* at ____, 356 S.W.2d at 21. There was no appeal on this judgment. *Id.* at ____, 356 S.W.2d at 21.

39. *Id.* at ____, 356 S.W.2d at 21. Glenn was so drunk that when he struck the car driven by Walton he thought it was raining and, therefore, he did not realize that a collision occurred. *Id.* at ____, 356 S.W.2d at 21. Tull was exiting the car onto the highway because Walton parked on the left hand side of the road. *Id.* at ____, 356 S.W.2d at 21. The evidence produced at trial showed that Tull did not adequately look before he exited the vehicle. *Id.* at ____, 356 S.W.2d at 21.

40. *Id.* at ____, 356 S.W.2d at 21. The jury fixed Tull's damages at $27,500. The trial court credited the $27,500 award with a $10,000 compromise payment previously agreed upon between Tull and Glenn and entered judgment for the balance, $17,500, against Walton and against Glenn for his remaining share. *Id.* at ____, 356 S.W.2d at 21. The court refused to allow Tull to recover from Brigham because they were equally at fault. *Id.* at ____, 356 S.W.2d at 22.

41. *Id.* at ____, 356 S.W.2d at 25. Tull asserted that his negligence should be compared against the combined negligence of all the defendants: Glenn; Walton; and Brigham. *Id.* at ____, 356 S.W.2d at 25.

42. *Id.* at ____, 356 S.W.2d at 26. Arkansas' comparative negligence statute at the time *Walton* was decided provided that a person's negligence would not bar recovery where it was of a less degree than the negligence of any person causing the damage. *Id.*; *see* ARK. STAT. ANN. § 27-130.1 (1961) (repealed 1973) (plaintiff's contributory negligence shall not bar recovery where it is of less degree than the negligence of any person causing such injuries). Arkansas clarified this statute in 1975. *See* Act of 1975, ch. 367, 1975 Ark. Acts 922 (codified as amended at ARK. STAT. ANN. § 16-64-122 (1987)) (if plaintiff's fault is equal to or greater in degree than the fault of defendants, then plaintiff is not entitled to recover). The Arkansas Supreme Court in *Walton* determined that comparing the plaintiff's negligence to each defendant's negligence separately would cause unjust results in cases in which the plaintiff's injuries were the result of the concurring negligence of several defendants. *See*

recovery only if his or her negligence was fifty percent or more of the cause of the injury and not simply when the negligence was equal to or greater than the negligence of the person against whom recovery was sought.[43] The court justified this holding by reasoning that to refuse Tull recovery when he was only ten percent negligent would be a return to the common-law doctrine of contributory negligence.[44]

The individual rule arose in 1934 in the Wisconsin case of *Walker v. Kroger Grocery & Baking Co.*[45] The Idaho Supreme Court followed Wisconsin's lead in *Odenwalt v. Zaring*[46] and adopted the individual rule.[47] In *Odenwalt*, John Odenwalt's pickup collided with a cow that was on the highway.[48] The cattle belonged to Don Zaring and were grazing on land owned by the Bannock Creek

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Walton, 234 Ark. at ____, 356 S.W.2d at 26. Thus, the court recognized the injustice which arises under the individual rule when a plaintiff is precluded any recovery because there are several defendants and the plaintiff's negligence, although small, is greater than the negligence of any single defendant. *See id.* at ____, 356 S.W.2d at 26.

43. *Walton*, 234 Ark. at ____, 356 S.W.2d at 26. The court reasoned that the individual comparison method was unjust because a plaintiff with one-third apportioned negligence may recover against one defendant with two-thirds apportioned fault, but not against two defendants who each have been found to be one-third contributorily negligent. *Id.* at ____, 356 S.W.2d at 26. Where the plaintiff's conduct was identical and the only difference was the number of defendants, the common sense answer, according to the court, was that the plaintiff ought to recover. *Id.* at ____, 356 S.W.2d at 26-27.

44. *Id.* at ____, 356 S.W.2d at 26. The court recognized that a problem could arise under the combined comparison approach when there was an insolvent or immune tortfeasor and the remaining defendant was liable because of joint and several liability, not only for his or her own negligence but also the negligence apportioned to the insolvent or immune tortfeasor. *Id.* at ____, 356 S.W.2d at 26. The court, however, found this possibility of unfairness to be the result of the contribution laws and refused to narrow its construction of comparative negligence to avoid inequitable situations due to insolvency or immunity. *Id.* at ____, 356 S.W.2d at 26.

45. 214 Wis. 519, 252 N.W. 721 (1934). In *Walker* the plaintiff drove his car across a bridge on a foggy night and proceeded to hit a truck left on the bridge by the defendant. Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, ____, 252 N.W. 721, 721 (1934). Walker was found negligent in driving at a rapid speed in the fog and the defendant negligent in leaving the truck on the bridge and for not having a signal on the truck which would have warned Walker of the truck. *Id.* at ____, 252 N.W. at 723. Also, the passengers riding with Walker were found to be at fault because they gave negligent instructions to Walker as he navigated through the fog. *Id.* at ____, 252 N.W. at 723. The Wisconsin Supreme Court held that the negligence attributed to the passengers, as well as to Walker and the defendant, should be taken into consideration and that Walker's fault should be compared against the defendant's apportioned fault individually. *Id.* at ____, 252 N.W. at 727. The court determined that the language of Wisconsin's comparative negligence law, which compares the plaintiff's negligence to the fault of the *person* against whom recovery is sought, implies that an individual, rather than a combined comparison of Walker's negligence with the defendant's should be applied. *Id.* at ____, 252 N.W. at 727; *see* WIS. STAT. § 331.045 (1931) (contributory negligence shall not bar recovery if such negligence was not as great as the *person* against whom recovery is sought) (emphasis added) (codified as amended at WIS. STAT. ANN. § 895.045 (West 1983)) (contributory negligence shall not bar recovery if such negligence was not greater than the person against whom recovery is sought).

46. 102 Idaho 1, 624 P.2d 383 (1980).

47. Odenwalt v. Zaring, 102 Idaho 1, ____, 624 P.2d 383, 388 (1980). The court stated that its decision was not based upon which rule, individual or unit, it believed to be the best approach, but instead its decision was based on what the court determined to be the intent of the Idaho Legislature. *Id.* at ____, 624 P.2d at 388.

48. *Id.* at ____, 624 P.2d at 384. The cattle wandered onto the highway through some inadequate fencing that was intended to pen in the cattle. *Id.* at ____, 624 P.2d at 384.

Stockmen's Association.[49] In Odenwalt's negligence action against the Association and Zaring, the jury found Odenwalt twenty-five percent negligent, Zaring ten percent negligent, and the Association sixty-five percent negligent.[50] The issue before the court was whether Odenwalt could recover from Zaring, who was less negligent than Odenwalt, where Odenwalt's negligence was still less than the combined negligence of Zaring and the Association.[51]

The Idaho Supreme Court determined that Idaho's forty-nine percent modified comparative negligence statute implied that the individual rule should be applied.[52] The court stated that Odenwalt could recover only from the Association because the Association was the only defendant whose negligence was greater than his.[53] To allow Odenwalt to recover from Zaring, who was only ten percent negligent, would, according to the court, go against the forty-nine percent comparative negligence rule which allows a plaintiff to recover only when his or her negligence is not as great as the defendant tortfeasor's.[54] Although *Odenwalt* was decided in a forty-nine percent modified comparative negligence jurisdiction, the individual rule has also been applied in jurisdictions which follow the fifty percent modified comparative negligence form.[55]

49. *Id.* at ____, 624 P.2d at 384. The Bannock Creek Stockmen's Association was made up of Indian members and it grazed both Indian and non-Indian owned livestock on the Fort Hall Indian Reservation. *Id.* at ____, 624 P.2d at 384.

50. *Id.* at ____, 624 P.2d at 384. The jury found that Odenwalt had sustained $53,800 in damages but allowed Odenwalt to recover only sixty-five percent of his damages from the Association which amounted to $40,350. *Id.* at ____, 624 P.2d at 384.

51. *Id.* at ____, 624 P.2d at 384. The trial court held that Odenwalt's negligence had to be compared with each individual defendant's negligence. *Id.* at ____, 624 P.2d at 384. Since Odenwalt's negligence was greater than Zaring's, the trial court precluded any recovery by Odenwalt from Zaring. *Id.* at ____, 624 P.2d at 384.

52. Odenwalt v. Zaring, 102 Idaho 1, ____, 624 P.2d 383, 388 (1980); *see* IDAHO CODE § 6-801 (Supp. 1987) (contributory negligence shall not bar recovery if such negligence was not as great as the negligence of the person against whom recovery is sought). The court reiterated Idaho's general rule that when a statute is adopted from another jurisdiction, the construction placed upon the statute by the courts of the other jurisdiction is also presumed to be adopted. *Id.* at ____, 624 P.2d at 387. Since Idaho's comparative negligence statute was virtually the same as Wisconsin's, the court felt that the Idaho Legislature intended Wisconsin's individual rule to also apply. *Id.* at ____, 624 P.2d at 387. *Compare* WIS. STAT. ANN. § 895.045 (West 1983) (contributory negligence will not bar recovery if such negligence was not greater than the negligence of the person against whom recovery is sought) *with* IDAHO CODE § 6- 801 (Supp. 1987) (contributory negligence shall not bar recovery if such negligence was not as great as the negligence of the person against whom recovery is sought).

53. *Id.* at ____, 624 P.2d at 387.

54. *Id.* at ____, 624 P.2d at 387. If the unit rule, rather than the individual rule was applied, the court reasoned that an inequitable result would arise because Zaring could be liable for seventy-five percent of Odenwalt's injuries while only being ten percent negligent. *Id.* at ____, 624 P.2d at 387. The court found it unfair for Zaring to pay the great majority of the damages when Odenwalt's negligence was two and one-half times greater than Zaring's. *Id.* at ____, 624 P.2d at 387. According to the court, this inequity did not arise under the individual rule because under that rule Odenwalt was barred because his fault was equal to or greater than Zaring's. *Id.* at ____, 624 P.2d at 388.

55. *See* Reiter v. Dyken, 95 Wis. 2d 461, ____, 290 N.W.2d 510, 517 (1980). In *Reiter,* Marian Reiter, a real estate agent, slipped and fell while she was showing a house to a prospective purchaser. *Id.* at ____, 290 N.W.2d at 511. Reiter brought a negligence action against Paul and Linda Dyken,

Proponents of the individual rule find the individual comparison method, rather than the unit rule, to be more compatible with the modified comparative negligence laws.[56] In addition, individual rule jurisdictions view the unit rule as unjust and harsh in situations in which a defendant less negligent than the plaintiff is liable for the total amount of liability attributed to all of the defendants.[57] The individual rule is also favored because some courts believe that it leads to uniform judgments throughout many different comparative negligence actions that may arise.[58] Finally,

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the owners of the home, and Edward A. Purtell Realty Company (Company), who was impleaded as a defendant. *Id.* at ____, 290 N.W.2d at 512. The jury returned a verdict apportioning thirty percent of the causal negligence to the Dykens, twenty percent to the Company, and fifty percent to Reiter. *Id.* at ____, 290 N.W.2d at 511. The Wisconsin Supreme Court held that the trial court erred when it combined the negligence of the Dykens and the Company in determining that Reiter's negligence was not greater than the person against whom recovery is sought. *Id.* at ____, 290 N.W.2d at 517. The court found that the Wisconsin Legislature intended the individual rule to pertain to comparative negligence because the legislature switched from the forty-nine percent comparative negligence rule to the fifty percent rule without implementing specific language adopting the unit rule. *Id.* at ____, 290 N.W.2d at 517; *see* Act of June 23, 1971, ch. 47, 1971 Wis. Laws 50 (codified as amended at WIS. STAT. ANN. § 895.045 (West 1983)) (contributory negligence shall not bar recovery if such negligence was not greater than the negligence of the *person* against whom recovery is sought) (emphasis added).

56. *See, e.g.*, VanHorn v. William Blanchford Co., 88 N.J. 91, ____, 438 A.2d 552, 554 (1981). The court in *VanHorn* adopted and applied the individual rule to New Jersey's fifty percent comparative negligence law by finding that a plaintiff who was fifty percent negligent was barred from recovering where the defendants were thirty percent and twenty percent negligent respectively. *Id.* at ____, 438 A.2d at 556. The court stated that the use of the individual comparison rule was consistent with New Jersey's comparative negligence law at the time which stated that a plaintiff will recover if his or her negligence is not greater than the person against whom recovery is sought. *Id.* at ____, 438 A.2d at 554; *see* N.J. STAT. ANN. § 2A:15-5.1 (West 1973) (contributory negligence shall not bar recovery if such negligence was not greater than the negligence of the person against whom recovery is sought) (amended 1982). The court held that the use of the singular "person" rather than the plural form strongly suggested a legislative intent that a plaintiff's negligence should be compared to the negligence of one person at a time. *VanHorn*, 88 N.J. at ____, 438 A.2d at 554. In 1982, the New Jersey Legislature overruled the court's interpretation of the 1973 comparative negligence statute and implemented instead the unit rule. *See* Act of Dec. 6, 1987, ch. 191, 1982 N.J. Laws 786 (codified as amended at N.J. STAT. ANN. § 2A:15-5.1 (West 1987) (contributory negligence shall not bar recovery if such negligence is not greater than the negligence of the *person or persons* against whom recovery is sought) (emphasis added)).

57. *See, e.g., Odenwalt*, 102 Idaho at ____, 624 P.2d at 387. The court in *Odenwalt* stated that one reason for the adoption of the individual rule was the unfairness that arose in cases where one defendant was immune or insolvent and the defendant less negligent than the plaintiff ended up paying the damages attributed to the defendants as a whole. *Id.* at ____, 624 P.2d at 387. *But see* Mountain Mobile Mix, Inc. v. Gifford, 660 P.2d 883, 889 (Colo. 1983). The Colorado Supreme Court in *Mountain Mobile* adopted the unit rule to its fifty percent comparative negligence law by allowing a plaintiff with one-third apportioned fault to recover from two defendants each of whom had apportioned negligence of one-third. *Id.* at 890. In so holding, the court reasoned that the unfairness to another defendant which occurred when a co-defendant was immune or judgment proof, was the result of the worker's compensation and joint and several liability laws, and not the result of the unit rule. *Id.* at 889. The court further contended that the existence of joint and several liability in a jurisdiction shows an intent by the law-making body to place the risk of an immune tortfeasor on the defendant rather than the plaintiff. *Id.* The court also stated that the unfairness to a defendant less negligent than the plaintiff does not outweigh the injustice visited upon countless injured persons denied recovery because several tortfeasors combined to cause the plaintiff's injuries. *Id.*

58. *See Odenwalt*, 102 Idaho at ____, 624 P.2d at 387. In adopting the individual rule, the Idaho Supreme Court believed that an inconsistency would arise if the unit rule was applied to Idaho's forty-nine percent comparative negligence statute. *Id.* at ____, 624 P.2d at 387-88. It was incongruous to the court to suggest that pursuant to the unit rule a plaintiff should not recover when there was one equally negligent (fifty percent) defendant, but should recover when there were two

the idea that a plaintiff should be barred from recovering against a defendant when the defendant's apportioned fault is less than or equal to the plaintiff's is furthered by the individual comparison approach.[59]

States which reject the individual rule believe the unit rule, in which the plaintiff's fault is compared to the defendants' negligence in the aggregate, is more in accord with modified comparative negligence.[60] Followers of the unit rule interpret modified comparative negligence as providing that a plaintiff's claim against any defendant should not depend on the number of defendants but should be barred only if the plaintiff's negligence is greater than forty-nine percent, or, in jurisdictions which apply the "not greater than" rule, fifty percent.[61] In addition, legal scholars have stated that the legal theory of joint and several liability is advanced by the unit rule because both of these rules allow liability to be imposed upon any defendant who was less negligent than the plaintiff.[62] Moreover, the unit rule is believed to encourage settlements, which is the goal behind many comparative negligence statutes.[63]

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defendants and one plaintiff who were all equally negligent (thirty-three and one-third percent). *Id.* at ____, 624 P.2d at 387. The court stated that under the individual rule one was barred from recovery only if one's negligence was equal to or greater than the defendant's no matter how many defendants caused the plaintiff's injury. *Id.* at ____, 624 P.2d at 387-88. Consequently, the court in *Odenwalt* concluded that the individual rule would result in more uniform judgments than would the unit rule. *See id.* at ____, 624 P.2d at 388.

59. *See, e.g., id.* at ____, 624 P.2d at 387-88. The Idaho Supreme Court stated that the individual rule bars recovery when the plaintiff was as much to blame as the defendant, just as the forty-nine percent modified comparative negligence rule allows a plaintiff to recover only when the plaintiff's negligence was not as great as the defendant's. *Id.* at ____, 624 P.2d at 387-88.

60. *See, e.g.,* North v. Bunday, 735 P.2d 270, 275 (Mont. 1987). In *North,* the plaintiff brought an action for the wrongful death of her husband against the State of Montana for failing to provide drivers with a proper warning of an approaching dead end. *Id.* at 271-72. The plaintiff also sued a trucking company for the negligence of its employee in parking the truck at the end of the roadway, blocking the decedent's view of the dead end. *Id.* The court allowed the plaintiff to recover even though the jury apportioned forty-five percent of the fault to the decedent, forty percent of the fault to the trucking company, and fifteen percent of the fault to the state. *Id.* at 275-76. The court based its decision favoring the unit rule on the grounds that comparative negligence was founded on the idea that everyone was responsible for his or her negligence which caused injury to others. *Id.* at 275. The court determined that the unit rule advanced this idea, that everyone is responsible for his or her negligence, better than the individual rule did because the unit rule holds defendants liable for their share of the fault as long as the plaintiff's negligence is below fifty percent. *Id.* at 275-76.

61. *See id.* In *North,* the Montana Supreme Court stated that a negligent plaintiff should share the blame for any injuries resulting by having his recovery decreased by that amount. *Id.* at 275. The court determined, however, that the plaintiff's recovery should be decreased only, and not barred, as long as his or her apportioned fault is not greater than fifty percent. *Id.; see* Mountain Mobile Mix, Inc. v. Gifford, 660 P.2d 883, 888 (Colo. 1983) (court declared that financial responsibility for an injury, in a forty-nine percent modified comparative negligence jurisdiction, should be divided according to fault as long as plaintiff is less than fifty percent negligent).

62. *See* Note, *Comparative Negligence: The Multiple Defendant Dilemma,* 36 ME. L. REV. 345, 353 (1984). The note writer states that the existence of a joint and several liability statute indicates that the legislature was more concerned with assuring the plaintiff's recovery than with the potential unfairness that arises under the unit rule. *Id.* The unfairness arises because an individual defendant will be liable for an amount greater than his or her fault. *Id.*

63. *See* Elder v. Orluck, 511 Pa. 402, ____, 515 A.2d 517, 524 (1986). In *Elder,* the Pennsylvania Supreme Court held that the unit rule was the proper multi-tortfeasor comparison rule to apply to

Furthermore, the unit rule is preferred over the individual rule because great inequities arise under the individual comparison method when many defendants caused the harm which injured the plaintiff.[64] Plaintiffs have a difficult time recovering under the individual rule when they are slightly negligent and the injury results from an individual hazard for which several parties are responsible, because the plaintiff's negligence may be higher than the negligence of any individual defendant.[65] For example, in *Borel v. Fibreboard Paper Products Corp.*,[66] Clarence Borel contracted the disease of asbestosis due to his daily contact with insulation.[67] Because Borel did not use one brand of insulation all the time, it was impossible to determine which brand caused his disease.[68] Instead of denying Borel recovery for failing to disclose which

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Pennsylvania's fifty percent comparative negligence law. *Id.* at ____, 515 A.2d at 525. Thus, a plaintiff with twenty-five percent apportioned negligence was allowed to recover from the defendant with only fifteen percent apportioned negligence because the combined fault of all the defendants was greater than plaintiff's negligence. *Id.* at ____, 515 A.2d at 524. A policy reason behind the court's decision was that the individual rule discouraged settlements. *Id.* at ____, 515 A.2d at 524. The court stated the reason for this result was that in cases in which there was some evidence of negligence on the part of the plaintiff, defendants were encouraged to add more defendants and go to trial in an attempt to lower the apportioned negligence assigned to them and, thereby, possibly escape liability. *Id.* at ____, 515 A.2d at 524.

Encouraging settlements would be an important policy consideration in North Dakota because any construction of North Dakota's comparative negligence statute should be in accordance with the promotion of settlements. *See* Bartels v. City of Williston, 276 N.W.2d 113, 121 (N.D. 1979) (the comparative negligence statute in North Dakota should be construed according to principles such as the promotion of settlements).

64. *See* Walton v. Tull, 234 Ark. 882, ____, 356 S.W.2d 20, 26 (1962). In criticizing the individual rule, the Arkansas Supreme Court stated that to refuse recovery to a slightly negligent plaintiff, because there were numerous defendants with less individually apportioned negligence, would be a return to the common law doctrine of contributory negligence. *Id.* For a discussion of *Walton v. Tull,* see *supra* notes 36-44 and accompanying text. Moreover, according to the Colorado Supreme Court, basing one's recovery on the number of defendants, rather than on the plaintiff's negligence, is contrary to the idea of modified comparative negligence. *See* Mountain Mobile Mix, Inc. v. Gifford, 660 P.2d 883, 888 (Colo. 1983). The Colorado Supreme Court stated that the forty-nine percent combined comparison approach of modified comparative negligence does not base a plaintiff's recovery on the number of defendants, but rather divides financial responsibility for an injury according to fault as long as the plaintiff is less than fifty percent negligent. *Id.* Thus, both the plaintiff and defendant are ultimately treated more fairly under the unit rule since their rights and obligations are determined in accordance with their actual degree of fault. *Id.*

65. *See* Steenson, *supra* note 35, at 37-42. Steenson maintains that the need for the unit rule in multitortfeasor actions is expressly shown in cases such as those in which many defendants have discharged pollutants causing the hazard which injured the plaintiff. *Id.* at 41. According to Steenson, the activities of several defendants which create an individual hazard which caused a plaintiff's injuries cannot be broken into apportionable harms. *Id.* at 40-41. Therefore, Steenson contends that the individual rule would preclude a plaintiff from recovering because there would be no proof that the plaintiff's negligence was not as great as, or not greater than, the individual defendant's. *Id.* at 41. Thus, Steenson contends the unit rule should be applied in cases where an injury results from an individual hazard to which several parties have contributed. *Id.*

66. 493 F.2d 1076 (5th Cir. 1973).

67. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1082 (5th Cir. 1973). Borel was employed as an industrial insulation worker. *Id.* at 1081. Borel's exposure to asbestos caused a lung cancer known as mesothelioma. *Id.* at 1082. As a result of the cancer, Borel died. *Id.* at 1082-83.

68. *Id.* at 1094. The Fifth Circuit Court of Appeals stated that it was impossible to determine with absolute certainty which particular exposure to which brand of asbestos caused Borel's disease. *Id.* It was undisputed, however, that Borel contracted his asbestosis from inhaling asbestos dust and that he was exposed to the products of the defendants on many occasions. *Id.*

manufacturing company was to blame, the Fifth Circuit Court of Appeals concluded that all eleven manufacturers of the various brands of insulation which Borel used during his work were liable for Borel's injuries.[69]

Although *Borel* was not a comparative negligence case, one legal writer contends that it demonstrates the need to apply the unit rule to cases in which many defendants contribute to an indivisible hazard which causes a plaintiff's injury.[70] When a plaintiff is negligent in being exposed to an individual hazard such as asbestos, the most logical comparison of the plaintiff's fault is to the total fault for the hazard to which the plaintiff was exposed, rather than to the individual percentages of fault assigned to each of the manufacturers of asbestos.[71] If the plaintiff's fault is compared only to a single defendant's fault in cases involving many defendants, the plaintiff has less chance to recover because the ability to do so diminishes in inverse proportion to the number of defendants who contributed to the hazard.[72] Because of the unfairness that arises under the individual rule when there are numerous defendants or when an indivisible hazard exists, the unit rule is thought to be the better approach.[73]

Legislative intent and statutory construction have been the main tools used by the courts in construing comparative negligence statutes as providing for either the individual rule or the unit rule.[74] Individual rule jurisdictions contend that the use of the singular

69. *See id.* Since Borel was repeatedly exposed to the different defendants' insulation and since the effect of exposure to asbestos is cumulative, the court stated that the jury could find that each defendant was the cause of the injury to Borel. *Id.*

70. Steenson, *supra* note 35, at 40; *see Borel,* 493 F.2d. at 1094 (Borel was not negligent in contracting the disease himself). According to Steenson, the unit rule provides a more equitable and less complicated result in indivisible hazard cases because the trier of fact has to decide only whether the plaintiff was forty-nine percent negligent, or fifty percent negligent in not greater than modified comparative negligence jurisdictions, without having to define the negligence of the many companies which contributed to the hazard. *See* Steenson, *supra* note 35, at 40-41.

71. *See* Steenson, *supra* note 35, at 41. Steenson asserts that by comparing the plaintiff's fault to the total fault for the indivisible hazard, the trier of fact is precluded from having to find the negligence of each defendant's contributions to a hazard which cannot be broken into apportionable harms. *Id.* Steenson contends that if the individual rule is applied to indivisible hazard cases, the defendants may not be held liable because their individual fault is not ascertainable. *See id.* Thus, the unit rule is more equitable because it does not allow those defendants an easy way to escape liability. *See id.*

72. *Id.* Steenson maintains that the individual rule is inequitable because under that multitortfeasor comparison form, recovery depends not on the plaintiff's negligence, but rather on the number of defendants. *Id.* Steenson states that the application of the unit rule avoids this problem because comparison of the plaintiff's negligence under the unit rule is to the total fault for the hazard to which he was exposed, which does not change with the number of defendants who contributed to that hazard. *Id.*

73. *Id.* Steenson contends that adopting the unit rule will prevent the inequity of a tortious defendant escaping liability because the number of other tortfeasors is great. *Id.*

74. *See, e.g.,* Board of County Comm'rs v. Ridenour, 623 P.2d 1174, 1182 (Wyo. 1981) (in electing the unit rule, the court found that comparative negligence was the handiwork of legislatures and not the judiciary).

word "person" by comparative negligence statutes in the phrase "person against whom recovery is sought" suggests a legislative intent toward the individual rule.[75] However, some courts, in construing the statutes, have determined that the legislature intended the plural as well as the singular form of the word "person" to be applied to the statute and hence, have adopted the unit rule.[76]

When a statute has been derived from another jurisdiction's statute, many states, including North Dakota, use the case law from that jurisdiction to interpret the new law.[77] Therefore, jurisdictions which derived their comparative negligence laws from Wisconsin's comparative negligence law are presumed to have adopted the individual rule.[78] However, the presumption that Wisconsin favors the individual rule has been weakened by recent Wisconsin Supreme Court decisions which question the rationale of the individual rule.[79] In fact, Wisconsin courts have never given

75. *See, e.g.,* Stannard v. Harris, 135 Vt. 544, ____, 380 A.2d 101, 102-03 (1977) (use of the singular word "defendant" instead of the plural form in Vermont's comparative negligence statute indicated a legislative intent to apply the individual rule because if the legislature intended to adopt the unit rule, it would have included the plural term "defendants").

76. *See, e.g.,* North v. Bunday, 735 P.2d 270, 276 (Mont. 1987). In *North,* the Montana Supreme Court found the unit rule to be applied to Montana's fifty percent comparative negligence law. *Id.* On its face, the Montana comparative negligence law allows a negligent plaintiff to recover as long as the plaintiff's negligence was not greater than the *person* against whom recovery is sought. MONT. CODE ANN. § 27-1-701 (1985) (contributory negligence shall not bar recovery as long as such negligence is not greater than the negligence of the *person* against whom recovery is sought) (emphasis added). The Montana Supreme Court interpreted the word "person" to be ambiguous and thus, opened to the statutory construction provisions of Montana's code. *See North,* 735 P.2d at 273-74. The court applied § 1-2-105 of the Montana Code to interpret the word "person" in the comparative negligence act, and found that "person" included the plural form "persons." *Id.* at 273; *see* MONT. CODE ANN. § 1-2-105 (1985) (in the code the singular includes the plural). Therefore, the court held that the unit rule applied. *Id.* at 276.

North Dakota's comparative negligence law compares the plaintiff's apportioned negligence to the *person* against whom recovery is sought. *See* N.D. CENT. CODE § 9-10-07 (1987) (suspended 1987). For the text of § 9-10-07, see *supra* note 3. It is conceivable, therefore, to treat the word "person" in § 9-10-07 to entail the plural "persons" because North Dakota has a construction statute that allows the singular to also mean the plural. *See* N.D. CENT. CODE § 1-01-35 (1985) (words in the singular include the plural and words in the plural include the singular).

77. *See, e.g.,* Bartels v. City of Williston, 276 N.W.2d 113, 118 (N.D. 1979) (there is a presumption that North Dakota will follow Wisconsin's comparative negligence law because North Dakota's comparative negligence law was derived indirectly from Wisconsin's); Board of County Comm'rs v. Ridenour, 623 P.2d 1174, 1185 (Wyo. 1981) (when Wyoming derives a statute from another state's statute, it is presumed that the case law construing the statute in that other jurisdiction will follow the statute to Wyoming); *see also infra* note 102.

78. *See, e.g.,* VanHorn v. William Blanchford Co., 88 N.J. 91, ____, 438 A.2d 552, 555 (1981) (court applied the individual rule to New Jersey's comparative negligence law because New Jersey derived its law from Wisconsin's law); *Ridenour,* 623 P.2d at 1185 (since Wyoming derived its comparative negligence law from Wisconsin's comparative negligence law, the court applied Wisconsin's adoption of the individual rule).

79. *See* May v. Skelley Oil Co., 83 Wis. 2d 30, ____, 264 N.W.2d 574, 578 (1976). In *Skelley,* a plaintiff with negligence apportioned at forty-five percent of the total fault failed to recover from a ten percent negligent defendant because the plaintiff's negligence was greater than the person against whom recovery was sought. *Id.* at ____, 264 N.W.2d at 575, 578. The majority of the Wisconsin Supreme Court was convinced that comparing the negligence of the plaintiff to the defendant's fault individually led to harsh and unfair results. *Id.* at ____, 264 N.W.2d at 578. The court, however, did not believe that *Skelley* was the proper case in which to change to the unit rule because the court found one of the defendants not to be negligent. *Id.* at ____, 264 N.W.2d. at 578. *But see* Reiter v. Dyken,

policy reasons for the individual rule, following it only on the basis of stare decisis.[80]

The current weight of authority among the states that have adopted modified comparative negligence is that the unit rule should be applied in comparing the negligence of the plaintiff to that of multiple defendants.[81] More than half the states that follow the forty-nine percent modified form of comparative negligence

95 Wis. 2d 461, ____, 290 N.W.2d 510, 517 (1980) (court upheld the individual rule in an action involving multiple parties). In *Reiter* the Wisconsin Supreme Court did not feel bound by the dicta in *Skelley* to adopt the unit rule and chose instead to uphold the legislative intent backing the individual rule. Id. at ____, 290 N.W.2d at 517. For a discussion of *Reiter,* see *supra* note 55.

80. *See* Mountain Mobile Mix, Inc. v. Gifford, 660 P.2d 883, 887 (Colo. 1983) (Colorado Supreme Court refused to give much weight to Wisconsin's adoption of the individual rule because it determined that Wisconsin adheres to the individual rule on the basis of stare decisis and legislative intent). For a more detailed discussion of *Mountain Mobile,* see *supra* note 57.

81. *See* Walton v. Tull, 234 Ark. 882, ____, 356 S.W.2d 20, 26 (1962) (court held that the unit rule is the appropriate comparison rule to apply to Arkansas' forty-nine percent comparative negligence law); Mountain Mobile Mix, Inc. v. Gifford, 660 P.2d 883, 884 (Colo. 1983) (court adopted the unit rule to Colorado's fifty percent comparative negligence law); Wong v. Hawaiian Scenic Tours, Ltd., 64 Haw. 401, ____, 642 P.2d 930, 933 (1982) (the Hawaii Supreme Court applied the unit rule to Hawaii's fifty percent comparative negligence law); Pape v. Kansas Power & Light, 231 Kan. 441, ____, 647 P.2d 320, 326 (1980) (Kansas elected the unit rule as the proper interpretation of its forty-nine percent comparative negligence statute); Graci v. Damon, 6 Mass. App. Ct. 160, ____, 374 N.E.2d 311, 317-18 (1979) (court applied the unit rule to Massachusetts' fifty percent comparative negligence rule by allowing a merchant in a shopping mall to recover for injury sustained while he was trying to nail shut an electrical box); North v. Bunday, 735 P.2d 270, 276 (Mont. 1987) (court adopted the unit rule as the multitortfeasor comparative negligence rule to apply to Montana's fifty percent comparative negligence law); Young's Machine Co. v. Long, 100 Nev. 692, ____, 692 P.2d 24, 25 (1984) (Nevada Supreme Court applied the unit rule in a wrongful death action brought under the theory of strict liability); Hurley v. Public Serv. Co., 123 N.H. 750, ____, 465 A.2d 1217, 1221 (1983) (court applied the unit rule to New Hampshire's fifty percent comparative negligence form); Laubach v. Morgan, 588 P.2d 1071, 1073 (Okla. 1978) (Oklahoma Supreme Court adopted the unit rule when it allowed a plaintiff with negligence of thirty percent to recover from a defendant with only twenty percent apportioned fault because plaintiff's negligence was less than fifty percent); Elder v. Orluck, 511 Pa. 402, ____, 515 A.2d 517, 525 (1986) (court held that the unit rule should be applied to Pennsylvania's fifty percent comparative negligence law); Duncan v. Cessna Aircraft, 665 S.W.2d 414, 428 (Tex. 1984) (court stated that Texas' fifty percent comparative negligence statute allows the plaintiff to compare his or her negligence to the combined negligence of the defendants); Jensen v. Intermountain Health Care Inc., 679 P.2d 903, 909-10 (Utah 1984) (court allowed a plaintiff to recover, under Utah's forty-nine percent comparative negligence law, from a hospital and doctor for the wrongful death of the plaintiff's husband who was only forty-six percent negligent in causing his own death); Bradley v. Appalachian Power Co., 163 W. Va. 332, ____, 256 S.E.2d 879, 885 (1979) (court adopted both the fifty percent modified comparative negligence form and the unit rule as the comparative negligence law in the state); CONN. GEN. STAT. ANN. § 52-572h (West 1987) (plaintiff's negligence will not bar recovery if the negligence was not greater than the combined negligence of the defendants); DEL. CODE ANN. tit. 10, § 8132 (Supp. 1986) (plaintiff's negligence will bar recovery only if it is greater than the combined negligence of the defendants); IND. CODE § 34-4-33-5 (1986) (plaintiff is barred from recovering if his fault is greater than the fault of all persons whose negligence contributed to the injury); IOWA CODE ANN. § 668.3 (West 1987) (plaintiff must have a greater percentage of fault than the combined percentage of fault attributable to defendants before recovery will be denied); N.J. STAT. ANN. § 2A:15-5.1 (West Supp. 1987) (contributory negligence will not bar recovery if such negligence was not greater than the combined negligence of persons against whom recovery is sought); OHIO REV. CODE ANN. § 2315.19 (Anderson 1981) (plaintiff's negligence does not bar recovery if it is not greater than the combined negligence of all defendants); VT. STAT. ANN. tit. 12, § 668.3 (1987) (causal negligence of all defendants is compared to plaintiff's apportioned fault).

A minority of jurisdictions follow the individual rule. *See, e.g.,* Mishoe v. Davis, 64 Ga. App. 700, ____, 14 S.E.2d 187, 193 (1941) (Georgia Court of Appeals applied the individual rule to its forty-nine percent comparative negligence law in a wrongful death action arising out of an automobile accident); Odenwalt v. Zaring, 102 Idaho 1, ____, 624 P.2d 383, 388 (1980) (court

apply the unit rule.[82] Moreover, the majority of states that have decided the multitortfeasor comparison problem in the 1980s have elected the unit rule, making it the modern trend.[83]

The 1987 North Dakota Legislature suspended the 1973 comparative negligence act and replaced it with a new comparative fault law that went into effect on July 8, 1987, for a six-year trial period.[84] The new comparative fault law provides for the recovery of damages involving tort claims, except products liability, pursuant to a modified comparative fault system.[85] The unit rule and several liability, rather than joint and several liability were a

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adopted the individual rule to Idaho's forty-nine percent comparative negligence law); Marrier v. Memorial Rescue Serv. Inc., 296 Minn. 242, ____, 207 N.W.2d 706, 709 (1973) (plaintiff, who was one-third negligent, was barred recovery under Minnesota's forty-nine percent comparative negligence law from two defendants, who also were one-third negligent); Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, ____, 252 N.W. 721, 727 (1934) (court adopted the individual comparison rule to Wisconsin's forty-nine percent comparative negligence law); Board of County Comm'rs v. Ridenour, 623 P.2d 1174, 1183 (Wyo. 1981) (court applied the individual rule to Wyoming's forty-nine percent comparative negligence law).

82. *See* sources cited *supra* note 81. Arkansas, Colorado, Kansas, Utah, and West Virginia are states with the forty-nine percent comparative negligence form that also apply the unit rule. *Id.* Georgia, Idaho, and Wyoming are forty-nine percent comparative negligence jurisdictions that have adopted the individual rule. *Id.* The North Dakota Legislature adopted the unit rule for actions that arise after July 1, 1987, but has not decided which rule to apply for pre-July 1987 actions. *See* N.D. CENT. CODE § 32-03.2-02 (Supp. 1987) (contributory fault does not bar recovery unless the fault was as great as the combined fault of all persons who contributed to the injury). For a discussion of § 32-03.2-02, see *supra* note 3. Maine is a state with forty-nine percent comparative negligence statute which has not decided on the issue. *See* C. HEFT & C. HEFT, *supra* note 11, at App. II. According to a recent law review article, however, Maine will opt for the unit rule if and when it is required to choose between the two rules. *See* Note, *supra* note 62, at 346.

In addition, seven states have adopted the unit rule by construing statutes so that their comparative negligence law applies to both the singular "person" and the plural "persons." *See* C. HEFT & C. HEFT, *supra* note 11, at App. II; *see also* sources cited *supra* note 81. In adopting the unit rule, Colorado, Kansas, Montana, New Hampshire, Oklahoma, Pennsylvania, and Utah have applied both the singular and plural forms of the words "person" and "defendant" to their comparative negligence statutes through the use of statutory construction. *See id.* All the jurisdictions that follow the individual rule interpret the singular word "person" in their comparative negligence statutes, as showing a legislative intention for the adoption of the individual rule. *See id.*

83. *See* sources cited *supra* note 81. Only Idaho and Wyoming have adopted the individual rule in the 1980s. *Id.* Colorado, Connecticut, Delaware, Hawaii, Indiana, Iowa, Kansas, Montana, Nevada, New Jersey, New Hampshire, Oregon, Ohio, Pennsylvania, Texas, Utah, and Vermont have all applied the unit rule in the 1980s. *Id.*

84. *See* Act approved April 9, 1987, ch. 404, § 15, 1987 N.D. Laws 989 (codified at N.D. CENT. CODE § 32-03.2-02 (Supp. 1987)). Section 15 of chapter 404 of the 1987 North Dakota Session Laws provides:

> This Act is effective through June 30, 1993, and after that date is ineffective. North Dakota Century Code sections 9-10-07 and 32-03-07 are suspended from the effective date of this Act through June 30, 1993. Sections 9-10-07 and 32-03-07 as they existed on the day before the effective date of this Act are in effect on July 1, 1993.

Id. Thus, the new comparative fault law has a sunset provision which requires the state legislature to renew it by June 30, 1993, or thereafter it becomes ineffective. *Id.*

85. *See* N.D. CENT. CODE § 32-03.2-02 (Supp. 1987) (contributory fault does not bar recovery unless the fault was as great as the combined fault of all the persons who contributed to the injury). Products liability actions are controlled by the pure comparative negligence form. *See id.* at § 32-03.2-03 (contributory negligence on the part of the plaintiff does not bar recovery, but plaintiff's recovery is reduced by his or her fault). For a discussion of the pure comparative negligence form, see *supra* notes 25-26 and accompanying text.

result of the new law while the forty-nine percent modified comparison form in the 1973 act was retained.[86]

The combined comparison approach adopted by the North Dakota Legislature does not, however, apply to actions that arose prior to July 8, 1987, if the law is found to have prospective application only.[87] Furthermore, if the North Dakota Legislature does not renew the law before June 30, 1993, the law in effect before the enactment of the new comparative fault law will be resurrected.[88]

In North Dakota, the question of whether a statute is to be applied prospectively hinges on legislative intent.[89] Both procedural and substantive statutes are applied prospectively in North Dakota unless the legislature indicates to the contrary.[90] However, the legislature is not required to use the word "retroactive" in the statute before it will be given such an effect.[91]

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86. *See* N.D. CENT. CODE § 32-03.2-02 (Supp. 1987) (contributory fault does not bar recovery unless the fault was as great as the combined fault of all the persons who contributed to the injury). Prosser and Keeton define "several liability" as limiting an individual defendant's total liability to only his or her equitable share. PROSSER & KEETON ON TORTS 475 (5th ed. 1984). *See generally* Note, *Multiple Party Litigation Under Comparative Negligence in Kansas-- Damage Apportionment as a Replacement for Joint and Several Liability,* 16 WASHBURN L.J. 672, 675 (1977) (discussion of the implications of several liability in a unit rule jurisdiction).

87. *See* Reiling v. Bhattacharya, 276 N.W.2d 237, 241 (N.D. 1979). In *Reiling,* the district court dismissed Arthur and Justine Reiling's complaint because they failed to comply with a new state law that required arbitration for medical malpractice claims by a medical review panel. *Id.* at 237. The North Dakota Supreme Court held, however, that the new malpractice statute was to be applied prospectively. *Id.* at 241. Since the Reilings' action arose before the effective date of the statute, the North Dakota Supreme Court determined that the law existing prior to the enactment of the new statute was applicable. *Id.* Thus, the Reilings were allowed to bring their medical malpractice action without first having a hearing before a medical review panel. *Id.*

88. *See* Act approved April 9, 1987, ch. 404, 1987 N.D. Laws 989 (codified at N.D. CENT. CODE § 32-03.2-02 (Supp. 1987) (the new comparative fault law contains a sunset provision that requires a renewal before June 30, 1993)). For a discussion of the new comparative fault law, see *supra* note 3. Sunset laws require the legislative body to justify the law's existence periodically or they become ineffective. BLACK'S LAW DICTIONARY 1288 (5th ed. 1979).

89. *See Reiling,* 276 N.W.2d at 241. In *Reiling,* the North Dakota Supreme Court stated that all statutes enacted by the legislature are to be applied prospectively unless the legislature clearly expresses an intention to the contrary. *Id.* at 240-41. In addition, § 1-02-10 of the North Dakota Century Code provides that no part of the North Dakota Century Code is retroactive unless it is expressly declared to be so. N.D. CENT. CODE § 1-02-10 (1985).

90. *See Reiling,* 276 N.W.2d at 238. The North Dakota Supreme Court stated in *Reiling* that § 1-02-10 of the North Dakota Century Code applies to all statutes enacted by the legislature regardless of whether they are substantive or procedural. *Id.; see* N.D. CENT. CODE § 1-02-10 (1985) (no part of the Code is retroactive unless so stated).

91. *See In re* W. M. V., 268 N.W.2d 781, 783 (N.D. 1978). In *W. M. V.,* a guardian for a minor commenced a paternity action against one J.S. *Id.* at 782. The guardian contended that the Uniform Parentage Act's statute of limitations applied to the paternity action and thus, the statute of limitations had not expired. *Id.* J.S. asserted that the Uniform Parentage Act could not be applied retroactively, and therefore, the shorter statute of limitations in effect before the passage of the Act ruled. *Id.* at 782-83. The North Dakota Supreme Court, however, disagreed with J.S. and held the Uniform Parentage Act to apply to actions arising before its effective date. *Id.* at 787. The court stated that a statute was not required to contain the word "retroactive" in order for it to be so applied. *Id.* at 783. Instead, the court espoused the view that the determination of whether a statute was to receive retroactive application should be determined by legislative intent. *Id.* at 784.

The language of the new comparative fault statute points toward a prospective application.[92] The use of the word "accrue" in the new law implies that the statute is only applicable to actions that arise after July 8, 1987.[93] In addition, the new law should only be applied prospectively because the legislature did not clearly state it to be retroactive and legislative debate underlying the passage of the new law expressly refers to the prospective application of the statute.[94] Consequently, as the legislative intent indicates, the new comparative fault law should only receive prospective application and any action arising before July 8, 1987, should be brought under North Dakota's 1973 comparative fault law.[95]

The United States District Court for the District of North Dakota examined North Dakota's position on the multitortfeasor comparison problem for pre-July 1987 actions in *Beaudoin v. Texaco, Inc.*[96] Beaudoin claimed that the combined, rather than the individual, negligence of Texaco and Wood Wireline should be compared against his apportioned fault in determining whether Texaco is liable for the injuries sustained by Beaudoin.[97] Texaco

92. *See* N.D. CENT. CODE § 32-03.2-02 (Supp. 1987) (this act is effective through June 30, 1993, and after that date is ineffective). *See generally In re* W. M. V., 268 N.W.2d 781, 784 (1978) (look to the specific wording of the statute, as well as the act as a whole, in determining whether a statute should be retroactively applied).

93. *See* N.D. CENT. CODE § 32-03.2-02 (Supp. 1987) (the chapter applies to claims that *accrue* after July 8, 1987) (emphasis added). A cause of action accrues when a suit may be maintained thereon. BLACK'S LAW DICTIONARY 19 (5th ed. 1979). Accrue also has been defined as coming into existence as a legally enforceable claim. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 8 (1979). Thus, North Dakota's new comparative fault law should apply only to claims which come into existence after July 8, 1987. *See* 1987 N.D. Laws 989 (codified at N.D. CENT. CODE § 32-03.2-02 (Supp. 1987)) (effective through June 30, 1993, and after that date is ineffective). For the relevant text of North Dakota's new comparative fault law, see *supra* note 84.

94. *See* Act approved April 9, 1987, ch. 404, 1987 N.D. Laws 989 (codified at N.D. CENT. CODE § 32-03.2-02 (Supp. 1987)); *see also W. M. V.*, 268 N.W.2d at 784 (if no intention to apply a statute retroactively is manifested by the legislature, then the statute is to be prospective in its operation); HOUSE JUDICIARY SUBCOMMITTEE REPORT ON TORT REFORM, 50th Leg. Sess., at 2 (Feb. 10, 1987) [hereinafter REPORT ON TORT REFORM]. Representative Kretschmar, answering a question about the possibility of having two sets of laws if the comparative fault law was passed, stated: "if we enact this [law] on July 1 of 1987, we are going to have two sets of laws, this and [the] old law, [those] who got hurt on [the] 30th of June would be under the old law." *Id.*

95. *See* REPORT ON TORT REFORM, *supra* note 94, at 2. Since the legislature did not manifest an intention in the new comparative fault law that the statute should be applied retroactively, the North Dakota Supreme Court should apply the new comparative fault law only prospectively. *See id.*; *W. M. V.*, 268 N.W.2d at 784 (if no statutory intent for a retroactive application of a statute is shown, the statute should be applied prospectively); Act approved April 9, 1987, ch. 404, 1987 N.D. Laws 989 (codified at N.D. CENT. CODE § 32-03.2-02 (Supp. 1987)). For a discussion of the new comparative fault act, see *supra* note 3.

96. 653 F. Supp. 512 (D.N.D. 1987). The action arose on February 21, 1983 which was prior to the effective date of the new comparative fault law. Beaudoin v. Texaco, Inc., 653 F. Supp. 512, 512 (D.N.D. 1987). The new comparative fault law which adopted the unit rule became effective on July 1, 1987, and is to be applied prospectively only. *See* Act of April 9, 1987, ch. 404, 1987 N.D. Laws 989 (codified at N.D. CENT. CODE § 32-03.2-02 (Supp. 1987) (requires a renewal by June 30, 1993, or it will become ineffective)). For the relevant text of the Act, see *supra* note 84. For a discussion of the prospective application of the new comparative fault law, see *supra* notes 84-95 and accompanying text.

97. *Beaudoin*, 653 F. Supp. at 513. The application of the unit rule would allow Beaudoin, though thirty percent negligent, to recover from Texaco, who was ten percent negligent, because

contended, however, that Beaudoin's apportioned negligence could only be compared against Texaco and Wood Wireline individually, rather than in the aggregate.[98] Since the North Dakota Supreme Court had not previously decided whether the individual rule or the unit rule should be applied in multitortfeasor actions occurring under North Dakota's comparative negligence law,[99] the federal district court had the task of deciding a legal issue with no state precedent.[100]

Texaco's negligence combined with Wood Wireline's sixty percent negligence was greater than Beaudoin's apportioned fault. *Id.; see* N.D. CENT. CODE § 9-10-07 (1987) (suspended 1987) (each defendant is jointly and severally liable for the plaintiff's award). For the relevant text of § 9-10-07, see *supra* note 3.

98. *Beaudoin*, 653 F. Supp. at 513. If Texaco's interpretation of North Dakota's comparative negligence law was correct, Beaudoin would have been precluded from recovery against Texaco because Beaudoin's thirty percent negligence was at least as great as Texaco's ten percent apportioned fault. *See id.* at 518; N.D. CENT. CODE § 9-10-07 (1987) (suspended from July 8, 1987 through June 30, 1993) (contributory negligence shall not bar recovery if such negligence is not as great as the negligence of the person against whom recovery is sought). For the text of 9-10-07, see *supra* note 3.

99. *Beaudoin*, 653 F. Supp. at 513. After reviewing the North Dakota case law, the federal district court concluded that the multitortfeasor comparison problem in comparative negligence cases is an open question in the state. *Id.* at 513, 515. The North Dakota Supreme Court had three opportunities to adopt the unit rule, but in each instance, however, the case was decided on other grounds. *See* Keller v. Vermeer Mfg. Co., 360 N.W.2d 502, 504 n.1 (N.D. 1984) (negligent farmer denied recovery against hay baler manufacturer, implement dealer, and insurance company for his injuries resulting from an allegedly defective hay baler because the issue of whether the unit or individual rule applies to North Dakota's comparative negligence law was not raised); Keyes v. Amundson, 359 N.W.2d 857, 858-59 (N.D. 1984), *rev'd on other grounds,* 391 N.W.2d 602 (N.D. 1986) (the issue of which multitortfeasor comparison form applied in North Dakota was not raised on a rehearing); Keyes v. Amundson, 343 N.W.2d 78, 80 n.1 (N.D. 1983) (the court refused to decide whether the unit or individual rule should be applied in a negligence action because the issue was not raised by the parties on appeal).

100. *Beaudoin*, 653 F. Supp. at 513. The traditional view of how a federal district court should resolve an issue not yet settled in the highest state court of the law-determining state was set forth in *New England Ins. Co. v. Mitchell.* 118 F.2d 414, 419 (4th Cir. 1941), *cert. denied*, 314 U.S. 629 (1941). The issue before the court in *Mitchell* was whether a Virginia statute which limited the contestability of an insurance policy to one year also decreased the time in which suicide by an insured could be a defense for nonpayment by the insurance company. *Id.* at 416-17. Since the issue concerned the interpretation of a Virginia Statute, the court applied Virginia law. *Id.* at 417. In finding that the insurance company did have a defense because of the insured's suicide for the nonpayment of benefits, the federal court based its decision on what it perceived to be the meaning of Virginia law. *Id.* at 419-20. The court stated that when there has not been a decision at the local level resolving the controversy, the federal courts are obligated to use their own judgment in deciding the conflict, with a view of finding the decision which reason dictates and with faith that the state court would reach the same decision when the question comes before it. *Id.* at 420. This rule was subtly changed in 1970 by the United States District Court for the Eastern District of Virginia. *See* Alabama Great S. R.R. v. Allied Chem. Co., 312 F. Supp. 3, 8 (E.D. Va. 1970), *rev'd on other grounds,* 467 F.2d 679 (5th Cir. 1972). In *Allied*, Alabama Great Southern Railroad (Railroad) incurred great expense when one of its trains derailed in Mississippi. *Id.* at 4. The Railroad brought an action in the United States District Court for the Eastern District of Virginia against Allied Chemical Company (Company) and others for the defective materials in, and manufacture of, the train. *Id.* The defendants moved for a dismissal of the action for lack of jurisdiction or for a change of venue to Mississippi. *Id.* The court stated that although Mississippi had not construed the permissible lengths of its long-arm statute, the long-arm statute did allow Mississippi to gain jurisdiction over the parties. *Id.* at 8. The court held that when a federal court must decide an issue of state law not yet decided in the state, the federal court must attempt to arrive at a decision *which it believes* in faith *the highest state court would reach. Id.* The Allied Chemical rule, that an undecided state issue should be determined by what the federal court believes the state supreme court would have decided, rather than what the federal court views as the best answer, is the majority rule. *See, e.g.,* Stancil v. Merganthaler Linotype Co., 589 F.

The court in *Beaudoin* concluded that the unit rule was the appropriate interpretation of North Dakota's 1973 comparative negligence law.[101] The court observed that North Dakota is presumed to follow Wisconsin's and Minnesota's interpretations of their comparative negligence laws because section 9-10-07 of the North Dakota Century Code was derived from Wisconsin's comparative negligence statute, which Minnesota has also adopted.[102] This presumption, however, was not absolute in the court's view.[103] Moreover, the court discovered no previous North Dakota case in which Wisconsin or Minnesota case law was dispositive of an issue involving North Dakota's 1973 comparative negligence law.[104] Notwithstanding this finding, the court

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Supp. 78, 81 (D. Haw.1984) (court predicted that the Hawaii Supreme Court would follow the majority rule and disallow the plaintiff's claim for injury to reputation in his breach of contract suit).

The federal district court in *Beaudoin* followed the majority rule espoused in *Allied Chemical* and declared that although it would not presume the thinking of the North Dakota Supreme Court, it would examine and weigh the *persuasive authority* as it believed the North Dakota Supreme Court would if the issue were before it. *Beaudoin*, 653 F. Supp. at 514.

101. *Beaudoin*, 653 F. Supp. at 515. The court recognized that the adoption of the unit rule was in direct conflict with Wisconsin's and Minnesota's adoption of the individual rule, but the court believed that the unit rule was the approach that overwhelming authority dictated. *Id.*

102. *Id.*; *see* Bartels v. City of Williston, 276 N.W.2d 113, 118 (N.D. 1979). In *Bartels*, the plaintiff was seriously injured when the jeep he was riding in went over a cliff and landed on its roof. *Id.* at 115. The land on which the accident took place was under lease to the City of Williston. *Id.* Subsequently, the plaintiff gave a release to the driver of the jeep and brought an action for negligence against the city. *Id.* The United States District Court for the District of North Dakota certified questions to the North Dakota Supreme Court asking if, in an action for negligence, the nonsettling tortfeasor is liable only for the percentage of the award equal to the amount of negligence attributed to him. *Id.* In answering in the affirmative, the North Dakota Supreme Court adopted Wisconsin's interpretation of released defendants in comparative negligence actions. *Id.* at 119; *see* Perringer v. Hoger, 21 Wis. 2d 182, ____, 124 N.W.2d 106, 111-12 (1963) (the issue between the plaintiff and the nonsettling defendant is the percentage of causal negligence of the nonsettling defendant which can only be determined by a proper allocation of the causal negligence of all the joint tortfeasors). The court in *Bartels* stated that when a statute is taken from another state, it is presumed that the legislature adopted the construction placed upon the law by the court decisions of the state from which the statute was taken. *See Bartels*, 276 N.W.2d at 118. Consequently, since North Dakota copied Wisconsin's comparative negligence law, the court applied Wisconsin's treatment of a nonreleased tortfeasor in comparative negligence actions. *Id.* at 119.

103. *Beaudoin*, 653 F. Supp. at 515. In arriving at the conclusion that North Dakota was only presumed to follow Wisconsin's and Minnesota's lead in comparative negligence issues, the *Beaudoin* court observed that in *Bartels*, the North Dakota Supreme Court, in interpreting section 9-10-07 of the North Dakota Century Code, did not slavishly follow Wisconsin's and Minnesota's comparative negligence rulings, but determined that the rationale presented in them was merely "persuasive." *Id.*; *see Bartels*, 276 N.W.2d at 120. Moreover, in *Mauch v. Manufacturer Sales & Services, Inc.*, the presumption that North Dakota blindly follows the ruling of Wisconsin and Minnesota in comparative negligence issues was rebutted. Mauch v. Manufacturer Sales & Servs., Inc., 345 N.W.2d 338, 348 n.2 (N.D. 1984). In *Mauch*, the North Dakota Supreme Court rejected Wisconsin's application of modified comparative negligence to products liability cases. *Id.* at 347-48. Instead, the court applied pure comparative negligence to products liability actions arising in North Dakota. *Id.* at 348.

104. *Beaudoin*, 653 F. Supp. at 515. The court in *Beaudoin* contended that not only was Wisconsin and Minnesota case law not dispositive of comparative negligence issues in North Dakota, but that the North Dakota Supreme Court has often looked to other states besides those two for aid in resolving comparative negligence disputes. *Id.* In *Bartels*, the North Dakota Supreme Court considered Texas law and various legal writings in addition to Wisconsin and Minnesota case law in deciding how to treat released and nonreleased tortfeasors in a negligence action. *See Bartels*, 276 N.W.2d at 121.

determined that it would adhere to the presumption that the North Dakota Supreme Court would follow the individual rule, as adopted by Wisconsin and Minnesota, unless there were countervailing considerations which would rebut that presumption.[105]

The court found countervailing considerations which rebutted the presumption that North Dakota will follow Wisconsin's interpretation of comparative negligence when it rejected the individual rule in *Beaudoin,* because the court concluded that there were many countervailing considerations which favored the adoption of the unit rule.[106] The fact that the unit rule was the majority rule and modern trend was found by the court to be compelling.[107] In addition, the court recognized that the weight of authority favored the unit rule because, in part, those jurisdictions which followed the individual rule had done so on the rather wooden analysis that the legislature must have intended the individual rule when it copied Wisconsin's comparative negligence statute.[108]

Moreover, the court determined that the Wisconsin Supreme Court itself did not wholeheartedly adhere to the individual rule, but followed it only because of precedent.[109] The court stated that the Wisconsin Supreme Court has asserted in past decisions that the individual rule leads to harsh and unfair results.[110] The court

105. *Beaudoin*, 653 F. Supp. at 515.

106. *Id.* at 517. The court in *Beaudoin* stated that the numerous and compelling factors pointing towards the adoption of the unit rule weighed against an election of the individual rule. *Id.*

107. *Id.* at 515-16. Twenty-one states favor the unit rule while only five adopted the individual rule. *See* sources cited *supra* note 81 and accompanying text. In addition, the court recognized that all seven states that have decided the multitortfeasor comparison problem in the last five years have elected the unit rule. *Beaudoin*, 653 F. Supp. at 516; see sources cited *supra* note 81 and accompanying text.

108. *Beaudoin*, 653 F. Supp. at 516. The court contended that none of the jurisdictions which follow the individual rule have based arguments for the adoption of the rule on its merits. *Id.* Rather the court stated that these jurisdictions decided in favor of the individual rule because of precedent and so-called legislative intent created by the court's belief that the legislature must have intended the individual rule when it adopted Wisconsin's statute. *Id.*

109. *Id.* at 517. The court contended that one of the most telling strikes against the individual rule was that it was no longer receiving great support in the Wisconsin Supreme Court. *Id.* For a discussion of the Wisconsin Supreme Court's decreased support of the individual rule, see *supra* notes 79-80 and accompanying text.

110. *Beaudoin,* 653 F. Supp. at 517; *see* May v. Skelley Oil Co., 83 Wis. 2d 30, ____, 264 N.W.2d 574, 578 (1978). The *Beaudoin* court asserted that in *Skelley,* the Wisconsin Supreme Court stated in dicta that the individual rule led to harsh and unjust results. *Beaudoin,* 653 F. Supp. at 517. The Wisconsin Supreme Court upheld the rule, however, since the issue of whether to adopt the unit rule became moot when one of two defendants was determined not to be negligent because he did not have sufficient notice of the danger. *See Skelley,* 83 Wis. 2d at ____, 264 N.W.2d at 574. For a more detailed discussion of *Skelley,* see *supra* note 79. Although the Wisconsin Supreme Court had a chance to adopt the unit rule in *Reiter v. Dyken,* it decided not to rely on the dicta expressed in *Skelley* and upheld the individual rule merely on the basis of stare decisis, deferring the ultimate decision of the issue to the Wisconsin Legislature. *See* Reiter v. Dyken, 95 Wis. 2d 461, ____, 290 N.W.2d 510, 517 (1980) (legislative intent was found by the fact the Wisconsin Legislature switched from the forty-nine percent to fifty percent comparative negligence form and did not implement language of the law to expressly provide for the unit rule). For a more detailed discussion of *Reiter,* see *supra* note 55.

reasoned that North Dakota should not fall in the trap of blindly following Wisconsin's precedent, but should learn from Wisconsin's trial and error in construing comparative negligence.[111] Therefore, because it believed North Dakota was not mandated to apply Wisconsin's and Minnesota's interpretation of comparative negligence to section 9-10-07 of the North Dakota Century Code, the court adopted the unit rule.[112]

Statutory construction was the final compelling reason which, according to the court, commanded the election of the unit rule.[113] The court stated that it was not clear from the text of section 9-10-07 of the North Dakota Century Code whether the legislature intended to apply the individual rule or the unit rule.[114] In the absence of the plain meaning of a statute, the court recognized that section 1-01-35 of the North Dakota Century Code allows the singular words in the Code to also mean the plural.[115] Consequently, the court asserted that the strongly mandated rule of construction in section 1-01-35 required the word "person" in section 9-10-07 to also mean "persons" and therefore, the court adopted the unit rule.[116]

In applying the unit rule to the facts in *Beaudoin*, the court had to decide whether the phrase "person against whom recovery is

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111. *Beaudoin*, 653 F. Supp. at 517. The court stated that North Dakota was not caught in the trap of being bound by prior inequitable decisions and, therefore, was free to elect the unit rule. *Id.* The *Beaudoin* court also contended that the North Dakota Supreme Court had previously recognized that it would be foolish to go through the same growing pains Wisconsin did when the refined product is readily available for viewing. *Id.; see* Bartels v. City of Williston, 276 N.W.2d 113, 120 (N.D. 1979) (it would be foolish for North Dakota to blindly follow Wisconsin's and Minnesota's interpretation of modified comparative negligence when it can study the refined product so as to preclude adopting its flaws). For a more detailed discussion of *Bartels*, see *supra* note 102.

112. *Beaudoin*, 653 F. Supp. at 517; *see* N.D. CENT. CODE § 9-10-07 (1987) (suspended from July 8, 1987 through June 30, 1993) (contributory negligence shall not bar recovery in an action if such negligence is not as great as the negligence of the person against whom recovery is sought). The court determined that the correct decision was to adopt the unit rule and, therefore, avoid the problem which Wisconsin had created by having prior law that impeded progress. *Beaudoin*, 653 F. Supp. at 517.

113. *Beaudoin*, 653 F. Supp. at 516; *see* North v. Bunday, 735 P.2d 270, 273 (Mont. 1983). In *North*, the Montana Supreme Court by applying statutory construction, determined that the singular word "person" in Montana's Comparative Negligence Law also meant the plural "persons." *Id.*

114. *Id.; see* N.D. CENT. CODE § 9-10-07 (1987) (suspended from July 8, 1987 through June 30, 1993) (contributory negligence shall not bar recovery if the negligence is not as great as the negligence of the person against whom recovery is sought). For the relevant text of 9-10-07, see *supra* note 3.

115. *Beaudoin*, 653 F. Supp. at 516; *see* N.D. CENT. CODE § 1-01-35 (1987). Section 1-01-35 of the North Dakota Century Code provides: "Words used in the singular number include the plural and words used in the plural number include the singular, except when a contrary intention plainly appears." *Id.*

116. *Beaudoin*, 653 F. Supp. at 516; *see* N.D. CENT. CODE § 1-01-35 (1987) (words in their singular include the plural); *id.* § 9-10-07 (1987) (suspended from July 8, 1987 through June 30, 1993) (contributory negligence shall not bar recovery if the negligence is not as great as the negligence of the person against whom recovery is sought). The court concluded that the application of § 1-01-35 to § 9-10-07 aggregated the negligence of the defendants and thus, commanded the adoption of the unit rule. *Beaudoin*, 653 F. Supp. at 516.

sought'' in section 9-10-07 included statutorily immune employers who were not made parties to a suit.[117] If Wood Wireline's negligence was not considered since Wood Wireline was immune from Beaudoin's negligence action by virtue of their employment relationship,[118] then Texaco's negligence would individually be compared against Beaudoin's, which might have kept Texaco from being liable.[119] The court followed the lead of other states, however, and held that Wood Wireline's negligence would be considered in allocating the responsibility for Beaudoin's injuries.[120] Therefore, Beaudoin's apportioned negligence (thirty percent) was compared against the negligence of Texaco (ten percent) and Wood Wireline (sixty percent) in the aggregate (seventy percent).[121]

The final issue before the court was whether Texaco was liable only for its individual share of Beaudoin's injuries or also for the share of negligence attributed to Wood Wireline.[122] The court stated that in North Dakota a joint tortfeasor is liable for the share

117. *Beaudoin*, 653 F. Supp. at 517; *see* N.D. CENT. CODE § 9-10-07 (1987) (suspended from July 8, 1987 through June 30, 1993) (contributory negligence shall not bar recovery if such negligence is not as great as the negligence of the person against whom recovery is sought). For the relevant text of section 9-10-07, see *supra* note 3.

118. *See Beaudoin*, 653 F. Supp. at 517-18. Beaudoin did not make Wood Wireline a party to the suit because Wood Wireline was immune from liability under § 65-04-28 of the North Dakota Century Code's Worker's Compensation Law. *Id.* at 518; *see* N.D. CENT. CODE § 65-04-28 (1985) (employers who comply with this law are not liable to respond in damages for injury or death to any employee). For the relevant text of 65-04-28, see *supra* note 5.

119. *See Beaudoin*, 653 F. Supp. at 517-18. The court stated that since an employer is immune from suit, it would be futile for Beaudoin to bring an action against Wood Wireline. *Id.* at 518. Thus, if Wood Wireline's negligence was not taken into account in allocating responsibility it would in effect be wiped away because Beaudoin could not bring any action to have Wood Wireline's sixty percent apportioned negligence attributed to Texaco. *See id.* Therefore, Beaudoin would be denied recovery because his apportioned fault of thirty percent was greater than the ten percent apportioned to Texaco, the only defendant in the suit. *Id.*

120. *Id.* at 517-18; *see, e.g.*, Pape v. Kansas Power & Light Co., 231 Kan. 441, 449, 647 P.2d 320, 326 (1982). In *Pape*, the widow and children of a deceased farm elevator worker brought a wrongful death and survivorship action against the electric company which installed the insulated electric wires which caused the decedent's death. *Id.* at 441-42, 647 P.2d at 322. The Kansas Supreme Court held that under Kansas' comparative negligence law, the decendent's employer, though immune, should have its negligence taken into account. *Id.* at 449, 647 P.2d at 326. In so holding, the court stated that the phrase 'parties against whom a claim for recovery is made' in Kansas' comparative negligence statute included immune employers. *Id.* at 449, 647 P.2d at 326; *see* KAN. STAT. ANN. § 60-258a (1983) (the negligence of all the parties should be considered in comparative negligence actions and those parties that contributed to the injury not a party to the action should be joined). *See also* Baird v. Phillips Petroleum Co., 535 F. Supp. 1371, 1378 (D. Kan. 1982) (Kansas' comparative negligence law gives a defendant in a tort action a substantive right to have all negligence compared in a single action even if all the tortfeasors are immune from suit); Gaither *ex rel.* Chalfin v. City of Tulsa, 664 P.2d 1026, 1029 (Okla. 1983) (no requirement that one must be a party to the lawsuit before his or her negligence may be considered by the jury in determinnig negligence calculations).

121. *Beaudoin*, 653 F. Supp. at 518. The court's interpretation is consistent with North Dakota's view that the negligence of all the parties should be considered when deciding on individual liability. *See* Day v. General Motors Corp., 345 N.W.2d 349, 354 (N.D. 1984) (all the negligence of the parties involved in the resulting injuries or damages is to be considered).

122. *Beaudoin*, 653 F. Supp. at 518. Although Texaco was liable to Beaudoin pursuant to the unit rule, the question remained whether Texaco was only liable for ten percent of Beaudoin's damages, or whether Texaco could also be liable for the portion of damages attributable to Wood Wireline. *See id.*

of negligence attributed to a statutorily immune employer.[123] Thus, the court held Texaco liable for Wood Wireline's apportioned fault of sixty percent, in addition to its own ten percent.[124]

The court conceded that an equitable result in the case was impossible.[125] Either Texaco was liable under the unit rule for seventy percent of the damages, even though only ten percent negligent, or under the individual rule, Beaudoin would be denied recovery because his negligence of thirty percent was greater than the ten percent apportioned to Texaco alone.[126] The court asserted, however, that the inequity that arose when Texaco was ordered to pay seventy percent of the damages was due to the doctrine of joint and several liability and the immunity provision of section 65-04-28 of the North Dakota Century Code, and not the unit rule.[127] Therefore, the court applied the unit rule and held Texaco liable for seventy percent of Beaudoin's damages.[128]

123. *Id.; see* Layman v. Braunschweigische Maschinenbauanstalt, Inc. 343 N.W.2d 334, 348-50 (N.D. 1983). In *Layman,* Layman sought to recover for injuries received when he became entangled with a sugar beet crystallizer. *Id.* at 337. The jury apportioned twenty-five percent of the negligence to the plant designer and seventy-five percent to the plant owner, Layman's employer. *Id.* at 338. The trial court held the plant designer liable for twenty-five percent of the damages and precluded Layman any recovery from the plant owner because it was a statutorily immune employer. *Id.* In reversing, the North Dakota Supreme Court stated that a negligent tortfeasor is liable for the share of negligence attributed to a statutorily immune employer. *Id.* at 350. Thus, the plant designer was liable for all of Layman's injuries. *Id.*

124. *Beaudoin,* 653 F. Supp. at 518. Under joint and several liability as applied by § 9-10-07, a defendant is liable for the whole award but is entitled to contribution from the other tortfeasors according to their apportioned fault. *See* N.D. CENT. CODE § 9-10-07 (1987) (suspended from July 8, 1987 through June 30, 1993) (each tortfeasor is jointly and severally liable for the whole award); *see also* Hoerr v. Northfield Foundry & Mach. Co., 376 N.W.2d 323, 334 n.7 (1985). In *Hoerr,* a worker who was injured by a high-speed wood shaper brought a products liability action against the manufacturer, distributor, and seller of the machine. *Id.* at 325. In holding that Hoerr could have judgment entered on negligent fault, rather than on a products liability assessment, the court adopted the Uniform Comparative Fault Act's definition of joint and several liability which provides that the plaintiff can recover from any defendant the total amount of his judgment. *See id.* at 334 n. 7; *see* UNIFORM COMPARATIVE FAULT ACT § 2 comment, 12 U.L.A. 44 (1979). The Uniform Comparative Fault Act also provides that under joint and several liability, the defendant who pays all of a plaintiff's claim is entitled to contribution from the other defendants based on their apportioned fault. *Id.* However, in North Dakota, a tortfeasor cannot obtain contribution from an immune tortfeasor. *See Layman,* 343 N.W.2d at 350 (negligent tortfeasor has no right to contribution from a negligent employer immune from suit by operation of the worker's compensation statutes).

125. *Beaudoin,* 653 F. Supp. at 518.

126. *Id.* The court stated that a collision of legal principles rendered an equitable result impossible. *Id.* The conflicting legal principles which the court had to apply were either the individual rule, which barred Beaudoin's recovery, or joint and several liability and the immunity provision under North Dakota's worker's compensation laws, which when coupled with the unit rule, necessitated that Texaco pays seventy percent of the damages while only ten percent negligent. *See id.;* N.D. CENT. CODE § 9-10-07 (1987) (suspended from July 8, 1987 through June 30, 1993) (each tortfeasor is jointly and severally liable for the whole award); *id.* § 65-04-28 (1985) (employers who comply with the provision of this chapter are not liable for injury or death to an employee).

127. *Beaudoin,* 653 F. Supp. at 518; N.D. CENT. CODE § 9-10-07 (1987) (suspended 1987) (each tortfeasor is jointly and severally liable for the whole award); *id.* § 65-04-28 (1985) (employers who comply with the provisions of this chapter are not liable for injury to or death of an employee).

128. *Beaudoin,* 653 F. Supp. at 518. The court stated that by electing the unit rule and rejecting the individual rule, it declined to adopt an outmoded and inequitable rule that works injustice. *Id.* It asserted, however, that another outmoded rule, joint and several liability, still remained to prevent a just outcome. *Id.* According to the court, if several liability had been adopted by North Dakota at the time, the combination of that rule with the unit rule would produce a just result because Beaudoin

Prior to *Beaudoin*, North Dakota's state district courts interpreted the individual rule as the rule which was to be implied out of North Dakota's 1973 comparative negligence law.[129] Furthermore, the presumption that North Dakota will follow Wisconsin's precedent on comparative negligence issues has been eroded by *Beaudoin*.[130] In addition, *Beaudoin* may persuade the North Dakota judiciary to be more open to interpreting for itself the old comparative negligence statute and the new comparative fault statute instead of deferring such decisions to the North Dakota Legislature.[131] Moreover, the need for judicial intervention in comparative negligence issues was made apparent by the inequitable result reached in *Beaudoin* when the legal principles of joint and several liability, worker's compensation immunity, and comparative negligence, collided to produce an unavoidably inequitable result.[132]

The most striking impact of *Beaudoin* is the aid it gives in determining whether the combined or individual comparison approach is to be applied to claims not covered by North Dakota's new comparative fault law.[133] Under *Beaudoin's* application of the

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would not be barred recovery and Texaco would only have been liable for ten percent of the damages. *Id.*

129. *See* Keyes v. Amundson, 343 N.W.2d 78, 80 (N.D. 1983), *rev'd on other grounds*, 391 N.W.2d 602 (N.D. 1986). In *Keyes*, the Northwest District Court of North Dakota apparently applied the individual rule because it denied recovery to a forty percent negligent plaintiff for his injuries resulting from a motorcycle accident, because the plaintiff's apportioned fault was greater than the individual negligence of any of the defendants. *Id.* Since the plaintiff did not raise the issue on appeal, the North Dakota Supreme Court did not address the question of whether North Dakota's comparative negligence law prohibited recovery when the plaintiff's negligence is greater than the combined fault of the defendants. *Id.* at n.1.

130. *Compare Beaudoin*, 653 F. Supp. at 515 (court stated that North Dakota will follow Wisconsin's lead in comparative negligence issues unless there was some compelling reason not to) *with* Bartels v. City of Williston, 276 N.W. 2d at 118 (where a statute is taken from another state and adopted without change, it is presumed that the North Dakota Legislature adopted the construction placed upon the law by the court of last resort in the state from which the statute was taken).

131. *Compare Beaudoin*, 653 F. Supp. at 517 (court was convinced that the North Dakota Supreme Court would apply the unit rule to North Dakota's comparative negligence law) *with* Krise v. Gillund, 184 N.W.2d 405, 409 (N.D. 1971) (court refused to change from contributory negligence to comparative negligence because it felt that this was a matter best left for the legislature).

132. *See Beaudoin*, 653 F. Supp. at 518 (the court stated that the collision of legal principles rendered a truly equitable result impossible). Prosser and Keeton state that joint and several liability is rationalized, in part, because the defendant that pays the judgment is allowed contribution from the other tortfeasors. *See* PROSSER & KEETON ON TORTS 475-76 (5th ed. 1984). They infer, however, that this rationale is not furthered when an immune tortfeasor is involved because the deep-pocket defendant is liable for all the judgment. *Id.* at 476.

133. *See Beaudoin*, 653 F. Supp. at 518. North Dakota's new comparative fault law is to be applied prospectively to actions arising before the effective date of the law, July 8, 1987. *See* Act approved April 9, 1987, ch. 404, 1987 N.D. Laws 989 (codified at N.D. CENT. CODE § 32-03.2-02 (Supp. 1987)) (this act is effective through June 30, 1993, and after that date is ineffective without legislative approval). For the relevant text of the new comparative fault law, see *supra* note 84. For a discussion of the prospective application of the 1987 comparative fault law, see *supra* notes 84-95, and accompanying text. Consequently, actions that arise before the 1987 comparative fault law will be governed by § 9-10-07 of the North Dakota Century Code and the unit rule. *See Beaudoin*, 653 F. Supp. at 517; N.D. CENT. CODE § 9-10-07 (1987) (suspended from July 8, 1987 through June 30, 1993) (each tortfeasor is jointly and severally liable for the whole award).

unit rule to pre-July 1987 comparative negligence actions, a negligent plaintiff has no fear of losing a valid claim because there are numerous defendants.[134] Finally, in light of *Beaudoin,* the adoption of several liability by the new 1987 comparative fault law highlights the fact that the law has produced a just answer to some of the problems which hampered North Dakota under its old comparative negligence provision.[135]

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134. *See Beaudoin,* 653 F. Supp. at 518 (adoption of the individual rule would preclude Beaudoin from recovering because there are two defendants to which his liability would be compared against); *see also* Walton v.Tull, 234 Ark. 882, ____, 356 S.W.2d 20, 26 (1962) (plaintiff ten percent negligent was allowed to recover pursuant to the unit rule from a defendant also ten percent negligent even though the plaintiff's negligence was as great as the defendant's). The Arkansas Supreme Court adopted the unit rule in *Walton* because it viewed the individual rule as unfair in cases where there are many defendants who were equally at fault and the plaintiff's negligence, although relatively minor, is greater than the negligence of any one defendant. *Id.* For a discussion of *Walton,* see *supra* notes 36-44 and accompanying text.

135. *See Beaudoin,* 653 F. Supp. at 518. The court expressed the view that the combination of joint and several liability with the individual rule in an action involving a statutorily immune tortfeasor caused an inequitable result. *Id.* In adopting the unit rule to pre-July 1987 comparative negligence actions, *Beaudoin* allows North Dakota's two comparative negligence laws to be consistent and complimentary because the new comparative fault law also adopted the unit rule. *See Beaudoin,* 653 F. Supp. at 517; Act approved April 9, 1987, ch. 404, 1987 N.D. Laws 989 (codified at N.D. CENT. CODE § 32-03.2-02 (Supp. 1987)) (plaintiff's negligence should be compared against the person or persons against whom recovery is sought). The 1987 comparative negligence law also adopted several liability. *See id.* (when two or more parties have contributed to the injury, the liability of each is several only). The court in *Beaudoin* stated that the combination of the unit rule with several liability produced more equitable results in multitortfeasor comparative negligence actions than can be achieved if either the individual rule or joint and several liability are applied. *Beaudoin,* 653 F. Supp. at 518.