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CONTRIBUTION—An Application of the Oklahoma Contribution Statute to Joint Tort-Feasors

More than fifty years ago, Oklahoma enacted a statute for the apparent purpose of subjecting joint tort-feasors to contribution.¹ Until recently there has been a marked absence of any reference to the statute by the Oklahoma Supreme Court. However, in the rehearing of *National Trailer Convoy, Inc. v. Oklahoma Turnpike Authority*² in October 1967, the court, faced with the task of determining the force and effect of the statute, rejected its applicability to joint tort-feasors.

As a general rule, at common law, there was no right of contribution among joint tort-feasors.³ The courts followed the underlying principle that the law should not allow a party to recover for his own wrongdoing. However, contribution was allowed where the liability of the joint tort-feasor who satisfied a judgment arose from acts of omission on his part, but where the proximate cause of the injury resulted from the active, positive acts on the part of the other joint tort-feasor.⁴ Thus, contribution was not allowed when the party seeking it was presumed to have known he was committing a wrongful act or where the act committed was illegal.

In 1893, the first session of the Second Legislative Assembly of the Territory of Oklahoma enacted the state's first statute concerning contribution.⁵ The statute was adopted in its entirety from Kansas law.⁶ The relevant portion read as follows:

When property, liable to an execution against several persons, is sold thereon, and more than a due proportion

¹ OKLA. STAT. tit. 12, § 831 (1961).

² 38 OKLA. B.J. 1965 (Okla. 1967).

³ See Annot., 60 A.L.R. 2d 1366 (1958).

⁴ See 18 C.J.S. *Contribution* § 11 (1939).

⁵ Ch. 66, § 495, [1893] Okla. Laws.

⁶ Ch. 80, § 480, [1868] Kan. Laws (repealed 1963).

of the judgment is laid upon the property of one of them, or one of them pays, without a sale, more than his proportion, he may compel contribution from the others⁷

In 1903, the Kansas Supreme Court held the Kansas contribution statute applicable to actions founded in tort.⁸ Its decision stemmed from an earlier action in which a city and a railroad company were held jointly liable for maintaining a dangerous trestle over a city street. The railroad had satisfied the joint judgment and sought to secure judgment for contribution against the city. In affirming the district court's decision, the court held that:

The statute, in terms, covers all kinds of judgments. No exception is made. We think it applies to judgments rendered in actions sounding in tort as well as to those based upon contract.⁹

In *Fakes v. Price*,¹⁰ a case decided in 1907 by the Oklahoma Supreme Court, the common law rule was followed. Making no reference to the Oklahoma statute or the Kansas court's decision, the court said: "It is a well-established rule that among wrongdoers the law raises no implied promise or right of contribution"¹¹ However, the case involved the commission of a fraud by several defendants, one of whom had satisfied the judgments for costs and was seeking contribution. The court held that court costs did not fall within the general rule denying contribution for damage judgments and allowed plaintiff to recover.

In 1910, the Oklahoma statute was revised for the apparent purpose of making it applicable to all judgments in order to include joint tort-feasors.¹² The revision consisted

⁷ Ch. 66, § 495, [1893] Okla. Laws.

⁸ *City of Ft. Scott v. Kansas City, Ft.S & M.R.R.*, 66 Kan. 610, 72 P. 238 (1903).

⁹ 72 P. at 239.

¹⁰ 18 Okla. 413, 89 P. 1123 (1907).

¹¹ *Id.* at 414, 89 P. at 1124.

¹² Ch. 60, § 5188, [1910] Okla. Rev. Laws.

of the addition to the existing statute of the following italicized portion:

When property, liable to an execution against several persons, is sold thereon, and more than a due proportion of the judgment is laid upon the property of one of them, or one of them pays, without a sale, more than his proportion, he may *regardless of the nature of the demand upon which the judgment was rendered*, compel contribution from the others

The revised statute represents the Oklahoma law today.¹³

In 1923, the Oklahoma Supreme Court recognized the right of contribution between joint tort-feasors in *Fleming v. Stephenson*.¹⁴ However, the case was dismissed as a result of the court's finding that the defendant was not a party to the fraud upon which the original action against the joint tort-feasors was based. The issue in the case was whether "as a matter of law . . . plaintiff was entitled to contribution."¹⁵ The court stated:

We conclude that before the plaintiff . . . may have a recovery against [the defendant] there must be a showing of some kind that there was some sort of joint legal liability on the part of the plaintiff and defendant A joint legal liability might grow out of one or both of two conditions—one emanating from a contractual relation, either express or implied; and the other arising by reason of a judgment fixing the liability.¹⁶

The first case in which the Oklahoma court confronted and rejected the theory of contribution between joint tort-feasors was *Cain v. Quannah Light & Ice Company*.¹⁷ In this case the defendant contractor had constructed a transformer and substation for a gypsum company. An employee of the gypsum company was electrocuted while attempting to cut

¹³ OKLA. STAT. tit. 12, § 831 (1961).

¹⁴ 94 Okla. 1, 220 P. 599 (1923).

¹⁵ *Id.* at 5, 220 P. at 603.

¹⁶ *Id.*

¹⁷ 131 Okla. 25, 267 P. 641 (1928).

off the electric current in the substation. In an earlier suit, the deceased's widow had recovered against the gypsum company, and the company's insurer paid the face amount of the policy in partial satisfaction of the judgment. When an action was brought by the gypsum company against the contractor, the insurer was made a party plaintiff. The insurer claimed its subrogation right to recover the policy amount from the defendant contractor. The court pointed out that "as between tort-feasors, there can be neither contribution nor indemnity..."¹⁸ It concluded that since the gypsum company was not entitled to indemnity, no right of subrogation existed in favor of the insurance company. In finding the gypsum company was not without knowledge of the dangerous condition existing at the substation, the court removed the case from the possible exception regarding acts of omission. Upon the determination that the company's act was outside the scope of the exception, the court reverted to the common law rule and granted the defendant a directed verdict.

In recent years the federal courts have had two occasions to interpret Oklahoma's contribution laws. In *United States v. Acord*,¹⁹ the Court of Appeals for the Tenth Circuit stated that Oklahoma did not recognize contribution or indemnity between joint tort-feasors.²⁰ The case arose because of an injury received by Acord, a business invitee of the Chicago, Rock Island and Pacific Railroad Company; he was struck by a mail pouch thrown from a moving train by a mail clerk employed by the United States. Acord brought an action against the railroad company, and the railroad company impleaded the United States as a third party defendant. The federal district court entered judgment in favor of Acord against the railroad company and against the United States in favor of the railroad company. On appeal, the United States

¹⁸ *Id.* at 28, 267 P. at 642.

¹⁹ 209 F.2d 709 (10th Cir. 1954).

²⁰ *Id.* at 714 (citing the *Fakes* and *Cain* decisions).

urged that the railroad company was not entitled to indemnity. The appellate court found the railroad company and the United States primarily negligent, and that according to Oklahoma law the railroad company was not entitled to indemnity. Likewise, in *Calvery v. Peak Drilling Company*²¹ the federal district court upheld the third party defendant's motion to dismiss the third party complaint when it recognized that the general prevailing rule of law in Oklahoma prohibited contribution or indemnity between joint tort-feasors.

The *National Trailer* case arose from a wrongful death action involving an automobile collision on the Will Rogers Turnpike which culminated in deceased's administratrix recovering a judgment against defendants, National Trailer Convoy, Inc. and the Oklahoma Turnpike Authority.²² Thereafter, the Oklahoma Turnpike Authority entered into an agreement in which the administratrix, for a specified consideration, agreed to proceed solely against the trailer company for the balance owed on the judgment. The trailer company paid the balance and brought the instant action against the turnpike authority for contribution of its proportionate share.

In its initial decision the court said:

A relatively large majority of jurisdictions in which the contribution rights of negligent joint tort-feasors are *not controlled by statute* hold that the fact that joint tort-feasors' injury-causing conduct was negligent, rather than wilful or intentional, furnishes no basis for freeing them of the burden of the general rule that there can be no contribution among joint tort-feasors.²³

The plaintiff recognized the general rule but urged that it was subject to an exception which permits contribution

²¹ 118 F. Supp. 335 (W.D. Okla. 1954).

²² *National Trailer Convoy, Inc. v. Saul*, 375 P.2d 922 (Okla. 1962).

²³ *National Trailer Convoy, Inc. v. Oklahoma Turnpike Authority*, 38 OKLA. B.J. 57, 60 (1967) (quoting Annot., 60 A.L.R. 2d 1366, 1373 (1958)) (emphasis added).

where the joint tort-feasors were not the primary wrongdoers or guilty of active negligence. It was plaintiff's contention that its employee was the active wrongdoer and that both plaintiff and defendant were guilty only of constructive fault. The court rejected this contention by referring to the jury's determination that plaintiff was primarily negligent.

On rehearing, plaintiff urged the court to consider and determine the force and effect of the Oklahoma statute.²⁴ Basing his argument upon the Kansas court's interpretation of the Kansas statute and the apparent purpose of the addition to the Oklahoma statute, plaintiff contended that the Oklahoma contribution statute was in derogation of the common law rule. In rejecting plaintiff's argument, the court held the statute procedural in nature and dependent upon another statute or the common law for the existence of a right of contribution.

In classifying the statute as procedural the court stated: [Statutes of this character] constitute a change in procedural, rather than substantive law, and, manifestly, *if the clear purpose of such a statute* is to make the summary remedy available to the judgment debtor who is entitled to contribution, it is not applicable to the case of a defendant whose payment of the judgment gives him no right to contribution.²⁵

It is submitted that the *clear purpose of the statute* was to abrogate a right of the joint tort-feasor existing at common law and to supersede it with a statutory right to contribution.

The purpose becomes more apparent when one inquires into the intent of the legislature in making the addition to the existing statute of the words, "regardless of the nature of the demand upon which the judgment was rendered." If any effect is to be given to the addition, it must be construed

²⁴ 38 OKLA. B.J. 1965 (Okla. 1967).

²⁵ *Id.* at 1966 (quoting 18 AM. JUR. 2d *Contribution* § 77 (1965)) (court's emphasis deleted; writer's emphasis added).

as subjecting joint tort-feasors to contribution. The court, however, concludes that the word "demand" in the added phrase includes too great a variety of meanings; and if plaintiff's contention were approved, the result would be to grant the right of contribution in numerous situations where they were previously denied.

Rejecting the 1903 decision construing the Kansas contribution statute, the Oklahoma court points out that subsequent Kansas decisions have not cited that decision for the point of law in question. In effect, the court is holding that this was not the controlling rule in Kansas. However, in referring to the Kansas court's interpretation of its contribution statute, a Kansas judge in 1958 stated that the Kansas statute was applicable to tort actions where a joint judgment had been rendered.²⁶

The court notes the Kansas statute was replaced in 1963²⁷ and that a 1966 Kansas decision followed the common law rule.²⁸ Because the Oklahoma statute has not been amended since 1910, it is submitted that the 1966 Kansas decision has no bearing upon the statute in question.

Referring to an earlier decision the court held that "a valuable right existing by common law will not be abrogated by a subsequent statute which did not expressly, nor by necessary implication, destroy such previously existing right."²⁹ However, in an earlier decision, the court made the following statement:

No authority is necessary to sustain the proposition that repeals by implication are not to be favored, and that to

²⁶ See Gard, *Uniform Contribution Among Tortfeasors Act (As Revised)*, 27 KAN. B.J. 2 (1958).

²⁷ See KAN. STAT. ANNO. § 60-2413 (1964).

²⁸ 38 OKLA. B.J. at 1967. See *Alseike v. Miller*, 196 Kan. 547, 412 P.2d 1007 (1966).

²⁹ 38 OKLA. B.J. at 1967 (citing, *Roxana Petroleum Co. v. Cope*, 132 Okla. 152, 269 P. 1084 (1928)).

strike down a valuable *right given by a statute and also existing by common law*, merely upon an inference to be drawn from a new statute, represents an unhappy manner of adjudicating those rights and holding that they no longer exist.³⁰

Although the right to refuse contribution did exist at common law, Oklahoma has no statute conferring this right. Thus, it seems appropriate to distinguish the earlier decision and negate its applicability.

In refusing to take away a valuable substantive right existing at common law, the court has apparently taken away a statutory right. The result is the usurpation of the legislative branch of Oklahoma government. Refusals to allow contribution in this field has led to several proposals³¹ to adopt the Uniform Contribution Among Tort-feasors Act. The original version of the act was promulgated in 1939 by the National Conference of Commissioners on Uniform State Laws. By 1955, the Act, which clarifies the ambiguities that existed in the common law rules governing joint tort-feasors, had been adopted by eleven states.³² As adopted by New Mexico,³³ it creates the right of contribution among joint tort-feasors. However, the right to contribution does not accrue until after discharge by one of the tort-feasors of the common liability or until a discharge is made of more than his share. The law applies regardless of whether the joint tort-feasors were joined in the original action, but it is not available to one who intentionally contributed to the injury.

³⁰ *Roxana Petroleum Co. v. Cope*, 132 Okla. 152, 153, 269 P. 1084, 1085 (1928) (emphasis added).

³¹ See Comment, *Contribution: Between Joint Debtors Exclusive of Contract Express or Implied*, 8 OKLA. L.R. 349, 353 (1958); see also Fraser, *Joint Tortfeasors*, 29 OKLA. B.J. 1933 (1958); Merrill, *Oklahoma and the Uniform State Law Program*, 1966, 38 OKLA. B.J. 643 (1967).

³² States which have adopted the Act include Arkansas, Delaware, Hawaii, Maryland, New Mexico, Pennsylvania, Rhode Island and South Dakota.

³³ N.M. STAT. ANN. §§ 24-1-12 to -18 (1953).

The act as adopted by New Mexico would seem to clarify the problem areas in Oklahoma and effectuate the legislative purpose which has long been ignored and now rejected.

A revision of the Act was promulgated in 1955 and has been adopted by at least two states.³⁴ The purpose of the revision was to eliminate the objectionable portions of the Act concerning settlements and the use of equitable principles in the determination of contributive shares.³⁵

In *National Trailer* the Oklahoma court was admittedly faced with a difficult question. To have recognized the legislative purpose of the statute, the court would have overruled sixty years of prior case law. However, the continued history of the misapplication of Oklahoma's contribution statute and its final rejection indicates the need for clarification of the statute as a guideline for the Oklahoma courts. Amending the statute would only cloud the areas of contribution among joint debtors and sureties to whom it is now being applied. Therefore, adoption of the revised Uniform Contribution Among Tort-feasors Act is suggested as a possible solution.

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³⁴ States which have adopted the revised Act include North Dakota and Massachusetts.

³⁵ Merrill, *supra* note 31, at 649.