STATEMENT OF MARYLAND DEFENSE COUNSEL REGARDING RULE-MAKING ON PLAINTIFFS' FAULT IN TORT CASES

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GARDNER M. DUVALL, ESQ.
PETER SHEEHAN, ESQ.
MERRILYN E. RATLIFF, ESQ.
Whiteford Taylor & Preston, L.L.P.
7 St. Paul Street
Baltimore, Maryland 21202

JENNIFER S. LUBINSKI, ESQ.
Funk & Bolton, P.A.
36 South Charles St. 12th Floor
Baltimore, MD 21201

DANIEL P. MOYLAN, ESQ.
CHRISTINE CAREY, ESQ.
Venable, LLP
210 W. Pennsylvania Ave.
Towson, MD 21204

JOHN T. SLY, ESQ.
Waranch & Brown, LLC
1301 York Road
Lutherville, MD 21093

SEAN P. EDWARDS, ESQ.
The Law Offices of Frank F. Daily, P.A.
11350 McCormick Road
Hunt Valley, Maryland 21031

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I. INTRODUCTION

The Court of Appeals has requested a study of its rule-making authority to implement "comparative fault" as a modification to Maryland's liability law. Maryland law currently observes the doctrine of contributory negligence, embodied in the following statement:

> [W]hen one who knows and appreciates, or in the exercise of ordinary care should know and appreciate, the existence of danger from which injury might reasonably be anticipated, he must exercise ordinary care to avoid such injury; when by his voluntary acts or omissions he exposes himself to danger of which he has actual or imputed knowledge, he may be guilty of contributory negligence.

Menish v. Polinger Co., 277 Md. 553, 560-61 (1976). Any dispute about the treatment of plaintiff's fault must begin with the recognition that the plaintiff was, to some degree, at fault in causing his own injury.

The effect of plaintiff's fault on fault-based liability may be expressed several ways in the determination of public policy. The invocation of contributory negligence, i.e. fault on the part of a plaintiff bars his recovery, is but one option. Another possibility is that causal fault has no effect on the plaintiff's recovery. Yet another option reduces the at-fault plaintiff's recovery from the potential amount recoverable had the plaintiff been faultless.

Regardless of which option is selected, the public policy determination between systems of fault-based liability falls squarely within the province of the General Assembly. For the reasons which follow, legislative policy-making in this particular realm cannot – and should not – be truncated through the rule-making process of Maryland judicial system.

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The mission of Maryland Defense Counsel, Inc. (**MDC**) is to attain equal justice for all, improve Maryland's courts and laws, and strengthen the defense of civil lawsuits. MDC respectfully submits that setting public policy on the manner in which plaintiffs' fault is addressed in tort cases is beyond the rule-making authority of the Court of Appeals. The weighing of public interests and subsequent choice of policy is a legislative function expressly reserved for the General Assembly.

This MDC Statement urges rejection of the attempt to convert Maryland's current contributory negligence paradigm to one of comparative fault through the rule-making process. As the Statement explains, the MDC's opposition is based upon considerations of (1) the limits of the Court of Appeals' rule-making authority, (2) the history of contributory negligence in Maryland, (3) common law courts' deference to legislative lawmaking, (4) the complexity of fashioning a new rule for plaintiffs' fault in light of related statues and common law doctrines, and (5) the demands of fairness for including product liability claims in any regime of comparative fault.

II. THE LIMITS OF THE COURT OF APPEALS' RULE-MAKING AUTHORITY

a. Defining the Court's Rule-Making Authority

Maryland's Constitution empowers the Court of Appeals to "adopt rules and regulations concerning the practice and procedure in and the administration of appellate courts and in the other courts of this State." MD. CONST. art. IV, § 18(a). The Maryland Code attempts to clarify the scope of the Court's rule-making authority by stating that:

> Without intending to limit the comprehensive application of the term 'practice and procedure,' the term includes the forms of process; writs; pleadings; motions; parties; depositions; discovery; trials; judgments; new trials; provisional and final remedies; appeals; unification of practice and

> procedure in actions at law and suits in equity, so as to secure one form of civil action and procedure for both; and regulation of the form and method of taking and the admissibility of evidence in all cases, including criminal cases.

MD. CODE ANN., CTS. & JUD. PROC. § 1-201(a)(LexisNexis 2010).

Rules adopted by the Court of Appeals "have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law." MD. CONST. art. IV, § 18(a). Properly enacted legislation supersedes rules adopted by the Court of Appeals. *Hauver v. Dorsey*, 228 Md. 499, 502 (1962); *Funger v. Mayor of Somerset*, 244 Md. 141, 150 (1966). As a result, the Attorney General has interpreted Article IV, § 18(a) of the Maryland Constitution as allocating concurrent rule-making powers to both the General Assembly and the judiciary. 66 Op. Att'y Gen. Md. 80 (1981). Stated simply, Article IV, § 18(a) does not confer exclusive rule-making power on the Court of Appeals. *Id.*

b. Limits on Rule-making Authority

The Court's rule-making authority is constitutionally limited to promulgating rules regarding "practice and procedure." MD. CONST. art. IV, § 18(a). It follows that the Court of Appeals of Maryland cannot change substantive Maryland law via rule-making. *Consol. Constr. Servs., Inc. v. Simpson*, 372 Md. 434, 451 (2002) ("As we have indicated the Constitution limits this Court's rule-making power to matters of procedure and practice. It does not confer upon this Court the power to, by rule, add substantive elements to causes of action."). Because the Court of Appeals cannot change substantive Maryland law via rule-making, and the current observation of contributory negligence is part of Maryland's substantive law, the Court of Appeals cannot abrogate contributory negligence via rule-making. *Erie Ins. Exch. v. Heffernan*, 399 Md. 598, 635 (2007)

("The principle of contributory negligence is a matter which relates to Maryland substantive law.").

Members of the Court of Appeals itself decried the possibility of adopting comparative negligence via rule-making. In Judge Eldridge's dissent to the Court's adoption of Rule 15-207(e), he complained that Article IV § 18 of the Maryland Constitution:

> has not previously been construed as authorizing the Court, by rule making, to change the substantive nature of civil action. I doubt that the majority of the Court believes that it could, by promulgating a rule, abolish the defenses of contributory negligence or assumption of the risk in civil tort actions based on negligence. Such action would not concern 'practice and procedure in' or 'the administration of' the courts.

See Court of Appeals of Maryland Rules Order, 24 Md. Reg. 97-100 (Jan. 3, 1997) (Eldrige, J., dissenting, joined by Bell, C.J.).

On occasion, the Court exceeds its rule-making authority. For example, in *Simpson*, the Court *sua sponte* determined that it lacked the power and authority to adapt a provision of Md. Rule 2-668 to govern the garnishment of contingent liabilities. *Simpson*, 372 Md. at 451. The Court acknowledged that when it adapted Maryland Rule 2-668 to include contingent liabilities, the Court added a substantive element to a statutorily created action. *Id.* at 456. Because the Court lacked the substantive lawmaking power to do so, the Court declared its own rule invalid and referred the matter to the Rules Committee to take action consistent with the opinion, i.e. to redraft the rule. *Id.* at 452, 456.

III. THE IMPRUDENCE OF A NON-LEGISLATIVE CHANGE

If the common law of contributory negligence is to be changed, the proper means is via legislation by the General Assembly. The Court lacks rule-making power to change Maryland common law. *Ginnavan v. Silverston*, 246 Md. 500, 504-05 (1967). Even though it is clear that changing the substantive law of contributory negligence is beyond the Court's rule-making power, we shall address why rule-making on this subject is imprudent even if the Court possessed the proper authority.

a. The History of Contributory Negligence in Maryland

The Court of Appeals first recognized the defense of contributory negligence more than 150 years ago. Since then that defense has survived both attempts to overrule the doctrine judicially and numerous attacks in the General Assembly.

The concept of contributory negligence originated in an 1806 English decision, *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809). *See Harrison v. Montgomery Co. Bd. of Educ.*, 295 Md. 442, 449 (1983). The United States first recognized the doctrine in 1824, and eventually all of the states and the District of Columbia adopted contributory negligence principles. *See Smith v. Smith*, 19 Mass. (2 Pick.) 621 (1824); Christopher J. Robinette & Paul G. Sherland, *Contributory or Comparative: Which is the Optimal Negligence Rule?*, 24 N. ILL. U.L. REV. 41 (2003). Maryland adopted the contributory negligence rule in *Irwin v. Sprigg*, 6 Gill. 200, 205 (Md. 1847).

In *Harrison v. Montgomery County Board of Education*, 295 Md. 442 (1982), the Court of Appeals was asked to reject the doctrine of contributory negligence in favor of a comparative fault system. The *Harrison* plaintiffs argued that the doctrine of

contributory negligence was "outmoded, unfair, [had] no place in modern tort law and should be abandoned in favor of comparative negligence." *Id.* at 446. At the time, thirty eight states and almost all common law and civil law countries had adopted comparative negligence principles. *Id.* Additionally, the plaintiffs argued that, because Maryland judicially created the contributory negligence rule, Maryland courts were similarly free to abrogate it. *Id.*

The *Harrison* Court noted Maryland's exceptions to the rule of contributory negligence, including last clear chance, *see N.C.R.R. Co. v. State use of Price,* 29 Md. 420 (1868), and the exception for children under the age of five, *see Taylor v. Armiger*, 277 Md. 638, 358 A.2d 883 (1975). Nevertheless, the Court was not persuaded that the existence of exceptions to the rule indicated dissatisfaction with its general application. *Harrison*, 295 Md. at 450-51. Instead, the Court indicated, Maryland "has steadfastly adhered to the doctrine since its adoption in 1847." *Id.* at 451.

In fact, the Court was asked to adopt a comparative negligence system as early as 1874, but declined. The *Harrison* Court also recognized that in 1902, the General Assembly considered and adopted a form of comparative negligence as part of early workers' compensation schemes. (The legislature repealed the statute 12 years later upon enactment of the Workers' Compensation Act.) 295 Md. at 452. *See* Ch. 139, Acts of 1902; Ch. 412, Acts of 1902.

b. Other States Defer to the Legislature

While thirty-nine states had adopted some form of comparative negligence at the time of the *Harrison* decision, only eight had done so by judicial decision. *Harrison*, 295 Md. at 453. In fact, in many of the thirty-one states adopting comparative fault by

statute, courts declined to judicially change the common law favoring contributory negligence and instead expressly deferred to their respective state legislatures. *Id.* at 456. *See Haeg v. Sprague, Warner & Co.*, 281 N.W. 261 (Minn. 1938); *Codling v. Paglia*, 298 N.E.2d 622 (N.Y. 1973); *Krise v. Gillund*, 184 N.W.2d 405 (N.D. 1971); *Baab v. Shockling*, 399 N.E. 2d 87 (Ohio 1980); *Peterson v. Culp*, 465 P.2d 876 (Or. 1970); *Bridges v. Union Pac. R. Co.*, 488 P.2d 281 (Utah 1971). Other states retained the contributory negligence system on the basis that any change would have to be made by the legislature. 295 Md. at 456. *See, e.g., Golden v. McCurry*, 392 So. 2d 815 (Ala. 1980); *Steinman v. Strobel*, 589 S.W.2d 293 (Mo. 1979); *McGraw v. Corrin*, 303 A.2d 641 (Del. Super. Ct. 1973).

c. The *Harrison* Court: Wary of Overstepping

The Court in *Harrison* reviewed the numerous public policy issues to consider in making the determination to switch to a comparative negligence system. These included:

- The possible difficulty of accurately apportioning fault;
- The likelihood that more negligence cases would be submitted to a jury, and recovery left to the jury's "unfettered discretion";
- The existence of any public disapproval of the contributory negligence rule;
- The equity advanced by application of the contributory negligence rule, whereby neither injured party may recover where both parties were negligent;
- The likelihood that more plaintiffs would file suit under a comparative negligence system, flooding the courts, increasing the settlement value of cases and increasing the cost of insurance to the public;
- The effect of a comparative fault system on other fundamental areas of Maryland law, such as last clear chance, assumption of the risk, joint

and several liability, contribution, setoffs and counterclaims, and strict liability in tort; and

- The pros and cons of each "form" of comparative negligence, such as "pure," "slight/gross," "not as great as," and "not greater than."

Id. at 453-55.

The Court was persuaded that a change from contributory negligence to comparative negligence would "involve[] considerably more than a simple common law adjustment[.]" *Id.* at 455. The *Harrison* Court considered itself bound by *stare decisis* on the subject of contributory negligence. *Id* at 458. *Stare decisis* alone would not preclude the Court from changing or modifying a common law rule where changed circumstances or increased knowledge rendered the rule unsound. Nevertheless the Court recognized that declaration of Maryland public policy had always been, and remained, a unique function of the legislature. *Id.* at 460.

Maryland courts have historically deferred to the legislature where change to well-settled legal principles was sought. *See, e.g., Felder v. Butler*, 292 Md. 174 (1981) (dram shop liability); *Murphy v. Balt. Gas & Elec.*, 290 Md. 186 (1981) (duty of care owed a trespasser by property owner); *Austin v. City of Balt.*, 286 Md. 51 (1979) (governmental immunity); *Howard v. Bishop Byrne Home*, 249 Md. 233 (1968) (charitable immunity); *Matakieff v. Matakieff*, 246 Md. 23 (1967) (recrimination in divorce actions); *Courson v. Courson*, 208 Md. 171 (1959) (same); *Hensel v. Beckward*, 273 Md. 426 (1974) (boulevard rule); *Creaser v. Owens*, 267 Md. 238 (1972) (same); *Stokes v. Taxi Operators Ass'n*, 248 Md. 690 (1968) (interspousal immunity); *White v. King*, 244 Md. 348 (1966) (*lex loci delicti* choice of law principle), *reaffirmed in Hauch v. Connor*, 295 Md. 120 (1983); and *Cole v. State*, 212 Md. 55 (1957) (M'Naughten rule).

Notably, by the time of the *Harrison* decision, the General Assembly had already considered - and refused to enact - twenty-one bills introduced to replace the contributory negligence rule with a comparative negligence system. *Harrison*, 295 Md. at 462.[1] The *Harrison* Court found that the legislature's rejection of the proposed changes was indicative of its intention to retain the contributory negligence doctrine. *Id.*

Nor was there was simple judicial alternative. According to the Court:

> The comparative negligence doctrine is not . . . a unitary doctrine but one which has been adopted by other states in either a pure or modified form. Those who advocate one form of the doctrine tend to be critical of the others. Whether to adopt either pure or modified fault plainly involves major policy considerations. . . . Whether the "pure" proportional fault system is preferable to any of the several types of modified comparative negligence, or to the doctrine of contributory negligence, is plainly a policy issue of major dimension. Which of these doctrines best serves the societal need is a debatable question. Not debatable is the conclusion that a change from contributory negligence to any form of comparative negligence would be one of great magnitude, with far-reaching implications in the trial of tort actions in Maryland. All things considered, we are unable to say that the circumstances of modern life have so changed as to render contributory negligence a vestige of the past, no longer suitable to the needs of the people of Maryland. In the final analysis, whether to abandon the doctrine of contributory negligence in favor of comparative negligence involves fundamental and basic public policy considerations properly to be addressed by the legislature.

Id. at 463.

The Court of Special Appeals briefly revisited the issue in *Stewart v. Hechinger Stores Co.*, 118 Md. App. 354 (1997). *Stewart* involved a slip and fall claim. A jury had found in favor of the store owner based on the plaintiff's contributory negligence. *Id.* at 357. On appeal the plaintiff urged the Court to adopt a comparative negligence scheme.

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[1] Since then, another seventeen bills to abolish contributory negligence have died in the General Assembly.

The Court held that this question was properly decided by the General Assembly. *Id.* at 359-60. The *Stewart* Court also noted that a bill which would have replaced contributory negligence with comparative negligence in the most recent legislative session had failed by one vote to reach the floor of the House of Delegates. 118 Md. App. at 360 n.4. Since then, the General Assembly has rejected another seven bills to abolish contributory negligence.

IV. Common Law Courts' Deference to Legislative Law-Making

The question posed by the Court of Appeals' inquiry to the Rules Committee regarding its potential power to abrogate Maryland's contributory negligence law concerns rule-making on the subject of plaintiffs' fault. This substantive law question falls outside the Courts' authority to make rules of practice and procedure. As this section makes clear, comparative fault is a realm where the Court should not engage in common law *lawmaking*. In several instances, the Court has acknowledged that the General Assembly is the only lawmaking authority in Maryland which can properly develop any comparative fault regime.

Many cases have relied upon *Harrison* for the principle that only the General Assembly -- not the courts -- acts to overrule long-standing common law rules. In *Mason v. Board of Education*, 143 Md. App. 507 (2002), the Court was asked to determine when a plaintiff had reached the age of eighteen for limitations purposes. *Id.* at 508. The Court relied on *Harrison* in concluding that, in the absence of legislative action, it would continue to follow the common law rule holding that the limitations period began to run on the date of the birthday, and not on the day after. *Id.* at 515.

Harrison was cited in several decisions for the proposition that the court *could*, under the right circumstances, repeal common law without the input of the General Assembly, although the court did not find it necessary to overrule the principles at issue in every case. *See, e.g., Bozman v. Bozman*, 146 Md. App. 183 (2002) (interspousal immunity); *B&K Rentals & Sales v. Univ. Leaf Tobacco Co.*, 324 Md. 147, 596 A.2d 640 (1991) (eliminating *res gestae* in favor of F.R.E. 801(d)(2)(D)); *Julian v. Christopher*, 320 Md. 1, 575 A.2d 735 (1990) (implied reasonableness standard in leases); *Miles Lab. v. Doe*, 315 Md. 704 (1989) (strict liability in blood products cases); *Ireland v. State*, 310 Md. 328 (1987) (proper sentence for crimes of assault and battery); *Kelley v. R.G. Indus.*, 304 Md. 124 (1985) (strict liability of gun manufacturers), *superseded by* MD. ANN.CODE art. 27 § 36 I-h; *Boblitz v. Boblitz*, 296 Md. 242 (1983) (interspousal immunity). Nevertheless, in *State v. Minster*, the Court of Appeals refused to replace the common law "year and a day" rule in murder cases because it found that there were many possible alternatives to the rule. 302 Md. 240, 245-46. Instead, the Court called upon the General Assembly to hold hearings and determine the appropriate time period. *Id.*

Similarly, in *Frye v. Frye*, 305 Md. 542 (1986), the Court of Appeals refused to overturn the common law rule of parent-child immunity in motor tort cases. *Id.* at 567. The Court, relying on *Harrison*, noted that because changing the rule would have a significant impact on the state's carefully crafted insurance scheme, any change should be addressed by the legislature. *Id.*

Further, in *Gaver v. Harrant*, 316 Md. 17, 557 A.2d 210 (1989), the Court of Appeals refused to permit minors to assert claims for loss of parental society in personal

injury (as distinct from wrongful death) claims. *Id.* at 33. Although the Court asserted that it had the power to change long-standing common law rules, it recognized that a change had the potential to greatly expand liability for future tortfeasors and would permit awards based on uncertain, difficult-to-calculate damages. *Id.* at 30. The Court again deferred to the General Assembly. *Id.*

In *Fennell v. Southern Maryland Hospital Center*, 320 Md. 776 (1990), the Court declined to revise the common law to permit damages for "loss of chance of survival" claims in medical malpractice cases. A change in the law would implicate significant public policy concerns; the Court was particularly impressed by the fact that the General Assembly had repeatedly addressed the rising costs of medical malpractice insurance in recent sessions. *Id.* at 794.

In *State v. Wiegmann*, 350 Md. 585 (1998), the Court was asked to reject the common law rule permitting persons illegally arrested to resist arrest. *Id.* at 590. Relying on *Harrison*, the Court declined to do so. *Id.* at 607. Even though most other states had abrogated the defense, the Court concluded that the General Assembly was aware and approving of the defense as demonstrated by its previous decisions on the subject. *Id.* at 606. The Court could not determine that the defense was no longer consistent with Maryland public policy because the legislature had failed to act to change the law when it had the unequivocal power to do so.. *Id.* at 606-07.

The Court in *Moore v. State*, 388 Md. 623 (2005), reaffirmed *Harrison* and the principle that the General Assembly's failure to enact legislation is evidence of public policy. The Court held:

> Although the failure of a single bill in the General Assembly may be due to many reasons, and thus is not always a good indication of the Legislature's intent, under some circumstances the failure to enact legislation is persuasive evidence of legislative intent.
>
> Legislative inaction is very significant where bills have repeatedly been introduced in the General Assembly to accomplish a particular result, and where the General Assembly has persistently refused to enact such bills.
>
> As pointed out in the above-cited cases, the General Assembly's repeated refusal to enact bills, which would have adopted a party's particular view of the law, is strong evidence of legislative intent.

Id. at 641-42 (internal citations and quotations omitted).

The Court underscored its commitment to these principles as recently as January 2011. *See Potomac Valley Ortho. Assocs. v. Md. St. Bd. of Phys.*, No. 18, 2011 MD LEXIS 9, at * 25-26 (Md. Jan. 24, 2011). Relying on *Harrison* and similar cases, the Court held that the legislature's failure to pass a self-referral law for multi-specialty group practices evidenced the General Assembly's intent not to permit self-referrals. *Id.* at * 29.

The Court in *Harrison* adhered to longstanding principles of jurisprudence concerning common law law-making, separation of powers, and respect for the General Assembly. The Court's humility, exemplified by *Harrison*, inherently recognizes that contributory negligence and related doctrines are substantive law. Any place that the Court of Appeals would not travel out of respect for the General Assembly's policy-setting authority is similarly off-limits under the guise of fashioning rules of practice and procedure.

V. THE COMPLEXITY OF FASHIONING A NEW RULE FOR PLAINTIFFS' FAULT IN LIGHT OF RELATED STATUES AND COMMON LAW DOCTRINES

Contributory negligence has been the law of Maryland for over 150 years. *See Irwin v. Spriggs*, 6 Gill 200 (1847); *Negligence Systems: Contributory Negligence, Comparative Fault, and Joint and Several Liability*, p. 11, Department of Legislative Services (2004) (hereafter, "*Negligence Systems*"). The proponents of comparative negligence offer no compelling reason to change the established rule of contributory negligence.

Before taking the drastic step of abolishing contributory negligence and the fifeen decades of Maryland law shaping its application, it is wise to consider three aspects of introducing comparative fault: (1) the allocation of comparative fault must, in fairness, extend to all parties to the tort, thereby abolishing joint and several liability among defendants; (2) a comparative fault system must address all fault-based torts, not just those which have traditionally been called "negligence;" and (3) the statutes enacted around contributory negligence must be amended if contributory negligence is abolished.

a. A Fair Comparative Fault Regime Requires Abolition of Joint and Several Liability

Because a plaintiff, in order to recover in a contributory negligence jurisdiction, must play no role in his injury, it is reasonably fair to place the complete burden of damages on every liable defendant. The General Assembly adopted legislation to permit recovery of "excess" payments by way of a contribution claim. *See, e.g.,* MD. CODE ANN., CTS. & JUD. PROC., §§ 3-1401, 3-1409 (LexisNexis 2010). Nevertheless, each

defendant remains severally responsible for the whole amount of damages awarded to the plaintiff.

Once a plaintiff at fault can collect damages, however, the justification for joint and several recovery of damages disappears. Over seventy-five percent of states have modified joint and several liability. *Negligence Systems*, p. 17 and Appendix 2.

A comparative fault statute that retains pure joint and several liability is hopelessly flawed. Consider what happens to the defendant who contributes a marginal share of responsibility to the plaintiff's harm in the following scenario: Suppose Plaintiff is 40% at fault, Defendant 1 is 50% at fault, Defendant 2 is 10% at fault, and the verdict is for $100,000. The two defendants would jointly owe 60% of the verdict to the plaintiff, or $60,000. Under pure several liability, Defendant 2 can be made to pay $60,000 for contributing ten percent of the responsibility for harm of $100,000. Then, Defendant 2 can attempt something[2] from Defendant 1, who was the overwhelmingly responsible defendant. *This example shows that when both plaintiff and defendants are at fault for causing an accident, there is no reason to protect only the plaintiff from collection risks.* In the example used above, Plaintiff contributed four times as much responsibility as Defendant 2, but Defendant 2 alone bears the risk of collection from Defendant 1, who contributed five times as much responsibility as Defendant 2. In light of these inequitable possibilities, imposing a fair comparative fault regime requires the abolition of pure joint and several liability.

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[2] Maryland's statute creating a right of contribution among joint tortfeasors provides for *per capita* liability among joint tortfeasors. *Lahocki v. Contee Sand & Gravel Co.*, 41 Md. App. 579 (1979), *rev'd on other grounds*, 286 Md. 714 (1980). Whatever fairness justifies this outcome in a contributory negligence regime disappears once responsibility is allocated among all parties to the suit and the fiction of equal responsibility among all joint tortfeasors is abandoned. Nonetheless, the *per capita* rule of the Contribution Act is beyond the authority of the courts to abrogate.

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Under the contributory negligence rule, there is no allocation of fault, which is a fundamental justification of Maryland's statute permitting joint tortfeasors to recover excess payments from one another. MD. CODE ANN., CTS. & JUD. PROC.., §§ 3-1401 to 3-1409 (LexisNexis 2010) (hereafter "Contribution Act"). Under the current statute, assuming two joint tortfeasors, a co-defendant who contributed 10% of the responsibility can be made to pay 100% of the liability, and then may employ joint and several liability principles to recover from his joint tortfeasor 50% of the liability payout. *See Lahocki*, 41 Md. App. 579; *supra*, n.2. Although not exactly fair to the defendants, this outcome is justified by the lack of contributory negligence on the part of the plaintiff. Under a contributory negligence regime, a faultless victim is allowed to collect from any at-fault defendant. Once fault is allocated between plaintiffs and defendants, as in comparative negligence, there is no reason to allow a plaintiff to collect for his own fault or to require a defendant to pay for another's fault.

There is no current "majority rule" for joint and several liability. The lack of consensus highlights the policymaking demands inherent in switching to a comparative fault regime. The current Restatement of Torts provides a number of reasons why American law has not settled on any particular balance of the interests bearing upon joint or several liability in a comparative fault regime. These reasons include the different policy choices made by different legislatures, and that "different foundational perspectives on tort law justify differing resolutions of the appropriate use of joint and several or [only] several liability." RESTATEMENT (THIRD) OF TORTS, § 10, cmt. A (hereinafter "RESTATEMENT (THIRD)). Rather than undertaking the officious task of purporting to "restate" American law regarding joint or several liability, the Restatement

instead identifies five different "tracks" into which different states' laws can be categorized. RESTATEMENT (THIRD), §§ A18 – E19. Likewise, rule-making by the Court of Appeals is an unwarranted and unsanctioned intrusion into the realm of policymaking controlled by the General Assembly and an affront to its long-expressed foundational principles.

b. Specific Issues Which Must Be Addressed by Any New Regime

i. Any Fair Comparative Fault Regime Should Apply to Product Liability Cases

Product liability cases usually are pleaded by asserting negligence, "strict" product liability, and UCC warranty claims. The distinctions between these theories are dwarfed by their sharing of fault as the basis of liability. *Phipps v. Gen. Motors*, 278 Md. 337, 350-52 (1976); *see also Owens-Illinois v. Zenobia*, 325 Md. 420, 432-38 (1992); *Klein v. Sears, Roebuck & Co.*, 92 Md. App. 477, 492 (1992) ("Maryland's view of strict liability in tort for injuries caused by a dangerous and defective product is that such tort is akin to negligence."). Each of these theories can be pleaded in the same product liability suit, and each is proven with the same evidence. RESTATEMENT (THIRD) § 2, comment n.

As the law stands in Maryland, contributory negligence is a complete defense to negligence and UCC warranty counts, and is no defense at all to a count of strict liability. *See* Gardner M. Duvall, *Plaintiffs' Fault in Products Liability Cases: Why Are They Getting Away With It in Maryland?*, 30 U. BALT. L. REV. 255, 271 (2001) (hereafter, "*Plaintiffs' Fault*").

The exclusion of the contributory negligence defense in a strict product liability case is a purely historical accident resulting from the erroneous treatment of dicta as

precedent. *Plaintiffs' Fault*, at 260-262. Any difference in available defenses to different counts in the general domain of product liability should flow from a meaningful difference in the elements of the action. Instead, the only clear difference between "strict product liability" and "negligence" counts in a product liability case is the subsequent treatment of plaintiff's fault. *Zenobia*, 324 Md. at 435 n.7. That difference, in turn, flows from dicta in a product liability case where no party alleged that there was a contributory negligence defense.[3]

This conceptual muddle regarding the effect of plaintiff's fault results in holding that where a drunk driver collides with a tree, his undeniable fault has no effect on his claim that his van was not crashworthy. *Binakonsky v. Ford Motor Co.*, 133 F.3d 281 (4th Cir. 1988) (applying Maryland law). In *Binakonsky*, the court rejected plaintiff's negligence count as a matter of law because of contributory negligence, but allowed the strict product liability count to proceed.

This outcome needs to be juxtaposed with the hypothetical outcome in a comparative fault regime for negligence claims. Comparative fault allows a plaintiff at fault to recover *some* of his damages. As Maryland law has been interpreted today, however, a plaintiff at fault in a strict product liability claim may recover *all* of his damages.

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[3] Footnote 7 in *Owens-Illinois* cites *Ellsworth v. Sherne Lingerie*, 303 Md. 581 (1985). *Ellsworth*, however, did not involve a contributory negligence defense, or any affirmative fault-based defense, to the strict product liability count. Furthermore, contributory negligence is included only at the conclusions in a "general discussion" of defenses to a strict products liability claims. *Id.* at 597. The Court cites *Anthony v. Sheehan Pools*, 295 Md. 285, 299 (1983) for the proposition that "contributory negligence is not a defense in an action of strict liability in tort." *Ellsworth*, 303 Md. at 597. *Anthony*, however, has no such absolute holding, and instead follows §402A of the Restatement (Second) of Torts in holding that a plaintiff's failure to inspect a product for safety defects is not contributory negligence which bars a strict product liability claim. *Anthony*, 295 Md. at 299.

In the context of product liability claims, the Court of Appeals has distinguished negligence from strict product liability only by the affirmative defenses available to the defendant. Nevertheless, the American Law Institute has abandoned as unsound any distinction between product liability pleaded in negligence, warranty or strict liability. RESTATEMENT (THIRD),§ 2, comment n. Moreover, two-thirds of American states and several territories accept plaintiff's fault as relevant in a product liability case. *See* Appendix. If a new system effectuating comparative fault is indeed ushered in, the new laws must address the advisability of preserving Maryland's treatment of plaintiffs' recovery in strict liability products claims.

ii. Failure to Wear A Seat Belt is Fault which any Comparative Fault Regime Should Address

If comparative fault becomes the law of Maryland, then the factfinder should be able to consider the failure to use seat belts as fault . Current Maryland law generally requires the use of seat belts, but does not treat a violation of this law as contributory negligence. MD. CODE ANN., TRANSP., § 22-412.3 (LexisNexis 2010). Failure to wear a seat belt, as a crime, should be considered negligence *per se*. The General Assembly, however, has legislated that failure to wear a seat belt is contributory negligence. *Id.* It is beyond the procedural rule-making authority of the Court of Appeals to amend this statute to become coherent in a comparative fault regime.

V. CONCLUSION

Contributory negligence is a policy choice that places the onus on the party seeking recovery to demonstrate that they have "clean hands" in the interaction that gives rise to the claim for compensation. In short, contributory negligence bars a party who

played a role in their injury from recovering anything. More than 150 years ago, the Court of Appeals accepted this rule as Maryland's common law, and since then, the Court has refused to change the rule. The General Assembly has likewise refused to abandon contributory negligence.

A number of legal doctrines have co-evolved with contributory negligence, both by statute and by common law. Each of these doctrines is part of Maryland's substantive law, and are counterbalanced by and inextricably intertwined with Maryland's basic tradition of contributory negligence. In the allocation of powers stated in the Maryland Constitution and Declaration of Rights, it falls to the General Assembly to sort through any changes in this complex intersection of law and policy. The rule-making authority of the Court of Appeals neither sanctions nor is prudently directed to deciding whether the contributory negligence regime should properly remain the law of Maryland.

APPENDIX OF STATES WHICH REDUCE RECOVERIES IN PRODUCT LIABILITY CASES FOR PLAINTIFF'S FAULT

State	Case law	Statute
Alaska	*Butaud v. Suburban Marine & Sporting Goods*, 555 P.2d 42 (Alaska 1976)	
Arkansas		Ark. Code Ann. § 16-64-122
California	*Daly v. Gen. Motors Corp.*, 575 P.2d 1162 (Cal. 1978)	
Colorado	*Huffman v. Caterpillar Tractor Co.*, 908 F.2d 1470 (10th Cir. 1990)	Colo. Rev. Stat. § 13-21-406
Connecticut	*Champagne v. Raybestos-Manhattan, Inc.*, 562 A.2d 1100 (Conn. 1989)	
Florida	*West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976)	Fla. Stat. § 768.81
Hawaii	*Kaneko v. Hilo Coast Processing*, 654 P.2d 343 (Haw. 1982); *Armstrong v. Cione*, 738 P.2d 79 (Haw. 1987)	
Iowa		Iowa Code Ann. §§ 668.1, 668.3
Idaho		Idaho Code § 6-1304
Illinois	*Coney v. J.L.G. Indus.*, 454 N.E.2d 197 (Ill. 1983	
Indiana		Burns Ind. Code Ann. § 34-20-
Kansas	*Kennedy v. City of Sawyer*, 608 P.2d 1379 (Kan. App. 1980), *rev'd on other grounds*, 618 P.2d 788 (Kan. 1980)	K.S.A. § 60-258a
Kentucky		Ky. Rev. Stat. Ann. § 411.182
Louisiana	*Bell v. Jet Wheel Blast*, 462 So. 2d 166 (La. 1985)	La. C.C. Art. 2323
Maine		Me. Rev. Stat. Ann. tit. 14, § 156
Michigan		Mich. Comp. Laws Ann. § 600.2959
Minnesota	*Omnetics, Inc. v. Radiant Tech Corp.*, 440 N.W.2d 177 (Minn. App. 1989)	Minn. Stat. Ann. § 604.01
Mississippi	*Edwards v. Sears & Roebuck*, 512 F.2d 276 (5th Cir. 1975)	Miss. Code Ann. § 11-7-15
Missouri		Mo. Ann. Stat. § 537.765
Montana		Mont. Code Ann. § 27-1-719

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State	Case law	Statute
New Hampshire	*Thibault v. Sears Roebuck*, 395 A.2d 843 (N.H. 1978)	
New Mexico	*Marchese v. Warner Comm.*, 670 P.2d 113 (N.M. App. 1983)	
New York		N.Y.C.P.L.R. § 1411
North Dakota		N.D. Cent. Code § 32-03.2-02
Oregon	*Sandford Chevrolet*, 642 P.2d 624 (Or. 1982)	
Puerto Rico	*McPhail v. Municipality of Culebra*, 598 F.2d 603 (1st Cir. 1979)	P.R. Laws Ann. tit. 31, § 5141
Rhode Island	*Fiske v. MacGregor Div.*, 464 A.2d 719 (R.I. 1983)	
Tennessee	*Whitehead v. Toyota Motor Corp.*, 897 S.W. 2d 684 (Tenn. 1995)	
Texas		Tex. Civ. Prac. & Rem. Code Ann. § 33.003
Utah		Utah Code Ann. § 78B-5-817 to 78B-5-823
Vermont	*Webb v. Navistar*, 692 A.2d 343 (Vt. 1996)	
Virgin Islands	*Murray v. Fairbanks Morse*, 610 F.2d 149 (3d Cir. 1979)	
Washington	*Lundberg v. All-Pure Chem. Co.*, 777 P.2d 15 (Wash. App. 1989)	Wash. Rev. Code Ann. § 4.22.005 et seq.
West Virginia	*Star Furniture v. Pulaski Furniture*, 297 S.E.2d 854 (W. Va. 1982)	
Wisconsin	*Dippel v. Sciano*, 155 N.W.2d 55 (Wis. 1967)	