In New York, Equitable Apportionment of Fault Among Joint Tortfeasors is an Affirmative Defense and Not an Absolute Right

On July 29, 2008, the United States Court of Appeals for the Second Circuit addressed an unsettled issue of New York law in the implementation of New York General Obligations Law ("NY GOL") § 15-108(a).[1] A plaintiff in New York, who settles with one of several joint tortfeasors, is subject to § 15-108(a), which provides that its claim against the remaining (non-settling) tortfeasors is reduced by the greater of:

- the amount paid for the release;
- the amount stipulated in the release; and
- the released tortfeasor's equitable share of the plaintiff's damages.

The New York Court of Appeals has held that, while the first two categories of reductions (the amount paid and the amount stipulated) are available at any point before final judgment is entered, the third category of reduction (the equitable share) is lost where a defendant fails to seek apportionment of liability until after a jury's liability verdict.[2] The question recently presented to the Second Circuit was whether a joint totfeasor forfeits its right to a setoff in the amount of the settling defendant's equitable share if it does not seek apportionment until after summary judgment is entered against it on the issue of liability.[3] The Court of Appeals held that a defendant forfeits this right if it waits until after summary judgment on liability to seek an equitable share apportionment.[4]

I. FACTS AND PROCEDURAL HISTORY

The appellants, passengers involved in a three car rear-end collision, filed a personal injury suit against joint defendants in the Eastern District of New York. According to the police report, a vehicle driven by defendants R. Byrd Trucking Company collided with a vehicle driven by defendants D.P. Gallimore & Sons, forcing it into the rear of the car carrying the appellants.[5] Shortly after filing suit, the appellants settled with the Byrd defendant for $35,000 and moved for summary judgment against Gallimore under a theory of negligence. In its response, Gallimore did not move to amend its answer to assert § 15-108 as a defense and the district court granted the appellants' motion for summary judgment.[6] The case was then referred to a Magistrate Judge and both parties submitted supplemental briefings to determine a basis and method for calculating damages. Gallimore submitted that it could still seek apportionment because § 15-108 rights cannot be waived "prior to trial."[7] The Magistrate Judge agreed, holding that the right to an apportionment was not lost and finding the Byrd defendants were 90% liable and Gallimore was 10% liable.[8]

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1 *Schipani* v. *McLeod*, No. 06-5733-cv, 2008 WL 2890466 (2d Cir. July 29, 2008).

2 *See Whalen* v. *Kawasaki Motors Corp., U.S.A.*, 92 N.Y.2d 288, 292, 680 N.Y.S.2d 435, 703 N.E.2d 246 (1998).

3 *Schipani*, 2008 WL 2890466 at *1.

4 *Id*. at *5.

5 *Id*. at *1.

6 *Schipani* v. *McLeod*, No. 00-CV-4343, 2004 WL 825583, at * 2 (E.D.N.Y. Mar. 31, 2004) (Johnson, J.).

7 *Schipani*, 2008 WL 2890466 at *2.

8 *Id*. at *2 (*citing Schipani* v. *McLeod*, No. 00-CV-4343, 2006 WL 3486778, at *4 (E.D.N.Y. Dec. 1, 2006) (Gold, J.)).

On appeal, the appellants contended that the Magistrate Judge erred in permitting an apportionment of liability after summary judgment. Finding no logical distinction between a jury verdict and an award of summary judgment on the issue of liability, the Second Circuit vacated the district court's judgment awarding Gallimore a setoff in the amount of the Byrd Defendants' equitable share, holding that liability must be apportioned at the time that it is determined and that a non-settling defendant's failure prior to summary judgment to raise equitable share apportionment waives the affirmative defense.

II. RATIONALE OF THE COURT

The Court of Appeals relied on *Whalen* v. *Kawasaki Motors Corp., U.S.A.*, where New York's highest court had cautioned that "as an affirmative defense, General Obligations Law § 15-180(a) must be pled by a tortfeasor seeking its protection."[9] In *Whalen*, the plaintiff settled with one defendant and proceeded to trial against another joint tortfeasor under a theory of negligence. The remaining defendant, after a jury verdict, sought to assert § 15-108.[10] The Court of Appeals determined that, by proceeding to a liability verdict, the defendant foreclosed any possibility of the jury determining the settling defendant's equitable share of the fault, "and in that respect foreclosed use of that prong of the statute's benefits."[11]

In *Schipani*, the Second Circuit held that "negligence is a necessary - but not sufficient - condition for liability. . . [i]n order for the defendant to be held liable, the plaintiff must show not only that the defendant was negligent, but also that the defendant's negligence was a substantial cause of the events which produced the injury."[12] Thus, when a court grants summary judgment as to liability, it necessarily determines both negligence and causation. Causation of injury and apportionment of fault are two components of the liability determination. "In judging Gallimore *liable*, the district court necessarily found that it caused the accident. The burden was on Gallimore to argue that other tortfeasors did as well."[13] The Second Circuit noted that fundamental fairness cannot sustain an outcome that would turn silence into a tactical advantage. "Non-settling defendants would have an incentive to wait until the latest allowable moment to seek apportionment, ambushing unsuspecting plaintiffs in the process."[14]

Despite holding that a defendant forfeits its right under § 15-108(a) to an offset in the amount of the settling defendant's equitable share if it waits until after summary judgment on liability to seek an apportionment, the Second Circuit remanded to permit an offset in the fixed amount that plaintiffs received from the settling defendants for their release. Offsetting the fixed amounts in subparts (1) and (2) of § 15-108(a) for the amount paid or stipulated for a release would not entail a new trial, and the Second Circuit found no prejudice to plaintiffs in implementing that offset. "A plaintiff must point to more than the mere passage of time in order to prove such prejudice."[15]

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9 *Whalen*, 92 N.Y.2d at 293.

10 *Schipani*, 2008 WL 2890466 at *2 (*citing Whalen*, 92 N.Y.2d at 291).

11 *Id*. at *3 (*citing Whalen*, 92 N.Y.2d at 292) (holding that according to § 15-108 the first two reductions were preserved, however, the third is forfeited if not raised in the pleadings as an affirmative defense prior to a liability verdict).

12 *Id*. at *4 (internal citations omitted).

13 *Id*. (*citing Bigelow v. Acands, Inc.*, 196 A.D.2d 436 (1st Dep't 1993)).

14 *Id*. at *5.

15 *Id*. at *6.

If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; or John Schuster at 212.701.3323 or jschuster@cahill.com.