No. 123132

In the

Supreme Court of Illinois

SUSAN D. SPERL, Ind., etc., et al.,

Plaintiffs,

v.

C.H. ROBINSON WORLDWIDE, INC., et al.,

Defendants.

C.H. ROBINSON COMPANY, et al.,

Appellants,

v.

TOAD L. DRAGONFLY EXPRESS, INC.,

Appellee.

On Petition for Leave to Appeal from the Third Judicial District, No. 3-15-0097.
There Heard on Appeal from the Circuit Court of the Twelfth Judicial Circuit,
Will County, Illinois, Nos. 04 L 428, 05 L 812 and 09 L 05 (Consolidated).
The Honorable **John C. Anderson** and **Michael J. Powers**, Judges Presiding.

REPLY BRIEF OF APPELLANTS C.H. ROBINSON COMPANY, C.H. ROBINSON WORLDWIDE, INC., C.H. ROBINSON INTERNATIONAL, INC. and C.H. ROBINSON WORLDWIDE LTL, INC.

DON R. SAMPEN (ARDC No. 2448351)
(dsampen@clausen.com)
THOMAS H.RYERSON (ARDC No. 2435918)
(tryerson@clausen.com)
EDWARD M. KAY (ARDC No. 3123415)
(ekay@clausen.com)
CLAUSEN MILLER, P.C.
10 South LaSalle Street
Chicago, Illinois 60603
(312) 855-1010

Attorneys for Appellants

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Carolyn Taft Grosboll
SUPREME COURT CLERK

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POINTS AND AUTHORITIES

ARGUMENT

I. UNDER THE CONTRIBUTION ACT AND AS A MATTER OF EQUITY, A VICARIOUSLY-LIABLE DEFENDANT IS ENTITLED TO CONTRIBUTION FROM ANOTHER SUCH DEFENDANT

A. Section 2 of the Contribution Act Permits CHR to Obtain Contribution

Part I of the Argument section of CHR's opening brief addressed contribution based on the theory that both CHR and Dragonfly were vicariously liable. CHR set forth reasons why the language of sections 2 and 3 of the Contribution Act provided CHR a right of contribution. (Op. Br. 12-16.) In response, Dragonfly relies on the Third District majority opinion and this Court's decision in *American National Bank & Trust Co. v. Columbus-Cuneo-Cabrini Medical Center*, 154 Ill. 2d 347 (1992), to argue that the Act applies only to parties "at fault in fact." (Dragonfly Br. 9-12.)

The argument fails to account for the full scope of the *American National Bank* decision. It also fails to account for contemporaneous and later case law developments. *American National Bank*, for example, did speak in terms of the Contribution Act addressing "the relative culpability of tortfeasors at fault in fact." 154 Ill. 2d at 354. But it also recognized that where a vicariously liable principal has an interest indistinguishable from "'other tortfeasors' at fault in fact . . . [t]he Contribution Act should . . . apply." *Id.* at 355. This Court appears to have anticipated that the Act would apply in a case such as the instant one where CHR's contribution interests are closely akin to those of other tortfeasors.

In any event, *Vroegh v. J&M Forklift*, 165 Ill. 2d 523 (1995), and other cases decided after *American National Bank*, used broad language recognizing that the Act applies to tort defendants generally, and not just defendants at fault in fact. (*See* CHR Op. Br. 13-14.) Consistent with these decisions are those holding that actual tort liability is not

even a prerequisite for contribution; mere allegations like those initially made against CHR are sufficient. (*See* CHR Op. Br. 14-15.) *See also FDIC v. Lowis & Gellen, LLP*, No. 11-cv-5902, 2013 U.S. Dist. Lexis 28261, at *22-23 (N.D. Ill. 2013) ("there need not be actual tort liability in order to state a cause of action for contribution"), *quoting People v. Brockman*, 143 Ill. 2d 351, 371-372 (1991). Dragonfly does not respond to any of these points or authorities.

The two cases it does address, and that it tries to distinguish, cut against it. (*See* Dragonfly Br. 12-13.) *Equistar Chemical L.P. v. BMW Constructors, Inc.* 353 Ill. App. 3d 593 (3d Dist 2004), and *Ramsey v. Morrison*, 175 Ill. 2d 218 (1997), are not on "all fours" with the instant case, as CHR pointed out in its opening brief (p. 11). But they do involve judicial approval of the proposition that a vicariously liable defendant – like Dragonfly claims to be – is not immune from having to make contribution. To that extent they undermine any proposed rule that would strictly limit the Contribution Act's application to parties at fault in fact.

In distinguishing *Equistar* and *Ramsey*, moreover, Dragonfly relies on the Third District majority opinion in attributing significance to the fact that the vicarious liability of Dragonfly and CHR arose out of the same agent's conduct. (Dragonfly Br. 12-13; *see also* A21-22 ¶¶ 40-42.) Neither Dragonfly nor the majority opinion explains why the involvement of a single agent, rather than a separate agent for each principal, should make a difference. The unarticulated supposition seems to be that if each principal became vicariously liable because of the acts of a different agent, then section 2 of the Contribution Act would, in fact, recognize the right of one vicariously-liable principal to seek

contribution from the other. Such a result cuts even more deeply against Dragonfly's argument that the Contribution Act applies only to parties at fault in fact.

A vicariously liable defendant's basic right to contribution under section 2, however, should not turn on the number of agents involved in the first place. As set forth in CHR's opening brief (p. 13), sections 2 and 3 of the Contribution Act determine pro rata share in accordance with each defendant's "relative culpability," the relative culpability of CHR and Dragonfly was equal, and CHR paid in excess of its share relative to Dragonfly. Dragonfly does not take issue with any of these propositions. The Act therefore should be found to authorize contribution in favor of CHR and against Dragonfly.

Finally, in a case involving different circumstances, such as where each of two principals' vicarious liability is incurred through different agents, it may be that an approach to contribution different from that set forth here would be appropriate. Where a single agent is involved, however, the only sensible reading of the Act is that the vicariously liable principals, through the exercise of contribution rights, share liability equally.

B. Section 3 of the Act Provides a Substitute for Determining Pro Rata Shares, if One Is Needed

Apart from its references to *American National Bank*, Dragonfly's main argument with respect to application of the second and third sentences of section 3 of the Contribution Act, is to repeat the statement made by the panel majority that "Henry's share of the common liability was not uncollectible, it was nonexistent." (Dragonfly Br. 14; A30 ¶ 59.) CHR addressed the panel majority's statement in its opening brief (pp. 16-17.) The only point further to be made by way of reply is that Dragonfly, and the panel's statement on which Dragonfly relies, are flatly wrong. Henry's share of the common liability to the

plaintiffs was 100% prior to satisfaction of the judgments by CHR. The panel itself seemed to so recognize earlier in the same paragraph quoted by Dragonfly. (*See* A30 ¶ 59 (referring to "Henry's relative culpability (100%)".) The last two sentences of section 3, moreover, refer to the "obligation" or "uncollectible obligation" of the judgment proof tortfeasor. In the context of this case, Henry's obligation, as referenced in section 3, is the full amount of the underlying judgements, $23,275,000, plus post-judgment interest.

Dragonfly also asserts that "the judgment was equally uncollectible against Dragonfly as against Henry" and that Dragonfly's sole asset is its insurance policy. (Dragonfly Br. 14; *see also* p. 15-16.) The uncollectability of the judgment against Henry is a matter of record, by stipulation. (R. C9313; *see also* Op. Br. 16.) So far as CHR is aware, the collectability of the judgment against Dragonfly is not a matter of record. Any argument based upon such an assertion therefore should be disregarded. Even if the assertion were true, however, it would have no effect on CHR's right to obtain a contribution judgment against Dragonfly. Nor would it have an effect on CHR's right to satisfy such a judgment through any and all insurance proceeds of which Dragonfly may be the beneficiary.

C. Contribution Also Should Be Allowed for Equitable and Settlement Reasons

Concerning the equitable and settlement purposes of the Contribution Act, Dragonfly does not disagree that CHR's interpretation of the Act would foster those purposes. Rather, it appears to argue that giving effect to equitable considerations would amount to having this Court "rewrite a clear and unambiguous statute." (Dragonfly Br. 15.)

Although the Contribution Act may be unambiguous as far as it goes, it does not expressly address contribution for vicariously liable defendants. Nonetheless, the language is sufficiently clear to bestow contribution rights and obligations on such defendants in a manner that comports with the important purposes of the Act most recently recognized by this Court in *Antonicelli v. Rodriguez*, 2018 IL 121943 ¶ 13 (2018). (*See* Op. Br. 17-18.) Dragonfly cites no language in the Act that would be "re-written" by including vicariously liable defendants within its scope and accommodating those purposes. The interpretation Dragonfly proposes, moreover, is one that would render it scot-free of liability. Not even Dragonfly claims that that resolution is equitable.

Hence, the purposes of the Act weigh in favor of reversal.

Dragonfly also reasserts its inability to pay a judgment (Dragonfly Br. 15-16), which CHR already has addressed (*supra* p. 4). The only other argument it makes is that a plaintiff has a common law right to collect a judgment from any jointly and severally liable defendant. (Dragonfly Br. 16.) That argument is irrelevant to CHR's contribution rights.

II. DRAGONFLY'S ADMISSIONS OF FAULT WERE JUDICIAL ADMISSIONS THAT PROVIDE A SEPARATE BASIS FOR CONTRIBUTION

Dragonfly makes several arguments regarding its judicial admissions of negligence. Each may readily be resolved.

A. Dragonfly Is Bound by Its Judicial Admissions

Initially, it defines judicial admissions as "unequivocal statements by a party about a concrete fact within that party's knowledge," and cautions that parties are not bound by admissions of law. (Dragonfly Br. 17.) In reciting these principles, Dragonfly does not controvert that its admissions were, in fact, judicial admissions. Negligence, moreover, if

contested, is the quintessential fact issue. Illinois Pattern Jury Instructions so acknowledge when defining "negligence" as follows:

> 10.01 Negligence--Adult—Definition. When I use the word "negligence" in these instructions, I mean the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not, under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. ***That is for you to decide***.

(Emphasis added.) *See also Osborne v. O'Brien*, 114 Ill. 2d 35, 41 (1986) ("If [the defendant] makes a showing sufficient to raise an issue of fact, the question of his negligence is for the jury"). Negligence thus is for the jury to decide because it typically involves a question of fact. Negligence is what Dragonfly admitted. Whether its principals failed to act as reasonably careful persons, moreover, is plainly a matter within Dragonfly's knowledge.

B. No Necessity Exists For Independent Negligent Acts

Relying upon the panel majority's opinion, Dragonfly further argues that CHR never proved up "any independent acts of negligence by Dragonfly," even though CHR had the opportunity to do so. (Dragonfly Br. 17-19.) Dragonfly, however, admitted its "negligence," *i.e.*, that it acted below a reasonable standard of care. (*See* IPJI 10.01, above.) An admission of "negligence" is ***fundamentally inconsistent*** with an admission of vicarious liability. Vicarious liability does not involve fault at all, according to both Dragonfly and the Third District. (*See* A13-14 ¶¶ 28-29; Dragonfly Br. 12.) Negligence does. Thus, whether Dragonfly's negligence was "independent," or whether its negligence involved joint conduct with Henry, is beside the point. It acted negligently, with fault, and its negligence was a proximate cause of the plaintiffs' injuries. (*See* Op. Br. 19.) Of course, because of Dragonfly's judicial admissions, the question of its negligence was withdrawn

from further contention, as established by undisputed case law (Op. Br. 20) that Dragonfly ignores. No further submission of evidence by CHR therefore was necessary.

C. Dragonfly Admitted Negligence, Not Agency Liability

Dragonfly characterizes CHR's argument as claiming that Dragonfly's vicarious liability makes it more at fault than CHR. (Dragonfly Br. 19.) But CHR has never made such a claim. If Dragonfly was vicariously liable, then its contribution obligations are set forth in Part I of this Argument, above. CHR's claim that Dragonfly is more at fault than CHR is based on Dragonfly's admissions of negligence, which do not give rise to vicarious liability. Nowhere in the record of the underlying tort trial did Dragonfly ever claim that it lacked fault or was only vicariously liable. Those claims were first made only after the contribution proceedings got under way.

Dragonfly also claims that it should be given some kind of credit for not insisting on a "trial over issues not truly contested" such as its liability "under an agency theory." (Dragonfly Br. 19.) As set forth in the trial judge's straightforward instructions, however, Dragonfly admitted its liability under a negligence theory, not an agency theory. (*See* Op. Br. 19.) Dragonfly's vicarious liability and agency arguments are a fantasy.

D. The Federal Regulation Contemplates Direct Liability

Dragonfly further argues that the federal regulation that required it to retain "exclusive possession, control, and use of the equipment" being operated by Henry at the time of the accident, imposed upon Dragonfly only vicarious liability and not direct liability for the plaintiffs' deaths and injuries. (Dragonfly Br. 19-20.) It also cites cases in which the regulation has been found to impose vicarious liability.

In none of the cases it cites, however, was the distinction between direct and vicarious liability raised as an issue. Indeed, in most cases it makes no difference. Where

the distinction does make a difference, however, the rules governing statutory interpretation should govern. As noted in CHR's opening brief (p. 23), the regulation does not use the term "vicarious," and it requires that Dragonfly be found to have had "***exclusive*** possession, control and use" of the leased equipment. Giving meaning to the regulation's express language necessitates the imposition of the same kind of liability upon the carrier – direct liability – as would be imposed upon the driver. The regulation's language otherwise would be rendered superfluous. *See Slepicka v. Illinois Department of Public Health*, 2014 IL 116927 ¶ 14 ("Each word, clause and sentence of a statute must be given a reasonable construction, if possible, and should not be rendered superfluous"). Direct liability therefore should be found.

E. Section 3 Applies

Finally, Dragonfly argues once again that Henry's lack of contribution liability to CHR protects Dragonfly from the operation of section 3 of the Contribution Act. (Dragonfly Br. 21.) CHR has already replied. (*See* pp. 3-4, *supra*.) No further response therefore is necessary.

F. Alternative Amounts of Contribution Are Not Contested

Dragonfly does not address the alternative amounts of contribution discussed in CHR's opening brief (pp. 21-25). If this Court agrees that Dragonfly has admitted its culpability, CHR therefore asks that it be awarded 100% contribution from Dragonfly, plus all post-judgment interest.

III. CONCLUSION

Dragonfly has ignored many, if not most, of the matters raised by CHR in support of reversal. It also persists in the notion – without citation to any record reference – that it admitted only vicarious liability. Whether Dragonfly's liability is vicarious or direct,

however, both the language and purposes of the Contribution Act support an award of contribution. CHR therefore once again asks this Court to clarify Illinois law and determine that, in the circumstances reflected here, a vicariously-liable defendant, such as CHR, has just as great, if not greater, contribution rights as any other defendant.

Dated: July 5, 2018

Respectfully Submitted By,

CLAUSEN MILLER P.C.

By: */s/ Don R. Sampen*
One of the attorneys for petitioners

Don R. Sampen
Thomas H. Ryerson
Edward M. Kay
CLAUSEN MILLER, P.C.
10 S. LaSalle St., 16th Floor
Chicago, IL 60603
312-606-7803

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a)(and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 9 pages.

Dated: July 5, 2018

/s/ Don R. Sampen
Don R. Sampen

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

SUSAN D. SPERL, Ind., etc., et al., *Plaintiffs,* v. C.H. ROBINSON WORLDWIDE, INC., et al., *Defendants.*	)	No. 123132
C H. ROBINSON COMPANY, et al., *Appellants,* v. TOAD L. DRAGONFLY EXPRESS, INC., *Appellee.*	)	

The undersigned, being first duly sworn, deposes and states that on July 5, 2018, there was electronically filed and served upon the Clerk of the above court the Reply Brief of Appellants and that on the same day, a pdf of same was e-mailed to the following counsel of record:

Thomas P. Burke
(tburke@querrey.com)
QUERREY & HARROW, LTD.
175 West Jackson Boulevard
Suite 1600
Chicago, Illinois 60604

David M. Lewin
(dmlewin@lewinlg.com)
LEWIN LAW GROUP, PC
175 West Jackson Boulevard
Suite 1600
Chicago, Illinois 60604

Within five days of acceptance by the Court, the undersigned states that he will send to the above court thirteen copies of the Brief bearing the court's file-stamp.

/s/ Don R. Sampen
Don R. Sampen

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Don R. Sampen
Don R. Sampen