



Contributory Negligence Defense Not Abolished in Professional Negligence Cases

Todd A. Lubben

www.brownjames.com

The Western District of the Missouri Court of Appeals, in the recent case of *Children's Wish Foundation International, Inc. v. Mayer Hoffman McCann PC*, 2010 WL 1656454 (Mo. App. W.D. April 27, 2010), confirmed that the contributory negligence defense may apply in certain professional negligence cases. Under that defense, a plaintiff cannot prevail on a negligence claim if the jury finds that the plaintiff is partially at fault.

In *Children's Wish Foundation*, an accounting firm was accused of overstating a charitable organization's contributions by \$1.3 million. As a result of the erroneous financial statements, the organization incurred legal fees in a tax dispute while also suffering damage to its reputation.

At trial, the accounting firm argued the \$1.3 million overstatement was the charity's fault because the organization had provided the accounting firm with erroneous records. The court sided with the accounting firm and allowed the accounting firm to proceed on the "contributory negligence" defense. Based on that defense, the jury was instructed to return a verdict for the accounting firm if the jury believed the charitable organization's negligence contributed to its damages. The jury entered a defense verdict for the accounting firm.

On appeal, the charity argued it was improper to instruct the jury on the contributory negligence defense. The charity sought a comparative fault instruction that would only reduce its damages based on its percentage of fault instead of completely negating its claim for damages. The organization cited a 1983 Missouri Supreme Court opinion that purported to abolish contributory negligence in favor of a comparative fault scheme.

The Missouri Court of Appeals rejected the charity's appeal, confirming that contributory negligence may apply in negligence claims for economic loss. In general, contributory negligence was only abolished in negligence actions seeking to recover damages for injury or death to a person. Thus, contributory negligence was only partially abolished, and the emerging trend in Missouri has been to uphold contributory negligence as a defense in economic loss negligence cases. This means that contributory negligence may apply in professional negligence cases where the client has only suffered monetary damages.

However, the Missouri Court of Appeals limited the ability of an accountant or other professional to obtain a defense verdict based on the defense. According to the court's decision, a professional may not escape liability by showing that the client should have performed the professional's duties. For instance, the accounting firm in *Children's Wish Foundation* was hired to perform an audit and locate the client's mistakes. The accounting firm therefore cannot prevail by showing that the client negligently made the same mistakes the accounting firm was hired to locate. Applying the contributory defense in that situation would unfairly shift the professional's duties to the client. In contrast, in a similar situation, an accounting firm could rely on the contributory negligence defense if the client relied on the audit while knowing that it was inaccurate or if the client actively misled the auditors.

Thus, although the contributory negligence may apply in professional negligence cases, the court's opinion suggests the limitation on that defense will apply in many situations. Specifically, the court noted that it will be the exception, and not the rule, where clients may be considered at fault for a professional's purported duties undertaken to a client.

The court also emphasized the importance of defining the scope of the duties that the professional has agreed to perform for a client. Since professionals can only be liable for mistakes that arise out of a duty specifically undertaken to a client, professionals should take great care in making sure the scope of their duties are clearly set forth in an initial letter or contract. A carefully crafted engagement letter could avoid a future lawsuit involving services that the professional never planned on providing to the client.

The *Children's Wish Foundation* decision is important in Missouri professional negligence cases. Contributory negligence is a strong defense that permits a defendant to completely avoid liability even if the plaintiff is only partially at fault. However, the defense cannot be based on a client's failure to perform the professional's job.

The application and scope of that limitation will likely be an issue of debate in professional liability cases for years to come. Indeed, we have not seen the last act of the *Children's Wish Foundation* case. On June 29, 2010, the Missouri Supreme Court took transfer of the case. As soon as the Missouri Supreme Court rules on the issue of contributory negligence, we will report it to you in *The Firm Inquiry*.

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