ALAN P. WILEY	*	**NO. 2000-CA-1544**
VERSUS	*	**COURT OF APPEAL**
CITY OF NEW ORLEANS, JOHN DOE AND CHRISTY LYNN CURL	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 94-10309, DIVISION "K-14"
HONORABLE RICHARD J. GANUCHEAU, JUDGE
* * * * * *
JUDGE MICHAEL E. KIRBY
* * * * * *

(Court composed of Judge Steven R. Plotkin, Judge Michael E. Kirby, Judge Max N. Tobias, Jr.)

ON APPLICATION FOR REHEARING

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We grant rehearing in this matter limited to Mr. Wiley's constitutional challenge to civil Code article 2323 and his request for costs. These issues were raised in his original brief and should have been addressed in our original opinion. We take each argument in the order in which it was presented in his brief.

CONSTITUTIONALITY OF CIVIL CODE ARTICLE 2323

LEGISLATIVE INVASION OF INHERENT JUDICIAL POWER

We believe Mr. Wiley reads the language "the appropriateness, and indeed the necessity, of quantifying the fault of a particular non-party . . . is inherently a question to be determined by the courts" in Cavalier v. Cain's Hydrostatic Testing, Inc., 94-1496 (La. 6/30/95) at 7, 657 So.2d 975 at 981 out of context. It is quite clear from a complete reading of the sentence in question that the only reason quantification of third party fault is a question for the court in that case is because the legislature failed to specify *which* non-parties should have their fault quantified.

In Keith v. U.S. Fidelity & Guar. Co., 96-2075, p. 5 (La. 5/9/97), 694 So.2d 180, 182, the Supreme Court of Louisiana stated:

> Having reviewed this act of the First Extraordinary Session of the 1996 Legislature, it is evident that the Legislature met the concerns we expressed in Cavalier regarding how it intended that employer fault be treated in third-party tort actions.

Thus we conclude the Supreme Court acknowledged the right of the legislature to address the issue. It was only because the legislature had not done so at the time of Cavalier that the Supreme Court exercised its judicial power to adjudicate a case in the absence of specific guidance from the legislature. We find no invasion of any inherent judicial power.

THE LEGISLATURE CANNOT OVERRULE A JUDICIAL DECISION CONTROLLING THE POWER TO ADJUDICATE:

We do not agree that the legislature "overruled a judicial decision controlling the power to adjudicate." Article 1 of the Louisiana Civil Code provides that there are two sources of law: legislation and custom. Legislation is the solemn expression of legislative will. La. C.C. art. 2. As comment (a) to Article 1 makes clear, "However, as in all codified systems legislation is the superior source of law in Louisiana." Jurisprudence is only

a secondary or persuasive source of law. When the Supreme Court in Cavalier, supra, noted that it was exercising its inherent power because the legislature had not addressed the issue, the legislature then exercised its superior prerogative to address the issue.

A**RTICLE 2323 VIOLATES PROCEDURAL DUE PROCESS**

We are unimpressed with Mr. Wiley's argument that article 2323, by permitting the adjudication of the liability of a non-party's fault and assessing that fault against the plaintiff, violates Article I, Section 2 of the state constitution, the guarantee of procedural due process of law. First, at trial a plaintiff has the same rights as all other parties to call and cross examine witnesses on the issue of a third person's fault. We do not construe the effect of a non-party's fault as an assessment against the plaintiff. Simply, he is not permitted to recover damages from someone the trier of fact concluded was not responsible for that portion of his damages.

RETROACTIVE APPLICATION OF ARTICLE 2323 IS UN-CONSTITUTIONAL

Mr. Wiley attempts to distinguish the holding in Keith, *supra,* on the basis that the case came to the Supreme Court "in a procedural posture on a procedural question". However, Mr. Wiley disregards the following

language in Keith:

> After carefully considering Act 3, we find the legislative amendment of La. Civ.Code arts. 2323 was procedural legislation. Act 431 of 1979 amended and reenacted La.Civ. Code arts 2103, 2323 and 2324 to usher a comparative fault system into Louisiana. This act eliminated the doctrine of contributory negligence and provided the framework for a comprehensive scheme of loss apportionment in multi-party litigation. [Citation omitted.] Since the adoption of a pure comparative fault system, it has been the task of the factfinder to allocate shares of negligence. [Citation omitted.]
>
> Viewing the applicability of Act 3 to the case *sub judice*, it is clear that the substantive right to allocate fault was created in 1979 with the introduction of comparative fault. As such, Act 3 simply delineates a method for enforcing that substantive right as particularly applied to the statutory employer.
>
> Accordingly, we conclude that the legislative changes reflected in Act 3 are procedural, and can be applied retroactively.
>
> Keith v. U. S. Fidelity and Guar. Co., 96-2075, p. 7 (La. 5/9/97), 694 So.2d at 183

We do not believe Mr. Wiley had a substantive right to have a non-party's fault assigned to the parties who were found at fault. His reliance on Judge Thibodeaux's concurring opinion in Crooks v. Metropolitan Life Insurance Co., 2000-0947 (La. App. 3 Cir. 1/17/01), 779 So.2d 966, is misplaced for two reasons. First, the legislature there had abolished plaintiffs' cause of action after they had filed suit, thus depriving them of a vested right. As

noted in Keith, *supra*, the statutory scheme for comparative negligence came into existence in 1979, long before Mr. Wiley's accident. In 1996 the legislature only modified the allocation of fault procedures. This did not deprive plaintiff of his cause of action or of a vested right. Secondly, reliance on Crooks is misplaced because the Supreme Court has reversed the decision and remanded the matter to the district court for reconsideration in light of another case. See Crooks v. Metropolitan Life Insurance Co., 2001-0466 (La. 5/25/01), 785 So.2d 810.

COURT COSTS

On authority of La. C.C.P. art. 2164 all costs of this appeal are taxed against The City of New Orleans.

CONCLUSION

For the above reasons we find Civil Code article 2323 is constitutional. Costs are taxed against the City of New Orleans. In all other respects our original opinion remains in full force and effect.

LIMITED REHEARING GRANTED; AFFIRMED

AS AMENDED