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Tort Law - New Mexico Adopts Proportional Indemnity and Clouds the Distinction between Contract and Tort: Amrep Southwest, Inc. v. Shollenbarger Wood Treating, Inc.

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TORT LAW—New Mexico Adopts Proportional Indemnity and Clouds the Distinction Between Contract and Tort: *Amrep Southwest, Inc. v. Shollenbarger Wood Treating, Inc.*

I. INTRODUCTION

In *Amrep Southwest, Inc. v. Shollenbarger Wood Treating, Inc.*,[1] the New Mexico Supreme Court extended proportional indemnity principles to actions in contract.[2] A defendant liable in contract now has a right to comparative contribution similar to a defendant jointly and severally liable in tort.[3] Prior to *Amrep*, a defendant liable under a breach of contract theory generally had no right of contribution from negligent parties who proximately caused the breach.[4] The *Amrep* court also retained the principle of active/passive indemnity for a defendant sued in tort.[5] This Note presents the contextual background of the indemnity doctrine and the underlying principles compelling other jurisdictions to adopt systems of proportional indemnity; it then analyses the *Amrep* court's reasoning and the implications of its decision.

II. FACTS AND PROCEDURAL HISTORY

Amrep Southwest, Inc. (Amrep) contracted with Baldridge Lumber Company (Baldridge) for Baldridge to supply treated wood for use in homes Amrep was building.[6] Baldridge then contracted with Shollenbarger Wood Treating, Inc. (Shollenbarger) to provide Baldridge with treated wood which would in turn be sold to Amrep.[7] Amrep never contracted directly with Shollenbarger in this matter.[8] During construction, Amrep learned that the treated wood was unfit for its intended use.[9] Amrep requested that Baldridge investigate the allegations.[10] Baldridge subsequently informed Amrep that the wood was fit for its intended purpose.[11]

The *Amrep* plaintiffs as well as other homeowners claimed that the wood was unfit for its intended purpose.[12] The New Mexico Attorney

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1. 119 N.M. 542, 893 P.2d 438 (1995).
2. *Id.* at 552-54, 893 P.2d at 448-50.
3. *See infra* note 113 and accompanying text.
4. *See infra* note 92 and accompanying text.
5. *Amrep*, 119 N.M. at 553, 893 P.2d at 449.
6. *Id.* at 544, 893 P.2d at 440.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 544-45, 893 P.2d at 440-41.
11. *Id.* at 545, 893 P.2d at 441. A factual issue existed as to whether Baldridge received reassurances from Shollenbarger as to the fitness of the wood it was supplying, and consequently whether Amrep disclaimed any warranties. Appellee's Answer Brief at 7-8, *Amrep* (No. 21,889).
12. *Amrep*, 119 N.M. at 545, 893 P.2d at 441.

General took action on the homeowners' behalf, suing Amrep under the Unfair Practices Act.[13] The suit claimed that Amrep "made misleading statements regarding the quality of wood used in its homebuilding."[14] Amrep settled with the Attorney General and, as a condition of the settlement, offered to perform necessary repairs.[15] Individual homeowners had the option to accept the repairs and relinquish any future claims arising from the wood or to pursue their own legal remedies.[16] A majority[17] of homeowners opted for Amrep's offer; the remaining homeowners sued Amrep[18] alleging breach of warranty, negligence, fraud, negligent misrepresentation, strict liability in tort, violation of the Unfair Practices Act[19] and breach of contract.[20] Neither Baldridge nor Shollenbarger was named in those actions.[21]

In response to the non-settling parties' claims, Amrep filed a third-party complaint against Baldridge and Shollenbarger.[22] The claim sought either traditional[23] or proportional indemnification for any liability it may have had from the nonsettling parties' claims and for its costs in fulfilling the Unfair Practices Act settlement agreement.[24] The indemnity claims were based on theories of negligence and strict liability in tort.[25] Upon a motion for summary judgment, the trial court dismissed Shollenbarger from the suit on the following grounds: New Mexico did not recognize proportional indemnification;[26] the economic-loss rule[27] barred Amrep's indemnity claims;[28] and traditional indemnification was unavailable because Amrep "was partially at fault for any damages awarded against it in favor of the homeowners."[29] Amrep appealed[30] to the New Mexico Supreme Court.[31]

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13. N.M. STAT. ANN. §§ 57-12-1 to -22 (Repl. Pamp. 1995).
14. *Amrep*, 119 N.M. at 545, 893 P.2d at 441.
15. *Id.*
16. *Id.*
17. Of the 180 homes affected, "[a]ll but nineteen homeowners accepted the offer." *Id.*
18. These remaining cases were consolidated for pre-trial purposes in the present case. Appellee's Answer Brief at 1, *Amrep* (No. 21,889).
19. *Amrep*, 119 N.M. at 545, 893 P.2d at 441.
20. *Id.* at 552, 893 P.2d at 448.
21. *Id.*
22. *Id.* at 545, 893 P.2d at 441.
23. *See infra* notes 38 to 58 and accompanying text.
24. *Amrep*, 119 N.M. at 545, 893 P.2d at 441.
25. *Id.*
26. Appellant's Brief-In-Chief at 7, *Amrep* (No. 21,889).
27. In brief, the economic-loss rule provides that economic damages cannot be recovered under a tort theory unless the plaintiff's person or property is physically impacted. *See infra* note 104 and accompanying text for discussion of the rule.
28. *Amrep*, 119 N.M. at 545, 893 P.2d at 441.
29. *Id.* at 544, 893 P.2d at 440.
30. Amrep's appeal was "pursuant to [N.M. R. CIV. P.] 1-054(C)(2) (Repl. Pamp. 1992) (stating that judgment dismissing all claims against one party in multiple-party litigation is a final judgment)." *Id.* at 545, 893 P.2d at 441.
31. At the time of this appeal, the New Mexico Supreme Court had primary appellate jurisdiction in actions involving a claim in contract. N.M. R. APP. P. 12-102(A)(1) (Repl. Pamp. 1992). This rule has since been modified and the Court of Appeals now has primary appellate jurisdiction for contractual claims. N.M. R. App. P. 12-102 (1996 Supp.).

The supreme court reversed the trial court, holding that (1) New Mexico recognizes proportional indemnity,[32] (2) a genuine issue of material fact existed as to Amrep's claim for traditional indemnity,[33] and (3) the economic-loss rule does not bar a claim for indemnity.[34]

III. CONTEXTUAL BACKGROUND

The doctrine of indemnity is muddled as a result of its often misunderstood relationship to contribution. In addition, the widespread shift by states from tort systems based on contributory negligence and joint and several liability to systems of comparative negligence and several liability has further confused the doctrine.[35] Insight into the current status of indemnity requires an understanding of the doctrine's roots, as well as the effects of comparative negligence.

A. Traditional Indemnity and Contribution Prior to Comparative Fault

Indemnity and contribution are legal doctrines through which a party who pays a claim or judgment to an injured party may recover some portion of the amount paid from a culpable third party.[36] Common-law indemnity requires an active wrongdoer to reimburse any damages paid by a passive party.[37] The statutory right of contribution imposes an obligation upon jointly and severally liable tortfeasor B to reimburse jointly and severally liable tortfeasor A for A's payment of B's liability.[38]

The right of indemnity is rooted in "equitable principles of restitution and unjust enrichment."[39] Traditional indemnification is essentially "a judicially created common-law right that grants to one who is held liable an all-or-nothing right of recovery from a third-party."[40] In general, a

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32. *Amrep*, 119 N.M. at 552, 893 P.2d at 448.

33. *Id.* at 549, 893 P.2d at 445.

34. *Id.* at 551, 893 P.2d at 447.

35. The doctrine of indemnity has been described as shrouded in a dense "legal vapor" as a result of this shift. Schneider National, Inc. v. Holland Hitch Co., 843 P.2d 561, 571 (Wyo. 1992).

36. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 51, at 341 (5th ed. 1984).

37. *Id.*

38. *See* Dessauer v. Memorial Gen. Hosp., 96 N.M. 92, 628 P.2d 337 (Ct. App. 1981).

39. Schneider National, Inc. v. Holland Hitch Co., 843 P.2d 561, 571 (Wyo. 1992) (citing 2 GEORGE E. PALMER, THE LAW OF RESTITUTION § 10.6(c) (1978)). The RESTATEMENT (SECOND) OF TORTS § 886B (1979) states:

> If two persons are liable in tort to a third person for the same harm and one of them discharges the liability of both, he is entitled to indemnity from the other if the other would be unjustly enriched at his expense by the discharge of the liability.

40. *Amrep*, 119 N.M. at 545, 893 P.2d at 441. The RESTATEMENT OF RESTITUTION § 76 (1937) states:

> [a]s a general rule . . . "[a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct."

Schneider, 843 P.2d at 572. *See also* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 191 (1987) (justifying all-or-nothing loss allocation in situations where economic efficiency requires that only one party need take precautions).

court will not create a right of indemnification unless the party seeking indemnification stands in a prior legal relationship to the party from whom indemnification is sought.[41] Courts recognize legal relationships founded on obligations lying in contract, quasi-contract and tort[42] "apart from the joint duty . . . owe[d] to the injured party."[43]

The type of indemnification under which the indemnitee will recover is determined by the type of legal relationship upon which the indemnitee claim is founded.[44] Thus, where a right to indemnity is expressly provided for in a contract, the indemnitee will have a right to "express indemnity" under a contract theory.[45] Where a contractual relationship for indemnity is implied in fact between two parties, such as in a warranty claim, the indemnitee will have a right of implied contractual indemnity and will sue for breach of warranty.[46] Where a relationship is implied in law between two parties, the indemnitee will have a right of "equitable implied indemnity" and will sue under a theory of negligence or strict liability.[47]

Recovery under a right of express indemnity differs from recovery under implied contractual indemnity and equitable implied indemnity. Recovery under express indemnity is controlled by the contract, and the parties may choose to allocate the percentage of indemnification between themselves as they see fit.[48] Because implied contractual indemnity and equitable implied indemnity are based on legally determined obligations, the law provides for a fixed scheme of apportionment consisting of 100% recovery.[49]

The law giving rise to indemnity based on express or implied contract is relatively straightforward and is not further addressed in this note;[50]

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41. Frazer v. Munsterman, 527 N.E.2d 1248, 1251 (Ill. 1988). But some jurisdictions have done away with the pre-existing legal relationship requirement altogether. *See* Sargent v. Interstate Bakeries, Inc., 229 N.E.2d 769, 776 (Ill. App. Ct. 1967).

42. RESTATEMENT OF RESTITUTION § 76 cmt. b (1937).

43. *Amrep*, 119 N.M. at 545-46, 893 P.2d at 441-42 (quoting Peak Drilling Co. v. Halliburton Oil Well Cementing Co., 215 F.2d 368, 370 (10th Cir. 1954)).

44. *Schneider*, 843 P.2d at 573, (citing Richardson Associates v. Lincoln-Devore, Inc., 806 P.2d 790 (Wyo. 1991)).

45. Wyoming Johnson, Inc. v. Stag Industries, Inc., 662 P.2d 96, 99 (Wyo. 1983); Mountain Fuel Supply Co. v. Emerson, 578 P.2d 1351, 1358 (Wyo. 1978).

46. Pan American Petroleum Corp. v. Maddux Well Services, 586 P.2d 1220, 1226 (Wyo. 1978).

47. Other terms for this type of indemnity include "implied in law indemnity" and "common law indemnity." *Schneider*, 843 P.2d at 573. Implied in law indemnity is founded on a legally fixed obligation, i.e. an obligation lying in tort. Thus, a right to indemnification may arise outside an express or implied contractual setting "by operation of law to prevent a result which is regarded as unjust or unsatisfactory." KEETON ET AL., *supra* note 32, § 51, at 341.

48. Valloric v. Dravo Corp., 357 S.E.2d 207, 208 (W. Va. 1987).

49. *Schneider*, 843 P.2d at 587.

50. Express indemnity is bargained for. Frank v. Storer, 517 A.2d 1098, 1103 (Md. Ct. App. 1986). Implied contractual indemnity is based on the law of warranty:

> The rationale [is] that a contract under which the indemnitor undertook to do work or perform services *necessarily implied an obligation to do the work involved in a proper manner and to discharge foreseeable damages resulting from improper performance* absent any participation by the indemnitee in the wrongful act precluding recovery.

Bear Creek Planning Committee v. Title Ins. & Trust Co., 211 Cal. Rptr. 172, 178 (Cal. Ct. App. 1985) (emphasis added) (quoting Great Western Furniture Co., Inc. v. Porter Corp., 48 Cal. Rptr. 76, 86 (Cal. Ct. App. 1965)).

the law giving rise to equitable implied indemnity is more intricate. Once a pre-existing legal relationship is established, a party seeking traditional equitable implied indemnity must establish that he acted passively in comparison to the indemnitor's active negligence.[51] With these elements met, an indemnitee may shift 100% of its liabilities to its indemnitor.[52]

The test for determining whether a tortious act is "active" or "passive" within the scope of traditional indemnity is somewhat vague.[53] A party is considered actively negligent for indemnity purposes if he "personally participated in an affirmative act of negligence, was connected with negligent acts or omissions by knowledge or acquiescence, or has failed to perform a precise duty which the indemnitee had agreed to perform."[54] A party is considered passively negligent for indemnity purposes if he "has been held liable in tort for his own negligence in failing to discover and remedy a dangerous condition created by the negligence or wrongdoing of another."[55] A party is also considered passively negligent if he is merely the retailer in a product's chain of distribution.[56] These criteria are broad and subject to manipulation, inconsistent application, and, consequently, criticism.[57] These characteristics often lead to inequitable resolutions, as equitable implied indemnification allocates liability in an "all-or-nothing" manner.[58]

B. *Effect of Comparative Negligence and Several Liability On Traditional Indemnity*

Motivated by inadequate contribution statutes and the adoption of comparative negligence, some jurisdictions have done away with "all or nothing" indemnification.[59] These jurisdictions have instead based indemnification on degree of fault when a party seeking indemnity asserts a right to equitable implied indemnity based on a theory of negligence.[60]

1. Comparative Negligence and Several Liability Generally

Prior to the adoption of comparative negligence, a plaintiff who was partially at fault for his harm was said to be "contributorily negligent,"

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51. *Schneider*, 843 P.2d at 574. Passive negligence has also been termed "constructive negligence," *id.*, or "secondary negligence." Allison v. Shell Oil, 495 N.E.2d 496, 498 (Ill. 1986).

52. *Allison*, 495 N.E.2d at 501.

53. *Schneider*, 843 P.2d at 574.

54. *Schneider*, 843 P.2d at 574 (citing Rossmoor Sanitation, Inc. v. Pylon, Inc., 532 P.2d 97, 101 (Cal. 1975)).

55. Rio Grande Gas Co. v. Stahman Farms, Inc., 80 N.M. 432, 436, 457 P.2d 364, 368 (citing Robert A. Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130).

56. Trujillo v. Berry, 106 N.M. 86, 89, 738 P.2d 1331, 1334 (Ct. App. 1987).

57. In showing its disfavor of the active/passive rule, the *Schneider* court stated: "[w]ith a little ingenuity in phrasing, negligence can be made to be either 'active' or 'passive' as suits the writer." 843 P.2d at 574 (citing Missouri Pac. R. Co. v. Whitehead & Kales Co., 566 S.W.2d 466, 471 (Mo. 1978)). *See also* Nicholas J. Bua, *Third Party Practice in Illinois: Express and Implied Indemnity*, 25 DEPAUL L. REV. 287, 314 (1976) ("[a]ll attempted definitions of active-passive indemnity break down in application").

58. American Motorcycle Ass'n v. Superior Court, 578 P.2d 899, 910 (Cal. 1978).

59. *See, e.g.*, *Allison*, 495 N.E.2d 496; Kennedy v. City of Sawyer, 618 P.2d 788 (Kan. 1980).

60. *See, e.g.*, *American Motorcycle*, 578 P.2d 899; *Allison*, 495 N.E.2d 496; *Kennedy*, 618 P.2d 788; Dole v. Dow Chemical Co., 282 N.E.2d 288 (N.Y. 1972); *Schneider*, 843 P.2d 561.

and consequently could not recover any damages in tort from another culpable party.[61] The contributory negligence doctrine is now widely criticized as inequitable because "[i]t places on one party the entire burden of a loss for which two [parties] are . . . responsible."[62] To ease the hardship brought on plaintiffs by the contributory negligence doctrine, most jurisdictions have done away with contributory negligence in favor of systems based on comparative negligence.[63] Comparative negligence awards damages in proportion to fault.[64] Comparative negligence exists in three forms: pure, modified, and slight/gross.[65]

New Mexico adopted a system of pure comparative negligence for tort liability in *Scott v. Rizzo* in 1981.[66] In that case, the defendants raised the contributory negligence of the plaintiffs as an affirmative defense. The supreme court rejected this defense and adopted comparative negligence on the grounds that "the doctrine of comparative negligence more equitably apportions damages . . . [than] the 'all-or-nothing' rule of contributory negligence."[67]

Comparative negligence remedied the inequity between a plaintiff and a defendant. Furthermore, the principles underlying its adoption forced courts to reexamine inequities between co-tortfeasors arising under the doctrine of joint and several liability.[68] Under joint and several liability, one of multiple tortfeasors may be "liable for the entire amount of the damage caused by [the group]."[69] Joint and several liability appears inequitable in that a party may be liable for more than its percentage of fault.[70] To ameliorate this problem, legislatures[71] established statutory rights to contribution among joint-tortfeasors.[72] Under a right of contribution, a tortfeator who discharges a co-tortfeasor's liability may get a judgment against the co-tortfeasor for the amount of the co-tortfeasor's liability that it discharges.

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61. KEETON ET AL. *supra* note 36, § 67, at 469. *See also* RESTATEMENT (SECOND) OF TORTS § 467.

62. *Id.*; *see also* Li v. Yellow Cab Co. of California, 532 P.2d 1226, 1230 (Cal. 1975) (concluding that "the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault").

63. KEETON ET AL., *supra* note 36, § 67, at 471.

64. *See id.* at 472.

65. *Id.*

66. 96 N.M. 682, 684, 634 P.2d 1234, 1236.

67. *Id.*

68. *See* Weeks v. Feltner, 297 N.W.2d 678 (Mich. Ct. App. 1980) (holding that adoption of comparative negligence did not require the abrogation of joint and several liability); *American Motorcycle*, 578 P.2d 899.

69. Bartlett v. New Mexico Welding Supply, Inc., 98 N.M. 152, 154, 646 P.2d 579, 581 (Ct. App. 1982), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982) (citing Salazar v. Murphy, 66 N.M. 25, 340 P.2d 1075 (1959)).

70. *American Motorcycle*, 578 P.2d at 911.

71. Under classical common law, courts did not recognize a right to contribution because the equitable principles in support of such a doctrine did not outweigh the maxim that "the law will not aid a wrongdoer"; consequently, contribution had to be established legislatively. *American Motorcycle*, 578 P.2d at 907. *See also* RESTATEMENT (SECOND) OF TORTS § 886A, cmt. a, for historical roots of common-law rule against contribution.

72. In New Mexico, *see* N.M. STAT. ANN. §§ 41-3-1 to -8 (Repl. Pamp. 1989 and Cum. Supp. 1995) (Uniform Contribution Among Tortfeasors Act) (creating right to contribution based on principles of comparative fault).

Nevertheless, contribution has not completely remedied the inequities of joint and several liability. The risk that a concurrent tortfeasor may be insolvent or unavailable is still placed on the defendant regardless of the concurrent tortfeasor's degree of fault.[73] In light of this inequity, New Mexico has concluded that under a system of comparative negligence, the plaintiff, rather than the defendant, should bear the risk that another defendant is insolvent.[74] Relying on these equitable considerations, New Mexico has substituted a system of apportioning damages amongst defendants based on principles of comparative fault or several liability in place of joint and several liability in most circumstances.[75] Where joint and several liability has been preserved, either the legislature or the judiciary has made a policy decision that the party found liable in tort, rather than the party suffering the loss, should bear the risk of an insolvent defendant.[76]

2. The Shortfalls of Contribution: Proportional Indemnity to the Rescue

The widespread adoption of comparative negligence has changed the doctrine of indemnity. Courts now apply the doctrine of indemnity to apportion damages according to fault where contribution statutes do not otherwise allow for such apportionment.[77] The doctrine of indemnity is effectively becoming the common-law shadow of contribution. As a result, apportionment of liability in an all-or-nothing manner is being abandoned.[78]

California was one of the first jurisdictions to adopt a system of proportional indemnity, and *American Motorcycle*[79] is typical of many courts' reasonings. In that case a defendant co-sponsored a motorcycle race in which a minor was injured.[80] The defendant was potentially subject to joint and several liability in an action brought by the parents.[81] The defendant sought declaratory judgment as to the comparative negligence of the minor's parents for negligently granting permission for the child to enter the race.[82] The defendant also sought indemnity from the parents, alleging that the parents were actively negligent for granting the minor permission to participate in the race, while the defendant was merely passively negligent in sponsoring the race.[83]

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73. *Bartlett*, 98 N.M. at 158, 646 P.2d at 585.
74. *Id.*
75. This substitution was accomplished in *Bartlett* and later codified by the New Mexico legislature in N.M. STAT. ANN. §§ 41-3A-1 to -2 (Supp. 1995). *See also* Andrew G. Schultz & M.E. Occhialino, *Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-legislative History*, 18 N.M. L. REV. 483 (1988).
76. Schultz & Occhialino, 18 N.M. L. REV. 487-94.
77. *See supra* note 60.
78. *See supra* note 48 and accompanying text.
79. *American Motorcycle*, 578 P.2d. 899.
80. *Id.* at 902.
81. *Id.*
82. *Id.* at 903.
83. *Id.*

The court would not assess the parents' fault under principles of several liability.[84] Furthermore, the defendant lacked a right to contribution from the parents because the contribution statute required a joint judgment as a prerequisite.[85] The court, constrained by legislative enactment from modifying the contribution statute,[86] nonetheless felt compelled to fashion a just remedy using the doctrine of indemnity.[87] Upon examining the all-or-nothing rule of indemnity in light of *Yellow Cab*, the court stated:

> [t]he all-or-nothing aspect of the doctrine has precluded courts from reaching a just solution in the great majority of cases in which equity and fairness call for an apportionment of loss between the wrongdoers in proportion to their relative culpability . . . .[88]

The court ruled that principles of comparative fault require apportionment of tort liability among defendants in a comparative manner. Otherwise, the offsetting of tort liability in an all-or-nothing manner is inconsistent with principles of comparative fault.[89]

Like the California statute, New Mexico's Contribution Act[90] excludes some classes of defendants. The Act does not provide for apportionment of fault for a defendant liable in contract; "[c]ontribution is available under the Act only for *tort* liability."[91] With no rights under the Contribution Act, a defendant liable in contract prior to *Amrep* was subject to all-or-nothing liability.[92]

IV. RATIONALE

The *Amrep* court made two key rulings: (1) it affirmed the validity of shifting 100% of liability from one person to another pursuant to the prior law of active/passive negligence in limited situations, and (2) it created a right to proportional indemnity when proration according to fault is otherwise unavailable.

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84. The court was not persuaded that its decision in *Yellow Cab*, 532 P.2d 1226 (Cal. 1975), implicitly replaced joint and several liability with several liability. *American Motorcycle*, 578 P.2d at 905.

85. *American Motorcycle*, 578 P.2d at 910.

86. *Id.* At that time, a joint judgment had to be rendered against both defendant parties for one party to have a right of contribution against the other, and there was no prospect of a joint judgment in this case. CAL. CIV. PROC. CODE. §§ 875-79.

87. *American Motorcycle*, 578 P.2d at 907.

88. *Id.* at 910.

89. Each jurisdiction adopting proportional indemnity vests the right with different attributes; however, each case stands for the proposition that the equitable principles underlying the adoption of comparative negligence mandate that indemnity allocates liability in a manner proportional to fault in at least some situations. *Cf.* cases cited *supra* note 60.

90. N.M. STAT. ANN. §§ 41-3-1 to -8 (Repl. Pamp. 1989).

91. Appellant's Brief-In-Chief at 16, Amrep (No. 21,889) (citing N.M. STAT. ANN. § 41-3-2(A) ("[t]he right of contribution exists among joint tortfeasors"); Kinetics, Inc. v. El Paso Products, Co., 99 N.M. 22, 28, 653 P.2d 522, 528 (Ct. App. 1982) ("party liable under a theory of respondeat superior is not a joint tortfeasor and therefore cannot seek contribution under the Act")). *Accord* Higgins Erectors & Haulers, Inc. v. E.E. Austin & Son, 714 F. Supp. 756, 759 (W.D. Pa. 1989) ("party liable for breach of construction contract had no right of contribution").

92. *See Amrep*, 119 N.M. at 552-53, 893 P.2d 448-49.

Amrep urged the court to "replace completely traditional indemnification with proportional indemnification."[93] The court declined to follow precedent from other jurisdictions which adopted comparative negligence and which abandoned the active/passive rule.[94] In so doing, the court stated that "[t]raditional indemnification addresses other considerations of contractual right or of restitution to which a passive wrongdoer is entitled."[95] Consistent with this statement, the court permitted Amrep's claim for traditional indemnity based on active/passive negligence.[96] As a result, the court ruled that Amrep would have to prove it was merely passively negligent to have full recovery on its traditional indemnity claim against Shollenbarger.[97]

Following other jurisdictions,[98] the *Amrep* court also created a right to proportional indemnity.[99] The court reasoned that the equitable principles underlying its adoption of comparative negligence in *Scott* mandated that it create a right of proportional indemnity.[100] The right extends to a "defendant who cannot raise the fault of a concurrent tortfeasor as a defense because of the plaintiff's choice of remedy"[101] or to a defendant who cannot claim a right to "contribution or some other form of proration of fault [from other] tortfeasors."[102] The court departed from other jurisdictions which adopted proportional indemnity[103] by extending the right to actions where a defendant is liable to an injured party outside of tort, such as contract and unfair trade practices.[104]

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93. *Amrep*, 119 N.M. at 553, 893 P.2d at 449.

94. Amrep presented in its brief-in-chief precedent from jurisdictions that abandoned active/passive indemnity because of the doctrine's incompatibility with comparative fault: Kohr v. Allegheny Airlines, Inc. 504 F.2d 400, 405 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975); *Allison*, 495 N.E.2d 496, 501; *Kennedy*, 618 P.2d 788, 798-803; Tolbert v. Gerber Industries, Inc., 255 N.W.2d 362, 366-68 (Minn. 1977) (en banc); Missouri Pacific R. Co. v. Whitehead & Kales Co., 566 S.W.2d 466, 469-73 (Mo. 1970); *Dole*, 282 N.E.2d 288, 291-92; B&B Auto Supply, Sand Pit & Trucking Co. v. Central Freight Lines, Inc., 603 S.W.2d 814, 816-17 (Tex. 1980); Pachowitz v. Milwaukee & Suburban Transp. Corp., 202 N.W.2d 268, 270-72 (Wis. 1972); *Schneider*, 843 P.2d 561.

95. *Amrep*, 119 N.M. at 553, 893 P.2d at 449. For a discussion of equitable justifications for active/passive rule upon which the court may have relied, compare cases cited *supra* notes 39 & 40 and accompanying text.

96. *Amrep*, 119 N.M. at 549, 893 P.2d at 445.

97. *Id.* at 549-50, 893 P.2d at 445-46.

98. *Id.* at 551, 893 P.2d at 447 (citing *American Motorcycle*, 578 P.2d 899; *Allison*, 495 N.E.2d 496; *Schneider*, 843 P.2d 561).

99. *Amrep*, 119 N.M. at 552-54, 893 P.2d at 448-50.

100. *Id.* at 552, 893 P.2d at 448.

101. *Id.*

102. *Id.* at 553, 893 P.2d at 449.

103. *Id.* at 551, 893 P.2d at 447 (citing *American Motorcycle*, 578 P.2d 899; *Allison*, 495 N.E.2d 496; *Schneider*, 843 P.2d 561).

104. *Amrep*, 119 N.M. at 553, 893 P.2d at 449.

The court also clarified the relationship between the economic-loss rule and a claim for proportional indemnification. *Id.* at 549-51, 893 P.2d 445-47. Economic-losses are losses where the plaintiff has suffered "no physical impact to his person or property." DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 116 (2d ed. 1994). *See also* Utah International, Inc. v. Caterpillar Tractor Co., 108 N.M. 539, 541 (Ct. App. 1989), *cert. denied*, 108 N.M. 354, 772 P.2d 884 (1989). Shollenbarger argued that Amrep's potential contract liability would constitute an economic-loss. Appellee's Answer Brief at 32-34, Amrep v. Shollenbarger, 119 N.M. 542, 893 P.2d 438 (1995) (No. 21,889). Because the economic-loss rule bars the recovery of economic-loss damages in a tort action, *Amrep*, 119 N.M.

V. ANALYSIS

Proportional indemnity as established in *Amrep* is a substantial new right raising issues for later resolution. The court is logically inconsistent in ruling that principles of fairness mandate proportional indemnity while also preserving all-or-nothing active/passive indemnity. Furthermore, the court does not explain clearly how liability based on a no-fault theory should be apportioned according to fault in a proportional indemnification action. Finally, by allowing tort damage principles to offset contractual liability, the court is limiting the traditional scope of contract.

First, the *Amrep* court views its adoption of proportional indemnity as substantially completing the task it began in *Scott v. Rizzo*[105] of allocating liability based on fault.[106] But the court did not explain why the adoption of comparative negligence in *Scott* does not eliminate active/passive indemnity. These actions are logically inconsistent. If the passive wrongdoer is a tortfeasor, there is no reason to allow the wrongdoer to recover 100% from another tortfeasor. Instead, logically, comparative fault principles should come into play and passive negligence should entail at least a small portion of fault.

Other jurisdictions have recognized this inconsistency. In *Allison v. Shell Oil Co.*,[107] the Illinois Supreme Court concluded that pure comparative negligence was inconsistent with the theory of all-or-nothing active/passive indemnity.[108] Similarly, the Kansas Supreme Court modified active/passive indemnity as follows:[109]

> in actions where comparative negligence is in issue the court deals in percentages of causal responsibility, and distinctions between primary, secondary, active and passive negligence lose their previous identities. The nature of misconduct in such cases is to be expressed on the basis of degrees of comparative fault or causation, and the all or nothing concepts are swept aside.[110]

In the interest of jurisprudential consistency, New Mexico should follow Illinois and Kansas and abandon the active/passive rule. As a result of New Mexico's current inconsistency, a party found liable in tort may now have a right to proportional recovery under the Contribution Act[111] or a right to all-or-nothing recovery under the principles of active/passive

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at 551, 893 P.2d at 447, and Amrep's claim for equitable implied indemnity was based in tort, *id.* at 547, 893 P.2d at 443, Shollenbarger asserted that the claim must be barred by the economic-loss rule. *Id.* While the court gave weight to this argument, it decided that it would be "unjust" to bar Amrep's claim on the basis of the economic-loss rule. *Id.* at 551, 893 P.2d at 447. The court did not otherwise limit the economic-loss rule. *Id.*

105. 96 N.M. 682, 634 P.2d 1234 (1981).

106. *Amrep*, 119 N.M. at 553, 893 P.2d at 449.

107. 495 N.E.2d 496 (Ill. 1986).

108. *Allison*, 495 N.E.2d at 501. This note does not address the logic behind the *Amrep* court's affirmation of active/passive indemnity in strict products liability actions.

109. *Id.*

110. *Kennedy*, 618 P.2d at 798.

111. N.M. STAT. ANN. §§ 41-3-1 to -8 (Repl. Pamp. 1989 and Cum. Supp. 1995) (Uniform Contribution Among Tortfeasors Act).

indemnity.[112] A party found liable in contract, however, now has a right of proportional recovery under proportional indemnity, but does not have a right to all-or-nothing recovery under active/passive indemnity.

Second, the court determined that New Mexico courts should apportion damages between the indemnitor and the indemnitee based on principles of comparative fault.[113] This poses a jurisprudential problem with practical implications. Fault is not an element of contractual liability,[114] yet a party seeking proportional indemnity for contractual liability will use principles of comparative fault to apportion the no-fault liability.[115] The court does not indicate how to reconcile this problem.[116]

Third, the *Amrep* court's opinion on the overlap between contract and tort is evident by the introduction of tort-based damage setoffs into the field of contractual remedies.[117] *Amrep* can be viewed as both an incursion on the field of contract as well as an affirmation-by-omission of the core of its classical assumption: the freedom of the individual to contract.[118]

Under *Amrep*, a defendant found jointly and severally liable in contract with a right of proportional indemnity is similarly situated to a defendant jointly and severally liable in tort with a right of comparative contribution. Like a defendant jointly and severally liable in tort, a defendant liable on a contract theory continues to be responsible for 100% of the plaintiff's awarded damages.[119] After *Amrep*, however, a defendant liable in contract may seek proportional indemnity based on principles of comparative fault in the same way a defendant jointly and severally liable in tort can seek comparative contribution.[120] In effect, a party in Amrep's position may now seek economic damages from a third party in a tort action even though he has suffered no physical impact to his person or property.[121] This introduction of tort principles into the realm of contract buttresses Gilmore's notion of "contort," the reabsorption of contract principles

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112. *See Amrep*, 119 N.M. at 552-54, 893 P.2d at 448-50.

113. *Amrep*, 119 N.M. at 553, 893 P.2d at 449.

114. Paiz v. State Farm Fire and Casualty Co., 118 N.M. 203, 212, 880 P.2d 300, 309 (1994).

115. *Amrep*, 119 N.M. at 552-53, 893 P.2d at 448-49.

116. The problems could be solved by treating the action for proportional indemnity like a negligence action between the indemnitee and the indemnitor. The court would assume for purposes of the proportional indemnity action only that the indemnitee was negligent to some degree and the negligence was a proximate cause of the breach. The court should then determine whether the indemnitor was negligent and whether and to what degree the negligence was a proximate cause of the underlying breach. *Cf. Amrep*, 119 N.M. at 553, 893 P.2d at 449 (stating that Amrep should seek recovery for "percentage of fault attributable to Shollenbarger"). The indemnitor would be liable to the indemnitee for its portion of the fault. While this plan would solve the practical problem, it would be founded on a fiction and the jury instructions would be exceedingly complicated and contrived.

117. *Id.*

118. FRIEDRICH KESSLER, *Introduction: Contract As a Principle of Order*, *in* FRIEDRICH KESSLER ET AL., CONTRACTS (3d ed. 1986) (stating classical model of contract theory), *excerpted in* PETER LINZER, A CONTRACTS ANTHOLOGY 33 (Anderson Publishing) (2d ed. 1995).

119. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981).

120. *Amrep*, 119 N.M. at 552-54, 893 P.2d at 448-50.

121. *Id.* at 549-54, 893 P.2d at 445-50. *See supra* note 104 on economic-loss rule.

into tort[122]—the "residual category of civil liability."[123] In this way *Amrep* allows tort to encroach upon the scope of contract's domain.

However, *Amrep* should not be read as an indication of the court's willingness to further encroach on the scope of contract. *Amrep* creates rights for a liable defendant against persons who have no contract with the defendant; it does not affect fundamental remedial rights between Amrep and the homeowners. These remedial rights continue to be controlled by the express terms of the contract.[124] In other words, if found liable under a contract theory, a breaching party must still compensate 100% of the non-breaching party's awarded damages even though the breaching party may not in fact be 100% responsible for the breach.[125] Although the *Amrep* court indicates a strong preference for the extension of comparative fault principles,[126] it stops short of substituting principles of comparative fault for the parties' bargained-for remedies.[127] In this sense then, the court has preserved the parties' freedom to contract.[128]

VI. IMPLICATIONS

Amrep has four main implications. First, a party which discharges a judgment based on contractual liability may now pursue a claim against a wrongful third party for a portion of the liability.[129] Second, courts may be more likely to enforce non-traditional loss setoffs such as several liability in place of joint and several liability. Although *Amrep* continues to hold the breaching party 100% liable for the non-breaching party's loss, the court indicates a desire to aid breaching parties.[130] In light of this policy decision, it is a small step for courts to recognize and enforce parties' rights to freely allocate the risk of a judgment-proof third-party amongst themselves as they see fit. Consequently, Amrep could bargain for several liability with other homeowners in the future.

Third, it will now be marginally easier for third-party plaintiffs to implead third-party defendants.[131] To bring in a third-party defendant, the third-party plaintiff must prove that the third-party defendant is or may be liable to the third-party plaintiff for its liability to the plaintiff.[132]

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122. GRANT GILMORE, THE DEATH OF CONTRACT 87 (1974). Laycock notes that the economic-loss rule "polic[es] the boundary between tort and contract." *Supra* note 104, at 117. By removing this "boundary" for third-party plaintiffs, *Amrep* erodes the scope of contract. *Cf. Symposium: Reconsidering Grant Gilmore's "The Death of Contract"* 90 NW. U. L. REV. 1 (1995).

123. GILMORE, *supra* note 122, at 87.

124. *See Amrep*, 119 N.M. at 552, 893 P.2d at 448.

125. *Id.* at 553, 893 P.2d at 449.

126. *Id.*

127. *Cf. Amrep*, 119 N.M. at 552-54, 893 P.2d at 448-50.

128. The New Mexico Supreme Court previously stated its support of the policy of freedom to contract: "New Mexico has a strong public policy of freedom to contract that requires enforcement of contracts unless they clearly contravene some law or rule of public morals." United Wholesale Liquor Co. v. Brown-Forman Distillers Corp., 108 N.M. 467, 471, 775 P.2d 233, 237 (1989).

129. *See Amrep*, 119 N.M. at 552, 893 P.2d at 448.

130. *Id.*

131. N.M. R. CIV. P. 1-014 (Repl. Pamp. 1992); FED. R. CIV. P. 14.

132. *Id.*

Prior to *Amrep*, a plaintiff could do this by establishing that it may have a right of contribution, contractual indemnity, active/passive indemnity, or several liability.[133] Because *Amrep* creates a broadly applicable right to indemnity, the defendant can bring in virtually any other party which, within the bounds of good faith,[134] may be potentially responsible for the third-party plaintiff's potential liability.[135] *Amrep* gives defendants a widespread substantive right against third parties; consequently, defense attorneys will have an easier time impleading other parties.

Fourth, while proportional indemnity seems appealing in its extension of fundamental values of fairness, it has systemic drawbacks. Litigation will increase due to defendants' increased ease in joining third-party defendants in contract-based suits.[136] Additionally, litigation will become more complex.[137] Procedural jockeying and the attendant costs and uncertainties which accompany complex litigation will only increase.

VII. CONCLUSION

Amrep preserves active/passive indemnity for a defendant sued in tort while creating a right to proportional indemnity for other defendants whose liability may not otherwise be susceptible to proration based on principles of comparative fault. Furthermore, *Amrep* manifests the New Mexico Supreme Court's approval of the overlap between contract and tort, and opens the door for more creative contractual remedies.

JAMES M. MOCK

133. Several liability does not fit the technical requirements of the "is or may be liable to" clause of N.M. R. Civ. P. 1-014, but Tipton v. Texaco, 106 N.M. 689, 692, 712 P.2d 1351, 1354 (1985), mitigates this barrier in New Mexico so that the clause bars virtually no party potentially liable in tort.

134. *See* N.M. R. Civ. P. 1-011 (Supp. 1992); Fed R. Civ. P. 11.

135. *Amrep*, 119 N.M. at 552-54, 893 P.2d at 448-50.

136. In disapproving of the adoption of proportional indemnity, the dissent in *Schneider*, 843 P.2d at 588 stated:

> This case may produce more litigation, more business for lawyers, more costs and expenses to the legal system, and more confusion and uncertainty in the law than anything since centuries ago when a forgotten English Lord sitting on the King's Bench . . . said "let the negligence trial begin."

137. *Id.*