

A09 – 1335

STATE OF MINNESOTA
IN SUPREME COURT

Alice Ann Staab,

Appellant,

vs.

Diocese of St. Cloud,

Respondent.

REPLY BRIEF OF APPELLANT ALICE ANN STAAB

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Rules:

None

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None

**APPELLANT STAAB'S STATEMENT OF THE CASE AND THE FACTS IN
REPLY**

APPELLANT STAAB'S STATEMENT OF THE CASE IN REPLY

In its Statement of the Case, Respondent Diocese of St. Cloud asserts that the jury found “only 50% liability against the Diocese.” See Respondent’s Brief, at 1. Unfortunately, Minnesota appellate decisions are replete with statements of a jury finding “liability.” See, for example, *Otterness v. Horsley*, 263 N.W.2d 403 (Minn. 1978).

But juries don’t find liability; courts do. Juries only make findings of fact [though they are instructed that they must follow appropriate applicable law in making those findings]. The litmus test is this: does a jury’s verdict, standing alone, result in liability? Of course not. Liability is a conclusion of law based upon one or more findings of fact.

APPELLANT STAAB'S STATEMENT OF FACTS IN REPLY

Once again, Respondent Diocese asserts that the jury found “liability”: “The jury assigned 50% liability to the Diocese and 50% liability to Mr. Staab.” See Respondent’s Brief, at 2. Appellant Staab disagrees.

APPELLANT STAAB'S ARGUMENT IN REPLY

Minn. Stat. § 604.02, Subd. 1, does not mandate, authorize or permit that a defendant found at fault have her/his/its obligation to the plaintiff reduced by a percentage of fault attributed to a non-party.

1. Because the clear and unambiguous language of Section 604.02, Subd. 1 states that it applies only where two or more persons are severally liable, in a case where only one person is severally liable Section 604.02, Subd. 1 does not apply.

Appellant Ann Staab brought this lawsuit against Respondent Diocese of St. Cloud seeking compensation for an injury that occurred on April 9, 2005. The Diocese could have added Richard Staab to the lawsuit as a third-party defendant, but chose not to. Following trial, a jury by its verdict found that the Diocese had been negligent and its negligence had been a cause of Appellant Staab's 4/9/2005 injury. The jury also found Appellant Staab's damages from the injury to be \$224,200.70.

Even though Richard Staab was not a party to the lawsuit, Respondent Diocese asked the trial court to include on the verdict form questions about Richard Staab's possible fault for his wife's injury. The jury found that Richard Staab had been negligent and his negligence had been a cause of his wife's injury. Apportioning the total negligence causing the injury between Respondent Diocese and non-party Richard Staab, the jury found that each of them had been 50% at fault.

Upon receiving the jury's verdict, the trial court had to make appropriate conclusions of law based upon the jury's findings of fact. From the jury's fact

findings, the trial court could conclude: [1] that Respondent Diocese had been negligent and its negligence had been a cause of Appellant Staab's 4/9/2005 injury; and [2] that Appellant Staab's damages as a result of the 4/9/2005 injury were \$224,200.70. The trial court entered judgment accordingly.

The crux of this dispute is whether the trial court should have made different legal conclusions because of the jury's findings about Richard Staab's conduct. Minn. Stat. § 604.02, Subd.1, is the focus of this appeal because this statute is the sole basis for the Court of Appeals' reversal of the trial court. The Court of Appeals held that § 604.02, Subd.1, compelled the trial court in this case to enter judgment against Respondent Diocese for only 50% of Appellant Staab's damages.

The statute begins with the words: "When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each..." Appellant Staab contends that in this case only one "person," Respondent Diocese, is "severally liable." Respondent Diocese contends that in this case two "persons," the Diocese and Richard Staab, are "severally liable." If Richard Staab is not "severally liable," then the trial court was correct and its judgment should be reinstated.

Respondent Diocese argues that "liability" means one thing "for the purposes of establishing common fault for an action" and something else "for the purposes of a claim for indemnity or contribution against another tortfeasor." See Respondent's Brief, at 12. Respondent also argues that "[i]n the context of

Minnesota Statutes, § 604.02, Subd.1, the plain meaning of the word 'liable' is 'concurring negligence causing injury.'" See Respondent's Brief, at 13.

If we accept Respondent Diocese's definition of "liable" and insert it into the statute, then the statute reads: "When two or more persons are liable concurrently negligent causing injury, contributions to awards shall be in proportion to the percentage of fault attributable to each ..." If the trial court in this case had viewed this statute using Respondent's definition of the word "liable," the trial court's judgment would not be changed. Because Richard Staab was not a party, the trial court had no more basis for finding him "concurrently negligent causing injury" than it had for finding him "liable."

Respondent Diocese argues that "concurrently negligent causing injury" is not something found by a court; it "is created at the instant the tort is committed." See Respondent's Brief, at 10. This argument suggests that the trial court in this case, in deciding what judgment to enter from the jury's verdict, should have concluded Richard Staab liable not because the jury had found him so but because he simply had been "liable" from the "instant" of his wife's injury.

In three of the cases cited by Respondent Diocese, the Minnesota Supreme Court did refer to "common liability" being "created at the instant the tort is committed." See *Employers Mut. Casualty Co. v. Chicago, St. P., M. & O. Ry. Co.*, 50 N.W. 2d 689, at 693 (Minn. 1951); *White v. Johnson*, 137 N.W. 2d 674, at 679 (Minn. 1965); and *Spitzack v. Schumacher*, 241 N.W. 2d 641, at 643 (Minn. 1976). In all three of these cases, the Supreme Court was addressing

contribution claims by one alleged tortfeasor against another alleged tortfeasor. In all three of these cases, the Court explained that even though a joint tortfeasor might, after the tort is committed, acquire a defense against the claim of the injured party, the tortfeasor might still be liable to another “joint tortfeasor” or “cotortfeasor” for contribution, because the common liability of the two tortfeasors was created when the tort was committed. See *Spitzack*, 241 N.W. 2d at 643, which cited both *Employers* and *White v. Johnson*.

In all three cases, the Supreme Court clearly stated that claims for contribution between joint tortfeasors were created at the time of the tort. In all three cases, the Supreme Court made it clear that even though the *claim* arose at the time of the tort, actual *liability* for a contribution claim must be proved before one joint tortfeasor would be considered liable to another.

There are, of course, situations where the parties to a lawsuit agree to be bound by findings and conclusions concerning the conduct of a non-party. One example is where an injured plaintiff settles with one defendant using a Pierringer release and proceeds to trial against other defendants. In such cases the plaintiff agrees to reduce her/his/its damages by the percentage of fault attributed to the Pierringer-released party. See *Frey v. Snelgrove*, 269 N.W.2d 918 (Minn. 1978), citing *Pierringer v. Hoyer*, 21 Wis. 2d 182, 124 N.W.2d 106 (1963).

In *Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289 (Minn. 1986), in addition to submitting to the jury questions of fault of parties who had been released by the plaintiff using Pierringer releases, the trial court also submitted to the jury

questions regarding the fault of Johns-Manville Sales Corporation. Johns-Manville had not been released from the case by the plaintiff using a Pierringer release. Johns-Manville had been a party to the case and had filed for bankruptcy, resulting in the claims against it being stayed. The trial court had then severed from the case those claims involving Johns-Manville, allowing the rest of the case to move forward. While not explicit in the appellate opinion, it appears that in *Hosley* the remaining parties agreed to be bound by the trial court's findings concerning Johns-Manville.

Respondent Diocese cites *Hosley* as holding that the word "person" in § 604.02, Subd. 1, refers to both parties and non-parties, such that the jury's finding of 50% fault against Richard Staab should be construed as a finding that Richard Staab is "liable." See Respondent's Brief, at 7. Any doubt about the possible application of the *Hosley* decision to the facts of this case was laid to rest with the Supreme Court's ruling in *Schneider v. Buckman*, 433 N.W.2d 98 (Minn. 1988).

In *Schneider*, the jury had found Defendant Buckman 35% at fault, his daughter and employee 25% at fault, and "two other tortfeasors who were not parties to the lawsuit" 40% at fault. The trial court had held Buckman liable for his employee's fault as well as his own, and had also held Buckman liable for the 40% fault found on the part of non-parties. The Court of Appeals reversed the trial court, holding that Buckman was only liable for the 35% fault found against him. See *Schneider v. Buckman*, 412 N.W.2d 787 (Minn. App. 1987).

On review of the decision of the Court of Appeals, the Supreme Court first held that Buckman was vicariously liable for the fault of his employee under the doctrine of *respondeat superior*. 433 N.W.2d at 102. The Court then addressed the issue of reallocating the fault attributed by the jury to non-parties:

It is our view that the reallocation procedures of Minn.Stat. Sec. 604.02, subd. 2, as interpreted in *Hosley I* [*Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289 (Minn.1986)], are not implicated where, as here, there is but one defendant against whom judgment can be or has been entered. The fact that a jury, in its task of apportioning liability among the various tortfeasors, has determined that Buckman's individual negligence was 35% of the total is of no practical consequence when there are no other defendants against whom judgment can be entered.

433 N.W.2d at 103.

The Supreme Court could not have been more clear in stating that when a jury apportions less than 100% fault to the only party, like the 50% apportionment to Respondent Diocese here, it is of “no practical consequence” when there are no other defendants against whom judgment can be entered. The trial court in this case cited *Schneider v. Buckman*, and followed it. See Add. 10-11.

The clear and unambiguous language of § 604.02, Subd. 1, states that it applies only where two or more persons are severally liable. Because in this case only one person, Respondent Diocese, is severally liable, the Court of Appeals erred in ruling that this statute obligated the trial court to adjudge Respondent Diocese less than 100% responsible for Appellant Staab's damages.

4. In addition to the fact that Section 604.02, Subd. 1, doesn't call for it, there are other good reasons for not allowing an at-fault defendant to reduce her/his/its obligation to plaintiff by a percentage of fault attributed to a non-party.

Respondent Diocese and Amicus Minnesota Defense Lawyers Association [MDLA] parade a series of horror stories, offered as the potential "absurd results" from the trial court's judgment in this case. These examples should be viewed in light of their underlying but unstated premise--that the legislature's 2003 Amendment to Minn. Stat. § 604.02, Subd. 1, overturned this state's long-standing policy of protecting the innocent victim over the wrongdoer, embodied in the state's common law and incorporated into the comparative fault statute, as amended,¹ and replaced it with a policy favoring the insurance industry and the well-heeled wrongdoer over the uncompensated victim. At a time when public distrust of the civil justice system and so-called "frivolous lawsuits" are the subject of public discussion, Respondent and Amicus urge a statutory interpretation that would result in increased litigation against the poor and underinsured while leaving innocent victims uncompensated.

Respondent Diocese' and Amicus MDLA's Absurd Examples:

To demonstrate the "absurd result" it claims would follow if the trial court's judgment in this case is reinstated, Respondent Diocese cites an absurd example, the 1%, 98%, 1% verdict, a classic law school hypothetical used to

¹ See the public policy discussion in the dissenting opinion of Justice Meyer in Rowe v. Munye, 702 N.W.2d 729, 748 (Minn. 2005).

illustrate the extreme possibilities of joint and several liability. Notably, Respondent cites no reported case in which the cited fault split actually occurred.

Respondent's example and the examples cited by Amicus MDLA all begin with the highly dubious assumption that the amount of fault a jury assesses against an unrepresented party is the same as the amount of fault the jury would assess against the same party with representation by counsel.² In the present matter, would a jury have found Richard Staab 50% at fault if he had been a represented party at trial? We think not.

Amicus and Respondent contend that the cited absurd results flow from plaintiffs' decisions on whom to sue. This claim ignores well-known strategic choices available to the defendant that affect outcomes. Most notably, the defense has the strategic choice of either joining an unnamed tort-feasor as a third-party defendant or trying the case against an "empty chair" while preserving the option of later pursuing an action for contribution in the event that defendant is forced to pay more than her/his/its fair share. Indeed, defendant has the benefit of a statute of limitations in contribution actions which does not begin to run until a joint tort-feasor has paid more than their fair share. See *Blomgren v. Marshall Management Services, Inc.*, 483 N.W.2d 504 (Minn. App. 1992).

Respondent Diocese posits that "a minimally at fault defendant cannot take any action to protect itself from paying 100% of a plaintiff's damages." See

² In the case at bar, the defense defended the case against Richard Staab's empty chair but in final argument argued that no one was at fault. The jury found non-party Richard Staab 50% at fault.

Respondent's Brief, at 18. Appellant Staab disagrees. A defendant is free to exercise the strategic option of asserting a third-party action against other potential tort-feasors. Would the 1% at-fault defendant in the Diocese' example still have to pay 100% of the plaintiff's damages before pursuing the third-party defendant for contribution? That would depend on whether a defendant and a third-party defendant, both found at fault, are considered to be "severally liable" under § 604.02, Subd. 1. While this issue is not before the Court, in this case the Diocese argues that a party and non-party found at fault are "severally liable." The argument has substantially more force where the persons found at fault are both parties and the findings bear legal consequences and principles of res judicata and collateral estoppel apply.

To return to the cited example, a defendant found 1% at fault, with a finding of 98% fault on the part of two nonparties, is responsible for 100% of plaintiff's damages. This outcome is dictated by the defendant's choices. Having made the strategic choice not to join third-party defendants, the defendant is left to pursue contribution claims against other tort-feasors. If defendant had chosen to join third-party defendants and the jury returned identical findings of fault, defendant would argue its "contribution to the award" was limited to its percentage of fault under § 604.02, Subd. 1.

The “Absurd Result” which would flow from the Court of Appeals’ Decision in this case:

More on point than the example cited by Respondent Diocese and Amicus MDLA is the following scenario:

Plaintiff is seriously injured in a non-motor accident as a result of the negligence of one or both of two potential tort-feasors. Pre-suit investigation indicates primary fault likely rests with A with possibly some fault on B. A is well insured. B has limited assets and no insurance. Plaintiff sues A. A chooses not to assert a third-party claim against B. Defendant A tries the liability case against B's empty chair. In a surprising verdict that shocks everyone in the courtroom, the jury returns a verdict placing 25% of the fault on A and 75% of the fault on non-party B. The jury awards substantial damages, but plaintiff can only recover 25% of her damages from A under the Court of Appeals’ ruling in *Staab v. Diocese of St. Cloud*. To add further insult, the entire recovery goes to plaintiff's ERISA health plan in satisfaction of its subrogation interest, leaving the innocent plaintiff uncompensated.

The statute of limitations has run on plaintiff's claims against B. With the clarity of hindsight, plaintiff wonders why his attorney had not sued the primary tort-feasor, B, who, though uninsured and with meager assets, is employed. Plaintiff sues his attorney for malpractice.

Rolling the clock forward two years, another plaintiff is seriously injured in a non-motor vehicle accident as a result of the negligence of one or both of two

potential tort-feasors. Pre-suit investigation indicates the primary fault rests with A, with possibly some fault on B. A is well insured. B has limited assets and no insurance. Fresh from attending a seminar on how to avoid malpractice in litigation, plaintiff's counsel reluctantly sues both the well-insured A and the employed but uninsured B. B retains counsel, using his limited assets to pay his lawyer, and B's lawyer successfully convinces the jury that B is only 25% at fault, with 75% fault on A. Plaintiff makes a full recovery. B files for bankruptcy.

Respondent Diocese made a strategic choice not to join Richard Staab as a third-party defendant. Respondent is now obligated under § 604.02, Subd. 1, for 100% of the damage award. This outcome is controlled by Respondent's own choice. This result is consistent with this state's long-held policy of protecting the innocent victim over the wrongdoer. The Diocese may now choose to pursue a contribution action against Richard Staab.

APPELLANT STAAB'S REPLY BRIEF CONCLUSION

Because the trial court appropriately ruled that Minn. Stat. § 604.02, Subd. 1, does not apply when only one party is liable, the Supreme Court must reverse the decision of the Court of Appeals and reinstate the judgment of the trial court holding Respondent Diocese of St. Cloud liable for 100% of Appellant Staab's damages.

Respectfully submitted,

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Dated: 8-6-10



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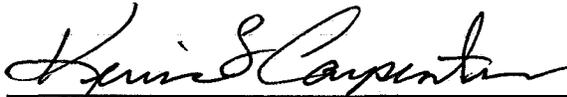
APPELLANT STAAB'S CERTIFICATION OF REPLY BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 3,481 words. This brief was prepared using Microsoft Office Word 2007.

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