

*State of Minnesota*  
***In Court of Appeals***

*Gail C. O'Brien, f/k/a Gail C. Dombeck,*

*Respondent,*

vs.

*William Raymond Herbert Dombeck, II,*

*Respondent,*

and

*Central Valley Cooperative, f/k/a Central Co-op and Robert Dean Hareid,*

*Appellants.*

**APPELLANTS' BRIEF, APPENDIX and ADDENDUM**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## STATEMENT OF LEGAL ISSUES

- I. Is reallocation of the judgment permissible when the district court found Respondent insolvent pursuant to Minn. Stat. §604.02, subd. 2, when Minn. Stat. §604.02, subd. 1 clearly states contributions to awards shall be in proportion to the percentage of fault attributable to each except in four conditions that are not present in this case?**

*The district court held in the affirmative. (ADD-3).*

Authorities: Minnesota Statute §604.02, subd 1 & 2; Staab v. Diocese of St. Cloud, 813 N.W.2d 68 (Minn. 2012); Eid v. Hodson, 521 N.W.2d 862, 864 (Minn. Ct. App. 1994).

- II. Can Respondent William Raymond Herbert Dombeck, II be declared insolvent by the district court when he has not demonstrated insolvency that is not the result of the judgment in this matter?**

*The district court held in the affirmative. (ADD-3).*

Authorities: Minnesota Statute §604.02, subd 2.

- III. Should Appellants be responsible, jointly and severally, with Respondent William Raymond Herbert Dombeck, II for the entire amount of Plaintiff's costs and disbursements rather than limit their exposure to the 10% fault attributable to them by the jury?**

*The district court held in the affirmative. (ADD-3).*

Authorities: Minnesota Statute §604.02, subd. 1.

## STATEMENT OF THE CASE

This matter is an appeal from the Order for Judgment issued by the Honorable Joseph F. Wieners of the District Court, Third Judicial District, Dodge County on May 10, 2012, granting Respondent's Gail C.O'Brien, f/k/a Gail C. Dombeck (hereinafter "Respondent Gail Dombeck") post-trial motions.

A jury verdict was rendered on February 16, 2012 which found Appellants Central Valley Cooperative, f/k/a Central Co-op and Robert Dean Hareid (hereinafter "Appellants") 10% negligent for the injuries sustained by Respondent Gail Dombeck. The jury placed 90% of fault on Respondent William Raymond Herbert Dombeck, II (hereinafter "Respondent Dombeck"). Several cross-motions were filed in this matter following the jury verdict. Oral arguments were held on all motions on March 30, 2012.

Based upon all of the testimony and evidence adduced at the hearing, the Honorable Joseph F. Wieners issued an Order for Judgment on May 10, 2012. The Court found that Respondent Dombeck was insolvent and reallocated an additional 10% of the judgment to Appellants pursuant to Minn. Stat. §604.02, subd. 2. The Court also held that Plaintiffs' costs and disbursements should be jointly and severally among the Respondents.

This appeal followed.

## STATEMENT OF FACTS

The underlying facts in the case involve a motor vehicle accident. Appellant Central Cooperative was the owner of a truck driven by its employee, Appellant Hareid, on February 22, 2005, when the motor vehicle accident occurred. (AA-1). Respondent

Gail Dombeck was the right front seat passenger of a vehicle owned by her and driven by her then husband, Respondent Dombeck. Respondents were driving on a straight, flat road when they began following a truck driven by Appellant Haried. (AA-1).

As both vehicles proceeded northbound and approached an intersection, Appellant Haried signaled a left turn, slowed and applied his brakes. (AA-8). As he began his turn, Respondents' vehicle, which was following him, began to pass the truck. As Appellant Haried observed Respondents' vehicle attempt to pass, he proceeded back into his lane of traffic at which time he was then rear-ended by Respondents' vehicle. (AA-8).

A jury trial was held over the course of three days. The jury rendered a verdict on February 16, 2012. The jury found Respondent Dombeck negligent and that his negligence was a direct cause of the accident. (AA-25). The jury attributed 90% fault to Respondent Dombeck. The jury found Appellant Hareid negligent and that the negligence was a direct cause of the accident. (AA-25). The jury apportioned 10% fault to Appellants. Respondent Gail Dombeck was awarded \$223,622.82 for past medical expenses, past wage loss, and past pain and suffering. (AA-25). The jury awarded \$80,000.00 to Respondent Gail Dombeck for future medical expenses and future pain and suffering. (AA-25). The Court entered judgment on or about March 22, 2012. (ADD-8).

Following the jury verdict, Appellants brought post-trial motions<sup>1</sup> asking the court to limit Appellants liability to 10% of the judgment and 10% of the costs and disbursements. (AA-30). On or about March 2, 2012, Respondent Gail Dombeck moved

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<sup>1</sup> Appellants also brought a motion for a reduction of collateral sources from the judgment. This motion was granted and is not at issue on appeal.

for Costs and Disbursements. (AA-33). On or about March 8, 2012, Respondent Gail Dombeck filed a motion<sup>2</sup> to reallocate the uncollectible portion of the verdict to Appellants, by reason of Respondent Dombeck's insolvency. Oral arguments were held on March 30, 2012 on all the post-trial motions.

In an Order for Judgment dated May 10, 2012, the district court denied Appellants' motion for amended findings to limit the judgment amount against them to 10%. The court granted Respondent Gail Dombeck's motion and found Respondent Dombeck insolvent. (ADD-1). The court reallocated an additional 10% of the judgment to Appellants by reason of Respondent Dombeck's insolvency pursuant to Minn. Stat. §604.02, subd. 2. (ADD-1). The district court also granted Respondent Gail Dombeck's motion for costs and disbursements against Appellants and Respondent Dombeck, jointly and severally. (ADD-1).

### STANDARD OF REVIEW

Interpretation of a statute on undisputed facts is a question of law subject to de novo review. Reider v. Anoka-Hennepin Sch. Dist. No. 11, 728 N.W.2d 246, 249 (Minn.2007); Staab v. Diocese of St. Cloud, 780 N.W.2d 392, 393 (Minn. Ct. App. 2010), review granted (May 26, 2010), aff'd as modified and remanded, 813 N.W.2d 68 (Minn. 2012).

Interpreting statutes, courts must "ascertain and effectuate the intention of the legislature." Minn.Stat. §645.16 (2008); Brua v. The Minn. Joint Underwriting Ass'n,

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<sup>2</sup> Respondent Gail Dombeck's motion also included the award of pre-judgment interest which was granted by the Court and not at issue on appeal.

778 N.W.2d 294, 300 (Minn.2010). Words should be construed according to their “common and approved usage.” Minn.Stat. §645.08, subd. 1 (2008). “If the legislature’s intent is obviously discernible from a statute’s language, we must interpret that language according to its plain meaning without applying other principles of statutory construction.” State v. Anderson, 683 N.W.2d 818, 821 (Minn.2004). The language of a statute is ambiguous only if it is subject to more than one reasonable interpretation. Amaral v. Saint Cloud Hosp., 598 N.W.2d 379, 384 (Minn.1999).

## ARGUMENT

### **I. Is reallocation of the judgment permissible when the district court found Respondent insolvent pursuant to Minn. Stat. §604.02, subd. 2, when Minn. Stat. §604.02, subd. 1 clearly states contributions to awards shall be in proportion to the percentage of fault attributable to each except in four conditions that are not present in this case?**

The jury found Robert Hareid negligent and a cause of the accident. They also found the percentage of fault to be 10%. Under Minnesota comparative fault law Minn. Stat. §604.02 provides for liability under the circumstances of this case to limit the amount of any judgment to the percentage of liability, or in this case to \$28,362.28, plus 10% of prejudgment interest and costs and disbursements.

The Minnesota Supreme Court held that the 2003 amendments to Minn. Stat. §604.02 are an indication of the, “...Legislature’s intent to limit joint and several liability to the four circumstances enumerated in the exception clause, and to apply the rule of several liability in all other circumstances.” Staab v. Diocese of St. Cloud, 813 N.W.2d 68, 78 (Minn., Apr. 18 , 2012). In Staab, the Court provided a detailed history of the legislative changes made to Minn. Stat. §604.02. Staab at 78. The Court

concludes that, "...the 2003 amendments to the statute clearly indicate the Legislature's intent to limit joint and several liability to the four circumstances enumerated in the exception clause, and to apply the rule of several liability in all other circumstances." Staab at 78. To now apply reallocation to the facts of this case is contrary to the intent and purpose of the general rule of several liability.

Minnesota Statute §604.02, subd 1. reads as follows:

When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award:

- (1) a person whose fault is greater than 50 percent;
- (2) two or more persons who act in a common scheme or plan that results in injury;
- (3) a person who commits an intentional tort; or
- (4) a person whose liability arises under chapters 18B - pesticide control, 115 - water pollution control, 115A - waste management, 115B - environmental response and liability, 115C - leaking underground storage tanks, and 299J - pipeline safety, public nuisance law for damage to the environment or the public health, any other environmental or public health law, or any environmental or public health ordinance or program of a municipality as defined in section 466.01.

This section applies to claims arising from events that occur on or after August 1, 2003.

Minn. Stat. §604.02 subd 1.

The starting assumption is that liability of two or more tortfeasors will be several, rather than joint. The amendment, as noted in Staab, makes several liability the norm and joint liability the exception. Joint liability applies only in the four specified categories of cases, as noted above. None of these exceptions apply to the facts of this case.

Appellants were found 10% liable by the jury, not even close to the threshold amount of 50% contemplated in statute. Appellants and Respondent Dombeck were also not engaged in a common scheme. There was no evidence presented nor allegations made at trial that Appellants and Respondent Dombeck were engaged in a joint venture. Issues of whether joint venture exists for purposes of joint liability is an issue of fact for the jury and Minnesota Courts have deemed the issue waived if not raised at the time of trial. Hansen v. St. Paul Metro Treatment Center, Inc., 609 N.W.2d 625 (Minn. Ct. App. 2000), review denied. Lastly, Appellants actions did not involve intentional torts or environmental torts. As none of the exceptions noted in Minn. Stat. §604.02, subd. 1, apply, a plain reading of the statute means that Appellants must only be responsible for the percentage allocated to them by the jury and therefore reallocation would not apply.

In the present case, the district court relied upon subdivision 2 of the statute in ordering reallocation of the uncollectable funds to Appellants. Subdivision 2 reads as follows:

Upon motion made not later than one year after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. A party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

Minn. Stat. §604.02 subd 2.

In Newinski, the Court stated:

The starting point for our review of the district court's reallocation decision is to determine whether “two or more persons are jointly liable” for the damage award. Minn.Stat. §604.02, subd. 1. There is no basis for reallocation unless joint liability is established. Eid v. Hodson, 521 N.W.2d 862, 864 (Minn.1994) (stating that “[u]nless joint liability is established ... Minn.Stat. §604.02, subd. 2 does not apply and there is no basis for reallocating any uncollectible amount of a judgment to another party”).

Newinski v. John Crane, Inc., A08-1715, 2009 WL 1752011 (Minn. Ct. App. June 23, 2009) (AA-38).

Although the Newinski court relies upon the pre-2003 amendment, the analysis regarding reallocation should be the same. It must be determined if two or more persons are jointly liable for reallocation to apply. Currently, the legislature has provided only four exceptions to apply joint liability, otherwise several liability is applied. As Appellants do not fall under one of the exceptions provided for joint liability, reallocation is not appropriate. Reallocation is not an issue unless joint liability is established.

Further, the issue of the conflict in language between subdivision 1 and 2 after the 2003 amendments to the statute was addressed by Michael Steenson in a 2010 law review article, also cited by the Court in Staab. Mr. Steenson states:

Section 604.02, subdivision 2 of the Comparative Fault Act was not directly changed by the 2003 amendment, although its role was substantially diminished through the adoption of several liability as the general rule in cases involving indivisible injuries caused by joint, concurrent, or successive acts of two or more at-fault defendants. The simple reason is that the elimination of joint and several liability in favor of a general rule of several liability will remove the need for reallocation.

Michael K. Steenson, *Joint and Several Liability in Minnesota: The 2003 Model*, 30 Wm. Mitchell L. Rev. 845, 885 (2010) (AA-46).

As noted by Steenson, the role of subdivision 2 of the statute was “substantially diminished through the adoption of several liability as the general rule in cases involving indivisible injuries caused by joint, concurrent, or successive acts of two or more at-fault defendants.” Steenson at 884-885. To now suggest that Appellants are liable to the Respondent Gail Dombeck, both joint and several with Respondent Dombeck, flies completely in the face of the several liability statute as crafted by the Legislature in 2003.

When the two subdivisions are read in conjunction with one another, it is clear that the legislature did not intend to carve out four exceptions in the first subdivision, but then essentially require all cases to submit to reallocation regardless of the nature of the case. The result of this would directly contradict the plain language in subdivision 1. If it was the intent of the legislature to reallocate among the parties, the 2003 amendment to the several liability statute would not have been drafted or at least be drafted to include an exception for insolvency. As noted by Steenson, the need for reallocation has been eliminated once the general rule of several liability was established. Steenson at 885. Therefore, to reallocate Respondent Dombeck’s judgment to the remaining Appellants is contrary to the several liability statute, and incorrectly classifies the two parties as joint and several.

Moreover, the language in subdivision 2 of the statute discusses the “equitable share” of the parties. The legislature’s choice of such words is interesting given the definition of equity as fairness or evenhanded dealing. The use of such words further emphasizes the points raised by Steenson; that the need for reallocation has diminished. The use of the terms “equitable share” demonstrates that the legislature’s intent of the

statute overall was to ensure fairness among the parties and proportionate responsibility rather than one party bearing the responsibility of an entire judgment.

Reallocation is not appropriate when joint liability has not been established.

Appellants should only be liable for the 10% allocated to them by the jury.

**II. Can Respondent William Raymond Herbert Dombeck, II be declared insolvent by the district court when he has not demonstrated insolvency?**

Under joint-liability principles, if one party's equitable obligation is uncollectible, another party may move for reallocation within one year of the judgment; in that circumstance, the district court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party. A motion must be made to the court no later than one year after judgment is entered, requesting reallocation. The trial court then must find that the judgment, at that time, is uncollectible. Minn.Stat. §604.02, subd. 2.

Respondent Gail Dombeck's request for reallocation of Respondent Dombeck's liability is premature. At the time the district court ruled on the issue, the judgment has not even been entered. Respondent Gail Dombeck had already assumed that Respondent Dombeck was unable to pay any judgment over and above the insurance coverage in the amount of \$30,000. Respondent Gail Dombeck has failed to attempt any collection process against Respondent Dombeck. Instead, an assumption is made by Respondent Gail Dombeck that Respondent Dombeck is unable to cover his percentage of the judgment. In order for a determination to be made about Respondent Dombeck's insolvency, Respondent Gail Dombeck must be required to conduct due diligence and

make a good faith effort to collect the judgment from Respondent Dombeck. Respondent Gail Dombeck should not be given a free pass to immediately declare Respondent Dombeck insolvent without conducting any attempts at collection.

Moreover, Respondent Dombeck's insolvency stems solely from the judgment in this matter. In his affidavit filed in district court, Respondent Dombeck simply states he is not currently working and has no assets. (AA-50). Respondent Dombeck is only 41 years of age. (AA-53). There is no indication that he is physically unable to work. His financial circumstances may change which allow him to satisfy the judgment entered against him. There simply is not basis to find Respondent Dombeck insolvent.

The statute allows for Respondent Gail Dombeck to bring this motion up until a year following the entry of the judgment. Time must be given to Respondent Dombeck to satisfy the judgment before reallocation becomes necessary. If insolvency can be declared simply because a 41 year-old does not have employment at the time the judgment is entered, there will be little incentive for Respondent Dombeck to ensure he takes responsibility for the judgment entered against him.

**III. Should Appellants be responsible, jointly and severally, with Respondent William Raymond Herbert Dombeck, II for the entire amount of Plaintiff's costs and disbursements rather than limit their exposure to the 10% fault attributable to them by the jury?**

Appellants do not object that Respondent Gail Dombeck is the prevailing party and is entitled to reasonable costs. The amount of costs and disbursements awarded by the district court is also not in dispute for purposes of this appeal. However, the award of

costs and disbursements imposed against the Appellants should be limited to the 10% of fault allocated by the jury.

This is not a modification of Minnesota law. Minnesota has not addressed the question of allocation of costs since amending Minn. Stat. §604.02, subd. 1 in 2003 to provide for a presumption of several liability. These Appellants are not seeking to abolish any award for costs to Respondent Gail Dombeck. Instead, they are asking the court to follow the holding of neighboring courts, with similar language in their several liability statute. In Bartels v. City of Williston, 276 N.W.2d 113, 121 (N.D.1979), the North Dakota Supreme Court explained that the comparative negligence concept expressed in 9-10-07, NDCC "also embraces related matters and contemplates the allocation of costs on the same percentage basis as the allocation of damages unless justice requires otherwise." Id. Application of North Dakota's interpretation is further supported by the language utilized by the Minnesota legislature in §604.02, subd. 1, which states that:

“when two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each.”

The plain meaning of the term “awards” suggests that it encompasses not only jury verdicts, but also costs and disbursements and interest.

In this case, Respondent Gail Dombeck sought \$15,303.80<sup>3</sup> for her costs and disbursements. This amount is inserted in the judgment and therefore *awarded* to Respondent Gail Dombeck. Based on North Dakota's interpretation and the language

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<sup>3</sup> The Court also awarded pre-judgment interest, the amount of which is not in dispute.

utilized by the Minnesota legislature in §604.02, subd. 1, any award, including costs and disbursements, should be based on the proportion of damages found against them.

A jury's determination of fault is the most appropriate source of allocation of these costs. The argument that additional resources may have been used to prove damages against one party or another is without merit and difficult to decipher. In this case, the claim brought against Appellants and Respondent Dombeck was negligence. The elements Respondent Gail Dombeck must use to prove the claims are identical against both parties. In a motor vehicle accident such as this, the evidence used to prove the charges against both parties was identical.

The majority of costs claimed by Respondent Gail Dombeck involve her injuries and medical treatment. Obviously, Respondent Gail Dombeck used the same evidence to prove causation and damages regardless of which party is responsible.

Appellants were found to be 10% liable by the jury and Respondent Dombeck was 90% at fault. The disproportionate allocation of fault between the parties further supports the need to allocate expenses proportionate to jury's findings. A party should only be responsible for their allocated proportion. This is consistent with the change by the legislature in 2003 to the several liability statute to ensure tortfeasors are not disproportionately penalized. Appellants were only found to be 10% at fault and the judgment entered against them, which includes costs, should reflect that amount.

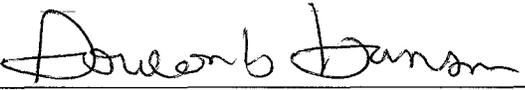
### **CONCLUSION**

For the forgoing reasons, Appellants Central Valley Cooperative, f/k/a Central Co-op and Robert Dean Hareid respectfully request the Court of Appeals find the district

court erred as a matter of law and reverse the lower courts decision on all three issues addressed above.

Dated this 11<sup>th</sup> day of July, 2012.

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