

Case No. A12-984

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' REPLY BRIEF

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ARGUMENT

I. REALLOCATION OF ANY PORTION OF THE JUDGMENT AGAINST APPELLANTS IS NOT PERMITTED BY MINNESOTA LAW BECAUSE APPELLANTS ARE NOT JOINTLY AND SEVERALLY LIABLE.

A. Several Liability between Multiple Tortfeasors is now the Default Rule in Minnesota pursuant to the 2003 Amendments to Minn. Stat. § 604.02 subd. 1.

Respondent O'Brien urges this court to look to Minnesota's common law history of joint and several liability as the "starting assumption" for the analysis in this case. Respondent O'Brien's Brief, p. 5 (citing Maday, et al. v. Yellow Taxi Co. of Minneapolis, et al., 311 N.W.2d 849, 850 (Minn. 1981)). Such a method of analysis would be erroneous, however, because the common law referred to in Maday has been overturned by statute. More specifically, Maday – the case upon which Respondent O'Brien relies – was decided at a time when "[the] common-law rule [had] been incorporated into our comparative negligence statute[,]” and when such statute provided that joint and several liability existed in all cases involving “parties whose negligence concurs to cause injury”. Maday, 311 N.W.2d at 850 (citing Minn. Stat. § 604.01 subd. 1 (1976)). But when Section 604.01 was amended in 2003 to make several liability the default rule, the 1976 version of the statute on which Maday relies, as well as the corresponding common law, was expressly overturned. Respondent O'Brien cannot argue that this Court should rely on the common law joint and several liability rules which are outdated and were expressly overturned by the 2003 amendments to the statute at issue.

B. Reallocation is only available against a Party which is Jointly and Severally Liable.

Because several liability is now the default rule in Minnesota, the holding of Eid v. Hodson, 521 N.W.2d 862 (Minn. Ct. App. 1994) would prohibit reallocation in this case of any part of the judgment to Appellants because Appellants are not jointly liable for the damages awarded. Recall that the Eid court stated, “Unless joint liability is established, however, 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.” Eid, 521 N.W.2d at 864. As pointed out on page 4 of Respondent O’Brien’s Brief, the legislature in 2003 made no changes to Minn. Stat. § 604.02, subd. 2. Therefore, this Court’s rule in Eid in 1994 that joint liability must be established before subdivision 2 can have any effect was unchanged by the 2003 amendments to subdivision 1. This Court has continued to rely on Eid for the principals set forth above. See Newinski v. John Crane, Inc., A08-1715, 2009 WL 1752011 (Minn. Ct. App. June 23, 2009)(unpublished case at AA-38). Similarly, this Court has held that reallocation in a products liability case under Minn. Stat. § 604.02 subd. 3 is not available unless joint liability is established. See Hahn v. Tri-Line Farmers Co-op, 478 N.W.2d 515, 522 (Minn. Ct. App. 1991), review denied (Minn. Jan. 27, 1992), overruled on other grounds by Conwed Corp. v. Union Carbide Chems. & Plastics Co., 634 N.W.2d 401, 414 (Minn. 2001). Thus, this Court’s earlier opinions have set the precedent that reallocation under subdivision 2 is not available in this case because Appellants are not jointly and severally liable. This Court should reverse the trial court’s reallocation of a portion of the judgment against Appellants.

C. A Decision in Appellants' Favor would not Render Minn. Stat. § 604.02 subd. 2 Meaningless, as Respondent O'Brien Argues.

Respondent O'Brien's argument that Appellants are trying to read Minn. Stat. § 604.02 subd. 2 out of the statute is unfounded and completely ignores several scenarios under which joint and several liability can be established by the express terms of one of the statutes on which focus has been placed in this appeal; Minn. Stat. § 604.02 subd. 1. See Respondent O'Brien's Brief, pp. 4, 5, 7. If this Court reaffirms its prior position that a party must be jointly and severally liable for an award of damages before a portion of such judgment can be reallocated against it – as was held in Eid, Newinski and Hahn – and if this Court adopts Appellants' argument that they are not jointly and severally liable and cannot have a portion of the judgment reallocated against them, the effect would not be to “read subdivision 2 out of 604.02[.]” as Respondent O'Brien argues. Respondent O'Brien's Brief, p. 4. The reallocation provisions of subdivision 2 would still apply in many cases involving joint and several liability. Specifically, if a decision is made in favor of Appellants here, this Court's opinion would have no impact on the application of the reallocation statute to those instances of joint and several liability which are described in Minn. Stat. § 604.02 subd. 1, subsections (2) through (4). For example, reallocation would still be available in all of the following situations:

- Reallocating a portion of a judgment against a tortfeasor found 10% at fault, where the other tortfeasor is 90% at fault, where the judgment against the 90% at-fault party is uncollectible, and where joint and several liability

exists under Minn. Stat. § 604.02 subd. 1(2) because the tortfeasors acted “in a common scheme or plan that results in injury”;

- Reallocating a portion of a judgment against a tortfeasor found 10% at fault, where the other tortfeasor is 90% at fault, where the judgment against the 90% at-fault party is uncollectible, and where joint and several liability exists under Minn. Stat. § 604.02 subd. 1(3) because the 10% at-fault tortfeasor committed an intentional tort; or
- Reallocating a portion of a judgment against a tortfeasor found 10% at fault, where that tortfeasor is jointly and severally liable because the liability arose out of any of the chapters listed in Minn. Stat. § 604.02 subd. 1(4) (e.g. those governing pesticide control, water pollution control, waste management, etc.) and where the judgment against the other tortfeasor with 90% liability is uncollectible.

To summarize, the effect of the legislature’s 2003 amendments to Section 604.02 subd. 1 which made several liability the default rule was to reduce the spectrum of the types of cases in which reallocation under subdivision 2 would apply; but the effect was far from one which renders subdivision 2 meaningless. The instant matter provides one example of a fact pattern under which reallocation would have been available against Appellants under a pre-2003 version of Section 604.02. But the adoption of a default rule of several liability by the legislature rendered such a remedy unavailable in this case. The plain language of the relevant statutes, as well as existing caselaw on reallocation principles, allow Respondent O’Brien to collect no more than the 10% of the judgment

awarded to her from Appellants by the jury, regardless of any ability to collect from Respondent Dombeck. For these reasons, this Court should reverse the trial court's reallocation of a portion of the judgment to Appellants.

II. APPELLANTS SHOULD ONLY HAVE TO PAY COSTS AND DISBURSEMENTS IN AN AMOUNT WHICH REFLECTS THE PERCENTAGE OF FAULT PLACED ON THEM BY THE FACT FINDER.

On this issue, Respondent O'Brien cites Posey v. Fossen, 707 N.W.2d 712 (Minn. Ct. App. 2006) and argues that this issue be reviewed under an abuse of discretion standard. Respondent O'Brien's Brief, p. 11. The Posey court explained such a standard by stating, "When a district court has discretion, it will not be reversed unless it 'abused its discretion, exercised its discretion in an arbitrary or capricious manner, or based its ruling on an erroneous view of the law.'" Id. at 714 (quoting Montgomery Ward & Co. v. County of Hennepin, 450 N.W.2d 299, 306 (Minn. 1990)). Here, the trial court should be reversed because it based its ruling on an erroneous view of the law; i.e. that a defendant found 10% at fault should pay 100% of the costs and disbursements owed to a plaintiff where another tortfeasor had been found 90% at fault.

Appellants' obligation to pay costs and disbursements should be limited to 10% of the costs because that is the percentage of fault placed upon them by the jury in relation to the fault of Respondent Dombeck. Respondent O'Brien's arguments in response to this issue primarily focus upon a request which is not being made by Appellants; that is, that a plaintiff's award for costs and disbursements – where the plaintiff is the prevailing party – should be reduced in proportion to any fault placed on that plaintiff. No such request or argument is being made. Again, as stated in Appellants' principal brief, there

is no disagreement here that Respondent O'Brien was the "prevailing party" and is entitled in the end to collect from all tortfeasors 100% of the amount of costs and disbursements awarded.

Appellants' arguments here are focused on the allocation of the obligation to pay costs between multiple tortfeasors who are found to be at fault; with the total amount to be paid by the defendants collectively being 100% of the costs and disbursements awarded. The division of costs and disbursements as between Appellants and Respondent Dombeck should be made in accordance with the finding of fault by the jury; 90% of the costs and disbursements to be paid by Dombeck and 10% by appellants. The North Dakota case of Keller v. Vermeer Manufacturing Company, 360 N.W.2d 502 (N.D. 1984), which was raised by Respondent O'Brien in her Brief, actually provides clarification on this point. Again, Appellants urge this Court to follow the reasoned analysis by the North Dakota Supreme Court in light of the two states' similar presumption of several liability, and because Minnesota case law has yet to provide guidance on this issue since the revision of Minn. Stat. § 604.02 in 2003.

In Keller, the at-fault defendant relied on the case of Bartels v. City of Williston, 276 N.W.2d 113 (N.D. 1979)¹, and argued that an award of costs and disbursements in plaintiff's favor should be reduced by the 37% of fault placed on the plaintiff by the jury. Keller, 360 N.W.2d at 508. The court declined to make such a reduction, clarifying that the language being relied upon in Bartels simply referred to the division of costs as

¹ Recall that Bartels is the primary case relied upon by Appellants here in their principal brief on this issue. See Appellants' Brief, p. 11.

between multiple tortfeasors, “not between plaintiffs and defendants.” Id. at 509. The relevant language in Bartels provides:

[W]e agree . . . that North Dakota, in enacting its comparative negligence act (s 9-10-07) in 1975, in effect adopted the pure comparative negligence concept at least in instances involving more than one tort-feasor. This concept also embraces related matters and contemplates the allocation of costs on the same percentage basis as the allocation of damages unless justice requires otherwise.

Bartels, 276 N.W.2d at 121 (emphasis added); see also N.D.C.D. § 32-03.2-02 (current North Dakota statute identifying liability of a tortfeasor as “several only” except under certain defined scenarios).

Here, because there are multiple tortfeasors, and because – like in North Dakota – Minnesota law now presumes several liability between those multiple tortfeasors, the award of costs and disbursements here should be allocated in relation to the fault attributable to the tortfeasors; 10% being paid by Appellants and 90% being paid by Respondent Dombeck.² Such a framework is workable because in cases where a portion of the fault is placed on plaintiff, yet the plaintiff is the “prevailing party”, the plaintiff would still be entitled to collect 100% of the costs and disbursements from the tortfeasors, with the allocation between multiple tortfeasors being determined by the ratio of fault placed on each tortfeasor. For these reasons, Appellants request that this Court

² It should be noted that Respondent Dombeck’s 90% obligation to pay the award for costs and disbursements would not qualify for reallocation under Minn. Stat. § 604.02 subd. 2. If for no other reason, this is because the reallocation statute requires the claimant’s fault to be considered in the calculations; a process which – as highlighted in Respondent O’Brien’s arguments – would be inconsistent with the practice in Minnesota that an award of costs and disbursements not be reduced by any percentage of fault placed on the claimant. But, as discussed above, such reallocation would also be disallowed because Appellants are not jointly and severally liable for the judgment.

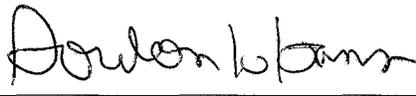
reverse the trial court's award of costs and disbursements and direct that the trial court enter an order requiring Appellants to pay 10% of the total amount of costs and disbursements awarded to Respondent O'Brien, with Respondent Dombeck being ordered to pay the other 90%.

CONCLUSION

For the forgoing reasons, Appellants Central Valley Cooperative, f/k/a Central Co-op and Robert Dean Hareid again respectfully request that this Court (1) reverse the trial court's reallocation of a portion of the judgment and (2) reverse the trial court's order for costs and disbursements and direct that the trial court enter a new order requiring Appellants to pay 10% of the awarded costs and disbursements.

Dated this 27th day of August, 2012.

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