

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.

RESPONDENT GAIL C. O'BRIEN'S REPLY BRIEF

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STATEMENT OF LEGAL ISSUES

- I. **Whether a plaintiff in a personal injury action is entitled to reallocation of amounts uncollectible from one defendant under the plain language of Minnesota Statutes § 604.02, subd. 2.**

The Trial Court held that Plaintiff was entitled to reallocation, such that Appellants, found 10% at fault, were also held liable for 10% of the uncollectible shortfall.

Authority: Minnesota Statutes § 604.02, subd. 2.

- II. **Whether the trial court erred as a matter of law in determining that Defendant William Raymond Herbert Dombeck, II was "insolvent" on the evidence presented, therefore allowing reallocation under Minnesota Statutes § 604.02.**

The Trial Court made a factual finding that Mr. Dombeck was insolvent, on the basis of both trial testimony and his uncontradicted affidavit.

Authority: Minnesota Statutes § 604.02, subd. 2.

- III. **Whether the trial court abused its discretion in holding both Defendants jointly and severally liable for all costs and disbursements.**

The Trial Court held both Defendants jointly and severally liable to the Plaintiff for all costs and disbursements.

Authority: *Posey, et al., v. Western Petroleum Company, et al., and v. Fossen, et al., v. Uponor Aldyl Co. Inc.*, 707 N.W.2d 712 (Minn. App. 2006).

STATEMENT OF FACTS

Appellants' Statements of Facts and of the Case are correct, with one qualification. In its post-trial order, the trial court reallocated to Appellants not an additional 10% of the total judgment, but 10% of the unpaid judgment remaining after application of payments from Dombeck (\$30,000 policy limits) and Appellants (10% of the total judgment).

STANDARD OF REVIEW

Appellants present three issues, each with its own standard of review.

The first of Appellants' issues – the interplay between two subdivisions of Minnesota Statutes § 604.02 – does present a legal question, to be resolved by the courts in accordance with the principles of statutory construction. Among those principles are that statutes in derogation of the common law are to be strictly construed, *Do v. American Family Mut. Ins. Co.*, 779 N.W.2d 853, 858 (Minn. 2010), and that statutes are to be read together to give effect to all of their provisions. *Harris v. County of Hennepin*, 679 N.W.2d 728, 732 (Minn. 2004), *citing* Minn. Stat. § 645.16.

The second issue involves procedural and substantive aspects of subdivision 2 of § 604.02, which provides that upon motion “the court shall determine whether all or part of a party's equitable share of the obligation is

uncollectible from that party” That is a finding of fact to be made by the trial court. This should be reviewed under the same standard of review applicable to findings of any finder of fact, that is, whether the finding is manifestly and palpably contrary to the evidence taken as a whole. *Donovan v. Dixon, et al.*, 261 Minn. 455, 460-61, 113 N.W.2d 432, 435-36 (Minn. 1962).

On the final issue, whether costs and disbursements should be reallocated according to the respective percentages of fault, the standard of review is abuse of discretion. *Posey, et al., v. Western Petroleum Company, et al., and v. Fossen, et al., v. Uponor Aldyl Co. Inc.*, 707 N.W.2d 712, 714 (Minn. App. 2006).

ARGUMENT

I. Respondent and Plaintiff Gail C. O'Brien is entitled to reallocation of amounts uncollectible from Respondent William Raymond Herbert Dombeck, II under Minnesota Statutes Section 604.02.

Minnesota Statutes Section 604.02, subdivision 2, provides that uncollectible amounts are to be reallocated among the other parties. Here, Mr. Dombeck lacked any insurance coverage for amounts in excess of \$30,000.00, and the balance of his 90% share of the award was uncollectible. Consequently, the trial court was obliged to “reallocate any uncollectible amount among the other parties . . . according to their respective percentages at fault” as provided by that subdivision. The trial court did so, and its actions are now challenged.

Subdivision 1 of Section 604.02, amended in 2003, limits joint and several liability. When the legislature amended the first subdivision, it left intact subdivision 2, which provided for reallocation of uncollectible amounts.¹

“Every law shall be construed, if possible, to give effect to all its provisions.” Minn. Stat. § 645.16. When a statute’s language is unambiguous, the clear language of the statute shall not be disregarded to pursue the spirit of the law. *Irongate Enterprises, Inc. v. County of St. Louis*, 736 N.W.2d 326, 329 (Minn. 2007), citing Minn. Stat. § 645.16. Sections of a statute should be construed together to give its words their plain meaning. *Glen Paul Court Neighborhood Association, et al., v. Paster*, 437 N.W.2d 52, 56 (Minn. 1989), citing *Chanhassen Estates Residents Ass’n. v. Chanhassen*, 342 N.W.2d 335, 339 (Minn. 1984).

To entirely prohibit reallocation of uncollectible amounts would read subdivision 2 out of 604.02, which the legislature did not do. The solution is to read the law to give effect to both provisions. See Minn. Stat. § 645.16, and *Glen Paul Court Neighborhood Ass’n*, 437 N.W.2d at 56. That is accomplished by making a solvent defendant additionally liable for its pro-rata percentage of the uncollectible amount. Here, that means that the Appellants were liable for 10% of the award, and an additional 10% of the uncollectible amount. That is consistent with the

¹ See 2003 Minnesota Session Laws c. 71, § 1.

plain meaning of the statute and gives effect to both subdivisions of Section 604.02.

Consequently, the total principal amount of the judgment against Appellants was not \$28,362.28, but \$50,888.33, representing their original 10% share, and an additional 10% of the shortfall resulting from the inability of the 90%-liable defendant to pay that share of the award. That is what Section 604.02, in its entirety, requires.

Appellants state that the “starting assumption” is that liability of two or more tortfeasors is several, rather than joint. App. Brief at 5. That is not the starting assumption; instead, one starts with the common law. That law has long held that liability is joint and several. *Maday, et al. v. Yellow Taxi Company of Minneapolis, et al.*, 311 N.W.2d 849, 850 (Minn. 1981). There is good reason for this; where the injury is indivisible, all negligent parties are jointly liable for the damages, and part of the financial loss should not be shifted from an at-fault defendant to a faultless injured party.

The legislature modified this common law, in two stages. But in doing so it did not repeal subdivision 2 of Section 604.02 out of the law. The legislature must be presumed to have intended to do that.

The Appellants placed great reliance on the Minnesota Supreme Court decision in *Staab v. Diocese of St. Cloud*. *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68 (Minn. 2012). This reliance is misplaced. In *Staab*, the Court interpreted

Section 604.02, subdivision 1, in the context of a jury's finding a sole defendant 50% at fault, and deciding whether the defendant was 100% responsible for the whole jury award when the plaintiff had not joined another prospective defendant. *Id.* at 72. The outcome of that interpretation turned on the determination as to whether a sole defendant is liable for a nonparty's liability. *Id.* Factually, that case is not analogous to the issue before the Court here, and did not present the same issues.

The Minnesota Supreme Court in *Staab* specifically limited its interpretation of Section 604.02 to subdivision 1. The Court stated "Minnesota Statutes § 604.02, subd. 1, does not address whether a particular severally liable person is obligated to contribute to a judgment," *id.* at 76, n. 6, and went on to state that the application of subdivision 2 of Section 604.02 was not before them. *Id.* at 79, n. 7. The Court explicitly did not interpret subdivision 2, stating "[n]either the holding in *Schneider* nor our holding in this case relies upon the reallocation procedures of subdivision 2, and our holding in this case in no way alters our previous decisions regarding subdivision 2." *Id.* at 79, n. 8. Appellants can find no comfort here.

Appellants rely on an article by Michael Steenson in support of their claim that 604.02, subd. 2, should be disregarded. That article's speculations cannot take precedence over the laws of Minnesota. And contrary to Appellants' suggestion, the Supreme Court decision in *Staab* does not rely on the Steenson article, and the

majority opinion makes no mention of it.²

Appellants also rely on *Newinski v. John Crane, Inc.*, an unreported case which established no new law. *Newinski* does not apply here. In fact, *Newinski* specifically notes that the “general rule” is joint and several liability; and “once the individual liability of each defendant has been established, all defendants liable to compensate the plaintiff for an indivisible injury are jointly liable and, therefore, pursuant to the statute each remains jointly and severally liable for the entire award.” *Newinski v. John Crane, Inc.*, A08-1715, 2009 WL 1752011, 8 (Minn. App. June 23, 2009), citing *Ruberg v. Skelly Oil Co.*, 297 N.W.2d 746 (Minn. 1980). That remains the law except as explicitly limited by statute.

Under *Staab*, the appellant argued for an interpretation which would have allowed full collection from a 50%-at-fault party, a result which would have read subdivision 1 out of Section 604.02. Here, the Appellants argue for an interpretation which would read subdivision 2 out the statute. Neither interpretation is correct. The correct interpretation gives effect to both subdivisions, as the trial court did here.

² The *Staab* dissent does mention the Steenson article, in describing how no clear guidance concerning the interpretation of the 2003 Amendment appears in history. See *Staab*, 813 N.W.2d. at 83-84. The Minnesota Court of Appeals also had referred to Mr. Steenson’s article. See *Staab v. Diocese of St. Cloud*, 780 N.W.2d 392, 394 (Minn. App. 2010). However, the Supreme Court affirmed under a different analysis. See *Staab*, 813 N.W.2d at 71.

II. As the insolvency of William Dombeck was established, the trial court properly reallocated the uncollected portion of the judgment.

The insurance covering the Dombeck vehicle had liability limits of only \$30,000. That was paid. The 10% share of the damages which was Appellants' responsibility was \$28,362.28; that has also been paid. That left \$225,260.54 of the total judgment uncollectible, which resulted from low coverage limits and Mr. Dombeck's penury.

Section 604.02, subdivision 2, provides that:

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.

This makes the trial court the finder of fact on whether Dombeck's share was in part uncollectible. The court so found, based on the trial testimony, Transcript of William Dombeck, II, Supplemental Record (SR, accompanying this Brief) 1-26, and Mr. Dombeck's affidavit; Appellants' Appendix (AA, bound in Appellants' Brief) 50-51.

Mr. Dombeck was seriously injured in the accident and was airlifted from the scene. SR 17. He remembers nothing of the events leading up to the accident,

the accident itself, or his emergency treatment. SR 2, 6-7, 17. He had two subdural hematomas and his short-term memory is affected. SR 3, 17. At the time of the accident he was trying to be a professional wrestler and was a student. SR 11-12. Even before the accident he had financial struggles. SR 11-12. After the trial, Mr. Dombeck stated that he had no assets, no job, and no income. AA 50-51.

Appellants did not take any discovery on Mr. Dombeck's assets, nor seek a continuance of the motion to take such discovery. Nor did they submit any evidence in opposition, and do not now cite authority prohibiting the trial court from procedurally finding insolvency as it has. Instead, they argue that collection should first have been attempted, and that the motion was premature as Respondent Gail C. O'Brien had a year to make it.

As to the first, the statute does not require collection attempts. Such attempts would have been futile, as Mr. Dombeck has no assets. As to the second argument, there is no need to wait before bringing the motion. Speculation that he may find a job belies his actual work history since the accident. He is unemployed, and had suffered a traumatic brain injury. The one-year time to bring a motion is a ceiling, not a floor, and a plaintiff is not required to wait to bring a motion. Moreover, any such delay could have resulted in two appeals, rather than one.

Appellants argue that Dombeck has little incentive "to ensure he takes responsibility for the judgment entered against him." App. Brief at 10. This is a

peculiar contention. Dombeck remains liable for the entire uncollectible amount: to Gail O'Brien for 90% of that amount, and to Appellants in contribution for the 10% of the shortfall. It is hard to see how adding another party interested in collection from him would diminish his responsibility.

III. Comparative fault does not apply to costs and disbursements and the trial court did not abuse its discretion in holding all defendants liable for them.

The trial court entered judgment for costs and disbursements in the amount of \$15,303.80. Appellants seek to limit their responsibility for those costs and disbursements to 10% of their amount. There is nothing in statutory law or prior case law which limits or requires apportionment of the liability for costs.

The plaintiff in civil litigation cases is entitled to recovery of plaintiff's costs and disbursements. Once a party is determined to be the prevailing party, costs and disbursements can be recovered. Here, there is no question that plaintiff was the prevailing party.

Appellants seek to modify Minnesota practice, and provide that a prevailing plaintiff is only entitled to recover a pro-rata share of costs. Carried to its logical conclusion, the effect of such an interpretation would be to reduce a plaintiff's claim to costs for plaintiff's contributory fault. In fact, the "equities" of such an arrangement would be even stronger in such a case, as an at-fault plaintiff would only be "penalized" to the extent of the plaintiff's own percentage of fault. Yet that

is not the law; the “prevailing party” is entitled to recover costs. *See, Keller v. Vermeer Manufacturing Company*, 360 N.W.2d 502 (N.D. 1984) (plaintiff awarded damages in a negligence action is entitled to recover costs and disbursements, undiminished by the percentage of negligence attributable to him).

Here, the Appellants seek to bootstrap themselves into an extension of Minnesota Statutes Section 604.02, subdivision 1, which limits the extent of joint liability for *damages*. That section is entitled “Apportionment of damages” and does not mention costs. Minnesota Statutes § 604.02. Section 604.02, subdivision 1, was amended by 2003 Minnesota Session Laws, Chapter 71, subdivision 1, which amended the previous language, but did not change the use of the term “awards”, which was in the prior language. There is no indication in the 2003 legislation that it was intended to include costs and disbursements, which historically have always been given to the prevailing party.

An award of costs and disbursements is in the discretion of the court. *Posey, et al., v. Western Petroleum Company, et al., and v. Fossen, et al., v. Uponor Aldyl Co. Inc.*, 707 N.W.2d 712, 714 (Minn. App. 2006). Here, there is no reason why costs should be apportioned in proportion to the percentage of fault, particularly when there is insufficient insurance coverage on Mr. Dombeck. Nearly all of the costs and disbursements incurred on the liability portion of the case were for the purpose of proving up negligence against Appellants. It would be unjust to

exonerate Appellants from the majority of costs used to establish their liability.

The case law is clear: An award of costs is discretionary with the trial court, which has the discretion to determine not only the *amount* of an award of costs and disbursements, but also who the prevailing party is for purposes of such an award. *Posey*, 707 N.W.2d at 714, citing *In re the Matter of Will of Gershcov*, 261 N.W.2d 335, 340 (Minn. 1977); *Bachovchin v. Stingley*, 504 N.W.2d 288, 290 (Minn. App. 1993); and *Kusniryk v. Arrowhead Regional Corrections Board*, 413 N.W.2d 182, 184 (Minn. App. 1987). An award of costs and disbursements is within the trial court's discretion, and will not be reversed absent an abuse of discretion. *Jonsson v. Ames Construction, Inc.*, 409 N.W.2d 560, 563 (Minn. App. 1987); *Craft Tool & Die Co., Inc. v. Payne, et al*, 385 N.W.2d 24, 28 (Minn. App. 1986). The trial court properly exercised its discretion in refusing to allocate costs by comparative fault, and should be upheld here.

CONCLUSION

Courts should not speculate on what legislatures meant but apply the law as written. The trial court properly applied both subdivisions 1 and 2 of Minnesota Statutes Section 604.02, in the only manner in which those subdivisions and the case law can be reconciled.

As Mr. Domeck was found to be insolvent, without any factual opposition by Appellants, the trial court's factual finding should be upheld, and the

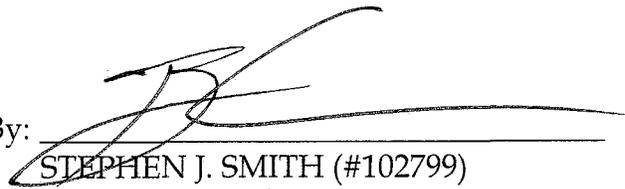
reallocation confirmed.

Finally, the trial court did not abuse its discretion on holding all defendants jointly and severally liable for costs and disbursements.

The trial court should be affirmed.

Dated: August 13, 2012.

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CERTIFICATE AS TO BRIEF LENGTH

I certify that the foregoing brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a 13 point Book Antigua font. The length of this brief is 2,875 words. This brief was prepared using Corel WordPerfect 12 software and the word processing program has been applied specifically to include all text, including headings, footnotes, and quotations for word count purposes.

Dated: August 13, 2012

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