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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000495-MR

RAY WAITS — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 02-CI-04909

NATHAN HENDERSON, AND HIS FATHER DANIEL HENDERSON; COREY MOORE, AND HIS MOTHER JANE MOORE; IAN BAKER, AND HIS FATHER RICK BAKER — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: McANULTY AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.[1]

TAYLOR, JUDGE: Ray Waits appeals from a January 23, 2004, Opinion and Order and a February 19, 2004, Order of the Fayette Circuit Court awarding damages against three juveniles and their respective parent for vandalism to appellant's personal property. We reverse and remand.

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

In August 2002, five juveniles vandalized a mobile home and other items of personal property belonging to appellant. A complaint was filed against the juveniles in the Fayette District Court, Juvenile Division. Appellant sought restitution of $9,759.00 for damage to his property. It appears, however, that restitution was not ordered in the juvenile proceeding. Two of the juveniles settled with appellant and paid their proportionate share of the alleged damages or $1,951.80 each. The other three juveniles, Nathan, Corey, and Ian, and their respective parent, believed the damage estimate was inflated and refused to pay appellant.

Appellant initiated this action by filing a complaint against Nathan, Corey, and Ian in the Fayette Circuit Court.[2] Thereafter, appellant filed a motion for summary judgment on the issue of liability. The circuit court granted the motion and entered a partial summary judgment in favor of appellant. On January 8, 2004, a bench trial was then conducted on the issue of damages. On January 23, 2004, the circuit court entered an Opinion and Order that awarded appellant damages of $4,294.00. The court apportioned fault equally among the three juvenile defendants, awarding a judgment against each for $1,431.33. Upon appellee's motion to reconsider, by order entered February 19, 2004, the circuit court amended its previous order and held

[2] The complaint was later amended to include a parent of each of the three juveniles.

that each of the five juveniles "should have been assessed twenty percent (20%) liability, jointly and severally" for the damages awarded. The court then ordered that the damage award of $4,294.00 be set off by the total amount appellant had recovered from the two settling tortfeasors.[3] The court further ordered that "[a]fter said credit, the amount of damages due and owing from these three defendants is $390.40 . . . ." Thus, the court required Nathan, Corey, and Ian to each pay appellant $130.13. This appeal follows.

Appellant contends the circuit court erroneously ordered the damage award set off by the amount the two settling tortfeasors paid appellant. We agree.

KRS 411.182 codifies the allocation of fault and award of damages in tort actions[4] and reads, in relevant part, as follows:

> (1) In all tort actions, including products liability actions, involving fault of more than one (1) party to the action, including third-party defendants and persons who have been released under subsection (4) of this

[3] The two settling tortfeasors had previously paid appellant $1,951.80 each for a total of $3,903.60.

[4] No party to this appeal has raised the issue of whether this statute is applicable to damages arising from intentional torts. At least one Kentucky Court has applied this statute to intentional tort claims, holding joint and several liability claims are not available for intentional torts. Roman Catholic Diocese of Covington v. Secter, 966 S.W.2d 286 (Ky.App. 1998). However, the prevailing view in most jurisdictions is that comparative negligence principles are not applicable to intentional torts and thus joint and several liability would be applied to intentional tort damage claims. See Allan L. Schwartz, Annotation, Applicability of Comparative Negligence Principles to Intentional Torts, 18 A.L.R.5th 525 (2005).

> section, the court, unless otherwise agreed by all parties, shall instruct the jury to answer interrogatories or, if there is no jury, shall make findings indicating:
>
> (a) The amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and
>
> (b) The percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under subsection (4) of this section.
>
> . . . .
>
> (4) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable, shall discharge that person from all liability for contribution, but it shall not be considered to discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons shall be reduced by the amount of the released persons' equitable share of the obligation, determined in accordance with the provisions of this section.

It is well-established that fault must be apportioned among "each claimant, defendant, third-party defendant, and person who has been released from liability" and that the liability of each is limited to the degree of fault apportioned to each. Stratton v. Parker, 793 S.W.2d 817, 820 (Ky. 1990). It is equally clear that liability shall be imposed in proportion to fault, without regard to whether a particular

tortfeasor was named as a party to the action. Floyd v. Carlisle Construction Co., 758 S.W.2d 430 (Ky. 1988).

In Central Kentucky Drying Co. v. Dept. of Housing, Building and Construction, 858 S.W.2d 165 (Ky. 1993), the Supreme Court specifically addressed setoffs against damage awards and held that Stratton precludes consideration of a setoff for amounts paid by settling tortfeasors. The Court reasoned:

> If we were to hold otherwise . . . there would be a real chilling effect on voluntary settlements of claims. Non-settling defendants would always get the benefit of set-offs from overpayments by settling defendants, but would never have to pay more than their apportioned share, even if there was an underpayment by the settling defendant.

Central Kentucky Drying Co., 858 S.W.2d at 168. We view the rule enunciated in Stratton, Central Kentucky Drying Co. and Floyd as broad enough to encompass the circumstance presented in the case sub judice.

Here, two of the five tortfeasors chose to settle with appellant before he filed the complaint in the circuit court. Nathan, Corey, and Ian chose to litigate rather than settle their claims and should not be permitted to benefit from the purported overpayment made by the settling tortfeasors. See Central Kentucky Drying Co., 858 S.W.2d 165. To allow Nathan, Corey, and Ian to benefit from the payment made by the settling

tortfeasors would promote the "chilling effect" on voluntary settlement of claims. See id. As such, we believe the circuit court erroneously ordered the damage award to be set off by the amount the settling tortfeasors paid appellant.

Additionally, we note that pursuant to KRS 411.182, the allocation of several liability to the three tortfeasors shall be based upon the total liability (100%) less that percentage allocated to the two settling tortfeasors (40%), for a total liability of 60 percent, applied against the total damage award of $4,294.00. The several liability of Nathan, Corey, and Ian will be $858.80 each.

For the foregoing reasons, the Opinion and Order and the Order of the Fayette Circuit Court are reversed and this cause remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

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