This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1604

Hermann Horst,
Appellant,

vs.

Bill's Diesel Repair, Inc.,
Respondent,

Thompson Gas LLC,
Third-Party Defendant.

Filed September 27, 2021
Affirmed
Reyes, Judge

St. Louis County District Court
File No. 69DU-CV-18-3192

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Considered and decided by Connolly, Presiding Judge; Reyes, Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

In this workplace-injury action against a third-party tortfeasor, appellant-employee argues that the district court erred as a matter of law by applying Minn. Stat. § 604.01,

subd. 1 (2020), to bar recovery because appellant's contributory fault was greater than the third-party tortfeasor's fault. We affirm.

FACTS

In 2016, appellant-employee Hermann Horst sustained a workplace injury while employed by Thompson Gas, LLC. Respondent Bill's Diesel was the third-party tortfeasor in the workplace injury. After the injury, Horst collected worker's compensation benefits from Thompson Gas.

In 2018, Horst sued Bill's Diesel. Bill's Diesel, in turn, raised a contribution claim against Thompson Gas.

Weeks before the trial, the Minnesota Supreme Court decided *Fish v. Ramler Trucking, Inc.*, 935 N.W.2d 738 (Minn. 2019). The parties and the district court knew of that decision.

Following a jury trial, the jury found Horst 45% at fault, Bill's Diesel 5% at fault, and Thompson Gas 50% at fault. The jury found $447,055.19 in damages. Both Horst and Bill's Diesel moved for entry of judgment in their favor. The district court denied Horst's motion and granted Bill's Diesel's motion, determining that Horst is barred from recovering under Minn. Stat. § 604.01, the comparative-fault statute, because his fault is greater than Bill's Diesel. Horst appeals.[1]

[1] Thompson Gas takes no part in this appeal.

DECISION

Horst argues that the district court erred by applying the comparative-fault statute in this workplace-injury claim to bar recovery because he had fault greater than Bill's Diesel. We are not persuaded.

A statute's application to undisputed facts presents a question of law, which we review de novo. *See Harlow v. State, Dep't of Human Servs.*, 883 N.W.2d 561, 568 (Minn. 2016) (noting that relevant facts are undisputed).

The relevant portion of the comparative-fault statute states:

> Contributory fault does not bar recovery in an action by any person or the person's legal representative to recover damages for fault resulting in death, in injury to person or property, or in economic loss, *if the contributory fault was not greater than the fault of the person against whom recovery is sought*, but any damages allowed must be diminished in proportion to the amount of fault attributable to the person recovering.

Minn. Stat. § 604.01, subd. 1 (emphasis added). Horst argues principally that the Minnesota Supreme Court's recent decision in *Fish v. Ramler Trucking, Inc.* marks a shift in caselaw and renders the comparative-fault statute inapplicable in workplace-injury actions against a third-party tortfeasor. 935 N.W.2d 738.

The Minnesota Supreme Court recognized an equitable right of contribution between a third-party tortfeasor and an employer in *Lambertson v. Cincinnati Corp.*, 257 N.W.2d 679, 689 (1977). It then clarified the mechanics of contribution and reimbursement among an employee, third-party tortfeasor, and employer in *Johnson v. Raske Bldg. Sys., Inc.*, 276 N.W.2d 79, 81 (Minn. 1979) (holding that employers have a right to reimbursement for benefits paid). Under the "correct procedure," (1) the third-

party tortfeasor pays the entire verdict to the employee; (2) the employer then contributes "to the third-party tortfeasor an amount proportionate to its percentage of negligence, but not to exceed the amount of workers' compensation benefits payable;" and (3) the employee then reimburses the employer. *Id.*

But before the apportionment process in *Johnson* begins, the district court must apply the comparative-fault statute to determine whether the employee-plaintiff's fault is greater than the third-party tortfeasor from whom the employee-plaintiff seeks recovery. *See Cambern v. Sioux Tools, Inc.*, 323 N.W.2d 795, 799 (Minn. 1982) (not reaching apportionment because plaintiff's fault greater than third-party tortfeasor's). In *Cambern*, the employee was 35% at fault, the third-party tortfeasor 20%, and the employer 45%. *Id.* at 798. The Minnesota Supreme Court rejected the argument that the third-party tortfeasor's fault and the employer's fault could be aggregated for purposes of the comparative-fault statute. *Id.* The supreme court reasoned that there is no joint liability because there are no "joint and overlapping" duties: an employer has a duty to provide a safe workplace while a third-party's duty depends on the situation. *Id.* at 798-99 (recognizing that third-party tortfeasor was manufacturer who had duty to provide reasonably safe product); *see also Hendrickson v. Minn. Power & Light Co.*, 104 N.W.2d 843, 847-48 (Minn. 1960) (holding that, because no common liability exists between an employer, who is immune from tort liability, and a third-party tortfeasor, no statutory right of contribution exists), *overruled in part on other grounds by Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362 (Minn. 1977). The supreme court concluded that the reason the plaintiff-employee could not recover is because the jury found her negligence greater than

the defendant-third-party tortfeasor, not because her employer is immune from her suit. *Id.* at 799. The supreme court clarified that "[t]he compromise effect of the workers' compensation system is well documented, and it would not be appropriate to try to counteract the system's consequences by creating an *exception to section 604.01*." *Id.* (emphasis added).

The Minnesota Supreme Court recently held in *Fish* that a 2003 amendment to Minn. Stat. § 604.02, subd. 1 (2020), did not overturn prior decisions that an employer and a third-party tortfeasor cannot be "severally liable" for a workplace injury. *Fish*, 935 N.W.2d at 740; *Hendrickson*, 104 N.W.2d at 849 (reasoning that no common liability exists between an employer and a third-party tortfeasor). *Fish* reiterates that section 604.01 applies to reduce the damage award by the plaintiff-employee's percentage of fault. 935 N.W.2d at 743. In a footnote, the Minnesota Supreme Court stated:

> The comparative fault provision states that a plaintiff can recover if the plaintiff's fault "*was not greater than the fault of the person against whom recovery is sought,* but any damages allowed must be diminished in proportion to the amount of fault attributable to the [plaintiff]." Minn. Stat. § 604.01, subd. 1. Here, *the district court applied Minn. Stat. § 604.01 in submitting the verdict form to the jury, and that decision is not at issue in this appeal.* The jury found Fish to be 5 percent at fault, and the district court correctly reduced his damage award accordingly.

Id. (emphasis added). Thus, in *Fish*, the supreme court noted that the district court applied the comparative-fault statute but acknowledged that its decision to do so was not at issue.

In this case, the district court acknowledged *Cambern* as controlling precedent that *Fish*, which governs section 604.02 rather than section 604.01, left undisturbed. The

district court articulated the difference between finding fault and apportioning damages based on the percentage of fault to each party: "until there is sufficient fault found by a jury, there is no liability to trigger the contribution and [the apportionment process]." As in *Cambern*, if the plaintiff-employee's fault is greater than the defendant-third-party tortfeasor's, then the first step of the "correct procedure" articulated in *Johnson* is not triggered. We agree with the district court's summary of the relevant caselaw and application of section 604.01 to these facts.

Horst argues that the comparative-fault statute "does not apply to workplace injury cases." But that assertion is contrary to *Cambern* and *Fish*. In *Cambern*, a workplace-injury case, the Minnesota Supreme Court expressly applied "the plain wording and history of section 604.01" when it barred a plaintiff-employee, who was at greater fault than the defendant-third-party tortfeasor, from recovery. 323 N.W.2d at 800. Similarly, in *Fish*, also a workplace-injury case, the supreme court indirectly applied section 604.01 when it stated that "the third-party tortfeasor pays the entire verdict, which is the full damage award reduced by the plaintiff's percentage of fault *under Minn. Stat. § 604.01* [the comparative-fault statute]." 935 N.W.2d at 743 (emphasis added).

Horst attempts to distinguish *Cambern* by stating that only the "principles from the comparative fault act" apply to workplace-injury cases against a third-party tortfeasor. It is true that in some limited circumstances, the Minnesota Supreme Court has stated that the comparative-fault statute does not apply, as it did in a *contribution claim* between a third-party tortfeasor and *an employer*. *Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149, 151 (Minn. 1982) ("A third-party tortfeasor may recover contribution from a negligent

employer whether or not the employee, in a direct suit, would have been barred from recovery under the comparative-fault statute."). But *Cambern* has definitively answered that the relevant clause, "the contributory fault was not greater than the fault of the person against whom recovery is sought," applies when a plaintiff-employee seeks *recovery* from a *defendant-third-party tortfeasor*, as is the case here. 323 N.W.2d at 800. Horst thus misstates that "the *Cambern* court did not address whether the application of the Comparative Fault Act to a workplace-injury case was appropriate."

Horst also argues that *Cambern* is distinguishable from his case because he does not seek an exception to the comparative-fault statute. This appears to be an argument of semantics. Horst essentially argues that subdivision 1 of the comparative-fault statute does not apply to a plaintiff-employee seeking recovery from a defendant-third-party tortfeasor. The Minnesota Supreme Court addressed this by stating that (1) section 604.01 applies and (2) there is no exception to allow aggregation between an employer and third-party tortfeasor for section 604.01 purposes. *Cambern*, 323 N.W.2d at 800. Under *Cambern*, section 604.01 applies to bar recovery from a plaintiff-employee whose fault is greater than the defendant-third-party tortfeasor.

Horst appears to borrow language from section 604.02 to create a new standard that would allow an employee to recover from a third-party tortfeasor if the employee is less than 51% at fault.[2] But *Fish* clearly states that section 604.02 does not apply because there

[2] At times Horst refers to a rule of "less than 51%" and other times he refers to a rule based on "less than 50%." To be clear, section 604.02, subdivision 1, applies when "two or more persons are severally liable," a person whose fault is "greater than 50 percent" is liable for the entire amount.

is no "several liability" between an employer and a third-party tortfeasor. As such, it is not section 604.02 that bars Horst from recovery, but rather section 604.01. It is irrelevant that Horst is less than 50% at fault for apportionment purposes because Horst has not shown sufficient liability to trigger the first step of apportionment in workplace-injury cases as articulated in *Johnson*.

Horst suggests that, because *Fish* does not cite to *Cambern*, the Minnesota Supreme Court impliedly limited *Cambern* to "its holding and its facts." But *Fish* merely clarifies that the 2003 amendment to section 604.02 does not overturn its prior decisions. 935 N.W.2d at 743. Horst's argument, that the Minnesota Supreme Court intended to modify a case to which it does not cite when it expressly held that an amendment to a different statute does not overturn its prior decisions, is meritless.

Next, Horst argues that *Hudson* is directly applicable to this case. In *Hudson*, the Minnesota Supreme Court held that a "third-party tortfeasor may recover contribution from a negligent *employer* whether or not the employee, in a direct suit, would have been barred from recovery under the comparative-fault statute. 326 N.W.2d at 158. The supreme court reasoned that the comparative-fault statute applies to plaintiff-defendant relationships under the plain language of the statute: "of the person against whom recovery is sought." *Id*. at 157 (quoting Minn. Stat. § 604.01, subd. 1). Because a third-party does not seek recovery from an employer, but rather contribution, the comparative-fault statute does not apply. *Id*. As such, *Hudson* governs a contribution claim between a third-party tortfeasor and an *employer*, not a plaintiff-employee seeking recovery from defendant-third-party tortfeasor. Because section 604.01 applies to a person seeking "recovery," the plain

language of the statute accounts for the different applications between a defendant seeking a contribution and a plaintiff seeking recovery. Moreover, *Hudson* undercuts Horst's argument because the district court in *Hudson* entered judgment against the two defendant-third-party tortfeasors whose fault was greater than the plaintiff, but not against the defendant-third-party tortfeasor whose fault was less than the plaintiff.

Lastly, we note that Horst cites no case, and we are aware of none, in which a plaintiff-employee recovered from a defendant-third-party tortfeasor who was less at fault. Horst also does not rely on any amendment to section 604.01 to suggest that *Cambern* no longer applies.

In sum, we conclude that *Cambern* is directly on point and that *Fish* does not modify the supreme court's prior decisions, including *Cambern*. Under *Cambern* and the plain language of section 604.01, the district court correctly concluded that Horst cannot recover because the jury found his fault greater than Bill's Diesel, from whom he sought recovery.

Affirmed.