

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001423-MR

VAEL EUGENE BROWN AND ELWOOD BROWN

APPELLANTS

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 98-CI-00148

CARLOS EUGENE BLANKENSHIP

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: ACREE AND LAMBERT, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

ACREE, JUDGE: Vael Eugene Brown and his father Elwood Brown appeal from a judgment of the Greenup Circuit Court finding them jointly and severely liable for damages caused to the property of Carlos Eugene Blankenship. Because the trial court did not apportion damages upon request, as required under KRS 411.182, we reverse and remand.

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

The underlying suit was brought by Vael Brown, alleging Blankenship trespassed on his property and cut and removed timber belonging to him. Blankenship filed a counterclaim stating he was the owner of the property in question and that Vael Brown, or his heirs, contractors or employees, cut and removed timber on his land. Both parties sought damages for the cut lumber.

On February 21, 2003, the trial court entered a partial judgment adjudicating the boundary line between the land owned by Blankenship and Vael Brown. The trial court appointed Greenup County surveyor, Richard A. Howerton, to survey the boundary line. During the survey, Mr. Howerton discovered Vael Brown's father, Elwood Brown, actually lived on the property bordering Blankenship. On March 24, 2006, Elwood Brown was added as party to this action relating back to the date the complaint was filed. Blankenship was found to own the land where the forty-eight trees were cut.

Based on interrogatories answered by Elwood and Vael Brown and evidence presented at the bench trial, the trial court concluded that Elwood Brown hired someone to cut the trees on the disputed area found to be owned by Blankenship. The trial court further found Vael Brown either actively participated in the hiring of the timber cutters, or that he acquiesced in allowing his father to hire the cutters. Damages were assessed at \$31,680.00, the fair market stumpage value of the timber, trebled pursuant to KRS 363.130, in addition to attorney's fees

and court costs. The trial court held Vael and Elwood Brown to be jointly and severally liable.

On May 18, 2006, the Appellants filed a motion to alter, amend, or vacate the May 2, 2006, judgment. The motion requested the judgment be set aside because there had been insufficient evidence presented to find Vael Brown was involved in the timber cutting. In the alternative, the motion requested that fault should be allocated between Vael and Elwood Brown pursuant to KRS 411.182. Appellants' motion was denied. This appeal followed.

The trial court's choice of words has raised issue with both of the parties on appeal. The Browns argue joint and several liability is no longer the law in this state and the trial court should have found them liable under our comparative negligence standard. Blankenship argues KRS 411.182 is a general statute and points to KRS 454.040 as the specific statute on point in this case.

KRS 454.040 states:

In actions of trespass the jury may assess joint or several damages against the defendants. When the jury finds several damages, the judgment shall be in favor of the plaintiff against each defendant for the several damages, without regard to the amount of damages claimed in the petition, and shall include a joint judgment for the costs.

We do not believe the two statutes to be mutually exclusive and find Blankenship's reliance on KRS 454.040 to be misplaced.

KRS 411.182 states in relevant part:

(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 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.

(2) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

The Browns correctly note that joint and several liability is no longer the applicable liability standard in this state. The liability of joint tortfeasors is "no longer joint and several, but is several only." *Degener v. Hall Contracting Corporation*, 27 S.W.3d 775, 779 (Ky. 2000); see also, *Kentucky Farm Bureau Mut. Ins. Co. v. Ryan*, 177 S.W.3d 797 (Ky. 2005). In fact, "joint and several liability was partially abrogated by KRS 454.040[,], which permitted a jury the option of assigning either joint or several damages against defendants." *Dix & Associates Pipeline Contractors, Inc. v. Key*, 799 S.W.2d 24, 27 (Ky. 1990). In *Floyd v. Carlisle Const. Co., Inc.*, 758 S.W.2d 430, 432 (Ky. 1988), our Supreme Court went on to hold, "when

there are joint tortfeasors the liability of either of them is limited by the extent of his fault."

The law has now developed to the point that in tort actions involving the fault of more than one party, including third-party defendants and persons who have settled the claim against them, an apportionment instruction, if requested, must be given whereby the jury will determine the amount of the plaintiff's damage and the degree of fault to be allocated to each claimant, defendant, third-party defendant, and person who has been released from damage. The extent of the liability of each is a several liability and is limited to the degree of fault apportioned to each.

Stratton v. Parker, 793 S.W.2d 817, 820 (Ky. 1990).

The Browns requested that the trial judge apportion their respective liability in the supplemental memorandum to their motion to alter, amend, or vacate, filed on May 31, 2006. When the trial court denied the motion and declined to allocate liability, it abused its discretion. Its actions merit our reversal and remand.

It is necessary for the trial court to make findings in accordance with KRS 411.182. Because Vael Brown has not been properly apportioned a percentage of the fault, we are unable to review his claim concerning the substantiality of the evidence against him. We are confident that upon remand, the trial court, who is most familiar with the facts of this case and in the best position to assess Vael Brown's liability, will make the appropriate determination.

For the foregoing reasons, the judgment of the Greenup Circuit Court is reversed and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT, VAEL
EUGENE BROWN:

James W. Lyon, Jr.
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BRIEF FOR APPELLEE:

Roger R. Cantrell
Greenup, Kentucky