APPORTIONING FAULT BETWEEN A NEGLIGENT TORTFEASOR AND AN INTENTIONAL TORTFEASOR IN MINNESOTA

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The question regarding whether fault can be apportioned between a tortfeasor who acted negligently and a tortfeasor who committed an intentional tort is a question that has not been settled by Minnesota courts. However, the policies underlying the Minnesota Supreme Court's holding in *Staab v. Diocese of St. Cloud*, 853 N.W.2d 713 (Minn. 2014)/(Staab IV) clear the way for the application of comparative fault principles to apportion fault between a negligent tortfeasor and a co-defendant who is an intentional tortfeasor.

A. HISTORY OF COMPARATIVE FAULT PRINCIPLES IN MINNESOTA

Minnesota case law prohibits comparing fault between an intentional tortfeasor and a negligent victim. *Florenzano v. Olson*, 387 N.W.2d 168 n.7, 175 (Minn. 1986) (holding that plaintiff's fault was compared to defendant where there is negligent misrepresentation but not if defendant had committed intentional tort or fraud). Further, the Minnesota Supreme Court has repeatedly held that comparative fault principles do not apply to the benefit of intentional tortfeasors and contributory negligence is not a defense to intentional torts. Michael K. Steenson, *Joint and Several Liability in Minnesota: The 2003 Model*, 30 Wm. Mitchell L. Rev. 845, 880 (2004). *See, e.g.*, *Farmer's State Bank of Darwin v. Swisher*, 631 N.W.2d 796, 801 (Minn. 2001) (holding that an intentional tortfeasor is not entitled to the benefit of negligent tortfeasors' settlement with plaintiff under the facts of settlement agreement with negligent tortfeasors); *Farmers Ins. Exchange v. Vill. of Hewitt*, 274 Minn. 246, 258, 143 N.W.2d 230, 238 (1966) (stating that an intentional tortfeasor does not have a right of contribution and cannot assert defense of contributory negligence). The negligent tortfeasor, however, has a right of contribution against the intentional tortfeasor. *Id*. at 255, 143 N.W.2d at 236, citing *Kemerer v. State Farm Mutual Auto Ins. Co*., 201 Minn. 239, 242, 276 N.W. 228, 230 (1941). The problem with contribution is that the intentional tortfeasor has no insurance coverage and probably has no money. The practical issue then, is whether the negligent tortfeasor is entitled to the protection of the comparative fault act's limitations on joint liability, thereby shifting the burden of collecting the intentional tortfeasor's share of the fault to the plaintiff. The current statute already shifts the burden of uncollectibility in a case involving negligent tortfeasors to the plaintiff rather than a severally liable tortfeasor. *See* Staab IV.

Despite the Minnesota Supreme Court's decisions, there are cases in which fault has been compared among tortfeasors, some of whom committed intentional torts, although the issue was never directly addressed in these cases. *Steenson*, 30 Wm. Mitchell L.Rev. at 880 n.106. In *Gregor v. Clark*, 560 N.W.2d 744 (Minn. Ct. App. 1997), a battery and negligence action, the trial court apportioned fault among seven defendants. The issue on appeal related to the propriety of reallocation of the uncollectible shares of five defendants to

Apportioning Fault **continued on page 12**

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Apportioning Fault **continued from page 11**

the two solvent defendants, even though they were responsible for only a minimal share of the damages. *Gregor*, 560 N.W.2d at 744. As this case involved an older version of the relevant statute, there would be a different result under *Staab v. Diocese of St. Cloud*, 853 N.W.2d 713 (Minn. 2014).

The trial court, in *Crea v. Bly*, 298 N.W.2d 66 (Minn. 1980), a case involving a battery against the plaintiff, apportioned fault evenly among the three defendants in the case, including the defendant who committed the battery, a second defendant who encouraged him to commit the battery, and a third defendant, which was the bar that served alcohol to the defendant who encouraged the battery. In a very short opinion, the Minnesota Supreme Court reversed the case as to the bar and neatly avoided commenting on the propriety of apportioning fault among a negligent defendant and two defendants who would have been held liable under an intentional tort and aiding and abetting theory. *Crea*, 298 N.W.2d at 66. Instead, the Minnesota Supreme Court simply held that the bar was not responsible for intentional torts "of third parties beguiled into committing assaults on innocent victims by the importuning of intoxicated female patrons." *Id*.

B. RECENT CASE DISCUSSING WHETHER FAULT CAN BE APPORTIONED BETWEEN A NEGLIGENT TORTFEASOR AND AN INTENTIONAL TORTFEASOR

In *ADT Sec. Servs., Inc. v. Swenson, ex rel. Estate of Lee*, 687 F. Supp. 2d 884 (D. Minn. 2009), the United States District Court for the District of Minnesota addressed the issue of apportioning fault between a defendant who acted negligently and a defendant who committed an intentional tort. The case arose out of the murders of Teri Lynn Lee and Timothy J. Hawkinson, Sr., who were killed by Steven Van Keuren, Lee's ex-boyfriend, in a home that was equipped with an allegedly faulty ADT security system.

On July 29, 2006, Van Keuren assaulted Lee in her home. *ADT*, 687 F. Supp. 2d at 887. On August 3, 2006, after Van Keuren had been arrested, charged, and released on bond, Lee and her current boyfriend, Hawkinson, purchased an ADT security system to protect Lee's home. *Id*. Lee and Hawkinson allegedly informed ADT's sales representative that they were purchasing the security system to protect against attacks by Van Keuren. *Id*.

The security system was allegedly improperly installed in Lee's home, and on September 22, 2006, Van Keuren broke into Lee's home again and shot and killed both Lee and Hawkinson. *Id*. He allegedly carried out the murders after cutting the phone lines to the home, breaking the sliding glass door in the basement, and walking past several basement motion detectors. *Id*.

Following the murders, ADT brought an action against the estates of Lee and Hawkinson, the trustee proceeding on behalf of Lee's next-of-kin, and Lee's children (collectively, "the victims") seeking a declaratory judgment that its liability was limited to a modest amount prescribed in the security system purchase agreement. *Id*. at 887. ADT also wanted the court to ask the jury to apportion fault between ADT and Van Keuren, and wanted assurances that it would not be jointly and severally liable for any fault (and damages) assigned to Van Keuren. *Id*. at 894. The victims responded that Minnesota's comparative fault statute does not allow the liability of a negligent party to be reduced based on the fault of a party who committed an intentional tort. *Id*. The parties agreed that this question has not been settled by Minnesota's courts. *Id*.

The court noted that both parties' views were at least modestly plausible, and that both were able to point to other states that had adopted their view. *Id*. The court stated that the victims' view would help ensure that tort victims fully recover for their losses. *Id*. To the extent that a negligent party believes it shares the blame with a third party who committed an intentional tort, the burden would be on the negligent party to bring a claim against that third party for contribution. *Id*. The court further stated that the victims' view may prevent the negligent party from unjustly minimizing its exposure, by preventing the jury from weighing the fault of a party that was merely negligent alongside the fault of a party that intentionally caused harm. *Id*.

On the other hand, the court noted that ADT's position would serve the general purposes of comparative fault statutes by helping ensure that a party's liability is no greater than its fault. *Id*. It would also eliminate the odd possibility that a party could invoke Minn. Stat. § 604.02 if the third-party tortfeasor is negligent, but not if the third party did something wrong intentionally. *Id*. On ADT's view, the risk of insolvency of the third party would be borne by the tort victim. *Id*.

Both parties pointed to specific Minnesota statutory provisions supporting their respective views. *Id*. The court agreed that the provisions imply different results, and thus do not resolve the issue. *Id*. ADT relied heavily on section 604.02, as revised in 2003, which includes a specific provision on joint liability:

> When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award ... (3) a person who commits an intentional tort ....

Id. at 895. ADT argued that by mentioning intentional torts, the provision clearly implies that such torts can be considered as part of a comparative fault analysis. *Id*. ADT argued that while the provision clearly indicates that the intentional tortfeasor cannot defray any of his liability onto another tortfeasor, **the provision does not prevent the negligent party from defraying liability onto the intentional tortfeasor.** *Id*.

Apportioning Fault **continued on page 13**

Apportioning Fault **continued from page 12**

The victims, on the other hand, relied on section 604.01, subd. 1a, which expressly defines "fault." *Id*. That provision states:

> "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages, and the defense of complicity under section 340A.801.

Id. The court stated that the definition does not mention intentional torts and the omission is consistent with the view that intentional torts are simply out of the equation for comparative fault purposes. *Id*. However, the definition of "fault" does not say "limited to."

Ultimately, the court concluded that it did not need to resolve whether Minnesota law generally permits the application of Minn. Stat. § 604.02 in cases involving intentional torts. *Id*. The court determined that even if ADT was correct about that general proposition, on the facts alleged, it could not conclude as a matter of law that ADT would not be jointly and severally liable for harm caused by Van Keuren. *Id*.

While the court did not believe that Minnesota's statutes resolve this question, it did not feel it was writing on an entirely clean slate. *Id*. The Restatement (Third) of Torts—a source frequently relied on by Minnesota's courts in other contexts—provides:

> A person who is liable to another based on a failure to protect the other from the specific risk of an intentional tort is jointly and severally liable for the share of comparative responsibility assigned to the intentional tortfeasor in addition to the share of comparative responsibility assigned to the person.

Restatement (Third) of Torts: Apportionment of Liability § 14. The court stated that on this view, even if there are cases where a negligent tortfeasor is able to defray some of its liability onto intentional tortfeasors through Minn. Stat. § 604.02, the negligent tortfeasor remains jointly and severally liable in cases where it was responsible for protecting against the specific type of intentional conduct that occurred. *ADT*, 687 F. Supp. 2d. at 895-96. In light of the lack of specific guidance from Minnesota's statutes on the issue, the court concluded that Minnesota's state courts would most likely follow guidance from the Restatement (Third) of Torts, a source frequently treated as authoritative under Minnesota law. *ADT*, 687 F. Supp. 2d. at 896. The court went on to detail how specific facts of the case underscored the relevance and fairness of this approach. *Id*.

C. COMMENT TO RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 14

Although the *ADT* court stated that the Restatement (Third) of Torts is a source frequently relied on by Minnesota's courts in other contexts, Minnesota has not adopted the Restatement (Third) of Torts: Apportionment of Liability.

Even if the *ADT* court is correct and Minnesota does adopt the Restatement (Third) of Torts: Apportionment of Liability, comment (a) to § 14 limits the scope of the rule and states that "this Section applies only when a person is negligent *because* of the failure to take reasonable precautions to protect against the **specific risk** created by an intentional tortfeasor. ... When a person's unrelated tortious conduct and an intentional tortfeasor's acts concur to cause harm to another, the rules of joint and several liability ... govern."

Based on the scope of the rule, a negligent party could argue that § 14 does not apply as it was not responsible for protecting against the specific type of intentional conduct that occurred and its alleged negligence is wholly unrelated to the intentional tortfeasor. Moreover, usually in a case involving a tortfeasor who acted negligently and a tortfeasor who committed an intentional tort, absent a special relationship, the allegedly negligent tortfeasor does not owe a duty to the plaintiff. Some examples of scenarios in which a special relationship can be found, and thus this issue comes up, are in the innkeeper-guest relationship, common carrier-passenger relationship, hospital-patient relationship, and the operator of a parking ramp and its customers. *See Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165, 168 (Minn. 1989); *Roettger v. United Hospitals of St. Paul*, 380 N.W.2d 856, 859–60 (Minn. Ct. App.1986).

Although these arguments might be strongly made in some situations, in cases like *ADT* or negligent security/ premises assault cases, adopting the Restatement (Third) of Torts would result in joint liability for the negligent tortfeasor. Nonetheless, as discussed below, the current version of joint and several liability in Minnesota results in the negligent tortfeasor, even in ADT's position, limiting its liability to its percentage of fault as long as it's 50% or less.

D. ANALYZING *STAAB'S* EFFECT ON WHETHER FAULT CAN BE APPORTIONED BETWEEN A NEGLIGENT TORTFEASOR AND AN INTENTIONAL TORTFEASOR

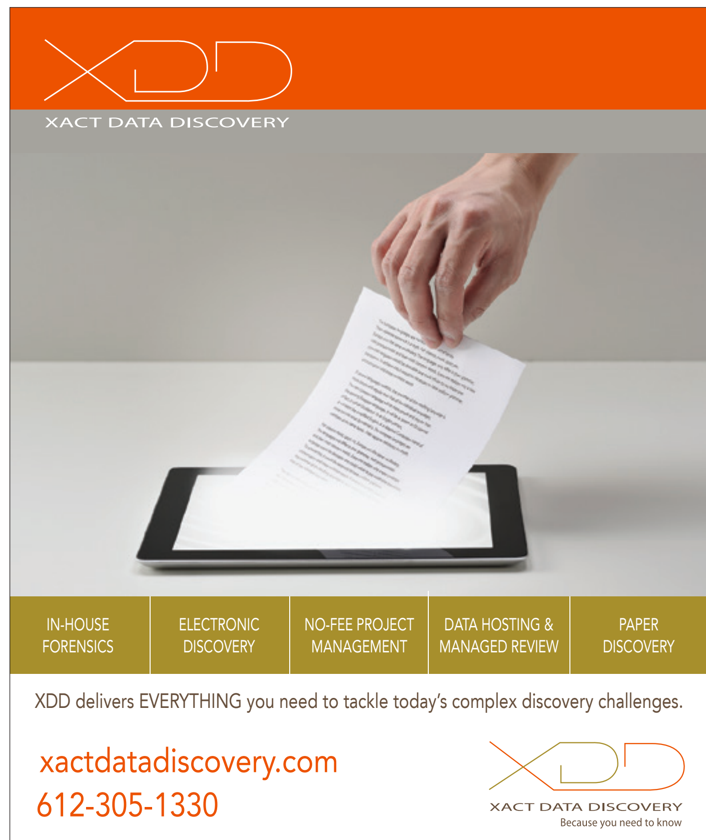
Minnesota, like most states, has a joint and several liability statute. The statute, Minn. Stat. § 604.02, was enacted to address what happens when a defendant is only severally liable for its share of a judgment and when a defendant is jointly liable with other defendants for the entire amount of a judgment. The statute was significantly amended in 2003. Before 2003, the default position was that all at-fault defendants were jointly liable but there were some provisions to soften that blow. In 2003, the default position was modified so that defendants are severally liable unless an exception can be met to establish joint liability.

Apportioning Fault **continued on page 15**

Apportioning Fault **continued from page 13**

The plaintiff's bar responded to this by focusing on the reallocation provisions of Minn. Stat. § 604.02 to try to collect judgments. *Staab* was the first case to reach the appellate courts for an interpretation of the 2003 statute. The current version of the statute provides:

> Subdivision 1. When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award.
>
> (1) a person whose fault is greater than 50 percent;
> (2) two or more persons who act in a common scheme or plan that results in injury;
> (3) a person who commits an intentional tort; or
> (4) a person whose liability arises under [one of several environmental or public health laws].
>
> Subdivision 2. 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.



Staab involved a personal injury case. Plaintiff was injured when she fell out of her wheelchair as her husband, Richard Staab, pushed her out of a school building owned by the church. She sued only the church. The church did not assert a third-party claim against her husband. However, the husband's fault was submitted to the jury, which found the husband and the church each 50% at fault and awarded damages of $224,200.70. The district court entered judgment requiring the church to pay the entire verdict as it was the only defendant in the case. It concluded that Minn. Stat. § 604.02 did not apply when there was only one tortfeasor named as a defendant. The church appealed.

This resulted in *Staab I*, the first appeal — *Staab v. Diocese of St. Cloud*, 780 N.W.2d 392 (Minn. Ct. App. 2010). The Minnesota Court of Appeals held that, because Minn. Stat. § 604.02, subd. 1, provides for joint and several liability only against parties "whose fault is greater than 50 percent," the church could only be held liable for 50% of the damage award. The court of appeals noted that, prior to the 2003 amendment, a tortfeasor was generally jointly and severally liable for the whole award. However, after 2003, a tortfeasor is liable only in accordance with its percentage of fault, with the limited exceptions set forth in § 604.02, subd. 1. Because the church was only severally liable for 50% of the fault for the plaintiff's injuries, it could only be ordered to contribute to the damages in proportion to its percentage of fault.

The Minnesota Supreme Court accepted review creating *Staab II*. In *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68 (Minn. 2012), the Minnesota Supreme Court affirmed the court of appeals, though under a slightly different analysis. Justice Dietzen, writing for the majority, said that both the church and the husband were severally liable, because at common law liability attached at the moment a tort was committed. Thus, even though the husband was not a party to the lawsuit, he was a "party to the tort" and therefore had several liability. The liability of the church, which was also severally liable, was limited to its own percentage of fault, although it was the only defendant in the lawsuit. In other words, "section 604.02 applies whenever multiple tortfeasors act to cause an indivisible harm to a victim, regardless of how many of those tortfeasors are named as parties in a lawsuit arising from that tort." *Staab*, 813 N.W.2d at 77. Because the church's fault was not greater than 50%, it was severally liable for only its share of the judgment.

Justice Meyer wrote a dissent and noted that if a "party" means a party to the tort and not necessarily a party to the lawsuit, then the church would have to pay the entire verdict under the reallocation provisions of subdivision 2. Meyer was not alone in her dissent — the decision was 4 to 3. The case was sent back to the district court to enter judg-

Apportioning Fault **continued on page 16**

Apportioning Fault **continued from page 15**

ment consistent with the decision. The majority did not address reallocation, and the district court agreed with the dissent's view and applied subdivision 2 to reallocate the husband's share of the verdict to the church. This resulted in the church appealing and arguing that the reallocation provisions did not apply to a severally liable defendant and could only be invoked against jointly liable tortfeasors.

In *Staab III*, *Staab v. Diocese of St. Cloud*, 830 N.W.2d 40 (Minn. Ct. App. 2013), the Minnesota Court of Appeals stated that it was compelled to follow the supreme court's definition of "party" and, because Richard Staab was a "party" to the tort and his share was uncollectible, that amount had to be reallocated to the church. The court of appeals rejected the argument that reallocation only applied to jointly and severally liable defendants because the legislature never amended subdivision 2 to make that change. One of the judges dissented and asserted that because Richard Staab was not subject to a judgment there was no uncollectible judgment that could be reallocated.

The church sought review of this decision with the Minnesota Supreme Court, which resulted in *Staab IV*, *Staab v. Diocese of St. Cloud*, 853 N.W.2d 713 (Minn. 2014), a 5 to 2 decision. The supreme court framed two questions for resolution: 1) whether the reallocation provision applies to parties who are only severally liable and 2) whether the damages must be reduced to a judgment before reallocation can be sought.

The church argued that subdivision 1 provides its contribution to the award "shall" be limited to its proportion of fault and to apply reallocation would violate this provision. Staab argued that nothing in the language of subdivision 2 limits reallocation to jointly and severally liable defendants so it should be allowed against severally liable defendants. The supreme court concluded that the two subdivisions were ambiguous and reviewed the legislative history for guidance. Ultimately the supreme court concluded that the legislature intended to amend the joint and several liability determination and to apply the reallocation provision as suggested by Staab would in effect add a 5th provision to the exception to several liability under subdivision 1. The holding in the case is that reallocation can only be applied to parties that are jointly and severally liable.

Since the resolution of this question resolved the case, the supreme court did not address the second question in the appeal. Justice Lillehaug's dissent expressed concern that the supreme court was adding language to subdivision 2 to limit reallocation to jointly liable parties when the legislature never added that language. In response, the majority concluded that it was merely applying legislative intent, and any change to the existing statute would need to be made by the legislature.

Although *Staab* did not involve an intentional tortfeasor, the supreme court's reasoning supports the argument that fault should be apportioned between a defendant who acted negligently and a defendant who committed an intentional tort in favor of the negligent, severally liable tortfeasor. In *Staab* IV, the Minnesota Supreme Court addressed the reallocation provision of the joint and several liability statute and concluded that an uncollectible portion of a judgment cannot be reallocated to a defendant who is only severally liable. Thus, when a jury apportions fault to two or more tortfeasors, any defendant whose fault is 50% or less will have to pay only its percentage of fault. None of the fault apportioned to other tortfeasors can be reallocated to that defendant. This is true regardless of whether all of the tortfeasors listed on the verdict form are defendants in the case. The Minnesota Supreme Court explained that "[a]llowing uncollectible damages attributable to the fault of one party to be reallocated to a severally liable party would be contrary to the clear purpose of the 2003 amendment—requiring severally liable parties in the Minnesota tort system to pay only for the harm caused by their own conduct and not for the harm caused by others." *Staab*, 853 N.W.2d at 720-21.

If Minn. Stat. § 604.02 allows the apportionment of fault between a negligent party and a party who committed an intentional tort, under *Staab* IV, a negligent party who is only severally liable cannot be ordered to contribute more than that party's equitable share of the total damages award under the reallocation-of-damages provision in Minn. Stat. 604.02, subd. 2. The policy reasons set out in *Staab* IV support applying comparative fault principles to apportion fault between a negligent tortfeasor and an intentional tortfeasor. Apportioning fault between a negligent tortfeasor and an intentional tortfeasor serves the intent of the comparative fault statute by ensuring a negligent party's liability is no greater than its fault. The effect of subdivision 1 of 604.02 is to limit "the magnitude of a severally liable person's contribution to an amount that is in proportion to his or her percentage of fault, as determined by the jury." *Staab*, 813 N.W.2d 68, 75. If comparative fault principles were not applied to a situation involving a negligent tortfeasor and an intentional tortfeasor, the negligent party would be required to contribute in excess of the severally liable party's equitable share of the damages—a circumstance that is contrary to the plain meaning of subdivision 1 and several liability.

Although the question regarding whether fault can be apportioned between a tortfeasor who acted negligently and a tortfeasor who committed an intentional tort has not been settled by Minnesota courts, the policies underlying the Minnesota Supreme Court's holding in *Staab* IV support the application of comparative fault principles in those situations.