

2005

Venna M. Swalsberg Lange, Carl A. Swalsberg Family Trust v. David Eby : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Venna M. Swalsberg Lange, Carl A. Swalsberg Family Trust v. David Eby*, No. 20050040 (Utah Court of Appeals, 2005).
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VENNA M. SWALSBERG LANGE,
TRUSTEE OF THE CARL A.
SWALSBERG FAMILY TRUST,

Plaintiff-Appellee,

VS.

DAVID EBY,

Defendant-Appellant.

Case No. 20050040

REPLY BRIEF OF APPELLANT DAVID EBY

Appeal from the Third Judicial District Court of
Salt Lake County, State of Utah
Judge Deno G. Himonas

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ORAL ARGUMENT REQUESTED

FILED
UTAH APPELLATE COURTS
OCT 07 2005

IN THE UTAH COURT OF APPEALS

VENNA M. SWALSBURG LANGE,)	
TRUSTEE OF THE CARL A.)	
SWALSBURG FAMILY TRUST,)	
)	Case No. 20050040
Plaintiff-Appellee,)	
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vs.)	
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DAVID EBY,)	
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ARGUMENT

I. THE ISSUE OF CREDITING EBY WITH GEARY'S EXCESSIVE SETTLEMENT TO LANGE IS PROPERLY BEFORE THIS COURT.

Plaintiff/Appellee, Venna M. Swalberg Lange ("Lange"), agrees that Defendant/Appellant David Eby ("Eby") has the right to raise on appeal the basis for the trial court's denial of Eby's Rule 60(b) Motion for Relief from Judgment.¹ However, rather than addressing the true basis for the denial, Lange erroneously tries to create a basis that she can attack. Lange nowhere addresses the fact that Eby raised as a reason for his rule 60(b) motion the failure of the trial court to credit him with the excessive portions of co-defendant Geary Construction Inc.'s ("Geary") settlement with Lange, after being told by the trial court that it would receive briefing, fully consider and then rule on that specific issue before entering a judgment on a verdict against Eby. Instead, Lange tries to suggest that Eby's basis for his rule 60(b) motion was limited to "irregularities in entering the judgment prior to expiration to the time for making objections." (Lange Br. at 6-7.) Although it is true that such irregularities were part of the basis for Eby's rule 60(b) motion, it was not limited to those "irregularities."

Eby's rule 60(b) motion for relief from judgment was based in part on the issue of the credit to which Eby is entitled by law. The issue of the credit had not been decided at the time Eby brought his motion. The trial court, before trial, ruled that it would receive

¹Lange further agrees that if the basis is the trial court's ruling that Eby was not entitled to have the judgment against him credited with co-defendant Geary Construction Inc.'s settlement proceeds, the standard of review on this issue is correctness under the law, not abuse of discretion. (Lange Br. at 2.)

briefing and rule on that issue after trial should doing so be necessary following a verdict against Eby, but the trial court never did so. Eby's rule 60(b) motion clearly sought relief from a premature judgment that was improperly entered by the trial court before it ruled on the legal issue of the credit, and therefore before properly crediting Eby with the excessive portion of the Geary settlement to Lange.

The fact that Eby raised the issue of the credit in his rule 60(b) motion is not disputable. Eby expressly argued that he was entitled to relief "in light of [Lange's] settlement with Geary." Eby's Memorandum In Support Of Motion for Relief From Judgment at 3 (R. 1193-1209). "[Lange] already has received in settlement from a co-obligor many times her total damages." Id. at 4. Eby incorporated in his rule 60(b) motion his prior Objections To Plaintiffs' Proposed Judgment which objections were filed before he knew the judgment had been entered. Id. at 1. Therein, Eby "contend[ed] no judgment should be entered until . . . the issue of the credit to which Eby is entitled, is ruled upon in the [trial c]ourt." Objections To Plaintiff's Proposed Judgment at 1 (R. 1170-75). One of the objections was the fact that the trial court had not yet ruled on the issue of the credit and had not yet applied the credit in favor of Eby. Id. at 4. Again, the objection and motion at issue were in the context of the trial court having said it would entertain briefing and then rule on the issue of the credit following a verdict against Eby, but having failed to do so. R. 1048-49. The issue of crediting Eby with the excessive settlement Lange received from Geary was a basis for Eby's rule 60(b) motion which motion was denied because the trial court ultimately refused to credit Eby with any part of

the Geary settlement.

Lange also points out that this same basis, the credit to which Eby is entitled by law, was asserted as a basis for Eby's other (first) motion that is not the subject of this appeal. Lange suggests that because the issue of the credit was the basis for that motion, it somehow cannot also be a basis for the instant rule 60(b) motion that is the subject of this appeal. No reason has been given, nor could any reason be given, to support such an absurd position that the issue of the credit not yet being fully considered and ruled upon can only be a basis for one motion and not the other or both at the same time. It should not be forgotten that the first motion that addressed the issue of the credit was filed when it was believed no judgment had been entered. The rule 60(b) motion that also addressed the issue of the credit was filed after Eby learned the judgment had been entered. The instant motion merely sought a different remedy in light of the changed circumstances, yet the basis for the relief was the same – the trial court's continuing failure to consider and grant a credit to Eby for the excessive Geary settlement paid to Lange. The mere existence of the first motion not now before this Court is no reason not to consider the trial court's ultimate refusal thereafter to grant the requested credit and the related relief sought through the instant rule 60(b) motion.²

Finally, Lange incorrectly contends that Eby cannot argue on appeal the particular

²The first motion is not before the Court only because the Court refused jurisdiction over the denial of that motion due to the technicality of the Notice of Appeal being filed after the announcement of the decision but before the actual order. It is worth noting that that senseless technicality now has been removed from revised Rule 4 of the Utah Rules of Appellate Procedure, effective November 1, 2005.

errors that led to the erroneous denial of his rule 60(b) motion, the refusal to consider the credit and ultimate wrongful rejection of the credit, because they constitute legal errors. There is no such limitation to the Utah R. Civ. P. 60(b) grounds for relief from a judgment. Lange relies on Fischer v. Bybee, 2004 UT 92, 104 P.3d 1198 and Franklin Covey Client Sales, Inc. v. Melvin, 2000 UT App 110, 2 P.3d 451. These cases do not limit Eby's right to relief from the judgment that was entered before the trial court considered and granted to him the credit required by law.

The case at bar presents the usual circumstance where the trial court entered judgment upon its own mistake, inadvertence or neglect. It expressly stated in a pretrial ruling that it would invite further briefing and rule after trial upon the issue of a credit to avoid a double recovery by Lange, should a verdict be entered against Eby. R. 1048-49. The trial court mistakenly, inadvertently or negligently entered judgment against Eby without complying with what it said it would do. Later, after the rule 60(b) motion was filed, the trial court ultimately made the additional legal mistake of refusing to grant the credit, and for that reason denied the rule 60(b) motion.

Fischer, citing Franklin Covey, holds that judicial mistake includes the correction of a judicial oversight which usually would be obvious. The failure of a trial court to do what it previously ruled it would do certainly is an oversight that usually would be obvious. The wrongful refusal to grant a credit expressly required by law also should be obvious. At a minimum, Utah R. Civ. P. 60(b)(1) applies to set aside the premature judgment that should not have been entered until after the trial court fully considered and

ruled on the issue of the credit which occurred on December 20, 2004.³ The December 27, 2004 Notice Of Appeal (R. 1287-88) certainly would be timely to appeal the legal mistake of not granting the credit as reflected in a judgment filed at any time on or after December 20, 2004. Utah R. App. P. 4(a) (notice of appeal required within 30 days after the entry of judgment). See also Utah R. App. P. 4(c) (“a notice of appeal filed after the announcement of a . . . judgment . . . but before the entry of the judgment . . . shall be treated as filed after such entry and on the day thereof”).

Moreover, Fischer and Franklin Covey do not address the other grounds set forth in Utah R. Civ. P. 60(b) for relief from judgment. In addition to judicial mistake, Lange concedes that Eby also relies on the grounds that the judgment has been satisfied, discharged, or is void and the trial court, and now this Court, should grant relief from the judgment because it is no longer equitable that it should have prospective application (subsection 5) and for the miscellaneous grounds of fairness and equity (subsection 6). (Lange Br. at 8.) With the credit required by law, the judgment is satisfied, discharged and/or void. With the credit required by law, it is inequitable to allow the judgment to have continued application against Eby. With the credit required by law, this Court is justified in granting Eby relief from the current judgment. The trial court should have granted Eby relief from the judgment for any or all of those reasons. Its failure to do so is an abuse of discretion. Indeed, its failure is an error that must be corrected as a matter of law inasmuch as it is predicated on the erroneous legal conclusion that Eby was not

³Eby mistakenly indicated in its opening brief that it was December 12, 2004. The correct date of the hearing and oral ruling was December 20, 2004. R. 1278-82.

entitled to a credit.

Eby properly has raised on appeal the erroneous nature of the basis for the trial court's denying him relief from the premature and improper judgment.

II. SECTION 15-4-3 OF THE JOINT OBLIGATIONS ACT REQUIRES THAT EBY BE CREDITED WITH GEARY'S EXCESSIVE SETTLEMENT TO LANGE.

Turning to the substance of the reason why Eby's rule 60(b) motion was denied, Lange argues, as anticipated, that the Liability Reform Act ("LRA") in general repeals by implication the particular statute at issue, section 15-4-3 of the Joint Obligations Act ("JOA"). Therefore, Lange contends, section 15-4-3 of the JOA cannot be applied in this case. Lange is wrong because she ignores Utah law pertaining to repeals by implication and misinterprets the differing purposes of the LRA and JOA.

Lange does not dispute, in fact she does not address, Utah law that requires statutes to be reconciled to the fullest possible extent. Repeal by implication is not favored. Two statutes that address different issues easily are reconcilable to give full effect to how the different issues are addressed. Only when two statutes address the same issue differently is there a likelihood of a conflict that cannot be reconciled. The LRA and JOA address different issues that can, and must, be reconciled by this Court. The JOA is not implicitly repealed simply because Lange does not like its continuing effect in the LRA era. It is absolutely false to say, as does Lange, that to "reduce a defendant's liability by amounts paid by other defendants to settle their percentage share of fault would be totally inconsistent with the purpose of the LRA." (Lange Br. at 9.)

The LRA addresses the issue of the allocation of fault among multiple defendants. It abolishes joint and several liability in favor of only several liability of each defendant only to the extent of such defendant's proportionate share of fault. Section 15-4-3 does not purport to allocate fault among multiple defendants. Section 15-4-3 addresses the completely different issue of limiting plaintiffs to one recovery for a single harm caused by multiple defendants. It provides for only one recovery by a plaintiff who receives consideration from one or more of several defendants on their obligations by crediting the amount received on the obligations of all co-defendants. It expressly pertains to consideration received from "one or more of several obligors," as well as "one or more of joint or [even] joint and several obligors." The LRA does not address the one-recovery rule that pertains to plaintiffs. It nowhere states that the payment by one co-obligor severally liable to the plaintiff is not to be credited to the extent of the amount received on the obligations of all co-obligors. The two statutes are compatible, reconcilable and applicable in limiting Lange's ability to recover the huge economic windfall she seeks in this case.

This conclusion is compelled by, among other cases, Murray City v. Hall, 663 P.2d 1314 (Utah 1983). Utah law unambiguously provides that two statutes are to be construed to maintain the integrity of both because repeal of a statute by implication is not favored. Although Lange has not disputed such authority, she has criticized Eby's citation to the Murray City case which states this hornbook law. Eby cited that case only for the general statement of Utah law that prohibits repeal by implication except in the

limited circumstance of a former statute being irreconcilable with a later statute.

Apparently accepting the law as stated by the Murray City court, Lange nevertheless suggests that the facts of that case undermine Eby's position. They clearly do not.

In Murray City, a former statute addressed the specific issue of when it is unlawful for an intoxicated person to drive a vehicle, stating that there were a series of rebuttable presumptions. One of the rebuttable presumptions was that a person was intoxicated if found to have .08 percent or more by weight alcohol in his/her blood. A later statute provide that a blood alcohol content of 1.0 percentage or greater created a non-rebuttable conclusion of intoxication. Both statutes addressed the exact same issue of when it is unlawful to drive while intoxicated. Even with the two statutes addressing the same issue, there was not a total repeal by implication. Instead, the Utah Supreme Court reconciled the two statute to the extent possible. It held that a blood alcohol content of .08 percent or greater but less than 1.0 percent gave rise to only a rebuttable presumption while a blood alcohol content of 1.0 percent or greater gave rise to a non-rebuttal conclusion of intoxication. 663 P.2d at 1318-19. This Court also must reconcile section 15-4-3 with the LRA, to the fullest extent possible.

Neither does Jorgensen v. Aetna Casualty & Surety Co., 769 P.2d 809 (Utah 1988) aid Lange, who merely quotes a few lines of text out of context and without analysis. In dicta, the court stated that the drafters of section 15-4-3 had in mind obligations that were "shared by the obligors." The facts of that case are convoluted but necessary to fully appreciate the statement quoted by Lange.

In Jorgensen, Aetna was a surety for a livestock dealer who sold some sheep to the plaintiff. Both the dealer and Aetna were sued by the purchaser for the dealer's breach of contract, and the purchaser obtained a judgment for \$191,463.40 of which Aetna was jointly and severally liable for the amount of its bond - \$75,000. Aetna shared no liability for the remainder of the judgment. 769 P.2d at 810. Both defendants appealed, but only the dealer obtained a supercedas bond for the full amount of the judgment against him. The bond was provided by Aetna who did not file a separate bond to cover the \$75,000 portion of the judgment for which it shared liability. Thereafter, the amount of the judgment was augmented with an award for prejudgment interest and post judgment interest. Id. After the appeal resulted in upholding the initial damages award and later interest awards, the plaintiff moved for judgment against Aetna as surety on the supercedas bond for the full amount of the judgment against the dealer who by then had filed a bankruptcy petition. That motion was resolved by stipulation with Aetna's payment of only \$191,463.40, the exact amount of the initial damage award without any interest. Aetna made that payment solely as surety on the supercedas bond and not as a co-obligor of any shared liability. The plaintiff then claimed that Aetna still was liable for \$75,000 of the original judgment plus interest. Aetna took the position it only was liable on the judgment against it for the post-judgment interest on the \$75,000 for which it shared liability with the dealer, and Aetna paid only that interest. Id. at 810-11.

On appeal again, the pertinent issues were (1) how to properly allocate a partial payment on a debt when the payor, the dealer (since Aetna made that payment only as

surety on the superceded bond, that payment is deemed to have been made by the dealer), has two obligations – one a separate debt for the entire amount and the other a joint and several debt for a portion of that amount; and (2) when a partial payment is made on an interest bearing debt, should the payment first be credited to principal or interest? Id. at 811. The Utah Supreme Court held that as a general rule in the absence of any agreement or election by the debtor or creditor, it is presumed that a payment is credited first to the separate debt of the payor with any remainder allocated to the joint debt of the payor. It also held that interest was to be paid before principal. In this context, the court ruled that section 15-4-3 did not over-ride the above-stated general rule by requiring the payment to be applied first to the joint debt. In doing so, the court stated that the language “their obligations” of that section suggested that the section applied to obligations that are “shared” by obligors and did not “govern the allocation of a payment made by one who has two separate obligations, one of which happens to be a shared obligation and the second of which is an entirely individual obligation.” Id. at 812. Thus, in context, the Jorgensen court only held that section 15-4-3 applies to crediting shared obligations, not whether a single payment is to be applied first to a payor’s shared debt before the payor’s separate debt.

Moreover, it cannot be inferred by Jorgensen that section 15-4-3 only applies to joint and several obligations, or that only joint and several obligations are “shared” obligations. It should be not be forgotten that the separate debt or obligation was the obligation of the dealer for the entire judgment plus interest, and that Aetna’s payment of

that judgment without interest was as surety on the supercedes bond; hence, it was as if the dealer himself made that payment. Therefore, that payment was applied first to the dealer's separate debt, interest before principal, and then to the dealer's joint debt with Aetna "with the resulting reduction of that joint debt being credited equally between the co-obligors, as section 15-4-3 of the Code requires." Id. at 814. Even with that credit, the shared obligation was not satisfied and Aetna's second payment went toward paying off that shared debt, interest before principle, leaving an amount still owed by Aetna. Had there been an issue of whether the dealer would have been credited with that second payment, there is no doubt section 15-4-3 would have applied for his benefit as well. Their shared obligation pertaining to the judgment against them simply happened to be "joint and several" rather than several only. The rule set down in Jorgensen does not undermine the applicability of section 15-4-3 to the case at bar.

Just like the dealer and Aetna in the Jorgensen case, Eby and Geary certainly did have a shared obligation to Lange within the scope of section 15-4-3. That section expressly pertains to "several obligors," "joint . . . obligors" and "joint and several obligors." Eby and Geary both were subject to liability to Lange who is an "obligee" – "a person having a right based on tort" – entitled to payment for the same tort damages arising from the same harm to her real property. Section 15-4-1(2). The fact that their obligations happened to be several, and limited, because of the LRA does not mean their obligations were not "shared" within the scope of the JOA.

Leaving her attempt to rely on Utah authority, Lange next makes a policy

argument. She contends that because of the LRA plaintiffs now settle at their own risk because they may settle with a severally liable co-defendant for less than the amount for which a jury may determine that particular defendant to be responsible. In order to reduce that risk, Lange complains, plaintiffs should be entitled to prevent any overpayment in settlement from being credited to any co-defendants. Lange's reasoning is wrong because plaintiffs always had a risk in settling. A plaintiff may have settled with a joint and severally liable co-defendant only to find that the amount is less than the verdict and what any other jointly liable co-defendant can pay. The risk now may be different, but there always has been a risk.

Likewise, it makes no difference that co-defendants who were jointly and severally liable had rights to contribution, but severally liable co-defendants do not because their liability is limited to their proportionate share of fault. Contribution and the one-recovery rule are not conflicting concepts. The right to a credit for excessive payments made to a plaintiff is not related to the right to contribution from a co-defendant who made no payment. If too little was paid in settlement by one severally liable obligor, the LRA prevents the obligee from seeking recovery of the difference from any other co-obligor. That is a policy decision encompassed in the LRA. However, if too much was paid, the LRA is silent. Section 15-4-3 then kicks in and requires any overpayment to be credited in whole or partial satisfaction of the other obligors' obligations to the extent of the overpayment received on the obligations of all such co-obligors. If any overage still exists after such credit is given, the receiving obligee is entitled to retain the full benefit

of that bargain. Nothing has to be paid back to the settling payor. Nothing has to be paid by the obligee to anyone else. The obligee simply is fortunate enough to have reached a bargain that more than compensates her for the damages suffered. There is nothing unfair to plaintiffs about the one-recovery rule that is codified in section 15-4-3.

The LRA's intent to limit liability of co-defendants to their proportionate share of fault does not express an intent not to limit liability further by crediting to all co-defendants an excessive payment made by one of the defendants. The LRA does not express an intent to abolish the one-recovery rule codified in section 15-4-3. The LRA does nothing to implicitly repeal section 15-4-3. The issue raised by Lange really boils down to the policy decision, to be made by the Utah Legislature, of whether the crediting requirement of section 15-4-3 should remain the policy of Utah, or whether Utah should move towards favoring plaintiffs by allowing them to recover more than once for their damages by repealing the existing legal right to a credit afforded co-defendants who are sued for the same tort and resulting damages.

To support her position on how she believes Utah policy should be changed, Lange turns to foreign authority. That authority is not binding on this Court. Indeed, such authority is advanced only as an invitation to judicially legislate away section 15-4-3, not to show how the LRA implicitly repeals section 15-4-3. E.g., Glenn v. Fleming, 732 P.2d 750 (Kan. 1987) (no statute similar to section 15-4-3 was considered; holding only that where the fault of the settling defendant was not submitted to the jury, the judgment should not be reduced by the amount the plaintiff received from the settling party);

Gemstar Ltd. v. Ernst & Young, 917 P.2d 222 (Ariz. 1996) (no statute like section 15-4-3 was considered; settlement and judgment together were less than the plaintiff's total damages); Krieser v. Hobbs, 166 F.3d 736 (5th Cir. 1999) (no statute similar to section 15-4-3 was considered, instead the Mississippi crediting statute did not apply because it pertained only to "joint or joint and several" liability, not several liability); Nilsson v. Bierman, 839 A.2d 25 (N.H. 2003) (no statute similar to section 15-4-3 was considered, instead the New Hampshire crediting statute did not apply because it pertained only to "joint and several" liability, not several liability). Anticipating Lange's reliance on foreign authority to support a change in Utah policy, Eby discussed Gemstar in its initial brief. (Eby Br. at 22-25.) That discussion, not opposed by Lange, disposes of all Lange's foreign authority.⁴ Lange's policy arguments are wrong. However, more importantly, those arguments demonstrate that they are for full consideration by the Utah Legislature,

⁴The case of Krieser v. Hobbs, now cited by Lange, also expressly undermines Lange's position. That court acknowledged that where there was a state statute like section 15-4-3, its conclusion would have to be different until the state legislature changed that statute. It stated:

The case from Idaho, Curtis [v. Canyon Highway Dist. No. 4], 122 Idaho 73, 831 P.2d 541 (Idaho 1992)], held that legislative modification of joint-and-several liability did not implicitly repeal its tortfeasor release statute. However, Curtis confronted a specific statute mandating a pro tanto credit, as well as a rule limiting implied repeal unless two statutes are "manifestly inconsistent with and repugnant to each other," 831 P.2d at 546.

166 F.3d at 744. It is the Utah Legislature, not Lange through this Court, who must abolish the one-recovery rule as applied in the context of severally liable defendants, if it is to be abolished as she hopes.

not this Court. This Court is required to reconcile section 15-4-3 with the LRA and not judicially legislate section 15-4-3 into nonexistence.

Lange also contends that Nelson v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints, 935 P.2d 512 (Utah 1997), a case that exemplifies the importance of reconciling the JOA with the LRA, is inapposite because it involved a different issue, section 15-4-4 instead of section 15-4-3. Section 15-4-4 pertains to releasing one co-defendant while preserving the right to proceed against other co-defendants. Lange misses Eby's point. As to section 15-4-4, the point is that it was not implicitly repealed in total, but was reconciled to the extent possible such that section 15-4-4 continued to be applicable to vicariously liable defendants. Section 15-4-4 was held to apply, and not be implicitly repealed, despite the fact that the LRA also directly addressed this same issue in section 78-27-42. The court held that section 15-4-4 applied to vicariously liable co-defendants and section 78-27-42 applied to "regular" co-defendants. 935 P.2d at 514 n.3. See also Peterson v. Coca-Cola USA, 2002 UT 42, ¶ 22, 48 P.3d 941, 947.

Also, Lange totally ignores that Nelson held, in the LRA era, that section 15-4-3 would apply, and the Court did so without any statement that it applied because of the particular relationship between the co-defendants. 835 P.2d at 514-15. There is no implication in Nelson that section 15-4-3, that addresses a different issue, does not apply to plaintiffs' settlements with "regular" LRA co-defendants. The Nelson court simply stated that under the JOA "any amount received [from] one obligor is to be credited

against any amount owed by the rest.” Id. at 514.

Lange contends again, yet from a different angle, that Eby and Geary did not share a tort obligation to Lange because their “liability” was separate. In other words, Lange argues that section 15-4-3 only would apply if Eby was liable for Geary’s conduct and Geary was liable for Eby’s conduct. That is not what section 15-4-3 provides. It nowhere requires vicarious or even joint liability between co-obligors. Their obligations to Lange were to compensate her for the same harm. Liability for that harm was shared by both Eby and Geary. Both were found to be at fault for that harm. They were co-obligors within the meaning and scope of section 15-4-3, regardless of whether they otherwise were severally, jointly or jointly and severally liable, as expressly contemplated by that section.

Finally, Lange argues in favor of a tortured application of section 15-4-3 in an attempt to demonstrate that it cannot be applied in this case. Lange suggests that Eby should be entitled to a credit before Geary’s proportionate share of fault is paid. In other words, Lange contends that section 15-4-3 requires a credit of any payment, even if there is no overpayment by the paying obligor. Obviously, a defendant who pays only its proportionate share of fault which no other defendant is liable to pay has not made an excessive payment to be credited to the benefit of the other defendants. It is not Eby’s intent to have section 15-4-3 applied as if the LRA did not exist. Eby’s intent is to have section 15-4-3 reconciled with the LRA to the fullest extent possible, just like the two statutes in Murray City were reconciled. In that case, the first statute did not expressly

state that the rebuttable presumption of intoxication extended only up to a blood alcohol content of 1.0 percent, but the court read that limitation into the statute in light of the later statute. Reading limitations into a former statute in order to reconcile it with a later statute also was done in Nelson, *supra*. This Court has to reconcile section 15-4-3 with the LRA in the same sort of way that makes sense. Eby has shown how that is to be done. Lange does not suggest that Eby's approach does not make sense. It is not helpful for her to attack an approach not advanced by Eby. Section 15-4-3 can, and should, be applied in this case in a reasonable and reconciliatory way within the context of the LRA, as shown by Eby.

There is no question but that Lange wants to prevent any credit to Eby in order to be able to recover even more from Eby in addition to the settlement proceeds that already far exceed her damages. What is this desired result, if not an economic windfall that is over 300% of her damages? Eby certainly received no economic windfall. He has not received a thing. He is entitled, in accordance with existing law, merely to a limitation of his liability to his proportionate share of fault and to his share of damages caused by his fault for which Lange has not already been compensated by a co-obligor. If Geary had only overcompensated Lange by a small difference, Eby would only be entitled to a credit for that difference and would be liable for the remainder. It just so happens that Geary overcompensated Lange by many times her damages. Even with the credit required by law, Lange will be able to retain an economic windfall far in excess of her actual damages that were determined by the jury.

CONCLUSION


Eby respectfully requests that the Order Denying Eby's Motion For Relief From Judgment be reversed. Eby is entitled to relief from the judgment in light of the credit to which he is entitled by law and which the trial said it would, but did not, consider before entering judgment. It is against the law, unjust and inequitable for any judgment to remain against Eby when he is entitled to be credited with the excessive portion of Geary's settlement. Thus, it is requested that the judgment be vacated and that Eby recover his costs on appeal.

DATED this 7th day of October, 2005.

BERMAN & SAVAGE, P.C.

E. Scott Savage

Casey K. McGarvey



Attorneys for David Eby

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 2005, I caused true and correct copies of the within and foregoing **REPLY BRIEF OF APPELLANT DAVID EBY** to be mailed, postage prepaid, to the following:

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