RENDERED: December 6, 1996; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 95-CA-001689-MR

LARRY T. MULLIN and
DEBRA LYNN MULLIN — APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KENNETH G. COREY, JUDGE
ACTION NO. 89-CI-008927

COMPLETE ELECTRIC, INC. — APPELLEE

OPINION
REVERSING and REMANDING

* * * * * * * *

BEFORE: COMBS, EMBERTON and GUDGEL, Judges.

EMBERTON, JUDGE. Larry T. Mullin and his wife, Debra Lynn Mullin bring this appeal from the April 20, 1995, judgment of the Jefferson Circuit Court. The Mullins, who had obtained a default judgment against Complete Electric, Inc., were awarded zero damages following a hearing in which they presented substantial and uncontradicted proof of damages. The zero damages award was based on the trial court's apportionment of zero percent fault to

the only remaining, and defaulting party, Complete Electric. The Mullins complain that the trial court misapplied case law and Ky. Rev. Stat. (KRS) 411.182. We agree. The judgment is reversed.

This case presents yet another of the many difficulties the courts have encountered since the adoption of comparative fault in this jurisdiction[1] and the subsequent enactment of KRS 411.182, which governs the allocation of fault and the award of damages in tort actions.[2]

While working to restore a power outage at a Louisville hotel, Larry Mullin was seriously burned as a result of an electrical explosion. The power outage occurred as a result of an earlier explosion at the hotel while Complete Electric was performing electrical services.

Larry and Debra brought suit against Federal Pacific Electrical Company and its successor Challenger Electrical Equipment Corporation based on product liability. Federal was identified as the manufacturer of the exploding electrical circuit breaker and Challenger as the purchaser of Federal. Following further investigation, the Mullins' initial complaint was amended to name Complete Electric a defendant and assert a

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[1] Hilen v. Hays, Ky., 673 S.W.2d 713 (1984).

[2] See Kentucky Law Journal; Apportioning Liability to Nonparties in Kentucky Tort Actions: A Natural Extension of Comparative Fault or a Phantom Scapegoat for Negligent Defendants? 82 Ky. L. J. 789 (1993-94), for an interesting and comprehensive survey of the development of the law.

claim against the contractor company. The complaint contained the following allegations:

> (4) Defendant, Complete Electric, Inc., had been performing electrical service work at the Holiday Inn on June 23, 1989, when an explosion took place which preceded the explosion that burned Plaintiff herein.
>
> (5) Defendant, Complete Electric, Inc., through the actions of its agents and employees within the scope of their employment, performed their service and electrical work at the Holiday Inn located on Broadway in Louisville, Kentucky, in such a negligent manner that it caused or contributed to cause the electrical circuit breaker in question to explode and seriously burn Plaintiff, Larry T. Mullin.

A default judgment against Complete Electric was granted to the Mullins on January 18, 1991. It provided:

> This action coming on to be heard on the Plaintiffs' Complaint,
>
> IT IS ORDERED AND ADJUDGED that the Defendant, Complete Electric, Inc., is in default, and the Plaintiffs are entitled to Judgment against the Defendant on liability as a matter of law. . .
>
> IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs shall have Judgment against the Defendant, Complete Electric, Inc., on the Complaint for such sum as shall be determined and found as damages in proceedings before this Court. . . .

The litigation continued with the Mullins pursuing their claims against Federal and Challenger. Ultimately these defendants were granted summary judgments. The court dismissed the claims ruling, as a matter of law, these defendants were not

legally liable to the Mullins based on the products liability theory asserted against them.

On September 3, 1992, twenty months after entry of the default judgment, Complete Electric filed a motion seeking to have the trial court set aside the default judgment. After considering memoranda and conducting a hearing, the trial court entered its order on November 25, 1992, denying the motion.

The matter was subsequently scheduled for a trial on the issue of damages only on April 17, 1993. The Mullins introduced substantial proof of the damages they sustained. The amounts were specifically itemized and in accord with pretrial discovery. Complete Electric did not participate in this damage hearing and the amount of damages sought was not contested, nor was apportionment requested. The trial court acknowledged the Mullins' damages, but made no finding as to an amount. Instead, the court revisited the issue of liability and ultimately apportioned fault to Complete Electric at zero percent. Reflecting this, the judgment awarded no damages to the Mullins.

KRS 411.182 provides:

> (1) In all tort actions, including products liability actions, involving fault of more than one 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.
>
> (3) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under subsection (4) of this section, and shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.
>
> (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 apparent that the trial court felt obligated, whether pursuant to cases construing and applying the law prior to the effectiveness of KRS 411.182[3] or under the statute itself,

[3] See e.g., Orr v. Coleman, Ky., 455 S.W.2d 59 (1970); Floyd v. Carlisle Construction Company, Inc., Ky., 758 S.W.2d 430 (1988); Dix & Associates Pipeline Contractors, Inc. v. Key, Ky., 799 S.W.2d 24 (1990).

to apportion causation as to Complete Electric when considering damages.

As pointed out in Baker v. Webb, Ky. App., 883 S.W.2d 898 (1994):

> The statue codified the law of allocation of fault and joint and several liability. The statute will prevail over the case law.
>
> The decisions relied on by Webb which were prior to KRS 411.182 were inconsistent and confusing; each seemed to settle an isolated point of law but never the whole problem presented. The cases were described in one dissent as 'vexatious.' At the least, we may say, their holdings were as incompatible with one another as sin is with salvation; thus the reason the legislature stepped in with the enactment of KRS 411.182.

Id. at 899-900.

Baker went on to conclude:

> [T]he thrust of KRS 411.182, considered in its entirety, limits allocation of fault to those who actively assert claims, offensively or defensively, as parties in the litigation or who have settled by release or agreement. When the statute states that the trier-of-fact shall consider the conduct of 'each party at fault,' such phrase means those parties complying with the statute as named parties to the litigation and those who have settled prior to litigation, not the world at large.

Id. at 900. See also Copass v. Monroe County Medical Foundation, inc., Ky. App., 900 S.W.2d 617 (1995). Cf Stratton v. Parker, Ky., 793 S.W.2d 817 (1990). In this case, the Supreme Court held an instruction on apportionment between a defendant who settled with the claimant and the non-settling defendant was correctly

given. A third defendant who had been granted summary judgment prior to trial was not included in the apportionment instruction.

The appellee has not cited, and we are not aware of, any authority mandating application of KRS 411.182 in a situation such as we have here. The Mullins asserted a claim against Federal and Challenger premised on a theory of product liability. A different theory of liability was asserted against Complete Electric. Ultimately summary judgment was granted in favor of Federal and Challenger because, as a matter of law, they could not be held liable. In contrast, Complete Electric never answered the complaint, and the Mullins obtained a default judgment against the company. The trial court subsequently refused to set the default aside. A hearing to ascertain damages was conducted. Complete Electric did not attend and did not request apportionment.

Through entry of the default judgment, Complete Electric admitted the allegations concerning its negligence and waived the right to raise defenses, affirmative or otherwise, pursue cross-claims, file third-party complaints, etc. See Howard v. Fountain, Ky. App., 749 S.W.2d 690 (1988); Ky. R. Civ. P. (CR) 8.04; CR 55; CR 54.04. Pursuant to these cited authorities, the trial court appropriately scheduled the matter for a hearing to assess damages and thereby effectuate the judgment. See also National Fire Insurance Co. v. Spain, Ky. App., 774 S.W.2d 449 (1989).

However, at the damage hearing the court unexpectedly revisited the issue of Complete Electric's liability. Utilizing Larry's affidavit, filed in opposition to the motions for summary judgment made by Federal and Challenger, as a judicial admission, the trial court concluded the Mullins could not recover from Complete Electric. We deem this improper under the circumstances. See Goldsmith v. Allied Building Components, Ky., 833 S.W.2d 378, 380 (1992); Bell v. Harmon, Ky., 284 S.W.2d 812 (1955).

First, the court had previously designated the hearing as limited to the issue of damages. Second, Larry's statement did not negate the theory of liability asserted against Complete Electric and should not have been construed as such. Third, if Complete Electric's liability were to be properly considered, the Mullins should have been notified, permitted an opportunity to present evidence from lay and expert witnesses after meaningful discovery as to Complete Electric and afforded a jury trial, as requested, on this issue.

A careful review of the video-taped hearing reveals, contrary to the trial court's finding, that Larry possessed information that would support the theory of liability asserted against Complete Electric. Understandably, Larry was reluctant to testify personally about this information. In fact, the record, including the testimony and expert opinion of Thomas

Eaton, contained evidence that contractor negligence caused the accident resulting in Larry's injuries.

In our opinion, the trial court improperly utilized the apportionment statute as a vehicle to set aside a valid default judgment and litigate the issue of liability.

In light of the default judgment, the trial court's conclusion that it had to find an act or omission on the part of Complete Electric constituting negligence was clearly erroneous. Further, the trial court erred when it apportioned zero percent fault to the single remaining, defaulting defendant without apportioning fault to any other party at fault or persons liable, but who "bought their peace from the litigation by way of releases or agreements." Copass, supra, at 620. Moreover, proof of negligence was nonexistent with regard to the Mullins, and the trial court had previously ruled, by the summary judgment, that neither Federal nor Challenger was liable.

We conclude the trial court failed to follow the proper procedures as provided in the case law, statutes and the civil rules governing default judgments. The judgment is reversed and this matter is remanded for proceedings consistent with this opinion.

ALL CONCUR.

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