

RENDERED: March 27, 1998; 10:00 a.m.  
NOT TO BE PUBLISHED

NO. 97-CA-0220-MR  
AND 97-CA-0221-MR

CALVIN A. BAKER

APPELLANT/  
CROSS-APPELLEE

v. APPEAL FROM GREENUP CIRCUIT COURT  
HONORABLE LEWIS D. NICHOLLS, JUDGE  
ACTION NO. 94-CI-0565

THOMAS M. RUCKER,

APPELLEE/  
CROSS-APPELLANT

AND

STACEY R. PARKER,  
and JAMES PARKER

APPELLEES

OPINION  
AFFIRMING

\* \* \* \* \*

BEFORE: COMBS, HUDDLESTON, and KNOPF Judges.

KNOPF, JUDGE: Calvin Baker, a defendant in a motor vehicle accident lawsuit, appeals the trial court's failure to list on the apportionment instruction a dismissed co-defendant, Stacey Parker.

The car accident occurred on October 28, 1994. The plaintiff, Thomas Rucker, stopped his vehicle behind another vehicle attempting to make a left-hand turn. Thomas's car was struck in the rear by a Ford Probe operated by the defendant,

Stacey Parker. Stacey's Ford Probe was struck in the rear by a pick-up truck operated by the defendant Calvin Baker. Thomas sued both Stacey and Calvin for negligently operating their motor vehicles and causing him injuries.

During discovery, Thomas testified that he observed Stacey coming to a complete stop behind his vehicle before Stacey was hit by Calvin's truck. Thomas testified that Stacey's Ford Probe did not hit his car until Calvin's pickup truck rear-ended Stacey's Ford Probe. Stacey also testified that she came to a complete stop before being struck by Calvin's pickup truck and then hitting Thomas's car. Calvin testified that he could not tell if Stacey's Ford Probe had first hit Thomas's car before he hit Stacey's Ford Probe. Also during discovery, Calvin took the deposition of an alleged eyewitness named, James Gillum. Gillum testified that Stacey's car first hit Thomas's car before Calvin's pickup truck hit the rear of Stacey's Ford Probe.

During the trial Thomas put on proof of Calvin's negligence. Thomas testified according to his deposition testimony as well as did Stacey and Calvin. Thomas then closed his proof. Thomas did not call Gillum because he believed that Gillum was not credible. Consequently, no evidence of negligence was presented by Thomas against Stacey. Stacey made a motion for a directed verdict which the trial court granted. Calvin agreed at that point in time that the directed verdict was proper since no proof of negligence had been offered by Thomas against Stacey.

The trial continued against Calvin. Calvin called Gillum as a witness who testified according to his discovery

deposition that Stacey had been negligent in hitting Thomas's vehicle. At the close of Calvin's proof, Calvin requested an apportionment instruction listing Stacey. The trial court denied Calvin's request. The jury returned a verdict against Calvin and awarded Thomas the following amounts in damages: \$5,000.00 for past mental and physical suffering; \$0 for future mental and physical suffering reasonably certain to be endured in the future; \$14,000.00 for necessary and reasonable medical expenses reasonably likely to be incurred in the future; and \$1,056.68 for property damage.

In the trial court's order, verdict, and judgment, the court explained that it denied the apportionment instruction against Stacey because "Stacey Parker was not a party to the action, after having been dismissed with the consent of the defendant, and since she was not a settling party and there being no cross-claim against her by the defendant . . . ."

Calvin contends that he was entitled to an apportionment instruction against Stacey because once an alleged tortfeasor becomes a party to a lawsuit, apportionment is required under KRS 411.182 and Dix & Associates v. Key, Ky., 799 S.W.2d 24 (1990). Calvin recognizes that he could have not filed any claim against Stacey for contribution or indemnity because Stacey had no liability to Calvin.

Calvin is correct to the extent that he could have not made a claim against Stacey for contribution or indemnity. The cause of action for contribution was clearly eliminated in Dix, supra. Calvin also has no basis for a claim of indemnity in this

case. Furthermore, a cause of action does not exist for apportionment. As the law currently stands, apportionment does not create liability by a third-party defendant to either the defendant or the plaintiff. Thus, no cause of action exists.

Calvin misunderstands, however, that a person once named in a lawsuit must automatically be listed on an apportionment instruction. This is not true. An apportionment instruction is only given if an active assertion of a claim is made (or the person settled with the plaintiff) and proof of negligence of the party is offered at trial. In this case only Thomas made an active assertion of a claim against Stacey. No other claims were made against Stacey and no other claims could have been made against Stacey. Thomas, however, failed to establish the negligence of Stacey at trial. Consequently, Stacey was appropriately dismissed. Stacey then became essentially a nonsettling nonparty. Kentucky case law has clearly held that no apportionment instruction shall be given against a nonsettling nonparty. Baker v. Webb, 883 Ky. App., 898 S.W.2d (1994) and Bass v. Williams, Ky. App., 839 S.W.2d 559 (1992). The trial court properly refused to list Stacey on the apportionment instruction.

On cross-appeal Thomas argues that the trial court erroneously denied his motion for a new trial. Thomas argues that reversible error occurred when the jury awarded future medical expenses but awarded zero (0) for future pain and suffering. Thomas cites American States Ins. v. Audubon Country Club, Ky., 650 S.W.2d 252, 254 (1983), which stated "It was

reversible error to permit a judgment which awarded \$10,000 in future medical expenses but made no award for future pain and suffering."

The Court in Spalding v. Shinkle, Ky. App., 774 S.W.2d 465 (1989), clarified that American States, supra, also held that there must be sufficient evidence to support an award for future pain and suffering. In Court in Spalding found that:

There was counterveiling evidence of a substantial nature; therefore, the jury was not bound to believe Spalding's version, and they did not, as evidenced by no damages being awarded for the claimed item [future pain and suffering]. A jury is not bound to believe a plaintiff or her doctors. [cites omitted]. There was no error in the trial court overruling Spalding's motion for a new trial in this regard.

774 S.W.2d at 467.

Likewise, in this case, there was counterveiling medical testimony that Thomas was not suffering from any permanent injury and that he should not suffer any future restrictions as a result of the accident. Consequently, the jury's award of zero (0) for future pain and suffering was supported by the evidence. The trial court did not err in denying Thomas' motion for a new trial.

For these reasons, we affirm the judgment of the Greenup Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS  
APPELLEES:

Stephen S. Burchett  
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BRIEF FOR THOMAS M. RUCKER  
APPELLEE/CROSS-APPELLANT:

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BRIEF FOR STACEY R. PARKER AND  
JAMES PARKER APPELLEES:

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