

2013 WL 8147159 (Miss.) (Appellate Brief)
Supreme Court of Mississippi.

BAKER & MCKENZIE, LLP and Joel Held, Appellants,
v.
S. LAVON EVANS, Jr., S. Lavon Evans, Jr. Operating Company, Inc., S.
Lavon Evans Drilling Ventures, LLC, and E & D Services, Inc., Appellees.
and
LAREDO ENERGY HOLDINGS, LLC, S. Lavon Evans Operating
Texas, LLC, and E & D Drilling Services, LLC, Appellees.

No. 2011-CA-00110.
January 28, 2013.

Appeal from the Circuit Court of Jones County, Mississippi

**Supplemental Brief of Appellees, S.lavon Evans, Jr., S. Lavon Evans, Jr. Operating
Company, Inc., S. Lavon Evans Drilling Ventures, LLC, and E & D Services, Inc.**

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*1 Plaintiffs/Appellees S. Lavon Evans, Jr., S. Lavon Evans, Jr. Operating Company, Inc., and E&D Services, Inc. (collectively “Plaintiffs”) submit this brief in response to the Court’s order for supplemental briefing dated December 13, 2012. As in Plaintiffs’ initial brief, Plaintiffs refer to Defendants/Appellees Baker & McKenzie, LLP and Joel Held collectively as “Baker” or the “Baker Defendants” and Defendants/Cross-Plaintiffs/Appellees Laredo Energy Holdings, LLC, S. Lavon Evans Operating Texas, LLC and E&D Drilling Services, LLC collectively as “Laredo” or “LEH.”

I. Preliminary Statement

Plaintiffs respond to the Court’s request for additional briefing in the context of the issues appealed by the Baker Defendants as to Plaintiffs’ judgments. Baker’s appellate issues regarding assessment of fault with respect to Plaintiffs’ judgments are different from Baker’s assessment issues as to Cross-Plaintiffs/Laredo’s judgments.

As to Plaintiffs, the Baker Defendants appeal the refusal of their proposed verdict form that permitted the jury to assess fault against *Reed Cagle*, who was Baker’s client. R. 7734, R.E. 302 (D-8a). That is the only issue of assessment of fault in the Baker Defendants’ appeal of Plaintiffs’ judgments. *See* Baker Brief, p. 52 (“The Baker Defendants are entitled to a new trial because the trial court refused to permit the jury to apportion fault to Reed Cagle.”) The Baker Defendants do not make any arguments that Plaintiffs’ malpractice claims should be treated *2 differently for purposes of assessment of fault or any arguments based particularly on Cagle’s status as their preferred client. ¹

Baker’s refused verdict form also permitted assessment of fault against unnamed people but the Baker Defendants did not raise that issue on appeal as to Plaintiffs’ judgments. R. 7734, R.E. 302 (D-8a). Instead, the Baker Defendants only appealed the issue of assessment of fault against Reed Cagle. The Baker Defendants did not offer a proposed verdict form on Plaintiffs’ claims that would have permitted the jury to assess fault against the Cross-Plaintiffs/Laredo and do not raise that issue on appeal as to Plaintiffs’ judgments. ²

Baker's refused verdict form also permitted assessment of fault against Plaintiffs. But the given verdict form provided space for the jury to assess fault against Plaintiffs and the jury did assess fault to Plaintiffs. *See* R. 7752-54 (completed verdict form showing 10% fault assessed to plaintiff S. Lavon Evans, Jr. and 0% fault to two other Plaintiffs). Neither the Baker Defendants nor the Plaintiffs have raised the issue of assessment of fault against any *Plaintiff* on appeal.

*3 Therefore, the first issue for additional briefing with respect to Plaintiffs' judgments only addresses whether legal authority exists that would allow *Reed Cagle*, as Baker's preferred client, to be assessed with fault in Plaintiffs' legal malpractice action. As to the second issue, the answer is that, on this record, there is no legal authority to allocate fault against any *party* because Baker has not raised that issue on appeal as to Plaintiffs' judgments.

II. Issue One: What Legal Authority Exists That Would Allow A Client (Including A Non-Party Client) To Be Assessed With Legal Fault In A Legal Malpractice Action?

A. Summary Answer to Issue One

A party or non-party client can be assessed with legal fault in a legal malpractice action only if the defendant presents sufficient proof to satisfy the requirements of [Miss. Code Ann. § 85-5-7](#) or [§ 11-7-15](#). [Section 11-7-15](#) applies only to parties and therefore does not apply to allocation of fault to a non-party such as Reed Cagle. Under [Miss. Code Ann. 85-5-7](#), which is the only Mississippi statute that permits allocation of fault to a non-party, fault can only be assessed to a party or non-party who engaged in negligent acts or omissions that are a proximate cause of the plaintiff's damages. [Section 85-5-7](#) does not apply to intentional torts or breaches of contract and leaves intact joint and several liability for the conscious and deliberate pursuit of a common plan to commit a tort. Allocation of fault under [section 85-5-7](#) is an affirmative defense so a defendant bears the burden of proof and is not entitled to a jury instruction for allocation in the absence of sufficient evidence supporting the requirements of [section 85-5-7](#).

*4 In this case, there is no legal authority to assess fault against Baker's client Reed Cagle because, even though the Baker Defendants bore the burden of proof, they offered no instruction or argument as to the nature of Reed Cagle's purported fault, including duty and proximate cause. Additionally, the Baker Defendants did not point the trial court or this Court on appeal to any record proof from which a jury could conclude that Reed Cagle engaged in "fault" for purposes of [section 85-5-7](#).

B. Discussion of Issue One

Two Mississippi statutes address allocation or assessment of fault, but only one of those statutes permits assessment of fault to a non-party. [Miss. Code Ann. § 11-7-15](#) codifies the doctrine of comparative negligence and permits the jury to consider a plaintiffs' contributory negligence to reduce a plaintiffs award of damages.³ In contrast, [Miss. Code Ann. § 85-5-7](#) limits joint and several liability and provides for assessment of relative fault among certain, but not all, joint tortfeasors. [Section 85-5-7](#) is the only statutory authority to assess fault to a non-party and, in certain circumstances, permits the jury to apportion a joint tortfeasor's amount of damages "in direct proportion to his percentage of fault." [Miss. Code Ann. § 85-5-7](#). Because Cagle is a non-party, [§ 85-5-7](#) provides the only applicable authority for allocation of fault to him.

*5 Under the common law, defendants were jointly and severally liable, meaning that they each had an obligation to pay an entire award. *Dawson v. Townsend & Sons, Inc.*, 735 So.2d 1131, 1135 (Miss. App. 1999). [Section 85-5-7](#) changed that common law rule to make certain joint tortfeasors only severally liable (not jointly liable) and therefore only responsible for the amount of damages allocated to them in direct proportion to their percentage of "fault." [Miss. Code Ann. § 85-5-7](#). Joint and several liability is not abolished and remains the rule as to the exceptions listed in [section 85-5-7\(2\)](#) and in circumstances that are not addressed by [section 85-5-7](#). *See Robinson Property Group v. McCalman*, 51 So.3d 946, 951-52 (Miss. 2011); *Dawson*, 735 So.2d at 1141.

Section 85-5-7(5) refers to allocating fault among “parties,” but this Court has held that the statute applies to any participant to an occurrence that gives rise to a lawsuit. *Hunter v. General Motors Corp.*, 729 So.2d 1264, 1276 (Miss. 1999). But even though, under *Hunter*, the statute is not limited to parties, it is still limited to persons “alleged to be at fault” as required by statute. See Miss. Code Ann. § 85-5-7(5). Any other interpretation would make non-parties and parties subject to different rules, reducing a plaintiffs damages attributable to a non-party without regard to that non-party's fault or other culpability.

“Fault” is defined by section 85-5-7 as:

An act or omission of a person which is a proximate cause of injury or death to another person or persons, damages to property, tangible or intangible, or economic injury, including, but not limited to, negligence, malpractice, strict liability, absolute liability or failure to warn. ‘Fault’ shall not include any tort which results from an act or omission committed with a specific wrongful intent.

*6 Miss. Code Ann. § 85-5-7(2).

Under this language, a person who commits an intentional tort or breaches a contract is not at “fault” for purposes of § 85-5-7. Subsection (4) of the statute carves out another exception and states that joint and several liability remains “on all who consciously and deliberately pursue a common plan or design to commit a tortious act or actively take part in it.” Miss. Code Ann. § 85-5-7(4). See *Robinson*, 51 So.3d at 951 (listing exceptions); *Dawson*, 735 So.2d at 1136. To the extent section 85-5-7 does not change the common law rule, defendants are still jointly and severally liable. See *Dawson*, 735 So.2d at 1141. Therefore, damages attributable to an intentional tort, breach of contract, or conscious and deliberate common plan to commit a tort remain subject to joint and several liability and are not eligible for allocation of damages under section 85-5-7. As the court in *Dawson* put it, “there is only limited joint and several liability for those at fault and complete joint and several liability for intentional actions.” 735 So.2d at 1136.

Allocation of damages is an affirmative defense, so the defendant bears the burden of establishing the requirements of section 85-5-7. See *Eckman v. Moore*, 876 So.2d 975, 989 (Miss. 2004); *Travelers Cas. & Surety Co. v. Ernst & Young LLP*, 542 F.3d 475, 490 (5th Cir. 2008). In other words, the defendant must show that the person to whom it seeks to allocate damages engaged in conduct that constitutes “fault” as that term is defined in section 85-5-7. If the defendant does not present or point to sufficient evidence in the record to support this affirmative defense, the trial court properly refuses to submit the issue of allocation to the jury. See *Robinson*, 51 So.3d at 952 (when defendant did not direct Court to evidence *7 supporting comparative negligence instruction, not possible to conclude trial court abused discretion in refusing instruction); *Eckman*, 876 So.2d at 989 (summary judgment proper when defendant failed to provide sufficient evidence of affirmative defense); *Mississippi State Federation of Colored Women's Club Housing for the Elderly in Clinton, Inc. v. L.R.*, 62 So.3d 351, 367 ¶53 (Miss. Dec. 16, 2010) (after examining record for evidence supporting breach of duty, Court affirmed trial court's decision that evidence was insufficient).

Mississippi state and federal courts have considered the nature of conduct that supports allocation of damages under section 85-5-7. Conduct that is merely unwise is not sufficient, criticism of a witness is not enough to establish breach of a defined duty, and a person is not a tortfeasor simply because a defendant says so. See *Jackson Public School District v. Smith*, 875 So.2d 1100, 1103 (Miss. App. 2004); *Mississippi State Federation*, 62 So.3d at 367 ¶53. In other words, vague and unsupported suggestions of some wrongdoing will not support allocation of fault under section 85-5-7.

This construction is also consistent with statutory language and its reference to “tortfeasors.” The statute's title includes “contribution among joint tortfeasors,” and subsection (5), which sets out the rules for assessment of fault, refers to “joint tort-feasors.” Further, the definition of “fault” specifically lists established tort causes of action as examples of conduct that constitutes “fault.” Requiring at least negligence for “fault” under section 85-5-7 is also supported by section 11-7-15, Mississippi's comparative negligence statute. As the Fifth Circuit noted in *Travelers*, allowing a plaintiffs recovery to be reduced under section 85-5-7 by *8 something less than negligence conflicts with the requirement of “negligence” under section 11-7-15. *Travelers*, 542 F.3d at 493. See also *Hunter*, 729 So.2d at 1273 (“policy considerations underlying the comparative

fault doctrine would best be served by the jury's consideration of the *negligence* of all participants to a particular incident which gives rise to a lawsuit.”) (emphasis added).

The Court's request for supplemental briefing inquires specifically into assessment of fault to clients in legal malpractice actions. Under established interpretation of [section 85-5-7](#), assessment of fault to clients in legal malpractice actions is subject to the requirements of the statute and is not applicable for breach of contract, intentional tort, or concerted action to commit a tort. In this case, the jury returned a general verdict and the Baker Defendants did not request interrogatories on any of Plaintiffs' claims. Plaintiffs' claims included conduct that is not entitled to several liability under [section 85-5-7](#), including breach of contract, an intentional tort (interference with contract), and conspiracy. So if the general verdict is construed as finding that Baker engaged in conduct that is excluded by [section 85-5-7](#), the issue of Cagle's “fault” is irrelevant because Baker would be jointly and severally liable for Plaintiffs' damages under [section 85-5-7](#), regardless of Cagle's fault. Moreover, as discussed in more detail below, Baker has never pointed to any evidence or legal argument or instruction that would permit the jury to find that Cagle engaged in “fault” so as to authorize allocation under [section 85-5-7](#).

Additionally, there is authority from other jurisdictions that assessment-of-fault is not applicable to clients in legal malpractice actions based on fiduciary duty. *9 See, e.g., *Jackson State Bank v. King*, 844 P.2d 1093, 1097 (Wy. 1993) (“We further hold that neither the comparative negligence statute nor any other principle of Wyoming law requires that the plaintiffs recovery be reduced by his percentage of fault.”). This Court has long recognized the distinction between malpractice claims based on fiduciary duty or a breach of the duty of conduct and those malpractice claims based on negligence or breach of the duty of care. See, e.g., *Crist v. Loyacono*, 65 So.3d 837 (Miss. 2011). Plaintiffs asserted both claims here, but the proof at trial primarily focused on the Baker Defendants' egregious breach of the duty of loyalty. For example, Baker's conduct in causing Rig 12 to be mortgaged without notice to Plaintiffs was a breach of fiduciary duty and duty of loyalty because that conduct preferred Baker's client Reed Cagle and his companies over Plaintiffs, who were also Baker's clients. See Ex. P-112 (secured promissory note for Rig 12 loan signed by Reed Petroleum, LLC as “Maker”). While the distinction between different types of legal malpractice claims supports different treatment under [section 85-5-7](#), in this legal malpractice action, fault cannot be allocated to Baker's client Cagle under established precedent of this Court's interpretations of [section 85-5-7](#).

In the end, damages can only be allocated to Reed Cagle in Plaintiffs' legal malpractice case against the Baker Defendants if the Baker Defendants identify record proof of “fault,” which, for purposes of [section 85-5-7](#), necessarily requires proof of traditional tort concepts including duty and proof that the “fault” was a proximate cause of injury.

***10 C. Application of [Section 85-5-7](#) to this Case**

The record shows that “fault” could not be assessed to Baker's client Cagle on legal malpractice or any of Plaintiffs' other claims. Plaintiffs and Cross-Plaintiffs/Laredo objected during the charge conference that the Baker Defendants had not identified any “fault” on the part of Cagle. See Tr. 1541-43; 1573. The Baker Defendants never responded to those objections, never pointed to any proof in the record that would support a jury's finding that Cagle engaged in “fault,” and never proposed a jury instruction regarding the details of Reed Cagle's alleged “fault.” For those reasons, no legal authority exists to assess fault against Reed Cagle and the trial court's refusal of D-8a was not an **abuse** of discretion.

1. The Jury Charge Conference at Trial

The Baker Defendants submitted a proposed verdict form as to Plaintiffs' claims that permitted the jury to determine whether Plaintiffs, the Baker Defendants, Reed Cagle, or “some other participant” were guilty of “any fault or other conduct which was a proximate contributing cause” of Plaintiffs' damages.⁴ R. 7659-61 (Proposed Instruction D-8). Plaintiffs initially objected to D-8 because it began with a finding whether Plaintiffs were at fault and directed the jury to end their deliberations if they found Plaintiffs to be 100% at fault. Tr. 1539. Plaintiffs argued that the law of comparative fault required the jury to make a finding of liability first and then reduce that amount for comparative fault. Tr. 1539. The *11 Baker Defendants responded that this

was the instruction that was routinely given in state and federal courts. Tr. 1540. The court agreed that the sequence of findings should be changed because the Plaintiffs were “entitled to know whether or not the jury finds that there is any liability... on the part of what they allege against Baker.” Tr. 1540. Plaintiffs also objected that D-8 permitted allocation of fault against Cagle, even though Baker had not alleged that Cagle did anything wrong. Tr. 1541. The court directed Baker to change the sequence of findings and the court would consider the revised verdict form the next day. Tr. 1542. Laredo subsequently repeated the objection that the fault of Cagle had not been plead and was not in evidence. Tr. 1543-44. Counsel for Laredo specifically noted that, because Cagle is not a lawyer, his duties were entirely different from those of Baker. Tr. 1544. The trial court agreed. Tr. 1544 (“On that point I agree with you.”)

Through all of the discussion of the objections to allocation of fault to Cagle, the Baker Defendants never made any statement that would support permitting the jury to allocate fault to Cagle on Plaintiffs' legal malpractice claim or any other claim.⁵ For example, Plaintiffs' counsel stated that Plaintiffs

take the position that comparative fault should not be before the jury because the defendants have not presented any evidence or legal standard to evaluate what kind of fault any of the plaintiffs or other people might have committed...[T]here's nothing to guide the jury to determine what is fault that would constitute fault that would justify reduction of the verdict in damages against the defendants...”

*12 Tr. 1574. *See also* Plaintiffs' Brief, p. 59 & n. 46 (citing transcript of charge conference for references by counsel for Plaintiffs and Cross-Plaintiffs to lack of evidence in record supporting allocation of fault to Cagle).

The following morning, counsel and the court continued the charge conference. The court asked if Baker's new verdict form, D-8a, had been revised as the court had requested and Baker responded that it had. Tr. 1569; R. 7734; R.E. 302-04 (D-8a). Baker subsequently advised the court that they had not changed the sequence of findings in D-8a as requested by the court. Tr. 1572. After that clarification, Plaintiffs objected to any reference to comparative fault on the ground that “the defendants have not presented any evidence or legal standard to evaluate what kind of fault any of the plaintiffs or other people might have committed.” Tr. 1573-74. Again, Baker did not respond or present any counterargument.

The trial court refused verdict form D-8a and granted P-6a, which permitted allocation of damages to each of three Plaintiffs. Verdict form P-6a also addressed Plaintiffs' cross claims and required the jury to find whether Cross-Plaintiffs/Laredo engaged in wrongful conduct. After deliberation, the jury allocated 10% fault to S. Lavon Evans, Jr., 0% fault to E&D Services, Inc., and 0% fault to S. Lavon Evans, Jr. Operating Co., Inc. R. 7754. The jury also found in favor of Cross-Plaintiffs/Laredo on Plaintiffs' claims. R. 7752-54.

2. On this record, the jury could not allocate fault to Cagle consistent with [Miss. Code Ann. Section 85-5-7](#).

After this case was argued, the Mississippi Supreme Court issued an opinion regarding the trial court's responsibility with respect to jury instructions. In *13 [Mississippi Valley Silica Co. v. Eastman](#), 92 So.3d 666, 669 (Miss. 2012), this Court reaffirmed its holding in [Byrd v. McGill](#), 478 So.2d 302, 305 (Miss. 1985), that

Where under the evidence a party is entitled to have the jury instructed regarding a particular issue and where the party requests an instruction which for whatever reason is inadequate in form or content, the trial judge has the responsibility either to reform and correct the proffered instruction himself or to advise counsel on the record of the perceived deficiencies therein and to afford counsel a reasonable opportunity to prepare a new corrected instruction.

[92 So.3d at 669, ¶14.](#)

The trial court in this case complied with that obligation and did not **abuse** its discretion in refusing verdict form D-8a and giving verdict form P-6a because the Baker Defendants were not entitled, under the law and evidence, to an instruction that permitted the jury to assess fault to Cagle.

At bottom, the Baker Defendants have never - at trial or on appeal - explained how Cagle could be at "fault" on the trial record and they thereby failed to satisfy their burden of proving the affirmative defense of allocation. As a result, there is no legal authority on this record to assess fault against Reed Cagle.

First, the Baker Defendants never proposed any jury instruction that addressed Cagle's conduct or duty or alleged "fault," or otherwise set out a legal standard for assessing fault to Cagle. On appeal, Baker argued that the jury could have relied on the instructions for Plaintiffs' claims against Baker. *See* Baker Reply Brief, p. 26. But the substantive instructions on Plaintiffs' claims against the Baker Defendants were specific to the Baker Defendants and particularly as to their obligations as lawyers. For example, the instructions on negligent misrepresentation referred specifically to Held and Baker. *See* R. 7700, R.E. 273 *14 (P2a); R. 7711, R.E. 284 (D4a). These instructions, including Baker's instruction on this claim, directed the jury only to conduct by Baker and Held, with no mention of Cagle. Similarly, the legal malpractice instructions referenced obligations of attorneys and referred to Held and Baker. *See* R. 7704, R.E. 277 (P.4a). These instructions could not guide the jury in analyzing Cagle's conduct because of their specific reference to Baker and Held and because Cagle's duties were different: Cagle is not a lawyer and his duties to Plaintiffs, if he had any duties at all, were different. The trial court agreed that Cagle had different duties but Baker never responded.⁶ *See* Tr. 1544. Without instructions that set out Cagle's duties and the elements of any "fault," allocation of damages to Cagle could not properly be presented to the jury.

Second, Baker has never set out *facts* that would support a finding that Reed Cagle engaged in negligent conduct that proximately caused Plaintiffs' damages. Yet the proponent of an instruction must show that the instruction is supported by the evidence. *Church v. Massey*, 697 So.2d 407, 411 (Miss. 1997). As noted above, Plaintiffs' counsel repeatedly pointed this out before the trial court and Baker never *15 responded. On appeal, Baker's reply brief describes for the first time (although without record citations) the conduct on which they apparently rely to establish Cagle's fault. *See* Baker Reply Brief, p. 25.

In Baker's reply brief, Baker posits that there was proof at trial to support a finding that Cagle engaged in negligence, breach of contract, fraud, and conversion in his dealings with Plaintiffs. *See* Baker Reply Brief, p. 25. But even if Baker had made these arguments at the trial level, Plaintiffs would have countered with conclusive arguments that this proof was insufficient. For example, Cagle's failure to pay debts or capitalize Laredo, if supported by the record, would be a breach of contract that does not support allocation under [section 85-5-7](#); and there was no proof in the record that Cagle individually incurred any debts or promised to capitalize Laredo. Rather, the proof showed that HEI, not Cagle individually, incurred debts and, under the operating agreement, Reed Petroleum, LLC, not Cagle individually, was obligated to capitalize Laredo. *See* Ex. 131; R.E. 146, 162; P264. Even the promissory note for the Rig 12 transaction shows Cagle's lack of involvement individually: Reed Petroleum, LLC signed that note, not Cagle or any of the Plaintiffs. *See* Ex. P-112. Similarly, Cagle's breach of the Laredo operating agreement would be breach of contract only if he were individually a party to that agreement, and he was not.⁷ *See* R. Ex. 131, R.E. 146, 178. Finally, even if there were proof in the record that Cagle engaged in "fraud" or "conversion," both of those *16 claims are intentional torts and do not support allocation under [section 85-5-7](#).⁸ Baker's failure to identify facts - at the trial court or on appeal - that would support allocation of fault to Cagle demonstrates that the trial court properly refused to submit this issue to the jury.

Therefore, no legal authority exists on this record to allocate damages to any client because (1) Baker did not appeal any issue that would support allocation of damages to Plaintiffs or Cross-Plaintiffs/Laredo and (2) Baker did not offer any legal argument or instruction or point to any facts in the record that would support a finding that Cagle engaged in "fault" for purposes of allocation of damages under [section 85-5-7](#).

III. Issue Two: What Legal Authority Exists for Assessing A Plaintiff/Cross-Plaintiff With Fault When the Plaintiff's/ Cross-Plaintiffs Claims Include Intentional Torts, Negligence, Breach Of Contract, And Breach of Fiduciary Duties?

In this case, no legal authority exists to assess Plaintiffs or Cross-Plaintiffs with fault as to Plaintiffs' judgments because those issues are procedurally barred by Baker's failure to raise them at trial or appeal.

Issues that are not raised in an appellants' brief are procedurally barred.⁹ See [Miss. R. App. P. 28\(a\)\(3\)](#). As noted above, the Baker Defendants have not *17 raised any argument on appeal challenging assessment of fault to Plaintiffs or Cross-Plaintiffs/Laredo as to Plaintiffs' judgments. For that reason, no legal authority exists to assess Plaintiffs or Cross-Plaintiffs/Laredo with fault as to Plaintiffs' judgments.

Additionally, at trial, the Baker Defendants did not preserve the issue of assessment of fault against Cross-Plaintiffs because they never proposed a verdict form that would have permitted the jury to assess fault against Cross-Plaintiffs as to Plaintiffs' damages. See [R. 7734](#), R.E. 302 (D-8a).

At trial, the final verdict form permitted the jury to assess fault against three Plaintiffs and neither Plaintiffs nor the Baker Defendants have raised that issue on appeal. Plaintiffs objected at trial to any reference to comparative fault of Plaintiffs but, as a strategic trial decision, included provision for an assessment of fault against Plaintiffs in their own verdict form.

IV. Conclusion

The legal authority to assess fault against a party or non-party is governed both by statute and principles of appellate review. Here, the applicable statutes, as well as the trial and appellate record, establish that there is no legal authority in this case to assess fault against a non-party or party as to Plaintiffs' judgments.

Footnotes

- 1 Plaintiffs were also Baker's clients although, with one limited exception, Baker denied that they represented Plaintiffs. On appeal, Baker did not challenge the sufficiency of the evidence to establish that Plaintiffs were Baker's clients.
- 2 Plaintiffs' complaint included claims against Laredo and its subsidiaries and those claims were included in Plaintiffs' jury instructions and verdict form, which the trial court granted. See, e.g., [R. 7701](#), R.E. 274 (Instruction P-2a) ("You must also return a verdict in favor of Plaintiffs if you find that Laredo Energy Holdings, LLC made a significant or material misrepresentation or omission of fact and failed to exercise the degree of diligence that the public is entitled to expect of such entity; that Plaintiffs reasonably relied on Laredo Energy Holdings, LLC; The jury found in favor of Laredo and its subsidiaries and awarded no damages to Plaintiffs on those claims, concluding that Laredo and its subsidiaries did not engage in wrongful conduct. See [R. 7752-54](#) (completed verdict).
- 3 "In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property." [Miss. Code Ann. § 11-7-15](#).
- 4 The Baker Defendants submitted two separate verdict forms, one for Plaintiffs' claims, D-8 and D-8a, and one for the claims of Cross-Plaintiffs/Laredo, D-9 and D-9a. The verdict forms were substantially identical. These verdict forms were all refused by the trial court.
- 5 In response to Plaintiffs' argument, Baker proposed an instruction that stated that Lavon Evans' actions caused his damages and was a proximate contributing cause or proximate cause of Plaintiffs' and Cross-Plaintiffs' damages. [Tr. 1574](#); [R. 7733](#) (D-6c). Baker never offered any instruction or argument regarding Cagle's purported fault. Baker has not appealed the refusal of instruction D-6c.
- 6 Perhaps Baker did not argue that Cagle was at "fault" or offer any instruction on Cagle's "fault" because that argument was directly contrary to Baker's position at trial. For example, Baker's instruction on malicious interference specifically linked Baker's conduct with that of Cagle, stating that all of Baker's work on Plaintiffs' contracts involving Cagle or his companies "was done in their capacity as legal counsel for Cagle or Cagle's companies." [R. 7710](#), R.E. 283. Especially with this and Baker's other instructions, an instruction that Cagle acted wrongfully would strongly suggest to the jury that Baker also acted wrongfully. Additionally, if the jury had assessed

fault to Cagle, Plaintiffs would have argued that Baker was nonetheless jointly and severally liable for all damages under [Miss. Code Ann. § 85-5-7\(4\)](#) on the ground that Cagle and Baker engaged in concerted action to commit a tort. Even on appeal, Baker does not take the position that Cagle engaged in “fault,” but rather that the jury could have found, from Plaintiffs’ proof, that Cagle acted wrongfully. That argument, which attempts to preserve some consistency in Baker’s trial and appellate arguments, nonetheless does not excuse Baker’s failure to identify proof and offer an instruction supporting the affirmative defense of allocation.

7 Reed Petroleum, LLC and S. Lavon Evans, Jr. Drilling Ventures, LLC signed the operating agreement as the only two members of LEH. R.E. 178. Cagle and Evans also signed an acknowledgement as managers of LEH. *Id.* In the May 2007 suit against Plaintiffs, Baker alleged that Reed Petroleum, LLC was controlling member of LEH, without mention of Cagle individually. P210.

8 Allegations of fraud must be pled with particularity under [Rule 9 of the Mississippi Rules of Civil Procedure](#). In their answer, Baker stated that Plaintiffs’ claims were barred “in whole or in part by the doctrines of contributory negligence, comparative fault and assumption of risk” and that Plaintiffs’ claims arose “from the acts, omissions, and fault of third parties for whose conduct the Baker Defendants are not, and cannot be held, responsible, or over which the Baker Defendants had no control.” R. 1823-24.

9 Issues that are procedurally barred under [rule 28\(a\)\(3\)](#) can be reviewed for plain error, which is limited to “correcting obvious instances of injustice or misapplied law.” *Newport v. Fact Concerts*, 453 U.S. 247, 256, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981). The issue of allocation of fault is not “plain error” because Baker simply chose not to raise the issue on appeal.

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