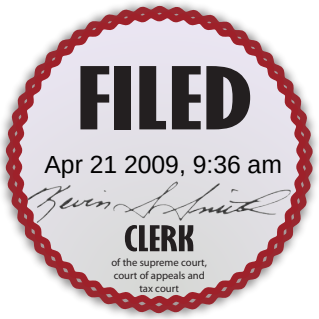


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LaPorte, Indiana

# IN THE
# COURT OF APPEALS OF INDIANA

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| ERIC C. LEWIS, | ) | |
| | ) | |
| Appellant-Plaintiff/Counterdefendant, | ) | |
| | ) | |
| vs. | ) | No. 46A04-0810-CV-604 |
| | ) | |
| ROBERT T. SMITH and ROBERT R. SMITH, | ) | |
| | ) | |
| Appellees-Defendants/Counterclaimants. | ) | |

APPEAL FROM THE LAPORTE CIRCUIT COURT
The Honorable Thomas Alevizos, Judge
Cause No. 46C01-0508-CT-261

**April 21, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## Case Summary

Eric Lewis ("Lewis") appeals the trial court's order determining both drivers in a two-car collision to be "at fault to the extent of their individual monetary damages." Appendix at 4. We reverse and remand with instructions.

## Issue

Lewis raises the dispositive issue of whether the trial court erred in not applying the Comparative Fault Act.[1]

## Facts and Procedural History

Lewis and Robert T. Smith ("Smith") were driving vehicles in a parking lot.[2] They collided. Lewis filed a complaint; Smith filed a counterclaim. In a bench trial, Lewis testified that he sustained $3885 in damages, while Smith testified that his damages amounted to $2664.

The trial court found that each driver did "not rationally prove additional fault on behalf of" the other. Id. It ordered that Lewis and Smith were "both at fault to the extent of their individual monetary damages, and recover nothing in excess thereof." Id.

Lewis now appeals.

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[1] In light of our conclusion, we need not address Lewis' argument that the trial court's judgment was contrary to the evidence.

[2] Lewis sued both Smith and his father, the owner of the car Smith was driving. For purposes of the Comparative Fault Act, they may be treated as a single party. Ind. Code § 34-51-2-4. "[A] defendant may be treated along with another defendant as a single party where recovery is sought against that defendant not based upon the defendant's own alleged act or omission but upon the defendant's relationship to the other defendant." Id.

## Discussion and Decision

Lewis argues that the trial court erred in applying Indiana's Comparative Fault Act to the facts of this case. We review questions of law de novo. City of Carmel v. Steele, 865 N.E.2d 612, 616 (Ind. 2007). Where, as here, the appellee does not file an appellate brief, we may reverse the trial court "on the appellant's showing of prima facie error." Ind. Appellate Rule 45(D).

The Comparative Fault Act bars a claimant from recovery if his "contributory fault is greater than the fault of all persons whose fault proximately contributed to the claimant's damages." Ind. Code § 34-51-2-6. Whether a jury or a trial court, the trier of fact must make one or two determinations. Ind. Code § 34-51-2-9 (In bench trials, "the court shall make its award of damages according to the principles specified for juries in sections 7 and 8 of this chapter."). First, the trier of fact must determine the percentage of fault for both parties and any nonparties whose fault contributed to the injury. Ind. Code §§ 34-51-2-7(b)(1). Second, the trier of fact then considers damages only if the claimant is 50% at fault or less. Ind. Code § 34-51-2-7(b)(2). It multiplies the claimant's damages by the defendant's percentage of fault to determine the claimant's recovery. Ind. Code § 34-51-2-7(b)(3-5).

It is clear from the trial court's brief order that it did not consider either party's testimony to be entirely credible. It found that Lewis' and Smith's "explanation[s] of events do not rationally prove additional fault" of the other. App. at 4. Nonetheless, the trial court was still required to apply the Act's provisions. It did not. Instead, it concluded that "[b]ecause opposing parties fail to prove an excess of liability above the individual monetary

damages, both parties recover nothing." Id. Accordingly, we reverse and remand with instructions to determine each party's percentage of fault, and if appropriate, determine the damages to which they are entitled.[3]

**Conclusion**

The trial court erred in not applying the Comparative Fault Act to this two-car collision.

Reversed and remanded with instructions.

DARDEN, J., concurs.

ROBB, J., concurs with opinion.

[3] The trial court concluded that Lewis and Smith were "both at fault," but "both parties recover nothing." App. at 4. By mere logic, this is not possible under the Act. A party fails to recover only if he is more than 50% at fault. It is not possible for each claimant to be more than 50% at fault.

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**ROBB, Judge, concurring**

I agree with the majority's statement of the applicable statutory provisions; however, I write separately to note that although Indiana Code section 34-51-2-7 states that a claimant fails to recover only if he is more than 50% at fault, it cannot have been the intent of the legislature that damages have to be awarded even when the parties are equally at fault. There are simply situations in which the negligence of two parties is so identical that neither should collect damages, and the statute as written does not allow for such situations. In such cases, the outcome is dependent upon a race to the courthouse: whoever is the first to file gets the benefit of the statutory provision in favor of the "claimant." We should not force defendants into creating an artifice by naming, for instance, a bystander who could have warned of an impending collision, as an anonymous nonparty in hopes some small

percentage of fault will be assigned to a third party and "break the tie." In short, I concur with the result reached by the majority based upon the language of the statute, but would encourage the legislature to take a second look at the statute.