SUPREME COURT OF FLORIDA

CASE NO. 68,689

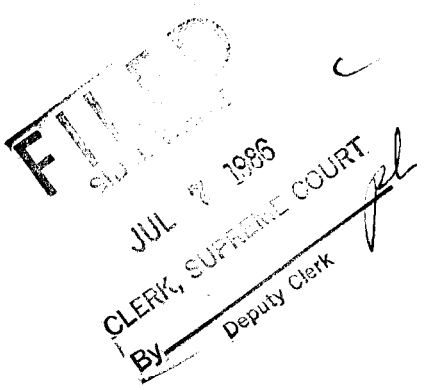
PATSY DIONESE and CHARLES DIONESE,

Petitioners,

-vs-

CITY OF WEST PALM BEACH,

Respondent.
_____/



BRIEF OF RESPONDENT, CITY OF WEST PALM BEACH, ON THE MERITS

DISCRETIONARY REVIEW OF DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, CERTIFYING AN ISSUE OF GREAT PUBLIC IMPORTANCE

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TABLE OF CONTENTS

TABLE OF CITATIONS

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STATEMENT OF CASE AND FACTS

Introduction

This case is before this court pursuant to a question certified by the District Court of Appeal, Fourth District, as being one of great public importance. In this case a trial court applied an undifferentiated joint lump sum settlement amount received from one joint tort-feasor pursuant to a documented joint settlement as a set-off to a jury award. The trial court followed the terms of a documented, mutual pre-trial settlement between claimants and one joint tort-feasor as opposed to adopting a private, unilateral apportionment agreement between the claimants which was first disclosed post-trial and, admittedly, was not the basis of the settlement with the joint tort-feasor. The question as phrased by the District Court of Appeal, Fourth District, and interpolating the parties involved in this litigation therein, was whether a private, unilateral agreement among several plaintiffs [DIONESE] to apportion funds paid by one joint tort-feasor [HOYLE] is binding

upon non-settling joint tort-feasors [CITY OF WEST PALM BEACH], and the court in determining the set-off claim of the non-settling joint tort-feasor [CITY OF WEST PALM BEACH]?

The petitioners, PATSY DIONESE and CHARLES DIONESE, her husband, were plaintiffs in the trial court, appellants in the District Court of Appeal, Fourth District, and will be referred to herein by name. The respondent, the CITY OF WEST PALM BEACH, was a defendant, cross-plaintiff, cross-defendant in the trial court, an appellee in the District Court of Appeal, Fourth District, and will be referred to herein as the "CITY". Nominal respondents, ROSEMARY BRUNNER HOYLE, NATIONWIDE INSURANCE COMPANY, and INDIANA INSURANCE COMPANY, were originally defendants, cross-plaintiffs, and cross-defendants in the trial court, nominal appellees in the District Court of Appeal, Fourth District, and will be referred to herein collectively as "HOYLE" and "JOINT TORT-FEASOR".

The material pertinent to this appeal concerning the post-trial set-off proceedings, which is truly the subject matter of this litigation at this stage, is primarily contained in transcripts appearing at various non-consecutive locations in the Record. Therefore, the following chronological reference is presented for the convenience of this court in understanding what occurred in this case:

1. Transcript of hearing on motion in limine of October 1, 1984, appears at R. 576-597.

2. Transcript of jury charge conference and actual jury instructions appear at R. 152-179.

3. Transcript of the first transcribed hearing concerning a

claimed set-off, which occurred on November 2, 1984, appears at R. 480-507.

4. Post-trial deposition of PATSY DIONESE appears at R. 508-551.

5. Post-trial deposition of CHARLES DIONESE appears at R. 532-575.

6. Transcript of the final evidentiary hearing concerning the disputed set-off, which occurred on November 29, 1984, appears at R. 1-83.

These transcripts of hearings and depositions will be referred to specifically by name, and specific page numbers in this brief. All emphasis is supplied by counsel unless otherwise indicated.

Case and Facts

The District Court of Appeal, Fourth District, was most generous in its discussion of the facts as to what occurred in this case as PATSY DIONESE and CHARLES DIONESE attempted to manipulate this case into a posture of double recovery. The decision of the District Court of Appeal, Fourth District, certainly recites certain facts which will not be repeated herein. However, it is important to understand and know additional facts which will place the legal arguments into a proper perspective.

As the trial level proceedings were moving toward actual trial, and on or about September 27, 1984, the CITY became aware that PATSY and CHARLES DIONESE, as claimants, and HOYLE, the other joint tort-feasor, had entered into some form of settlement and the CITY filed its motion for set-off. (R. 395). The CITY, through its counsel, represented to the court that it did not have copies of

settlement documents but believed that it was entitled to a set-off of at least $45,000 and possibly up to $60,000. (R 395).

On October 1, 1984, the parties appeared before the trial judge to commence trial and preliminary matters were considered by the court. (T. Motion in Limine 1-21). PATSY DIONESE had received workers' compensation benefits as a result of the accident and sought a collateral source exclusionary ruling. (T. Motion in Limine 1-6). Counsel for HOYLE was present and advised the court that a settlement had occurred. (T. Motion in Limine 9).

At that time the CITY advised the trial judge that its motion for set-off had been filed and that the CITY did not have documents concerning the amount of the settlement or whether there were any other agreements. (T. Motion in Limine 10). Counsel for PATSY DIONESE and CHARLES DIONESE specifically stated:

> We'll put it on the record. It's $45,000 and there is no problem with that. (T. Motion in Limine 10).

The CITY specifically stated that it wanted to be entitled to a set-off for such amount and inquired whether there were any other agreements. (T. Motion in Limine 10). Counsel for CHARLES and PATSY DIONESE thereupon responded:

> There is not going to be. I have completely settled my claim with him for a general release. (T. Motion in Limine 10).

At no time did counsel for DIONESE advise the court that there was any type of private, unilateral apportionment agreement between the claimants other than the stated $45,000 undifferentiated lump sum settlement amount. The seeds of non-disclosure were being sown at this time to set the stage for what was to follow.

The action proceeded to jury trial and after instructing the

jury that the elements of damage for PATSY DIONESE included the normal bodily injury/pain and suffering elements, aggravation elements, medical and hospital expense elements, and loss of earnings/working time elements (T. Jury Charges 18-19), the jury returned its adjusted verdict in favor of PATSY DIONESE in the amount of $57,000. After receiving instructions that CHARLES DIONESE could recover the loss of consortium, the jury returned an adjusted verdict in his favor in the amount of $3,800.

After the verdict had been returned, on October 10, 1984, PATSY and CHARLES DIONESE filed a motion for entry of final judgment and for the first time represented that the settlement with HOYLE was for the payment of only $10,000 for PATSY DIONESE, and the sum of $35,000 to CHARLES DIONESE. (R. 449-453). It is interesting to note that the certificate of service did not reflect a copy served upon counsel for HOYLE. (R. 450). The CITY immediately objected to the motion filed by DIONESE (R. 454-456), the CITY included in its motion for new trial an assertion that its contribution claim was not properly litigated because of misconceptions or misrepresentations made by the parties concerning the $45,000 settlement (R. 459), and the CITY also filed its motion for the entry of final judgment providing for a set-off of the total undifferentiated joint lump sum settlement amount which PATSY DIONESE and CHARLES DIONESE had received from HOYLE. (R. 460-461).

An initial hearing was held on November 2, 1984, at which time the trial court inquired about the set-off. It was conceded that CHARLES DIONESE was not injured in the accident and the court questioned as to why the settlement would be $35,000 to CHARLES

DIONESE and only $10,000 to PATSY DIONESE from the HOYLE settlement proceeds when it was PATSY DIONESE who sustained all of the injuries. (T. Hearing 11/02/84 3). The court stated that the situation looked very strange and counsel for DIONESE agreed. (T. 11/02/84 3). Counsel for DIONESE conceded that an attempt was made to amend the documents which released HOYLE in connection with the settlement to reflect a $35,000/$10,000 apportionment but HOYLE'S counsel rejected the apportionment and required a $45,000 lump sum release. (T. Hearing 11/02/84 5). Counsel for DIONESE asserted that the set-off should be applied in accordance with the private, unilateral apportionment agreement between the claimants. The trial judge found and stated that this type of conduct was "extremely distasteful". (T. Hearing 11/02/84 9).

The CITY objected to the position asserted by DIONESE and called the court's attention to the CITY'S attempt to obtain the necessary information before trial commenced and reminded the court that the CITY had existing contribution claims at that time. (T. Hearing 11/02/84 12-13). The CITY also asserted that the original release documents did not in any way apportion funds and they provided only for an undifferentiated joint lump sum settlement amount. The CITY asserted that there were attempts post-trial to materially alter the release documents to establish a claim for an unjustified apportionment. (T. Hearing 11/02/84 13-14). The court specifically inquired and wanted to know when the first release was signed and when releases were changed. (T. Hearing 11/02/84 14). At that time counsel for DIONESE apparently disclosed the existence of only two releases (T. 11/02/84 14-15), however, later testimony at

the final hearing established the existence of an additional release which was never disclosed or divulged to the court after specific inquiry.

The trial judge in this case was of the opinion that this entire situation smelled on its face, and he was concerned with the entire situation. (T. Hearing 11/02/84 17). The court decided that he had no alternative but to conduct an evidentiary hearing and specifically stated that he was very concerned about the entire situation. (T. 11/02/84 19).

On or about November 6, 1984, HOYLE filed with the court a copy of the only release which had been accepted by HOYLE in connection with the settlement. (R. 467-468). It is important to note that the release which was filed and was accepted by HOYLE was not the release which PATSY and CHARLES DIONESE had previously filed with the court, had represented to be the settlement documents in the case, and upon which they sought the entry of a final judgment. It is of equal importance that the release contained absolutely no apportionment of settlement proceeds but, on the contrary, reflected an undifferentiated joint lump sum settlement. This is exactly what the claimants attempted to manipulate so that they could make a double recovery in this case.

Prior to the final hearing, the post trial deposition of PATSY DIONESE was scheduled and counsel for HOYLE appeared to make his position abundantly clear for the record. (Depo. PATSY DIONESE 11/21/84 3). HOYLE'S counsel specifically asserted that the settlement was without question a $45,000 lump sum settlement with no mention of apportionment. (Depo. PATSY DIONESE 11/21/84 3).

Counsel for DIONESE conceded that HOYLE had no involvement in connection with the alleged private, unilateral apportionment agreement asserted by DIONESE and admitted on the Record that the settlement was based upon HOYLE'S lump sum offer without mention of apportionment. (Depo. PATSY DIONESE 11/21/84 3-5).

The trial court conducted a final hearing on November 29, 1984, to consider the matters involved in the DIONESE/HOYLE settlement, which also developed credibility issues as the hearing proceeded. (T. Final Hearing 1-38). Counsel for HOYLE testified that the claims of PATSY DIONESE and CHARLES DIONESE against HOYLE were settled on the Wednesday before trial on the basis of a joint settlement without apportionment. (T. Final Hearing 48, 51, 53). The settlement with HOYLE was for a joint lump sum amount without apportionment. (T. Final Hearing 56). The settlement, along with the documentation for the settlement, did not differentiate between the claims of PATSY DIONESE or CHARLES DIONESE, nor did the settlement or its documentation involve a discussion of differentiation of claims (T. Final Hearing 59), and the original release documents absolutely did not contain an apportionment of settlement proceeds or any type of differentiation as to claims. (T. Final Hearing 53).

The matter of an apportionment of the HOYLE settlement proceeds first surfaced post-trial during brief contact between counsel for HOYLE and an attorney in the office of counsel for DIONESE. (T. Final Hearing 49, 51, 61). On the Thursday or Friday after trial, inquiry was made on behalf of DIONESE to counsel for HOYLE as to whether HOYLE would object to counsel for DIONESE indicating

on the HOYLE release documents that the settlement proceeds were divided $22,500 for each claimant. (T. Final Hearing 61). In that post-trial timeframe, counsel for HOYLE initially thought that there would be no problem with permitting the placement of a self-serving statement on the releases as to an apportionment (T. Final Hearing 51, 56, 61-62), however, after discussing the issue with other attorneys in his office, it was determined that since the HOYLE/DIONESE settlment was for an undifferntiated joint lump sum settlement amount without apportionment, an after-the-fact unilateral apportionment on the face of the release was totally and inalterably unacceptable. (T. Final Hearing 51, 56, 61-62).

Counsel for HOYLE immediately notified counsel for DIONESE of his position and demanded that the release document reflect the undifferentiated lump sum joint settlement in conformity with the contractual settlement agreement and the release document which had been originally submitted by counsel for HOYLE for proper execution. (T. Final Hearing 51, 53, 56). Counsel for HOYLE advised that if he could not receive the proper release in conformity with the actual settlement there was no settlement. (T. Final Hearing 56). The terms of the contract were clear, unambiguous, and not subject to any type of creativity to develop a double recovery.

Although it had never been divulged in the post-trial depositions, nor to the trial judge upon specific inquiry by the court during prior hearings, it appears that the first release document executed which contained the non-existent apportionment concept, was unilaterally placed on the document in the office of counsel for DIONESE on the afternoon that the jury verdict had been returned.

(T. Final Hearing 26). The first attempt to alter the release documents post-trial was the attempt to demonstrate a 50/50 division of the HOYLE settlement proceeds, or $22,500 each between PATSY and CHARLES DIONESE. (T. Final Hearing 27, 29, 32). Trial counsel for DIONESE testified that the apportionment on this first release document which was mailed to counsel for HOYLE was a mistake and, before counsel for HOYLE actually received the altered release document, he sent someone to the office of counsel for HOYLE, intercepted the mailed release, and destroyed the release. (T. Final Hearing 34-35, 36).

It was admitted that the existence of this first altered release document was known on November 2, 1984, when the trial court had inquired as to when the first release document was signed, and also admitted that its existence was not disclosed to the court at that time when inquiry was made. (T. Final Hearing 38, 39-40). There was the further admission that the existence of this first release document was known at the time of the post-trial DIONESE depositions (T. Final Hearing 38), but the transcripts of such depositions reflect that such facts were never disclosed and were concealed.

It is important to note and it has not been disputed, that DIONESE had admitted that when the DIONESE claims against HOYLE were actually settled, no mention was ever made of an apportionment. (T. Final Hearing 43-44). When the settlement was discussed in the presence of the trial judge, just before trial commenced, the now alleged apportionment was not disclosed (T. Final Hearing 45), PATSY DIONESE had roughly $45,000 as special damages prior to the

settlement (T. Final Hearing 46), and CHARLES DIONESE made absolutely no claim for medical bills or any other special damages with the exception of his consortium claim. (T. Final Hearing 47).

Counsel for HOYLE testified that his first knowledge of the existence of an altered release document which contained a $35,000/$10,000 apportionment upon which DIONESE sought the entry of a final judgment and double recovery, was through a copy of the actual motion for the entry of final judgment. (T. Final Hearing 52). HOYLE'S counsel stated that he had specifically advised counsel for DIONESE that there had been no apportioned settlement, only a joint settlement, and he rejected a release document with an apportionment while demanding execution of the release document which he had submitted without an apportionment of any kind or nature whatsoever. (T. Final Hearing 53). HOYLE'S counsel also specifically testified that the $35,000/$10,000 apportionment release document was totally unacceptable, it was rejected, and was returned to counsel for DIONSE. (T. Final Hearing 55). The only release accepted by HOYLE was dated October 31, 1984, and had absolutely no apportionment concept included. (T. Final Hearing 56).

After hearing and considering the evidence, the trial court essentially determined that the DIONESE/HOYLE settlement was a joint, undifferentiated lump sum settlement, documents attempting an apportionment had been rejected, and the lump sum settlement amount received from the JOINT TORT-FEASOR/HOYLE was applied as a set-off in connection with the judgment to be entered against the CITY. The total HOYLE settlement of $45,000 was applied as a set-off against the net jury award to PATSY and CHARLES DIONESE of

$60,800.

DIONESE entered their appeal to the District Court of Appeal, Fourth District, and essentially asserted that the settlement should be apportioned in accordance with their own private, unilateral agreement between their two claims. The District Court of Appeal, Fourth District, determined that the DIONESE position was not supported by what actually occurred in this case and stated:

> The problem with this contention is that in the present case the appellants [DIONESE] and the settling tort-feasor [HOYLE] did not preserve the identity of the separate causes of action in the settlement agreement.

The court went further to adopt the position of the CITY in quoting from its brief that:

> Claimants cannot secretly, privately and unilaterally apportion a joint undifferentiated lump sum settlement contrary to an actual settlement, and then utilize their private apportionment as the legal basis for a determination of the rights and obligations of parties and others which are affected by the settlement. When claimants enter into a settlement which fails to preserve or otherwise differentiate settlement sums which pertain to separate causes of action, the total amount of the prior settlement is set-off against the total sum of subsequent verdicts entered against a separate joint tort-feasor.

The court relied upon the principles enunciated by this court in Devlin v. McMannis, 231 So. 2d 194 (Fla. 1970), to the effect that where a settlement fails to preserve or otherwise differentiate settlement sums pertaining to separate underlying causes of action, subsequent verdicts necessitate the off-setting against the total sum of the verdicts the total amount of the prior settlement.

The District Court of Appeal reasoned that settlements and set-offs have a direct relationship to contribution claims and the protection afforded a tort-feasor by good faith settlements. It is

reasonable to require a joint tort-feasor to defend a settlement which has been knowingly and intentionally entered into with a claimant, but it is absurd to suggest that such joint tort-feasor would be required to defend something in which it did not participate at all.

The court held that a private, unilateral agreement among plaintiffs to apportion settlement funds under the circumstances in this case was not binding on the non-settling tort-feasor and would not control the set-off due the non-settling tort-feasor pursuant to Florida Statutes Section 768.041(2). The judgment of the trial court was affirmed, but the court deemed the concept to involve an issue of great public importance and a question was certified to this court.

The District Court of Appeal, Fourth District, has phrased the question certified as:

> WHETHER A PRIVATE, UNILATERAL AGREEMENT AMONG SEVERAL PLAINTIFFS TO APPORTION FUNDS PAID BY ONE JOINT TORT-FEASOR IS BINDING UPON NON-SETTLING JOINT TORT-FEASORS IN THE COURT IN DETERMINING THE SET-OFF CLAIM OF THE NON-SETTLING JOINT TORT-FEASORS?

The respondent would suggest that additional factors involved in this case should be included in the question presented to include factors that the plaintiffs/claimants are husband and wife, the pretrial settlement did not preserve the identity of separate direct and derivative causes of action, the private, unilateral apportionment agreement was first disclosed post-trial and, the private, unilateral apportionment agreement which the claimants allege is contrary to the actual settlement. It is submitted that while the District Court of Appeal, Fourth District, has phrased a

question in very simple, sterile terms, the facts of this case must be considered as part of the legal issue because the issue does not exist in a vacuum.

POINTS INVOLVED ON APPEAL

Point I

WHETHER HUSBAND/WIFE PLAINTIFFS/CLAIMANTS WHO HAVE ENTERED INTO A JOINT, UNDIFFERENTIATED, LUMP SUM PRE-TRIAL SETTLEMENT WITH ONE JOINT TORT-FEASOR WHICH DOES NOT PRESERVE THE IDENTITY OF SEPARATE DIRECT AND DERIVATIVE CAUSES OF ACTION ARE ENTITLED TO APPORTION THE SETTLEMENT PROCEEDS AS A MATTER OF LAW PURSUANT TO A PRIVATE, UNILATERAL APPORTIONMENT AGREEMENT FIRST DISCLOSED POST-TRIAL AND CONTRARY TO THE ACTUAL SETTLEMENT FOR THE PURPOSE OF DETERMINING THE SET-OFF DUE ANOTHER JOINT TORT FEASOR?

SUMMARY OF ARGUMENT

The overwhelming evidence in this case demonstrated that husband/wife claimants entered into a joint, undifferentiated, lump sum settlement with a JOINT TORT-FEASOR/HOYLE which did not preserve the identity of separate causes of action. The husband/wife then sought to apply an alleged private, unilateral and totally unreasonable apportionment of the settlement proceeds between themselves, which was disclosed for the first time after the trial was completed, as a basis for a set-off even though such apportionment was not the basis of or part of the actual settlement and was actually rejected by the settling tort-feasor. The apportionment which the husband/wife sought to apply in this litigation was also contrary to the first apportionment they attempted unsuccessfully, which was contained in the first release document signed after trial, which was later intercepted and destroyed.

Claimants should not be permitted to secretly, privately, unilaterally and unreasonably apportion a joint undifferentiated lump sum settlement contrary to the terms of an actual settlement, and then utilize their private apportionment as the legal basis for the determination of the rights and obligations of parties and others who are affected by the settlement. When claimants enter into a settlement which fails to preserve or otherwise differentiate settlement sums which pertain to separate causes of action or parties, the total amount of the prior settlement is set-off against the total sum of any subsequent verdict entered against a separate or another joint tort-feasor. In this case the claimants simply failed to establish that the apportionment upon which they sought

to base a set-off was part of the actual settlement, and totally failed to satisfy the issue before the court making the factual determination.

ARGUMENT

Point I

HUSBAND/WIFE PLAINTIFFS/CLAIMANTS WHO HAVE ENTERED INTO A JOINT, UNDIFFERENTIATED, LUMP SUM PRE-TRIAL SETTLEMENT WITH ONE JOINT TORT-FEASOR WHICH DOES NOT PRESERVE THE IDENTITY OF SEPARATE DIRECT AND DERIVATIVE CAUSES OF ACTION ARE NOT ENTITLED TO APPORTION THE SETTLEMENT PROCEEDS AS A MATTER OF LAW PURSUANT TO A PRIVATE, UNILATERAL APPORTIONMENT AGREEMENT FIRST DISCLOSED POST-TRIAL AND CONTRARY TO THE ACTUAL SETTLEMENT FOR THE PURPOSE OF DETERMINING THE SET-OFF DUE ANOTHER JOINT TORT FEASOR.

At times there are disputes which crystalize not only legal issues, but bring into clear focus questions of fundamental fairness, natural justice and concepts of basic right and wrong as our society knows them. This court is presented with these elements in this case and two very clear possible choices. Based upon the facts in this case, this case will determine whether a party can successfully manipulate into a position of double recovery without regard to the true fact and without regard to the numerous interests adversely affected by such conduct.

This case presents an attempt by husband/wife claimants to engage in an after-the-fact private, unilateral manipulation of a lump sum settlement to adversely impact upon not only the parties in this litigation, but it will also impact upon others who may have some interest in the outcome, such as persons who have paid first party benefits and have some interest in the recovery such as workers' compensation benefits. Although there was conflicting evidence concerning the alleged private apportionment of the settlement proceeds due to the execution of a release document on the afternoon that the jury verdict was returned, which was later

intercepted, destroyed and essentially concealed from the parties and the court during the proceedings, even if the terms of a private, unilateral apportionment agreement between husband/wife claimants are established without any conflict as between themselves, such private agreement should not be applied in the set-off context when such private agreement is not the basis of, nor part of the actual settlement with a different tort-feasor.

The DIONESES attempt to weave themselves into general statements and theories expressed in other Florida decisions, including the decision of this court in Devlin v. McMannis, 231 So. 2d 194 (Fla. 1970). This dancing argument never addresses the fact that the settlement with the JOINT TORT-FEASOR/HOYLE in this case was admittedly a lump sum settlement and was not only not on the apportioned basis now asserted by DIONESE, but an apportionment was specifically rejected. The DIONESES overlook and refuse to consider that this court in Devlin specifically addressed the contemplated factual situation in this case and recognized that the total amount of a settlement should be set-off against the total sum of the verdicts when it stated:

> We are not unaware that there may be occasions where a settlement is effected so as to fail to preserve or otherwise differentiate settlement sums pertaining to the damages distinctive and peculiar to the underlying causes of action. Under such circumstances, subsequent verdicts entered against another joint tort-feasor on the same causes of action may indeed occasion the necessity of off-setting against the total sum of the verdicts the total amount of the prior settlement. Devlin at 196-197.

The set-off concept as applied and determined by the trial court below and the district court of appeal is not only consistent with the statements of this court in Devlin pertaining to joint,

undifferentiated lump sum settlements, it is also consistent with an overview of the interaction and ramifications of Florida Statutes Section 768.041 and Section 768.31. First, the payment of settlement proceeds by one joint tort-feasor to a claimant has a direct and identifiable relationship with the concept or doctrine of contribution. This is a statutory concept which attempts to achieve fundamental fairness by requiring one to pay for what one has caused. The terms of a settlement most certainly impact upon the rights of a settling tort-feasor to obtain contribution with reference to a "pro rata share" and amounts that are "reasonable". See, Florida Statutes Section 768.31(2). The settlement terms also impact upon the protection or insulation a settling tort-feasor obtains by the settlement with reference to "good faith". See, Florida Statutes Section 768.31(5). There can be no doubt that the doctrine of contribution is clearly an equitable concept predicated upon the proportionate sharing of a common obligation. See generally, Stuart v. Hertz Corp., 351 So. 2d 703 (Fla. 1977); D.T.N. Consol., Inc. v. Coastal Eng'g Assoc., Inc., 341 So. 2d 226 (Fla. 2d DCA 1977).

The courts of this state have rejected the concept that a party to litigation can unilaterally and arbitrarily determine the rights of other parties to the proceeding by directing payment of amounts due. For example, in Sobik's Sandwich Shops, Inc. v. Davis, 371 So. 2d 709 (Fla. 4th DCA 1979), the court determined that a claimant was prohibited from arbitrarily deciding how much a particular tort-feasor would pay based upon an openly published position. If a claimant is prohibited from arbitrarily deciding how much a partic-

ular tort-feasor will pay, then, most certainly, claimants should not be permitted to arbitrarily, privately and unilaterally determine for themselves, with binding effect on all other parties and interests that are not represented in the litigation, that a non-disclosed apportionment of settlement proceeds has occurred when such has not been part of the settlement with the settling tort-feasor.

The interests of the settling tort-feasor would be adversely affected in this case if the claimants are permitted to take any action they desire. The reason for this is that a joint tort-feasor is required to defend the merits and substance of the terms of a settlement entered into knowingly and intentionally with the claimant as analyzed in Fleury v. City of Riviera Beach, 396 So. 2d 813 (Fla. 4th DCA 1981). It would be a totally different situation if the settling tort-feasor were required to defend the terms of a settlement based solely upon a private, arbitrary, unilateral and totally unreasonable apportionment by a claimant in which the settling tort-feasor had no participation and which is actually contrary to the agreed upon settlement. For these reasons alone, claimants should not be permitted to enforce, as a matter of law, their own private, unilateral, unreasonable and non-disclosed apportionment agreements in this set-off context when the apportionment was not the basis of the actual settlement with the settling tort-feasor.

The DIONESES attempt to assert that principles of law applied in the judgment debtor/creditor situation should be applied in this case to permit a claimant (not a judgment creditor) to make their

own apportionment of proceeds as discussed in White Constr. Co. v. Dupont, 478 So. 2d 485 (Fla. 1st DCA 1985). It is submitted that a judgment debtor/creditor proposition has absolutely nothing to do with this case as recognized by the district court of appeal below, and, if anything, this case should be controlled by the principles of law applicable to contracts because the release and settlement between the DIONESES and HOYLE was a matter of contract, and such contract should be binding for all purposes. It is clear that under Florida the terms of a release document, along with its operative effect, are governed by the law applicable to contracts, the mutual intent of the parties as demonstrated in the document, and parties to the document simply cannot disregard the content of the final document and manufacture some type of undisclosed, private, unilateral and unreasonable desired effect. See generally, Travelers Ins. Co. v. Horton, 366 So. 2d 1204 (Fla. 3d DCA 1979); Alberts Shoes v. Crabtree Constr. Co., 89 So. 2d 491 (Fla. 1956); Belefonte Ins. Co. v. Queen, 431 So. 2d 1039 (Fla. 4th DCA 1983); Hendrick v. Redfearn, 88 So. 2d 620 (Fla. 1956). It is submitted that the facts in this case are abundantly clear, were clearly understood by the trial court and the district court of appeal, and demonstrate that there simply was no apportionment involved in connection with the DIONESE/HOYLE settlement, apportionment was never part of the settlement agreement, and HOYLE simply refused to enter into the settlement if the apportionment which the DIONESES now assert was to be part of the settlement.

Additionally, the DIONESES simply failed to establish and satisfy their evidentiary burden. The DIONESES had the burden of

establishing the mutual assent of the DIONESES/HOYLE to the settlement upon which the DIONESES sought entry of the final judgment in this case. See, e.g., Galligan v. Burgess, 423 So. 2d 1037 (Fla. 4th DCA 1982). It is clear that the evidence submitted was overwhelmingly contrary to the position asserted by the DIONESES in this litigation. Settlement which does not differentiate between multiple causes of action against joint tort-feasors does not permit a claimant to unilaterally, privately and unreasonably attempt to apportion settlements to causes of action, as determined in Madden v. Rodovich, 367 So. 2d 1083 (Fla. 4th DCA 1979), and the same proposition should be applied in this case.

Although there does not appear to be a decision within the category of being "on all fours" with the present case, it is clear that the courts of this state have totally rejected any notion that parties can privately and unilaterally determine the rights of other parties in litigation. It is not unique for parties to attempt to manipulate the legal system to their benefit, but on each occasion such attempts have been quashed. For example, the court refused to enforce the specific terms of an express mutual agreement between a claimant and a tort-feasor to defeat a set-off due other tort-feasors contrary to statutory intent, even though the agreement specifically provided that it would not flow to the benefit of any other tort-feasors, in Leasco, Inc. v. Bartlett, 257 So. 2d 629 (Fla. 4th DCA 1972), cert. denied, 262 So. 2d 447 (Fla. 1972). In a similar manner, an after-the-fact attempt to apportion an undifferentiated lump sum settlement in an attempt to reduce or defeat medical lien rights, was totally rejected in Dade County v. Perez,

237 So. 2d 781 (Fla. 3d DCA 1970). The same result can be found in the court's refusal to enforce a claimant's private and unilateral manipulation of an apportionment of insurance benefits in Fernandez v. South Carolina Ins. Co., 408 So. 2d 753 (Fla. 3d DCA 1982).

It is submitted that an approval of the DIONESE position in this case that they are entitled to enforce their alleged private, unilateral and unreasonable apportionment against others, would have far reaching impact not only in this case but in other situations as well. Any settling tort-feasor would suffer the consequences of unknown private agreements to which they were not parties, subrogation lien and indemnity interests would be adversely affected and essentially destroyed, and claimants would be permitted to create inequitable windfalls for themselves far beyond any sense of justice or fairness. To adopt a phrase utilized by the trial judge during the final hearing in response to the argument of DIONESE that the CITY was entitled to no set-off--"NICE TRY, BUT NO CIGAR". (R. Final Hearing 67).

CONCLUSION

It is submitted that the determination by the trial court and the District Court of Appeal, Fourth District, were eminently correct, and based upon the facts in this case the position of DIONESE should be rejected totally.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 30 day of June, 1986, to: Barbara Green, Esq., DANIELS & HICKS, P.A., 2400 New World Tower, 100 North Biscayne Boulevard, Miami, FL 33132; RICCI AND ROBERTS, P.A., P.O. Box 3947, West Palm Beach, FL 33402; and to C. Brooks Ricca, Esq., REID & RICCA, P.A., P.O. Drawer 2926, West Palm Beach, FL 33402.

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