SUPREME COURT OF FLORIDA

CASE NO. 68,689

PATSY DIONESE and CHARLES DIONESE,

Petitioners,

vs.

CITY OF WEST PALM BEACH, et al.,

Respondents.

DISCRETIONARY REVIEW OF DECISION OF THE
FOURTH DISTRICT COURT OF APPEAL OF FLORIDA
PASSING ON A QUESTION CERTIFIED TO BE OF
GREAT PUBLIC IMPORTANCE

PETITIONERS' BRIEF ON THE MERITS

RICCI AND ROBERTS, P.A.
1645 Palm Beach Lakes Boulevard
Post Office Box 3947
West Palm Beach, Florida 33402
and
DANIELS AND HICKS, P.A.
2400 New World Tower
100 North Biscayne Boulevard
Miami, Florida 33132-2513
(305) 374-8171

TABLE OF CONTENTS

DANIELS AND HICKS, P. A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

TABLE OF CITATIONS

OTHER AUTHORITIES

DANIELS AND HICKS, P. A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

SUMMARY OF ARGUMENT

Lumping together two separate verdicts on two separate causes of action, for purposes of setting off a settlement with a joint tort-feasor, is contrary to the law. The causes of action of spouses for injury to one spouse and loss of consortium to the other are separate and distinct. The mere fact that a release form does not set out the apportionment does not obliterate the distinction between the causes of action. The plaintiffs have a right to allocate the money they receive as they see fit.

The public policy of the State of Florida encourages settlement. Allowing plaintiffs to enter into a contract between themselves apportioning their settlement with one joint tort-feasor will simplify and encourage settlement by all parties.

Even if this Court finds that the apportionment should not be made according to the contract between the plaintiffs, some type of apportionment is required, and the case should be remanded to the trial court for a hearing to determine a reasonable apportionment.

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

STATEMENT OF THE CASE AND FACTS

Petitioners have invoked the discretionary jurisdiction of this Court to review the decision of the Fourth District Court of Appeal, which that court has certified as passing on a question of great public importance. The facts, as set forth in that court's opinion,[1] are as follows:

> Appellant, Patsy Dionese, a driving instructor, was injured in an automobile accident when an automobile driven by a student collided with a manhole cover in the City of West Palm Beach. Patsy sued the City of West Palm Beach (the City), Rosemary Hoyle (the student driver), Indiana Insurance Company (Hoyle's insurer), Nationwide Insurance Company (the insurer of the automobile) and Jack Grant, Patsy's employer, to recover for her personal injuries and her husband Charles joined as a plaintiff, seeking damages for loss of consortium.[2] The Dioneses later voluntarily dismissed their action against Jack Grant. Mutual crossclaims were filed by and between the City and Hoyle.

---

[1] Facts added by petitioners here for clarification or background will appear in the footnotes.

[2] The claims were in separate counts (R. 180-185).

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

Prior to trial, the Dioneses agreed to settle their claims against defendants Rosemary Hoyle, Nationwide Mutual Insurance and Indiana Insurance Company for the sum of $45,000. The trial commenced on October 1, 1984. Patsy and Charles Dionese won separate adjusted jury verdicts of $57,000 and $3,800 respectively for Patsy's personal injury claims and Charles's loss of consortium claim.

On October 10, 1984, the Dioneses filed a motion for entry of final judgment in accordance with the set-off procedure set forth in section 768.041(2), Florida Statutes (1983), and represented for the first time that the Hoyle settlement was to be apportioned with $10,000 for Patsy Dionese and $35,000 to Charles Dionese. According to appellants, the set-off was to be:

	Patsy Dionese	Charles Dionese
Adjusted Jury Award	$57,000	$ 3,800
Hoyle settlement proceeds	10,000	35,000
Final Judgment	47,000	0

The City filed an objection to the above motion, a motion for new trial, and a motion for entry of final judgment providing for a set-off of the total undifferentiated joint lump

DANIELS AND HICKS, P. A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

sum settlement against the total sum of the jury award.

The trial court conducted a post-trial hearing concerning set-off at which counsel for Patsy and Charles contended the set-off should be in accordance with the schedule set out above, which division Patsy and Charles subsequently testified in post-trial depositions that they had agreed to before trial.[3/] The City objected, arguing that the original release document did not apportion the funds, but rather provided an undifferentiated joint lump sum settlement amount. Although there had been a discussion between counsel for Hoyle and plaintiffs, after trial and the jury verdict, of an apportionment of the settlement in accordance with the plaintiffs' proposed division, Hoyle had rejected the proposal and insisted on the lump sum

---

3/ There was no showing that the Dioneses had not reached their agreement before trial. Counsel for the City conceded he had no proof the Dioneses had not reached their agreement before trial (R. 73). The trial court made no finding of bad faith.

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

settlement as originally agreed to prior to trial.[4/]

The trial court entered judgment in favor of the City finding that the settlement between the plaintiffs and Hoyle was for an undifferentiated, unapportioned sum of $45,000 as provided in the only release accepted by Hoyle. Therefore, the judgment provided the City was entitled to a set-off of the Hoyle settlement of $45,000 against the net jury award to the plaintiffs of $60,800.

The Fourth District affirmed, and certified its decision as one passing upon a question of great public importance.

[4/] The release did, however, expressly incorporate the court file (R. 467-468). The complaint had stated the Dioneses' claims in separate counts (R. 180-185). Further, Hoyle's counsel had first agreed to the apportionment, and then changed his mind (R. 42, 52, 61-62).

DANIELS AND HICKS, P. A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

QUESTIONS PRESENTED FOR REVIEW

The Fourth District stated the question of great public importance to be:

> 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 AND THE COURT IN DETERMINING THE SET-OFF CLAIM OF THE NON-SETTLING JOINT TORT-FEASORS.

Petitioners submit that the somewhat broader question presented by this case is:

> WHETHER THE TRIAL COURT IS FREE TO IGNORE THE SEPARATE IDENTITIES OF TWO PLAINTIFFS' SEPARATE CAUSES OF ACTION AND THE PLAINTIFFS' APPORTIONMENT AGREEMENT, BY LUMPING TOGETHER THEIR TWO SEPARATE VERDICTS AGAINST ONE JOINT TORT-FEASOR, AND SETTING OFF AGAINST THE TOTAL OF THE TWO VERDICTS THE AMOUNT OF THEIR SETTLEMENT WITH ANOTHER JOINT TORT-FEASOR.

DANIELS AND HICKS, P. A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

ARGUMENT

A TRIAL COURT IS NOT FREE TO IGNORE THE SEPARATE IDENTITIES OF TWO PLAINTIFFS' SEPARATE CAUSES OF ACTION AND THE PLAINTIFFS' APPORTIONMENT AGREEMENT, BY LUMPING TOGETHER THEIR TWO SEPARATE VERDICTS AGAINST ONE JOINT TORT-FEASOR, AND SETTING OFF AGAINST THE TOTAL OF THE TWO VERDICTS THE AMOUNT OF THE SETTLEMENT WITH ANOTHER JOINT TORT-FEASOR.

The jury rendered two separate verdicts against the City of West Palm Beach on the separate claims of Mr. and Mrs. Dionese. The Dioneses had made an agreement with each other apportioning their settlement with the other defendants. Despite these facts, the trial court combined the verdicts and set off the total settlement from the total of the two verdicts awarded by the jury. The trial court's decision was contrary to the law and the policy of the State of Florida.

A. The law requires that the settlement be apportioned.

Section 768.041(2), Fla. Stat. (1983) requires that any settlement funds received by a plaintiff from a joint tort-feasor are to be set off from the amount awarded by the jury to the plaintiff at trial. That statute has been interpreted to authorize the apportionment of settlement funds between separate causes of action or separate plaintiffs. Devlin v. McMannis, 231 So.2d 194 (Fla. 1970). An individual's cause of action for personal injuries is separate and distinct from his or her spouse's cause of action for loss of consortium. Busby v. Winn & Lovett Miami, Inc., 80 So.2d 675 (Fla. 1955). Several cases have consi-

DANIELS AND HICKS, P. A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

dered the application of the apportionment statute to settlements with one joint tort-feasor of separate causes of action of multiple plaintiffs. All of them have required an apportionment of the settlements for the separate causes of action. Two cases have required apportionment in accordance with the agreement between the plaintiffs and the settling defendant. Devlin v. McMannis, 231 So.2d 194 (Fla. 1970); City of Tamarac v. Garchar, 398 So.2d 889 (Fla. 4th DCA 1981). In a third, the court held that, despite the parties' failure to make any agreement about apportionment, some form of apportionment was required. Florida Freight Terminals, Inc. v. Cabanas, 354 So.2d 1222, 1226 (Fla. 3d DCA 1978). Although none of these cases involved the precise situation present here -- an agreement between plaintiffs to which the settling defendants were not parties -- all three demonstrate that the result reached below was wrong.

In Devlin, a father filed suit against a number of joint tort-feasors responsible for his son's death. The father maintained two distinct causes of action, one as administrator of his son's estate and the other on behalf of himself and his wife. Prior to trial, the father settled with some of the defendants and the settlement funds were apportioned between the causes of action at $2,000 for the estate and $18,000 for the parents. At trial the jury awarded the estate $10,000 and the parents $5,000. The trial court set off the total settlement amount from the total jury award and entered judgment jointly at $0. The district court reversed and this Court upheld the district

DANIELS AND HICKS, P. A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

court's decision, holding that the statute "must be interpreted so as to preserve the identity of the separate causes of action and the distinctive character of the damage element accruing under each cause." 231 So.2d at 196.

Similarly, in City of Tamarac, as in the present case, one plaintiff was injured in an automobile accident, and his action for personal injuries was joined with his wife's action for loss of consortium. All the defendants except the City of Tamarac settled with the plaintiffs prior to trial, and the funds were apportioned between them so that the wife received $750,000 for her loss of consortium claim, while the husband, a permanent quadriplegic, received only $400,000. At trial, the jury awarded the wife less than she had received from the settlement. The trial court set off the settlement amount from the individual jury awards and denied the city's request to apply the wife's excess against the husband's jury award. On appeal, the Fourth District held that the trial court correctly denied the City's request.

In both of those cases, the apportionment was ordered in accordance with the settlement agreement of the parties. However, even where the parties have failed to mention apportionment in the settlement agreement or release, some kind of apportionment is required. Florida Freight Terminals, Inc. v. Cabanas, 354 So.2d 1222, 1226 (Fla. 3d DCA 1978). As in the present case, in Cabanas there were separate causes of action: for wrongful death and for injuries to the surviving children of the dece-

DANIELS AND HICKS, P. A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

dents. In a ruling logically consistent with the ruling below, the trial court in Cabanas held that no portion of a settlement by the children against some of the defendants in their personal injury action could be set off against their verdict against the remaining defendant in the wrongful death action. The release, like the release in this case, was in general terms, releasing all of the children's claims against the settling defendants, and did not make an apportionment of the settlement proceeds. Nonetheless, the court reversed the trial court's failure to apportion the settlement. It held that, since some portion of the settlement covered the children's wrongful death claims, some but not all of the settlement would have to be set off against the judgment in that case. The court was careful to point out that "a set off of the total sum would be incorrect...," and that apportionment was required. 354 So.2d at 1227.

The court below relied on dicta in Devlin, 231 So.2d at 196-197, to the effect that, when a settlement fails to preserve the separate causes of action, a setoff of the total settlement against the total verdict "may" be proper. That language was not necessary to the decision in Devlin, and is not applicable here. First, the release here expressly referred to the court file, which contained the plaintiffs' claims in separate counts of the complaint. Second, the settling defendants did not object to whatever apportionment the plaintiffs wished to make. They initially agreed to such an apportionment, and simply decided subsequently that they did not want it to appear on the face of

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

the release (R. 61, 42, 52, 62).

Thus, there is no basis in the law for the refusal to make any apportionment at all.

B. The setoff should be made in accordance with the Dioneses' agreement.

The three cases discussed above stand for the proposition that some apportionment must be made. The question left open is what standard must be used in allocating the amount, where no standard is set out on the face of the release. For reasons grounded in settled principles of law and public policy, Petitioners submit that their agreement should be honored.

First, in the absence of direction from a debtor as to how a payment is to be credited, the law allows joint creditors to apply the payment as they desire. White Construction Co. v. DuPont, 478 So.2d 485 (Fla. 1st DCA 1985). This rule was described by this Court nearly 140 years ago as "too well settled for controversy." Randall v. Parramore, 1 Fla. 407, 428 (1847). The settling tort-feasors gave the Dioneses no direction as to how the settlement was to be apportioned, and, in fact, refused to permit any apportionment to be reflected in the release. Thus, the Dioneses were entitled to apportion the settlement as they saw fit.

In addition to the plain requirements of the law, however, the policy of the State of Florida would be furthered by reversal here.

Since the law strongly favors settlement, this Court should make a decision which encourages settlement. Although a

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

major reason why parties settle a lawsuit rather than litigate is their common interest in avoiding legal costs, plaintiffs and defendants have other, differing motivations for settling. Generally, a plaintiff will settle to guarantee some certain recovery, while a defendant seeks to guarantee a definite, limited liability. Different defendants will also have varying propensities to settle, depending on, among other factors, their aversion to risk. Where one defendant might settle an action for a certain sum, a more adventurous defendant in the same situation may refuse to settle.

A holding that the plaintiffs may validly apportion a settlement award between themselves will encourage multiple plaintiffs and defendants to settle and will discourage an adventurous defendant from opting to go to trial instead of settling.

Allowing apportionment between plaintiffs is likely to have the following effects:

(1) Multiple plaintiffs would be more inclined to agree to a settlement because each would be assured of receiving his exact desired minimum recovery.

(2) The risk-averse defendant would be encouraged to settle because the settlement would be less vulnerable to a collateral challenge by a non-settling codefendant since the settling defendant took no part in the apportionment.

(3) The more adventurous codefendant will be discouraged from going to trial because the plaintiffs' reasonable apportionment agreement will preclude a set off of the total

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

amount.

The opposite holding will have the opposite effect:

(1) Each individual plaintiff will be unable to determine his final award and each will either require a larger total settlement to ensure he receives his required minimum recovery or will refuse to settle.

(2) Defendants who are inclined to settle will find it more difficult to settle because the plaintiffs will require a larger settlement amount.

(3) More adventurous defendants will be encouraged to go to trial because, even if they lose, they will be entitled to set off the total settlement award without regard to the separate causes of action or plaintiffs.

The District Court of Appeal suggested below that the results the Petitioners seek would require a settling tort-feasor "to defend the terms of a settlement based upon a private unilateral apportionment by claimants where the settling tort-feasor did not participate". That is not necessarily the case. This Court could construct a decision that would permit a tort-feasor to make a good faith settlement of all claims, and leave the plaintiffs and the remaining defendants to litigate the legitimacy of whatever apportionment the plaintiffs selected. This would encourage settlement, since the settling tort-feasor could then wash its hands of the whole matter. It would also encourage reasonableness and good faith in apportionment, since plaintiffs would try to structure their apportionment to avoid litigating

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

these issues with the remaining tort-feasors.

Under the district court's decision, a settling joint tort-feasor has nothing to gain and everything to lose by allowing an apportionment to appear on the face of the release. It is unrealistic to expect a settling defendant to voluntarily expose himself to possible litigation with a non-settling codefendant for contribution under Section 768.041(5), Fla. Stat. (1983). This is plainly demonstrated by the actions of the settling defendants below. Although their counsel first agreed to permit the release to reflect apportionment, he later changed his mind in order to avoid any possible litigation concerning contribution.

The ruling Petitioners seek provides certainty for the settling parties. Where the settling tort-feasors act reasonably and in good faith, they know their exact maximum liability, without having to worry about apportionment or contribution. The plaintiffs know their exact minimum recovery. Only the tort-feasor who refuses to settle is left with uncertainty. He can avoid that uncertainty by joining in a reasonable settlement.

This Court's decision in this case can encourage settlements by giving effect to an agreement which has not been shown to have been made in bad faith, which was made prior to trial, and which is in accordance with all of the previous decisions which have addressed the issue. Or, it can discourage settlements, refuse to acknowledge a good faith agreement, and allow the party who refused to settle to come out the winner.

DANIELS AND HICKS, P. A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

CONCLUSION

The trial court's decision to set off the total of the settlement received by the Dioneses from the settling tort-feasors, against the total of the two verdicts they received against the tort-feasor who refused to settle, without making some kind of apportionment, was contrary to the law. The law requires that some kind of apportionment be made. The agreement between the plaintiffs provides a reasonable and certain basis for calculating that apportionment. Such an apportionment is consistent with settled law and the policy of the State of Florida. The decision of the District Court of Appeal, affirming the decision of the trial court, should be reversed. The case should be remanded to the trial court for an apportionment consistent with the Dioneses' agreement. In the alternative, the case should be remanded to the trial court for a hearing to determine what a reasonable apportionment would be.

RICCI AND ROBERTS, P.A.
1645 Palm Beach Lakes Boulevard
Post Office Box 3947
West Palm Beach, Florida 33402
and
DANIELS AND HICKS, P.A.
2400 New World Tower
100 North Biscayne Boulevard
Miami, Florida 33132-2513
(305) 374-8171

By Barbara Green
BARBARA GREEN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioners' Brief on the Merits was mailed this 29th day of May, 1986, to: Magill and Lewis, P.A. 730 Ingraham Building, 25 S.E. 2nd Avenue, Miami, Florida 33131 and C. Brooks Ricca, Jr., Esq., Reid and Ricca, P.A., Post Office Drawer 2926, West Palm Beach, Florida 33402.

Barbara Green

BARBARA GREEN

DANIELS AND HICKS, P. A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171