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' REPLY BRIEF

RICCI AND ROBERTS, P.A.
1645 Palm Beach Lakes Blvd.
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

	PAGE
FACTS.....	1
ARGUMENT	
THE 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.....	4
CONCLUSION.....	10
CERTIFICATE OF SERVICE.....	11

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

PAGE

City of Tamarac v. Garcher,
398 So.2d 889 (Fla. 4th DCA 1981).....3,4,7

Dade County v. Perez,
237 So.2d 781 (Fla. 3d DCA 1970)..... 7

Devlin v. McMannis,
231 So.2d 194 (Fla. 1970)..... 5,6

Fernandez v. South Carolina Insurance Co.,
408 So.2d 753 (Fla. 3d DCA),
review denied, 417 So.2d 329 (Fla. 1982)..... 7

Florida Freight Terminals, Inc. v. Cabanas,
354 So.2d 1222 (Fla. 3d DCA 1978)..... 6

Madden v. Rodovich,
367 So.2d 1083 (Fla. 4th DCA 1979)..... 5,6

Randall v. Parramore,
1 Fla. 409 (1847)..... 7

OTHER AUTHORITIES

§ 768.31(2)(d), Fla. Stat..... 9

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

FACTS

Appellants emphatically disagree with the City's version of the facts in several respects. Principally, the City appears to be urging upon this Court a finding that the Dioneses made their agreement in bad faith. Neither the trial court nor the Fourth District made any such finding, however. Instead, the courts simply found a unilateral agreement between Patsy and Charles Dionese to apportion between them the settlement of their claims with the settling defendants.

The basic facts are that Mrs. Dionese had a personal injury claim, and Mr. Dionese had a claim for loss of consortium. A settlement offer was made to the Dioneses by defendant Hoyle and her insurers (R.48). The Dioneses agreed between themselves on an apportionment of the proceeds (R.520-521, 558-561). They agreed with Hoyle's counsel on the settlement amount (R.48). Hoyle's attorney did not object to apportionment (R.61), but ultimately did not want it reflected in the release (R.42, 51, 62). Three different releases were executed (R.27, 549, 550). Essentially, this happened for two reasons. First, the Dioneses' principal attorney was out of town and his partner, who was unfamiliar with the case, handled the releases (R.26, 27). Second, Hoyle's counsel changed his mind (R.51, 62). It was a comedy of errors -- not the circus of horrors which the City attempts to depict. The release in its final form, delivered to and accepted by Hoyle's counsel, did not address the issue of apportionment (R.550).

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

The City suggests that the Dioneses' agreement was an after the fact event. See, e.g., Brief of Respondent, at 9, 18. This is not what the record shows. In fact, the City conceded below that there was no evidence to dispute that the Dioneses agreed to their apportionment prior to the trial (R.73). Neither the trial court nor the Fourth District made any finding to the contrary (R.598-600).

The City argues that the Dioneses' trial counsel actively misled them about the terms of the settlement. The City argues that it asked "whether there were any other agreements" (Respondent's Brief at 4). In fact, the City inquired only about Mary Carter agreements, and it was not the Dioneses but the City who moved on to the next point. The entire discussion of the settlement at the hearing on the motion in limine is set out below:

> MR. RICCA: I had filed a motion for setoff on Friday because I don't have any documents indicating yet what the amount of settlement is, or where [sic] there are any agreements, two things --
>
> THE COURT: Well, I'll take that up post-judgment.
>
> MR. RICCI: We'll put it on the record. It's $45,000, and there is no problem with that.
>
> MR. RICCA: And I want to be entitled for a setoff on that, and if there is any type of Mary Carter agreement, since there hasn't been any --
>
> MR. RICCI: There is not going to be. I've completely settled my claim with him for a general release.

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

MR. RICCA: I had a motion in limine also.

(R.585).

It was the City's counsel who changed the subject without inquiring about apportionment, after the trial judge had said he wanted to discuss the matter "postjudgment".

Finally, the City has not shown how the allegations of its fourteen-page tirade against the Dioneses and their counsel are relevant to the issue before this Court. The City can point to nothing in the record evidencing any action that it took or failed to take in reliance on the colloquy at the hearing on the motion in limine.

Thus, what the record shows is this: The Dioneses reached an agreement between themselves on the apportionment of the proceeds (R.520-521, 558-561), and agreed with Hoyle's counsel on a settlement (R.48). Hoyle's counsel had no objection to apportionment, but decided he did not want it reflected in the release (R.42, 51, 62). The release in its final form did not address the question of apportionment, either affirmatively or negatively (R.550).

The trial court ruled that the settlement could not be apportioned pursuant to the Dioneses' agreement for three main reasons: first, that the apportionment did not appear on the face of the release; second, that City of Tamarac v. Garcher, 398 So.2d 889 (Fla. 4th DCA 1981) was distinguishable because the

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

injuries there were more serious,[1] (R.598-600); and third because the terms of the apportionment made him uncomfortable. (See R.482, 488). He lumped the two causes of action and the two separate verdicts together and set off the total settlement against the total of the two verdicts.

The Fourth District affirmed, based on the facts as they are set out in Petitioners' Initial Brief. That Court certified to this Court the following question of great public importance:

> 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 SETOFF CLAIM OF THE NON--SETTLING JOINT TORT-FEASORS.

Petitioners respectfully submit that this question should be answered based on its merits, and not on the irrelevant assertions in Respondent's Statement of Facts.

ARGUMENT

> THE 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.

Despite the City's lengthy effort to muddy the waters, several things are clear from the record below. First, the

---

[1] After apportionment Mr. Dionese received $35,000 on his loss of consortium claim. In City of Tamarac, the settling wife received $750,000 for her loss of consortium claim.

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

Dioneses had separate causes of action, hers for her injuries in the accident and his for loss of consortium. Second, they entered into an agreement with defendant Hoyle and her insurer to settle both of those claims, and both of those claims are incorporated into the release by reference to the complaint. Third, they agreed between themselves that they would apportion the proceeds, $10,000 to Patsy Dionese and $35,000 to Charles Dionese. The application of the law to these facts requires a two-step analysis. In the first step, this Court must decide whether the fact that there were two separate, distinct verdicts for separate causes of action can be ignored. If not, then in the second step, this Court must decide how an apportionment must be made.

The two causes of action should not be lumped together.

This case is not, as the City contends, outside the scope of this Court's holding in Devlin v. McMannis, 231 So.2d 194 (Fla. 1970). It does not fall within the dicta of the Devlin decision concerning failure to preserve the distinction between causes of action. The separate causes of action were preserved here by specific reference in the release to the complaint, which stated the causes of action as separate counts. This is emphatically not a case like Madden v. Rodovich, 367 So.2d 1083 (Fla. 4th DCA 1979), cited by the City. There, the amended complaint drew no distinction in four causes of action against any of the defendants. The plaintiffs settled with some of the defendants. The court held that, since there were no separate and

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

different causes of action against the remaining defendants, they were entitled to a set off of the entire settlement. However, the Dioneses' case is different, because the claims of the Dioneses were alleged separately, in different counts of the complaint. Significantly, it is the complaint to which the court looked in Madden to determine whether there were separate causes of action. If Madden is of any value in deciding the present case, it supports the position of the Dioneses, not the City.

Very similar facts to those presented by this case were held by the Third District to fall under the Devlin holding, not the dicta, in 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 decedents. The release in Cabanas, like the releases in the present case, was in general terms, referring to both the wrongful death and personal injury claims. Although the release form made no apportionment of the settlement between these two claims, the Third District 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 the wrongful death claim. Relying on Devlin, the court was careful to point out that "a set off of the total sum would be incorrect." 354 So.2d at 1227. Thus, under Devlin and Cabanas, some apportionment is required.

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

The setoff should be apportioned according to the Dioneses' agreement.

The next question that arises is how that apportionment must be made. The City argues that it should not be made according to the Dioneses' agreement because that agreement is an attempt to manipulate the system in their favor. In fact, however, their agreement is an exercise of the time-honored right of creditors to allocate funds among multiple claims absent contrary instruction from the debtor. See Randall v. Parramore, 1 Fla. 409 (1847).

Furthermore, the City's reliance on Dade County v. Perez, 237 So.2d 781 (Fla. 3d DCA 1970) and Fernandez v. South Carolina Insurance Co., 408 So.2d 753 (Fla. 3d DCA), review denied, 417 So.2d 329 (Fla. 1982) is not justified. Those cases merely decide the priority to which a health care provider is entitled under a lien statute. They are not helpful here, for several reasons. First, the priority of the liens discussed in those cases is determined by statute, while the apportionment of a settlement is determined by contract. Cf. City of Tamarac v. Garcher, 398 So.2d 889 (Fla. 4th DCA 1981). Second, manifestly, the lien of one who has provided services to an injured person is subject to different policy considerations from the claim for set off of the one who, like the City, has inflicted the injury. We remind the City of what this case is really about: the jury found that the City had negligently inflicted injuries on Patsy and Charles Dionese. The apportionment the City sought and obtained

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

below would allow the City to escape almost unscathed from the consequences of its negligence.

Nor has the City suggested any good policy reason for refusing to honor the agreement of the Dioneses in apportioning the set off. Although the City argues that the settling defendant would be injured by the application of this rule, there is no reason why this has to be so. This Court can make clear that, so long as the settling tort-feasor acts in good faith, his settlement is not subject to attack by the non-settling tort-feasor. The good faith of the apportionment agreement is clearly something that can be litigated between the plaintiffs and the non-settling defendant. All that would be affected is the amount that the non-settling defendant has to pay to the plaintiffs. The settling defendant, if he has settled in good faith, need not be involved at all.

Finally, we address briefly the contentions of the amicus. Although amicus attempts to characterize its argument as one for a setoff of the entire settlement against the total of the verdicts, what amicus really seeks is apportionment in accordance with the jury's verdict. At first glance, this seems like a plausible and fair solution. Certainly, it would be preferable to a decision giving the City the full benefit of its refusal to settle.

The problem with this solution is that it overlooks nearly a century and a half of Florida law on the right of creditors to apportion funds they receive from debtors. And most

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

important, it overlooks some of the basic policy considerations involved in the settlement of multiple claims against multiple tort-feasors. Where one tort-feasor chooses to settle, and the other does not, who should get the benefit? Should it be the tort-feasor who has not only inflicted injury on the plaintiffs but has refused to settle, and thus has put the plaintiffs and the public to the effort and expense of a trial? Petitioners submit that it should be the plaintiff, who has been forced to litigate a claim -- a claim which a jury has now found was justified.

To affirm the decision below is to say to joint tort-feasors that they will be foolish to settle. If they settle for what they think the case is worth, the non-settling defendant is likely to have to pay a negligible amount. If they hold out and do not settle, then they are likely to be liable for no more and, in addition, they are likely to be entitled to contribution from the joint tort-feasors. If they settle, they get no contribution. § 768.31(2)(d), Fla. Stat. Thus, tort-feasors will come out ahead by refusing to settle.

We acknowledge that there are competing considerations, and this may be a difficult issue to decide, particularly in the current climate. However, a decision in favor of the petitioners in this case will, as outlined in the initial brief, have the effect of encouraging settlement and thus reducing litigation.

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

CONCLUSION

For the foregoing reasons, and those asserted in the petitioners' initial brief, it is respectfully submitted that the decision below should be reversed. The case should be remanded to the trial court for entry of a judgment in accordance with the Dioneses' agreement. In the alternative, the trial court should enter judgment based upon a reasonable apportionment of the petitioners' separate and distinct claims.

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

By Barbara Green
BARBARA GREEN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioners' Reply Brief was mailed this 23 day of July, 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