IN THE SUPREME COURT OF FLORIDA

CASE NO.: 78,368

SAFECARE HEALTH CORPORATION,

Petitioner/Defendant(s),

vs.

GRETEL LOEB

Respondent/Plaintiff(s).

_____/

DISCRETIONARY PROCEEDINGS TO REVIEW A DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT OF FLORIDA

PETITIONER SAFECARE'S BRIEF ON THE MERITS

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STATUTES

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STATEMENT OF THE CASE AND FACTS

This matter originated as a personal injury action brought by Mrs. Gretel Loeb (Mrs. Loeb) against Safecare Health Corporation (Safecare) and Donald Howard, D.O. (Dr. Howard). (R-1)

Initially, Mrs. Loeb, age 74, went to Safecare HMO in order to determine the cause of her decreased appetite and early satiety. [R.2] Dr. Howard ordered an upper GI series, but failed to order additional tests which, it is alleged, would have revealed Mrs. Loeb's cancer. In the original complaint Mrs. Loeb sued Dr. Howard and Safecare claiming that the care she received fell below acceptable medical standards. [R. 1-4]

Mrs. Loeb settled her claim against Dr. Howard in September of 1989 and executed a Release. The release settled "all actions, causes of action, claims, demands, damages, costs, loss of services and consortium, expenses, attorneys' fees, compensation and all consequential damages on account of or in any way growing out of any and all known and unknown injuries and death which may hereafter result, and property damage resulting or to result or arising out of or in connection with." [R. 55, Appendix p. 3-6] The language of the release specifically excluded Safecare.

Mrs. Loeb passed away on September 20, 1989, nine days after executing the release to Dr. Howard. Judith Rimer was substituted as the Plaintiff in her capacity as Special Administrator of the Estate of Gretel Loeb and the complaint was amended against Safecare, for the wrongful death of Mrs. Loeb. The complaint sought damages provided by the Wrongful Death Act, both for the

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alleged act of negligence of Safecare in failing to diagnose the stomach cancer as well as for the vicarious responsibility of Dr. Howard, despite Dr. Howard having settled the claim for the same tortious conduct for One Hundred and Fifty Thousand ($150,000.00) Dollars. (R. 35-37)

Safecare moved for summary judgment claiming 1) that the wrongful death was barred based upon the legal effect of the Dr. Howard release; and 2) that in the alternative Safecare was entitled to a set-off for the Dr. Howard settlement. The trial court granted the summary judgment as to the set-off issue but denied it as to the release issue.

The Fourth District affirmed the trial court's ruling that the wrongful death action was viable but reversed on the set-off issue, concluding that "to permit a set-off would be to ignore the distinction between an action for personal injury and one for wrongful death, and the respective elements of damages thereof, as well as the difference in the parties entitled to recover." *Rimer v. Safecare Health Corporation, 16 FLW D1728 (Fla. 4th DCA, July 3, 1991)* [Appendix p. 1-2]

The Fourth District acknowledged that its decision departed from established Florida law on both issues, i.e. the viability of the wrongful death action and whether a set-off was proper where recovery had already been made for the same tortious conduct; therefore the following questions were certified to this Court:

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IS AN ACTION FOR WRONGFUL DEATH AGAINST A JOINT TORTFEASOR BARRED BY A PRIOR SETTLEMENT OF A CLAIM FOR PERSONAL INJURIES AGAINST ANOTHER TORTFEASOR?

IS THE TORTFEASOR INVOLVED IN THE WRONGFUL DEATH ACTION ENTITLED TO A SET-OFF FOR A SETTLEMENT MADE WITH A JOINT TORTFEASOR IN A PERSONAL INJURY ACTION SETTLED PRIOR TO THE CLAIMANT'S DEATH?

This Court postponed its order on jurisdiction and accepted the case for briefing on the merits.

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SUMMARY OF THE ARGUMENT

The Fourth District erred because its decision below will permit a double recovery for the same injury. This is in conflict with the law in Florida, including this Courts prior decisions, which prevent double recoveries for the same injury. This error is predicated upon the Fourth District's finding that the Estate's wrongful death action is totally independent of the underlying personal injury action. This characterization departs from Florida law which recognizes the dual nature of a wrongful death action, i.e. it is a separate cause of action but it retains its essentially derivative character.

Safecare's position before this Court is the same as before the trial and appellate courts: 1) The Estate's wrongful death action is barred because there has already been a recovery for the same tortious conduct which forms the basis for the wrongful death action, and 2) in the alternative, Safecare should be entitled to a set-off for the amount of $150,000 for the same reason, i.e. the same tortious conduct caused the personal injuries and the subsequent wrongful death, and a set-off would prevent a double recovery.

That the same tortious conduct is involved in both causes of action is evident by the language found in the original and amended complaints. The tortious conduct of both Defendants was the failure to order the additional test which Mrs. Loeb alleged would have revealed her stomach cancer. Thus the tortious conduct was

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the failure of performing one act, on the same day, at the same time; i.e. ordering the test which the Plaintiff alleges would have avoided Mrs. Loeb's untimely death. Therefore, the direct and only source of negligence was Dr. Howard's failure to order the test. Mrs. Loeb, and her Estate, have already recovered against Dr. Howard the total amount recoverable. For that reason the wrongful death cause of action should have been barred. However, if this Court decides that the wrongful death cause of action is viable, to disallow the set-off would result in a double recovery for the Estate. This is contrary to the public policy of this State and in conflict with the prior decisions of this Court. This Court should reverse the Fourth District and bar this action so that a double recovery does not occur. Alternatively this Court should reverse on the issue of set-off and answer the second certified question affirmatively.

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ISSUE ONE

IS AN ACTION FOR WRONGFUL DEATH AGAINST A JOINT-TORTFEASOR BARRED BY A PRIOR SETTLEMENT OF A CLAIM FOR PERSONAL INJURIES AGAINST ANOTHER TORTFEASOR?

Though separate causes of action exist for medical malpractice and wrongful death, recovery for wrongful death by the estate of a decedent for failure to diagnose cancer is barred where prior to death, the decedent had already recovered $150,000 for the same tortious act, that is, the failure to diagnose the cancer. That is the conclusion reasonably drawn from this Court's unequivocal statement in *Variety Children's Hospital v. Perkins*, 445 So.2d 1010 (Fla. 1984):

> "the judgment for personal injuries rendered in favor of an injured party while living barred the subsequent wrongful death action based on the same tortious conduct,"

Variety at 1011.

Variety involved an action for injuries by a minor. The minor recovered for his injuries and his parents also recovered for past and future medical expenses. Upon the minor's death, the father as personal representative brought a wrongful death action. Variety Children's Hospital was granted a summary judgment on the grounds that the cause of action had already been satisfied by the first recovery. The certified question to this court was

> "whether a judgment for personal injuries recovered during life-time of an injured person bars a subsequent wrongful death action by the personal representative of the deceased where death is a result of the same injuries."

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The question certified in *Variety* is substantively indistinguishable from the first certified question presented to this Court by the Fourth District in Loeb.[1] The *Variety* Court answered the question affirmatively, thus barring the wrongful death action "based on the same tortious conduct" *Variety at 1011*. See also *Valiant Ins. Co. v. Webster*, 567 So.2d 408, 411 (Fla. 1990) ("a prior judgment for personal injuries will bar a cause of action for wrongful death brought when the injured party subsequently dies.")

The key elements in barring a subsequent wrongful death action then are the same tortious conduct causing both the injury and the wrongful death and a recovery in the first action. In Loeb, the original complaint sought damages for personal injury, alleging medical malpractice against Dr. Howard and Safecare. At all times material to this suit, Safecare was Dr. Howard's employee and any negligence alleged against Safecare ultimately resulted in Dr. Howard's failure to order certain tests. The Estate amended the complaint against Safecare, adding the action for the wrongful death of Mrs. Loeb, who died nine days after releasing Dr. Howard. Thus the wrongful death action against Safecare is based upon the same tortious conduct as in the original action filed against Safecare and Dr. Howard. The only distinguishing feature between this case and *Variety* (where the wrongful death action was barred)

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[1] "Is an action for wrongful death against a joint-tortfeasor barred by a prior settlement of a claim for personal injuries against another tortfeasor." *Rimer v. Safecare Health Corporation*, 16 FLW D1728 (Fla. 4th DCA, July 3, 1991)

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is that in *Variety* there was only one defendant, the hospital, while here there are two; the HMO and the employee doctor, but the tortious conduct is the same. Applying the doctrine of *Variety* to the facts in Loeb leads to the conclusion that the action against Safecare should also have been barred.[2]

The Fourth District however, held that The Estate's wrongful death action was not barred, because "[t]he right to recover for wrongful death is separate and distinct from, rather than derivative of, the injured person's right while living to recover for personal injuries." *Rimer v. Safecare Health Corporation*, 16 FLW D1728 (Fla. 4th DCA, July 3, 1991). The Fourth District relied upon this Court's language in *Devlin v. McMannis*, 231 So.2d 194 (Fla. 1970) but in so doing disregarded this Court's post-Devlin decision which had acknowledged the dual nature of a wrongful death cause of action as both derivative and independent:

> While the Wrongful Death Act creates independent claims for the survivors, these claims are also derivative in the sense that they are dependent upon a wrong committed upon another person. No Florida decision has allowed a survivor to recover under the wrongful death statute where the decedent could not have recovered.

Valiant Insurance Co. v. Webster, 567 So.2d 408 (Fla. 1990) at 411.

Thus the Fourth District's reasoning that the wrongful death act was not derivative and created an "independent cause of action in the statutory beneficiaries" which was not dependent upon the underlying personal injury claim, was in error. See also *Celotex Corp. v. Meehan*, 523 So.2d 141, 147 (Fla. 1988) ("A wrongful death

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[2] This was the very issue raised in Safecare's cross-appeal in Loeb. See Appellee's Answer Brief and Cross-Appeal at page 17.

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action is derivative of the injured person's right, while living, to recover for personal injury").

Mrs. Loeb had been fully compensated for her injury before her death. To now allow the estate to re-litigate the case to obtain an additional judgment... would create, as this Court has stated, many additional problems involving "lack of repose, double recovery, discouragement of settlement..." *Variety at 1012*.

In a similiar context, the Third District in *Warren v. Cohen*, 363 So.2d 129 (Fla. 3d DCA 1978), Cert. Denied 373 So.2d 462 (Fla. 1979) held that a "subsequently filed wrongful death action is barred by the release signed by the decedent prior to her death." *Warren at 131*. The Third District also noted that while there was "split of authority on the issue, it appears that Florida follows the majority view, i.e. a decedent's release bars a subsequent wrongful death action.[3]" *Warren at 131*.

The *Warren* court, while acknowledging that "the damages awardable to the deceased's survivors on a wrongful death claim are not identical to those paid to the injured person or settlement" nonetheless rejected the argument that these different damages prevent "double recovery" and barred the subsequent wrongful death action filed for the same tortious conduct. *Warren at 131*. This

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[3] Footnote by the Court: *Boole v. Florida Power & Light Co.*, 147 Fla. 589, 3 So.2d 335 (1941); *Ryter v. Brennan*, 291 So.2d 55 (Fla. 1st DCA 1974), cert. den. 297 So.2d 836 (Fla. 1974); also in accord is the federal rule, as pronounced in *Mellon v. Goodyear*, 277 U.S. 335, 48 S.Ct. 541, 72 L.Ed. 906 (1928) and *Walrod v. Southern Pacific Company*, 447 F.2d 930 (9th Cir. 1971).

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Court cited the Warren decision approvingly in *Ash v. Stella*, 457 So.2d 1377 (Fla. 1984).

Based upon the foregoing, this court should answer the first certified question in the affirmative and bar the wrongful death action against Safecare, thereby preventing a double recovery for the Estate.

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ISSUE TWO

IS THE TORTFEASOR INVOLVED IN THE WRONGFUL DEATH ACTION ENTITLED TO A SET-OFF FOR A SETTLEMENT MADE WITH A JOINT TORTFEASOR IN A PERSONAL INJURY ACTION SETTLED PRIOR TO THE CLAIMANT'S DEATH?

Safecare and Dr. Howard at all times pertinent to this case have been in an employee/employer relationship. Thus the Estate is seeking damages against two different parties for the same injury (the failure to order a test on the same date). This Court should acknowledge as the Trial Court did, that Safecare is entitled to a set-off of One Hundred and Fifty Thousand ($150,000.00) Dollars for the wrongful death action brought against them.

Florida Statutes §768.31 (5)(a) (1989) provides in pertinent part that "when a release... is given in good faith to one of two or more persons liable in tort for the same injury... it reduces the claim against the others..." The injury in the wrongful death action for which the Estate seeks to recover is the injury arising out of the failure to order the test which would have diagnosed Mrs. Loeb's cancer of the stomach. This is the same injury that was the basis of the recovery from Dr. Howard. The fact that they both arise out of the same tortious conduct, mandates under Florida law a set-off for the $150,000 paid to Mrs. Loeb in the wrongful death action against Safecare. The trial court so ruled, and the Fourth District's reversal on this point was error.

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That a set-off should be applied to guard against double recovery is clearly the law in Florida:

> The only proper method of ensuring against duplicate recoveries in an undifferentiated lump sum settlement situation is to set-off the total settlement funds against the total jury award.

Dionese v. City of West Palm Beach, 500 So.2d 1347, 1350 (Fla. 1987)

As this Court noted in *Dionese*, the *Uniform Contribution Among Tortfeasors Act*, Section 768.31, Florida Statutes (1983), specifically subsection (5) was created "[i]n order to encourage settlements." *Dionese at 1350*. See also *Warren v. Cohen*, 363 So. 2d 129, (3rd DCA 1978) cert. denied 373 So.2d 462 (Fla. 1979) ("[t]o hold otherwise would be to undermine the public policy favoring the settlement of lawsuits...") Thus *Dionese* is fully applicable. See also *Alexander v. Seaquest Inc.*, 575 So.2d 765 (Fla. 4th DCA 1991) where the Fourth District, relying upon the authority of *Dionese* found that

> The trial judge properly set-off the undifferentiated lump sum settlement against the total jury award <u>in order to ensure that appellant did not recover twice for the same wrong.</u>[Emphasis Supplied]

Alexander at 766.[4]

The principle that one may not recover twice for the same injury was addressed in the Fourth District's *Raben Builders v. First American Bank*, 561 So. 2d 1229 (Fla. 4th DCA 1990). And

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[4] The Fourth District in *Alexander* also noted that settlements are to be encouraged, "In any event, the apportionment comes too late if done after the jury verdict because the non-settling tort-feasors lose the right to settle, thus frustrating the purpose of section 768.31(5), Florida Statutes (1987). *Alexander at 766*.

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while the case involved the embezzlement of funds and not medical malpractice and a wrongful death action, the language on double recovery was not in any way limited to the specific facts of the case. In *Raben*, a bookkeeper in Raben's real estate office embezzled $650,000 dollars. Raben subsequently settled with First American for the embezzlement and other dealings for over two million. First American was subsequently dismissed from the action based upon their settlement which, like the settlement in Loeb, specifically excluded Raben's accountants, Peat Marwick.[5] When Raben proceeded against Peat Marwick for recovery of the same injury, i.e. the embezzled funds, Peat Marwick moved for summary judgment "on grounds that Raben had been fully compensated for its $650,000 loss by way of the settlement with First American and therefore Raben could not be compensated again for the same damages flowing from the embezzlement." *Raben at 1230*. The Court determined that despite there being two different defendants, with one being "responsible for banking malpractice and the other for accounting malpractice...[and] even if the number of dollars recoverable by plaintiff from bank and Peat Marwick were not identical, all the damages recoverable by plaintiff from Peat Marwick were also recoverable by plaintiff from bank." *Raben at 1230*. Thus the court's focus was on preventing a double recovery for the same injury. The Fourth District, in agreeing with the

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[5] The language stated "all of the claims filed in this matter by the Plaintiffs, against *only* the Defendant, First American and Trust with prejudice." *Raben at 1230*. In Loeb, the settlement specifically excluded Safecare from the release.

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trial court that its "decision is supported by the law of setoff..." *Raben at 1230*, concluded that:

> Raben had a choice of whether to settle with either of the defendants or go to trial against both, but in either case, its total damages flowing from the embezzlement remained the same. The trial court rightly found that Raben was entitled to but one recovery for $650,000. Raben elected to receive full compensation for its loss from the embezzlement from the settlement with First American. It is not entitled to a double recovery. [citations omitted, emphasis supplied]

Raben at 1231.

In order to prevent just such a double recovery Florida law provides that an election of remedies is necessary. The Second District has held specifically that an election of remedies is necessary to prevent one from having a double recovery when there are damages in a survival action which leads to a death which proximately occurs from the same negligent act. In *Diamond vs. Whaley, Chapman & Hannah*, 550 So.2d 54 (Fla. 2d DCA 1989), Mr. & Mrs. Diamond initially filed a medical malpractice claim alleging misdiagnosis of cancer. After the suit was filed, Mrs. Diamond died. The husband, as Personal Representative, continued the survival action and also filed an Amended Complaint for wrongful death. The Court concluded that "The Plaintiff's theories are factually inconsistent and ultimately he can recover, at most, upon one factual scenario," *Diamond at 55*. In this case allowing the Estate to recover in the wrongful death action would be permitting a double recovery because recovery has already occurred for the survival action.

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The Fourth District has similarly recognized that a widow, whose husband allegedly would have lived six (6) to eight (8) months longer, had he received proper diagnosis and treatment of cancer, but whose cancer was incurable, even with proper treatment, could not maintain an action against the physician under the survival statute. See, *Tappan vs. Florida Medical Center*, 488 So.2d 630 (Fla. 4th DCA 1986). The Fourth District held that Mrs. Tappan could not recover under the survival statute for the failure to properly diagnose and treat the cancer, and then after the death of her husband, seek wrongful death damages alleging that the same misdiagnosis and treatment of the cancer caused the death. See also, *Williams vs. Bay Hospital, Inc.*, 471 So.2d 626 (Fla. 1st DCA 1985), (where the Court concluded that a party could not bring both a survival action and a wrongful death action against a health care provider for misdiagnosing cancer, but instead could only bring a survival action.)

The fact that this case involves an employee-employer relationship does not render the principle which prevents double recovery inapplicable. As the First District has stated, "when there is an active employee tortfeasor and respondeat superior liability of the employer then the prosecution of an action to judgment and satisfaction against the employer precludes a subsequent second action against the employee for the same conduct." *Atlantic Cylinder v. Hetner*, 438 So.2d 922 (Fla. 1st DCA 1983) Admittedly, the situation is reversed in the Loeb case, with the settling party being the employee and not the employer, however

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the rationale underlying the principle is the same, there cannot be a double recovery for the "same wrongful conduct." *Atlantic at 923*.

Once this Court recognizes, which it must, that the Plaintiff is seeking damages against two different parties for the same injury (the failure to order the test which allegedly would have detected the stomach cancer) it must then recognize that at the very least, Safecare is entitled to a set-off of One Hundred and Fifty Thousand ($150,000.00) Dollars for the wrongful death action brought against them, regardless of the Estate's stipulation that no medical expenses will be sought.[6]

That a set-off, at the very least is appropriate, is supported by the decision of the Third District in *Florida Freight Terminals, Inc., vs. Cabanas*, 354 So.2d 1222 (Fla. 3d DCA 1978). In *Florida Freight*, various actions were brought as a result of an airplane crash. Two (2) children, though injured, survived, although, their parents and grandparents died as a result of the crash. Four (4) wrongful death actions were brought and a fifth action was brought by the children's guardian for their own injuries, which was severed for separate trial. The children's personal injury action

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[6] The Estate of Mrs. Loeb has attempted to remove the set-off issue by stipulating that their damages "do not exceed" $150,000. [R. 120, Transcript p. 15] However, this attempt to stipulate the damages which would be duplicated both in the personal injury and wrongful death actions, does not ameliorate the fact that a double recovery would be recovered if no set-off was permitted for the same tortious conduct causing the same injury. This double recovery is exactly what the Supreme Court in *Variety* sought to prevent. See also discussion pages 11-18, *infra*.

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was settled for Four Hundred and Forty-Five Thousand ($445,000.00) Dollars for their personal injuries and pain and suffering. The District Court of Appeal took judicial notice that some portion of the Four Hundred and Forty-Five Thousand ($445,000.00) Dollars was paid for the childrens' wrongful death claim since their personal injury claim did not involve such substantial damages.

Similarly, in this case this Court should recognize that a significant portion if not all of the One Hundred and Fifty Thousand ($150,000.00) Dollars was paid for the potential wrongful death claim since Mrs. Loeb's death was imminent when the recovery was paid. In fact, Mrs. Loeb died nine days later.

Accordingly, the Third District Court in *Florida Freight*, determined that the Trial Court erred in finding as a matter of law that no portion of the Four Hundred and Forty-Five Thousand ($445,000.00) Dollars was subject to being set-off against the judgments for wrongful death. The Appellate Court recognized that the Trial Court, if need be, should conduct proceedings to determine that portion of the Four Hundred and Forty-Five Thousand ($445,000.00) Dollars applicable to the wrongful death claims in order that such sum may be proportioned as a set-off. At the very least, Safecare contends that this action should be remanded to the Trial Court to determine what portion or extent, if any, of the One Hundred and Fifty Thousand ($150,000.00) Dollars settlement was allocable to the potential wrongful death recovery.

In any event, to not allow a set-off in this matter, would be in contravention of the doctrines recognized in *Variety*, the intent

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and purpose of the Joint Tort-feasor Statute and the abundant case law in Florida which prevents double recoveries for the same injury.

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CONCLUSION

Based upon the foregoing, Safecare asks this Court to bar the wrongful death action filed by the Estate. In the alternative, Safecare asks that this court authorize a set-off in the amount of $150,000 dollars, the amount paid by Dr. Howard for the same tortious conduct alleged against Safecare. At the very least, the Court should remand this case with instructions to determine what portion of the One Hundred and Fifty Thousand ($150,000.00) Dollars was allocable to the wrongful death claim.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 1st day of October, 1991, to: Thomas D. Lardin, Esquire, 1901 W. Cypress Creek Road, Suite #100, Fort Lauderdale, Florida 33309.

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granting the motion for new trial and gave as its reason the misreading of the jury instruction.

When it began reading the wrong verdict form, after instructing the jury on the applicable law, the trial court uttered the word "gross" preceding the word "negligent" because it had received this wrong jury verdict form inadvertently. The incident occurred as follows:

> [THE COURT]: When you agree on your verdict, the Foreman, acting on behalf of the jury whould [sic] date and sign the appropriate form, the Verdict Form, right here. "We the Jury return the following verdict. Do you find from the greater weight of the evidence that the defendant, Lake Wor[th] Boating Center, Inc., was grossly negligent—"
>
> MR. SELZER: Excuse me. That's a mistake, was negligent.
>
> THE COURT: So we're striking the word grossly. Do you find, by the greater weight of the evidence, the defendant, Lake Worth Boating Center, was negligent, and that such negligence was a legal cause of damage to the plaintiff, Howard Bomze. Answer yes or no.

The trial court immediately read the verdict form correctly and provided the jury with the correct verdict form. Appellee did not request a curative instruction nor any other relief. Appellant appeals the grant of a new trial.

Appellant correctly points out that the trial court did not read the standard of gross negligence to the jury. Prior to this occurrence, the court had read the definition of negligence and that of reasonable care. Both closing arguments referred only to negligence and reasonable care. In addition, the jury received the proper verdict forms. Thus, contends appellant, any error was harmless.

The issue here is whether the trial court abused its discretion in granting a new trial because the reason it articulated for the granting is not supported in the record. *See Wackenhut Corp. v. Canty*, 359 So.2d 430, 435 (Fla. 1978); *Eley v. Moris*, 478 So.2d 1100, 1104 (Fla. 3d DCA 1985). The appropriate standard of review is whether there has been a clear showing of abuse of discretion. *Bern v. Spring*, 565 So.2d 809, 810 (Fla. 3d DCA 1990). We conclude there has been in this case. *See McNair v. Davis*, 518 So.2d 416 (Fla. 2d DCA 1988); *Gallagher v. Federal Ins. Co.*, 346 So.2d 95, 97 (Fla. 3d DCA), *cert. denied*, 354 So.2d 980 (Fla. 1977); *Yacker v. Teitch*, 330 So.2d 828, 830 (Fla. 3d DCA 1976); and *National Car Rental Sys. v. Holland*, 269 So.2d 407, 412, (Fla. 4th DCA 1972), *cert. denied*, 273 So.2d 768 (Fla. 1973). (LETTS, GLICKSTEIN and DELL, JJ., concur.)

* * *

Wrongful death—Trial court properly ruled that health care provider was not released by the execution of a release in favor of its employee-doctor—Action for wrongful death against joint tortfeasor is not barred by prior settlement of a claim for personal injuries against another tortfeasor—Question certified—Tortfeasor involved in wrongful death action is not entitled to a set-off for settlement made with a joint tortfeasor in a personal injury action settled prior to claimant's death—Question certified

JUDITH RIMER, the Personal Representative of the Estate of GRETEL LOEB, Deceased, Appellant/Cross Appellee, v. SAFECARE HEALTH CORPORATION, Appellee/Cross Appellant. 4th District. Case No. 90-2115. Opinion filed July 3, 1991. Appeal and cross appeal from the Circuit Court for Broward County; Estella M. Moriarty, Judge. Thomas D. Lardin of Thomas D. Lardin, P.A., Fort Lauderdale, for appellant/cross appellee. James D. Demet of Klein & Tannen, P.A., Hollywood, for appellee/cross appellant.

(ANSTEAD, J.) Appellant, Judith Rimer, the personal representative of the Estate of Gretel Loeb, appeals from a summary judgment in favor of appellee, Safecare Health Corporation (Safecare), the defendant below in an action for Mrs. Loeb's wrongful death. The trial court held that Safecare was entitled to a set-off in the amount paid by its employee-doctor, Donald C. Howard, in settlement of a preceding medical malpractice action for personal injuries filed by Mrs. Loeb while she was still alive. Safecare cross-appeals the court's determination that the release given to the doctor did not have the legal effect of also releasing Safecare from liability for the wrongful death action. We disapprove of the set-off and affirm on the issue raised on cross-appeal.

FACTS

Mrs. Loeb filed a personal injury action in 1988 against Dr. Howard and Safecare alleging liability based upon Howard's neglect, as well as an independent claim against Safecare unrelated to Howard's alleged neglect. Subsequently, in September of 1989, Mrs. Loeb settled her claim against Dr. Howard and his medical malpractice insurer for $150,000.00. The settlement specifically excluded Safecare from its terms. Pursuant to the settlement, Mrs. Loeb and Dr. Howard stipulated to the entry of an order of dismissal as to Dr. Howard. Nine days after the settlement, Mrs. Loeb died. Consequently, the original complaint was amended to seek damages against Safecare under the Florida Wrongful Death Act, and Judith Rimer, as special administrator for Mrs. Loeb's estate, was substituted as plaintiff.

Safecare filed a motion for summary judgment claiming (1) its exoneration from liability based upon the legal effect of the Howard release; and (2) its entitlement to a set-off for the Howard settlement. The court denied summary judgment as to the legal effect of the release, but granted it as to the set-off issue. This resulted in a judgment for Safecare, since the Estate stipulated that the amount of its damages would not exceed the amount received from Howard.

SET-OFF AND RELEASE

The Estate concedes that it is not entitled to recover any damages for wrongful death against Safecare predicated upon any actions or inactions of Dr. Howard. Instead, it seeks to proceed only on its alleged independent claim against Safecare. Hence, any issue as to Safecare's liability for its employee's conduct is moot.

The statute under which the court granted the set-off is Section 768.041, Florida Statutes (1989), which in part provides:

> (1) A release or covenant not to sue as to one tortfeasor for property damage to, personal injury of, or the wrongful death of any person shall not operate to release or discharge the liability of any other tortfeasor who may be liable for the same tort or death.
>
> (2) At trial, if any defendant shows the court that the plaintiff, or any person lawfully on his behalf, has delivered a release or covenant not to sue to any person, firm, or corporation in partial satisfaction of the damages sued for, the court shall set off this amount from the amount of any judgment to which the plaintiff would be otherwise entitled at the time of the rendering of the judgment and enter judgment accordingly...

To the same effect is Section 768.31(5), Florida Statutes (1989), which states in part:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater;...

Initially, we note that both the terms of the Howard release and the provisions of these statutes expressly provide that a joint tortfeasor is *not* released by the execution of a release in favor of another tortfeasor. Accordingly, we find no error by the trial court in holding that Safecare was not discharged by execution of the Howard release.

The Estate contends that the trial court improperly allowed Safecare the $150,000.00 set-off in the wrongful death action, that amount having been paid by Dr. Howard in settlement of the personal injury claim. The Estate argues that section 768.041

authorizes a set-off only for a settlement with another tortfeasor for the damages recoverable in the *same cause of action*. Accordingly, since there are two different actions involved here—a personal injury action and a wrongful death action—the set-off provisions of sections 768.041 and 768.31 should not apply.

On the other hand, Safecare contends that it is not that clear that set-off is only appropriate in a situation involving recovery by a plaintiff against one of multiple tortfeasors in a *single* cause of action. Rather, it asserts, sections 768.041 and 768.31 suggest that set-off may be appropriate whenever the plaintiff has received a partial recovery from one of multiple defendants who may be liable in tort for the same injury, whether that injury results in a personal injury action or a claim for wrongful death.

The Estate relies on *Devlin v. McMannis*, 231 So.2d 194 (Fla. 1970). *Devlin* held that amounts received from one tortfeasor for payment of a survival claim should not be set off against a recovery against another tortfeasor for the wrongful death of the same victim. The supreme court noted that the set-off statute, section 768.041(2), was designed to prevent duplicate or overlapping compensation for identical elements of damage. Since a survival action and a claim for wrongful death are separate and distinct actions involving different elements of damage, a set-off would be inappropriate. In the present situation, the Estate notes that the only potential duplication would be the medical expenses from the date of the injury to the date of death, and those claims have been waived by the estate.

Although conceding that the case did not involve a set-off, Safecare relies on the Florida Supreme Court's decision in *Variety Children's Hospital v. Perkins*, 445 So.2d 1010 (Fla. 1983). The father there, as personal representative of the estate of his son, brought an action for his son's wrongful death against the hospital, after having already prevailed in an earlier personal injury action on behalf of his son against the same defendant. The trial court entered summary judgment for the defendant based upon its affirmative defense that any claims against it had already been satisfied in the personal injury suit. The district court reversed on the ground that the right to recover for wrongful death is separate and independent from, rather than derivative of, the injured person's right while living to recover for personal injuries.

In quashing the district court's decision, the supreme court held that the judgment for personal injuries rendered against the same defendant and based on the same tortious conduct, barred the subsequent wrongful death claim. The court concluded:

> At the moment of his death the injured minor Anthony Perkins had no right of action against the tortfeasor because his cause of action had already been litigated, proved and satisfied. The recovery awarded by the judgment in the previous personal injury action included damages arising from future expenses. Since there was no right of action existing at the time of death, under the statute no wrongful death cause of action survived the decedent. . . .

Id. at 1012, (citations omitted). The *Variety* court noted that [t]he majority of the courts (in other jurisdictions) have held that a judgment for or against the decedent in an action for his injuries commenced during his lifetime, or the compromise and release of such an action, will operate as a bar to any subsequent suit founded upon his death.' W. Prosser, *Law of Torts*, §127 (4th ed. 1971), footnotes omitted). *Id.* The court thereupon recited the general rule:

> . . . if the injured party sues and recovers damages for his fatal injuries during his lifetime, the cause of action is thereby satisfied and, in the absence of fraud, duress, inadvertence or mistake, no right of action for death remains for the benefit of the persons named in the wrongful death statute.

Id.

Importantly, and unlike *Variety*, the instant case involves not only the question of a set-off, but also two different tortfeasors, only one from whom the injured plaintiff obtained a recovery before she died. The *Variety* court noted that one of the paramount purposes of the Florida Wrongful Death Act was to prevent a tortfeasor from evading liability for his misconduct when such misconduct results in death. Prior to her death, Mrs. Loeb was entitled to litigate her personal injury claim against Safecare. Of course, if that claim had proceeded to judgment, Safecare would have been entitled to a set-off for the Howard settlement. However, the death of Loeb precluded her from litigating her personal injury claim against Safecare. Legally, this constituted both good news and bad news for Safecare. Under current law her death extinguished her personal injury claim. However, because she had not settled or otherwise resolved the claim against Safecare, her estate was entitled to bring a wrongful death claim. To bar the wrongful death suit against Safecare as an independent tortfeasor, because of the recovery of personal injury damages against another tortfeasor, would be to allow Safecare to evade liability to Mrs. Loeb's survivors for her wrongful death. Unlike the situation in *Variety*, the Loeb claim against Safecare was still alive at the time of her death. Hence, it does not appear that the *Variety* decision is an impediment to the wrongful death action proceeding.

We also believe that to permit a set-off would be to ignore the distinction between an action for personal injury and one for wrongful death, and the respective elements of damages thereof, as well as the difference in the parties entitled to recover. While *Devlin* was decided at a time that Florida law recognized both survival and wrongful death claims after a death, we believe its reasoning still applies. The right to recover for wrongful death is separate and distinct from, rather than derivative of, the injured person's right while living to recover for personal injuries. The latter is that of the injured person to be secure in his person or property, while the former is the right of the family of the deceased to the companionship and support of the decedent, coupled with the expectancy of a participation in the estate which the decedent might have accumulated but for his untimely death. Accordingly, the Wrongful Death Act creates an independent cause of action in the statutory beneficiaries, and any recovery obtained therein cannot properly be set off by the decedent's settlement of a personal injury claim against a separate tortfeasor.

In accord with the above, we reverse and remand for further proceedings in accord herewith. Notwithstanding our ruling, and because we consider these to be issues of great public importance, we certify the following questions to the Florida Supreme Court:

> IS AN ACTION FOR WRONGFUL DEATH AGAINST A JOINT-TORTFEASOR BARRED BY A PRIOR SETTLEMENT OF A CLAIM FOR PERSONAL INJURIES AGAINST ANOTHER TORTFEASOR?
>
> IS THE TORTFEASOR INVOLVED IN THE WRONGFUL DEATH ACTION ENTITLED TO A SET-OFF FOR A SETTLEMENT MADE WITH A JOINT TORTFEASOR IN A PERSONAL INJURY ACTION SETTLED PRIOR TO THE CLAIMANT'S DEATH?

(WARNER, J., and STEVENSON, W. MATTHEW, Associate Judge, concur.)

* * *

Estates—Wills—Trial court erred in determining that beneficiaries of charitable remainder unitrust consisted only of the children of decedent's brother, sisters, and cousin and did not include grandchildren of decedent's sister whose parents were deceased at time of decedent's death

IN RE: ESTATE OF FOLKE H. PETERSON, Deceased. 4th District. Case No. 90-3055. Opinion filed July 3, 1991. Appeal from the Circuit Court for Okeechobee County; William L. Hendry, Judge. William T. Coleman of Martin and Coleman, P.A., Fort Lauderdale, for Appellants-Roland and Peter Sauber, Joan Fritz, Richard Green, Patricia Skelton, Sally Gottwalt, Janet Kenning, Roger, Debbie, Holly, Richard and Charles Green, Sharron Hoffman and Ramona Crisp. Harry G. Carratt of Morgan, Carratt and O'Connor, P.A.,

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
COURT IN AND FOR BROWARD
COUNTY, FLORIDA

CASE NO. 88-28711 CU

FL BAR NO. 319906

GRETAL LOEB,

Plaintiff,

vs.

DONALD C. HOWARD, D.O., and
SAFECARE HEALTH CORPORATION,

Defendant.

NO-LIEN AFFIDAVIT

STATE OF California

COUNTY OF San Diego

GRETAL LOEB, being first duly sworn, deposes and says that Affiant is claimant against DONALD C. HOWARD, D.O., ~~SAFECARE HEALTH CORPORATION~~ and FLORIDA PHYSICIANS INSURANCE TRUST* hereinafter called "RELEASEES", for damages allegedly arising out or in connection with: *as insurer of Howard GPH Initials

Any and all examinations, diagnosis, medical and surgical treatments of the undersigned GRETAL LOEB which is the subject matter of that certain lawsuit filed in the Circuit Court of Broward County, Florida, bearing Case No. 88-27811 CU, and any other examinations, diagnosis, medical and surgical treatments of the undersigned GRETAL LOEB whatsoever;

Further, GRETAL LOEB (hereinafter called "AFFIANT") is about to consummate settlement of her above-described claim against RELEASEES for the sum of ONE HUNDRED AND FIFTY THOUSAND DOLLARS ($150,000.00) Dollars to be paid on behalf of the said RELEASEES.

AFFIANT hereby states under oath that there are no unpaid obligations incurred and owing by AFFIANT to any hospital, doctor, or any health care provider whatsoever in the State of Florida for services, medicines, medical appliances or X-rays of any kind rendered to the undersigned, either as an in-patient or an out-patient, on or since the date of the matters referred to above.

This Affidavit is made to induce the said RELEASEES and those making payment on behalf of RELEASEES to enter into such settlement and pay said sum of money to AFFIANT.

THE UNDERSIGNED SPECIFICALLY UNDERTAKES AND AGREES TO INDEMNIFY the said RELEASEES and those making such payment in connection with such settlement, against any and all loss, costs, expenses and attorneys' fees incurred as a result of the falsity or inaccuracy of this Affidavit in any respect, including all such losses, costs, expenses and fees incurred in the enforcement of this indemnity agreement.

FURTHER AFFIANT SAYETH NOT.

Gretal Loeb
GRETAL LOEB, A WIDOW

SWORN TO AND SUBSCRIBED before me this 11th day of September, 1989.

OFFICIAL SEAL
JOANNE SUMMERS
NOTARY PUBLIC-CALIFORNIA
SAN DIEGO COUNTY
MY COMMISSION EXPIRES NOV. 12, 1990

Joanne Summers
NOTARY PUBLIC, STATE OF CALIFORNIA
Joanne Summers

379HRLAF.P17

KNOW ALL MEN BY THESE PRESENTS, that the u.. signed GRETAL LOEB, for and in consideration of the sum of:

ONE HUNDRED AND FIFTY THOUSAND DOLLARS ($150,000.00);

To them in hand paid on this day, by or on behalf of DONALD C. HOWARD, D.O. and FLORIDA PHYSICIAN'S INSURANCE TRUST, the receipt of which is hereby acknowledged, do hereby jointly and severally, forever and in all ways, discharge and fully release the said DONALD C. HOWARD, D.O. and FLORIDA PHYSICIAN'S INSURANCE TRUST, and their servants, agents, employees, heirs, legal representatives, insurers, successors and assigns, and each of them respectively, and all other persons, firms, corporations, associations and estates, excluding SAFECARE HEALTH CORPORATION, from any and all liability not accrued or hereafter to accrue on account of any and all claims, demands and causes of action which the undersigned now has or may hereafter have against the aforesaid parties hereby released, and by virtue of these presents, do hereby fully release and forever discharge each of them from any and all actions, causes of action, claims, demands, damages, costs, loss of services and consortium, expenses, attorneys' fees, compensation and all consequential damages on account of or in any way growing out of any and all known and unknown injuries and death which may hereafter result, and property damage resulting or to result or arising out of or in connection with:

Any and all examinations, diagnosis, medical and surgical treatments of the undersigned GRETAL LOEB which is the subject matter of that certain lawsuit filed in the Circuit Court of Broward County, Florida, bearing Case No. 88-27811 CU, and any other examinations, diagnosis, medical and surgical treatments of the undersigned GRETAL LOEB whatsoever;

And for the consideration aforesaid, each person executing this release does hereby covenant and agree as follows:

1. That the injury, disease and illness sustained by me or by any of the undersigned, as the proximate result of the aforesaid happening, may be permanent, and progressive, and that recovery therefrom is uncertain and indefinite, and in making this release, I rely wholly upon my own judgment, belief and knowledge of the nature, extent and duration of said injuries, illness and disease, and all damages arising therefrom.

2. That I have not been influenced in any manner or to any extent in making this release by any representations or statements regarding said injuries, illness and/or disease, or regarding any other matters, by the persons, parties or estates who are hereby released, or by any physician or surgeon by them or any of them employed.

3. That I have had the benefit of counsel of my own attorneys; and that I fully understand the terms of this release; and that I am making full and final settlement of all claims of every nature and character against the persons, parties or estates hereby released.

4. That I do voluntarily accept the aforesaid sum for the purpose of making a full and final compromise, adjustment and settlement of all my claims against the parties hereby released, past, present and future, and including any and all claims upon my death, and upon the death of any of the undersigned by my beneficiaries, spouse, dependents, heirs, children, estate and legal representatives, and all other persons.

5. That the persons, parties or estates hereby released deny any and all liability to me upon all claims which I have asserted or might hereafter assert pertaining to the aforesaid happening or arising out of the injuries aforesaid; and that I have been offered the aforesaid sum by the said persons, parties

all claims, and the aforesaid sum is not offered by them or accepted by me as being in the nature of compensation of injuries, illness, disease, or any other damage or claims asserted by me, or by any of the undersigned.

6. I hereby expressly state that the above consideration is in full payment for this release, and there is no understanding or agreement of any kind for any further or future consideration whatsoever, either implied, expected or to come to me, in money, employment, services or otherwise.

7. I hereby declare that I am eighteen years of age or over and that I am suffering from no legal disabilities whatsoever; and that I am suffering from no mental or physical disability which would disable me from executing this release.

8. That I have caused the action hereinabove referred to be dismissed by proper Order of the Court, each party to bear his own costs, and with prejudice to the plaintiffs.

9. To induce the parties hereby released to pay the aforesaid consideration, I hereby warrant that all hospital bills incurred by me or in my behalf, or by any of the undersigned, in connection with or arising out of the aforesaid incident have been fully paid, and that none are outstanding whatsoever; and that more than ten (10) days have elapsed since my and their final discharge from any hospital, nursing home, rest home, convalescent home, or related establishment. All hospital bills, doctors' bills and other expenses incurred by me or on my behalf have been fully satisfied, and there are no existing liens whatsoever. This representation is being relied upon by the aforesaid parties being released herein to make payment of the consideration for this agreement. The undersigned shall hold harmless and indemnify the aforesaid parties from any and all claims of liens arising from the subject cause of action.

IN WITNESS WHEREOF, I/we have hereunto set our hands and seals and delivered these presents at La Mesa, Ca, on this 11 day of September, 1989.

SIGNED, SEALED AND DELIVERED
in the presence of:

Judith Linnet

Gretel Loeb (Seal)
GRETAL LOEB, A WIDOW

STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

I HEREBY CERTIFY that on this day personally appeared before me, an officer duly authorized to administer oaths and take acknowledgments, in the state and county aforesaid, GRETAL LOEB, to me well known and known to be the persons described in and who executed the foregoing Release of All Claims, and they acknowledged to and before me that they have read and fully understand its contents; that they have thereby released all of their claims, and that they duly executed the same in my presence as their free act and deed, and for the sole consideration therein expressed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at La Mesa, County of San Diego, State of California, on this 11th day of September, 1989.

Joanne Summers
Notary Public, State of California

My commission expires: Nov.12, 1990