IN THE SUPREME COURT OF FLORIDA

JOYCE WELLS,

Petitioner,

vs.

CASE NO: 83,207

TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER, INC.,

First District Court of Appeal Case No: 92-3294

Respondent.

BRIEF OF FLORIDA DEFENSE LAWYERS ASSOCIATION AS AMICUS CURIAE

JONATHAN C. HOLLINGSHEAD, ESQ.
Fla. Bar #307726
JENNIFER HERNDON McRAE, ESQ.
Fla. Bar #0987281
Fisher, Rushmer, Werrenrath,
Keiner, Wack & Dickson, P.A.
Post Office Box 712
Orlando, FL 32802-0712
407/843-2111

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PRELIMINARY STATEMENT

Petitioner will be referred to herein as Petitioner or Plaintiff. Respondent will be referred to herein as Respondent, TMRMC, or Defendant. Dr. Donald Alford will be referred to as ALFORD. Anesthesiology Associates will be referred to by the acronym "AA." Any reference to AA or TMRMC will include their employees unless otherwise stated.

Citations to the original record will be made by the letter (R. and the appropriate page number). Citations to the transcript of the hearing on Appellant's post trial motions will be made by the letter (T. and the appropriate page number).

The cause of action which is the subject of this appeal accrued on January 3, 1990. All references to Florida Statutes herein are to Florida Statutes (1989) unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

This case is an appeal from the First District Court decision in TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER, INC. vs. JOYCE WELLS, 19 FLW D302, (Fla. 1st DCA 1994) as corrected by 19 FLW D651 (Fla. 1st DCA 1994), which certified the following questions to be of great public importance:

A. Is a non-settling defendant in a case tried under §768.81(3) entitled to set-off or reduction of the apportioned share of the damages, as assessed by the jury, under the provisions of §768.041(2), §46.015(2) or §768.31(5)(a), based upon sums paid by settling defendants in excess of their apportioned liability as determined by the jury?

B. Does the rule as to set-off apply equally to both economic and non-economic damages?

Briefly, this case raises issues relating to the several statutes in effect in Florida which provide, with variations of language, for a reduction of the damages recoverable from a non-settling defendant based upon the amount of damages received in settlement from other defendants/ tortfeasors who are responsible for the same tort.

The case underlying this appeal was brought pursuant to §766.101 et. seq., Florida Statutes, and §768.16 et. seq., Florida Statutes, (the medical malpractice statute and the wrongful death act, respectively). In her original Complaint, the Plaintiff alleged that her husband died as a result of the negligence of TMRMC and Co-defendants, ALFORD and "AA" (R.7-10). Prior to trial, one of "AA's" employees was dismissed as a Defendant and the Plaintiff reached a settlement with the remaining Defendants, receiving in settlement $250,000 from ALFORD and $50,000 from "AA." The settlement agreement with ALFORD apportioned the $250,000 between economic and non-economic damages attributing $50,000 to the former

and $200,000 to the latter. There was no apportionment made as to "AA's" $50,000 settlement. (T.43) The case went to trial against TMRMC as the sole Defendant, and the parties agreed at trial that the jury would be instructed to render a verdict as to each party according to such party's percentage of fault. The parties also agreed to place the settling Defendants on the jury form and to allow the jury to apportion fault to those settling Defendants. (T.30-31) The case was thus tried in conformity with §768.81(3), Florida Statutes (1991) as currently construed by this court.

At the conclusion of the trial, the jury returned a verdict assessing damages at $573,853.00, finding TMRMC 90% at fault, ALFORD 5% at fault, and "AA" 5% at fault. By Amended Final Judgment Plaintiff was found to have sustained, consistent with the jury verdict, $202,853.00 in economic damages, and $371,000.00 in non-economic damages, for a total of $573,853.00. (R.112-114)

To reflect the jury's findings that TMRMC was 90% negligent, the trial court entered judgment for Plaintiff in the amount of 90% of the $573,853.00 total damage award. (R.1-2) In post trial motions and memoranda referencing §768.041(2) and §768.31(5)(a), Florida Statutes, Appellant asked the court to reduce the jury verdict by the $300,000.00 amount paid by the settling Co-defendants (R.59-65). Appellant also moved to set-off the judgment by $17,000.00, the net amount of social security benefits received by the Plaintiff as a result of her husband's death (R.59-65). The trial court granted Respondent's motion to set-off the Social Security benefits, but denied its motion to set-off the settlement proceeds. Instead, the trial court awarded 90% of the $573,853.00 total damage award plus $9,000.00 in costs to be paid by

TMRMC deducting $17,000.00 as a set-off for the Social Security benefits received by Appellee for a total of $509,267.70.[1]

TMRMC appealed, (1st DCA Case No: 92-3294) alleging that the trial court's judgment was entered in error and that the $300,000.00 paid by the two other tortfeasors should be set-off against the total amount of damages. The First District Court of Appeal agreed, based upon Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993) and reversed the trial court.

The Petitioner now seeks to invoke the jurisdiction of the Supreme Court to review the decision of the First District Court of Appeal.

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[1] The amount the trial court awarded in total was $509,267.70. Obviously, there was a miscalculation in arriving at this figure, because 90% of the total damages is $516,467.70. When $9,000.00 is added to this sum and $17,000.00 is subtracted, the total becomes $508,467.70.

SUMMARY OF THE ARGUMENT

The First District court correctly decided that the plain language of Sections 768.041(2), 46.015, and 768.31(5), Florida Statutes, mandate the full amount of pre-trial settlement to be set-off from the total final judgment. The language of these statutes is clear and unambiguous and Florida courts have consistently applied them to require set-off of the total amount.

The application of section 768.81(3), which directs that judgments shall no longer be entered on the basis of joint and several liability but shall instead be entered on a party's percentage of fault, does not impact established law requiring set-off before judgment is entered because the statutes deal with two separate issues, damages and liability. This Court affirmed this principle in its recent decision of Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993).

Finally, public policy strongly favors the settlement of lawsuits. Refusing to allow set-offs for pretrial settlements will discourage the settlement of lawsuits because plaintiffs will be empowered to obtain windfalls in every multi-defendant case where at least one defendant enters into a pretrial settlement. Moreover, disallowing set-offs for pretrial settlements repeals by implication the long-established law providing that plaintiffs are entitled to recover only once for each injury.

Further, the purpose of these statutes requiring a set-off of settlements is to prevent plaintiffs from receiving double recoveries. It would frustrate the purpose of these statutes to allow plaintiffs to receive a windfall over the amount found by the jury to be her total damage.

Therefore, this Court should affirm the First District's decision finding the total amount of settlements should be set-off from the final judgment.

ARGUMENT

SECTIONS 768.041(2), 46.015(2) AND 768.31(5), FLORIDA STATUTES, (1993) REQUIRE THIS COURT AFFIRM THE FIRST DISTRICT'S HOLDING THAT PRE-TRIAL SETTLEMENTS SHOULD BE SET OFF FROM THE TOTAL AMOUNT OF A PLAINTIFF'S DAMAGES AS DECIDED BY THE JURY.

This appeal asks this court to construe and apply certain "set-off" statutes (hereinafter SET-OFF statutes) and calls into play longstanding principles governing the role of the judiciary and of statutory construction.

In Florida there are three statutes governing set-off of settlements from a verdict prior to a judgment being entered against a non-settling Defendant.

Section 768.041(2), Florida Statutes (1993) provides:

> 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 rendering judgment and enter judgment accordingly.

Similarly, Section 46.015(2), Florida Statutes (1993) has essentially identical language and provides:

> (2) At trial, if any person shows the court that the plaintiff, or his legal representative, has delivered a written release or covenant not to sue to any person 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 otherwise be entitled at the time of rendering judgment.

Finally, subparagraph (5) of Section 768.31, Florida Statutes (1993), otherwise known as the Uniform Contribution Amongst Tortfeasors Act, (UCATA), provides in pertinent part:

> 5. RELEASE OR COVENANT NOT TO SUE. When a release or 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 greater;
>
> . . . .

At the outset, it is well settled in the State of Florida that where the language of a statute is clear and unambiguous, the courts will not resort to rules of statutory construction, but rather the statute must be given its plain and ordinary meaning. Steinbrecher v. Better Construction Co., 587 So. 2d 492 (Fla. 1st DCA 1991). This court has reaffirmed this basic principle and unequivocally stated the courts of this state are "without power to construe an unambiguous statute in a way which would extend, modify or *limit*, its express terms or its *reasonable and obvious implications*. To do so would be an abrogation of legislative power." (Emphasis in original) Holly v. Auld, 450 So. 2d 217 (Fla. 1984) This principle is adhered to, notwithstanding to do so in a particular matter may be unpalatable to the court. In Holly this court held, "It is not the court's duty or prerogative to modify or shade clearly expressed legislative intent in order to uphold a policy favored by the court." Id. at 219 citing McDonald v. Rowland, 65 So. 2d 12 (Fla. 1953). Likewise, in St. Petersburg Bank & Trust Co. v. Ham, 414 So. 2d 1071 (Fla. 1982), this Court held that the lower court's inability to "believe that the legislature could have intended for its statute to be read in such a way as would permit the outcome portrayed in the hypothetical" was an insufficient reason to overcome the plain meaning of the statutory language. Consequently, the first level of analysis dictates there is no need to construe a clear and unambiguous statute.

Applying this initial analysis to the statutes in question, it is clear the language of the SET-OFF statutes contemplate set-off of the full amount of any settlements which serve to release a defendant for the damages or damage elements recoverable for a particular cause of action. All three statutes speak in terms of a set-off for the total amount of the settlement paid if the amount paid is in partial satisfaction of the damages sought in the lawsuit.

For example, this court has considered the application of §768.31(5) in a medical malpractice case which is very factually similar to the present case. Florida Patient's Compensation Fund v. Scherer, 558 So. 2d 411 (Fla. 1990). In Scherer, the plaintiff sued two doctors, a hospital, and the Florida Patient's Compensation Fund for medical malpractice. The doctors settled for $100,000 prior to trial and the trial court set-off this sum from the amount of damages awarded to plaintiff at trial. The district court reversed as to the set-off issue, and this court held:

> Section 768.31(5)(a) provides that a release given to one of two or more tortfeasors shall reduce the claim against any other tortfeasor "to the extend of any amount stipulated by the release . . . , or in the amount of the consideration paid for it, whichever is the greater." §768.31(5)(a), Fla.Stat. (1989). Shultz was a joint tortfeasor in this action. Scherer received $100,000 to dismiss the claim at issue here, not a separate claim. This arrangement clearly falls within the plain meaning of section 768.31(5)(a), contrary to the district court's finding. Id. at 414.

Similarly, in City of Jacksonville v. Outlaw, 538 So. 2d 1360 (Fla. 1st DCA 1989), the City of Jacksonville was sued when a plaintiff fell and injured himself on a sidewalk located in the City. The plaintiff was also advised to contact the property owner, a Dr. Collins, who the plaintiff subsequently released from liability acknowledging receipt of the amount of $6,250 in settlement. The court noted that the damages and injuries for which the plaintiff received the $6,250 settlement were the same injuries and damages for which the plaintiff later sued the City.

The court then noted, "The City therefore is properly entitled to have the amount of settlement set-off against the $5,700 damage award. The trial court erred in denying such set-off and failing to enter judgment in the amount of zero dollars." Other cases interpreting Section 768.31(5) are in accord. See, e.g., Eller & Co., Inc. v. Morgan, 393 So. 2d 580 (Fla. 1st DCA 1981) review denied, 399 So. 2d 1141 (Fla. 1981). Alexander v. Seaquest, Inc., 575 So. 2d 765 (Fla. 4th DCA 1991). (Trial judge properly set-off the undifferentiated lump sum settlement against the total jury award in order to insure that appellant did not recover twice for the same wrong.)

It should be emphasized the above construction applies regardless of how relative fault is apportioned between settling parties vs. non-settling parties. In Department of Transportation v. Webb, 409 So. 2d 1061 (Fla. 1st DCA 1982), modified and approved, 438 So. 2d 780 (Fla. 1980) the defendants argued that a settlement executed for $14,000 should act as a settlement of 75% of plaintiff's claim since the settling defendants were apportioned 75% of liability for the accident. The court held, however, that the release given to the settling tortfeasors reduced the claim by any amount stipulated in the release. "The plain language of the statute supports the trial judge's decision that the judgment should be reduced by $14,000, not by 75% of the total award." Id. at 1063. Additionally, in Brown v. U.S., 838 F.2d 1157 (11th Cir. 1988), the United States and co-defendants were sued for the same wrongful death. The court held, "Section 768.31(5) unequivocally requires that the claim against the United States be reduced by the amount of that settlement. . . . the relative responsibility of the various defendants for causing the death is a separate issue that bears no relation to this injury." Therefore, it is clear, where, as here, various defendants are being sued for the same injury and the same damages,

the court must reduce the judgment against the remaining defendants in the full amount of any settlement. A similar construction has been given to both Section 768.041(2) and 46.015(2). See, e.g., Scheib v. Fla. Sanitarium & Benev. Assoc., 759 F.2d 859 (11th Cir. 1985) (interpreting Section 768.31(5) and 768.041(2)); Madden v. Rodovich, 367 So. 2d 1083 (Fla. 1st DCA 1979) (interpreting Section 768.041(2)); Process Masters, Inc. v. Alpha III, Ltd., 477 So. 2d 69 (Fla. 1st DCA 1985) (interpreting Section 768.041(2)); Rowe v. Leichter, 561 So. 2d 647 (Fla. 4th DCA 1990).

As shown in Brown, Outlaw, Scheib and Scherer above, the plain meaning of the SET-OFF statutes require pre-trial settlements be set-off in their entirety from the total amount of damages awarded at trial. Therefore, based on the clear and unambiguous statutory language cited above of the SET-OFF statutes the First District was correct in setting off the full $300,000.00 which was paid to the plaintiff in the settlement prior to trial from the total amount of the damages awarded to the plaintiff at trial.

Petitioner contends the above clear and unambiguous construction of the SET-OFF statutes should not apply in the context of cases tried pursuant to Section 768.81, Florida Statutes (1993). Petitioner argues subsection (3) separates tortfeasors liability and consequently no set-off should be allowed.

Section 768.81(3), Florida Statutes, provides:

> 3. APPORTIONMENT OF DAMAGES
>
> In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any parties whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic

damages against that party on the basis of the doctrine of joint and several liability.

Petitioner argues that the legislative intent and language of the SET-OFF statutes lead to the conclusion that there is no right to set-off when there is no shared liability. Petitioner further contends that since Florida law contemplates apportioning fault among the various parties, in situations where fault is apportioned by percentage, the SET-OFF statute should not apply at all. However, Petitioner's position is not supported by case law, statutory construction or logic.

Clearly there is no support in case law for the Petitioner's position; in fact, just the opposite is true. In Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993) was faced with the question of whether Florida's comparative fault statute should allow a jury to consider and apportion fault to parties who are no longer defendants in a lawsuit, but who are responsible, for some of the damages caused to the plaintiff. This court concluded that §768.81(3) was unambiguous and by its clear terms liability should be apportioned against each party liable on the basis of that party's percentage of fault whether they were currently in the lawsuit or not. 623 So. 2d at 1185. This court held the statute required parties' liabilities be apportioned among all parties partially responsible for the total fault.

This court anticipated Petitioner's argument but showed how Sections 768.81 and 768.31 worked together. In so doing, the court correctly applied the SET-OFF statutes which application has not been altered by the requirement of dividing percentages of fault. In footnote 3 to the Opinion, this court specifically addressed and answered in the affirmative the first certified question which is the issue of this appeal. Footnote 3 reads as follows:

3. Thus, we reject the argument that our interpretation of Section 768.81(3) when coupled with the right to set-off under section 768.31(5) will lead to double reduction in the amount of damages. This possibility may be avoided

by applying the set-off contemplated by Section 768.31(5) against the total damages (reduced by any comparative negligence of the plaintiff) rather than against the apportioned damages caused by a particular defendant. For example, suppose defendant A is released from the suit for a settlement of $60,000 and the case goes to trial against defendant B. The jury returns a verdict finding the plaintiff's comparative negligence to be 40%, the negligence of A and B to be 30% each, and the damages to be $300,000. Because the $60,000 set-off would not reduce the plaintiff's $180,000 to below $90,000, B would still have to pay the full $90,000 for his share of the liability. Of course, if the damages were found to be $150,000, the $60,000 from the settlement with A would be set-off against the plaintiff's $90,000 recovery which would mean that B's obligation would be reduced from $45,000 to $30,000. 623 So. 2d at 1186.

An analysis of the examples of footnote 3 above, points up three premises that are contrary to Petitioner's position. Petitioner contends the total amount of the settlements should not be set-off from the verdict. However, in both examples the total settlement sum is set-off.

Similarly, Petitioner contends she should be the entity who should benefit from a windfall settlement and not the tortfeasor. However, courts should focus on the proper application of legal principles and not on the particular result of a given case. Indeed, in the first example of footnote 4, plaintiff does not ultimately recover all of plaintiff's damages found by the jury.

Finally, Petitioner contends set-offs should only apply to damages for which the settling defendant and remaining defendant are joint and severally liable. However, both examples contemplate a plaintiff whose percentage of negligence exceed that of either defendant and consequently neither defendant A nor B would be jointly or severally liable for economic or non-economic damages. See §768.81(3), Fla. Stat. (1993).

The second example of footnote 3 in Fabre addresses the precise scenario which is presently before this court in the current appeal. This court's example starts with the premise that the total damages assessed by the jury are $150,000.

Therefore, in summation format the numbers are as follows:

$150,000.00	(Damages assessed by the jury)
- 60,000.00	(Plaintiff's comparative negligence at 40% of $150,000)
$ 90,000.00	(Verdict reduced by Plaintiff's comparative negligence)
-60,000.00	(Pre-trial settlement by A)
$ 30,000.00	(Balance owed by B the non-settling defendant)

The Fabre footnote specifically recognized that the full amount of A's $60,000 settlement would be set-off against the Plaintiff's $90,000 total damages and indicated that although the non-settling defendant B's responsibility would ordinarily be $45,000, the non-settling defendant's obligation "would be reduced from $45,000 to $30,000." To state this another way, B is only held responsible for 20% of the total damages even though the hypothetical jury in this example determined B's percentage of fault to be 30%.

This is the exact situation we have in the present case. In fact, we can plug in the figures in the present case to the above formula to see how it is applied.

$573,853.00	(Total Damages assessed by the jury)
- .00	(Jury found no comparative negligence on the part of the Plaintiff)
$573,853.00	(Since there was no comparative negligence verdict was not reduced by plaintiff's negligence)
-300,000.00	(Total of Pre-trial settlement by Co-defendants)
$273,853.00	(Balance owed by Appellant)

This is the precise figure awarded by the First District.

The examples set forth above demonstrate clearly that set-offs for pre-trial settlements survived the abolishment of joint and several liability under §768.81(3). Whether the settlement with the hypothetical defendant ended up being more or less than the proportion of liability subsequently assessed by the jury, the total amount of the settlement was set-off against the verdict. Thus the Petitioner's position is not supported by case law.

Nor is Petitioner's argument supported by logic. To harmonize and correctly construe the effects of Section 768.81, on the one hand, and Sections 768.31(5), 768.041(2) and

46.015(2), on the other, the legislative purposes behind the various statutes should be recognized. The statutes address two distinct issues: liability and damages.

Florida tort jurisprudence, through both judicial construction and legislative enactment, has evolved over time moving ever closer to a system where liability is equated with fault. Section 768.81, the proportionate liability statute, was enacted by the legislature to correct prior inequities of Florida's tort system. This court acknowledged this purpose and history in Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993) and construed Section 768.81 as establishing a system of proportionate liability where a defendant is only liable for its own proportionate share of the total fault attributable for the damages incurred by a plaintiff.

However, separate and apart from the liability issues addressed in Section 768.81, the SET-OFF statutes address the issue of damages. The SET-OFF statutes address the concept a plaintiff is entitled to recover only that amount which will compensate him/her for injuries and no more. Florida Physicians Ins. Reciprocal v. Stanley, 452 So. 2d 514 (Fla. 1984). This state has a clear policy of prohibition of double recovery to a plaintiff. Kingswharf Ltd. v. Kranz, 545 So. 2d 276 (Fla. 3d DCA 1987). See also Bessett v. Basnett, 437 So. 2d 172 (Fla. 2d DCA 1983); Westerman v. Sears, Roebuck & Co., 577 F.2d 873 (U.S. 5th Cir. 1978). In Stanley, this court held that evidence of free or low cost services from governmental or charitable agencies available to anyone with specific disabilities was admissible on the issue of future damages and did not violate the common law collateral source rule. In so holding this court stated:

> We refuse to join those courts which, without consideration of the facts of each case, blindly adhere to "the collateral source rule, permitting the plaintiff to exceed compensatory limits in the interest of insuring an impact on the defendant." (Citations omitted) The purpose of compensatory damages is to

> compensate (Restatement (2d) of Torts §903, Comment A (1979)); it is not the purpose of such damages to punish defendants or bestow a windfall upon plaintiff. The view that a windfall, if any is to be enjoyed, should go to the plaintiff (Citations omitted) borders too closely on approval of unwarranted punitive damages, and it is a view not espoused by our cases. Id. at 516.

Therefore, it is well settled in Florida that the plaintiff is entitled to compensatory damages to make them whole, but that the purpose of compensatory damages is not to punish the defendant. In enacting the SET-OFF statutes, the legislature clearly recognized and sanctioned this concept. However, plaintiff in this case asks this court to recede from this longstanding policy and find that plaintiff should be able to recover $300,000 more than the jury found her to have been damaged. This does not comport with the law in Florida nor the intent of the statutes.

The separate and distinct purposes of these statutes can both be accomplished by simply allowing the plain language of the statutes to apply in each case. As noted above, Florida courts have moved from the principle of joint and several liability to a proportionate fault system. Applying the Fabre construction to Section 768.81 insures no defendant is held liable for more than its proportionate share of the total liability. However, a fundamental principle of Florida law is a plaintiff is entitled to full compensation for damages, and not a penny more. Prohibition against double recovery, or unjust enrichment, is avoided by applying the plain wording of the SET-OFF statutes.

The above principles set forth under Fabre conform with Florida's long time principles of no double recovery for the same damages. There is clearly no conflict between the statutes when they are applied as suggested by this court. However, even if a conflict were to be found, this court has recognized that the legislature has contemplated such conflict and provided a resolution. Section §768.71(3), Florida Statutes (1993), provides that if any provisions of

§768.71 through §768.81 conflict with any other provisions of the Florida Statutes, the other provisions will prevail. Therefore, even if application of the comparative fault statute were found to conflict with the set-off provisions rather than apply as this court has suggested in footnote 3, the legislature created its own resolution to this problem and the SET-OFF statutes would govern. Consequently, under any construction of the SET-OFF statutes, the total amount of pre-trial settlement should be set-off from the total amount of damages prior to entry of judgment against any remaining tortfeasors.

Finally, the Petitioner asserts that following the Fabre footnote 3 analysis is contrary to public policy in the State of Florida. This is clearly not the case. In fact, there are two public policies at work which would be thwarted if this court should readdress the issue of how to apply a set-off in a proportionate liability situation. The first policy, preventing double recovery and refusal to allow windfalls to the plaintiff, has been more fully addressed above. The Petitioner's construction would clearly undermine this public policy and encourage gamesmanship in an effort to recover compensation in excess of damages. However, there is a second public policy which would be thwarted should this court limit the application of the SET-OFF statutes. It has been recognized that the purpose of the SET-OFF statutes is to i mplement public policy in favor of settlement and avoiding civil litigation. Rowe v. Leichter, 561 So. 2d 647 (Fla. 4th DCA 1990). Petitioner has suggested that continuing to apply the Fabre footnote 3 analysis will result in discouragement of settlement. However, the exact opposite is true.

Petitioner contends, under the approach followed by the First District, a plaintiff will be reticent to settle with any defendant in a multiparty suit, arguing plaintiff takes all the risk and

remaining defendants have no incentive to settle. However, plaintiff takes the same risk in settling with one party of a multiparty suit that it does with settling with a defendant in a single party suit: plaintiff may not be totally compensated. However, the other side of the coin is still present: plaintiff accepts and receives definite sums without further cost and harassment of litigation (with that party). Settlement will continue to exist because both plaintiffs and defendants have the same interest in avoiding the uncertainty of trial and face the same problems of evaluating their respective positions.

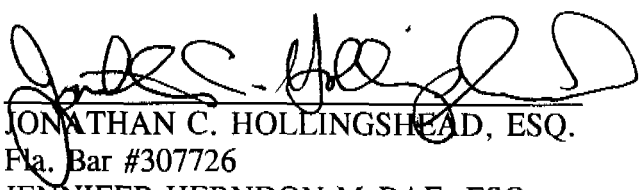
However, if total settlement sums are not set-off in a multiparty suit, a plaintiff is encouraged to settle with one of several defendants but not with all defendants. If the first defendant pays what appears to be in excess of their liability, but the amount doesn't reduce the plaintiff's total damages, plaintiffs will actually be encouraged to not settle with the remaining defendant in an effort to obtain recovery in excess of their total damages. Consequently the established public policy of settling lawsuits instead of trying them would actually be frustrated by Petitioner's approach.

Given the clear language of the statutes, the Supreme Court's decision in Fabre and the logic and public policies in support of the First District's approach, this court should affirm the decision.

CONCLUSION

For the foregoing reasons, Amicus FDLA respectfully requests this Court to answer both certified questions in the affirmative, and to affirm the decision of the First District Court of Appeal holding that pre-trial settlements should be set-off in their entirety from the total damages awarded at trial.

Respectfully submitted,



JONATHAN C. HOLLINGSHEAD, ESQ.
Fla. Bar #307726
JENNIFER HERNDON McRAE, ESQ.
Fla. Bar #0987281
Fisher, Rushmer, Werrenrath,
Keiner, Wack & Dickson, P.A.
Post Office Box 712
Orlando, FL 32802-0712
407/843-2111

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by U. S. Mail this 9th day of May, 1994, to JON D. CAMINEZ, ESQUIRE, and BARRY GULKER, ESQUIRE, Caminez, Walker & Brown, 1637-B Metropolitan Blvd., Tallahassee, FL 32308; and JESSE F. SUBER, ESQUIRE, Henry, Buchanan, Mick, Hudson & Suber, Post Office Drawer 1049, Tallahassee, FL 32302.

JONATHAN C. HOLLINGSHEAD, ESQ.
Fla. Bar #307726
JENNIFER HERNDON McRAE, ESQ.
Fla. Bar #0987281
Fisher, Rushmer, Werrenrath,
Keiner, Wack & Dickson, P.A.
Post Office Box 712
Orlando, FL 32802-0712
407/843-2111

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