QA 12-7-94

SUPREME COURT OF FLORIDA

JOYCE WELLS,

Petitioner,

vs.

TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER, INC.,

Respondent.
_____/

CASE NO. 83,207

BRIEF OF AMICUS CURIAE, ACADEMY OF FLORIDA TRIAL LAWYERS

RAYMOND V. MILLER, ESQ. and
JEFFREY DICKSTEIN, ESQ.
Kaufman, Miller, Dickstein
& Grunspan, P.A.
200 S. Biscayne Boulevard
21st Floor
Miami, FL 33131
Telephone: (305) 372-5200

-AND-

BARBARA GREEN, ESQUIRE
Barbara Green, P.A.
Florida Bar No. 264628
Co-counsel for Amicus
Academy of Florida Trial
Lawyers
999 Ponce de Leon Boulevard
Suite 1000
Coral Gables, FL 33134
Telephone: (305) 448-8337

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Barbara Green, P.A. - Attorney at Law - 999 Ponce de Leon Boulevard - Suite 1000 - Coral Gables, FL 33134 - Phone: (305) 448-8337 - Fax: (305) 445-7964

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OTHER AUTHORITIES:

Barbara Green, P.A. - Attorney at Law - 999 Ponce de Leon Boulevard - Suite 1000 - Coral Gables, FL 33134 - Phone: (305) 448-8337 - Fax: (305) 445-7964

The settlement was apportioned:

$ 50,000 economic damages

$250,000 non-economic damages.

The verdict was apportioned:

$202,753 economic damages

$371,000 non-economic damages.

TMRMC seeks a setoff of the full amount of the settlement. The First District ruled in TMRMC's favor, and certified the question to this Court.

QUESTION PRESENTED

Although the question certified by the First District was in two parts, the Academy submits that the issue for resolution by this Court is simply this:

> In a tort case with an apportioned settlement and an apportioned verdict, must any setoff be calculated to preserve the distinction between economic and non-economic damages and the apportionment of fault in §768.81(3), so that only the economic damages are set off, and judgment is entered for non-economic damages according to the jury's apportionment of fault?

SUMMARY OF THE ARGUMENT

Where the jury has found that the fault of the non-settling defendant equals or exceeds that of the plaintiff, and both the settlement and the verdict have been apportioned between economic

Barbara Green, P.A. - Attorney at Law - 999 Ponce de Leon Boulevard - Suite 1000 - Coral Gables, FL 33134 - Phone: (305) 448-8337 - Fax: (305) 445-7964

and non-economic damages, any setoff should take into account the distinction between the two types of damages. Only the economic damages portion of a settlement should be set off against the economic damages portion of the verdict. Judgment for non-economic damages should be entered in accordance with the jury's apportionment of fault.

This is the only result that is consistent with this Court's decision in Fabre v. Marin, 623 So.2d 1182 (Fla. 1983). It harmonizes the tort reform act with the setoff statutes. It preserves the distinction between economic and non-economic damages in §768.81(3). It fulfills the mandate at the heart of Fabre, apportioning non-economic damages according to fault. It denies setoff for damages for which the tortfeasors are not jointly liable. It is supported by the better reasoned cases from other jurisdictions and from the Supreme Court of the United States. It encourages settlement, and does not reward tortfeasors who refuse to settle.

ARGUMENT

IN A TORT CASE WITH AN APPORTIONED SETTLEMENT AND AN APPORTIONED VERDICT, ANY SETOFF MUST BE CALCULATED TO PRESERVE THE DISTINCTION BETWEEN ECONOMIC AND NON-ECONOMIC DAMAGES AND THE APPORTIONMENT OF FAULT IN §768.81(3), SO THAT ONLY THE ECONOMIC DAMAGES ARE SET OFF, AND JUDGMENT IS ENTERED FOR NON-ECONOMIC DAMAGES ACCORDING TO THE JURY'S APPORTIONMENT OF FAULT.

Despite the jury's finding that TMRMC was 90 percent at fault, and the clear mandate of Fabre v. Marin, 623 So.2d 1182 (Fla. 1993) to apportion damages according to fault, TMRMC argues that it

Barbara Green, P.A. - Attorney at Law - 999 Ponce de Leon Boulevard - Suite 1000 - Coral Gables, FL 33134 - Phone: (305) 448-8337 - Fax: (305) 445-7964

should only pay 48 percent of the damages, barely half of the proportion attributed to TMRMC by the jury.

As we discuss more fully below, the judgment against defendant TMRMC must be calculated by (1) setting off the amount of the economic damages settlement against the economic damages verdict: $202,753.00 - $50,000 = $152,753.00; and (2) calculating the non-economic damages according to the percentage of fault the jury assessed against defendant TMRMC: 90% of $371,000 = $333,900. The sum of the resulting figures should be the total damages payable by defendant TMRMC: $152,753.00 + $333,900.00 = $486,653.00. (This amount, of course, should be adjusted for collateral sources and costs. Collateral sources should reduce only economic damages.)

This is the only result that is in accord both with the verdict and with Florida law.

The jury found that Mr. Wells' widow and estate suffered $573,000 in damages. They have recovered only a part of that through pretrial settlements with other defendants. The settling tortfeasors did not appear at trial. The jury found the settling defendants 10% at fault. Any judgment that the court enters, in accordance with Florida law,

-- must comply with §768.31(5) and allow TMRMC a setoff for payments from any person jointly responsible for the same injury.

-- must take into account the jury's apportionment of fault among parties and non-parties under Fabre v. Marin, to preserve the plaintiff's right under the Florida Constitution to trial by jury;

Barbara Green, P.A. - Attorney at Law - 999 Ponce de Leon Boulevard - Suite 1000 - Coral Gables, FL 33134 - Phone: (305) 448-8337 - Fax: (305) 445-7964

Article I, §22, Florida Constitution; Rowlands v. Signal Constr. Co., 549 So.2d 1380 (Fla. 1989);

-- must distinguish between economic and non-economic damages, as required by §768.81(3), Florida Statutes;

-- must consider the total absence of any fault found by the jury on the part of Mr. Wells or his widow; Rowlands, supra.;

-- should neither punish Mrs. Wells for entering into a reasonable settlement, nor reward defendant TMRMC for refusing to settle.

The solution we urge will serve all of these important constitutional, statutory and policy considerations, and is fully consistent with Fabre v. Marin.

a. The Fabre mandate.

In Fabre v. Marin, this Court held that the jury must consider evidence presented that non-parties are at fault, so that the jury may determine the proportion of fault, if any, to be assessed against the defendant. "We are convinced that section 768.81 was enacted to replace joint and several liability with a system that requires each party to pay for non-economic damages only in proportion to the percentage of fault by which the defendant contributed to the accident". 623 So.2d at 1185. The allocation of non-economic damages in proportion to fault is the heart of the Fabre decision, a profound departure from prior law.

This Court also emphatically declared that §768.81(3) can and should be harmonized with other Florida statutes, including those pertaining to setoffs. 623 So.2d at 1186. In the present case,

Barbara Green, P.A. - Attorney at Law - 999 Ponce de Leon Boulevard - Suite 1000 - Coral Gables, FL 33134 - Phone: (305) 448-8337 - Fax: (305) 445-7964

the setoff statute, §768.31(5)[1] must be harmonized with §768.81(3), including the provision in §768.81(3) distinguishing between economic damages and non-economic damages.

Section 768.81(3) "disfavors joint and several liability to such a degree that it survives only in those limited situations where it is expressly retained". 623 So.2d at 1185. Where, as here, the plaintiff is without fault, §768.81(3) expressly retains joint and several liability for economic damages, while requiring non-economic damages to be apportioned according to apportionment of fault.

Section 768.31(5) requires a setoff for settlements with anyone "liable in tort for the same injury or the same wrongful death." The two statutes can only be harmonized by preserving the distinction between economic and non-economic damages, as the settling parties did, as the jury did in its verdict, and as §768.81(3) mandates. This is so simply because there is no longer joint liability for non-economic damages.

b. Set off only economic damages for which parties are jointly liable.

Traditionally under Florida law, there is no setoff for damages for which there is no joint liability. See generally, e.g., Safecare Health Corp. v. Rimer, 620 So.2d 161 (Fla. 1993); Robert E. Owen & Assoc. v. Gyongyosi, 433 So.2d 1023 (Fla. 4th DCA 1983); §768.31(5). Under §768.81(3), Florida Statutes, tortfeasors are

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[1] Sections 768.041(2) and 46.015(2) are not significantly different from §768.31(5). We focus on §768.31(5) because this Court focused on it in Fabre.

Barbara Green, P.A. - Attorney at Law - 999 Ponce de Leon Boulevard - Suite 1000 - Coral Gables, FL 33134 - Phone: (305) 448-8337 - Fax: (305) 445-7964

jointly liable for the same injury or wrongful death only to the extent of the economic damages.[2] Consequently, the non-settling defendant is entitled only to a setoff for the amount of the settlement attributable to economic damages, the only damages for which it is jointly liable. As to non-economic damages, judgment should be entered against the non-settling defendant in accordance with the percent of fault attributed to him by the jury.

Pursuant to §768.81(3), Florida Statutes, defendant TMRMC is jointly and severally liable for the economic damages. It is entitled to a setoff for the settlement of the economic damages claim. Since it is not jointly and severally liable for non-economic damages, it is not entitled to any setoff for settlement proceeds attributed to non-economic damages. See, e.g., In re Piper Aircraft, 792 F.Supp. 1189 (N.D.Cal. 1992) (no setoff for non-economic damages where non-settling tortfeasor not jointly and severally liable for non-economic damages); Order Regarding Potential Setoffs, Weber v. Inwood, Case No. CL-92-4543-AN (Fifteenth Circuit, Palm Beach County, Sept. 24, 1993). See also Safecare Health Corp. v. Rimer, 620 So.2d 161 (Fla. 1993) (no setoff in wrongful death action for prior settlement of personal injury claim because different rights of recovery and damages involved).

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[2] We address only situations where, as here, the plaintiff has been found less culpable than the defendants. Section 768.81(3) makes tortfeasors jointly and severally liable for economic damages if the tortfeasor's fault "equals or exceeds" that of the plaintiff. In the present case, the jury apportioned no fault to the plaintiff.

Barbara Green, P.A. - Attorney at Law - 999 Ponce de Leon Boulevard - Suite 1000 - Coral Gables, FL 33134 - Phone: (305) 448-8337 - Fax: (305) 445-7964

Under §768.81(3), economic and non-economic damages must be considered separately. Both the settlement and the verdict in this case maintained the distinction.

The jury found that the plaintiff's total economic damages were $202,753.00. Defendant TMRMC is jointly and severally liable for this amount. The plaintiff's settlement with the other tortfeasors allocated $50,000 of the settlement to economic damages. This allocation, made, we assume, in good faith by all of the settling parties, is binding on the non-settling tortfeasor and on the Court. Devlin v. McMannis, 231 So.2d 194 (Fla. 1970) (setoff must be calculated to preserve distinctive character of damages in settlement); City of Tamarac v. Garchar, 398 So.2d 889 (Fla. 4th DCA 1981) (en banc), overruled on other grounds, Seaboard Coastline R. Co. v. Addison, 502 So.2d 1243 (Fla. 1987). See also Magsipoc v. Larsen, 19 Fla.L.Wkly. D1484 (Fla. 5th DCA 1994) ("parties could have expressly agreed in the settlement that a portion of the recovery was for medical costs and expenses").[3] Thus, defendant TMRMC is entitled only to a setoff of the $50,000 economic damages portion of the settlement against the jury's verdict of $202,753.00 in economic damages. This leaves TMRMC liable for $152,753.00 in economic damages.

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[3] Where the settling parties have not made such distinctions, the court may apportion the settlement between economic and non-economic damages according to the jury's apportionment in its verdict, and proceed from there.

Barbara Green, P.A. - Attorney at Law - 999 Ponce de Leon Boulevard - Suite 1000 - Coral Gables, FL 33134 - Phone: (305) 448-8337 - Fax: (305) 445-7964

Relegated to mere dicta in a footnote was a suggestion that §768.81(3) could be harmonized with the requirements of the setoff statute in some hypothetical situations by "applying the setoff contemplated by §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".

The Court then gave two hypothetical examples, both apparently involving unapportioned settlements, unapportioned verdicts, and a plaintiff who was found by the jury to be partly at fault.

Setoff was not an issue in Fabre; the Court was giving hypothetical examples of ways to harmonize the two statutes.

Relying on this dicta, TMRMC has argued for an even more far-reaching change in the law: a straight setoff, subtracting the total settlement from the total verdict, ignoring the difference between economic and non-economic damages and ignoring the jury's apportionment of fault. TMRMC says that even though the jury found it 90% at fault, it should only pay 48% of Plaintiff's damages because somebody else settled.

The simplicity of TMRMC's position is falsely appealing; upon application, the fallacy of its logic becomes apparent.

First, an indiscriminate application of the setoff to economic and non-economic damages would make the jury's apportionment of 90% fault to TMRMC meaningless and would deprive Mrs. Wells of her right to trial by jury under the Florida Constitution. The Court in Fabre required that the relative fault of parties and non-parties be apportioned by the jury, with judgment to be entered for

Barbara Green, P.A. - Attorney at Law - 999 Ponce de Leon Boulevard - Suite 1000 - Coral Gables, FL 33134 - Phone: (305) 448-8337 - Fax: (305) 445-7964

non-economic damages in proportion to the jury's assessment of fault. As this Court firmly stated in Rowlands v. Signal Const. Co., 549 So.2d 1380, 1383 (Fla. 1989):

> The determination of liability falls within the right to trial by jury guaranteed by Article I, Section 22 of the Florida Constitution. Since liability is inextricably bound up with the apportionment of damages under the doctrine of comparative negligence, this matter must be left to the jury.

There is nothing in Fabre to suggest that the Court, in describing two hypothetical examples involving undifferentiated settlements and undifferentiated verdicts, intended to overrule this important and settled principle of constitutional law. The Fabre court was simply giving an example of one way in which the two statutes could be harmonized. Fabre nonetheless requires that the jury's allocation of fault be honored.

Second, §768.81(3) treats economic damages differently from non-economic damages. The parties in this case were careful, both in their settlement and in the verdict form, to distinguish between economic and non-economic damages. The Fabre footnote makes no distinction between economic and non-economic damages. The Court was, therefore, most likely addressing a hypothetical situation where, unlike the present case, the parties made no apportionment in their settlement or in the verdict form.

Where, as here, the parties have taken pains to ensure that the proper allocation is made in the settlement and in the verdict,

Barbara Green, P.A. - Attorney at Law - 999 Ponce de Leon Boulevard - Suite 1000 - Coral Gables, FL 33134 - Phone: (305) 448-8337 - Fax: (305) 445-7964

the apportionment should be honored. Devlin v. McMannis, supra., City of Tamarac, supra.; §768.81(3); see also Magsipoc, supra. Section 768.81(3) expressly requires that economic and non-economic damages be treated differently. The Fabre footnote does not require that this distinction be ignored where, as here, it has assiduously been preserved.

Third, the jury has found that Mrs. Wells suffered $573,853.00 in damages, almost all of which was caused by the negligence of TMRMC. An indiscriminate application of the dicta in the Fabre footnote would leave her with a paltry judgment against the hospital -- the entity the jury has found to be most at fault. This would not be fair or rational under any view of the law or of justice. It would leave Mrs. Wells inadequately compensated from TMRMC according to the jury's verdict. It would leave the hospital, which the jury found most at fault, with not much liability at all. Rather than the 90 percent found by the jury, TMRMC would wind up paying only 48 percent of the total damages.

Fourth, such a result rewards TMRMC for not settling. If there were no settlement, Mrs. Wells would be entitled to a judgment totalling the full amount of the verdict, and TMRMC would be responsible for its full 90 per cent share. It is the policy of the state of Florida to encourage settlement. Imhof v. Nationwide Mut. Ins. Co., 19 Fla.L.Wkly. S441, 442 (Fla. 1994) Therefore, any rational result must leave Mrs. Wells in at least as good a position as if she had not settled, and should not leave the most culpable defendant better off for having refused to

Barbara Green, P.A. - Attorney at Law - 999 Ponce de Leon Boulevard - Suite 1000 - Coral Gables, FL 33134 - Phone: (305) 448-8337 - Fax: (305) 445-7964

settle. The plaintiff's "good fortune in striking a favorable bargain with one defendant gives other defendants no claim to pay less than their proportionate share of the total loss". McDermott, Inc. v. AmClyde, 114 S.Ct. 1461 (1994).

If there were no settlement with the other tortfeasors, under the contribution statute, §768.31(3)(a), TMRMC would eventually pay 90% of the total judgment. The settlement by two other tortfeasors should not result in a windfall to TMRMC.

In sum, the method we suggest harmonizes the constitution, the statutes and the public policies involved, as applied to the facts of this case. It fulfills the Fabre mandate of apportioning the non-economic damages according to the proportion of fault determined by the jury. It still allows a setoff for economic damages for which the defendant is jointly and severally liable. Consequently, the method we suggest is consistent with the Fabre mandate.

d. Supported by U.S. Supreme Court decision in McDermott

The United States Supreme Court recently considered the effect of a settlement with one tortfeasor on the amount of a judgment to be entered against a non-settling tortfeasor, where the jury has made an apportionment of fault. The court held that judgment should be apportioned in accordance with the apportionment of fault determined by the jury. McDermott, Inc. v. AmClyde, 114 S.Ct. 1461 (1994). Although the Supreme Court was not faced with the daunting task of reconciling the Florida Tort Reform Act with the setoff and contribution statutes, the decision suggests why judgment should

Barbara Green, P.A. - Attorney at Law - 999 Ponce de Leon Boulevard - Suite 1000 - Coral Gables, FL 33134 - Phone: (305) 448-8337 - Fax: (305) 445-7964

be entered against TMRMC in accordance with the fault apportioned to it by the jury, to the extent possible in light of the setoff statutes.

In McDermott, the court adopted a straight percentage allocation of damages, as determined by the jury, without regard to any settlement. McDermott did not involve a setoff statute or a statutory modification of joint and several liability, which require a setoff as to economic damages here. But McDermott does contain important principles that support the result we urge here with respect to non-economic damages.

The Supreme Court pointed out that

> [T]hree considerations are paramount: consistency with the proportionate fault approach [of a prior Supreme Court case], promotion of settlement, and judicial economy.

114 S.Ct. at 1466-1467. These considerations should concern this Court as well.

The present situation discourages settlement and results in more litigation. As the Supreme Court noted, requiring the non-settling defendant to pay his proportionate share as determined by a jury promotes settlement and judicial economy as well as any other method, 114 S.Ct. at 1469, and is the fairest method to all the parties. Id. The court considered any danger of sometimes overcompensating plaintiffs less important than "making tortfeasors pay for the damage they cause." 114 S.Ct. at 1470-1471. Non-settling tortfeasors like TMRMC should not enjoy a windfall just

Barbara Green, P.A. - Attorney at Law - 999 Ponce de Leon Boulevard - Suite 1000 - Coral Gables, FL 33134 - Phone: (305) 448-8337 - Fax: (305) 445-7964

because the plaintiff was able to negotiate a good deal with the other tortfeasors.

A setoff in the full amount of the settlement would make defendant TMRMC, who did not settle and who was most at fault, the primary beneficiary of the settlement. It would totally negate the jury's assessment that TMRMC was 90 percent at fault, and make the jury's determination of relative fault a meaningless exercise. Moreover, it would discourage plaintiffs from ever settling, because there would be no advantage to plaintiffs, and any benefit of the settlement would go to the non-settling tortfeasor.

Nobody has a crystal ball. The outcome of a trial is always uncertain. Nobody knows whether a settlement agreement was a good deal for the plaintiff until after the verdict is in. Under TMRMC's theory, only the plaintiff bears all of the risk of settlement. The non-settling defendant bears none.

In enacting §768.81(3), the legislature plainly intended to make tortfeasors like TMRMC "pay for the damages they cause". In the present case, that can only be accomplished by making TMRMC pay the non-economic damages it caused: 90 percent of $371,000.00.

CONCLUSION

Where both the settlement and the verdict have been apportioned between economic and non-economic damages, and the jury finds the defendant's fault "equals or exceeds" that of the plaintiff, any setoff should take into account the distinction between the two types of damages. Only the economic damages portion of a settlement should be set off against the economic

Barbara Green, P.A. - Attorney at Law - 999 Ponce de Leon Boulevard - Suite 1000 - Coral Gables, FL 33134 - Phone: (305) 448-8337 - Fax: (305) 445-7964

damages portion of the verdict. Judgment for non-economic damages should be entered in accordance with the jury's apportionment of fault.

Respectfully submitted,

RAYMOND V. MILLER, ESQ. and
JEFFREY DICKSTEIN, ESQ.
Kaufman, Miller, Dickstein
& Grunspan, P.A.
200 S. Biscayne Boulevard
21st Floor
Miami, FL 33131
Telephone: (305) 372-5200

-AND-

BARBARA GREEN, ESQUIRE
Barbara Green, P.A.
Co-counsel for Amicus
999 Ponce de Leon Boulevard
Suite 1000
Coral Gables, FL 33134
Telephone: (305) 448-8337

BY: Barbara Green
BARBARA GREEN, ESQ.
Florida Bar # 264628

CERTIFICATE OF SERVICE

We hereby certify that a true copy hereof was mailed and faxed to: John D. Caminez, Esquire, Caminez, Walker & Brown, 1307 South Jefferson Street, Monticello, Florida 32344; William Norwood, Esquire, P.O. Box 1479, Thomasville, Georgia 31799; John Hollingshead, Esquire, Fisher, Rushmere, et al., P.O. Box 712, Orlando, Florida 32802 and Jesse F. Suber, Esquire and J. Steven Carter, Esquire, P.O. Drawer 1049, Tallahassee, FL 32302 this 6 day of October, 1994.

RAYMOND V. MILLER, ESQ. and
JEFFREY DICKSTEIN, ESQ.
Kaufman, Miller, Dickstein
& Grunspan, P.A.
200 S. Biscayne Boulevard
21st Floor
Miami, FL 33131
Telephone: (305) 372-5200

-AND-

BARBARA GREEN, ESQUIRE
Barbara Green, P.A.
Co-counsel for Amicus AFTL
999 Ponce de Leon Boulevard
Suite 1000
Coral Gables, FL 33134
Telephone: (305) 448-8337

BY: Barbara Green
BARBARA GREEN, ESQ.
Florida Bar # 264628