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SUPREME COURT OF FLORIDA

JOYCE WELLS,

Petitioner,

v.

TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER, INC.,

Respondent.
_____/

Case No. 83,207

First District Court of Appeal Case No. 92-3294

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner, Joyce Wells, will be referred to herein as Petitioner or Plaintiff. Respondent, Tallahassee Memorial Regional Medical Center, will be referred to herein as TMRMC or as Respondent. The settling defendants, Dr. Donald Alford, Anesthesiology Associates, and Ray Johns will be referred to by name.

Citations to the original record will be made by the letter "R" and the appropriate page number. Citations to the supplemental record will be made by the letters "SR" and the appropriate page number. Citations to the transcript of the hearing on appellant's post-trial motions, which is contained within the original record, will be made by the letter "T" and the appropriate page number.

Sections 768.041(2), 46.015, and 768.31(5), Florida Statutes, will be referred to by statute number or collectively as "the set off statutes."

The cause of action in this case accrued on January 3, 1990. All references to Florida Statutes herein are to Florida Statutes (1989).

ISSUE PRESENTED

THE FIRST DISTRICT COURT WAS CORRECT IN REVERSING THE TRIAL COURT WITH DIRECTIONS TO APPLY THE SET OFF IN THIS CASE.

STATEMENT OF THE CASE AND FACTS

This is an appeal from the decision of the First District Court in Tallahassee Memorial Regional Medical Center Inc. v. Joyce Wells, found at 19 F.L.W. D651 (Fla. 1st DCA 1994), in which the First District, following this Court's opinion in Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993), reversed the lower court with directions to set off all pre-trial settlements prior to entering judgment on the jury verdict. No error is claimed as to the jury's verdict on liability or damages.

The underlying case is a medical malpractice case brought pursuant to the Florida Wrongful Death Act, Sections 768.16-768.27, Florida Statutes. In her complaint, Petitioner alleged that her husband died as a result of negligence of Respondent TMRMC, codefendants Donald Alford, M.D., Anesthesiology Associates, Brence Sell, M.D., and Raymond Johns, C.R.N.A. (R 7-10). Petitioner brought suit against these health care providers seeking those damages available under the Florida Wrongful Death Act (R 7-10).

Petitioner settled in good faith with Alford for $250,000 (R 42-45). Of this sum, $50,000 was allocated for economic damages and $200,000 was allocated for non-economic damages (T 43). On July 17, 1992, Petitioner settled in good faith with Anesthesiology Associates and its employee, Ray Johns, for $50,000. This settlement was not apportioned (R 51-54). The claim against Brence Sell, M.D., was dismissed.

The case went to trial on July 20, 1992, with TMRMC as the sole defendant. As Fabre v. Marin was pending in this Court at the

time, TMRMC and Petitioner stipulated that the names of the settling codefendants, Alford and Anesthesiology Associates, would appear on the verdict form with TMRMC (R 112-113). At the conclusion of the week-long trial, the jury found for Petitioner, awarding a total of $573,853 in damages (R 112-114). The jury found that TMRMC was 90% negligent, and that settling codefendants Alford and Anesthesiology Associates were each 5% negligent (R 113).

To reflect the jury's finding that TMRMC was 90% negligent, the trial court entered judgment for Petitioner in the amount of $520,687.80, or 90% of the $573,853 total damage award (SR 1-2). In entering the judgment, the court incorrectly used $43,792 as the amount awarded for past loss of support and services when the amount actually awarded by the jury was $39,100. The court corrected this error in the amended final judgment and it is not an issue in this appeal.

In a post-trial motion and memorandum referencing sections 768.041(2) and 768.31(5)(a), Florida Statutes, TMRMC asked the Court to reduce the jury verdict by $300,000, the total amount paid by the settling codefendants (R 59-65). TMRMC also moved to set off the judgment by $17,000, the net amount of social security benefits received by Petitioner as a result of the death of her decedent (R 59-65). The trial court granted TMRMC's motion to set off the social security benefits but denied its motion to set off the settlement proceeds (R 74-75).

An amended final judgment was entered October 13, 1992, in the amount of $509,267.70 (R 76-77). That sum represents 90% of the total verdict of $573,853, less $17,000 to reflect the set off for social security benefits, plus $9,000 in taxable costs.

TMRMC appealed the amended final judgment to the First District Court of Appeals, and the First District Court of Appeals, relying on this Court's opinion in Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993) reversed the lower court with directions to set off the $300,000 in pre-trial settlement payments from the final verdict and enter judgment accordingly. (A copy of the First District Court's opinion is attached as Exhibit A.) In reversing the trial court, the First District certified the following two questions as questions of great public importance:

A. Is a non-settling defendant in a case tried under Section 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 Section 768.041(2), Section 46.015(2), or Section 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?

The Petitioner is seeking to invoke the jurisdiction of the Supreme Court to review the decision of the First District Court of Appeals.

SUMMARY OF ARGUMENT

The issue before this Court is a damages issue, and does not depend on any analysis of apportionment of fault for its resolution. Sections 768.041(2), 46.015, and 768.31(5), Florida Statutes, require that pre-trial settlement monies paid in partial satisfaction of damages sued for shall be set off from the amount of any judgment which the plaintiff would otherwise be entitled. This Court has held that the purpose of the set off statutes is "to prevent duplicate or overlapping compensation for identical damages." Devlin v. McMannis, 231 So. 2d 194, 196 (Fla. 1970).

The enactment of Section 768.81(3), Florida Statutes, which abolished joint and several liability for non-economic damages, did absolutely nothing to change this long-established rule of Florida law which prohibits duplicate compensation for the same damages. This Court recognized the continued vitality of the set off statutes when it harmonized Section 768.31(5), Florida Statutes, with Section 768.81(3), Florida Statutes, in its opinion in Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993).

The long-standing public policies of the State of Florida which encourage settlement and which discourage double recovery would be thwarted if pre-trial settlements are not set off prior to the entry of final judgment as ordered by the First District.

For these reasons, both certified questions should be answered in the affirmative and the decision of the First District should be affirmed.

ARGUMENT

POINT I: SECTIONS 768.041(2), 46.015(2), AND 768.31(5), FLORIDA STATUTES MANDATE THAT THE PRE-TRIAL SETTLEMENTS SHOULD BE SET OFF FROM THE JURY VERCICT.

The issue before this Court is a damages issue, and any issues involving comparative fault are only tangential. The purpose of compensatory damages under the tort systems is to compensate, not to provide a windfall for a plaintiff. Florida Physician's Insurance Reciprocal v. Stanley, 452 So. 2d 514 (Fla. 1984).

Section 768.041(2), Florida Statutes, was enacted for the sole purpose of preventing double recoveries and windfalls. The statute 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.

(emphasis added). Section 46.015(2), Florida Statutes, is virtually identical.

In reviewing Section 768.041(2), Florida Statutes, this Court found that "the statute is designed, within the degree of specificity ascertainable under verdict and judgment procedures, to prevent duplicate or overlapping compensation for identical damages." Devlin v. McMannis, 231 So. 2d 194, 196 (Fla. 1970).

Section 768.31(5)(a), Florida Statutes, provides for a similar result. The statute provides:

> (5) RELEASE OR COVENANT NOT TO SUE.
>
> 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[.]

The concept that an injured plaintiff cannot get duplicate or double recovery on the same element of damages is well established in Florida law. Dionese v. City of West Palm Beach, 500 So. 2d 1347 (Fla. 1987); Beset v. Basnett, 437 So. 2d 172 (Fla. 2nd DCA 1983); Kingswharf Ltd. v. Kranz, 545 So. 2d 276 (Fla. 3rd DCA 1989); Westerman v. Sears, Roebuck & Co., 577 F. 2d 873 (5th Cir. 1978). The prohibition against double recovery is the very purpose behind section 768.041(2), Florida Statutes, as indicated by Devlin v. McMannis, 231 So. 2d 194 (Fla. 1970); and Thomas Air Conditioning & Refrigeration, Co. v. Bankston, 231 So. 2d 272 (Fla. 3rd DCA 1970), cert. den., 238 So. 2d 107 (Fla. 1970). It is also clear that the purpose of the set off provision found at section 768.31(5), Florida Statutes, is to ensure that plaintiffs receive full compensation for their injuries and not duplicate recoveries for the same injury. Alexander v. Seaquest Inc., 575 So. 2d 765 (Fla. 4th DCA 1991).

Both statutes have been applied consistently and uniformly over the years to set off pre-trial settlements from jury verdicts prior to the entry of judgment. In City of Jacksonville v. Outlaw, 538 So. 2d 1360 (Fla. 1st DCA 1989), the plaintiff received injuries in a fall on a city sidewalk and asserted claims therefor against the adjoining property owner and the city. Prior to trial, the plaintiff settled her claim with the adjoining property owner. She obtained a favorable verdict in the ensuing trial against the city. After trial, the city requested a set off pursuant to Section 768.041(2), Florida Statutes, for the amount recovered by the plaintiff in her settlement with the property owner. On appeal, the First District found error in the trial court's denial of that request. Specifically, the District Court observed:

> The damages and injuries for which the plaintiff received the $6,250 settlement are the same injuries and damages for which the plaintiff sued the City. 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 $0.

City of Jacksonville, 538 So.2d at 1361.

The First District reached the same result in Process Masters, Inc. v. Alpha III Ltd. Partnership, 477 So. 2d 69 (Fla. 1st DCA 1985). The Third and Fourth Districts have reached identical results in Florida Freight Terminals, Inc. v. Cabanas, 354 So. 2d 1222 (Fla. 3rd DCA 1978); Thomas Air Conditioning and Refrigeration, Co. v. Bankston, 231 So. 2d 272 (Fla. 3rd DCA 1970); and Madden v. Rodovich, 367 So. 2d 1083 (Fla. 4th DCA 1979). In

applying the set off in Thomas Air Conditioning and Refrigeration, Inc., the Third District Court gave some insight as to the purpose of Section 768.041(2) by approving the holding of the trial court that a failure to apply the set off "would, in effect, allow the plaintiffs to recover a sum greater than the amount of damages found to be due by the verdict of the jury ..." 231 So. 2d at 274.

Section 768.31(5)(a) has been applied by this Court in the same manner. In Florida Patient's Compensation Fund v. Scherer, 558 So. 2d 411 (Fla. 1990), plaintiff Scherer sued two doctors, a hospital, and the Patient's Compensation Fund for medical malpractice. Prior to trial, Dr. Schultz was released from liability after paying $100,000 to the plaintiff. The trial court later granted a defense request for a $100,000 reduction of the final jury verdict, but this ruling was reversed by the Fourth District Court of Appeal in Morales v. Scherer, 528 So. 2d 1 (Fla. 4th DCA 1988). In quashing that portion of the District Court's opinion which disallowed the set off, this Court said:

> 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 extent 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). Schultz was a joint tortfeasor in this action. Scherer received $100,000 to dismiss Schultz. The $100,000 was paid to satisfy 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.

(emphasis added). Scherer, 558 So. 2d at 414.

Other courts have applied Section 768.31(5)(a), consistently with the same results. See Alexander v. Seaquest Inc., 575 So. 2d 765 (Fla. 4th DCA 1991); Scheib v. Florida Sanitarium & Benevolent Association, 759 F. 2d 859 (11th Cir. 1985)(construing Florida law); and Brown v. United States, 838 F. 2d 1157 (11th Cir. 1988)(construing Florida law).

Brown v. United States is a perfect example of the clarity of Section 768.31(5), Florida Statutes, and of the result it unequivocally compels. Brown involved a wrongful death case in which the plaintiff alleged that Jackson Memorial Hospital, the Veterans Administration (VA) Hospital, and two Jackson Memorial doctors negligently failed to diagnose the decedent's cancer. Suit against the Jackson Memorial defendants proceeded in a Florida trial court while the claim against the United States for the VA Hospital's negligence proceeded in the U.S. district court. Ultimately, the plaintiff settled his claims against the Jackson Memorial defendants for $237,500, releasing said defendants from liability. After the district court trial against the United States resulted in a plaintiff's verdict, the government sought a set off in the amount of the settlement between the plaintiff and the Jackson Memorial defendants. The government argued that the amount paid by the Jackson Memorial defendants had been in settlement of damages identical to those claimed in the district court trial. The district court denied the government's motion but the Eleventh Circuit reversed with this observation about section 768.31(5):

> This statute plainly requires that the United States be granted the set off it requests. Both the United States and the state court defendants were sued for the same wrongful death. Both suits sought to recover those damages that the Florida Legislature has authorized in Fla. Stat. § 768.21 (1985)(sic). The state court defendants settled out of court. Section 768.31(5) unequivocally requires that the claim against the United States be reduced by the amount of that settlement.

(emphasis added). Brown, 838 F. 2d at 1162.

The plain meaning of the set off statutes is clear, and the courts have consistently interpreted the statutes to require set off of pre-trial settlement amounts for over 20 years. The purpose behind the set off statutes is to avoid duplicate recovery for the same elements of damages. The application of the set off statutes, combined with the reasoning behind these statutes, compels the same result in this case.

In the instant case, Petitioner sued various defendants under Florida Wrongful Death Act and sought from each defendant the statutory wrongful death damages. Petitioner received $300,000 in settlement and partial satisfaction of those very same damages and thereafter, a jury determined her total damages to be $573,853. In denying TMRMC's request for a set off of those settlement monies against the verdict, the trial court in effect awarded Petitioner $809,267.70, or over $200,000 more than the amount found by the jury to be her total damages. This result is contrary to the plain meaning of the set off statutes and the cases interpreting and applying those statutes. It also thwarts the statutory purpose of prevention of "duplicate or overlapping compensation for identical

damages." Devlin, 231 So. 2d at 196. For these reasons, the District Court's opinion reversing the trial court with directions to enter the set off should be affirmed and the certified questions answered in the affirmative.

POINT II: THE ENACTMENT OF SECTION 768.81(3) WHICH ABOLISHED JOINT AND SEVERAL LIABILITY FOR NON-ECONOMIC DAMAGES, DID NOT AFFECT THE VIABILITY OR APPLICABILITY OF THE SET OFF STATUTES.

Petitioner argues that due to the enactment of Section 768.81(3), Florida Statutes, the set off statutes should no longer apply to require that pre-trial settlements be set off from jury verdicts. Petitioner argues that as Section 768.81(3) requires that judgment be entered based upon each party's percentage of fault and not on the basis of joint and several liability, the set off statutes no longer apply because there is no longer a common liability. This argument is clearly without merit when one considers this Court's opinion in Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993). In Fabre, the Court clearly recognized the viability of one of the set off statutes, Section 768.31(5) and showed how this statute should be applied in cases tried under Section 768.81(3). In fact, in an example at footnote three of the opinion, this Court considered the precise issue now before the Court and arrived at the exact same result argued below by TMRMC and ordered by the First District Court. The method suggested by this Court applying the set off was to apply the set off against the total amount of damages rather than against any one defendant's apportioned share of damages.

Footnote three in Fabre reads as follows:

> 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 a double reduction in the amount of damages. This possibility may be avoided by applying the setoff 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, supposed 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 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 setoff 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.

(emphasis added). Fabre v. Marin, 623 So. 2d 11982 (Fla. 1993) at fn. 3. Reorganizing the numbers used by this Court in the second example of footnote three may be helpful:

$ 150,000	(damages assessed by the jury)
- 60,000	(plaintiff's comparative negligence of 40%)
$ 90,000	(damages reduced by plaintiff's comparative negligence)
- 60,000	(pretrial settlement by "A")
$ 30,000	(balance owed by "B", non-settling defendant)

The hypothetical jury in this example determined the percentage of fault of "B", the non-settling defendant, to be 30%,

which, when applied to the verdict of $150,000 equals $45,000. This Court clearly indicated by this example that although the non-settling defendant's responsibility would ordinarily be $45,000, the non-settling defendant's obligation was reduced to $30,000 because the plaintiff had received a pre-trial settlement in the amount of $60,000.

This same analysis when applied to the instant case yields the following result:

$ 573,853	(damages assessed by the jury)
- 0	(no comparative negligence of plaintiff)
$ 573,853	(damages not reduced since no comparative negligence of plaintiff)
- 300,000	(total of pretrial settlements by settling co-defendants, Alford, Anesthesiology Associates and Ray Johns)
$ 273,853	(balance owed by TMRMC)

Applying this Court's analysis in footnote three in Fabre shows that TMRMC should pay $273,853, or 48% of the total damages, to Petitioner in order to ensure full compensation, notwithstanding that the jury determined TMRMC's share of liability to be 90%. This result conforms with long-standing principles of Florida statutory and case law which prohibit double recovery for the same damages.

It is clear from a reading of Fabre, and in particular footnote three, that the set off statute not only survived the abolishment of joint and several liability with the enactment of Section 768.81(3), but that the set off statutes should indeed be

applied to reduce damages before issues related to the comparative fault of defendants are addressed.

Moreover, as this Court pointed out in Fabre, the Legislature provided that in the event Section 768.81(3) conflicts with other statutes, those other statutes would prevail. Fabre, 623 So. 2d at 1186. Therefore, even if Petitioner were to argue that the set off statutes conflicted with Section 768.81(3), the set off statutes would control.

Petitioner has made other attempts to distinguish the set off statutes by in essence contending that the set off statutes are no longer applicable since joint and several liability has been abolished with respect to non-economic damages. Considering this Court's analysis in footnote three of Fabre, these arguments are all without merit. Each of the set off statutes, as previously discussed, are based on the fundamental premise in Florida tort law that a plaintiff is entitled to but one recovery for his or her damages. Sections 768.041(2) and 46.015(2) basically reaffirm Florida law that if part of the damages sought are recovered prior to trial through pre-trial settlements, that money must be deducted from any verdict ultimately returned so that the plaintiff does not get a windfall. Neither statute is at all involved in the determination of relative percentages of fault. These statutes address damages issues only, not liability issues.

The same is true for Section 768.31(5), Florida Statutes. This statute provides in essence that if a plaintiff releases in good faith one of two or more persons liable in tort for the same

injury or wrongful death the claim is reduced by the amount paid in settlement for the release. The purpose is clearly to prevent plaintiff from recovering more than once for the same off injury or wrongful death. Alexander v. Seaquest Inc., 575 So. 2d 765 (Fla. 4th DCA 1991).

TMRMC respectfully submits that Petitioner's reliance on Section 768.81(3), Florida Statutes, for the proposition that the statute now requires judgment to be entered solely on the basis of comparative fault without consideration to the set off statutes and the long-standing principles against double recovery is without merit. Section 768.81(3) was enacted as part of a tort reform act by the Legislature. As this Court pointed out in Fabre, enactment of the statute appears to be a response by the Legislature to the harsh result in Walt Disney World Co. v. Wood, 515 So. 2d 198 (Fla. 1987), where Walt Disney World, who was found to be 1% at fault, was forced to pay 100% of the plaintiff's damages due to joint and several liability. A common sense reading of Section 768.81(3), with a knowledge of the history behind the statute, shows that the real purpose of the statute was to abolish joint and several liability and thereby avoid the harsh result reached in Walt Disney World where one solvent defendant may be forced to pay all of a plaintiff's damages irrespective of degree of fault. No logical reading of Section 768.81(3) can support Petitioner's arguments that the Legislature intended to repeal the set off statutes; to change long-standing Florida law and allow plaintiffs to receive more than one recovery for an injury; or that courts henceforth are

to enter judgment solely on a party's percentage of fault without regard to the fact that a plaintiff's damages may have been partially satisfied prior to verdict.

For example, in the instant case, had TMRMC been the only entity on the verdict form, it is clear that the set off statutes would require the pre-trial settlements of $300,000 to be set off from the verdict. Please assume that the case went to trial with the settling defendants as well as TMRMC on the verdict form as it did in the instant case, but that the jury determined TMRMC to be 100% at fault instead of 90% at fault, Petitioner would argue that judgment should be entered against TMRMC for the total amount of Petitioner's damages, $573,853, and that Petitioner would be entitled to collect the full verdict amount of $573,853 in addition to the $300,000 received in pre-trial settlements for these same damages. This argument simply cannot be supported by any reading of Section 768.81(3), Florida Statutes, or its history.

Neither can Petitioner contend that the Legislature intended to repeal the set off statutes by implication. Since these set off statutes all predated the Tort Reform Act of 1986 which produced Section 768.81(3), it therefore must be presumed that the Legislature chose not to repeal these statutes. It is well settled in Florida that statutory repeal by implication is not favored unless such is clearly the Legislative intent. Palm Harbor Special Fire Control District v. Kelly, 516 So. 2d 249 (Fla. 1987); State v. Dunmann, 427 So. 2d 166 (Fla. 1983).

POINT III: THE OUT OF STATE AUTHORITIES CITED BY THE PETITIONER PRESENT THE CLEAR MINORITY VIEW.

The suggestion by the petitioner that "numerous" courts around the country have agreed with the principle that she advocates is misleading. First, the proportionate share set off method argued by the petitioner is clearly the minority view around the country. See H. Woods, Comparative Fault § 13:14-13:21 and Appendix (2d Ed. 1987 & Supp. 1993). The most universally accepted method of crediting a defendant's settlement is the method ordered by the District Court in the instant case; that is, to give a dollar-for-dollar credit to the non-settling defendant, thereby reducing the plaintiff's claim by the dollar amount of the settlement. Augustine v. Langais, 402 A.2d 1187, 1189 (R.I. 1979); Curtis v. Canyon Highway District No. 4, 831 P.2d 541, 546 (Idaho 1992). This method is also called the pro tanto method as compared to either the proportionate share or the pro-rata share methods. Over 30 states of the United States apply a form of the pro tanto method to reduce a plaintiff's award based on the dollar amount of any settlement by a settling defendant. See H. Woods, Comparative Fault Appendix.

Some examples of jurisdictions that have adopted the pro tanto method include Augustine, 402 A.2d at 1189, in which the Rhode Island Supreme Court adopted the pro tanto method and recognized that jurisdictions considering the issue "universally hold that amounts paid by settling defendants must be credited to the verdict amount returned against [the] non-settling tortfeasor" based on the

fundamental doctrine that an injured person is entitled to only one satisfaction for the tort, even though two or more parties contributed to the loss; Curtis, 831 P.2d at 546, in which the Idaho Supreme Court rejected the same argument made by the petitioner that the abolition of the doctrine of joint and several liability implicitly repealed the Idaho set-off statute. In addition, the court recognized that "the more widely accepted view is that under provisions such as I.C. § 6-805 [Idaho's version of a set off statute], the amount a plaintiff receives in settlement from a party should be deducted from the plaintiff's judgment even though the settling party was never judicially determined technically to be a joint tortfeasor."; Stuart v. Town of Brookline, 587 N.E.2d 1384, 1387 (Mass. 1992), in which the Massachusetts Supreme Court applied the pro tanto method and reaffirmed the state's important policy goal that requires a reduction of a plaintiff's claim based on a previous settlement because it "ensure[s] that a plaintiff suing multiple tortfeasors does not 'receive renumeration in excess of his actual damages'"; Boyken v. Steele, 847 P.2d 282, 284 (Mont. 1993), in which the Montana Supreme Court stated that "[t]he law is clear in Montana that when a joint tortfeasor settles with a claimant, the claimant's recovery against the remaining tortfeasor is to be reduced dollar-for-dollar by the consideration paid by the settling tortfeasor."; Popovich v. Ram Pipe & Supply Co., Inc., 412 N.E.2d 518, 521 (Ill. 1980), in which the Illinois Supreme Court held that "[u]nder well-established principles, amounts paid by one or more

of the joint tortfeasors are to be applied in reduction of the damages recoverable from those remaining in the suit."

In addition to the majority of states, the federal courts have also adopted the pro tanto method in securities cases, civil rights litigation, and in Title VII actions.[1] See Singer v. Olympia Brewing Co., 878 F.2d 596 (2d Cir. 1989); Miller v. Apartments & Homes, N.J., Inc., 646 F.2d 101 (3d Cir. 1981); Sears v. Atchison, Topeka & Santa Fe Ry., 749 F.2d 1451 (10th Cir. 1984), cert. den., 471 U.S. 1099, 105 S.Ct. 2322, 85 L.Ed.2d 840 (1985).

The cases cited by the petitioner, which, again, represent the minority view, clearly indicate that the courts in those cases were only addressing the issue of set off as it related to their particular versions of the Uniform Contribution Among Tortfeasors

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[1]Although the United States Supreme Court recently approved the proportionate share method in McDermott, Inc. v. Amclyde, 8 F.L.W. Fed. S-50 (April 20, 1994), the case is easily distinguishable and does not apply to the present case. In McDermott, the case involved the narrow field of admiralty law. Id. at 551. In reviewing the statutory and case authorities in the field of admiralty law, the Supreme Court found that there was no hard and fast law in admiralty against overcompensation and therefore the Court was free felt free to choose from among the three alternatives recognized by the American Law Institute in deciding which method of set off to adopt. (In fact, the Court recognized that the American Law Institute refused to make a recommendation among the three alternatives as to which one was better.) Id. at 551-52. No such situation exists, however, in the present case. The State of Florida has hard and fast laws and statutes against overcompensation in the form of set off statutes and the case law interpreting those statutes.

In addition, the Fifth Circuit Court of Appeals had applied the set offs in such a way as to effectuate a double reduction of plaintiff's damages. Id. at 552. However, this Court's application of the set off provisions explained in footnote three of the Fabre opinion clearly prevents any possibility of double reduction in damages. 623 So. 2d at 1186, n. 3.

Act (the "Uniform Contribution Act") or a similar contribution statute. The instant case, however, involves two additional set-off statutes, Sections 46.015(2) and 768.041(2), Florida Statutes, in addition to the Florida version of the Uniform Contribution Act found at Section 768.31(5), Florida Statutes. Because these courts only considered the application of a set-off under their respective contribution statutes and specifically did not consider, and presumably do not have, any additional set off statutes, the cases cited by the Petitioner are distinguishable and not applicable to the present case.

In addition, although the petitioner continues to cite Duncan v. Cessna Aircraft, 665 S.W.2d 414 (Tx. 1984), as persuasive authority for the proportionate share credit method, the petitioner fails to point out that the current law of Texas now gives the non-settling defendant the exclusive right to select the method of reduction prior to trial. Tex. Civ. Prac. & Rem. Code § 33.012 and 33.014. Therefore, even the authority cited by the petitioner recognizes that the dollar-for-dollar credit method may be most appropriate in certain circumstances.

Finally, the jurisdictions cited by the petitioner apparently do not share Florida's clear public policy prohibiting double recovery. Because the principle against overlapping compensation for identical damages is so strong in Florida as reflected in the set off statutes and in case law including Devlin v. McMannis, Dionese v. City of West Palm Beach, and Florida Physician's Insurance Reciprocal v. Stanley, any policy considerations

discussed by the other jurisdictions cited by petitioner are neither controlling nor persuasive.

POINT IV: REFUSING TO ALLOW SET OFF CLEARLY FRUSTRATES STRONG PUBLIC POLICY CONCERNS WHICH ENCOURAGE SETTLEMENT.

Public policy strongly favors encouraging settlements and discouraging unnecessary litigation. Plaintiffs and defendants look at pretrial settlements as a way of avoiding the uncertainty and risks associated with jury trials. In evaluating a case for settlement, a defendant pays the value to him or her of avoiding the risk and uncertainty of trial. The defendant's decision is largely unaffected by the prospect of a future set off claim as Petitioner contends.

Petitioner fails to appreciate the differences in the respective positions of plaintiffs and defendants with regard to settlement and trial. Plaintiffs have nothing to lose by going to trial, particularly if they have a war chest consisting of monies obtained from pre-trial settlements with former defendants. The worst a plaintiff can do is fail to get a verdict. Defendants, on the other hand, have everything to lose by going to trial and nothing to gain. Any time a defendant goes to court, he faces the prospect of a verdict for money damages at the very least, a runaway jury at the worst, and other costs such as adverse publicity and a disruption of business.

In contrast, if set off of pre-trial settlements in these circumstances are not allowed, plaintiffs will be strongly

encouraged to settle with some parties but not all, and to go to trial against those unfortunate defendants who remain in the case. Assume, for example, a wrongful death case against three defendants exists in which all parties believe the plaintiff has provable damages totaling $1 million. Two defendants settle out paying $400,000 each for a combined settlement of $800,000 in exchange for their releases from the case. If all parties agree that a reasonable damage assessment is $1 million, and set off for the settlement amount of $800,000 is not available, the plaintiff will always demand nothing less than $1 million of the non-settling defendant in order to settle the case. The remaining defendant is thus extorted to either pay full value of the case as demanded by the plaintiff in spite of the fact that the plaintiff has received 80% of the value in pre-trial settlements, or go to trial and try to keep the damages down.

On the other hand, assuming the same facts, both parties will be more likely to reach a settlement if pre-trial settlements are set off from verdicts. In that event, plaintiff's settlement demand of the non-settling defendant would be $200,000 as opposed to $1 million, because the plaintiff knows that total recoverable damages from all sources is $1 million. The non-settling defendant in the example would be able to avoid the risk of trial by paying $200,000 instead of the full value of the plaintiff's claim.

In addition, this Court in Fabre pointed out that the purpose of the Tort Reform and Insurance Act of 1986 was to try and alleviate the financial crisis in the liability insurance industry

which was being caused by the current tort system. Fabre, 623 So. 2d at 1185. Refusing to allow pre-trial settlements to be set off from jury verdicts in the circumstances of this case would frustrate the very purpose of the Tort Reform and Insurance Act because it would expose liability insurers to payment of more than the value of every insurance claim. Costs associated with insurance would go up, not down.

Petitioner fails to articulate any strong reasons why the District Court's ruling would frustrate settlements from a plaintiff's standpoint. Plaintiffs have always had the dilemma when settling cases of making sure they get enough money from each defendant they release. When considering the release of any defendant, the plaintiff has always had to evaluate the total case to make sure that by releasing some defendants he or she is not allowing the remaining defendants to place all the blame on the defendants who settled out. Nothing about the First District's ruling changes this age old evaluation process. The plaintiffs will still be faced with assessing the same risks they have always assessed prior to entering into a settlement with some but not all of the defendants.

The Petitioner suggests that it is not fair for TMRMC to pay less than the amount the jury ultimately determined to be their proportionate share of liability. This argument is incorrect for two reasons. First of all, the case that the Petitioner tried against TMRMC was an entirely different case than would have been

tried had the settling defendants remained in the case. Dr. Alford, who was the prime target until it was revealed that his policy limits were only $250,000, melted into the background during the trial of this case. Had the case gone to trial against all defendants, there is simply no guarantee that the percentages of fault returned by the jury would have been the same.

Secondly, Petitioner's argument that TMRMC is getting an unfair advantage begs the question. What is fair under the law is that a plaintiff is entitled to but one recovery for her damages. Plaintiffs can select whom they choose to satisfy their damages to the degree that they can choose who to sue and who not to sue. Petitioner in this case had the right to sue Dr. Alford only and have him pay all of her damages. She also had the right, which she exercised, to sue TMRMC, Dr. Alford, and Anesthesiology Associates in order to satisfy her damages. However, she does not have the right to have her damages satisfied more than once. The legal system in Florida is not without flaw, but when a case is tried to a jury, the jury weighs all the evidence and determines, once and for all, the total amount of plaintiff's damages when they return a verdict. Petitioner can have no legitimate expectation that she is entitled to recover 90% of her total damages as determined by the jury from TMRMC in addition to amounts paid by the settling defendants. Were this the case, there would be no limit to the number of parties plaintiffs would join in lawsuits in order to increase the total recovery.

In short, there is simply no policy in Florida that allows plaintiffs or their attorneys to profit from litigation. Allowing plaintiffs in similar circumstances to keep the full amount of a jury verdict as well as any pre-trial settlements for the same damages does just that.

Finally, Petitioner also indicates that it is only fair from a public policy standpoint that a plaintiff receive the benefit of a favorable settlement even if it does result in unjust enrichment or a windfall. However, this is a view which has been expressly rejected by this Court in Florida Physician's Insurance Reciprocal v. Stanley, 452 So. 2d at 514. In that medical malpractice case involving a brain-damaged baby, the issue was whether the common law collateral source rule should prevent the defense from arguing the availability of free or low-cost therapy services to rebut the plaintiff's jury demand for future medical expenses. The court found that to exclude from evidence the availability of free therapy services would be to "provide an undeserved and unnecessary windfall to the plaintiff." Stanley, 452 So. 2d at 515. Further, as this Court explained:

> The purpose of compensatory tort damages is to compensate (Restatement (Second) of Torts section 903, comment a (1979)); it is not the purpose of such damages to punish defendants or bestow a windfall upon plaintiffs. The view that a windfall, if any is to be enjoyed, should go to the plaintiff (citation omitted) borders too closely on approval of unwarranted punitive damages, and it is a view not espoused by our cases.

(emphasis added) 452 So. 2d at 516, citing, Peterson v. Lou Bachrodt Chevrolet Company, 76 Ill. 2nd 353; 392 N.E. 2d 1 (1979).

The jury in this case, after hearing all the Petitioner's evidence regarding damages, awarded appellee $573,853. Prior to trial, Petitioner received $300,000 in settlements in partial satisfaction of these same damages. By refusing to allow the set off, the trial court violated clearly established public policy as reflected in numerous Florida cases and long standing Florida statutes. The court, in fact, awarded Petitioner more than $200,0090 more than the jury found to be her total damages. That is a result not contemplated by Florida law.

For these reasons, the District Court's opinion should be affirmed and the certified questions should be answered in the affirmative.

CONCLUSION

The well established principles of Florida law prohibiting duplicate compensation for the same damages require that all pre-trial settlements be set off from jury verdicts prior to the entry of judgment. The set of statutes can be harmonized with Section 768.81(3) as indicated by this Court in Fabre v. Marin. For these reasons, TMRMC respectfully requests the Court to affirm the First District Court of Appeal and to answer the certified questions in the affirmative.

Respectfully submitted,

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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 to Jon D. Caminez, Esquire, Caminez, Walker & Brown, 1307 South Jefferson Street, Monticello, Florida 32344; William Norwood, Esquire, Post Office Box 1479, Thomasville, Georgia 31799; and John Hollingshead, Esquire, Fisher, Rushmere, et al, Post Office Box 712, Orlando, Florida 32802, this 18th day of May, 1994.

Jesse F. Suber

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER, INC.,

Appellant,

v.

JOYCE WELLS,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 92-3294

SUBMITTED p 2.12

MAILED 3/14/94

BY JT

Opinion filed February 9, 1994.

An appeal from the Circuit Court for Leon County.
L. Ralph Smith, Jr., Judge.

Jesse F. Suber of Henry & Buchanan, P.A., Tallahassee, for Appellant.

Jon D. Caminez and Barry Gulker of Caminez, Walker & Brown, Tallahassee, for Appellee.

SMITH, J.

Tallahassee Memorial Regional Medical Center, Inc. (TMRMC), appeals a final judgment entered against it after a jury trial, contending that the trial court erroneously refused to set-off

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EXHIBIT A

Blumberg No. 5110

from the judgment the amounts paid in settlement by two co-defendants prior to trial. Upon consideration of certain language appearing in the decision of the Florida Supreme Court in Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993) (Fabre II), we conclude that reversal is mandated. However, we certify the question at issue as one of great public importance.

The appellee, Joyce Wells, as representative of the estate filed suit against TMRMC, Dr. Donald Alford, M.D., Dr. Bruce Sell, M.D., Raymond Johns, a ~~respiratory therapist~~ Certified registered nurse anesthetist, and Anesthesiology Associates, for wrongful death of her husband, Jacob Wells, while in the care of the defendants. The claim against Dr. Sell was dismissed. Prior to trial, Wells reached a settlement with the remaining defendants, receiving in settlement $250,000 from Dr. Alford, and $50,000 from Johns and Anesthesiology Associates.

The case went to trial against TMRMC as the sole defendant; however, the jury was instructed to apportion fault among all defendants.[1] At the conclusion of the trial, the jury returned a verdict assessing damages at $573,853, finding TMRMC 90% at fault, Dr. Alford 5% at fault, and Johns and Anesthesiology Associates 5% at fault. By amended final judgment, the appellee was found to have sustained, consistent with the jury verdict, $202,853 in economic damages and $371,000 in non-economic

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[1]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 case was thus tried in conformity to section 768.81(3), Florida Statutes (1991).

damages, which totals $573,853.[2] The appellee was awarded 90% of this sum, plus $9,000 in costs; however, $17,000 was deducted as a setoff for the social security benefits received by appellee for a total of $509,267.70.[3]

TMRMC moved the court for a reduction of the amended judgment by setting off from the total damages awarded the sum of $300,000, the total amount received by Wells from the settling defendants. After a hearing on the motion, the trial court denied the requested setoff. This appeal followed.

This case raises issues relating to the several statutes in effect in Florida which provide, albeit in somewhat different language, for a reduction of the damages recoverable from a non-settling tortfeasor based upon the amount of damages received in settlement from other jointly or severally liable tortfeasors.[4]

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[2]More particularly, the damages were assessed as follows: funeral expenses, $3,753.00; past loss of support of decedent, $39,100; future loss of support of decedent, $160,000; pain and suffering of Joyce Wells, $250,000; pain and suffering of Tara Wells, $100,000; pain and suffering of Patricia Wells Dillon, $7,000; pain and suffering of Jerrod Wells $7,000; pain and suffering of Paula Wells Anderson, $7,000.

[3]The amount the trial court awarded in total was $509,267.70. There was a miscalculation in arriving at this figure. Ninety percent of the total damages is $516,467.70; when $9,000 is added to that sum and $17,000 is subtracted, the total becomes $508,467.70.

[4]Section 46.015(2), Florida Statutes (1991), reads:

> (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

More importantly, this case raises the question of the effect, if any, upon the applicability of these statutes created by the adoption of section 768.81(3), which provides for the apportionment of damages based upon each party's percentage of fault, and not on the basis of joint and several liability.[5]

> 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.

Section 768.041(2), Florida Statutes (1991), reads:

> (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 rendering judgment and enter judgment accordingly.

Section 768.31(5), and 5(a) Florida Statutes (1991), read:

> (5) RELEASE OR COVENANT NOT TO SUE.--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; and,

[5]Section 768.81(3), Florida Statutes, reads:

> (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

TMRMC urges that notwithstanding the abolition of joint and several liability accomplished by section 768.81 (except as to economic damages, with respect to a defendant whose percentage of fault equals or exceeds that of the claimant), the other previously existing statutory provisions still require a setoff or reduction in the amount of the total damages assessed by the jury, in the amount of $300,000 paid in settlement by Dr. Alford and Anesthesiology Associates. More specifically, TMRMC argues, section 768.041(2) provides that when a release has been given "in partial satisfaction of the damages sued for," the court "shall setoff this amount from the amount of any judgment to which the plaintiff would be otherwise entitled . . .," and the court must enter judgment accordingly. Further, section 768.31(5)(a) provides that a release or covenant not to sue does not discharge any other tortfeasors from liability, "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;. . . ."

It is important to note that under both statutes, sections 768.041(2) and 768.31(5)(a), in order for a setoff to be made the payments made in settlement must be in satisfaction of the claim

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and not on the basis of the doctrine of joint and several liability; provided that with respect to any party 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.

at issue in the lawsuit, not a separate claim. Devlin v. McMannis, 231 So. 2d 194 (Fla. 1970); Florida Patient's Compensation Fund v. Scherer, 558 So. 2d 411 (Fla. 1990). In the case before us it is without dispute that the settlement payments were made in partial satisfaction of the damages sued for.

The trial judge below rejected appellant's arguments, reasoning that notwithstanding the existence of the statutes above referred to, the judgment against TMRMC should be in accordance with the jury's verdict; and that since the jury was called upon to decide the specific amount that should be paid by TMRMC, the judgment should be based upon that amount. We note that the trial court at the time of this ruling did not have the benefit of the supreme court's recent decision in Fabre v. Marin, supra, which, as we indicated earlier, in our opinion dictates a contrary result.

Upon certification of conflict, the Florida Supreme Court in Fabre II disapproved the Third District's decision in Fabre v. Marin, 597 So. 2d 883 (Fla. 3d DCA 1992)(Fabre I), and approved the ruling of the Fifth District in Messmer v. Teachers Insurance Co., 588 So. 2d 610 (Fla. 5th DCA 1992). In Fabre II, the court found that section 768.81(3), Florida Statutes (1991), is unambiguous; that by its terms the statute requires entry of judgment against each party liable based upon their percentage of fault; and further, that the only means of determining a party's percentage of fault "is to compare that party's percentage of fault to all of the other entities who contributed to the

accident, regardless of whether they have been or could have been joined as defendants." Id. at 1185 (emphasis added). Mrs. Marin, the injured party, argued that judgment should have been entered for the full amount of her damages against the Fabres, although they were found to be only 50 percent at fault by the jury, because, under the doctrine of interspousal immunity, Mrs. Marin could not recover damages from her husband who was found 50 percent at fault in causing the accident. This argument was rejected by the court, based upon its interpretation of the statute.

We recognize that the Fabre II court was not called upon to reach the specific issue presented in the case before us; that is, whether in entering judgment for the apportioned liability of a non-settling defendant, the amount of the judgment should be reduced by sums paid in return for a release from liability by settling parties. Nevertheless, the court expressed a belief that any conflicts or inconsistencies between section 768.81(3) and other statutes could be harmonized; and in event they cannot be harmonized, the court said, then the issue must be resolved by application of the legislative directive appearing in section 768.71(3) which states that in event of conflict with other statutes, "such other provisions shall apply." From these and other expressions of the court in its Fabre II opinion, it is clear that the appellee's arguments, both here and in the lower court, that the setoff provisions do not survive the abolition of joint and several liability found in section 768.81(3), must

yield to the contrary legislative intent expressed in section 768.71(3).

Should there remain any doubt as to the applicability of the setoff provisions in the light of section 768.81(3), we find such doubt eliminated by reference to footnote 3 of the Fabre II opinion, which we think can be best explained here by quoting in its entirety:

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

Fabre II, 623 So. 2d at 1186 fn. 3 (emphasis added).

In our view, the emphasized portion of the above-quoted hypothetical, when applied to the case before us, unequivocally directs that the $300,000 paid in settlement by other defendants

must be applied in reduction of the total damage award returned by the jury.

We acknowledge, as urged by appellee, that footnote 3 of the Fabre II opinion is dicta. Nevertheless, we follow the rule as expressed in our opinion in Aldret v. State, 592 So. 2d 264, 266 (Fla. 1st DCA 1991), reversed on other grounds, 606 So. 2d 1156 (Fla. 1992), where we stated:

> [I]t is well-established that dicta of the Florida Supreme Court, in the absence of a contrary decision by that court, should be accorded persuasive weight. O'Sullivan v. City of Deerfield Beach, 232 So. 2d 33 (Fla. 4th DCA 1970); Weaver v. Zoning Board of Appeals of the City of West Palm Beach, 206 So. 2d 258 (Fla. 4th DCA 1968); Milligan v. State, 177 So. 2d 75 (Fla. 2d DCA 1965).

We therefore apply the Fabre II dicta in our resolution of this case.

Appellee has cited to us a number of cases from other jurisdictions in which the courts have reached a result contrary to the one we reach today. We confess that we have not attempted to explore the precise language of the statutory provisions applied by the courts in these several cases so as to compare them with the Florida Statutes. That there are some variations among the states we have no doubt. However, the general thrust of each of these decisions is similar. The courts in these other jurisdictions, with persuasive reasoning, have refused to allow a setoff against an apportioned fault verdict rendered against a non-settling defendant based upon sums paid by settling defendants. See, D.D. Williamson & Co. v. Allied Chemical, 569

S.W.2d 672, 674 (Ky. 1978)(the general public policy favoring settlements "militates in favor of allowing the plaintiff to enjoy a favorable settlement or being bound by a poor settlement . . ."; non-settling tortfeasor not entitled to setoff from judgment against the amount paid in settlement by co-tortfeasor); Wilson v. Galt, 668 P.2d 1104, 1109 (N.M. App. 1983)(injured person may pursue recovery from each severally liable tortfeasor without reduction; this policy encourages settlements, and discourages other tortfeasors from taking advantage of the good faith efforts of settling tortfeasors; whereas, if reduction is allowed, non-settling tortfeasor would know that he could be found liable only for his share, and also, if settling tortfeasor pays an amount greater than the total damages, as determined by the jury, he would not be required to pay at all); Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 430 (Tex. 1984)("plaintiffs bear the risk of poor settlements; logic and equity dictate that the benefit of good settlements should also be theirs"); Thomas v. Solberg, 442 N.W.2d 73, 77 (Iowa 1989)(". . . the proportionate credit rule is compatible with comparative fault; the one recovery policy underlying the pro tanto credit rule is not"); Roland v. Burnstein, 828 P.2d 1237 (Ariz. App. 1991)(under statute abolishing joint and separate liability, each defendant is liable only for the portion of the injury he caused, not the whole injury; it would be anomalous to give the benefit of an advantageous settlement to the non-settling tortfeasor, rather than the plaintiff who negotiated it; symmetry requires that if

the disadvantage of settlement is the plaintiff's, then the advantage ought to be also; a rule allowing a non-settling tortfeasor to escape liability by reason of the faulty assessment of probabilities by a settling tortfeasor might well discourage settlement by the last tortfeasor, and these considerations have lead most courts considering the question to apply the rule disallowing reduction for settlements).

We are unable to determine from the Fabre II opinion whether any of the arguments briefly outlined above were addressed to the court. We find it highly unlikely, however, given the Fabre II court's carefully drafted interpretation and discussion of section 768.81(3), that the court overlooked any of these arguments, if made, or if not made, that a different result would have been reached if they had been made.

We note that on remand, the trial court is instructed to award judgment for an amount based upon the total damages found by the jury, plus costs, reduced by the social security off-set and the amount of the settlement.[6]

In conclusion, we find that the issue presented here has a potentially significant impact on the resolution of disputes in Florida, and that it is likely to arise with such frequency as to

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[6]Because the plaintiff was not comparatively negligent, the computations of the award against TMRMC would begin with the total damages awarded by the jury, $573,853.00, to which must be added court costs of $9,000.00, making a sum of $582,853.00 for damages and costs. From this amount must be subtracted $17,000 for the social security offset, and $300,000 received in settlement, leaving a balance of $265,853.00 as the amount of the judgment to be entered against TMRMC.

justify a direct ruling by our highest court. Therefore, we certify as one of great public importance the following questions:

> (A) IS A NON-SETTLING DEFENDANT IN A CASE TRIED UNDER SECTION 768.81(3) ENTITLED TO SETOFF OR REDUCTION OF HIS APPORTIONED SHARE OF THE DAMAGES, AS ASSESSED BY THE JURY, UNDER THE PROVISIONS OF SECTIONS 768.041(2), 46.015(2) OR 768.31(5)(a), BASED UPON SUMS PAID BY ~~NON~~-SETTLING DEFENDANTS IN EXCESS OF THEIR APPORTIONED LIABILITY AS DETERMINED BY THE JURY?
>
> (B) DOES THE RULE AS TO SETOFF APPLY EQUALLY TO BOTH ECONOMIC AND NON-ECONOMIC DAMAGES?

REVERSED and REMANDED with directions to enter an amended judgment in accordance with this opinion.

ALLEN AND MICKLE, JJ., CONCUR.