IN THE SUPREME COURT OF FLORIDA

JOYCE WELLS,

Petitioner,

vs.

TALLAHASSEE MEMORIAL REGIONAL CENTER, INC.,

Respondent.
_____/

CASE NO. 83,207

First District Court of Appeal Case No. 92-3294

INITIAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CITATIONS

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 and Anesthesiology Associates will be referred to by name. Any reference to "Anesthesiology Associates" 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.

Unless otherwise indicated, all references to Florida Statutes herein are made to Florida Statutes (1989).

STATEMENT OF THE FACTS AND CASE

Plaintiff brought the action below pursuant to Section 766.101 et seq., Florida Statutes, and Section 768.16 et seq., Florida Statutes, (the medical malpractice statute and the wrongful death statute, respectively). Plaintiff alleges that on or about January 2, 1990, the decedent, JACOB WELLS died as a result of negligent treatment received at Tallahassee Memorial Regional Medical Center (TMRMC). Plaintiff brought the action below, alleging negligence on the part of Tallahassee Memorial Regional Medical Center, by and through its employees; Anesthesiology Associates and its employees Ray Johns and Dr. Brence Sell, (collectively Anesthesiology Associates); and Dr. Donald Alford. (R pp. 6-10.) At mediation prior to trial, Dr. Alford settled for $250,000.00 with the Plaintiffs (R. p. 42-45). This settlement was allocated by the parties $50,000.00 for economic damages and $200,000.00 for non-economic damages (T. p. 43). On July 17, 1992, several days prior trial, Defendant Anesthesiology Associates entered into a non-apportioned settlement with the Plaintiffs for a total of $50,000.00. This settlement also released Anesthesiology Associates employees Ray Johns and Dr. Brence Sell. (R. 51-54).

Prior to the dismissal of Anesthesiology Associates but after the settlement with Dr. Alford, a Pre-trial conference was held during which TMRMC was given the opportunity of deciding whether it wished to place the dismissed parties names on the verdict form or not. Plaintiff agreed that there would be no objection either way. (T. p. 30-31). TMRMC subsequently opted to place the names of both

the former parties on the verdict form, and to instruct the jury to determine the relative negligence of each. (R. 112-113).

After a week long trial, the jury returned a verdict finding TMRMC 90% responsible and Dr. Alford and Anesthesiology Associates each 5% responsible for the total verdict of $573,853.00, of which $202,753.00 was economic damages, and $371,000.00 was noneconomic damages. (R. 112-114). After several hearings concerning setoffs and collateral sources, the trial court entered an Amended Final Judgment against TMRMC on October 13, 1992 in the amount of $509,267.70. (R. 76-77). This judgment represents the jury assessment of 90% of the total verdict of $573,853.00, reduced by $17,000.00 in collateral source benefits for social security received by Plaintiff and increased $9,000.00 in taxable costs.

TMRMC appealed, (First District Court of Appeal Case No. 92-3294) alleging that the trial court's judgment was entered in error, and that the $300,000 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. (Corrected Opinion, appendix A). However, the First District Court of Appeal also certified the following two questions as being of great public importance:

> (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 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?

Petitioners now seek to invoke the jurisdiction of the Supreme Court to review the decision of the First District Court of Appeals.

SUMMARY OF ARGUMENT

Since the adoption of comparative negligence by this Court in Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973), the policy of this state has been to move toward a system which equates, as much as possible, fault with liability. This was the intent of the legislature in enacting section 768.81(3), Florida Statutes, as part of the Tort Reform Act, which provides for entry of judgment against each party liable on the basis of that party's relative degree of fault. This Court, in Fabre v. Marin 623 So. 2d 1182 (Fla. 1993) (Fabre II), supported the rule that judgment should be entered based on relative fault in all cases involving more than one negligent party, and that rule should be applied here.

Furthermore, the abolition of joint and several liability as to noneconomic damages mandates that payments by one tortfeasor should not have any effect upon another's liability for those damages. The notion that each party is responsible only for his or her respective share of the damages would dictate that payment by one tortfeasor can only extinguish that tortfeasor's liability, and no more. Numerous courts around the country that have considered this issue have supported this position.

In the instant case, section 768.81(3) does not conflict with the provisions of sections 768.041(2), 46.015(2) or 768.31(5)(a) (collectively the "setoff statutes"), which require the court to set off sums paid by other tortfeasors against the damages to which the plaintiff would otherwise be entitled to recover. These statutes are easily harmonized. The setoff statutes, by their

clear language and legislative intent, are only applicable where there is a common liability, as in the case of economic damages. Where liability is determined by the jury as a percentage of fault, such as with noneconomic damages, the comparative fault statute, section 768.81(3), would apply. This hybrid application is consistent with Florida's hybrid system of joint and several liability.

Additionally, footnote 3 in Fabre II, upon which the First DCA based its decision, does not control the outcome of this case. The issue of setoff was not squarely before the Court in Fabre II, nor were the facts which are present here. Since the statutes noted above can be harmonized, the dicta of footnote 3 does not apply.

Lastly, the public policy of this state favors settlement of lawsuits. Adopting the rule as set forth by the First District Court of Appeals would have a chilling effect on settlement in all multi-defendant negligence cases. Fundamental fairness dictates that the Plaintiffs (who take the risk of a poor settlement) reap the benefit of a good settlement in which they participated, rather than the Defendant who did not participate in the settlement.

ARGUMENT

I. A NON-SETTLING DEFENDANT IS NOT ENTITLED TO SETOFF OR REDUCTION OF HIS APPORTIONED SHARE OF THE DAMAGES, AS ASSESSED BY THE JURY, BASED UPON SUMS PAID BY SETTLING DEFENDANTS IN EXCESS OF THEIR APPORTIONED LIABILITY AS DETERMINED BY THE JURY.

A. This Court's holding in Fabre II requires the first certified question to be answered in the negative.

For the past twenty years, culminating with this Court's opinion in Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993)(Fabre II), the focus of tort law in Florida has gradually shifted. Prior to the changes outlined below, tort law and policy were guided by the notion that an injured plaintiff should be fully compensated, regardless of each defendant's degree of fault. The current tort system is based upon the notion that each party bears responsibility only for that portion of the injury which he has caused, at least with respect to noneconomic damages.

This Court, in its opinion in Fabre II, traced this twenty-year history from Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973), which established the doctrine of comparative negligence in Florida; through Lincenberg v. Issen, 318 So. 2d 386 (Fla. 1975) which abolished the rule against contribution among joint tortfeasors; to Walt Disney World v. Wood, 515 So. 2d 198 (Fla. 1987) in which the Court declined to abolish joint and several liability, despite a judgment which required a defendant who was 1% at fault to pay 86% of the plaintiff's damages; and finally to section 768.81(3), Florida Statutes, which abolishes joint and several liability as to noneconomic damages (and in certain other

situations which are not at issue here).

Since the adoption of comparative negligence in Florida in Hoffman v. Jones, 280 So. 2d 431 (Fla.1973), it has been the public policy of the state to equate liability with fault as much as possible. The Florida Supreme Court in Hoffman explained its rationale as follows:

> "If fault is to remain the test of liability, then the doctrine of comparative negligence, which involves apportionment of the loss among those whose fault contributed to the occurrence is more consistent with liability based on a fault premise."
>
> Hoffman, 280 So. 2d at 436 (emphasis added).

In 1986, the Florida Legislature forged an even stronger link between liability and damages by adopting the Tort Reform Act of 1986. One of the significant portions of this act, section 768.81(3), Florida Statutes, all but did away with joint & several liability. Section 768.81(3) reads as follows:

> (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 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 joint and several liability.

This statute, which was endorsed by defense attorneys and the insurance industry, was intended to assure that defendants only paid their own share of the liability, in keeping with the public policy espoused in Hoffman.

This public policy was well stated in the holding in Messmer

v. Teacher's Insurance Company, 588 So. 2d 610, (Fla. 5th DCA 1991):

> "[T]his court is of the opinion that the legislative intent in adopting 768.81(3) was to implement a system of equating fault with liability . . .. To exclude from the computation of fault an entity that happens not to be a party to the particular proceeding would thwart this intent."
>
> Messmer, at 612.

In Messmer, the court upheld an arbitration award which found plaintiff's husband, who was immune from suit, 80% liable for plaintiff's injuries, and allowed the Uninsured Motorist's carrier to setoff that 80%, and pay plaintiff 20% of her damages (the amount caused by the uninsured motorist).

This Court, in Fabre II, approved of the Messmer court's holding when it was asked to determine whether a defendant who is found to be only partially liable for injuries should be entitled to a reduction of damages based on the negligence of persons or entities who are not named as parties to the lawsuit. This Court held that section 768.81(3) controlled, and stated:

> "We conclude that the statute is unambiguous. By its clear terms, judgment should be entered against each party liable on the basis of that party's percentage of fault."
>
> Fabre II, at 1185.

This is precisely the application of 768.81(3) which the plaintiffs sought, and which the trial court granted. Judgment was entered against TMRMC on the basis of the jury's determination that TMRMC was 90% at fault for the death of Jacob Wells. The fact that Dr. Alford and Anesthesiology Associates, who were at one time

defendants in the lawsuit, had paid in excess of their apportioned liability, does not change the fault of TMRMC, and therefore should have no effect on its ultimate liability to the Plaintiff, since fault is the test of liability.

Numerous courts around this country, when faced with this issue, have agreed with this principle. Roland v. Bernstein, 171 Ariz. 96, 828 P. 2d 1237 (Ariz. App. Div. 2, 1991) is strikingly similar to the instant case. In Roland, the plaintiff filed a medical-malpractice action against Dr. Bernstein, a neurosurgeon (and his professional corporation); an anesthesiologist and the hospital. The hospital and anesthesiologist settled for $700,000 each. The jury subsequently found Bernstein and his corporation 47% at fault, the hospital was found to be 25% at fault and the anesthesiologist 28% at fault. The total damages awarded were $1,965,000. The trial court set off the amounts of the settlements and entered judgment for $565,000 against Bernstein.

The Court of Appeals of Arizona held that the trial court was in error, and that the Uniform Contribution Among Tortfeasors Act did not apply because it only applied where "two or more persons [are] liable in tort for the same injury." A.R.S. sec. 12-2504. Since joint and several liability was abolished by A.R.S. sec. 12-2506, the Court reasoned, no two people can be liable for the same injury; each party is only liable for the portion which that party caused. Roland, 171 Ariz. at 97-98, 828 P. 2d at 1238-1239.

The Supreme Court of Kentucky reached a similar conclusion in D.D. Williamson & Co. v. Allied Chemical, 569 S.W. 2d 672 (Ky.

1978). In that case, D.D. Williamson & Co. bought defective chemicals from PB&S Chemicals. Allied was the manufacturer of the chemicals. Williamson sued both Allied and PB&S, and prior to trial PB&S settled for $16,500. The jury awarded $20,000 and found PB&S and Allied each 50% responsible. The trial court set off the $16,500 settlement against the $20,000 verdict and entered judgment against Allied for $3,500.

The Kentucky Supreme Court reversed, holding that the policy of applying setoff in the dollar amount of settlement was based on the assumption that the entire liability rests on each co-tortfeasor because each has contributed and that no determination can be made of each party's relative share. The court noted that with the adoption of comparative fault in Kentucky, the assumption no longer applies. Id.

Both Roland and D.D. Williamson are based on a sound, logical legal premise: the notion that where liability is several and not joint, a party's settlement can only be applied to that party's own share of the liability. This principle is well stated in Wilson v. Galt, 100 N.M. 227, 668 P. 2d 1104 (1983), in which the parents of an infant brought a medical malpractice action against several parties; prior to trial they settled with the hospital, a Dr. Armstrong and a lab tech Dittus. The jury found total damages of $510,000 and assessed liability at 65% for Armstrong; 15% for the hospital; 5% for Dittus; 15% for another doctor, Dr. Haynes; and 0% for Dr. Galt. The total amount of pre-trial settlements exceeded the amount of the jury award. The trial court set off the

settlements and ruled that Plaintiffs were not entitled to any judgment.

The Court of Appeals of New Mexico held that since liability in New Mexico is several, and not joint and several, settlement with one tortfeasor can only extinguish that tortfeasor's share of the liability.

> "If the injured person settles and releases one tortfeasor, the consideration paid would satisfy only that tortfeasor's percentage of fault."
>
> Galt, 668 P. 2d at 232.

This reasoning applies in the case at bar. It is virtually certain that when Dr. Alford and Anesthesiology Associates were negotiating their settlements with the Plaintiff that they cared little what effect their settlements would have upon TMRMC'S liability to the Plaintiff. They were negotiating for the release of the claims against them, and nothing more; since they share no liability for non-economic damages with TMRMC, those damages were not part of the bargain, and therefore, those damages should not be affected by that bargain. Again, this interpretation is consistent with the policies espoused in Fabre II, which held that each party pays for noneconomic damages "in proportion to the percentage of fault" caused by that party. Fabre II, 623 So. 2d at 1185.

In Duncan v. Cessna Aircraft, 665 S.W. 2d 414 (Tx. 1984), Plaintiff's decedent settled with one party for $90,000 as a result of a plane crash and then sued Cessna, the manufacturer of the plane. The jury awarded $1 million, but did not allocate fault to the settling defendant. The Supreme Court of Texas held that

Cessna was entitled to a dollar credit, since fault was not allocated, but held that in future cases where the settling defendant's fault is established, the proportional credit rule, based on relative fault, shall apply.

The Court's reasoning in Duncan is especially sound, and should be applied to the instant case. The Duncan Court explains its holding as follows:

> "A dollar credit reduces the liability of the non-settling defendants, pro tanto, by the dollar amount of any settlement. The defendant's liability thus may fluctuate depending on the amount of a settlement to which he was not a party. This fluctuation cannot be reconciled with the policy of apportioning fault in relation to each party's responsibility, the conceptual basis of comparative causation."
>
> Duncan, 665 S.W. 2d at 430.

In addition to those cases cited above, other states have agreed. See, Charles v. Giant Eagle Markets, 513 Pa. 474, 522 A. 2d 1 (1987); Thomas v. Solberg, 442 N.W. 2d 73 (Iowa 1989). While it is acknowledged that the precise statutory language involved in each of these cases is different, the principles of comparative fault and the abolition of joint and several liability are the same, and dictate the same results in the case at bar. This Court in Fabre II approved of the decision in Messmer v. Teacher's Insurance Co., 588 So. 2d 610 (Fla. 5th DCA 1991), and recognized the same principle of comparative causation as the courts in all the cases cited above. The Messmer court held:

> "[T]his court is of the opinion that the legislative intent in adopting 768.81(3) was

> to implement a system of equating fault with damages."
>
> Messmer, 588 So. 2d at 612.

If we accept this principle, it is logically inconsistent to apply traditional setoffs where the liability is not joint and several. For this reason, The petitioner must concede that the second certified question should be answered in the negative, and that traditional setoffs should continue to apply to economic damages, where joint and several lability still exists under Florida's hybrid system of joint and several liability. However, it is equally clear that the legislative intent of a system of liability on the basis of relative fault can only be served by answering the first certified question in the negative; setoffs should be based on the relative fault of each defendant, not on amounts paid by settling defendants.

B. Section 768.81(3) can be harmonized with sections 46.015, 768.041, and 768.31(5), Florida Statutes.

Section 768.81(3) does not conflict with sections 46.015, 768.041, and 768.31(5), Florida Statutes (collectively referred to herein as "the setoff statutes"), because sections 46.015, 768.041 and 768.31(5) do not apply where there is no joint and several liability. The legislative intent and the language of these statutes lead to the conclusion that there is no right to setoff where there is no shared liability.

Section 46.015, Florida Statutes, reads as follows, in pertinent part:

"(1) A written covenant no to sue or release of a person who is or may be jointly liable with other persons for a claim shall not release or discharge the liability of any other person who may be liable for the balance of such claim.

(2) At trial, if any person shows the court that the plaintiff, or his legal representative, has delivered a 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 otherwise would be entitled at the time of rendering judgment."

Section 768.041, Florida Statutes, reads as follows, in pertinent part:

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

Section 768.31(5), Florida Statutes, reads as follows, in pertinent part:

(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 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; and,
> (b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor."

It is the petitioner's position that these statutes do not conflict with the provisions of section 768.81, requiring "judgment against each party liable on the basis of such party's percentage of fault." All of the above-cited statutes do not apply where joint an several liability has been abolished, such as in the case of noneconomic damages. Since all of these statutes are slightly different, it would be best to discuss each one individually.

We begin with section 46.015. This section, by its clear terms, applies only to "a person who is or may be jointly liable with other persons for a claim." § 46.015(1), Fla. Stat. (emphasis added). Obviously, since defendants are not "jointly liable" as to noneconomic damages, the setoff provisions of section 46.015 do not apply to noneconomic damages.

We next turn to the provisions of section 768.041. The statutory language in section 768.041(2) suggests an intent to apply setoffs only where liability is joint and several. The legislature states that the amount of a release "in partial satisfaction of the damages sued for" shall be set off against the judgment. Since the amount of "the damages sued for" is determined by the relative fault of each party (with regard to economic damages), the release of the settling parties cannot be "in partial satisfaction of the damages" which are payable by the non-settling

party. Where the damages are joint and several, the setoff would apply.

In addition, the language of section 786.041(1) also indicates that a release as to one tortfeasor "shall not operate to release or discharge the liability of any other tortfeasor." This language is clear. However, applying the setoff in the instant case would clearly violate this statutory provision, by using portions of payments by the settling defendants which exceed their proportionate liability to discharge part of the liability of TMRMC.

Lastly, the provisions of section 768.31(5) do not apply to situations where the liability of the settling party has been determined by a jury. The provisions of section 768.31(5) must be read in para materia with the rest of section 768.31. When read in this manner, it is clear that the Uniform Contribution Among Tortfeasors Act was adopted to remedy a problem which occurred when one tortfeasor paid "more than his pro rata share of the common liability." § 768.31(2)(b), Fla. Stat. (emphasis added). Since there is no "common liability" for noneconomic damages, the Uniform Contribution Among Tortfeasors Act would not apply. The entire focus of the Act is directed toward contribution. There is no contribution where there is no joint and several liability.

When section 768.31 became law in 1975, subsection (7) provided:

> This act shall apply to all causes of action pending on June 12, 1975, wherein the rights of contribution among joint tortfeasors is involved and to cases thereafter filed.
>
> § 768.31(7), Fla. Stat.

From the language above, it is clear that the legislative intent in passing the Act was to govern the "rights of contribution among joint tortfeasors." It is clear that the legislature, when it adopted section 768.31, never anticipated its application to a situation like the case at bar, wherein settling defendants appeared on the verdict form and their relative fault was determined by the jury. This is evident because at the time section 768.31 was passed, joint and several liability was still the law in Florida. In fact, prior to this Court's decisions in Fabre II and Allied Signal Corporation v. Fox, 623 So. 2d 1180, (Fla. 1993), former parties and non-parties did not appear on the verdict form, and their liability was not determined by the jury. It is highly unlikely that the legislature anticipated the Fabre II and Allied Signal decisions, and their effect on liability, back in 1975.

In 1975, the legislature, faced with the recent abrogation of the rule against contribution among tortfeasors in Lincenberg v. Issen, 318 So. 2d 386 (Fla. 1975), needed to establish rational rules to insure that a settlement by one tortfeasor was credited against the total damages in some way. Since there was no provision for determining the relative liability of the settling tortfeasor at that time, the legislature credited the entire amount paid by the settling tortfeasor toward the final judgment.

However, now that the tort system has been refined to allow a rational, fault-based determination of each party's responsibility to a particular plaintiff, that determination should control the credit a non-settling defendant should receive, at least with regard to noneconomic damages.

The provisions of the setoff statutes, and specifically section 768.31(5), apply only in situations where there is no application of relative fault; in situations where judgment is entered on the basis of liability, section 768.81(3) would apply.

C. Footnote 3 in Fabre II does not control the outcome of the instant case.

The First District, in the case at bar, insisted that footnote 3 in Fabre II compelled reversal of the trial court. 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 setoff under section 768.31(5) will lead to 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 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.
>
> Fabre II, at 1186, fn 3.

Petitioner would respectfully suggest that in Fabre II, the issue of setoff was not squarely before the Court, as here, and that footnote 3 is merely dicta. Petitioner would also respectfully suggest that upon the facts presented here, a reconsideration is in order, especially in light of the importance of the questions presented.

This Court interpreted the legislative intent of section 768.81(3) as follows:

> "We are convinced that section 768.81(3) was enacted to replace joint and several liability with a system that requires each party to pay for noneconomic damages . . . in proportion to the percentage of fault by which that defendant contributed to the accident."
>
> Fabre II, 623 So. 2d at 1185 (emphasis added).

It is important to note that footnote 3 was written in response to concerns about the possibility of double reduction in damages from both a setoff and a reduction for comparative fault. The language of the footnote suggests that "this possibility may be avoided" by using the example outlined in footnote 3. Fabre II, at 1186, fn 3, (emphasis added). However, the use of the word "may" rather than "should" or "shall" indicates that footnote 3 suggested only one possible method to avoid double reductions in damages.

A double reduction can also be avoided, and the seemingly conflicting statutes harmonized, by adopting Petitioner's position;

that is, that the setoff statutes, which were enacted when joint and several liability was still the law of this state (and prior to the Fabre II decision), continue to apply where there is joint and several liability, such as in the case of economic damages. In cases of several liability, where relative fault is at issue, section 768.81(5) applies. This hybrid application of section 768.81(5) is consistent with Florida's unusual hybrid system of joint and several liability, and is mandated by the highlighted language from Fabre II cited above. This is a rational interpretation of these statutes which leads to a just result, gives force and effect to the public policy of equating liability with fault, and avoids any conflict between section 768.81(3) and the setoff statutes.

III. ALLOWING A SETOFF WHICH IS NOT BASED ON APPORTIONED FAULT WOULD THWART THE PUBLIC POLICY OF THIS STATE.

A. Allowing setoffs which are not based on relative fault would decrease the likelihood of settlements in multi-defendant cases by forcing plaintiffs to take all the risk.

The public policy of this state favors settlement and discourages unnecessary litigation. See Rowe v. Leichter, 561 So. 2d 647 (Fla. 4th DCA 1990). This public policy is clear in the adoption of section 768.75, Florida Statutes, which allows the court to require settlement conferences in certain cases, and in the policy of virtually every Circuit Court in the state of either requiring or suggesting mediation in most tort actions.

Clearly, approving TMRMC's argument and allowing setoffs which are not based on relative fault will thwart attempts at settlement.

In the instant case TMRMC, as the last remaining defendant, would have had no incentive to settle, knowing it would get full credit for any amounts paid by settling parties, or the opportunity to set off the comparative fault of the other parties, if greater. Defendants such as TMRMC will always choose to go to trial. It is a win/win situation for the defendant who does not settle. In such situations, the plaintiff takes all the risk of a verdict assigning less responsibility to the remaining defendant; the defendant does not take any risk. This system is unfair, and puts an undue burden on injured parties.

Judge Smith in explaining his rationale for denying Respondent's post-trial motion clearly recognized that to accept Respondent's argument in this case would not have encouraged settlement:

> "We have got to assume that the law you are citing to the court should be one that would not discourage settlement and the position that you were advancing to me would in fact discourage settlement." (T. 37-38).

All of the cases previously cited from other jurisdictions have recognized the chilling effect on settlements that would be caused by adopting Respondent's position. Their reasoning is noted by the First DCA to be "persuasive." Tallahassee Memorial Regional Medical Center v. Wells, 19 Fla. L. Weekly D302, 303-304 (Fla. 1st DCA, Feb 9, 1994).

Settlement is a means of avoiding the risk and uncertainty of a trial. In settling a case, both plaintiff and defendant attempt to assess their exposure and do what they feel is in their best

interests. In addition, there are many costs of going to trial (both financial and emotional) which can never be recovered. In the instant case, the petitioner made a good bargain with the settling parties. Had the petitioner made a bad bargain, she would have had to live with the result. She should now be allowed to enjoy the fruits of her good bargain, since she took the risk. "[S]ymmetry requires that if the disadvantage of settlement is hers so ought the advantage be." Roland v. Bernstein, 171 Ariz at 98, 828 P. 2d at 1239.

In the instant case, the jury awarded $202,753 in economic damages and $371,000 in noneconomic damages for a total of $573,000. Dr. Alford settled for $250,000 prior to trial, and Anesthesiology Associates settled for $50,000 prior to trial. Had the percentages been the opposite, and TMRMC found to be 10% at fault, TMRMC would get a set off based upon the 90% fault of the other defendants. The plaintiff would not have collected the entire amount of her damages, because she made a poor decision on settlement.

TMRMC refused to bargain, which turned out to be a poor decision on settlement. Having made this poor decision, TMRMC now urges that it should be allowed to reap the fruits of the plaintiff's good settlements with Dr. Alford and Anesthesiology Associates. Obviously, this result would be more inequitable than allowing the petitioner, who to enjoy the benefits of her shrewd negotiating. See, D.D. Williamson & Co. v. Allied Chemical, 569 S.W. 2d 672, 674 (Ky. 1978) (plaintiff should "enjoy a favorable

settlement or be bound by a bad one"); Roland v. Bernstein, 171 Ariz. 96, 828 P. 2d 1237, 1239 (Ariz. App. Div. 2, 1991) ("it would be anomalous to give the benefit of an advantageous settlement, not to the plaintiff who negotiated it, but to the non-settling tortfeasor."

Fabre II also stands for this proposition, although indirectly. In Fabre II, it was held:

> "the plaintiff should take each defendant as he or she finds them. . . liability is to be determined on the basis of the percentage of fault of each participant to the accident and not on the basis of solvency or amenability to suit of other potential defendants."
>
> Fabre II, 623 So. 2d at 1186.

This reasoning, when taken to its next logical step, suggests that defendants take the other defendants as they find them. This means that if defendant 1, for one reason or another, should pay too much, it does not decrease the amount payable by defendant 2, just as if defendant 1 is immune from suit or insolvent, it does not increase the liability of defendant 2 (as to noneconomic damages). The law cannot be one-sided, and affect only plaintiffs.

B. Respondent's concerns regarding a "windfall" or "double recovery" are misplaced and disingenuous.

Respondent has argued that because the jury determined the Plaintiff's losses in this case to be $573,853, any recovery by the plaintiff in excess of this amount is an illegal "double recovery," resulting in injustice. In response to this argument, one must ask, "injustice to whom?" If, as the respondent has claimed, The petitioner is receiving a "double recovery" or a "windfall", there

must have been some "double payment" by someone. Certainly, the hospital cannot complain that it is being required to shoulder more than its fair share of the burden; it is being required to pay the exact amount the jury intended for it to pay.

In Charles v. Giant Eagle Markets, 513 Pa. 474, 522 A. 2d 1 (1987), the Supreme Court of Pennsylvania addressed this precise point, and held:

> "Appellees' concern over a windfall to the plaintiff, if appellee were required to pay its full pro-rata share, is far overshadowed by the injustice of the result they urge."
>
> Giant Eagle, 513 Pa. at ___, 522 A. 2d at 2.

If any "double recovery" was received, or any "injustice" done, (a claim disputed by the petitioner), it was at the expense of Anesthesiology Associates and Dr. Alford, who each paid more than they would have if they had gone to trial. However, at the time they paid, they assessed their risks, and bought their peace. No matter how this Court decides, they will not be able to get their money back. If we accept the respondent's position, the respondent, while decrying this supposed "injustice" will be the beneficiary of it.

The Supreme Court of Texas agreed with this reasoning, and questioned whether the non-settling defendant even had standing to complain of any injustice:

> "If there is enrichment, it is not at the defendant's expense. Defendant does not seek to make [the settling defendant] whole but rather to profit from the injustice that [the settling defendant] supposedly experienced. If the voluntary agreement between the plaintiff

> and [the settling defendant] were thought to offend public policy as to require redress, the remedy would run to [the settling defendant] rather than a stranger to the bargain."
>
> Duncan, 665 S.W. 2d at 430 (citations omitted).

The same logic applies here. It is disingenuous for the respondent to allege that it is the victim of some injustice here. The respondent is not seeking to refund the money to the settling parties, but is seeking to reduce its own payments. By rejecting this claim and imposing judgment according to the jury's apportionment of fault, the public policy, as well as the legislative intent, of favoring settlement, and imposing liability upon the basis of fault, is served.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests this Court to answer both certified questions in the negative; to quash the opinion of the First District Court of Appeals, and to remand this cause to the trial court with instructions to enter final judgment on the basis of relative fault with regard to noneconomic damages.

RESPECTFULLY SUBMITTED this 12th day of April, 1994

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Jesse F. Suber, Henry, Buchanan, Mick, Hudson & Suber, Post Office Drawer 1049, Tallahassee, Florida 32302, Counsel for Respondent; and to Jonathan C. Hollingshead, Fisher, Rushmer, et al., Post Office Box 712, Orlando, FL 32802-0712, Counsel for Amicus Curie Florida Defense Lawyers Association, this 12th day of April, 1994.

BARRY GULKER

Appendix A

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

p. 2,12

3/14/94

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

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.