

IN THE SUPREME COURT OF FLORIDA

JOHN M. GOUTY,

Petitioner/Plaintiff,

CASE NO.: SC00-1853

Lower Tribunal No.: 1D99-1337

vs.

J. ALAN SCHNEPEL,

Respondent/Defendant.

_____ /

AMENDED INITIAL BRIEF OF PETITIONER

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INTRODUCTION

The Petitioner/Plaintiff, John M. Gouty, will be referenced as "Gouty" and the respondent/defendant, J. Alan Schnepel, will be referenced as "Schnepel." The settling defendant, Glock, Inc., will be referenced as "Glock." The record on appeal will be referenced as ("R.__"), followed by volume number and page number. The First District Court of Appeal Opinion, J. Alan Schnepel v. John M. Gouty, 25 Fla. Law Weekly D2109 (Fla. 1st DCA 1999), from which this appeal is taken is attached hereto as the Appendix and will be referenced as ("Schnepel, at App.__"), followed by Appendix page number.

CERTIFIED QUESTION

WHERE THE PLAINTIFF HAS DELIVERED A WRITTEN RELEASE OR COVENANT NOT TO SUE TO A SETTLING DEFENDANT ALLEGEDLY JOINTLY AND SEVERALLY LIABLE FOR ECONOMIC DAMAGES, SHOULD THE SETTLEMENT PROCEEDS APPORTIONABLE TO ECONOMIC DAMAGES BE SET OFF AGAINST ANY AWARD FOR ECONOMIC DAMAGES EVEN IF THE SETTLING DEFENDANT IS NOT FOUND LIABLE?

(Schnepel, at App. 2)

STATEMENT OF THE CASE AND FACTS

There is no conflict as to the material facts of this case. Schnepel negligently discharged a Glock firearm causing injury to Gouty. Gouty filed a complaint alleging that Schnepel was negligent and that the gun and its case, manufactured and distributed by Glock, were defective. (R:1-01). Glock denied liability. (R:1-8). Prior to trial, Gouty settled with Glock for \$137,500.00 and executed a release and settlement agreement in favor of Glock (R:2-259). In the release and settlement agreement, Glock expressly denied liability for the accident (R:2-259). Schnepel was not a party to the negotiations, the settlement or the release (R:2-259). In the pretrial stipulation, Schnepel admitted liability and conceded that Gouty had no fault. (R:1-119). Schnepel contended, however, that Glock was also liable for Gouty's injury. Gouty proceeded to trial against Schnepel. Pursuant to § 768.81, Florida Statutes, both Schnepel and Glock were placed on the verdict form (R:1-179). The jury found Schnepel 100% liable and assessed damages in the total amount of \$250,000, 50% of which were determined to be non-economic damages (R:1-180). The jury found that Glock was not negligent and did not legally cause any of the injuries or damages Gouty sued for. (R:1-179).

The trial court denied (1) Schnepel's pretrial motion in

limine seeking to estop Gouty from denying Glock was liable for Gouty's injuries (R:1-142); (2) Schnepel's post-trial motion for new trial on the same ground (R:1-190); and (3) Schnepel's motion for setoff in the amount of 50% of the Glock settlement. (R:1-199).

Schnepel appealed these three rulings to the First District Court of Appeals (R:2-265). Because a trial transcript was not provided, the First DCA unanimously affirmed the lower court's rulings concerning estoppel without addressing the merits of the argument. (Schnepel, at App. 2). On a split decision, with Judge Van Nortwick dissenting, the First DCA reversed the trial court's denial of setoff but certified the following question of great public importance:

WHERE THE PLAINTIFF HAS DELIVERED A WRITTEN RELEASE OR COVENANT NOT TO SUE TO A SETTLING DEFENDANT ALLEGEDLY JOINTLY AND SEVERALLY LIABLE FOR ECONOMIC DAMAGES, SHOULD THE SETTLEMENT PROCEEDS APPORTIONABLE TO ECONOMIC DAMAGES BE SET OFF AGAINST ANY AWARD FOR ECONOMIC DAMAGES EVEN IF THE SETTLING DEFENDANT IS NOT FOUND LIABLE?

(Schnepel at App. 2)

This Petition for Certiorari followed.

SUMMARY OF ARGUMENT

The purpose of Section 768.81(3), Florida Statutes, is to protect the tortfeasor from paying for more than his share of the damages by requiring judgment to be entered on the basis of fault. In this case, that purpose was met: the jury found Schnepel 100% at fault, precluding joint and several liability under § 768.81(3) (Florida's Tort Reform Act), and the trial court entered judgment against Schnepel for 100% of the damages because the setoff statutes do not apply in the absence of joint liability. Therefore, the certified question should be answered in the negative and the trial court's ruling reinstated.

Florida disfavors joint and several liability to such a degree that the legislature has abrogated joint and several liability except where expressly retained by § 768.81. The three exceptions enumerated in the statute are: (1) when the damages do not exceed \$25,000, (2) when the tort is determined to be intentional or involve pollution or other specific tort, and (3) when the party's fault equals or exceeds that of the plaintiff. These exceptions do not apply here. In the majority opinion, Judges Browning and Benton contradict the clear terms of § 768.81 and the rulings of this court by looking to the setoff statutes to judicially create a fourth exception; that is, if a release is given to one of multiple defendants, the execution of that

release automatically creates joint and several liability.

However, the three setoff statutes presuppose the existence of joint liability among multiple defendants and, as such, cannot logically be read to create such liability. As Judge Van Nortwick stated in his dissent, it is the actual "existence," not the mere allegation, of joint and several liability that is the foundation for application of the setoff.

Under § 768.81, it is the finder of fact who determines the existence of joint and several liability. If, as in this case, the jury determines that joint and several liability does not exist, then the setoff statutes cannot apply. This view has been followed by the overwhelming majority of jurisdictions that, like Florida, have adopted comparative fault and modified or abolished joint and several liability and have addressed this issue.

Under this scenario, it is clear that one party must benefit from the settlement with Glock. If Schnepel receives the benefit, then Schnepel would pay less than his share of the damages as determined by the jury. Such a result is contrary to the express intent of § 768.81(3), Florida Statutes (1997). The equitable dimension of this issue requires the court to determine who is entitled to the benefit: the defendant who was found to be 100% at fault and now seeks to pay less than his share of the damages; or the injured plaintiff, who had no fault in the matter, but was able to resolve his potential claims against Glock without the necessity of trial.

Finally, requiring a setoff under these circumstances is contrary to the stated policy underlying § 768.81 and the setoff statutes. The effect of such a holding would be to discourage plaintiffs from partially settling cases with less than all of several defendants who have potential joint and several liability, and to encourage intransigent defendants not to settle, in contradiction to Florida's public policy encouraging settlement.

ARGUMENT

THE PURPOSE OF SECTION 768.81(3), FLORIDA STATUTES, IS TO PROTECT THE TORTFEASOR FROM PAYING MORE THAN HIS SHARE OF THE DAMAGES BY REQUIRING JUDGMENT TO BE ENTERED ON THE BASIS OF FAULT. IN THIS CASE, THAT PURPOSE WAS MET: THE JURY FOUND SCHNEPEL 100% AT FAULT, PRECLUDING JOINT AND SEVERAL LIABILITY UNDER SECTION 768.81(3), AND THE TRIAL COURT ENTERED JUDGMENT AGAINST SCHNEPEL FOR 100% OF THE DAMAGES BECAUSE THE SETOFF STATUTES DO NOT APPLY IN THE ABSENCE OF JOINT LIABILITY. THEREFORE, JUDGE VAN NORTWICK'S DISSENTING OPINION SHOULD BE ADOPTED, THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE NEGATIVE, AND THE TRIAL COURT'S RULING SHOULD BE REINSTATED.

A. FLORIDA'S TORT REFORM ACT, SECTION 768.81, ABROGATED JOINT AND SEVERAL LIABILITY FOR NON-ECONOMIC AND ECONOMIC DAMAGES, EXCEPT WHERE EXPRESSLY RETAINED UNDER SECTION 768.81(3), (4), AND (5), WHICH EXCEPTIONS DO NOT APPLY HERE. IN THE ABSENCE OF JOINT AND SEVERAL LIABILITY, THE SETOFF STATUTES DO NOT APPLY.

The legislature's enactment of § 768.81 abrogated joint and several liability for non-economic and economic damages except in "those limited situations set forth in §§ 768.81(3), (4), and (5), Florida Statutes (1989)." Conley v. Boyle Drug Co., 577

So.2d 275, 285 (Fla. 1990). Florida's Tort Reform Act "disfavors joint and several liability to such a degree that it survives only in those limited situations where it is expressly retained." Fabre v. Marin, 623 So.2d 1182 at 1185 (Fla. 1993) (emphasis supplied);

In Conley, this court set forth the three exceptions to Florida's abrogation of joint and several liability:

Under §§ 768.81(3), (4), and (5), joint and several liability is abrogated except:

1) in the case of economic damages 'with respect to any party whose percentage of fault equals or exceeds that of a particular claimant';

2) in 'any action brought by any person to recover actual economic damages resulting from pollution, to any action based upon an intentional tort, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by Chapter 403 [Pollution Control], Chapter 498 [Land Sale Practices], Chapter 571 [Security Transactions], Chapter 542 [Anti-trust], or Chapter 895 [the RICO Act]'; and

3) as 'to all actions in which the total amount of damages does not exceed \$25,000.'

Id.

If, as here, the case does not fall within these three exceptions, then no joint and several liability can exist for non-economic or economic damages. Id.; Metropolitan Dade County v. Frederic, 698 So.2d 29 (Fla. 3rd DCA 1997). In Frederic, the plaintiff sued the County and Metro Limo, Inc. for wrongful death damages arising from an automobile accident. Metro Limo, Inc. settled with the plaintiff prior to trial and the jury awarded

the plaintiff damages, finding the County 17.5% at fault and Frederic 55% at fault for failure to use a seatbelt (although not specifically stated, the additional 28.5% of fault was apparently attributed to Metro Limo). The court noted that Florida law only permits joint and several liability under the limited circumstances set forth by § 768.81(3), (4), and (5), and found that the County had no joint and several liability for either economic damages (because his percentage of fault was less than the plaintiff's) or non-economic damages (because the total amount of damages exceeded \$25,000). As a consequence, the court held that "the County is not jointly and severally liable for economic or non-economic damages, hence it is not entitled to a setoff for the [Metro Limo] settlement." 698 So.2d at 292 (emphasis in original).

At the lower court, Schnepel convinced Judges Browning and Benton to ignore the legislative intent, the language of § 768.81, and this court's interpretation of § 768.81 and to judicially create a fourth exception to the abrogation of joint and several liability via the setoff statutes; that is, if plaintiff executes a release in favor of one of multiple defendants, the fact of settlement automatically creates joint and several liability for economic damages. Such a holding contradicts the express terms of § 768.81 and the Wells v. Tallahassee Memorial Regional Medical Center, Inc., 659 So.2d 249

(Fla. 1995), Conley, and Frederic opinions.¹

Prior to § 768.81, and the Fabre, Conley, and Wells decisions, joint and several liability existed for all claims under Florida law. There was no mechanism for settling defendants and other non-parties to appear on a verdict form, and there was no judicially approved method for apportionment of settlement. Fabre, supra at 1185. The setoff statutes on which Schnepel relies, §§ 46.015, 768.041 and 768.31(5), were drafted in this light:

the setoff provisions, which were enacted before § 768.81, presuppose the existence of multiple defendants jointly liable for the same damages.

Wells, supra at 252-253 (emphasis supplied).

"Presuppose" is defined by Webster's Tenth Edition (1993) as: "to require as an antecedent in logic or fact." If the setoff statutes "presuppose" the existence of joint and several liability, then by definition they cannot create joint and several liability, as proposed by Schnepel and the majority opinion in the lower court. The existence of joint and several liability must therefore be established by admission, or at trial, in order to apply the setoff statutes. Wells, supra;

¹In fact, the majority holding from the lower court directly conflicts with Frederic, supra. According to the lower court's majority opinion, when a settlement and release is provided by one of multiple defendants, then joint and several liability is automatically established. (Schnepel, at App. 11). If the jury then determines that the non-settling defendant's negligence is less than that of the claimant, according to the lower court's majority opinion there still would be a setoff for the economic damages, in direct contradiction to § 768.81(3) and the holding of Frederic.

Frederic, supra. This is true for both non-economic and economic damages. Here, joint and several liability was not established by admission. Glock denied liability in the pleadings (R:1-8) and release (R:2-259), and Florida courts have repeatedly ruled that a settlement and release fall short of being a factual determination, either by admission or otherwise. Gilbert v. Florida Birth-related Neurological Injury Compensation Ass'n, 724 So.2d 688 (Fla. 2d DCA 1999); Martin County v. Mobil Corporation, 513 So.2d 243 at 244 (Fla. 4th DCA 1987) ("settlements ... have never been considered admissions against interest binding on the parties making them.")

In his dissenting opinion, Judge Van Nortwick correctly points out this fallacy of the majority's rationale: "under Wells it is the actual 'existence,' not the mere allegation, of joint and several liability that is the foundation of the application of the setoff statutes." (Schnepel, at App. 14-15). Simply put, the setoff statutes cannot, by independent operation, create joint and several liability.

The language of the setoff statutes support this conclusion. Section 46.015 refers to a written covenant not to sue, or release of, a "person who is or may be jointly and severally liable with other persons for a claim." (Emphasis supplied). Section 768.041 states that 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." (Emphasis supplied).² Section 768.31 refers to a release or covenant not to sue given to "one of two or more persons liable in tort for the same injury or the same wrongful death" (Emphasis supplied).

This is true even if the damages involved are economic damages. Contrary to Schnepel's position, the Wells court held that joint and several liability continues only for economic damages that are subject to joint and several liability, not for all economic damages:

"....setoffs are only applicable to economic damages where the parties are "subject to joint and several liability."

Frederic, supra at 292, citing Wells.

In other words, Wells held that while multiple defendants can never be found jointly and severally liable for non-economic damages (unless total damages do not exceed \$25,000), joint and several liability for economic damages remains a possibility if joint and several liability is found to exist between the settling and non-settling defendants. Id; Wells supra. Pursuant to §768.81, Wells, Conley, and Frederic, if joint and several

²In fact, in Devino v. McMannis, 231 So.2d 194 at 196 (Fla. 1970), this Court held that Section 768.041 "authorized to be setoff from a judgment against one joint tortfeasor only the amount constituting a settlement for the damages or damage elements recoverable in the same course of action against another joint tortfeasor." (Emphasis supplied).

liability is not found to exist under §768.81, then no setoff is allowed for economic damages.

Moreover, under Sections 768.81(3) and (5) and Wells, the existence of joint and several liability can only be determined by the fact finder; in other words, it is the jury that decides what damages, if any, are in partial satisfaction of the damages sued for and thus whether the setoff statutes apply:

(1) If the jury finds 100% of the damages are non-economic, then there is no joint and several liability and no setoff because the settlement does not include any damages in partial satisfaction of the damages that the remaining defendant was sued for. 768.81(3), Florida Statutes. Wells, supra.

(2) If the jury finds that the defendant is less at fault than the plaintiff, then there is no joint and several liability for non-economic or economic damages and no setoff because the settlement was not for damages in partial satisfaction of the damages that the remaining defendant was sued for. § 768.81(3), Florida Statutes; Metropolitan Dade County, supra.

(3) If the jury finds that the total damages do not exceed \$25,000 then joint and several liability exists for economic and non-economic damages and the setoff statutes apply because the settlement dollars are then considered in

partial satisfaction of damages sued for. § 768.81(5), Fla. Stat.; see Metropolitan Dade County, supra.

(4) If the jury finds that the non-settling tortfeasor is 100% liable then, by definition, there exists no joint and several liability and thus no setoff because no settlement dollars can be considered in partial satisfaction of damages that, in this case, Schnepel was sued for. 768.81(3), Fla. Stat;³ see Shufflebarger v. Galloway, 688 So.2d 996 (Fla. 3d DCA 1995).

In fact, as recently as last year, this Court held that it was the jury, not the settlement or release, that determined whether settling and non-settling parties are joint tortfeasors: "... because Dade County School Board was 100% liable for the injuries to the spectators, the parties were not joint tortfeasors; therefore contribution is not an available option." Dade County School Board v. Radio Station WOBA, 731 So.2d 638, at fn1 (Fla. 1999); also see MacKenzie Tank Lines, Inc. v. Empire

³In the court below, the majority misinterprets subsection (2) of §§ 46.015 and 768.041: Subsection 2 of both statutes sets forth (with brackets reflecting 46.015(2) language not in § 768.041(2)): "at trial, if any [person] defendant shows the court that the plaintiff, ... has delivered a [written] release or covenant not to sue to any person ... in partial satisfaction of the damages sued for, the court shall setoff this amount from any judgment to which the plaintiff would be otherwise entitled at the time of rendering judgment ..." (Emphasis supplied). Because defendant Schnepel was found 100% liable, he is not jointly liable with Glock and thus has failed to show the court that Glock's settlement dollars were in partial satisfaction of damages that Schnepel was sued for.

Gas Corporation, 538 So.2d 482 (Fla. 1st DCA 1989) (holding that in a contribution action where the non-settling defendant was found 100% liable at trial, the non-settling defendant was not jointly liable with the settling defendant and the settling defendant had no right of contribution against the non-settling defendant under Section 768.31).

Justice Anstead's concurring opinion in Wells puts in perspective the limits that § 768.81 and the Wells opinion have on the application of the setoff statutes:

With the enactment of § 768.81(3), the need for, and the role of, the contribution scheme set out above has been substantially reduced. Under § 768.81(3), a judgment is to be entered against a particular tortfeasor-defendant only 'on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability.' Since this tortfeasor-defendant now faces a judgment based only on its 'percentage of fault,' it, unlike Disney in the Wood case, has no basis for seeking contribution from another tortfeasor who might also have contributed to the cause of the claimant's injury. Such a tortfeasor is no longer in need of or entitled to contribution, either by a claim against other tortfeasors, or by a reduction in the judgment against him in the amount of any settlements made by the claimant with other tortfeasors. Since the 'problem' of a tortfeasor paying more than his fair share has been eliminated by the enactment of Section 768.81(3), the 'solution' to the problem by the scheme of contribution and setoff is no longer needed. The underlying purpose of the contribution scheme and §§ 46.015(2), 768.31(5)(a), and 768.041(2) is simply no longer served in such a case. This is the essence of our decision today.

Wells, supra at 256. (Emphasis supplied).

While the setoff statutes can still apply to economic damages, they only apply to economic damages awarded under the three exceptions enumerated in § 768.81, none of which apply here.

B. THE LOWER COURT APPLIED THE "PREVAILING VIEW" FOR NON-COMPARATIVE FAULT JURISDICTIONS AS SET FORTH IN THE RESTATEMENT (SECOND) OF TORTS, PROSSER ON TORTS, AND THE NORTH DAKOTA CASE OF LEVI V. MONTGOMERY. FLORIDA IS A COMPARATIVE FAULT JURISDICTION AND SUBSEQUENT TO THE WIDESPREAD ADOPTION OF COMPARATIVE FAULT AND MODIFICATION OR ABROGATION OF JOINT AND SEVERAL LIABILITY, THE "PREVAILING VIEW" IN SUCH JURISDICTIONS IS TO PERMIT A CREDIT EQUAL TO ONLY THE SETTLING PARTY'S SHARE OF FAULT AND TO REJECT SETOFF UNDER THE PRESENT SCENARIO.

In the court below, the majority concludes its opinion with the following statement: "most importantly and determinative is the clear statutory language that rejects the minority common-law view Mr. Gouty espouses." (Schnepel, at App. 13). According to the majority, the "prevailing view" is that judicial determination of a settling (potential) defendant's fault is immaterial under Florida's setoff statute; that view requires a setoff even where the person released was not in fact a joint tortfeasor or was not liable to the plaintiff at all. (Schnepel, at App. 10). The "minority" view is that only a credit equal to the settling party's share of fault is permitted and a setoff

under the present scenario is not allowed. (Schnepel, at App. 9)

What the majority failed to realize was that the "prevailing view" is prevailing only in jurisdictions that have not adopted comparative fault and not modified or abolished joint and several liability. However, a majority of jurisdictions, including Florida, have now adopted the doctrine of comparative fault and a tort reform act (in varying forms) modifying or abolishing joint and several liability through judicial action or legislative enactment. In fact, since 1985, at least 35 of the 44 comparative fault states (as of 1990), through the enactment of tort reform, have required the jury to apportion fault among all parties, including settling defendants. Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 Tenn. L. Rev. 199 at 203 (1990). The overwhelming majority of such jurisdictions have followed what the lower court here referred to as the "minority" view. Those comparative fault jurisdictions that have specifically addressed the issue at bar have rejected the allowance of a setoff in favor of establishing proportionate shares of liability and the elimination of inequities inherent in common-law joint and several liability. Varner, *infra*, et al.

In fact, except for California, each state that has adopted comparative fault and, through tort reform, modified or abrogated joint and several liability, has refused to apply a setoff where

the settling defendant is determined by the finder of fact to have 0% fault. See, Varner v. Perryman, 969 S.W.2d 410, 413 (Tenn.Ct.App. 1997) (setoff provisions of contribution statute have no application subsequent to adoption of comparative fault statute where settling defendant is found not liable); Nichols v. Mid-Continent Pipe Line Company, 933 P.2d 272 (Okla. 1996) (holding that a settling defendant found 0% liable is not "liable in tort for the same injury" and therefore, the non-settling defendants are not entitled to a credit for the amount of settlement); Haderlie v. Sondgeroth, 866 P.2d 703 (Wyo. 1993) (comparative fault statute abolishing joint and several liability means credit for settlement proceeds will not be given where fault is apportioned to each of multiple defendants); Stratton v. Parker, 793 S.W.2d 817, 820 (Ky. 1990) (where comparative fault determination is made, non-settling defendant is liable for amount of judgment equal to his degree of fault and is not entitled to credit for amount paid by settling defendant found not liable); Anunti v. Payette, 268 N.W.2d 52, 55 (Minn. 1978) (where settling defendant is not joint tortfeasor due to finding of no liability, it is inequitable to permit non-settling defendant to profit from settlement agreement) ; Rogers v. Spady, 371 A.2d 285, 287-88 (N.J. Super.Ct.App.Div. 1977) (application of comparative negligence law "necessarily means that if the settling defendant is found 0% negligent ... plaintiff will receive the settlement plus the full verdict"); Kiss v. Jacob,

650 A.2d 336 (N.J. 1994) (citing to Rogers with approval).

While not faced with the precise scenario at issue here, the overwhelming majority of these comparative fault jurisdictions have refused to permit a *pro tanto* setoff for the settlement amount in the absence of joint and several liability. Roland v. Bernstein, 828 P.2d 1237 (Ariz.Ct.App. 1991) (comparative fault statute which abolished joint liability and setoff portion of contribution statute simply does not apply where no joint liability exists); Thomas v. Solberg, 442 N.W.2d 73, 77 (Iowa 1989) (because system of comparative fault permits allocation of equitable shares of liability, "settlement does not affect the amount of harm caused by the remaining defendants and likewise should not affect their [amount of] liability"); Rambaum v. Swisher, 435 N.W.2d 19, 23 (Minn. 1989) (citing Anunti; defendants found liable at trial should not benefit from settlement such that they would pay "less than their fair share"); Charles v. Giant Eagle, 522 A.2d 1 (Pa. 1987) (holding that non-settling defendant is liable for full amount of proportionate share of verdict); Wilson v. Galt, 668 P.2d 1104 (N.M.Ct.App. 1983) (holding that percentage reduction rather than *pro tanto* reduction is mandated where comparative negligence has abrogated joint liability). Nelson v. Johnson, 588 N.W.2d 246, 249 (N.D. 1999) (rejecting argument that award of damages encompasses settlement amount received by plaintiff because

settlement dollars are estimate of liability no reflective of damages alone); Washburn v. Beatt Equipment Company, 840 P.2d 860 (Wa. 1992) (holding that settling defendants simply cannot be joint and severally liable and therefore there can be no set off of settlement amounts); Domingue v. Luke Fruge, Inc., 379 So.2d 490 (La.Ct.App. 1979) (benefit of advantageous settlement should not inure to defendant who refuses to settle and defendant should be prepared to accept benefits and burdens of decision); Fidelholtz v. Peller, 690 N.E.2d 502, 506 (Ohio 1998) (if General Assembly had intended to require automatic setoff without regard to finding of liability, it could have used words to effect of "named defendant" rather than "liable in tort"); Glenn v. Fleming, 732 P.2d 750, 730 (Kan. 1987) (expressly rejecting rationale of Restatement (Second) of Torts, § 885(3) (1977) in comparative fault jurisdictions).

Prior to Florida's adoption of § 768.81, Florida did follow the "prevailing view." Fabre, supra; also see Lambert v. Nationwide Mutual Insurance Company, 456 So.2d 517, at 518-519 (Fla. 1st DCA 1984) in which, prior to the adoption of § 768.81, the First DCA espoused the policy in favor of single recovery quoting extensively from the North Dakota case, Levi v. Montgomery, 120 N.W.2d 383 (N.D. 1963). When the State of Florida adopted § 768.81 in 1986, however, the policy that each tortfeasor should pay only his percentage of fault took precedence over the policy limiting a plaintiff to a single

recovery as asserted in Lambert and in the lower court's majority opinion here. Fabre, supra.; Wells, supra.

The same shift in policy has occurred in numerous states that have adopted the comparative fault doctrine and modified joint and several liability. For example, in Tennessee, prior to Tennessee's adoption of comparative fault, Tennessee's setoff statutes (§ 29-11-105, Tenn. Code) (enacted as an element of the Uniform Contribution Among Tortfeasors Act), required settlements to be setoff from any judgment. See Rosenbaum v. First American National Bank of Nashville, 690 S.W.2d 873 (Tenn. Ct. App. 1985). After Tennessee adopted the comparative fault statute, its Supreme Court held that when a non-settling defendant was found 90% at fault, the plaintiff 10% at fault and the settling defendant 0% at fault, the setoff statutes did not apply and the Supreme Court refused to setoff the prior settlement because the non-settling defendant was already only paying for its percentage of fault as determined by the jury. Varner v. Perryman, 969 S.W.2d 410 (Tenn. Ct. App. 1997).

The Iowa Supreme Court also reversed the law of the state following the adoption of comparative negligence, Thomas v. Solburg, 442 NW2d 73 at 77 (Iowa 1989) (because system of comparative fault permits allocation of liability, "settlement does not affect the amount of harm caused by the remaining defendants and likewise should not affect their liability.") Accordingly, the non-settling defendant was not entitled to a pro

tanto credit for settlement proceeds paid by the plaintiff. The language of the setoff statute, Section 668.7, Iowa Code, read in conjunction with the comparative fault statute, Section 668.3, Iowa Code, meant that "non-settling defendants are not to have any of their liability discharged because a plaintiff makes a good settlement." Thomas, supra at 76. (Emphasis supplied).

Perhaps the most compelling reversal occurred in the State of North Dakota. The decision of that state's Supreme Court in Levi, has factored prominently in the analysis of this issue both in this state prior to the adoption of § 768.81 and in other non-comparative fault jurisdictions where the former "prevailing view" has been applied. See, e.g. Lambert, 456 So.2d at 518-519; Ex Parte Goldsen, 2000 Ala. Lexis 349 (Ala. 2000) (rejecting view disallowing setoff largely because Alabama has not yet adopted comparative fault). Subsequent to Levi, the doctrine of comparative fault was adopted by the Assembly of North Dakota. In this context, the North Dakota Supreme Court held that the correct calculation for setoff is the equitable portion of fault assigned to the settling defendant and not the amount paid for the release. Nelson v. Johnson, 588 N.W.2d 246 (N.D. 1999). See also, Bartles v. City of Williston, 276 N.W.2d 113 (N.D. 1979) (holding that comparative fault statute impliedly repealed setoff statute language referring to amount of setoff and replaced it with language permitting reduction equal to the relative degree of fault attributable to the released defendants).

The only comparative fault jurisdiction allowing a setoff where the settling defendant was found to have no liability is California. The majority's reliance on California, however, is misplaced. The California comparative fault statute, unlike Florida, only abrogates joint and several liability for non-economic damages.⁴ Because the statute does not address economic damages, California retains joint and several liability for all economic damages. In addition, although the "California setoff statutes are 'not unlike those of Florida,'" (Schnepel, at App. 11), the California setoff statute does contain a glaring difference: the statute permits a setoff where a release is given

⁴Cal. Civ. Code § 1431.2 provides:

(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

(b) (1) For purposes of this section, the term "economic damages" means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.

(b) (2) For the purpose of this section, the term "non-economic damages" means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.

to one "claimed to be liable for the same tort." Cal. Civ. Code Section 877.2.⁵ The California Supreme court specifically relied on this language to apply the setoff statutes, without regard to the settling defendant's apportioned fault, because the settling defendants were claimed to be liable. McComber v. Wells, 72 Cal. App.4th 512 (Cal. Ct. App. 1999). The Florida setoff statutes contain no such language, and the California holding has no application here.

The lower court's reliance on Restatement (Second) of Torts, Section 885 and Prosser's evaluation of the Section 885 is also

⁵Cal. Civ. Code § 877 provides:

Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it shall have the following effect:

(a) It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater.

(b) It shall discharge the party to whom it is given from all liability for any contribution to any other parties.

(c) This section shall not apply to co-obligors who have expressly agreed in writing to an apportionment of liability for losses or claims among themselves.

(d) This section shall not apply to a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment given to a co-obligor on an alleged contract debt where the contract was made prior to January 1, 1988.

misplaced. (Schnepel, at App. 11). The lower court needed to look no further than comment A to Section 885 to realize that Section 885(3) does not apply here:

The rules stated in this Section apply only when all the parties are liable for the entire harm. When a number of tortfeasors are liable only for proportionate shares of a harm (see Section 881), the rule does not apply nor does the rule apply when the claims against two persons are based not upon the harm done but on the extent of the wrongdoing of each. Thus when a death statute provides that the claim against the tortfeasor is proportioned to his fault, a discharge of one of several tortfeasors does not discharge the liability of the others; nor does a payment by one diminish the liability of the other unless the statute limits the total amount that can be received on account of the death.

Comment A, Restatement (Second) of Torts, Section 885 (emphasis supplied).

Just as under the death statute example used in comment A, under § 768.81, the negligence of multiple defendants can now be apportioned by the jury and the rules stated in Section 885 do not apply.

The error in the lower court's opinion is evidenced by the following statement from its opinion:

"If, moreover, Glock had underestimated its liability (and secured Mr. Gouty's release in exchange for "underpayment"), Glock would have benefitted at Mr. Schnepel's expense because he would have become responsible for more than his share of the economic damages ... a certain symmetry thus argues in favor of the result we reach today."

(Schnepel, at App. 12).

In this scenario, however, Schnepel could never become responsible for more than his share of the economic damages because he was found 100% at fault and thus responsible for 100% of the damages. As a result, Glock's settlement, no matter in what amount, could never be considered at the expense of Schnepel. Thus, the "certain symmetry" referenced by the majority to support its conclusion simply does not exist.

Nor is the majority's statement - that regardless of the result Mr. Gouty could expect full recovery of economic damages (Schnepel, at App. 12) - accurate. If Gouty had settled with Glock for \$10,000 and had been found 40%⁶ at fault, Glock 30% at fault and Schnepel 30% at fault with total damages of \$250,000, 50% of which were economic, then Schnepel would have no joint and several liability and would have responsibility for only \$75,000; \$37,500 of which would have been for economic damages. Mr. Gouty would have been entitled to the same amount of economic damages from Glock, but because of the settlement would have received only \$5,000 in economic damages from Glock; not the full amount of economic damages. Because it is Mr. Gouty who risked the disadvantageous settlement, the "symmetry" requires any advantage to also be his. Varner, supra at 413.

Among those jurisdictions that have adopted statutory comparative fault and modified or abolished joint and several

⁶The stipulation that Gouty was fault free was not signed by Schnepel until after the Glock settlement.

liability, the "prevailing view" rejects setoff under the instant scenario. Such view is consistent with the clear statutory language of § 768.81, the setoff statutes and this court's interpretation of those statutes in Conley and Wells to not allow setoff where the jury finds no joint and several liability.

C. THE STATUTORY PURPOSE, EQUITIES AND FLORIDA'S PUBLIC POLICY REQUIRE THAT NO SETOFF APPLY UNDER THE PRESENT SCENARIO.

The purpose of § 768.81 is not to limit the plaintiff's recovery but, by the statute's clear terms, to have judgment entered "against each party liable on the basis of that party's percentage of fault." Fabre supra at 1185. (Emphasis supplied). In this case, that purpose was met: Schnepel was found 100% at fault and the trial court required him to pay 100% of the damages.

Via § 768.81, Wells, and Fabre, the single recovery policy for economic damages, relied on by the court below, has been overridden by the policy that each defendant should be responsible for only that defendant's share of fault. In rejecting the single recovery rules, this Court has quoted the Arizona courts:

'the single-recovery rule, which historically permitted defendants a credit for amounts paid in settlement by other defendants to prevent a plaintiff's excess recovery, was adopted when courts could not allocate liability among defendants; a settling defendant could only offer to pay for a

plaintiff's entire, indivisible injury. Now, the respective shares of the liability of multiple defendants can be determined. Each defendant may settle his portion and such settlement neither affects the amount of harm caused by the remaining defendants nor the liability. The settling defendant simply is paid an agreed amount to "buy his peace" and the non-settling defendant has no right to complain that the settling defendant paid too much' (cites omitted)

The court also rejected the suggestion that the plaintiff will receive a 'windfall' if the total amount paid in settlement is not setoff:

'Settlement dollars are not synonymous with damages but merely a contractual estimate of the settling tortfeasor's liability; they include not only damages but also the value of avoiding the risk and expense of trial. Given these components of settlements, "there is no conceptual inconsistency in allowing a plaintiff to recover more from a settlement from a settlement or partial settlement than he could receive as damages.'"

Wells, supra at 252.

Furthermore, because Schnepel was 100% liable and because Glock's release did not release Schnepel, Glock has no right to contribution, subrogation, or indemnity against Schnepel. See Dade County School Board, supra. As a result, Schnepel can claim no injury, prejudice or adverse effect from the Glock settlement.

As Judge Van Nortwick asserts in his dissent:

obviously, either Gouty or Schnepel must benefit from the settlement with Glock. Logically, it would seem preferable to have the person who was injured and who successfully negotiated the settlement, rather than a tortfeasor, obtain the benefit. See Rogers v. Spady, 147 N.J. Super. 274, 278, 371 A.2d 285, 288 (N.J. Super. App. Div.

1977), superseded by statute as stated in Kiss v. Jacob, 268 N.J. Super. 235, 633 A.2d 544 (N.J. Super. App. Div. 1993) (“[I]deally a claimant should not receive but more than one satisfaction for a wrong, [but] when the situation arises in which additional enrichment must necessarily flow to someone, the more just result is to have the person wronged receive the benefit and not a wrongdoer.”); and Berg v. Footer, 673 A.2d 1244, 1256 (D.C. 1996) (“a plaintiff’s good fortune in striking a favorable bargain with one defendant give [another] defendant no claim to pay less”); see also Goldsen v. Simpson, ____ So.2d ____, 2000 WL 432856 (Ala. Civ. App. 1999).⁷

(Schnepel, at App. 15-16).

The Arizona courts that have adopted comparative fault agree with Judge Van Nortwick and submit compelling policy reasons for their agreement:

“...we believe that 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. Had plaintiff made a disadvantageous settlement, she would have born that consequence because her recovery against [the non-settling defendant] would have been limited to [the amount of the non-settling defendant’s fault]. At a minimum, symmetry requires that if the disadvantage of settlement is hers, so ought the advantage be. Beyond that, we see no reason why a non-settling tortfeasor ought to escape the liability that is his by reason of the faulty assessment of probabilities by a settling tortfeasor. Indeed, such a rule might well discourage settlement by the last tortfeasor

⁷The Goldsen opinion quoted by the majority and referred to by Judge Van Nortwick here was subsequently reversed by the Alabama Supreme Court because Alabama had not adopted comparative fault. Ex Parte Goldsen, 2000 Ala. Lexis 349 (Ala. 2000).

on the reasoning that his exposure is limited to his degree of fault and even that might be reduced by reason of pre-existing settlements."

Varner, supra at 413, citing Roland v. Bernstein, 828 P.2d 1237 at 1239 (Ariz. Ct. App. 1992).

In fact, if Schnepel receives a setoff here, he will pay less than his share of damages, contrary to the express intent of § 768.81. Such a result would encourage the intransigent defendant not to settle and would discourage the plaintiff from settling with one of the multiple defendants, contrary to this State's policy encouraging the facilitation of settlement:

[f]urther, requiring a setoff under these circumstances clearly works to discourage a plaintiff from partially settling a case with less than all of several defendants who have potential joint and several liability. Such a result is contrary to the public policy of Florida to encourage settlements. See JFK Medical Center, Inc. v. Price, 647 So.2d 833, 834 (Fla. 1994).

(Schnepel, at App. 16, dissent of Van Nortwick, J,).

If the Glock settlement is a windfall, then the Court must determine who would more properly be entitled to it: Schnepel, who, according to the jury, was 100% at fault, and now seeks to pay less than his share (100%) of the damages, or the injured plaintiff, who had no fault in the matter, but who was able to resolve his potential claim against Glock without the necessity of trial?

Because Schnepel was found 100% liable no joint and several liability exists, no setoff should be applied and the certified

question should be answered in the negative.

CONCLUSION

Because, at trial, the jury found Schnepel 100% liable and Glock 0% liable, no joint and several liability exists under § 768.81(3). Because the setoff statutes do not apply in the absence of joint and several liability under § 768.81, the trial court entered judgment against Schnepel for 100% of the damages. The lower court's opinion seeks to judicially create an additional exception to Florida's abrogation of joint and several liability that was not intended by § 768.81, or this court's interpretation of that statute. In fact, the lower court's ruling would contradict the express terms of § 768.81(3), the setoff statutes, and the holdings of this court and would run counter to the vast majority of jurisdictions that, having adopted comparative fault and some form of tort reform, have rejected setoff under the present scenario. To rule otherwise would allow Schnepel, as the only tortfeasor, found wholly at fault for this action, to pay less than the damages attributed to his fault pursuant to § 768.81, in direct contradiction to the express terms of § 768.81.

Accordingly, Judge Van Nortwick's dissenting opinion should be adopted, the certified question should be answered in the negative, and the trial court's ruling should be reinstated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one copy of the foregoing Petitioner's Brief has been furnished to Harris Brown, Esquire, Brown, Obringer, et al., 12 East Bay Street, Jacksonville, FL 32202 by hand delivery this ____ day of October, 2000 and also certify that this document is formatted in the Courier 12 font.

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