

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-33

PHILIP C. D'ANGELO, M.D. and
PHILIP C. D'ANGELO, M.D., P.A.,

Petitioners,

v.

JOHN J. FITZMAURICE and
CAROLE M. FITZMAURICE,

Respondents.

**AMICUS CURIAE BRIEF OF
FLORIDA DEFENSE LAWYERS ASSOCIATION
(Filed By Consent Of All Parties)**

On Discretionary Review from a
Decision of the District Court of Appeal,
Second District of Florida

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**STATEMENT OF IDENTITY OF
AMICUS CURIAE AND INTEREST IN THE CASE**

Florida Defense Lawyers Association (“FDLA”) is a statewide organization of defense attorneys consisting of over 1,000 members. FDLA has been actively involved in amicus briefing in important appellate cases with statewide impact.

This case has the potential to carry statewide impact, as recognized by the Second District Court of Appeal in certifying the following question as one of great public importance:

Is it appropriate to set off against the damages portion of an award against one tortfeasor in a medical malpractice action the amount recovered from settlement from another for the same incident causing the injury where the settling alleged tortfeasor was not included in the verdict form?

D’Angelo v. Fitzmaurice, 832 So. 2d 135 (Fla. 2d DCA 2002).¹

The certified question should be modified to encompass not just the cash award received, but the full value of the settlement (i.e., the part of the settlement which was attributable to forgiven medical bills should be included). Accordingly, the FDLA respectfully proposes that the certified question should be modified as follows:

Is it appropriate to set off against the damages portion of an award against one tortfeasor in a medical malpractice action the full value of the settlement from another for the same incident causing the injury where the settling alleged tortfeasor was not included on the verdict form?

¹ The Court has jurisdiction. See art. V, § 3(b)(4), Fla. Const.

SUMMARY OF ARGUMENT

The certified question, as modified, should be answered in the affirmative.

I. This case is governed by the set off statutes, which were enacted to prevent double or overlapping recovery for the same injury. Plaintiffs have already been partially compensated for the same injuries by the settling tortfeasor. Therefore, the final judgment should be reduced by the amount they have already received.

Contrary to the Second District Court of Appeal's decision, Gouty v. Schnepel, 795 So. 2d 959 (Fla. 2001), does not mandate a different result. Both Gouty and Wells v. Tallahassee Memorial Regional Medical Center, Inc., 659 So. 2d 249 (Fla. 1995), upon which Gouty is based, implicitly abrogated the set off statutes in multiple tortfeasor cases based on its determination that the statutes presuppose a finding of joint and several liability. While the set off statutes obviously presuppose more than one party responsible for the injury, they do not presuppose a specific finding of joint and several liability. Such decision to implicitly abrogate the set off statutes was made without legislative authority.

Further, even if Wells and Gouty were properly decided, they are not controlling because both are specifically limited to cases where the jury is specifically asked to apportion liability among multiple tortfeasors. In contrast, the jury in this case was not charged with that task. Accordingly, neither decision is applicable.

II. Should this Court determine that section 768.81(3), and not the set off statutes, is applicable, Defendant is entitled to set off the economic damage award pursuant to the formula set forth in Wells.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT DEFENDANT WAS NOT ENTITLED TO SET OFF THE FULL VALUE OF THE SETTLEMENT AGAINST THE JURY AWARD.

A. This Case Is Controlled By The Set Off Statutes.

Florida law regarding set off is delineated in sections 46.015(2)², 768.041(2)³ and 768.31(5),⁴Florida Statutes. Distilled to their most essential components, these three statutes provide that when a defendant establishes that the plaintiff has settled with another in partial satisfaction for the same injury, the court shall reduce the amount of any judgment by the amount of the settlement.

² 46.015. Release of parties

(2) At trial, if any person 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 set off this amount from the amount of any judgment to which the plaintiff would be otherwise entitled at the time of rendering judgment.

³ 768.041. Release or covenant not to sue

(2) At trial, if any defendant shows the court that the plaintiff . . . 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 would be otherwise entitled at the time of rendering judgment and enter judgment accordingly.

⁴ 768.31. Contribution among tortfeasors

(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 . . . :

(a) It does not discharge any of the other tortfeasors from liability for the injury . . . 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

These statutes are based on Florida's long standing adherence to the prevention of "double recovery" for the same injury. As this Court recognized in Devlin v. McMannis, 231 So. 2d 194, 196 (Fla. 1970), set off statutes were enacted "to prevent duplicate or overlapping compensation for identical damages." See also Dionese v. City of West Palm Beach, 500 So. 2d 1347, 1349-50 (Fla. 1987) (total amount of settlement must be set off from entire verdict); Builder's Square, Inc. v. Shaw, 755 So. 2d 721, 725 (Fla. 4th DCA 1999)(where damages in spoliation claim are derivative of damages in products liability claim, amount of settlement in products action should be set off against award in spoliation action); Mendez v. Simon, 739 So. 2d 101, 103 (Fla. 3d DCA 1999) (reducing jury's verdict by settlement amounts received from settling tortfeasor, reasoning in part that set off prevents overlapping compensation); Baudo v. Bon Secours Hosp., 684 So. 2d 211, 214 (Fla. 3d DCA 1996) (litigating tortfeasor "entitled to a credit for any amounts paid to the claimant [in settlement] for the [same] injury"); Nauman v. Eason, 572 So. 2d 982 (Fla. 1st DCA 1990) (wrongful death action remanded for setoff of judgment against doctor by entire settlement proceeds received from hospital); Kay v. Bricker, 485 So. 2d 486, 487 (Fla. 3d DCA 1986) (plaintiff could not recover an amount which would exceed amount of proven damages; defendant entitled to set off against jury award amount paid by original tortfeasor in satisfaction of same claim; set off statutes were designed to prevent duplicate compensation for identical damages).⁵

⁵ Florida's policy against duplicate compensation is also reflected in other statutes providing for set offs and cases interpreting such statutes. See, e.g., Rollins v. Pizzarelli, 761 So. 2d 294, 300 (Fla. 2000) ("To prevent the injured persons from receiving double recovery, the legislature has provided that any PIP benefits they have received from their insurers will be set off from the amount they are entitled to recover from the tortfeasors."); Orlando Reg'l Healthcare Sys. v. Tiznado, 804 So. 2d 1267, 1269 (Fla. 5th DCA 2002)(under section 440.39, employer entitled to set off settlement

Here, after the jury rendered its verdict in favor of Plaintiffs, Defendant presented the court with evidence of the settlement between Charlotte Regional Medical Center (“Hospital”) and Plaintiffs. Opting to not apply the applicable set off statutes, the trial court did not reduce the jury award by the full value of the settlement. This error was compounded when the Second District Court of Appeal, without acknowledging the set off statutes, held that Defendant was not entitled to a set off in any amount.

As the foregoing authorities made clear, a reduction of the settlement amounts is appropriate in this case, however. There can be no dispute that the hospital’s settlement award was paid in partial satisfaction for the same injury. To hold otherwise, and enter judgment in the full amount of the verdict, would run contrary to the purpose of the set off statutes and would frustrate a fundamental legal tenet—the purpose of tort recovery is to compensate, not enrich, an injured party.⁶

proceeds obtained by employee from third party tortfeasor from worker’s compensation benefits to preserve statutory purpose of preventing double recovery for same accident); Humana Health Plans v. Lawton, 675 So. 2d 1382, 1384 (Fla. 5th DCA 1996) (“[W]here full recovery has been made by the insured, who is thus ‘made whole,’ any payments to the insured over and above his actual damages may be viewed as a ‘double recovery. . . .’”). Cf. Chester v. Doig, No. SC01-348, 2003 WL 252142, 28 Fla. L. Weekly S126 (Fla. Feb. 6, 2003) (arbitration award not subject to set off by settlement amount where statute did not authorize such).

⁶ In any event, Plaintiffs should not be able to recover for losses they have not and will not incur. Here, as the Second District recognized, the economic damage award clearly included the amount of the forgiven medical bills. See D’Angelo, 832 So. 2d at 137 n.2. The district court further noted that although it believed that allowing recovery for bills that had been written off would result in a windfall, it was not aware of any authority that would permit it to reduce the economic damage award by the amount of the forgiven medical expenses. See id. Such authority does exist, however. See, e.g., Horton v. Channing, 698 So. 2d 865, 869 (Fla. 1st DCA 1997) (plaintiff not entitled to recover damages for amounts plaintiff will not have to pay); Hollins v.

Applying the set off statutes in this case would reduce the award for economic damages (\$128,732.81) by that portion of the settlement attributable to economic damages (\$88,603.18), resulting in an economic damage award totaling \$40,159.63. The noneconomic damage award (\$250,000) should be reduced by the undifferentiated settlement amount (\$200,000), resulting in an award for noneconomic damages totaling \$50,000.⁷ Accordingly, pursuant to the set off statutes, judgment should be entered in Plaintiffs' favor in the amount of \$90,159.63.

B. Gouty and Wells Do Not Require A Different Result.

The Second District's decision that Defendant was not entitled to any reduction was wholly based on its determination that Gouty v. Schnepel, 795 So. 2d 959 (Fla. 2001), which is premised on Wells v. Tallahassee Memorial Regional Medical Center, Inc., 659 So. 2d 249 (Fla. 1995), was controlling. Neither decision is applicable to this case, however.

Perry, 582 So. 2d 786, 786-87 (Fla. 5th DCA 1991) (plaintiff not entitled to recover from hospital economic damages in excess of medical expenses); accord Hanif v. Housing Auth., 200 Cal. App. 3d 635, 639 (1988)(plaintiff not entitled to recover medical expenses that hospital wrote off); Moorehead v. Crozer Chester Med. Ctr., 765 A.2d 786, 790-91 (Pa. 2001)(awarding plaintiff medical expenses that were written off would provide her with a windfall and violate fundamental tenets of just compensation); State Farm Mut. Auto. Ins. v. Bowers, 500 S.E.2d 212, 214 (Va. 1998)(plaintiff not entitled to recover amount written off by providers); Mitchell v. Hayes, 72 F. Supp. 2d 635, 637 (W.D. Va. 1999)(written off medical expenses are inadmissible because they do not have to be paid).

⁷ The jury awarded \$200,000 and \$50,000 to Mr. and Mrs. Fitzmaurice, respectively, for noneconomic damages. Because the cash settlement was for \$200,000 (undifferentiated), the full amount of the noneconomic damage awards (\$250,000) must be reduced by the full amount of the undifferentiated \$200,000 settlement. See, e.g., Dionese, 500 So. 2d at 1348 (fairness to the parties requires the court to ignore a private unilateral apportionment of settlement proceeds among the settling plaintiffs); Anderson v. Ewing, 768 So. 2d 1161 (Fla. 4th DCA 2000) (same).

In Wells, plaintiff settled with two of three tortfeasors. See id. at 250. At trial, the jury was asked to apportion liability amongst all three alleged tortfeasors pursuant to Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993). See id. at 250 n.1. The jury found all three tortfeasors liable and apportioned liability among them. See id. at 250. The trial court declined to set off the final judgment by the settlement proceeds. See id. at 253.

On review, this Court held that, with respect to noneconomic damages, the “litigating” defendant could not set off the jury award by the settlement proceeds. See id. The Court’s holding as to noneconomic damages was based on its determination that section 768.81(3), Florida Statutes (1989),⁸ eliminated joint and several liability for noneconomic damages. See id. at 252-53. Because the jury was asked to apportion fault among all three tortfeasors, section 768.81(3), dealing with apportionment of damages, was applicable to the case. Thus, in cases where section 768.81(3) applies, a litigating defendant does not have a right to a set off for noneconomic damages. See id.

However, with respect to economic damages, this Court held that the final judgment should have been reduced as required by the set off statutes. See id. (“Of course, the set off statutes do apply to economic damages for which parties continue to be subject to joint and several liability.”).

In Gouty, this Court was again faced with a case where a settling defendant was placed on the verdict form and the jury was asked to apportion fault among settling and litigating tortfeasors, rendering section 768.31(3) applicable. See 795 So. 2d at

⁸ The 1989 version of 768.81(3), addressed in Wells, contains the same relevant language as the 1997 version applicable in this case. See Basel v. McFarland & Sons, Inc., 815 So. 2d 687 (Fla. 5th DCA 2002) (applicable version of 768.81 is that in effect when cause of action accrued).

960. Unlike Wells, where the jury apportioned fault to the settling nonparty, in Gouty the jury found the litigating defendant 100% liable and the settling nonparty 0% liable. See id. The trial court declined to set off any settlement proceeds. See id. This Court agreed, reasoning that pursuant to its decision in Wells and its interpretation of section 768.81, a defendant is not entitled to set off the settlement proceeds apportionable to economic damages where “the jury expressly rejected a finding that [the settling defendant] was a joint tortfeasor.” Id. at 966 (emphasis supplied). That is, the Court held that the set off statutes were “inapplicable to a settling defendant who is found to have no liability.” Id. at 961.

The Court based its holding in Wells and Gouty on the determination that the set off statutes presuppose the existence of multiple defendants jointly liable for the same damages. See Gouty, 795 So. 2d at 963; Wells, 659 So. 2d at 249. While the set off statutes obviously presuppose more than one party responsible for the injury, they do not presuppose a specific finding of joint and several liability. See, e.g., § 46.015, Fla. Stat. (“(1) A written covenant not to sue or release of a person who is or may be jointly and severally liable . . . shall not release . . . any other person (2) . . . if any person shows . . . that the plaintiff . . . has delivered a written release . . . to any person in partial satisfaction of the damages sued for, the court shall set off this amount)(emphasis added); § 768.041, Fla. Stat. (similar language in (2)).

The obvious implication of Wells and Gouty is that this Court abrogated the set off statutes in favor of section 768.81 in multiple tortfeasor cases. At the time Wells was decided, the set off statutes and 768.81 had co-existed for approximately twenty years. As Justice Anstead noted, “the legislature left the contribution scheme described above largely intact when it adopted section 768.81(3).” Wells, 659 So. 2d at 256 (Anstead, J., specially concurring). He went on to state: “I have some concern

that the legislature has not acted to express or clarify its intent as to the continuing application of the provision of [the set off statutes], in view of the enactment of 768.81(3).” Id. at 255. Nevertheless, absent legislative authority, this Court decided to implicitly abrogate the set off statutes: “The underlying purpose of the contribution scheme and [the set off statutes] is simply no longer served in a [multiple tortfeasor] case. This is the essence of our decision today.” Id. at 256.

Ultimately, whether the legislature intended to abolish the contribution and set off scheme is a question, and a task, for the legislature, not the courts. See id. at 256 (“It would be far better, however, since this is an area in which the legislature has broad discretion and authority, and has been very active, for the legislature to expressly indicate the limitations on the continuing use of the contribution scheme, including the set off provisions”).

Even assuming, however, that Wells and Gouty were properly decided, they are inapplicable to this case. Critical to the conclusions reached in Wells and Gouty, is the fact that the jury was specifically charged with the task of apportioning fault pursuant to section 768.81. Indeed, the certified question in Wells specifies that the set off issue is being addressed in the context of a “case tried under section 768.81(3).” Wells, 659 So. 2d at 250. This important distinction was recognized by Justice Wells who noted the following at the outset of his specially concurring opinion (joined by Justice Kogan):

I concur with the majority’s reconciliation of . . . [the set off statutes] in this case in which the parties stipulated that the settling defendants would remain on the verdict form although Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993), had not yet been decided. It is my view that the majority’s interpretation of these statutes is correct in cases in which the jury is instructed to apportion fault in accordance with

Fabre's interpretation of section 768.81(3).

Id. at 255 (emphasis added). Similarly, in Gouty, the Court specifically held that the set off statutes were inapplicable because the jury “expressly rejected” the argument that the settling tortfeasor was liable. 795 So. 2d at 966.

The litigating defendant in Wells and Gouty elected to place the settling defendant on the verdict form, presumably for purposes of reducing its own liability. This decision triggered application of section 768.81(3).

In contrast to Wells and Gouty, the litigating defendant in this case elected to not place the settling tortfeasor on the verdict form. Importantly, Florida law does not require a defendant to place all parties potentiality at fault on the verdict form — Fabre provisions remain optional. See, e.g., Nash v. Wells Fargo Guard Servs., 678 So. 2d 1262 (Fla. 1996) (inclusion of Fabre defendant is not automatic); W.R. Grace & Co. v. Dougherty, 636 So. 2d 746, 748 (Fla. 2d DCA), rev. denied, 645 So. 2d 457 (Fla. 1994) (same). Because the jury was never asked to, and never did, apportion liability, section 768.81(3) does not apply here. A holding to the contrary would make the notion of a Fabre defendant mandatory.

II. SHOULD THIS COURT DECIDE THAT SECTION 768.81(3) IS APPLICABLE TO THIS CASE, THEN, UNDER WELLS, DEFENDANT IS ENTITLED TO SET OFF THE SETTLEMENT VALUE FROM THE ECONOMIC DAMAGE AWARD.

Wells was clear that economic damages are subject to the set off statutes. 659 So. 2d at 253. The sole reason why Gouty declined to set off the settlement award from the economic damages was because the jury specifically found the settling defendant was 0% liable (i.e., a specific finding that settling defendant was not a joint tortfeasor). So clear was Gouty on this point that the Court concluded its opinion by noting that the jury had “expressly rejected a finding that [the settling tortfeasor] was a joint tortfeasor.” 795 So. 2d at 966.

In the instant case, the jury made no such determination. Thus, if the Court determines that this case is controlled by section 768.81(3), Gouty remains inapplicable because there was no express finding that Defendant and the Hospital were not joint tortfeasors. Accordingly, the judgment against Defendant must be recalculated to comport with the formula established in Wells.⁹

⁹ (1) economic damages (\$128,732.81) / total jury award (\$378,738.81) = percentage of jury’s award allocated to economic damages (33.989%).

(2) settlements (\$288,603.18) x percentage of jury’s award allocated to economic damages (33.989%) = portion of settlements that nonsettling defendant is entitled to set off (\$98,093).

(3) economic damages assessed by jury (\$128,732.71) – amount of economic damages Defendant is entitled to set off (\$98,093) = economic damages for which Defendant is responsible (\$30,639.81).

(4) noneconomic damages (\$250,000) + economic damages for which Defendant is responsible (\$30,639.81) = total amount of judgment against Defendant

CONCLUSION

Based on the foregoing facts and authorities, FDLA submits that the certified question, as modified, should be answered in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on February ____, 2003, to: **Weldon E. Brennan, Esquire**, Wagner, Vaughan & McLaughlin, P.A., *Attorneys for Appellees*, 601 Bayshore Boulevard, Tampa, Florida 33606; **Joel D. Eaton, Esquire**, Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., *Attorneys for Appellees*, 25 West Flagler Street, Suite 800, Miami, Florida 33130; and **Esther E. Galicia, Esquire**, George, Hartz, Lundeen, Fulmer, Johnstone, King & Stevens, *Attorneys for Appellants*, 3rd Floor – Justice Building, 524 South Andrews Avenue, Fort Lauderdale, Florida 33301.

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CERTIFICATE OF COMPLIANCE

The type style utilized in this brief is 14 point Times New Roman proportionately spaced.

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