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Tort Law: Pre-Trial Settlements and Post-Trial Liability

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TORT LAW: PRE-TRIAL SETTLEMENTS AND POST-TRIAL LIABILITY

Wells v. Tallahassee Memorial Regional Medical Center, 659 So. 2d 249 (Fla. 1995)

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The petitioner, Joyce Wells, filed suit against the respondent, Tallahassee Memorial Regional Medical Center (TMRMC), and four other defendants for the wrongful death of her husband.[1] Prior to trial, petitioner reached a settlement with the four other defendants, leaving respondent as the sole defendant going to trial.[2] However, at the close of the case, the names of the settling defendants appeared on the verdict form and the jury was instructed to apportion fault among all the original defendants.[3] The jury returned a verdict for petitioner, assessing damages at $573,853 and finding respondent 90% at fault and two of the other four defendants a total of 10% at fault.[4] The trial court awarded petitioner 90% of this sum, plus costs, and less social security benefits.[5]

Respondent moved to reduce the judgment by setting off the total amount paid by the settling defendants.[6] The trial court rejected respondent's argument and denied the requested setoff.[7] The Florida First District Court of Appeal reversed,[8] but certified two questions to the Florida Supreme Court to determine whether, in cases tried under Florida Statutes section 768.81(3), Florida's comparative negligence statute, a non-settling defendant is entitled to setoff based upon sums

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* In honor of Janet Cole Willis.

1. Wells v. Tallahassee Memorial Regional Medical Ctr., 659 So. 2d 249, 250 (Fla. 1995) [hereinafter *Wells II*].

2. *Id.* The total amount of the settlement was $300,000. *Id.*

3. *Id.* at 250 & n.1.

4. *Id.* at 250. The jury found that petitioner suffered $202,853 in economic damages and $371,000 in noneconomic damages. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Tallahassee Memorial Regional Medical Ctr. v. Wells, 634 So. 2d 655, 659-60 (Fla. 1st DCA 1994) [hereinafter *Wells I*]. On appeal, respondent argued that FLA. STAT. §§ 46.015(2), 768.041(2), and 768.31(5) (1991) mandated a setoff in the amount paid by the settling defendants, notwithstanding the abolition of joint and several liability as to noneconomic damages as provided in FLA. STAT. § 768.81 (1991). *Id.* at 656-57, 656 n.4. The appellate court accepted the respondent's argument and found footnote three of Fabre v. Marin, 623 So. 2d 1182, 1186 n.3 (Fla. 1993) [hereinafter *Fabre II*], controlling. *Wells I*, 634 So. 2d at 658.

paid by settling defendants in excess of their apportioned liability and, if so, whether the rule applies equally to both economic and non-economic damages.[9] The Florida Supreme Court reversed and HELD, that the "setoff statutes"[10] do not apply to non-economic damages; with regard to economic damages, the settlement proceeds should be divided between economic and non-economic damages in the same proportion

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9. *Wells I*, 634 So. 2d at 659-60.

10. *Wells II*, 659 So. 2d at 252-53. The statutes that the court refers to as "setoff statutes" are FLA. STAT. §§ 46.015(2), 768.041(2), and 768.31(5) (1989).

Section 46.015 provides, in relevant part:

> (1) 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 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 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.

FLA. STAT. § 46.015(1), (2) (1989).

Section 768.041 provides, in relevant part:

> (1) A release or covenant not to sue as to one tortfeasor for the 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 be otherwise entitled at the time of rendering judgment and enter judgment accordingly . . . .

FLA. STAT. § 768.041(1), (2) (1989).

Section 768.31 provides, in relevant 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 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.

FLA. STAT. § 768.31(5), (5)(a) (1989).

as the jury's award and only that part of the settlement proceeds apportioned to economic damages should be set off against that part of the jury's award apportioned to economic damages.[11]

Historically, Florida courts abided by the doctrine of contributory negligence,[12] which prevented a plaintiff from recovering damages if the plaintiff's negligence was in any way responsible for the accident.[13] Florida courts also recognized the doctrine of joint and several liability,[14] but did not recognize the right of contribution among joint tortfeasors. In 1973, Florida receded from the common law doctrine of contributory negligence and began to equate liability with fault.[15] Two years later, the Florida Supreme Court abolished the rule against contribution among joint tortfeasors.[16]

Although this adoption of contribution among joint tortfeasors eliminated some of the inequities associated with joint and several liability, it failed to provide for situations in which defendants with low percentages of fault were forced to satisfy an entire judgment because other defendants were either insolvent or were not parties to the action.[17] In 1986, the legislature enacted section 768.81(3),[18] which

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11. *Wells II*, 659 So. 2d at 253-54. The jury found the total amount of damages to be $573,853, including $202,853 in economic damages and $371,000 in non-economic damages. *Id.* at 250. The economic damages represented 35.349% of the total award. *Id.* at 254 & n.3. Thus, 35.349% of the $300,000 settlement, or $106,047, is set off against the award for economic damages. *Id.* Respondent was responsible for the full 90% of non-economic damages, or $333,900. *Id.*

12. *Fabre II*, 623 So. 2d at 1184 (citing Smith v. Department of Ins., 507 So. 2d 1080 (Fla. 1987)). Contributory negligence is defined as "conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 65, at 451 (5th ed. 1984).

13. *Fabre II*, 623 So. 2d at 1184 (citing Louisville & Nashville R.R. v. Yniestra, 21 Fla. 700 (1886)); *see* KEETON ET AL., *supra* note 12, § 65, at 451.

14. *Fabre II*, 623 So. 2d at 1184 (citing *Smith*, 507 So. 2d at 1080).

15. Hoffman v. Jones, 280 So. 2d 431, 436 (Fla. 1973). In that case, the court stated: "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." *Id.*

16. Lincenberg v. Issen, 318 So. 2d 386, 391 (Fla. 1975). In *Lincenberg*, the court noted that with the adoption of comparative negligence, there was no longer any justification for denying fault allocation as between negligent defendants. *Id.* The court stated that "it would be undesirable for this court to retain a rule that under a system based on fault, casts the entire burden of a loss for which several may be responsible upon only one of those at fault . . . ." *Id.* The court retained the doctrine of joint and several liability, however, stating that the negligence attributed to the defendants should be apportioned on a pro rata basis without consideration to varying degrees of fault and noting that the defendants remain jointly and severally liable for the entire amount. *Id.* at 393-94.

17. *See, e.g.*, Walt Disney World v. Wood, 515 So. 2d 198, 199 (Fla. 1987). In that case,

abolished the joint and several liability doctrine and adopted the comparative negligence doctrine as to non-economic damages.[19] However, section 768.81(3) created a whole new series of questions for courts to answer, such as how a pre-trial settlement which exceeds the settling defendant's apportioned damages affects the liability of a non-settling defendant.

In 1983, a New Mexico court addressed this very question in *Wilson v. Galt*.[20] In *Wilson*, the parents and the conservator of an infant sued three physicians and a hospital for damages allegedly resulting from negligent treatment and care of the infant.[21] Prior to trial, the plaintiffs settled with the hospital and one of the doctors, and the case proceeded to trial against the other two doctors.[22] The amount paid by the settling defendants exceeded the total amount of damages as determined by the jury.[23] The trial court held that the plaintiffs could not recover any additional amounts, as a matter of law, because the settlement amount already exceeded the total award.[24]

On appeal, the court reviewed existing law, particularly the impact of a recent case abolishing joint and several liability.[25] With the

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the plaintiff, who sustained injuries on a Walt Disney World attraction, was found 14% at fault, her fiance 85% at fault, and Disney 1% at fault. *Id.* at 199. The plaintiff subsequently married her fiance and so the plaintiff was unable to recover from her husband under the doctrine of interspousal tort immunity, *see, e.g., Fabre II*, 623 So. 2d at 1184, and the court entered judgment against Disney for 86% of the damages. *Wood*, 515 So. 2d at 199. The court found *Lincenberg* to be controlling. *Id.* at 200. The court refused to judicially eliminate joint and several liability and therefore approved the decision of the Fourth District Court of Appeal finding Disney responsible for 86% of the damages. *Id.* at 202.

18. FLA. STAT. § 768.81(3) (1991) provides:

> 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 the doctrine of joint and several liability.

FLA. STAT. § 768.81(3) (1989).

19. *See Fabre II*, 623 So. 2d at 1185.

20. 668 P.2d 1104, 1107 (N.M. Ct. App. 1983).

21. *Id.* at 1107.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 1108. The *Wilson* court analyzed the effect of the holding of Bartlett v. New Mexico Welding Supply, Inc., 646 P.2d 579 (N.M. Ct. App. 1982), *cert. denied*, 648 P.2d 794 (N.M. 1982). The *Bartlett* court held that "[j]oint and several liability is not to be retained in

abolition of joint and several liability, the court noted there was no longer any basis for contribution among concurrent tortfeasors.[26] The court addressed the issue of whether non-settling defendants must pay their apportioned share of damages when a plaintiff has already settled with one or more settling defendants for an amount in excess of the total damages.[27] The court held that the most suitable approach is to allow the plaintiff to recover the apportioned damages from each severally-liable defendant without reduction.[28] The court reasoned that this approach would allow settling defendants to buy their peace and would discourage non-settling defendants from taking advantage of the good faith efforts of settling defendants.[29]

In *Espinoza v. Machonga*,[30] a California court also addressed the issue of how a settlement with one defendant affects the amount for which a non-settling defendant is liable.[31] In *Espinoza*, the plaintiff sued a housing authority and another defendant for injuries caused by the shattering of a glass door.[32] Before trial, the plaintiff settled with the housing authority, and the case proceeded against the other defendant.[33] The superior court held that the non-settling defendant was responsible for his full share of non-economic damages without setoff.[34]

The appellate court affirmed the decision, noting that a recent statutory change had abolished joint and several liability as to non-economic damages;[35] therefore, each defendant is solely responsible for

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our pure comparative negligence system . . . ." *Id.* at 585.

26. *Wilson*, 668 P.2d at 1108.

27. *Id.* at 1107.

28. *Id.* at 1109. The court rejected the possibility of reviving the common law rule that the release of one tortfeasor releases all others. *Id.* at 1108. The court also rejected an approach which would allow contribution among concurrent tortfeasors and, therefore, would permit the settling defendant to seek contribution for any amount paid in settlement in excess of the defendant's apportioned damages from other defendants who failed to settle. *Id.* at 1108-09. The court pointed out that "this approach offers little incentive for the injured person to settle with one or fewer than all of the tortfeasors." *Id.* at 1109.

29. *Id.*

30. 11 Cal. Rptr. 2d 498 (Cal. Ct. App. 1992).

31. *Id.* at 500.

32. *Id.* at 499.

33. *Id.* After the housing authority settled with the plaintiff, the case against the other defendant went to judicial arbitration. *Id.*

34. *Id.* at 500.

35. *Id.* at 501. Section 1431.2(a) of the California Civil Code (1986) 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

his or her share of non-economic damages, and non-economic damages are not subject to setoff.[36] With respect to economic damages, the *Espinoza* court allocated the settlement between economic and non-economic damages in the same proportion that the final damage award was allocated between economic and non-economic damages.[37] Then, the court set off only the economic portion of the settlement against the economic portion of the final award for damages.[38]

This issue was not addressed in Florida until the 1993 case of *Fabre v. Marin*,[39] in which the Florida Supreme Court, in dicta, discussed the issue of whether a pre-trial settlement would be setoff against a non-settling defendant's apportioned share of liability.[40] In *Fabre II*, the plaintiff alleged that she sustained injuries when the car in which she was a passenger was cut off by the car driven by Mrs. Fabre and was forced into a guardrail.[41] The defendants requested that the court draft the verdict form so as to include the drivers of both cars,[42] even though the driver of the plaintiff's car was the plaintiff's husband and the plaintiff could not recover from her husband because of the doctrine of interspousal tort immunity.[43] The trial judge denied the request. However, to avoid a retrial if this denial proved erroneous on appeal, the judge submitted the issue of the plaintiff's husband's negligence to the jury for a post-trial determination.[44] The jury found each driver 50% at fault.[45]

On appeal, the issue was whether the liability for non-economic damages should be apportioned on the basis of fault, even though the plaintiff could not recover from her husband.[46] The appellate court

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> 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.

Id. at 500.

36. *Espinoza*, 11 Cal. Rptr. 2d at 504. The court noted that to do otherwise would be to treat the settlement money as if it were paid as a joint liability. *Id.*

37. *See id.* In *Espinoza*, there was no jury award per se. The award amount and the percentages of fault for the housing authority, the other defendant, and the plaintiff himself were determined by judicial arbitration. *Id.* at 499.

38. *Id.* at 504.

39. 623 So. 2d 1182 (Fla. 1993) (*Fabre II*).

40. *Id.* at 1186 n.3.

41. *Id.* at 1183.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

below, in construing Florida's comparative negligence statute,[47] had found that the statute is ambiguous, and had concluded that the legislature intended to apportion liability only among defendants who were present in the lawsuit.[48] The Florida Supreme Court granted review based upon the appellate court's certified conflict with a Fifth District Court of Appeal case.[49] The court quashed the decision of the appellate court and approved the Fifth District Court of Appeal decision, thus allowing the jury to apportion liability among all tortfeasors.[50] In so doing, the court stated that requiring plaintiffs to take defendants as they find them better reflects the legislative intent behind the comparative negligence statute.[51]

Although the *Fabre II* court resolved the issue of the role of non-parties in apportioning damages,[52] it did not resolve the issue of how and when pre-trial settlements will be set off against the damages apportioned to a non-settling defendant. The *Fabre II* court discussed this issue in dicta in a footnote to its opinion.[53] The court suggested that a

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47. Fabre v. Marin, 597 So. 2d 883, 885 (Fla. 3d DCA 1992) [hereinafter *Fabre I*]; *see supra* note 18.

48. *Fabre I*, 597 So. 2d at 885-86. The court below had reasoned that, in abrogating joint and several liability, the court did not intend to prevent a faultless plaintiff from recovering the total amount of damages. *Id.*

49. *Fabre II*, 623 So. 2d at 1183; *see* Messmer v. Teacher's Ins. Co., 588 So. 2d 610, 612 (Fla. 5th DCA 1991) (holding that the purpose of Florida's comparative negligence statute, FLA. STAT. § 768.81(2), was to abrogate joint and several liability completely as to non-economic damages and that, therefore, to exclude from the apportionment of fault as to non-economic damages an entity that is at least partly at fault, merely because the entity is not a party to the action, would be to thwart the intent of the legislature).

50. *Fabre II*, 623 So. 2d at 1186-87.

51. *Id.* at 1186.

52. *See supra* notes 50-51 and accompanying text.

53. *Fabre II*, 623 So. 2d at 1186 n.3. The footnote states:

> 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 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

settlement amount should be set off against the entire amount of damages, not against the non-settling defendant's apportioned share alone.[54] The non-settling defendant would then pay his apportioned share of the damages only to the extent that the total damages, minus the settlement amount, has left that share unpaid.[55]

In the instant case, the appellate court below found footnote three of *Fabre II* to be controlling.[56] The Florida Supreme Court, however, receded from footnote three of *Fabre II*, holding that the setoff provisions[57] do not apply to non-economic damages.[58] The court reasoned that the setoff statutes apply only to situations in which a party is subject to joint and several liability, which would never happen with respect to non-economic damages under the comparative negligence statute.[59] Additionally, the court held that the way to apportion settlement proceeds between economic and non-economic damages is to base the allocation on the jury verdict.[60]

In receding from footnote three of *Fabre II* and announcing the proper application of the comparative negligence statute with respect to the setoff statutes, the court finally provided some guidance as to how settlements will affect subsequent judgments against non-settling defendants. The court's decision reflected a desire to encourage the settlement process and to retain pre-trial settlements as a desirable alternative to pursuing claims to trial.[61] Additionally, the court's decision sought to reconcile the language of Florida's setoff statutes[62] with the language of Florida's comparative negligence statute.[63] In a concurring opinion, Justice Anstead expressed concern as to the continued viability of the setoff statutes in light of the court's interpretation of the comparative negligence statute.[64] Justice Anstead noted that the setoff statutes, which are part of the legislative contribution scheme,

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to $30,000.

Id.

54. *Id.*
55. *Id.*
56. *Wells I*, 634 So. 2d at 658.
57. *See Wells II*, 659 So. 2d at 252-53; *supra* note 10.
58. *Wells II*, 659 So. 2d at 253-54; *see supra* note 11 and accompanying text.
59. *See Wells II*, 659 So. 2d at 253.
60. *Id.* at 254.
61. *See id.* at 252 (quoting Hoch v. Allied Signal, Inc., 29 Cal. Rptr. 2d 615, 624 (Cal. Ct. App. 1994)).
62. *See id.* at 252-53; *supra* note 10.
63. *Wells II*, 659 So. 2d at 252-53.
64. *Id.* at 255-56 (Anstead, J., concurring).

are no longer necessary,[65] thus raising the question as to why the legislature left the contribution scheme intact.[66]

Since the instant court found footnote three of *Fabre II* to be non-controlling,[67] the court instead focused on decisions from other jurisdictions that had already answered the specific questions before the instant court.[68] The court looked both to a California case that quoted *Wilson* and to *Espinoza* in determining whether setoff would be appropriate in cases of several liability.[69] The cases from other jurisdictions upon which the instant court relied persuasively argued that the application of setoff provisions in situations of several liability would actually discourage rather than encourage settlement.[70]

Firstly, if setoff were allowed, the plaintiff would bear the burden of a low settlement, but would not reap the benefit of a high one.[71] Secondly, as the *Wilson* court pointed out, allowing setoff would permit non-settling defendants to take advantage of the good faith efforts of settling defendants.[72] This could result in a non-settling defendant purposely refraining from settlement, hoping that another defendant will settle for an amount greater than the settling defendant's apportioned share because the extra amount will be subtracted from the non-settling defendant's apportioned share.[73]

In contrast, when setoff is disallowed, the plaintiff, rather than the non-settling defendant, is allowed to reap the benefits of a high settlement.[74] This approach permits a plaintiff to weigh the possibility

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65. *Id.* Justice Anstead pointed out that "[s]ince 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." *Id.* at 256.

66. *Id.*

67. *Id.* at 251.

68. *Id.* at 251-52.

69. *Id.* at 252.

70. *Id. See, e.g.,* Hoch v. Allied Signal, Inc., 29 Cal. Rptr. 2d 615, 623 (Cal. Ct. App. 1994) (posing that allowing setoff would require plaintiffs to bear the risk of divergence between the settlement and the apportioned liability without allowing plaintiffs to reap potential benefits from such divergence and would discourage plaintiffs from settling with independently with individual defendants); Neil v. Kavena, 859 P.2d 203, 206 (Ariz. Ct. App. 1993) (noting that awarding non-settling defendants a windfall from favorable settlements is unfair to plaintiffs and would encourage defendants to refrain from settling, by offering a hope of reaping benefits from the plaintiff's settlements with other defendants).

71. *Hoch*, 29 Cal. Rptr. 2d at 624; *Neil*, 859 P.2d at 206.

72. *Wilson*, 668 P.2d at 1109.

73. *See id.*

74. *Hoch*, 29 Cal. Rptr. 2d at 624. The court stated:

> If the settlement was "low," the plaintiff loses; he or she cannot recover the difference in noneconomic damages from the remaining defendants. If the

of settling for a high amount and the certainty of immediate recovery against the possibility of loss.[75] Furthermore, a non-settling defendant contributes nothing to the settlement process and has no equitable claim to the benefits of a high settlement.[76]

Although disallowing setoff will sometimes permit plaintiffs to receive more than the total amount of damages, this approach comports with the notion that settlement dollars represent more than mere damages.[77] The settling tortfeasor, in effect, contracts with the plaintiff to "buy his peace"[78] and avoid the expense of trial.[79] Thus, the plaintiff does not receive a windfall, but instead merely reaps the benefits of a good bargain. Also, it is the plaintiff who bears the risk of recovering less at trial.[80]

Furthermore, the single-recovery rule[81] had its roots in an era in which courts did not understand how to apportion liability among defendants and a plaintiff's injury was considered indivisible.[82] Today,

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> settlement was "high," as here, the plaintiff wins; he or she retains the benefit of the settlement bargain as well as receiving the amounts allocated by the jury to the nonsettling defendants. The nonsettling defendants bear no risk and can reap no benefit from divergence; the settlement does not affect their liability for noneconomic damages.

Id.

The *Hoch* court also advanced another argument as to why the setoff provisions should not apply. *Id.* at 623. The court pointed out that one of the reasons why joint and several liability was abolished was to partially eliminate the "deep pockets rule," which sometimes left a defendant that was only slightly at fault responsible for paying most or all of the damage award. *Id.* Holding each defendant only liable to the degree that each defendant is at fault guards against "deep pocket rule" inequities. *Id.*

75. David Kikel, Comment, *Comparative Negligence, Multiple Parties, and Settlements*, 65 CAL. L. REV. 1264, 1278 (1977). The author notes that allowing the plaintiff to retain the benefits from a high settlement presents the plaintiff with options similar to those presented to the plaintiff injured by a single tortfeasor. *Id.* In those cases, most plaintiffs settle their claims. *Id.* The results should not differ when the plaintiff is faced with multiple tortfeasors. *Id.*

76. *Id.* at 1279 (citing GLANVILLE WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE 152-55 (1951); Arthur Larson, *A Problem in Contribution: The Tortfeasor with an Individual Defense Against the Injured Party*, 1940 WIS. L. REV. 467, 486-91).

77. *See* Kikel, *supra* note 75, at 1279; *Neil*, 859 P.2d at 206.

78. Kikel, *supra* note 75, at 1279.

79. *Neil*, 859 P.2d at 206.

80. *See supra* note 71 and accompanying text.

81. *See Neil*, 859 P.2d at 207. The single-recovery rule credited defendants for the amount paid in settlement to prevent the plaintiff from recovering more than the total amount of damages. *Id.*

82. *See Hoch*, 29 Cal. Rptr. 2d at 625; Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 431 (Tex. 1984).

under comparative negligence statutes,[83] courts routinely determine each defendant's share of liability.[84] Thus, a settlement with one defendant does not change the harm caused by other defendants.[85] Therefore, a settlement with one defendant should not change the liability of other defendants.[86]

Analyzing the alternative approaches to the setoff statutes in relation to the comparative negligence statute further illustrates that the court in the instant case may have followed the most logical method in harmonizing these statutes.[87] The court could have followed the suggestion of Justice Grimes in footnote three of *Fabre II*.[88] Under this method, the "settlement-first" method,[89] the total amount of damages, both economic and non-economic, is reduced by the total amount of settlements paid.[90] Then, the liability of the non-settling defendants is determined by his or her share of fault.[91] This was the method employed by the appellate court below in the instant case.[92] The problem is that the non-settling defendant and not the plaintiff is allowed to reap the benefits of a high settlement.[93]

Alternatively, the court could have first reduced the total amount of damages by the comparative fault of all other parties and nonparties and subtracted the settlement from the reduced amount.[94] Yet, this method, known as the "fault-first" method,[95] results in a double reduction for the plaintiff and adversely affects the plaintiff's right to fair compensation.[96]

Under the method used by the instant court, the non-settling defendant was liable for 90% of the plaintiff's noneconomic damages,

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83. *See, e.g., supra* note 18.

84. *See, e.g., Fabre II*, 623 So. 2d at 1185.

85. *Duncan*, 665 S.W.2d at 431.

86. *Id.*

87. *See* Thomas S. Edwards, Jr. & Sarah H. Sharp, Fabre/Allied-Signal/Dosdourian *Trilogy: Questions Answered, More Created*, FLA. B.J., Apr. 1994, at 22, 28.

88. *Id.* at 27; *see supra* note 53.

89. Edwards & Sharp, *supra* note 87, at 27.

90. *Id.*

91. *Id.*

92. *Wells I*, 634 So. 2d at 659. The jury awarded damages in the amount of $573,853, which, when added to court costs, makes up a sum of $582,853. *Id.* at 659 n.6. Under the method used by the *Wells I* court, the $300,000 settlement and the $17,000 social security offset is subtracted, leaving the sole non-settling defendant with a balance of $265,853. *Id.*

93. *See supra* notes 71-73 and accompanying text.

94. Edwards & Sharp, *supra* note 87, at 27.

95. *Id.*

96. *Id.* Had the instant court employed this method, the court would have reduced the total amount of damages by 10%, the comparative fault of the settling parties. Then, the court would have subtracted the $300,000 settlement from the modified amount.

regardless of the settlement amount.[97] Thus, the plaintiff was able to reap the benefits of a high settlement, the non-settling defendant was not permitted to take advantage of the good faith efforts of the settling defendants, and the non-settling defendant was responsible for its apportioned share of damages, no more and no less. Thus, the instant court made the decision that seemed most equitable. The only remaining question appears to be the one raised by Justice Anstead's concurring opinion with respect to the continued viability of the setoff statutes.[98] However, as Justice Anstead points out, there are limited instances in which these statutes still apply.[99] Specifically, the statutes are still applicable to economic damages since joint and several liability still exists with respect to economic damages.[100]

The instant court's harmonization of the comparative negligence statute with the setoff statutes has finally given some guidance to plaintiffs and defendants wanting to know how pre-trial settlements will affect post-trial apportionment of damages. Given several options, the court chose to follow the rule advanced in other jurisdictions that abolishes joint and several liability.[101] In so doing, the court chose to allow the plaintiff rather than a non-settling defendant to reap the benefit of a high settlement. This decision not only encourages settlement but also conforms to the legislature's decision to abolish joint and several liability.

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97. *Wells II*, 659 So. 2d at 254.

98. *Id.* at 255-56 (Anstead, J., concurring). Indeed, one could argue that by leaving the "setoff statutes" intact, the legislature intended them to have continued application to non-economic damages, as well. In enacting the comparative negligence statute, the legislature might have been merely trying to eliminate situations in which parties with low percentages of fault were forced to pay all or nearly all of the damages. *See also Walt Disney World*, 515 So. 2d at 199 (holding that one defendant, determined by the jury to be 1% at fault, must pay 86% of the full damages awarded). The legislature may not have contemplated disallowing setoff and arguably thereby authorizing a plaintiff to receive a windfall in the event of a settlement with one defendant that is high in relation to the fault later apportioned to the settling defendant at trial.

99. *Wells II*, 659 So. 2d at 256 (Anstead, J., concurring).

100. *Id.* at 253-54.

101. *Id.* at 251-52.