

NO SETOFF WHERE THIRD PARTY DEFENDANT IS NOT  
FOUND LIABLE  
by Ted Babbitt

There is seemingly no end to the appellate interpretations necessary because of the Supreme Court's holding in Fabre v Marin, 623 So.2d 1182 (Fla. 1993). There the Court found that Fla. Stat. 768.81 required that all nonjoined parties who could potentially be liable should be included on the jury form. That case was followed by the Supreme Court in Wells v Tallahassee Memorial Regional Medical Center, 659 So.2d 249 (Fla. 1995) providing a formula by which a defendant found liable by a jury could receive a setoff as a result of the settlement with another party.

What about the situation where a plaintiff settles with one defendant but goes to trial against another defendant and at the trial the nonsettling defendant is found 100% responsible? Is there still a setoff available to the nonsettling defendant? That question was answered in the negative in the case of Gouty v Schnepel, 26 F.L.W. S586 (Fla. Sept. 13, 2001). That case involved a suit against the owner of a gun and the manufacturer of the gun. The plaintiff settled with the manufacturer and went to trial against the gun owner. The jury found the gun owner 100% liable and found no negligence on the part of the manufacturer. The trial court refused to reduce the verdict by the settlement amount and the First District reversed holding that under Wells, supra, the gun owner was entitled to the benefit of a setoff for economic damages based upon the settlement with the manufacturer. The Supreme Court disagreed and reinstated the verdict. The issue was framed by the Court as follows:

The core issue in this case is whether the setoff statutes may be used in circumstances where the jury finds a nonsettling defendant liable for economic damages, but finds that the settling defendant is not liable. Gouty contends that absent a finding of joint and several liability,

the setoff statutes may not be applied to reduce a nonsettling defendant's payment for liability. For the reasons that follow, we agree with Gouty and hold that the setoff statutes are inapplicable to a settling defendant who is found to have no liability.

In this case the defendant argued that the plaintiff was receiving a double recovery because the plaintiff received not only the total amount of the verdict but the amount of the settlement as well. The defendant reasoned that the jury determined, as a matter of law, the value of the case and yet plaintiff received the bonus of the amount received in settlement. The Supreme Court focused, however, not on whether the plaintiff received more than what he was entitled to but rather whether the nonsettling defendant was forced to pay any more than the amount of fault attributed to it. Quoting from the concurring opinion of Justice Anstead in Wells, supra, the Court reasoned:

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. . . . 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 sections 46.015(a), 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.

Justice Pariente, writing for a unanimous Court, points out that since the nonsettling defendant was found 100% liable, the settling defendant could not possibly be a joint tortfeasor and, as such, is not entitled to contribution.

As analyzed by Judge Van Nortwick, our decision in *Wells* was based upon the rationale that the setoff statutes 'presuppose the *existence* of multiple defendants jointly liable for the same damages. . . . Where a defendant is found 100% liable for the plaintiff's damages, the settling defendant who is not found liable cannot be

considered a joint tortfeasor. . . . '[c]ontribution is only available to joint tortfeasors' and [b]ecause DCSB was 100% liable for the injuries to the spectators, the parties were not joint tortfeasors; therefore contribution is not an available option').

This opinion has far reaching consequences. It has the effect of encouraging settlement since it gives an incentive to settle with an initial defendant and gives an equal incentive to a recalcitrant defendant to join in that settlement because of the risk of having to pay the entire judgment.

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