IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,689

PATSY DIONESE and CHARLES DIONESE,

Petitioners,

vs.

CITY OF WEST PALM BEACH, et al.,

Respondents.

BRIEF OF AMICUS CURIAE

FLORIDA POWER & LIGHT COMPANY

ON DISCRETIONARY JURISDICTION
TO REVIEW A DECISION OF THE
DISTRICT COURT OF APPEAL,
FOURTH DISTRICT, CERTIFIED TO BE
OF GREAT PUBLIC IMPORTANCE

Patricia A. Seitz
Nancy E. Swerdlow
STEEL HECTOR & DAVIS
4000 Southeast Financial Center
Miami, Florida 33131-2398
Telephone: (305) 577-2800

Attorneys for Amicus Curiae
Florida Power & Light Company

TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	ii
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE FACTS AND THE CASE	2
CERTIFIED QUESTION	3
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
THE TOTAL AMOUNT OF AN UNDIFFERENTIATED LUMP SUM SETTLEMENT MUST BE SET-OFF AGAINST THE TOTAL VERDICT(S) ENTERED AGAINST ANOTHER JOINT TORT-FEASOR	5
1. Plaintiffs Should Not Be Permitted To Secure Duplicate Compensation For Identical Damages	7
2. A Non-Settling Defendant Has A Legally Recognized Interest In A Fair And Proper Allocation Of Settlement Proceeds	10
3. A Jury's Assessment Of Damages Must Govern Post-Verdict Allocations Of Lump Sum Settlements	12
CONCLUSION	15
CERTIFICATE OF SERVICE	16

TABLE OF CITATIONS

CASES Page(s)

Devlin v. McMannis,
231 So.2d 194 (Fla. 1970) 2, 6, 7, 14

Kay v. Bricker,
485 So.2d 486 (Fla. 3d DCA 1986) 5, 14

Lareau v. Southern Pacific Company,
44 Cal. App. 3d 783, 118 Cal. Rptr. 837
(Ct. App. 1975) 10

Lupton v. Torbey,
548 F.2d 316 (10th Cir. 1977) 9

Madden v. Rodovich,
367 So.2d 1083 (Fla. 4th DCA 1979) 5

Port Royale Apartments v. Delnick,
358 So.2d 269 (Fla. 3d DCA 1978) 5

Scheib v. Florida Sanitarium and Benevolent Association,
759 F.2d 859 (11th Cir. 1985) 9-10

Sobik's Sandwich Shops, Inc. v. Davis,
371 So.2d 709 (Fla. 4th DCA 1979) 12

Wainwright v. Sykes,
433 U.S.72 (1977) 15

CONSTITUTIONAL AND STATUTORY AUTHORITIES

Article 1, Section 22, Fla. Const. 13

Section 768.041(2), Fla. Stat. (1985) 2, 5, 10

Section 768.31, Fla. Stat. (1985) 10

Section 768.31(5), Fla. Stat. (1985) 2, 10

Section 877, Cal. Civ. Code (West) 10

MISCELLANEOUS

Uniform Contribution Among Tort-feasors Act,
Uniform Commissioner's Prefatory Note (1939) .. 12

INTEREST OF AMICUS CURIAE

Florida Power and Light Company ("FPL") has been engaged in the generation, transmission, distribution and sale of electric energy in Florida since 1925. As the largest public utility company in Florida, serving more than 700 communities within 35 counties in the State, FPL has experience with, and an important perspective regarding, the impact of set-off and allocation of undifferentiated lump sum settlements on settling and non-settling joint tort-feasors.

The Court's resolution of the legal and policy issues presented in this case will have an impact far beyond its effect on the immediate parties. The guidance the Court provides in this case with respect to the set-off and allocation of lump sum settlements will affect the principles underlying Florida's civil jury trial system and, in turn, the perceptions and efficacy of that system. FPL appreciates the opportunity this Court has granted to participate in this case as *amicus curiae*, in support of the interests of Respondent, City of West Palm Beach.

STATEMENT OF THE FACTS AND THE CASE

FPL adopts the Statement of the Facts and the Case set forth in the brief of Respondent, City of West Palm Beach. For purposes of the arguments presented in this brief, FPL specifically notes the following procedural aspects of this case:

1. Prior to trial, the settling joint tort-feasors and the Dioneses entered into a $45,000 lump sum settlement. The settlement documents did not apportion the settlement between Mr. and Mrs. Dionese, nor did the settling tort-feasors direct or agree to any apportionment.

2. The Dioneses proceeded to trial against the remaining defendant, Respondent, City of West Palm Beach. In that trial, the jury considered the issues of liability and damages and rendered separate jury awards on Mrs. Dionese's claim and Mr. Dionese's derivative claim.

3. After conducting a post-trial set-off hearing, the trial court determined that because the settlement was for an unapportioned sum, the City was entitled to a set-off of the entire settlement sum against the Dioneses' net jury award.

4. The Fourth District Court of Appeal, in an opinion considering Florida's statutory set-off and contribution laws, §§ 768.041(2) and 768.31(5), Fla.Stat., and this Court's opinion in Devlin v. McMannis, 231 So.2d 194 (Fla. 1970), affirmed the trial court.

CERTIFIED QUESTION

The district court, recognizing "this issue to be one of great public importance," certified the following question to this Court:

> WHETHER A PRIVATE, UNILATERAL AGREEMENT AMONG SEVERAL PLAINTIFFS TO APPORTION FUNDS PAID BY ONE JOINT TORT-FEASOR IS BINDING UPON NON-SETTLING JOINT TORT-FEASORS AND THE COURT IN DETERMINING THE SET-OFF CLAIM OF THE NON-SETTLING JOINT TORT-FEASORS?

FPL respectfully suggests that this question must be answered in the negative. Where plaintiffs obtain a lump sum settlement from one joint tort-feasor and subsequently receive a verdict(s) against another joint tort-feasor, Florida's principles of set-off, contribution and due administration of justice require that the total amount of the settlement be set-off against the total verdict(s).

SUMMARY OF THE ARGUMENT

Florida's statutory set-off and contribution laws require a court to reduce a judgment against a joint tort-feasor by the amount of the settlement funds received from a settling joint tort-feasor. The courts below properly held that where a pre-verdict release does not apportion the settlement funds among the underlying causes of action, the total sum of the verdicts must be offset by the total amount of the settlement. Following the set-off, if necessary to preserve the distinct character of the damage elements of each cause of action, the set-off can then be allocated in proportion to the jury verdicts on each claim tried.

The set-off procedure employed in this case effectuates the three principles underlying the set-off and contribution statutes. First, it prevents recovery of damages in amounts greater than that which the jury has determined is just compensation. Secondly, it protects the interests of non-settling and settling joint tort-feasors by preventing collusive or self-serving allocations which extort duplicative recovery from non-settling tort-feasors and generate "breach of good faith" contribution claims against settling tort-feasors. Finally, using the jury's damage assessment to offset and allocate lump sum settlements safeguards the principles inherent in the right to trial by jury, especially the jury's role in assessing damages.

ARGUMENT

THE TOTAL AMOUNT OF AN UNDIFFERENTIATED LUMP SUM SETTLEMENT MUST BE SET-OFF AGAINST THE TOTAL VERDICT(S) ENTERED AGAINST ANOTHER JOINT TORT-FEASOR.

Florida's set-off law, § 768.041(2), Fla.Stat., requires a set-off of settlement funds against a verdict when the damage elements of the claims settled and those tried to verdict are the same.[1/] This case requires the Court to articulate the proper method for the set-off and allocation of lump sum settlements following a jury verdict.

The district court held that a private, unilateral agreement among plaintiffs apportioning settlement funds will not control the set-off due the non-settling tort-feasor, and affirmed the trial court's judgment setting-off the total lump sum settlement against the plaintiffs' net jury award. FPL submits that the district court's decision properly recognizes and harmonizes Florida's set-off and contribution laws and principles of due administration of justice. This Court should affirm

---

1/ See, e.g., Kay v. Bricker, 485 So.2d 486, 487 (Fla. 3d DCA 1986) (defendant entitled to a set-off against jury award of the settlement amount paid to plaintiff by another tort-feasor in partial satisfaction of damages); Madden v. Rodovich, 367 So.2d 1083, 1084 (Fla. 4th DCA 1979) (§ 768.041 requires a set-off against the verdict of any settlement proceeds received from a joint tort-feasor); Port Royale Apartments v. Delnick, 358 So.2d 269, 270 (Fla. 3d DCA 1978) (judgment must be reduced by amount received from settling joint tort-feasor).

that decision as the proper method to set-off lump sum settlements following a jury verdict.[2/]

There are three fundamental principles underlying statutory set-off and allocation procedures. These principles underscore the efficacy and propriety of the set-off procedure the lower courts used, as opposed to that which the Dioneses espoused. These principles are:

1. Plaintiffs should not be permitted to secure duplicate compensation for identical damages -- once from the settling tort-feasors, and again, from the non-settling tort-feasors.
2. A non-settling defendant has a legally recognized interest in a fair and proper allocation of settlement funds.

2/ The set-off procedure the courts below used is in accord with the principles this Court recognized in Devlin v. McMannis, 231 So.2d 194 (Fla. 1970), wherein this Court advised:

> [W]e are not unaware that there may be occasions where a settlement is effected so as to fail to preserve or otherwise differentiate settlement sums pertaining to the damages distinctive and peculiar to the underlying causes of action. Under such circumstances, subsequent verdicts entered against another joint tort-feasor on the same causes of action may indeed occasion the necessity of offsetting against the total sum of the verdicts the total amount of the prior settlement.

Id. at 196-97.

3. A jury's assessment of damages, based upon a full evidentiary trial, must be the governing factor in any post-verdict allocation hearing.

In contrast, the apportionment the Dioneses advocate thwarts these principles. First, it sanctions duplicate recoveries. Secondly, it encourages collusion and self-serving manipulation of the settlement contrary to the contribution statute's intent. Finally, but most importantly, it subverts the jury's prime function as the ultimate damage evaluator.

1. Plaintiffs Should Not Be Permitted To Secure Duplicate Compensation For Identical Damages.

The set-off statute is not intended to provide a tactical mechanism by which some plaintiffs can manipulate the judicial process to garner double recoveries and windfall gains in tort actions. Rather, as this Court explained in Devlin v. McMannis, 231 So.2d 194 (Fla. 1970):

> The statute is designed, within the degree of specificity ascertainable under verdict and judgment procedures, to prevent duplicate or overlapping compensation for identical damages.

Id. at 196.

Here, after hearing all the evidence, counsels' argument, and the court's instructions, the jury evaluated Mrs. Dionese's direct claim and Mr. Dionese's derivative

claim. The jury assessed Mrs. Dionese's damages at $57,000 and Mr. Dionese's derivative claim at $3,800. The settlement allocation the Dioneses advocate -- $10,000 to Mrs. Dionese and $35,000 to Mr. Dionese -- would result in more than a $30,000 windfall for Mr. Dionese, a recovery 900% greater than the damages the jury determined he should receive. Allowing Mr. Dionese such a recovery would pervert the intent of the set-off law to the detriment of both the non-settling tort-feasor and the primary plaintiff, Mrs. Dionese.[3/]

The only proper method for ensuring against duplicate recoveries in an undifferentiated lump sum settlement situation is to set-off the total settlement funds against the total jury award. If necessary, the settlement can then be allocated proportionately against the jury verdict for each cause of action tried, thus preserving the distinct nature of the separate claims. In

---

3/ Such a windfall recovery for one plaintiff can create a concomitant unjust loss for the other plaintiff, particularly where the latter plaintiff suffered the greater damage. For instance, if the allocation the Dioneses proposed was permitted but the judgment against the City was reversed on appeal, or the judgment was against a judgment proof defendant, Mrs. Dionese, who had the greater injury, would be undercompensated while her husband is overcompensated, but has no obligation to share his newfound wealth with his wife. In short, a judgment is subject to reversal, modification or remand on appeal, or non-collectibility, whereas the settlement fund is a "bird in hand."

the instant case, a proportionate allocation yields:

	Total Dollar Amount		Patsy Dionese Dollar Amount	Patsy Dionese % of Total	Charles Dionese Dollar Amount	Charles Dionese % of Total
Adjusted Jury Award	$60,800	=	$57,000.00	93.75%	$3,800.00	6.25%
Hoyle Settlement Proceeds	$45,000	=	$42,187.50	93.75%	$2,812.50	6.25%
Final Judgment	$15,800	=	$14,812.50	93.75%	$ 987.50	6.25%

The two step procedure of first setting-off the lump sum settlement against the total jury award and then allocating the settlement among the distinct claims tried to verdict realizes the intent of the set-off law -- each plaintiff recovers his or her proven damages without duplication.[4/]

4/ In those lump sum settlement cases where plaintiffs voluntarily dismiss some plaintiffs and/or claims and, therefore, do not obtain a jury's assessment of the claim's value, the second step of allocation cannot be applied to the untried claims because there is no evidence and, consequently, no basis to evaluate the untried claims. The trial court is simply left "without facts upon which to make an allocation, [proportionately or otherwise,] as apparently intended by plaintiff." Lupton v. Torbey, 548 F.2d 316, 320 (10th Cir. 1977). Cf. Scheib v. Florida Sanitarium and Benevolent Association, 759 F.2d 859 (11th Cir. 1985). In Scheib, prior to trial the plaintiff entered into an unapportioned lump sum settlement with several of the joint tort-feasors. Plaintiff subsequently received a judgment against the non-settling tort-feasor for some, but not all, of plaintiff's claimed elements of damages. Applying Florida's set-off statute, the Eleventh Circuit affirmed

(Footnote continued on next page)

2. A Non-Settling Defendant Has A Legally Recognized Interest In A Fair And Proper Allocation Of Settlement Funds.

The Uniform Contribution Among Tortfeasors Act, §768.31, Fla.Stat., is intended to protect the interests of both the settling and non-settling defendants. The contribution act relieves the settling joint tort-feasor of all liability, including liability to another joint tort-feasor having a contribution claim, provided that the release is given in "good faith." See Section 768.31(5), Fla.Stat. This good faith proviso extends the circle of interested parties beyond the parties to the settlement negotiations, embracing the absent, non-settling joint tort-feasor. "The latter has a financial stake in the amount of the settlement and thus justiciable interest in the question of good faith." See Lareau v. Southern Pacific Co., 44 Cal. App. 3rd 783, 118 Cal. Rptr. 837, 844 (1975).[5/]

(Footnote continued from previous page)

the trial court's set-off of the entire settlement against the judgment, explaining that if the trial court were:

> required to fathom the discrete elements of damages which were intended to equate with the dollar value of a given release before it could apply Section 768.041(2), the court would be led to a grossly speculative endeavor unwarranted by the provisions of 768.041(2).

Scheib, 756 F.2d at 863 (emphasis added).

5/ The California contribution statute applied in Lareau, supra, Cal. Civ. Code § 877 (West), is analogous to Florida's contribution statute.

The good faith requirement provides a compelling incentive for the settling tort-feasor to contribute his proportionate share of the total recovery in return for the contractual and statutory protection he seeks. With a unilateral, private allocation, however, there is no incentive to achieve the statutory goal of a fair, non-duplicative recovery. Instead, a unilateral, private allocation is subject to self-serving abuse and collusive agreements which undermine the statutory and judicial efforts to achieve just compensation for proven damages.

This case provides a clear example of the impermissible results such an allocation scheme produces. The Dionese's allocation, announced after the verdict, ignored what a jury of their peers determined was their just compensation. Instead, it has the appearance of a collusive effort to increase the plaintiffs' actual recovery above their proven damages.

The Dioneses' contention that the creditor-debtor concept of the law of payments should be applied to permit the plaintiffs' unilateral allocation, misinterprets the intent and design of Florida's contribution law. (See Petitioners' Brief at 11.) Under the common law, as under the law of payments, the claimant could place the loss where he chooses. As explained in the Uniform Act's Commissioner's Prefatory Note, this practice was one of

the principle reasons for providing for contribution among joint tort-feasors:

> [T]he common-law view [was] that the injured person is "lord of his action" and, when injured by the joint and several tort of two or more, may place the loss where and how he sees fit.
>
> This item of private, rather than judicial, control of the distribution of loss arising from a common burden of liability has no doubt been largely responsible for the recent trend toward legislative and judicial repeal or modification of the common-law rule. 6/

The due administration of justice, as opposed to the private interest of the claimants, controls set-off and allocation of settlement proceeds. The set-off procedure the courts below employed properly recognized the statutorily protected interest of the non-settling joint tort-feasor in a fair set-off and allocation of a lump sum settlement.

3. A Jury's Assessment Of Damages Must Govern Post-Verdict Allocations Of Lump Sum Settlements.

The third and most fundamental policy consideration underlying fair set-off and allocation procedures is the cardinal principle of the sanctity of the jury's verdict. Under our system of justice, litigants

---

6/ Commissioner's Prefatory Note, Uniform Contribution Act Among Joint Tort-feasors, 12 U.L.A. 60-61. Accord Sobik's Sandwich Shops, Inc. v. Davis, 371 So.2d 709, 711 (Fla. 4th DCA 1979).

have the constitutional right to present their case to an impartial jury, who, after hearing all of the evidence and receiving the court's instructions, has the responsibility to determine liability and assess damages.[7/] The set-off procedure used below, followed by the proportionate allocation procedure amicus suggests, safeguards the sanctity of the jury's role in damage assessment.

The jury's assessment of damages must be the benchmark used to set-off and allocate a lump sum settlement as its use promotes the fundamental equities and goals of our judicial system in four respects. First, it gives due deference to the jury's special function of deciding claims and damage awards based on the evidence elicited at trial. Unless the trial judge determines, based upon established legal standards, that a new trial on damages or an additur is warranted, there is no justification for displacing the jury's valuation of damages. Replacing a jury's verdict with a different, second valuation, undermines the validity of a jury verdict.

7/ Article 1, Section 22, of the Florida Constitution provides: "The right of trial by jury shall be secure to all and remain inviolate."

Secondly, off-setting the total jury award by the total settlement prevents overlapping or duplicate recoveries which is the intent of the set-off statute. Setting-off the jury award against the lump sum settlement funds does not jeopardize a claimant's recovery of damages, rather it ensures that the claimant's recovery does not exceed the amount of his proven damages. See Kay v. Bricker, 485 So.2d 486, 487 (Fla. 3d DCA 1986).[8/]

Thirdly, a set-off of the total settlement proceeds against the jury verdict removes the potential for collusive or self-serving allocations. The jury's objective assessment governs the set-off and allocation, rather than the unrestrained scheme of singular-interest plaintiffs.

Finally, using the jury's damage assessment to allocate lump sum settlements prevents waste of judicial and litigant resources. A post-verdict allocation hearing which ignores the jury's verdict and redetermines a

---

8/ After some lump sum settlements, to gain a strategic advantage at trial, one or more plaintiffs will voluntarily dismiss their cause of action. (Often the derivative claimant, who is comparatively negligent for the injuries to the primary plaintiff, dismisses his derivative claim). In those instances, the jury's award to the primary plaintiff is the only proven valuation in the record. Any post-verdict apportionment of settlement proceeds to the untried claims would be a wholly speculative endeavor because there is no basis upon which to assess liability or damages for the untried claims. Those cases provide a classical example of the situation referred to in Devlin, supra, which requires the set-off of the total settlement proceeds against the total verdict.

claim's value is basically a trial de novo which means a needless duplication of the court's, the parties' and the jury's efforts in determining damages. As the United States Supreme Court has stated in a different context, the trial on the merits should be "the 'main event'... rather than a 'tryout on the road.'" Wainwright v. Sykes, 433 U.S. 72,90 (1977).

CONCLUSION

FPL, amicus curiae, respectfully submits that the question certified by the Fourth District Court of Appeal should be answered in the negative. The proper offset of an undifferentiated lump sum settlement must be against the total sum of the verdicts.

STEEL HECTOR & DAVIS
4000 Southeast Financial Center
Miami, Florida 33131-2398
(305) 577-2800

By: Nancy E. Swerdlow
Patricia A. Seitz
Nancy E. Swerdlow

Attorneys for Amicus Curiae
FLORIDA POWER & LIGHT COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Amicus Curiae was mailed this 27th day of June, 1986 to: R. Fred Lewis, Esq., Magill & Lewis, P.A., Attorneys for Respondent, Suite 730, Ingram Building, 25 S.E. Second Avenue, Miami, Florida 33131; Barbara Green, Esq., Daniels and Hicks, P.A., Attorneys for Petitioners, 2400 New World Tower, 100 North Biscayne Boulevard, Miami, Florida 33132-2513; Ricci and Roberts, P.A., Attorneys for Petitioners, 1645 Palm Beach Lakes Boulevard, Post Office Box 3947, West Palm Beach, Florida 33402; and C. Brooks Ricca, Jr., Esq., Reid and Ricca, P.A., Post Office Drawer 2926, West Palm Beach, Florida 33402.

By: Nancy E. Swedlow