

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
(William C. Whitbeck, C.J.; Henry William Saad and Bill Schuette, JJ.)

**ROLAND KAISER, Personal Representative
of the Estate of MARION ROSE KAISER,
Deceased,**

Plaintiff-Appellee,

Docket No. 133031

v

**JAMES ROBERT ALLEN, a/k/a
JAMES KROTZER,**

Defendant-Appellant.

APPELLANT'S BRIEF ON APPEAL



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STATEMENT OF THE BASIS OF JURISDICTION

This is an appeal, by Defendant James Allen, on leave granted (48a), from the October 31, 2006, opinion of the Court of Appeals in this matter (44a-46a), reconsideration denied December 13, 2006 (47a).

This Court has discretionary by-leave jurisdiction to entertain such appeals. MCR 7.301(A)(2). This Court exercised that jurisdiction by granting, on April 13, 2007, Defendant's timely application for leave to appeal (2a, 48a).

Accordingly, Defendant's appeal is properly before this Court.

STATEMENT OF THE QUESTION PRESENTED

- I. IN ENTERING A JUDGMENT PURSUANT TO THE JURY'S VERDICT IN FAVOR OF PLAINTIFF AND AGAINST THE DEFENDANT VEHICLE DRIVER, DID THE TRIAL COURT CORRECTLY SET OFF, FROM THE JURY'S DAMAGE AWARD OF \$100,000.00, THE \$300,000.00 SUM PREVIOUSLY PAID IN THIS MATTER TO PLAINTIFF BY THE SETTLING CO-DEFENDANT VEHICLE OWNER? AND DID THE COURT OF APPEALS ERR IN REVERSING THAT SET-OFF?

Defendant-Appellant answers, "Yes."

STATEMENT OF FACTS

The facts pertinent to this appeal are not in dispute.

This is a wrongful death lawsuit, predicated on a motor vehicle negligence cause of action, that arises out of a fatal motor vehicle accident that took place on June 26, 2001 (6a, 13a).

By Complaint filed with the Bay County Circuit Court on October 3, 2003 (1a), Plaintiff Kaiser filed the instant action against Defendant James Allen and Defendant Gary Keidel, the driver and owner, respectively, of the motor vehicle that collided with Plaintiff's Decedent's vehicle.

Answers were filed by the Defendants, respectively, on November 13, 2003, and January 16, 2004 (1a).

On November 18, 2004, Plaintiff settled with the vehicle owner, Defendant Gary Keidel, for the sum of \$300,000.00 (34a, 39a). An order to that effect, dismissing Defendant Keidel, was entered on November 22, 2004 (1a).

The case proceeded on to trial against the vehicle driver only, Defendant James Allen. A jury trial was conducted in the Bay County Circuit Court, before Judge Lawrence Bielawski, on June 1 and 2, 2005 (1a, 39a). The defense admitted liability, leaving only the issue of Plaintiff's damages to be decided by the jury (5a, 6a, 11a, 13a). The jury returned its verdict, determining Plaintiff's total damages in this matter to be \$100,000.00 (1a, 39a).

Pursuant to request by Defendant Allen and over objection by Plaintiff, the trial court set off against the \$100,000.00 jury verdict the \$300,000.00 sum previously paid by the settling Co-Defendant Keidel, leaving Plaintiff with a net judgment against Defendant Allen of zero (35a-36a). The order of judgment was entered on July 5, 2005 (1a, 37a, 39a).

Plaintiff filed a motion for reconsideration on July 26, 2005, that was denied by order entered July 29, 2005 (1a, 40a).

Plaintiff appealed of right to the Court of Appeals by claim of appeal filed August 19, 2005. Plaintiff procured and entered the stipulation (41a-43a) of the parties waiving (as unnecessary) Plaintiff's obligation, as appellant, to provide the transcript of the 2-day jury trial in this matter. In support of the appeal, Plaintiff filed a 1-issue Brief on Appeal challenging only the set-off performed by the trial court, supra. By way of response in opposition, Defendant submitted his Brief on Appeal.

Plaintiff's appeal was decided by summary panel, on briefs, and without oral argument (1a, 44a). In a 3-page, unanimous, unpublished, per curiam opinion dated October 31, 2006 (44a-46a), the Court of Appeals reversed the trial court's set-off, supra, and remanded this case for entry of a judgment for Plaintiff in the amount of the jury verdict.

Defendant Allen timely moved for reconsideration, but his unopposed motion was denied by Court of Appeals order entered December 13, 2006 (2a, 47a).

On January 24, 2007, Defendant Allen timely applied to this Court for leave to appeal from the Court of Appeals decision (2a). No answer in opposition was filed by Plaintiff-Appellee. By order dated April 13, 2007, this Court granted Defendant's application for leave to appeal (2a, 48a).

Pursuant to this Court's grant of leave to appeal, Defendant-Appellant submits this Brief on Appeal.

ARGUMENT

- I. IN ENTERING A JUDGMENT PURSUANT TO THE JURY'S VERDICT IN FAVOR OF PLAINTIFF AND AGAINST THE DEFENDANT VEHICLE DRIVER, THE TRIAL COURT CORRECTLY SET OFF, FROM THE JURY'S DAMAGE AWARD OF \$100,000.00, THE \$300,000.00 SUM PREVIOUSLY PAID IN THIS MATTER TO PLAINTIFF BY THE SETTLING CO-DEFENDANT VEHICLE OWNER. THE COURT OF APPEALS ERRED IN REVERSING THAT SET-OFF.**

A. Introduction

As indicated, supra, this is a wrongful death motor vehicle negligence action brought against both the owner and the driver of the vehicle that collided with Plaintiff's vehicle.

Prior to trial, Plaintiff settled with the Defendant vehicle owner for the sum of \$300,000.00 and dismissed that party from this case (1a, 39a).

The case proceeded on to trial against the Defendant vehicle driver only, Defendant-Appellant James Allen. The defense conceded liability, leaving only the issue of damages to be decided by the jury (5a, 6a, 11a, 13a).

The jury determined Plaintiff's total damages in this matter to be \$100,000.00 (1a, 39a). Against the jury's verdict of \$100,000.00, the trial court set off the \$300,000.00 sum previously paid by the Co-Defendant vehicle owner, leaving Plaintiff with a net judgment against Defendant-Appellant Allen of zero (34a, 37a).

On appeal of right to the Court of Appeals from the judgment below, Plaintiff

contested only the validity of the set-off, supra. The Court of Appeals heard and decided the appeal by summary panel, without oral argument. In an unpublished, per curiam opinion dated October 31, 2006 (44a-46a), the Court of Appeals reversed the trial court's set-off and judgment and remanded for entry of judgment in the amount of the jury's verdict. Defendant Allen moved for reconsideration, but the motion was denied (47a).

Basically, the Court of Appeals opinion determined: that motor vehicle operator Allen and owner Keidel were "concurrent tortfeasors"; that (statutory) tort reform had converted their joint and several liability into several liability; that motor vehicle operator Allen was liable only for his own percentage of fault, distinct from the settling vehicle owner Keidel, on the basis of allocation of fault; that the jury allocated fault and determined Defendant Allen's liability to be \$100,000.00; and that the directly-on-point set-off rule on which the trial court relied – Thick v Lapeer Metal Products Co, 419 Mich 342 (1984) – had not survived this tort reform so as to be operable in this case.

In rendering this decision, the Court of Appeals focused exclusively on "tort reform's" allocation of fault, ignored the non-allocable nature of motor vehicle owner-driver liability, and mistakenly assumed that the jury had-in-fact allocated fault.

From the Court of Appeals decision, this Court has granted Defendant leave to appeal, directing the parties to brief the relationship between statutory tort reform fault allocation and statutory owner liability as well as the effect of the jury verdict and the appropriateness of the set-off that the trial court imposed on that verdict (48a).

For all of the reasons stated herein, Defendant respectfully submits that the set-off performed by the trial court was correct and compelled by the applicable authorities, infra, and that the Court of Appeals erred, both factually and legally, in reversing that set-off.

B. Standard of Review

This appeal involves only 1 overarching issue, the set-off issue, supra. That particular issue is a purely legal issue that is reviewed by this Court de novo for legal error. See, e.g., Markley v Oak Health Care, 255 Mich App 245, 249 (2003). Involved in that issue is an issue or issues of statutory construction which are also purely legal issues that are likewise reviewed de novo. Alex v Wildfong, 460 Mich 10, 16-17, 21 (1999).

C. Analysis

1. The effect of the jury's verdict

As indicated supra, the only disputed issue at the trial of this case was damages. That issue was submitted to and decided by the jury. The jury determined that Plaintiff's total damages in this case were \$100,000.00.

Although there were originally 2 Defendants in this case, vehicle owner Keidel and vehicle driver Allen, this was not a case of division or allocation of fault, and pro rata responsibility for damages. Both Defendants were responsible for the entirety of Plaintiff's loss (see infra). Plaintiff suffered a single actionable loss, determined by the jury to be worth no more than \$100,000.00, and both Defendants were responsible for the

entirety of that loss. Logically, Plaintiff was entitled to payment of the \$100,000.00 in damages from both Defendants, but just one total \$100,000.00 payment, not a double recovery or more (32a).

Since Defendant vehicle owner had already paid Plaintiff \$300,000.00 by way of pre-trial settlement in this matter, and since Plaintiff had already thereby received from that 1 Defendant 3 times the jury's total damage assessment, there was no reason for Plaintiff to extract yet another \$100,000.00 from the other remaining Defendant, which would have brought Plaintiff's total damage recovery to \$400,000.00, or 4 times the proper damage amount as determined by the jury. Hence, the post-trial set-off employed by the trial court resulted in a net judgment of no further damages being awarded to Plaintiff from Defendant-Appellant Allen.

**2. The nature of MCL 257.401(1)
motor vehicle owner liability**

Defendant-Appellant Allen was liable for the entirety of Plaintiff's damages because he was the admittedly negligent driver and active tortfeasor who admittedly caused those damages (5a, 6a, 11a, 13a). MCL 500.3135.

Co-Defendant Keidel was also liable for the entirety of those same Plaintiff damages, but for a wholly different reason. Defendant Keidel's liability arose out of the Civil Liability Act, or owner liability act, MCL 257.401(1).

MCL 257.401(1) makes an owner of a motor vehicle liable for an injury caused by the negligent operation of the vehicle by a permissive user:

“This section shall not be construed to limit the right of a person to bring a civil action for damages for injuries to either person or property resulting from a violation of this act by the owner or operator of a motor vehicle or his or her agent or servant. The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law. The owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge. It is presumed that the motor vehicle is being driven with the knowledge and consent of the owner if it is driven at the time of the injury by his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the family.”

This owner liability is purely a creature of the statute, supra. The liability so created is passive, secondary, vicarious, and strict. Vogh v American International Rent-A-Car, Inc, 134 Mich App 362, 365 (1984); Beck v Westphal, 141 Mich App 136, 144 (1984); Allstate Ins Co v Thrifty Rent-A-Car Systems, Inc, 249 F3d 450, 455 (CA 6, 2001). Designed to insure financial responsibility to the victims of negligent drivers to whom owners entrust their vehicles, the statute is not based on any separate “fault” of the vehicle owner; rather, it simply imputes the driver’s negligence to the vehicle owner. Kiefer v Gosso, 353 Mich 19, 30 (1958); Wieczorek v Merskin, 308 Mich 145, 148-149 (1944); Citizens Mut Auto Ins Co v Fireman’s Fund Ins Co, 234 F Supp 931, 935 (WD MI, 1964).

So we have 2 liable parties in this case, each liable not for a part but for all of Plaintiff’s damages. One is the active at-fault tortfeasor, the other is passive or

vicariously liable for all of the damages caused by the negligence or fault of the other party.

3. The legal basis for the verdict set-off

In requesting and implementing the set-off of the \$300,000.00 settlement from the \$100,000.00 jury assessment of Plaintiff's damages, reliance was placed by both Defendant-Appellant and the trial court (29a, 34a-35a) on Thick v Lapeer Metal Products Co, 419 Mich 342 (1984). In that case, the Supreme Court expressly dealt with the issue of whether a non-settling insurance company in a workers' compensation case could offset its liability by the amount of the settlement paid by a second insurance company for injuries ultimately determined to be covered solely by the non-settling insurer. The Supreme Court ruled in favor of the set-off, reversing both the Workers' Compensation Appeal Board and the Court of Appeals. (419 Mich, at 345).

The Supreme Court in Thick held:

*"We conclude that notwithstanding the non-liability of the settling carrier, the resulting judgment against the non-settling carrier must be reduced *pro tanto* by the settlement amount to the extent that settlement was in satisfaction of the identical claim."* (419 Mich, at 347).

In rendering this decision in a workers' compensation case, the Supreme Court (419 Mich, at 348-349) relied on a well-established common law principle of tort liability [i.e., the instant type of case]:

"This construction of the act parallels the common-law rule

that where a negligence action is brought against joint tortfeasors, and one alleged tortfeasor agrees to settle his potential liability by paying a lump sum in exchange for a release, and a judgment is subsequently entered against the non-settling tortfeasor, the judgment is reduced *pro tanto* by the settlement amount. See Larabell v Schuknecht, 308 Mich 419; 14 NW2d 50 (1944); see generally 4 Restatement Torts, 2d § 885(3), p. 333; Prosser, Torts (4th ed), § 49, pp. 304-305. The principle has been codified by our Legislature at MCL 600.2925d; MSA 27A.2925(4).

Significantly, the settlement is so credited ‘whether or not the person making the payment is liable to the injured person’. 4 Restatement Torts, 2d, § 885(3), p. 333; see, e.g., Miller v Bock Laundry Machine Co, 64 Ohio St 2d 265; 416 NE2d 620 (1980) (applying Texas law), cert den 451 U.S. 987 (1981); Duncan v Pennington County Housing Authority, 283 NW2d 546 (SD, 1979). In addition, ‘[if] the payment is made as full satisfaction for a specified item of damage, the claim against the [other tortfeasors] is terminated with respect to that item.’ 4 Restatement Torts, 2d, § 885, Comment e, p. 335.”

Thick, supra, 419 Mich, at 349, fn 1.

The Supreme Court noted that, just as in the tort context, workers’ compensation authorities “provide persuasive support for application of a rule to prevent double recovery for what are in fact the same injuries.” (419 Mich, at 350). In other words, a plaintiff is entitled to only 1 recovery for his/her injuries, or a plaintiff is entitled to recover his/her total damages no more than once (32a).

4. Plaintiff’s appeal to the Court of Appeals

On appeal to the Court of Appeals, Plaintiff’s cryptic 1½-page Issue/Argument I

challenged the trial court's application of the Thick set-off rule, supra, by arguing that 1995 Michigan tort reform statutes and subsequent case law have replaced joint and several liability with several liability to which the Thick rule is outdated, abrogated, or inapplicable.

Insofar as Plaintiff argued that the Thick one-recovery set-off rule only applies in cases of "joint" tortfeasor liability, that cannot possibly be true – Thick itself is a workers' compensation case involving 2 insurers which were not joint tortfeasors. Moreover, in the instant case, the 2 Defendants certainly share a common and coextensive if not "joint" liability for Plaintiff's damages (see infra).

Plaintiff's Court of Appeals brief placed its principal reliance on Gerling v Lawson, 254 Mich App 241 (2002), which Plaintiff said "addressed this issue," was "completely dispositive," and "noted that the purpose of the tort reform legislation was to ensure that exposure to liability was limited to a parties [sic] own pro rata degree of fault."

However, tort reform's allocation among tortfeasors of percentages of tort liability has no application to the motor vehicle owner liability at issue here. As explained supra, the nature of the statutory owner liability is such that there can be no pro rata allocation between negligent driver and vicariously liable owner. Both are 100% responsible for the same damages.

More importantly, Plaintiff's reliance on Gerling, supra, was completely misplaced

and misleading. Plaintiff did not bother to tell the Court of Appeals that the Gerling decision relied on by Plaintiff was reversed by the Michigan Supreme Court in Gerling Konzern Allgemeine Versicherungs AG v Lawson, 472 Mich 44 (2005). The Gerling Supreme Court recognized that, notwithstanding tort reform's abolition of most joint and several liability, replacing it with several liability, there still was "common liability," among some tortfeasors for a single indivisible injury (e.g., the instant case), to which contribution and other statutory and common law principles still applied, even where the common liability is only several (472 Mich, at 54-60).

Plaintiff's Court of Appeals Brief also relied on Markley v Oak Health Care, 255 Mich App 245 (2003). That reliance was surprising, since Defendant expressly relied on that decision in the trial court (32a), and since Markley is a modern-day, post-tort-reform reaffirmation of the Thick set-off rule, supra.

Plaintiff's Court of Appeals Brief isolated and extracted this short quote from Markley (255 Mich App, 255):

“. . . therefore, a settlement payment cannot be deemed to constitute a payment toward a loss included in a later damage award entered against the nonsettling tortfeasor. There exists little danger, in cases of several liability, that a plaintiff will receive recovery beyond the actual loss.”

But ironically, the instant case is exactly the situation where, without a set-off, the Plaintiff would receive a total recovery that is 4 times (see supra) "the actual loss" as determined by the jury.

Plaintiff's Court of Appeals Brief failed to note that, in Markley, the Court expressly re-visited the Thick common law set-off rule and all of its underpinnings and support (255 Mich App, 250, 251), and ultimately concluded that that rule did survive tort reform (255 Mich App, at 250, 254-257).

5. The Court of Appeals decision

Nevertheless, despite the foregoing analysis, the Court of Appeals agreed with Plaintiff and reversed the trial court's set-off in a unanimous, unpublished, per curiam, summary panel decision dated October 31, 2006 (44a-46a).

With all due respect to the Court of Appeals, its opinion is clearly erroneous, on its face, and begs correction for the reasons explained infra.

The Court of Appeals opinion, although short, has clearly, expressly, and repeatedly misconceived and miscast the basic nature of the liability in this case and the legal relationship between the 2 Defendants in this case.

Right at the start of the Court's "analysis" (45a, first paragraph), the Court refers to "concurrent tortfeasors." That is not this case. Here we have an actively negligent motor vehicle operator (Defendant Allen) and a purely passive, vicariously liable motor vehicle owner (Defendant Keidel).

Then, the Court of Appeals' analysis (45a, second paragraph) refers to "sweeping tort reform" and the abolition of joint and several liability "in most cases," and concludes that, here, "each defendant is liable only for his percentage of fault" (emphasis added),

and that “the nonsettling defendant [Allen] is ‘responsible for an amount of damages *distinct* from the settling defendant [Keidel] on the basis of allocation of fault” (emphasis added).

The fourth paragraph of the Court of Appeals’ analysis repeats the same theme of allocated fault and distinct damages for which each Defendant is separately liable: “Keidel’s settlement represented damages attributable only to his own allocated fault. As Allen owed damages distinct from Keidel, he should not be able to set off any portion of the settlement” (emphasis added).

As clearly and repeatedly set forth in Defendant Allen’s Court of Appeals Brief on Appeal, “tort reform” played no role in this case. There is no “allocation” of fault in a case such as this; indeed, the jury performed no such allocation.

**6. The relationship between MCL
600.2957(1) and MCL
257.401(1)**

The so-called tort reform statutes exclusively relied on by the Court of Appeals in this case include the following key provisions:

“(1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person’s percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.”

MCL 600.2957(1).

“(1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:

(a) The total amount of each plaintiff’s damages.

(b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under section 2925d, regardless of whether the person was or could have been named as a party to the action.”

MCL 600.6304(1).

These statutory provisions are expressly designed to allocate fault and damage responsibility between/among multiple, active, at-fault tortfeasors. See, e.g., Barnett v Hidalgo, ___ Mich ___ (Nos. 130071, 130073; rel’d 5/30/07).

But the instant case is about motor vehicle liability where there is only one at-fault active tortfeasor and a vicariously liable motor vehicle owner. Due to the very nature of motor vehicle owner liability, a creature of statute (MCL 257.401), there is no percentage of fault and no distinct amount of damages that belong to the vehicle owner separate from the negligent operator. Each Defendant, the actively negligent operator and the passively/vicariously/strictly liable owner, is legally responsible for the same entirety/100% of the Plaintiff’s total damages, here determined by the jury to be

\$100,000.00, and for which the settling Defendant, Keidel, had already paid Plaintiff \$300,000.00. This is not one of the “most cases” (45a), referred to by the Court of Appeals, to which allocation of fault and tort reform’s abolition of joint and several liability applies.

The owner liability statute, per the analysis supra, is expressly designed to not allocate fault or divide responsibility between the actively negligent motor vehicle driver-tortfeasor and the purely passive vicariously liable owner. Despite there being only one at-fault person (the negligent driver), the owner liability statute makes both driver and owner coextensively, commonly, jointly liable for the negligence of the driver. By design, the fault and responsibility are non-allocable. Juries do not and cannot allocate or apportion the liability, say, 80% to driver and 20% to owner.

The fault allocation statutes, supra, do not refer to the motor vehicle owner liability statutory situation and do not fit or seem to apply to that situation at all. But if there is a conflict between the statutes, it is the owner liability statute that is the specifically applicable and therefore controlling statute here. See, e.g., Alex v Wildfong, 460 Mich 10, 21 (1999); Michigan Millers Mut Ins Co v West Detroit Bldg Co, Inc, 196 Mich App 367, 374 (1992). There is no indication that the Legislature intended to amend the owner liability statute in a fault-allocation way. Repeals by implication are not favored. Travelers Ins v U-Haul, Inc, 235 Mich App 273, 285 (1999). And, most importantly, due to the very nature of owner liability, the fault allocation statutes couldn’t be imposed on

this type of liability anyway.

Despite the heavy and even repetitious emphasis and careful explanation in Defendant's Court of Appeals Brief on Appeal regarding the special nature of the common (motor vehicle owner and operator) liability in this case, the Court of Appeals opinion is absolutely silent in that regard and reflects either a misunderstanding of motor vehicle liability law or the misapprehension of fact that there was some kind of allocation of fault performed by the jury in this case. The Court of Appeals apparently envisions that a jury allocates separate percentages of fault, less than 100%, to the motor vehicle owner and the operator, respectively. That would of course make no sense and would defy the statutory mandate of MCL 257.401(1) owner liability.

The Court of Appeals opinion cites all the right cases, but it is as though the Court did not read Gerling v Lawson, 472 Mich 44 (2005), and Markley v Oak Health Care, 255 Mich App 245 (2003) completely, to their conclusion. As set forth in Defendant's Court of Appeals Brief, those cases actually support the trial court and Defendant's position; owing to the nature of the liability here, those cases expressly do not render inapplicable or obsolete the directly-on-point rule of Thick v Lapeer Metal Products Co, 419 Mich 342 (1984).

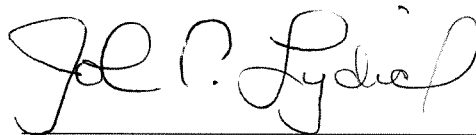
The Court of Appeals' fundamental mistake here was in never recognizing or addressing at all the special nature of the (motor vehicle owner) liability in this case and simply assuming that "tort reform" always requires the allocation of fault and

responsibility for damages, even where that liability is statutorily non-allocable. The trial court got it right, and that judgment (39a) should be reinstated.

RELIEF

For all of the foregoing reasons, Defendant-Appellant James Allen requests that this Honorable Court reverse the Court of Appeals decision (44a-46a, 47a) and reinstate the judgment of the trial court in this matter (39a).

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "John A. Lydick". The signature is written in black ink and is positioned above a horizontal line.

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