

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.)

**ESTATE OF MARION ROSE KAISER,
Deceased, by Roland Kaiser, Personal
Representative,**

Docket No. 133031

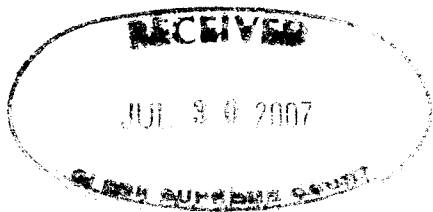
Plaintiff-Appellee,

v

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

Defendant-Appellant.

APPELLEE'S BRIEF ON APPEAL



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STATEMENT OF THE BASIS OF JURISDICTION

Defendant-Appellant's statement of jurisdiction is complete and accurate.

COUNTER-STATEMENT OF THE QUESTION PRESENTED

- I. DID THE COURT OF APPEALS CORRECTLY REVERSE THE TRIAL COURT'S ORDER GRANTING THE DEFENDANT VEHICLE DRIVER A SET- OFF AGAINST THE JURY VERDICT FOR THE SETTLEMENT AMOUNT PAID TO PLAINTIFF BY THE VEHICLE OWNER PRIOR TO THE TRIAL?

Plaintiff-Appellee answers, "Yes."

STATEMENT OF FACTS

The facts pertinent to this appeal are not in dispute.

Defendant-Appellant's statement of facts is complete and accurate for purposes of addressing the issues of this appeal.

ARGUMENT

I. THERE IS NO STATUTORY OR COMMON LAW BASIS TO SET-OFF THE SETTLEMENT AMOUNT PAID BY THE VEHICLE OWNER BEFORE TRIAL FROM THE JURY'S DAMAGE AWARD AGAINST THE DEFENDANT AT-FAULT DRIVER.

A. Introduction

As noted in Defendant-Appellant's statement of facts, this is a wrongful death motor vehicle negligence action originally brought against the owner of the at-fault vehicle and the negligent operator of the vehicle.

Plaintiff initiated suit against both the owner and the operator, but settled with the Defendant vehicle owner only before trial for the sum of \$300,000.00 (1a, 39a). The case proceeded to trial against the Defendant vehicle driver resulting in a jury verdict against him in the amount of \$100,000.00 (5a, 6a, 11a, 13a, 34a).

The trial court granted the Defendant vehicle operator's motion for a set-off for the amount previously paid by the Defendant owner, resulting in a judgment against Defendant driver of zero (37a).

Plaintiff appealed the trial court's set-off to the Court of Appeals. The Court of Appeals decided the appeal by summary panel without oral argument. Their unpublished per curiam opinion dated October 31, 2006 reversed the trial court's set-off and remanded for entry of judgment in the amount of the jury's \$100,000.00 verdict (44a-46a). After being denied their motion for reconsideration in the Court of Appeals, Defendant driver successfully sought leave to this Court (48a).

This Court's grant of leave directed the parties to address the interrelationship between

MCL 600.2957 (1) allocation of liability with MCL 257.401(1) vicarious owner liability. This Court's grant of leave further directed the parties to discuss the effect, if any, of the jury's verdict against the defendant driver of \$100,000.00 in assessing the trial court's conclusion that the set-off from the prior settlement amount of \$300,000.00 should result in Plaintiff taking a judgment of zero (48a).

B. Defendant-Appellant's Standard of Review is correct and complete.

The set-off issue is a purely legal issue that is reviewed by this Court de novo for error. Markley v Oak Health Care, 255 Mich App 245, 249 (2003).

C. Analysis

1. Michigan's Motor Vehicle Owner Liability is not subject to an allocation of fault.

As noted above, this Court's grant of leave asked the parties to discuss the relationship between allocation of fault under 600.2957(1) and the owner vicarious liability under MCL 257.401(1). The statutory provisions of the so-called tort reform statutes were expressly designed to allocate fault and damage responsibility between and among multiple active at-fault tortfeasors. The Michigan Owner Liability Statute, MCL 257.401(1), on the other-hand, does not call for a separate assessment of percentage of fault between the negligent operator of the vehicle and the vicariously liable owner of that vehicle. Because the vicarious owner liability is created by a statute that is specifically applicable to Plaintiff's claim in this case, it is the controlling statute. Alex v Wildfong, 460 Mich 10, 21 (1999).

2. There is no Statutory or Common Law basis to set-off the owner's settlement of \$300,000.00 against the jury's verdict against the Defendant negligent driver of \$100,000.00.

Defendant-Appellant asserts that the Markley v Oak Health Care decision supports the proposition that the set-off is authorized in this case by common law principal. However, the Markley decision specifically noted that an exception to the abolition in tort reform of joint and several liability applied in that case - a medical malpractice claim where the Plaintiff was without fault. MCL 600.6304(6)(a); Markley v Oak Health Care Investors of Coldwater, Inc., 255 Mich App 245, 251, 252; 660 NW 2d 344 (2003). No such exception to the abolition of joint and several liability applies to this case. Subsequent to tort reform, the statutory liability of an owner for the negligent operation of his or her vehicle is several to the liability of the at-fault driver, and not joint and several. Hashem v Les Stanford Oldsmobile Inc., 266 Mich App 61; 697 NW 558 (2005).

Defendant-Appellant further asserts that the decision of this Court in Thick v Lapeer Metal Products Co., 419 Mich App 342 (1984) supports their position that common law set-off is appropriate in this case. The Thick Court focused on statutory construction of the Workman's Compensation Act. In looking for direction, the Court referred to the common law rule in tort actions which authorized a set-off in the context of joint and several liability. Thick, id, at 348. The Thick holding did not deal with tort liability but, rather, workman compensation law. The Thick Court certainly did not expand the historical common law set-off in joint and several actions to apply to several liability only.

Finally, the Defendant-Appellant looks to Gerling Konzern Allgemeine Versicherungs AG v Lawson, 472 Mich 44 (2005) for their position 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 to which contribution and other statutory and common law principals still applied, even where the common liability is only several.” Appellant’s Brief Page 12. However, that position is over-reaching and misleading. The Gerling opinion did not hold that common law set-off applied where the “common liability” is only several. While this Court in Gerling discussed many of the concepts associated with settling versus non-settling tortfeasors that are implicated in this present case, the holding dealt only with contribution amongst tortfeasors.


D. Relief Requested

Simply stated, there is no basis in Michigan law for either statutory set-off or common law set-off where the liability is premised on several liability, and not joint and several. The Court of Appeals correctly noted the same. Because the set-off is not authorized by statute or common law, your Plaintiff-Appellee prays this Court will uphold the opinion of the Michigan Court of Appeals in this case.

Dated: 7-27-07

Respectfully submitted,

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