

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

<b>HOWARD M. JOHNSON</b>	)	
	)	CIVIL ACTION NUMBER
Plaintiff	)	
v.	)	00C-06-115-JEB
	)	
<b>KELLY SERVICES IRELAND, LTD.,</b>	)	
and <b>XEROX CORPORATION</b>	)	
	)	
Defendants	)	

***MEMORANDUM OPINION***

*Submitted: October 8, 2002*

*Argument: December 6, 2002*

*Decided: January 8, 2003*

*Upon Motion of Defendants' Seeking Set-Off Against  
Jury Verdict - **DENIED***

***Appearances:***

Edward T. Ciconte, Esq., of Ciconte Roseman & Wasserman, Wilmington, Delaware,  
attorney for plaintiff

Colleen D. Shields, Esq., of Elzufon Austin Reardon Tarlov & Mondell, Wilmington,  
Delaware, attorney for defendants

HERLIHY, Judge

On July 16, 2002, a jury awarded plaintiff Howard Johnson (“Johnson”) \$25,000 in damages for injuries he received in an auto accident. The other driver was Kenneth Ard. Ard was working for defendant Kelly Services Ireland (“Kelly”) on an assignment for defendant Xerox Corporation (“Xerox”) at the time of the accident.

Prior to trial, Johnson settled with Ard. Kelly and Xerox now seek, as joint-tortfeasors, a set-off of that amount against the jury’s award. Their motion was filed on September 18, 2002. As joint tort-feasors they would normally be entitled to such a set-off. But the document which Johnson signed in his settlement with Ard is neither entitled a “Joint Tort-feasor Release” nor incorporates statutory language providing for set-offs for joint tort-feasors.

While it is indisputable that Kelly and Xerox are joint-tortfeasors with Ard, the issue is whether the document Johnson executed deprives Kelly and Xerox of the set-off provisions. This Court holds that, despite the language of the particular document Johnson signed with Ard, Kelly and Xerox would be entitled to set-off. But, their motion, filed over two months post-verdict, is untimely as being beyond the ten days this Court’s rules require for filing such motions.

The defendants’ motion for set-off is **DENIED**.

#### *Facts*

Johnson sued Ard seeking compensation for injuries he suffered in a motor vehicle accident which occurred on July 30, 1999. At the time of the accident, Ard was driving his personal car, but was acting in the course and scope of his employment with Kelly, on a

temporary assignment for Xerox. In addition to claims against Ard, Johnson made derivative claims against Kelly and Xerox based on *respondeat superior*. By pre-trial stipulation, Kelly, Xerox and Ard conceded scope of employment and admitted that his negligence caused the accident.

Prior to trial, Johnson received \$16,666.67 from Allstate, Ard's personal insurance carrier. In exchange, Johnson executed the following document entitled "Agreement":

I, Howard Johnson, hereby acknowledge receipt of the payment of sixteen thousand six hundred sixty-six and 67/100 dollars (\$16,666.67) from Kenneth Ard and Allstate Insurance Company representing one-third (1/3) of Kenneth Ard's policy limits.

By signing this Agreement, Howard Johnson does not intend to adversely affect his right to continue his claim against other parties who may be liable to him through the actions of Kenneth Ard.

It is understood that in return for this payment of \$16,666.67, that Howard Johnson will not seek to hold Kenneth Ard personally responsible for any amounts that may be adjudicated in favor of Howard Johnson against any defendant. If any award is entered as a judgment in any court against Kenneth Ard in favor of Howard Johnson as a result of this lawsuit, (C.A. No. 00C-06-115 JEB) Howard Johnson agrees to satisfy such judgment as long as such satisfaction will not prejudice Howard Johnson.

The Agreement was not entitled as a Joint Tort-feasors' Release, nor did it incorporate the provisions of the Delaware Code covering such releases.

The case went to trial as one for damages only against Kelly and Xerox. The jury awarded Johnson \$25,000 representing its determination of all of his damages.

Kelly and Xerox have filed a "Motion Seeking Set-off Against the Jury Verdict" claiming that they are entitled to a \$16,666.67 reduction of that verdict in accordance with the Delaware Code providing for reduction of verdicts in circumstances such as this. Johnson, on the other hand, characterizes the motion as one not for a set-off, but rather as a remittitur. His argument is two-fold. First, he argues that the Agreement is not a joint tort-feasor release and that it was intentionally drafted to avoid the set-off provisions of the Uniform Contribution Among Tort-feasors Law. Second, he contends that the Motion is untimely under this Court's Civil Rule 59 since it was filed more than 10 days after the verdict.

To rebut the untimeliness argument Kelly and Xerox when first presenting their motion, suggested that Johnson led them to believe that Ard's payment would be set-off. The defendants also seemed to infer that Johnson refused to set-off only after the ten day deadline had passed.

These inferences prompted the Court to set up an evidentiary hearing. Kelly and Xerox produced no evidence at that hearing to support their earlier suggestions. The only evidence presented was a letter Johnson's counsel wrote to Kelly and Xerox's counsel prior to trial. There was no evidence of post-trial communications of any nature regarding set-off.

### ***Discussion***

Two distinct issues are before the Court. First, as a substantive matter, can a plaintiff settling a claim with one of several tort-feasors avoid the set-off provisions of the Uniform Contribution Among Tort-feasors Law by drafting the contract as an "Agreement" rather than

as a release and by avoiding “joint tort-feasor” phraseology? Second, as a procedural matter, is a "Motion for Set-off" untimely if it is filed over two months after verdict?

*A*

The first issue, of course, implicates Delaware’s statute concerning joint tort-feasors.

The provisions applicable to the resolution of this case are:

(a) A release by the injured person of one joint tort-feasor, whether before or after judgment, does not discharge the other tort-feasor unless the release so provides; but reduces the claim against the other tort-feasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.

(b) A release by the injured person of one joint tort-feasor does not relieve the one joint tort-feasor from liability to make contribution to another joint tort-feasor unless the release is given before the right of the other tort-feasor to secure a money judgment for contribution has accrued, and provides for a reduction, to the extent of the pro rata share of the released tort-feasor, of the injured person's damages recoverable against all the other tort-feasors.<sup>1</sup>

Johnson contends that in order to receive the set-off, Kelly and Xerox must establish that the release executed in Ard’s favor was intended by them to be a "joint tort-feasor release" containing this statutory language or its equivalent. According to Johnson, he never executed a joint tort-feasor release because the words "joint tort-feasor" and "release" do not appear in the Agreement. In fact, he admits that he worked diligently in drafting the Agreement to avoid the Law's set-off provisions. The Agreement, he maintains, was nothing more than a receipt for payment. However, the explicit language of the Agreement belies his

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<sup>1</sup> 10 DEL. CODE ANN. tit. 10 §6304 (Supp. 2000).

argument. It is clearly a release because it provides that "in return for this payment... Howard Johnson will not seek to hold Kenneth Ard personally responsible for any amounts that may be adjudicated in favor of Howard Johnson against any defendant." The Agreement goes on to provide other language clearly evidencing an intent to incorporate for Ard the protection of the Law. That language is:

If any award is entered as a judgment in any court against Kenneth Ard in favor of Howard Johnson as a result of this lawsuit, (C.A. No. 00C-06-115-JEB) Howard Johnson agrees to satisfy such judgment as long as such satisfaction will not prejudice Howard Johnson.

Finally, it is highly improbable that Allstate would have paid Johnson anything without obtaining a release for itself and its insured, Ard. In short, to argue that this document is merely a "receipt" is unpersuasive. Nor is it dispositive that the release does not contain the language of section 6304. There is no requirement that only the magic words of that statute be used to convert a release to a joint tort-feasor release. At least one decision has applied the set-off provision of section 6304 despite the lack of statutory language in the release.<sup>2</sup>

This case turns not on whether the parties labeled the contract an Agreement or a "release," but rather whether Ard, Kelly and Xerox are all joint tort-feasors for the purposes of section 6304. According to the Delaware Supreme Court, in order for parties to be

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<sup>2</sup> *Clark v. Brooks*, 377 A.2d 365 (Del. Super. Ct. 1977) (finding that release signed by plaintiff in connection with settlement of his personal injury claim against employer failed to contain beneficial language found in Uniform Contribution Among Tortfeasors Law, under accepted principles that proscribed unjust enrichment, employee doctor was entitled to benefit of amount received by plaintiff as consideration for release.)

deemed joint tort-feasors for the purposes of the statute, there must be "some reliable means there was a determination, either judicially or *by an admission*, that the settling party was liable in tort. i.e., a tort-feasor."(emphasis added)<sup>3</sup>

The parties' pretrial stipulation unequivocally contained an admission of Ard's tort liability when in part it stated:

The defendants Kelly Services Ireland, Ltd., Xerox Corporation and Kenneth A. Ard concede that Kenneth Ard was operating his vehicle while in the course and scope of his employment with Kelly Services on July 30, 1999. Defendants further concede that the negligence of Kenneth Ard was the proximate cause of a motor vehicle accident involving a vehicle operated by plaintiff Howard Johnson. Defendants dispute that Howard Johnson was injured in the manner or to the extent to which he claims. Defendants further dispute that Howard Johnson sustained damages including medical bills and wage loss to the extent he claims as a result of the accident.<sup>4</sup>

Ard's admission of negligence constitutes a "reliable means there was a determination" that he was liable in tort, and therefore a tort-feasor. Therefore, as a substantive matter, Kelly and Xerox would be entitled to a set-off of 16,666.67 from the \$25,000.00 judgment.

### ***B***

There remains, however, the issue of the timeliness of the defendants' motion. Johnson argues that while the defendants have couched the motion in terms of seeking a set-off, the actual remedy sought is a remittitur and that such requests are governed by Superior

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<sup>3</sup> *Medical Ctr. of Delaware v. Mullins*, 637 A.2d 6, 8 (Del. 1994).

<sup>4</sup> Pre-trial Stipulation at 2.

Court Civil Rule 59. Rule 59(d) provides that "[a] motion to alter or amend the judgment shall be served and filed not later than 10 days after entry of the judgment." Johnson concludes that since Kelly and Xerox filed this motion over two months after verdict, the motion is untimely and procedurally barred. Kelly and Xerox, of course, disagree. They maintain that their "motion for set-off" is not governed by Rule 59 because they are not seeking to alter or amend the judgment, but only obtain a credit for sums already paid. They have not, however, offered any alternative Rule or authority on which to judge the motion's timeliness.

Regardless of how one characterizes their motion, whether it be a remittitur or for set-off, some Rule or statute must govern as to the issue of timeliness. Rule 59, with its 10 day limitations period, is the most analogous. To avoid the consequences of the limitations period, Kelly and Xerox intimated that Johnson led them to believe there would be a set-off. Only when more than ten days had elapsed after the verdict, did Johnson, they hint, state there would be no set-off. Their evidence of this was scant, at best, and far from persuasive. It was a letter sent prior to trial. There was no evidence Johnson's counsel did anything after the trial to mislead counsel for Kelly and Xerox.

Accordingly, defendants' motion for seeking set-off against the jury verdict is **DENIED** as procedurally time barred.

**IT IS SO ORDERED.**

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J.



