Plaintiff's Right to Recover from Non-Settling Tortfeasor When Settlement with Joint Tortfeasor Exceeds the Jury Award

Cindi M. Ingram
PLAINTIFF'S RIGHT TO RECOVER FROM NON-SETTLING TORTFEASOR WHEN SETTLEMENT WITH JOINT TORTFEASOR EXCEEDS THE JURY AWARD

贺蒙 v. Safeway Sanitation Services, Inc.¹

In suits arising from injuries caused by joint tortfeasors,² the common law could be very harsh on the parties. The plaintiff who entered into a partial settlement with one or more of the tortfeasors, but less than all of them, found that giving a release to one tortfeasor had the effect, often unintended, of relinquishing the plaintiff's claim against all of the tortfeasors.³ It could be equally harsh on the defendant who was a joint tortfeasor. It barred a defendant from seeking contribution⁴ from another tortfeasor.⁵ Widespread dissatisfaction with these results led to the adoption of modern tort principles which are intended to alleviate the harshness of the common law doctrines.⁶

Missouri has taken an active role in reforming the common law position on the rights of the parties in suits involving multiple tortfeasors. First, in

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¹ 725 S.W.2d 605 (Mo. Ct. App. 1987). Judge Simeone of the Eastern District Court of Appeals delivered the decision.
² “Joint tortfeasors” is defined as “two or more persons jointly or severally liable in tort for the same injury to person or property.” BLACK'S LAW DICTIONARY 752-53 (5th ed. 1979); see W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 46, at 322-23 (5th ed. 1984).
³ See infra notes 34-37 and accompanying text.
⁴ “Contribution” is defined as “an order distributing loss among tortfeasors by requiring others each to pay a proportionate share to one who has discharged their ‘joint’ liability.” W. PROSSER & W. KEETON, supra note 2, § 51, at 341. “Under principle of ‘contribution,’ a tort-feasor against whom a judgment is rendered is entitled to recover proportional shares of judgment from other joint tort-feasors whose negligence contributed to the injury and who were also liable to the plaintiff.” BLACK'S LAW DICTIONARY 297 (5th ed. 1979); see also 18 AM. JUR. 2D Contribution § 1 (1965). “Contribution” is also sometimes referred to as non-contractual indemnity. See Fischer, The New Settlement Statute: Its History and Effect, 40 J. MO. BAR 13 (1984).
⁵ See infra notes 38-41 and accompanying text.
⁶ “Using the analogy of an old time-worn building, we have added and re-constructed so much of our law of joint and concurrent tortfeasor liability, the origins of which are ancient, that it has lost its architectural integrity and its structural balance.” Missouri Pac. R.R. v. Whitehead & Kales Co., 566 S.W.2d 466, 472 (Mo. 1978) (en banc).
Missouri Pacific Railroad v. Whitehead & Kales Co.," Missouri judicially adopted "a system for the distribution of joint tort liability on the basis of relative fault." Missour then took the next logical step in Gustafson v. Benda and adopted a scheme of comparative fault based upon the Uniform Comparative Fault Act.

The Missouri General Assembly has also been an active participant in tort reform. The statute dealing with settlements, contribution, and releases, Mo. REV. STAT. § 537.060 (1986), has been revised as new issues have arisen. One issue that remained unresolved, however, was the effect of a partial settlement with one tortfeasor on the non-settling tortfeasor's liability to the plaintiff when the settlement exceeded the jury award. This issue was faced and resolved in Hampton v. Safeway Sanitation Services, Inc.

Hampton involved a wrongful death suit brought by the parents of a five year old girl who died when a trash dumpster placed on uneven ground fell over and struck her. The plaintiff sued three defendants on theories of strict liability and negligence. One defendant was the manufacturer of the dumpster, Flint & Walling, Inc. The other two defendants, Safeway Sanitation

7. 566 S.W.2d 466 (Mo. 1978) (en banc).
8. Id. at 474. In Whitehead & Kales, the Missouri Supreme Court held that an action for contribution may be brought against a joint tortfeasor and that damages may be allocated among the tortfeasors on the basis of relative fault. Id. In adopting a system of relative fault, the court said:
We no longer value the antique moralism that if we permit concurrent tortfeasors to share their burden we will thereby be encouraging them in the very joint negligence for which we hold them liable. To limit any apportionment of damages between tortfeasors to those whom the plaintiff has chosen to sue and against whom judgement is rendered is an inartful and capricious policy, relying in excess upon the whim and wrath of a plaintiff before concurrent wrongdoers can share liability.
Id. at 473. See generally Note, Tort Law: Missouri Pacific Railroad v. Whitehead & Kales Co.: Uncertain Renovations, 48 UMKC L. REV. 54 (1979) (discussing indemnity and contribution before and after the Whitehead & Kales decision).
9. 661 S.W.2d 11 (Mo. 1983) (en banc).
10. UNIF. COMPARATIVE FAULT ACT §§ 1-6, 12 U.L.A. 38-48 (Supp. 1979). In explaining its decision, the Gustafson court said:
Expansion of comparative fault as first enunciated in Whitehead & Kales is in the best interest of all litigants. Comparative fault affords practicing attorneys a less complex and far more effective method for representing the rights of their clients, either plaintiff or defendant. Joining all parties to a transaction in a single lawsuit for the comparison of the fault of all concerned can best expedite litigation and relieve the congestion of overcrowded courts.
Gustafson, 661 S.W.2d at 15.
11. See infra note 30.
13. 725 S.W.2d 605 (Mo. Ct. App. 1987).
14. Id. at 606.
15. Id.
16. Id.
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Services, Inc. and J & Z Disposal, Inc., serviced the dumpster as joint venturers.17 Prior to trial, the plaintiffs settled with Flint & Walling for consideration of $45,000.18 The trial court entered an interlocutory order approving the separate settlement agreement between plaintiffs and Flint & Walling which preserved the plaintiffs' rights against the other defendants.19 The order provided that the plaintiff make a partial satisfaction of the judgment for that portion of plaintiffs' total judgment found by the jury to be the percentage of fault attributable to Flint & Walling.20

At trial, the jury found in favor of the plaintiffs and returned a verdict against all three defendants.21 The trial court's judgment stated that the jury had determined the damages of the plaintiffs to be $30,000.22 The jury assessed the relative fault of Flint & Walling to be 60%, the fault of Safeway Sanitation to be 20%, and the fault of J & Z Disposal to be 20%.23

Safeway Sanitation then moved for a judgment notwithstanding the verdict, claiming that the $30,000 verdict was satisfied by the $45,000 settlement with Flint & Walling.24 The trial court denied the motion and entered judgment in favor of the plaintiffs against Safeway Sanitation for $6000, 20% of the $30,000 verdict.25 Safeway Sanitation appealed from this ruling.26 On appeal, the court held that the non-settling defendant, Safeway Sanitation, was not liable to the plaintiff for the amount of the verdict assessed against it by the jury.27 Instead, Safeway Sanitation was released from liability to the plaintiffs without making any kind of financial compensation.28

A unanimous court held that when the plaintiff makes a settlement with one alleged joint tortfeasor and the amount of the settlement exceeds the amount of the jury verdict, the claim of the plaintiff is reduced to zero or a negative number so that the verdict rendered against the non-settling defendant is satisfied.29 The court based its reasoning primarily on the "plain meaning" of Missouri's recently revised contribution statute,30 the legislative intent

17. Id.
18. Id.
19. Id.
20. Id.
21. Id. at 606-07.
22. Id. at 607.
23. Id.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id.
29. Id.
30. Mo. Rev. Stat. § 537.060 (1986). Missouri's contribution statute provides for contribution as follows:

Defendants in a judgment founded on an action for the redress of a private wrong shall be subject to contribution, and all other consequences of such judgment, in the same manner and to the same extent as defendants in a judgment in an action founded on contract. When an agreement by release,
behind the statute, the Uniform Contribution Among Tortfeasors Act,\textsuperscript{31} and the reasoning of other jurisdictions on this issue.\textsuperscript{32}

Part of the importance of the \textit{Hampton} decision lies in the fact that courts and legislatures have pursued various alternatives when confronted with similar situations.\textsuperscript{33} An examination of these alternatives in light of the recent
covenant not to sue or not to enforce a judgment is given in good faith to one of two or more persons liable in tort for the same injury or wrongful death, such agreement shall not discharge any of the other tort-feasors for the damage unless the terms of the agreement so provide; however such agreement shall reduce the claim by the stipulated amount of the agreement, or in the amount of consideration paid, whichever is greater. The agreement shall discharge the tort-feasor to whom it is given from all liability for contribution or noncontractual indemnity to any other tort-feasor. The term "noncontractual indemnity" as used in this section refers to indemnity between joint tort-feasors culpably negligent, having no legal relationship to each other and does not include indemnity which comes about by reason of contract, or by reason of vicarious liability.

\textit{Id.}

\textsuperscript{31} UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 63 (1955). The section dealing with the effect of a release is § 4 which provides:
When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
(a) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,
(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

\textit{Id.} § 4, at 98.

\textsuperscript{32} For example, the court relied heavily on Martinez v. Lopez, 300 Md. 91, 476 A.2d 197 (1984).

\textsuperscript{33} \textit{See} Harris, \textit{Washington's Unique Approach to Partial Tort Settlements: The Modified Pro Tanto Credit and the Reasonableness Hearing Requirement}, 20 GONZ. L. REV. 69 (1984/85). According to Harris, four main issues must be considered when choosing between the various alternatives:
1. The amount of the non-settling defendant's credit that reduces the claimant's award against him;
2. Whether the settling defendant is discharged from all future liability for contribution;
3. Whether the settling defendant's right to seek contribution from a non-settling defendant survives the settlement. If it survives, the manner of determining the gross amount that the later contribution action will apportion;
4. Whether either the settling defendant or non-settling defendant retains the right to assert a vicarious liability claim, or other type indemnity claim, against the other.

\textit{Id.} at 74. Harris also discusses the three most common bases for determining the amount of credit applied to the non-settling tortfeasor's liability:
The pro rata rule allocates a single numerical share to each defendant in a lawsuit. In settling with one defendant, the plaintiff sacrifices the numerical pro rata share attributed to that defendant. When a plaintiff settles with one
tort reforms can shed light on the implications of the Hampton decision.

At common law, the plaintiff entering into a partial settlement with one of several tortfeasors could be surprised by the result of the settlement. If the plaintiff settled with one of the joint tortfeasors and released him from further liability, then the non-settling joint tortfeasors were also released from further liability to the plaintiff.\(^\text{34}\) This result can be traced to the common law principle that an injured party was entitled to only one satisfaction for his injury.\(^\text{35}\) The plaintiff who received consideration from one defendant in return for a release was deemed to have been fully satisfied. Therefore, the other responsible parties were deemed to no longer have an obligation to the plaintiff.\(^\text{36}\) This doctrine could have very unfortunate results for the unwary plaintiff who settled with one tortfeaso with no intention of releasing his right to compensation from the non-settling tortfeasors. Such a result was the subject of much legal criticism.\(^\text{37}\)

The common law position on a right to contribution among joint tortfeasors was also unfavorably viewed.\(^\text{38}\) This position was the result of the feeling that tortfeasors are "wrongdoers and hence not deserving of the aid of courts in achieving equal or proportionate distribution of the common burden of a three defendant case, his recovery is reduced by one-half. In a three defendant case, settlement with two defendants results in a two-thirds reduction.

The pro tanto rule enforces a reduction in the amount paid by the settling defendant. If the settling defendant pays $50,000 to settle the claim against him, any award against the non-settling defendant is reduced by that amount. States enforcing a proportionate credit rule reduce the plaintiff's award by the percentage of negligence attributable to the settling defendant.

Id. at 77-78 (emphasis in original).

34. For an analysis of the common law rule in Missouri, see Note, Settling Joint Tortfeasor Can Sue for Contribution from Non-Settling Joint Tortfeasor, 46 Mo. L. Rev. 886, 887-89 (1981).

35. Kassman v. American Univ., 546 F.2d 1029, 1033 (D.C. Cir. 1976) (it is a "cardinal principle of law" that the injured can recover no more than the damages that he has suffered); Rose v. Associated Anesthesiologists, 501 F.2d 806, 809 (D.C. Cir. 1974) (the one satisfaction rule "is equitable in its nature, and its purpose is to prevent unjust enrichment"); see also W. PROSSER & W. KEETON, supra note 2, § 48, at 330. Some courts, however, have rejected this principle. See, e.g., Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 431 (Tex. 1984) ("The reasoning behind the one recovery rule no longer applies.").

36. W. PROSSER & W. KEETON, supra note 2, § 49, at 332.

37. See id. at 333.

den." The plaintiff could select the tortfeasor of his choice to sue among multiple tortfeasors liable for the same injury. A judgment in the plaintiff's favor left the chosen tortfeasor in the unenviable position of solely bearing the full consequences of the injury. The tortfeasor had no recourse against the other tortfeasors who were also liable but managed to escape any financial obligation by not being named as defendants.

The Uniform Contribution Among Tortfeasors Act was the result of the 1936 Conference of Commissioners on Uniform State Laws. Its primary aim was to alleviate some of the harshness of the common law bar against contribution among joint tortfeasors. The Act allowed a party to bring an action for contribution against a joint tortfeasor, regardless of whether a judgment had been returned against that joint tortfeasor. The Act also sought to deal with some of the inequities inherent in the situation where the unsuspecting plaintiff relinquished his right to pursue claims against non-settling joint tortfeasors by settling with one joint tortfeasor.

The Act provides that a release given by the plaintiff to one joint tortfeasor does not discharge the other tortfeasors unless the release so provides. However, there was widespread dissatisfaction with one provision of the 1939 Act. That provision stated that a release of one tortfeasor did not bar a contribution claim by the other tortfeasors unless it expressly stated that the plaintiff's claim would be reduced "to the extent of the pro rata share of the released tortfeasor." This had the effect of discouraging settlements.

41. Id.
42. Commissioners' Prefatory Note [1939], Unif. Contribution Among Tortfeasors Act, supra note 39, at 61.
43. The Commissioners' Prefatory Note to the 1939 Act states: The desire for equal or proportionate distribution of a common burden among those upon whom it rests is everywhere fundamental. And if one of those subject to the burden discharges the obligation resting on all, its [sic] natural that this claim for contribution to the discharge of this common liability be recognized. His payment, made pursuant to his own obligation, has accrued to the benefit of his co-obligors.

Id. at 60.
45. Id. at 57-58.
46. Commissioners' Comment, Unif. Contribution Among Tortfeasors Act, supra note 31, at 99. The Commissioners' Comment states: The effect of Section 5 of the 1939 Act has been to discourage settlements in joint tort cases, by making it impossible for one tortfeasor alone to take a release and close the file. Plaintiff's attorneys are said to refuse to accept any release which contains the provision reducing the damages "to the extent of the pro rata share of the released tort-feasor," because they have no way of knowing what they are giving up. The "pro rata" share cannot be determined in advance of the judgment against the other tortfeasors. In many cases their
defendant who was contemplating settlement was unable to "buy his peace" with any degree of certainty since his pro rata share could not be determined until trial. He would still be liable for contribution if his pro rata share exceeded the consideration paid for the settlement.\(^48\) This scheme also placed the plaintiff in a difficult position because he was uncertain of what he was giving up by agreeing to release the settling tortfeasor to the extent of his pro rata share.\(^49\) Because of the dissatisfaction with the provision, it was revised by the 1955 version of the Uniform Contribution Among Tortfeasors Act.\(^50\)

The revision is contained in section 4 of the Uniform Contribution Among Tortfeasors Act.\(^51\) The section explains the effect of the settlement with one defendant on the obligation of the remaining non-settling defendants. It provides that the plaintiff's claim against the remaining defendants will be reduced by the amount stipulated in the release or by the amount of consideration paid for the release, whichever is greater.\(^52\)

The Uniform Contribution Among Tortfeasors Act has not been the sole statutory attempt to deal with the inequities of the common law doctrines. The Uniform Comparative Fault Act is another statutory scheme that confronts the problems. The Uniform Comparative Fault Act, like the Uniform Contribution Among Tortfeasors Act, provides that an agreement entered into by an injured party and one responsible party does not discharge the other parties responsible unless the agreement expressly provides for the discharge.\(^53\)

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*chief reason for settling with one rather than another is that they hope to get more from the party with whom they do not settle. A provision for reduction in a fixed amount will not protect the settling tortfeasor from contribution. No defendant wants to settle when he remains open to contribution in an uncertain amount, to be determined on the basis of a judgment against another in a suit to which he will not be a party.

*Id.* The "pro rata" share is determined by dividing the damages by the number of tortfeasors. W. Prosser & W. Keeton, [*supra* note 2, § 50, at 340.]

47. See [*supra* note 46. For a discussion of how the pro rata credit rule of the 1939 Act discouraged settlement, see Harris, [*supra* note 33, at 82-85. According to Harris, the pro rata rule discouraged settlement because of the uncertainty encountered by the plaintiff considering settlement. It was also inconsistent with the principle that the claimant receive no more than one full recovery. *Id.*

48. See [*supra* note 46.

49. *Id.*


51. *Id.* For a discussion of the constitutionality of § 4 of the Act, see Fischer, [*supra* note 12, at 18-19 (barring a non-settling tortfeasor from seeking contribution from the settling tortfeasor does not violate due process because denial of the right to contribution bears a rational relationship to the policy of encouraging settlements).]

52. *Unif. Contribution Among Tortfeasors Act, supra* note 31. For a discussion of how the pro tanto rule of credit is inconsistent with the policy of equitable distribution of losses among defendants, see Harris, [*supra* note 33, at 88-90.

53. *Unif. Comparative Fault Act, supra* note 10, at 47. The section dealing with the effect of a release provides:

A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribu-
There is an important difference, however, between the Uniform Contribution Among Tortfeasors Act and the Uniform Comparative Fault Act. The Uniform Comparative Fault Act differs in the effect of a partial settlement on the obligation of the remaining defendants to the plaintiff. Under the Uniform Comparative Fault Act, the plaintiff’s claim is reduced by the released tortfeasor’s equitable share of the obligation.\textsuperscript{54} The equitable share of the released tortfeasor is defined to be the percentage of the total fault that is allocated to each tortfeasor by the trier of fact.\textsuperscript{55} If Missouri had adopted this statutory scheme, then the \textit{Hampton} case would have had a different consequence for Safeway Sanitation. The effect of Flint & Walling’s settlement with the plaintiff would have been a reduction in the plaintiffs’ claim against the remaining defendants by Flint & Walling’s equitable share of the fault. The jury determined Flint & Walling’s equitable share of the fault to be 60\%.\textsuperscript{56} This would have reduced the plaintiff’s claim by $18,000, 60\% of the $30,000 verdict. Safeway Sanitation and J & Z Disposal would have remained liable for the remaining 40\% of the $30,000 verdict, or $12,000.

In addition to these two statutory schemes developed by the Commissioners on Uniform State Laws, states have also statutorily enacted other approaches dealing with the effects of partial settlements. New York has adopted a hybrid statutory scheme which provides that the obligation of the settling defendants is reduced by the consideration paid for the settlement, the amount stipulated in the release, or the equitable share of the settling defendant’s liability, whichever is greatest.\textsuperscript{57} Application of this statute to the \textit{Hampton} situ-

\textsuperscript{54} \textit{Id.} One problem that a plaintiff may encounter with this approach is the so-called “empty chair” defense where the non-settlor attempts to shift liability to a released co-defendant. \textit{See} Fischer, \textit{supra} note 12, at 15; Harris, \textit{supra} note 33, at 105.

\textsuperscript{55} Unif. Comparative Fault Act, \textit{supra} note 10, at 41-42.

\textsuperscript{56} \textit{Hampton}, 725 S.W.2d at 607.

\textsuperscript{57} N.Y. GEN. OBLIG. LAW § 15-108 (McKinney 1978) provides:

(a) Effect of release of or covenant not to sue tortfeasors. When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releaser against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is greatest.

(b) Release of tortfeasor. A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves his liability to any other person for contribution as provided in article fourteen of the civil practice law and rules.
ation would yield the same result as reached by the *Hampton* court because the consideration paid for the settlement was the greatest of the three alternatives and would have been the amount reduced from the plaintiff’s claim.

Texas follows an approach regarding the effect of a partial settlement on the non-settling defendant’s liability which is similar to the Uniform Comparative Fault Act. Texas has judicially adopted a scheme for contribution based upon comparative causation. In *Duncan v. Cessna Aircraft Co.*, the Texas court held that “a settlement with one tortfeasor will reduce the liability of the nonsettling defendants by the percentage of causation allocated to the settling tortfeasor rather than by a pro rata share.” If Missouri had followed this approach, the *Hampton* case would have had a different result for the nonsettling defendants. The plaintiffs’ claim would have been reduced by 60%, the percentage of causation allocated to Flint & Walling, leaving Safeway Sanitation and J & Z Disposal liable to the plaintiffs for 40% of the $30,000 verdict.

Missouri’s recently revised statute dealing with settlement, releases and contribution was greatly influenced by the Uniform Contribution Among Tortfeasors Act. It provides that an agreement with the plaintiff by one joint tortfeasor will reduce the plaintiff’s claim against the other tortfeasors by the stipulated amount of the agreement or the amount of the consideration paid, whichever is greater.

In *Hampton*, the court was faced with interpreting this statute in an unusual situation. The usual situation involves a joint tortfeasor who settles before trial for an amount less than the jury award. In Missouri, the statute and case law are clear on the consequences of settlement in this situation. The plaintiff’s claim, as determined by the jury, is reduced by the amount of the earlier settlement. However, the unusual occurred in *Hampton*. The settling defendant, Flint & Walling, miscalculated his liability to the plaintiff and set-

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(c) Waiver of contribution. A tortfeasor who has obtained his own release from liability shall not be entitled to contribution from other persons.

*Id.* See also Comment, *Repealing New York’s Post-Settlement Equitable Share Reduction Scheme: An Idea Whose Time Has Come*, 49 ALB. L. REV. 856, 859-61 (1985) (suggesting that the current statute “strongly discourages settlement by forcing parties to predict how a jury will later apportion liability”).

59. *Id.*
60. *Id.* at 430. This position may encourage parties to settle. “The proportionate rule probably encourages total settlement after the execution of a partial settlement. A culpable, non-settling defendant cannot minimize or escape financial responsibility merely because a settling defendant pays more than his fair share.” *Harris*, *supra* note 30, at 102. For a discussion of the advantages and disadvantages of a credit based on the settling tortfeasor’s relative share, see *Harris*, *supra* note 33, at 100-05.
61. MO. REV. STAT. § 537.060 (1986) (text of this section found *supra* note 30).
63. MO. REV. STAT. § 537.060 (1986) (text of this section found *supra* note 30).
64. *Id.*
tled for more than the jury award. In answering this question, the Hampton court turned to various principles for guidance. The court looked first to the "plain meaning" of the statute. Interpretation of a statute involves ascertaining the legislative intent behind the enactment of the statute. Consideration of the "plain meaning" of the words used in the statute is a basic principle of statutory construction in determining legislative intent. The Hampton court discussed the "plain meaning" of the words "reduce" and "claim" in reaching its construction of the statute. The court referred to the dictionary definition of "reduce" as meaning "to diminish in size, amount, extent or number; to make small or to lower, bring down or to change the denomination of a quantity." The court then judicially defined "claim" as "the amount of damages as determined by an impartial fact finder — the jury." The court also looked to judicial decisions in other jurisdictions for guidance on the issue. The Maryland Court of Appeals had been faced with a similar situation in Martinez v. Lopez. In that case, the plaintiff sued a physician and a hospital as joint tortfeasors on a medical malpractice theory. Before trial, the plaintiff settled with the hospital for $725,000. The plaintiff gave the hospital a release which provided that the plaintiff's claim against the physician would be reduced by the statutory pro rata share of the hospital. At trial, the jury returned a verdict of $600,000. The physician moved for an order crediting the hospital's settlement of $725,000 against the verdict of $600,000. The trial court, however, held that the physician remained liable for the amount of the verdict remaining after the hospital's statutory pro rata share, $300,000, was credited against the verdict. This was reversed on appeal. Like the Missouri statute, section 19 of the Maryland contribution statute is based upon section 4 of the Uniform Contribution Among Tortfeasors.

65. Hampton, 725 S.W.2d at 606-07.
66. Id. at 610.
67. "The primary object of statutory interpretation is to ascertain the intent of the legislature from the language used, and to give effect to that intent. In doing so we are to consider the words used in the statute in their plain and ordinary meaning." Springfield Park Cent. Hosp. v. Director of Revenue, 643 S.W.2d 599, 600 (Mo. 1983).
68. Hampton, 725 S.W.2d at 610.
69. Id.
70. 300 Md. 91, 476 A.2d 197 (1984).
71. Id. at 94, 476 A.2d at 198.
72. Id.
73. Id. at 94, 476 A.2d at 199.
74. Id. at 94, 476 A.2d at 198.
75. Id. at 95, 476 A.2d at 199.
76. Id.
77. Id. at 105, 476 A.2d at 204.
78. The Maryland statute is Md. ANN. CODE, art. 50, §§ 16-24 (1957). Section 19 of the statute provides:
In construing the Maryland statute, the court said:

Here the consideration paid by [the settling defendant] was more than the total compensation to which Plaintiffs were entitled in the eyes of the jury. We could not in this case denounce [the contribution statute] as absurd and proceed to rewrite the statute in the guise of construction, without holding that the use of juries to value personal injury claims is absurd.80

Therefore, the liability of the physician to the plaintiff was extinguished.81

The Hampton court noted that the principle of applying Mo. Rev. Stat. § 537.060 (1986) to reduce the plaintiff’s claim against the non-settling defendants to zero or a negative number had been recently recognized in State ex rel. Simmerock v. Brackmann.82 In Simmerock, the court confirmed the effect of § 537.060 on a partial settlement. The court held that a release given by a plaintiff to a settling tortfeasor bars an action for contribution or indemnity against the released tortfeasor by another joint tortfeasor.83 In discussing the right of the joint tortfeasor to offset the amount of the consideration paid for the release against the judgment, the court declared, “Plaintiffs in the underlying claim are not entitled to recover from any defendants remaining in the case any additional sum if a resulting judgment should occur in an amount less than the amount of the settlement.”84

In reaching its decision, the Hampton court also referred to Missouri Approved Instruction [hereinafter MAI] 7.01 which informed the jury that if the settlement amount was equal to or exceeded the amount of plaintiff’s damage, the verdict must be for the defendant.85 This instruction is no longer in use and has been replaced by MAI 1.06.86 Under the new instruction, the amount

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A release by the injured person of one joint tort-feasor, whether before or after judgment, does not discharge the other tort-feasors 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.

Id. § 19.

79. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, supra note 31.
80. Martinez, 300 Md. at 104, 476 A.2d at 203-04.
81. Id. at 105, 476 A.2d at 204.
82. 714 S.W.2d 938 (Mo. Ct. App. 1986).
83. Id. at 939.
84. Id. at 943.
85. MAI 7.01 [1965 New] states: Damages — Deduction for Admitted Settlement with Joint Tort-Feasor After you have determined such sum, you must deduct ____ dollars which (name of joint tort-feasor) has paid plaintiff. In the event such payment is equal to or exceeds the amount of plaintiff’s damage, then your verdict must be for defendant.
86. MAI 1.06 [1983 New] states: Advance Payment or Partial Settlement Instructions No instruction shall be given directing the jury to credit its verdict with the amount of any advance payment or partial settlement.
of the settlement is not disclosed to the jury because it is the court's function to reduce the verdict by the amount of the settlement agreement.\(^{87}\) The court reasoned that the result should be the same under the new instruction, i.e., the verdict should be for the defendant if the settlement amount exceeded the plaintiff's damage. The court noted that "[t]his change related to procedure not substance."\(^{88}\) The court also reasoned that the result was consistent with the common law doctrine of allowing a plaintiff only one satisfaction for his claim of damages.\(^{89}\)

Although not discussed by the court in \textit{Hampton}, the result reached is consistent with jurisdictions other than Maryland which have adopted section 4 of the Uniform Contribution Among Tortfeasors Act or a similar statutory scheme.\(^{90}\) California's statute dealing with the effect of a settlement with one joint tortfeasor is similar to Missouri's in that it reduces the claim of the plaintiff by the amount stipulated in the release or the amount of the consideration, whichever is greater.\(^{91}\) In construing the California statute in a case which presented issues similar to that in \textit{Hampton}, the court in \textit{Jaramillo v. State}\(^{92}\) reached the same result as that of the \textit{Hampton} court. The claim arose out of a motorcycle accident and, prior to trial, the plaintiff settled with two of the defendants for $350,000.\(^{93}\) At trial, the jury returned a verdict for

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87. In the Committee's Comment following MAI 1.06, it states:
[1]In \textit{Taylor v. Yellow Cab Co.}, 548 S.W.2d 528 (Mo. Banc 1977), wherein the Court pointed to the logic of making all deductions, whether advance payments or partial settlement payments by joint tort-feasors, a court function: If the only purpose in putting the payment in advance on the record was to allow for the reduction of the verdict by that amount, then that result is reached by \textit{simply advising the court of the prior payment} and the court will reduce the payment accordingly.

\textit{Id.}

88. \textit{Hampton}, 725 S.W.2d at 610 n.12.

89. \textit{See supra} notes 34-37 and accompanying text.


91. \textit{See} CAL. CIV. PROC. CODE § 877 (West 1980). This section provides:
Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort (a) It shall not discharge any other such tortfeasor from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater; and
(b) It shall discharge the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasors.

\textit{Id.}


93. \textit{Id.} at 970, 146 Cal. Rptr. at 824.
$500,000 in the plaintiff's favor.\textsuperscript{94} However, the jury found the plaintiff to be 33.3\% at fault and the verdict was thereafter reduced to $333,500 against the remaining non-settling defendant.\textsuperscript{95} Because the settlement exceeded the verdict after the plaintiff's negligence was taken into account, the plaintiff recovered nothing from the remaining non-settling defendant.\textsuperscript{96}

A long standing legal principle which the Hampton court did not discuss at length, however, is the principle of encouraging voluntary settlements between parties rather than resolving disputes by invoking a court's authority.\textsuperscript{97} A further issue which the Hampton court did not resolve will undoubtedly have an impact on the willingness of parties to enter into settlement agreements. In a footnote, the court noted that it was not necessary to decide whether the settling tortfeasor, having paid more than his proportionate share of the verdict, could bring an action for contribution against the non-settling tortfeasors.\textsuperscript{98} The answer to that question could have significant impact on the policy of encouraging parties to enter into settlement agreements.\textsuperscript{99}

There are alternative ways in which this issue could be resolved, each having a differing impact on the policy of encouraging settlements. If the settling tortfeasor were able to bring an action for contribution against the other joint tortfeasors when he has paid more than his proportionate share,\textsuperscript{100} then this might have the effect of encouraging more defendants to settle because they would have nothing to lose by entering into a settlement.\textsuperscript{101} If the defendant made a favorable settlement, he would be shielded from further liability to

\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id. at 972, 146 Cal. Rptr. at 826.
\textsuperscript{97} For a discussion of why settlement is a desirable goal for the client, see Comment, supra note 57, at 856 n.1; see also Pfizer Inc. v. Lord, 456 F.2d 532, 543 (8th Cir.), cert. denied, 406 U.S. 976 (1972) ("The policy of the law encourages compromise to avoid the uncertainties of the outcome of litigation as well as the avoidance of wasteful litigation and expense incident thereto."); Comment, Settlements in Multiple Tortfeasor Controversies — Texas Law, 10 ST. MARY'S L.J. 75, 75-76 (1978).
\textsuperscript{98} Hampton, 725 S.W.2d at 609 n.9.
\textsuperscript{99} The reason the answer is so crucial is that the parties have different goals. "In such circumstances, the interests of the plaintiff, the settling defendant, and the non-settling defendant collide. The tort system's three principal goals of promoting full recovery by claimants, encouraging settlement, and enforcing equitable sharing of losses among defendants, cannot be completely harmonized." Harris, supra note 33, at 71-72; see also Gomes v. Brodhust, 394 F.2d 465, 468 (3d Cir. 1967) (goals work against each other and court's task is to harmonize them as best they can).
\textsuperscript{101} See Note, Joint Tort-Feasors — Contribution — Release — Joint Tort-Feasor's Payment for Pro Rata Release in Excess of its Pro Rata Share Operated to Satisfy Injured Party's Judgment Entered Against Nonsettling Joint Tort-Feasor, 15 U. BALTIMORE L. REV. 330, 339-40 (1986) (suggesting that the released joint tortfeasor who has settled for more than his proportionate share should be permitted to bring an action for contribution against the nonreleased joint tortfeasor).
the plaintiff or the other joint tortfeasors and would also eliminate the costs of litigation. If the defendant made an unfavorable settlement, then he could bring an action for contribution and recoup some of the loss. Therefore, a rational defendant would have nothing to lose by settling rather than litigating the claim.

The policies promoted by allowing a tortfeasor to have it both ways, however, seem a little dubious. Certainly, if the settling defendant has made a favorable deal for himself by settling for an amount less than his equitable share of liability as determined by the jury, he has benefited and it is clear that the other tortfeasors cannot bring an action for contribution against him.\(^\text{102}\) So why should he not have to bear the detriment of a poor settlement alone if he is allowed to reap the benefits of a favorable settlement alone? The traditional view toward settlement agreements has always been that the parties entering into them must live with the agreements, whether they are favorable or unfavorable.

There is also another perspective to this issue other than that of analyzing which of the defendants, the settlor or the non-settlor, bears the consequences of a poorly made settlement. When there is a situation such as in Hampton, who should reap the benefit of the disproportionate settlement, the defendants or the plaintiff? The Hampton court held that the plaintiffs would not benefit from both a favorable settlement and a jury verdict in their favor.\(^\text{103}\) There is support, however, for the view that any windfall resulting from a situation such as this should go to the injured party and not the tortfeasor. Some courts have sympathized with the injured party and have held that it would be inequitable to allow the wrongdoer rather than the injured party to reap the windfall.\(^\text{104}\)


\(^{103}\) Hampton, 725 S.W.2d at 607.

\(^{104}\) See, e.g., Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 430 (Tex. 1984) ("Plaintiffs bear the risk of poor settlements; logic and equity dictate that the benefit of good settlements should also be theirs."); see also Comment, supra note 57, at 883 ("A sense of fairness demands . . . that if someone is to benefit it should be the plaintiff and not the wrongdoer."). The Tenth Circuit Court of Appeals addressed the issue in Grayson v. Williams, stating:

Where a part of a wrongdoer's liability is discharged by payment from a collateral source, as here, the question arises who shall benefit therefrom, the wrongdoer or the injured person. No reason in law, equity or good conscience can be advanced why a wrongdoer should benefit from part payment from a collateral source of damages caused by his wrongful act. If there must be a windfall certainly it is more just that the injured person shall profit therefrom, rather than the wrongdoer shall be relieved of his full responsibility for his wrongdoing.

As has been discussed concerning the settling tortfeasor, however, the general perception of settlement agreements is that both parties should be made to bear the consequences of the settlement agreement voluntarily entered into, whether favorable or unfavorable.\textsuperscript{105} It should also be recognized that the plaintiff is already receiving something of a windfall since he will receive more under the settlement agreement than the amount determined by the jury to be the extent of his damages.\textsuperscript{106} Deciding which party shall benefit from the windfall may ultimately involve deciding which policy is of greater importance. If the policy that parties must solely bear the consequences of their settlement agreements is paramount, then it seems that the party who didn’t enter into a settlement, the non-settling tortfeasor, will reap the benefit. If the policy that liability should be allocated among joint tortfeasors based on relative fault is paramount, then the non-settling tortfeasor may be liable for contribution to the settling tortfeasor who miscalculated the damages of the

\textsuperscript{474, 522 A.2d 1 (1987), Justice Musmanno wrote a strongly worded dissent to the majority's opinion holding that the non-settling defendant was released from liability to the plaintiff because the settlement with a joint tortfeasor exceeded the jury verdict: Why should Hershberger [the non-settling defendant] be relieved of paying the amount which the jury has decided he should pay for the damage he has done? Hershberger claims, and the Majority upholds him, that since Mong [the settling defendant] paid more than he (Mong) was required to pay (as the jury later decided), Hershberger is entitled to benefit from Mong's miscalculation or generosity, whichever term one chooses to use in describing it. Hershberger seeks to benefit from a negotiation in which he played not the slightest part. He wants to travel on a train for which he purchased no ticket, he seeks to mount a horse which he did not feed, he desires to ride on a merry-go-round which, so far as he was concerned, might never have been built. . . . To me it is absurd that a tortfeasor, because of the generosity of another person with whom he is no way associated except in fault, should by law be excused from paying what a tribunal of law has determined he should pay as a result of his own adjudicated individual wrong. Id. at 376-77, 126 A.2d at 735 (Musmanno, J., dissenting). The unfairness of the majority's opinion as viewed by Justice Musmanno was later alleviated somewhat in Mong v. Hershberger, 200 Pa. Super. Ct. 68, 186 A.2d 427 (1962), where the settling tortfeasor was allowed to bring an action for contribution. "As it would be inequitable for a plaintiff to recover twice, it is just as inequitable among joint tortfeasors to have one benefit at the expense of another. The doctrine of contribution rests upon equitable principles." Mong, 200 Pa. Super. Ct. at 71, 186 A.2d at 429. Mong was later questioned in Charles v. Giant Eagle Markets, 513 Pa. 474, 522 A.2d 1 (1987). Mong was also criticized in Best Sanitary Disposal Co. v. Little Food Town, Inc., 339 So. 2d 222 (Fla. Dist. Ct. App. 1976). While the Mong court had permitted the settling defendant to bring an action for contribution against the settling defendant, the Best court did not. "The fact that Little Food Town [settling defendant] ended up paying a disproportionate portion of the plaintiff's claim was a circumstance of its own making." Best, 339 So. 2d at 226. 105. See supra note 104 and accompanying text. 106. In Hampton, the plaintiffs received $15,000 more from the settlement than the amount of their damages as determined by the jury. Hampton, 725 S.W.2d at 606-07.
injured party.

While Missouri took another step toward adopting modern tort law principles in *Hampton*, other issues remain to be resolved. One such issue is the settling tortfeasor’s right to bring an action for contribution against the non-settling tortfeasors when the settlement exceeds the jury verdict. As this and other issues arise, the courts and legislature must remain focused on the policy aims of modern tort reform.107 The courts and the legislature may be able to mutually accommodate the possibly incompatible goals of encouraging settlement and permitting contribution based on a system of relative fault. The means to fulfilling both goals is through providing incentives to the parties to reach a settlement and promulgating rules which are “clear and predictable”108 in defining the effects of partial settlements on the parties’ rights.

The *Hampton* decision is important in several respects to Missouri tort law. The court held that the plaintiff would not receive the benefit of a jury verdict in addition to a favorable settlement when the settlement exceeds the verdict.109 This suggests that the policy of requiring parties who settle to bear the consequences of such settlements was paramount to the view that the injured party should reap the benefits of windfalls resulting from settlement. The issue left unresolved is the decision of whether the policy of requiring parties to bear the consequences of their settlements is more important than the policy of allocating liability among joint tortfeasors based on comparative fault. If so, it is unlikely that a contribution action of the settling tortfeasor against the non-settling tortfeasor would be permitted.

CINDI M. INGRAM

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107. For a discussion of the primary aims, see *supra* note 99.
109. *Hampton*, 725 S.W.2d at 607.