OA 10-2-95

FILED
SID J. WHITE
AUG 25 1995
CLERK, SUPREME COURT
By ____________
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO.: 85-271

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, as subrogee of MICHAEL B. SCHOENWALD, M.D.; UROLOGY ASSOCIATES; DRS. MEYERS, STRAUCH & SCHOENWALD, P.A.; MICHAEL B. SCHOENWALD, M.D.; UROLOGY ASSOCIATES and DRS. MEYERS, STRAUCH & SCHOENWALD, P.A., individually,

4TH DCA CASE NO.: 92-2446

Appellants/Petitioners,

vs.

WILLIAM J. SHURE, M.D. and SOUTH BROWARD HOSPITAL DISTRICT PHYSICIANS PROFESSIONAL LIABILITY INSURANCE TRUST,

Appellees/Respondents.

______________________________/

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT, STATE OF FLORIDA

# APPELLEES/RESPONDENTS' ANSWER BRIEF

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## PREFACE

For the Court's convenience, the following abbreviations have been used throughout Respondent's Answer Brief:

1. Op. - Opinion of the Fourth District Court of Appeals, contained in Appendix I of Respondent's Answer Brief.

2. R. - Record on Appeal.

3. Tr. - Transcript of the Contribution Case, St. Paul Fire and Marine Insurance Company, et al. v. Shure, et al., Case No.: 88-34626 (3), Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, excerpts cited in Respondents Brief contained in Appendix III.

4. Tr. Med. Mal. - Transcript of the underlying Medical Malpractice case of Binger, et al. v. Schoenwald, et al., Case No.: 85-14395 (CD), Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, excerpts cited in Respondents Brief contained in Appendix II.

5. Petitioner's Br. - Brief filed by St. Paul in the instant case.

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## STATEMENT OF THE FACTS AND THE CASE

This case involves a contribution action pursuant to Florida Statutes §768.31. In the underlying action, the Bingers sued Dr. Shure and Dr. Schoenwald for medical malpractice and negligence. Dr. Shure settled on the day trial was to begin for $250,000.00. Dr. Schoenwald went to trial and the jury returned a verdict of approximately $2.9 million. St. Paul Fire & Marine Insurance Company [hereinafter referred to as St. Paul], Dr. Schoenwald's insurance carrier filed a contribution action, alleging that Dr. Shure's settlement was not made in good faith.

After trial the jury returned a verdict that the settlement was not made in good faith. The trial court, after motions for directed verdict and JNOV, granted the JNOV. [Trial Court Order, Appendix I]

St. Paul then appealed to the Fourth District which upheld the trial judge, finding that "[s]ince, in the present case there was no evidence of collusion or other misconduct, the trial court held correctly as a matter of law that the settlement was in good faith". [Op., p.11, Appendix I] The Fourth District also determined that "a claim for contribution brought subsequent to the original suit by the plaintiff should be decided by the court, not a jury." [Op., p.7-8, Appendix I]

A Notice to Invoke Discretionary Jurisdiction was filed with this court by St. Paul and jurisdictional briefs were filed. This Court accepted jurisdiction to review this case.

*The Underlying Medical Malpractice Action*

Mr. Michael Binger developed lesions on his penis and burning upon urination and went to see Dr. Schoenwald about his symptoms. Dr. Schoenwald did not diagnose genital herpes. [R. 1545] Dr. Schoenwald was alleged to have been negligent in not informing Dr. Shure, the obstetrician who was seeing Mr. Binger's pregnant wife Linda, of Michael Binger's condition. [R. 1548]

Dr. Shure was alleged to have been negligent in the prenatal care and delivery of Chelsea Binger, and her mother Linda Binger, resulting in Chelsea Binger contracting herpes from her mother at the time of her birth in 1984 and suffering devastating injuries. [R. 1546]

The case proceeded with discovery from the time of its filing in June 1985, [R. 1539] and was set for trial to commence on May 26, 1987. [R. 1540] During the course of discovery there were numerous settlement demands and offers. Mr. Spector, on behalf of the Bingers wrote to Dr. Shure's counsel and offered to settle the case for $750,000.00. [Tr. 1257, Appendix III] Several days before trial was set, Mr. Klein, counsel for Dr. Shure, and Mr. Spector, counsel for the Bingers began earnest settlement discussions. The demand started at $400,000.00, and a counter-offer for $200,000.00, was made by Mr. Klein. Mr. Klein came back with a final offer of $250,000.00, which Mr. Spector accepted the next day, the morning trial was set to begin, on behalf of the Bingers. [Tr. 632, Appendix III]

Mr. Klein and Mr. Spector informed the court of the settlement that had been entered into between the parties and Judge J. Cail Lee not only specifically approved this settlement on behalf of the child but took the opportunity at a subsequent hearing in the contribution action to state that *he felt the settlement was in good faith and was reasonable*. [R. 1643-1646] Judge Lee specifically commented upon the actions of Dr. Shure in relation to Dr. Schoenwald and St. Paul, (the other defendants in this case) and how they dealt with their respective exposure:

> And for the life of me I don't understand why some of the other people didn't do more toward settling this case. But everybody else, every one of those defendants was so busy in shunning off the responsibility- wasn't me, it was him, it was him, it was him- and consequently they didn't see fit to settle it and resolve it.

[R. 1646]

After the settlement was agreed to by Dr. Shure and the Bingers, but before the trial was to begin, Mr. Spector asked Dr. Shure to give a sworn statement [Tr. 632-633, Appendix III], for the purpose of filling in some holes which had developed due to Dr. Shure's deposition being taken very early in the case. [Tr. 631, Appendix III] Mr. Spector, the Bingers' counsel was not present during the taking of the statement. [Tr. 633, Appendix III]

The jury found Dr. Schoenwald negligent and made an award of $2,900,356.89. A Final Judgment for damages, attorney's fees and costs was entered, and a settlement was agreed upon after St. Paul filed an appeal of the Judgment. The settlement was for three million dollars. [Tr. 421, Appendix III]

*The Contribution Action*

The contribution statute states in pertinent part:

> 768.31(5) RELEASE OR COVENANT NOT TO SUE. - 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:
>
> 768.31(5)(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

A contribution action was filed by St. Paul alleging that Dr. Shure did not pay "his pro rata share" of the liability in his settlement, and as such, the settlement was made in "bad faith". [R. 1542] St. Paul also alleged that Dr. Shure had given the sworn statement as a "condition precedent" to the settlement. [R. 1542] The sworn statement was never placed in evidence before the jury in the medical malpractice trial.

Mr. Womack, the attorney for St. Paul in the medical malpractice action, testified that in his opening remarks in the medical malpractice trial that he had told the jury that there were no signs or symptoms of herpes on Mrs. Binger and that Dr. Shure had no reason to culture her. [Tr. 381, Appendix III] This was, according to Mr. Womack, his "theory in the case..." [Tr. 382, Appendix III][1]

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[1] Mr. Womack also testified that he told the jury that Dr. Shure did a Pap smear on Mrs. Binger, which, although not foolproof, usually shows the abnormal cells for herpes and she was negative at that time. [Tr. 382, Appendix III] Further, Mr. Womack testified that he told the jury that the standard protocol for herpes would have been useless at that point to run because Mrs. Binger was without any symptoms of herpes. [Tr. 383, Appendix III]

Mr. Womack declined to testify as to his estimation of what the value of this case was or how he arrived at his decisions on whether to settle the case or not. [Tr. 314-315, Appendix III][2] He did testify that on September 15, 1986, he offered $150,000.00 to settle the case, and then before the case went to trial there was an offer of $750,000.00 from Dr. Schoenwald to settle the case. [Tr. 325-326, Appendix III] Both offers were declined.

Mr. Barwick was called as an expert attorney for St. Paul and his testimony was essentially that because Dr. Shure did not pay what Mr. Barwick had determined to be his theoretical proportional share of the final judgment, the settlement was made for tactical reasons, and was therefore, in bad faith. [Tr. 774, Appendix III] He also testified that the sworn statement given by Dr. Shure [Tr. 776, Appendix III] was the reason for the settlement, i.e., the settlement occurred because Mr. Spector needed Dr. Shure's testimony on the causation defense. [Tr. 776, Appendix III]

The record reveals that Dr. Shure's statement was not even brought before the jury in the medical malpractice trial and Dr. Shure's testimony regarding the matters covered in the sworn statement were discussed initially by Mr. Womack, counsel for Dr. Schoenwald, during his cross-examination of Dr. Shure. [Tr. of Dr. Shure's testimony in Medical Malpractice Action at pp. 478-499, Appendix II, and discussion infra at pp. 32-36] It was only after Mr. Womack extensively questioned Dr. Shure as to Mrs. Binger's

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[2] Judge Lee had denied Dr. Shure's request to go into Mr. Womack's thought process and files regarding the valuation of the medical malpractice action and the insurer, St. Paul.

asymptomatic herpes and its possible effect at delivery that Mr. Spector asked a clarifying question on re-direct. [Transcript of Dr. Shure's testimony in Medical Malpractice Action at p. 506, see Appendix II, and discussion infra at pp. 32-36]

Testifying on behalf of Dr. Shure were the two attorneys who negotiated the settlement, Robert Spector and Norman Klein. They explained how they had valued the case and the factors used in arriving at a settlement which they felt had been made in good faith. Also testifying that the settlement was within the ballpark of Dr. Shure's proportional liability and therefore made in good faith was Ray Ferrero, Jr. [Tr. 984-1079, Appendix III] and George Bunnell [Tr. 1096-1254, Appendix III].

After St. Paul rested, Dr. Shure moved for a directed verdict, which the trial court seriously considered, stating it was a "persuasive argument" and asked for additional research and argument before ruling. [Tr. 958, Appendix III] After hearing research and argument the court took the motion under advisement. [Tr. 982, Appendix III] The Motion for Directed Verdict was renewed during Dr. Shure's case and again, the court deferred ruling after extensive arguments on both sides. [Tr. 1317, Appendix III] After Dr. Shure completed his case, he moved again for a directed verdict, which the court deferred ruling on. [Tr. 1413, Appendix III]

The jury returned a verdict finding that Dr. Shure did not enter into his settlement with the Bingers in good faith. Dr. Shure renewed his motion for directed verdict [Tr. 1534, Appendix

III] and the court requested that he set it down for hearing. [Tr. 1535, Appendix III]

Dr. Shure filed a Motion for Directed Verdict [R. 3641-3643], Motion for Judgment Notwithstanding The Verdict [R. 3644-3645] and an Amended Motion for New Trial [R. 3656-3659].[3] The Memorandum accompanying the motions focused on the fact that the verdict was unsupported because it was based upon speculation and not the evidence placed before the jury. [R. 3606-3611]

The court ruled that St. Paul Fire & Marine Insurance Company did not sustain its burden of proof to make Dr. Shure liable to them for contribution in their payment on behalf of their insured, Dr. Schoenwald, notwithstanding the jury's verdict. The court entered a Judgment Notwithstanding the Verdict, [R. 3660-3661, Trial Court Order, Appendix I] and St. Paul appealed to the Fourth District [R. 3662-3663] which affirmed the lower Court's ruling. [Op., Appendix I]

St. Paul's Petition for Review was granted by this Court.

## SUMMARY OF THE ARGUMENT

A Judgment Notwithstanding the Verdict is an extraordinary ruling by any trial court. It signifies that there was no evidence upon which the jury could have found the way it did in accord with the directions it was given. In this case, the trial court determined, (based upon the cases cited in its order) that the jury had to have impermissible stacked inferences and disregarded the

[3] There was also a Motion to Interview Juror. [R. 3653-3655]

clear directions contained in the instructions to arrive at their verdict. Thus the verdict was based not upon the evidence but upon speculation. [R. 3660]

St. Paul's theory in the case below and in its brief to this court can be summarized thusly; because Dr. Shure paid less than his "theoretical proportional share" (which they have determined somehow to be half) of the underlying jury verdict, he entered into his settlement for "tactical reasons" and therefore it was a bad faith settlement.

St. Paul's argument ignores the overwhelming evidence presented to the jury and trial court which firmly established that Dr. Shure's exposure in the case was significantly less than Dr. Schoenwald's and thus Dr. Shure paid his equitable share based on his exposure or liability in the case. St. Paul's argument is defective because it is based upon hindsight, i.e., what the jury did award, rather than the foresight used in determining a settlement amount, i.e., what the evidence and liability appeared to establish to the experienced trial attorneys who settled the case as well as those who testified as to the difference in exposure as between the two doctors.

St. Paul's evidence on the settlement being made for "tactical reasons" was basically a conclusionary statement by a single witness, evidence which was contradicted by at least four other experts on the other side. The Fourth District's opinion recognized this discrepancy in evidence by pointing out that "[i]n its 30 page brief St. Paul devotes only 2 paragraphs to the

testimony of Barwick" and then sets forth those two paragraphs in their entirety" before emphasizing that St. Paul's counsel "acknowledged that there was no evidence of collusion or that Dr. Shure had testified improperly." [Op., p.3, Appendix I]

St. Paul ignores the issue of there being no evidence on collusive or other misconduct as they argue to this court that they "presented extensive expert testimony." [Petitioner's Br., p.5] Left out is any citation to this "extensive expert testimony" which supports their erroneous presumption that the "settlement was made for tactical reasons." [Petitioner's Br., p.5] Yet, despite making this allegation repeatedly, St. Paul does not explain what the tactical reasons were or cite this court to testimony regarding how these tactics were improper. Respectfully, the Fourth District could not find any evidence as to bad faith because there was none presented other than conclusionary allegations.

The cases cited to this court as providing "conflict with and contradict[ing] prior decisions of this Court and other appellate courts" is the same argument made to the Fourth District. St. Paul continues to try and buttress the fatally infirm testimony of its single expert into a fortress of evidence, yet both the trial court and the Fourth District agreed that St. Paul had presented <u>no evidence on the crucial issues</u> upon which the jury had to have made its decision, thus the JNOV and the Fourth District's opinion should be affirmed by this court. When a jury bases its verdict upon speculation, it is the trial court's function to issue a JNOV or directed verdict.

## ARGUMENT:

## THE TRIAL COURT WAS CORRECT IN GRANTING THE JNOV

St. Paul begins its argument on the JNOV by attempting to construct a contextual narrative establishing that the defendant below got "virtually every jury instruction they requested, resulting in a jury charge which was extremely favorable to the defendants". [Petitioner's brief, p.8] This narrative is factually incorrect as the record shows that Dr. Shure took exception to many of the instructions, especially on the burden of proof and specifically argued this point to the Fourth District in its brief. [See Dr. Shure's 4th DCA Br., p.6 found at Appendix II] But even assuming arguendo that St. Paul is correct that Dr. Shure received "extremely favorable" jury instructions, then it is almost axiomatic to state that the jury would have had to disregard those instructions to have found as they did for St. Paul based upon the evidence presented.

St. Paul then poses the hypothetical question "how is any contribution plaintiff supposed to prove its case?" [Petitioner's Br., p.11] Both the trial court and Fourth District have already answered this question, and the answer is by presenting evidence on the bad faith issue, specifically on collusive and or other improper conduct by the settlors. As the trial court found, based upon the cases cited in it's order, for the jury to have arrived at its conclusion that there was bad faith this jury had to have speculated and impermissibly stacked inferences to reach their verdict. [See Dr. Shure's 4th DCA Br. at p.32, Appendix II]

And the Fourth District stated it plainly and unanimously, that although St. Paul charged that the settlement was in bad faith because it was made for tactical reasons, "there was no evidence of collusion <u>or other misconduct,</u> [therefore] the trial court correctly held as a matter of law that the settlement was in good faith." [Op., p.11, Appendix I]

***St. Paul's Argument on the Evidence***

St. Paul's brief fundamentally misconstrues the standards applicable to the particular facts of this case. Rather than deal in specifics, St. Paul makes sweeping statements but offers no record support or citation. For example, St. Paul begins its brief by analogizing its evidential burden to that of auto negligence cases, stating that "St. Paul was in no different position in the instant case." [Petitioner's Br., p.15-16] St. Paul thus argues that a contribution case is the same as an auto negligence and medical malpractice case and the testimony of experts as to factual physical matters is the same as a speculative opinion in a contribution case.

The Fourth District answered this argument by pointing out that "[s]ignificantly, St. Paul does not cite one contribution case to support its argument." [Op., p.5, Appendix I] St. Paul continues this tautological line of argument in this Court now without reference to contribution cases.

Simply stated, Barwick's testimony is not the same as testimony in the cited auto negligence and medical malpractice cases because the evidence of those experts went to establishing

objective provable facts, whereas in St. Paul's case they have attempted to support the jury verdict with speculative opinion about a state of mind, i.e., the reason for the settlement was for tactical reasons.

There is a fundamental distinction between expert opinion as to physical facts (direct evidence) and an expert giving a speculative opinion (circumstantial evidence). In the discussion below, Dr. Shure will utilize the cases that St. Paul itself has cited in support of its argument that Barwick's testimony was sufficient to sustain the jury's verdict to demonstrate that Barwick's testimony was circumstantial and not direct evidence and thus was not competent evidence to withstand the motion for directed verdict and JNOV.

For example, in *Cromarty v. Ford Motor Company*, 341 So. 2d 507 (Fla. 1976) [Discussed in Petitioner's Br., p.16-17] this court stated that the opinion at issue in the case "was <u>grounded on the fact</u> that the defendant had used the wrong type of forceps." [emphasis supplied] *Cromarty* at 508-509. This Court then explained that there is a critical difference between a <u>fact</u> and a <u>circumstantial opinion</u> not based on physical facts (which St. Paul glosses over even as it cites these words):

> It has been held that an expert opinion may support a jury verdict, <u>so long as it is grounded in fact</u>, even though it involves a conclusion as to causation...[emphasis supplied]

*Cromarty* at 508-509.

Where is the "grounded in fact" condition precedent to the conclusion that the settlement was for "tactical reasons." St. Paul remains silent on this point, which Dr. Shure has continually argued is critical. In petitioner's second cited case, *La Barbera v. Millan Builders, Inc.*, 191 So. 2d 619 (Fla. 1st DCA 1966), the court itself states that the presence of physical facts was dispositive is relying upon the experts opinion as competent to sustain the jury's verdict:

> The expert opinion of this witness was based upon physical facts found to exist at the time of his inspection." [emphasis supplied]

*La Barbera* at 622.

The *La Barbera* court then fully discusses the distinction between a physical fact, (the ceiling louver inspection) which can support an expert opinion and "an inference drawn from circumstantial evidence", *La Barbera* at 622, concluding that:

> Since the fact necessary to prove that defendant's negligence was the proximate causation of plaintiff's damages was established by positive and direct evidence, and not by inference drawn from circumstantial evidence, we do not consider that the inference upon inference rule propounded in Commercial Credit Corporation, is applicable.

*La Barbera* at 622.

Likewise the other cases cited by St. Paul involve the physical facts of an inappropriate use of a foley catheter (*Zack v. Centro Espanol Hospital*, 319 So. 2d 34 (2nd DCA 1975) [Petitioner's Br., p.18]) and the use of forceps in a baby's delivery ("in this factual setting" *Wale v. Barnes*, 278 So. 2d 601,603 (Fla. 1973)) [See Petitioner's Br., p.19].

Thus, as St. Paul's own cases demonstrate there is a critical distinction between direct evidence of a factual physical nature and speculative evidence of a circumstantial nature.

***The Trial Court's Ruling***

St. Paul attempts to distinguish the cases cited by the trial court in granting the JNOV similarly to those already cited above, i.e., by repeating its mantra that Barwick's testimony was direct and not circumstantial. Dr. Shure will demonstrate the fallacy of that argument by using the materials found in Petitioner's discussion of *Voelker*. [Petitioners Br., pp.21-25]

St. Paul agrees that *Voelker* was decided correctly, "[i]n order to arrive at a conclusion which would permit recovery, the Voelker jury did, in fact, have to stack inference upon inference." [Petitioner's Br., p.23] What St. Paul argues is that *Voelker* and the other cases cited in the trial court's order "have no application to the case at bar." [Petitioner's Br., p.21] However St Paul itself draws the distinction between the nature of direct physical evidence (as already discussed in the immediately preceding cases of *Cromarty*, *La Barbera*, *Zack* and *Wale*) and the nature of circumstantial evidence, such as an opinion that a settlement was made for "tactical reasons."

St. Paul quotes the following from *Voelker* as an analogy to the present case, "[t]o conclude, however, that he received injuries in that accident simply because he was found dead in the canal, or that those presumed injuries were the sole cause of his

death, were purely speculative." [Petitioner's Br., p.24-25] This quote is more supportive of Dr. Shure's position than St. Paul's because their expert Barwick's testimony presumed that because a jury had awarded the Plaintiff's $2.9 million in damages and Dr. Shure settled for $250,000.00 that the settlement was made for "tactical reasons." Same kind of speculation that was disallowed in *Voelker*.

Then, in a stunning example of making Dr. Shure's point that direct evidence relates to a physical fact of some sort, St. Paul argues that *Voelker* would be more closely analogous to the instant case if:

> the plaintiffs therein produced the testimony of a pathologist, for example, to opine, having examined the body and the other physical evidence, that the auto-related injuries were the sole cause of Mr. Voelker's death. Then the plaintiffs would have direct evidence of the material issue in question" [some emphasis in original, remainder supplied]

[Petitioner's Br., p.25]

So, St. Paul does understand that direct evidence is generally of a physical nature while circumstantial evidence is of a more speculative nature[4], and thus the reason for the standard against stacking inferences enunciated by this Court in *Voelker*.

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[4] "Direct evidence is that which proves the fact in dispute directly without any inference or presumption and which, in itself if true, conclusively establishes the fact ... Indirect evidence is that which tends to establish the fact in dispute by proving another, and which though true does not of itself conclusively establish that fact but which affords an inference or presumption of its existence. I Jones on Evidence 5 (6th Edition 1972).

Notwithstanding this critical distinction between direct and circumstantial evidence, St. Paul then irrationally asserts that, "[t]his is a decision which the jury would have been entitled to make in this case without the aid of expert testimony..." [Petitioner's Br., p.25] If that is true, why are they basing their whole argument on Barwick's testimony being "direct" and thus competent to support a jury verdict? And, if there was such a plethora of other evidence on the good faith issue placed before the jury, why do they not cite it with record reference and provide excerpts for this court rather than making sweeping statements without support? Why, if there was such a plethora of evidence did the trial court order a JNOV for lack of evidence and the Fourth District hold directly that, "[s]ince there was no evidence of collusion or misconduct, the trial court held correctly as a matter of law that the settlement was in good faith." [Op., p.11, Appendix I]

St. Paul continues to work both sides of the street (Barwick's testimony was direct but we didn't need it anyway) as they attempt to distinguish the other cases cited in the trial court's order,[5] by stating that "Not one of them deals with direct evidence being provided by an expert witness, as was the case herein." [Petitioner's Br., p.31] Perhaps none of them deals with direct

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[5] Dr. Shure has fully briefed these cases and explained why the trial court was reasonable in relying upon them in its brief to the Fourth District. [Respondent's Br. to 4th DCA, pp.32-41 contains the full discussion, See Appendix II]

evidence because, simply stated, Barwick's testimony was not direct but was circumstantial.

After all, the key focus in *Voelker* was upon whether the circumstantial evidence in the case, at each inferential step, excluded every other reasonable inference so as to be elevated to a fact.[6]

The trial court below, in arriving at its decision on JNOV, had to determine, like the court in *Voelker*, that 1) the evidence in the case was circumstantial, and 2) that the two inferences, "theoretical share" and "bad faith" were not stackable, i.e., they did not exclude all other reasonable inferences.

St. Paul argues that Mr. Barwick's testimony is direct evidence. But what is his testimony direct evidence of? Was he involved in the settlement negotiations in the malpractice case? No. Unfortunately, St. Paul's brief does not set out what the direct evidence is. Is it Mr. Barwick's speculative opinion that Dr. Shure settled for "tactical reasons"?

Assuming that the "direct evidence" is that Dr. Shure settled for tactical reasons, can this inference be elevated to a fact when it does not exclude all other reasonable inferences.[7] After all,

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[6] St. Paul contends also that there is a distinction between the instant case and *Voelker*, because in *Voelker* they were "dealing with a case of circumstantial evidence only". [Petitioner's Brief, p.17]

[7] Dr. Shure's statement was not used at trial by Mr. Spector, the Binger's counsel, and the information contained in the statement was brought out by Mr. Womack, counsel for St. Paul on cross examination of Dr. Shure. It is only after this cross-exam that Mr. Spector then asks a single clarifying question of Dr. Shure on this point during redirect. [See pp. 32-36 infra]

this opinion that the settlement was made for tactical reasons was inferred from Mr. Barwick's truncated review of the file and this speculative opinion must be elevated to factual status in order for the second inference to be stacked upon it, i.e., that such a "tactical reason" means the settlement was not entered into in good faith. Again, St. Paul does not establish this second inference to the exclusion of all other reasonable inferences.

While arguing that *Voelker* is not analogous, St. Paul states the direct analogy to the instant case in its own discussion of *Voelker*, i.e., "there were many alternative explanations for Mr. Voelker's death, which were just as likely as the plaintiff's theory." [Petitioner's Brief, p.19] And perhaps this is why the trial court relied upon *Voelker*, because once the impermissible reliance upon the expert testimony to form the crucial first step (that Dr. Shure settled for "tactical reasons") in the inference pyramid was eliminated (because there were overwhelming contradictory inferences by the other experts) there was nothing to support the second inference that the settlement was made in bad faith.

According to *Voelker*:

> if there were but one reasonable inference other than that Voelker received bodily injuries in the accident, the jury would not have been justified in inferring that Voelker's internal bodily injuries were the *sole* cause of his death.

*Id.* at 408.

***<u>This is a critical distinction, one that the trial court understood fully</u>***. She surmised that for the jury to have found bad

faith, based upon the evidence before them, they had to have stacked inference upon inference to get to the ultimate determination of bad faith. And the evidence before the court and jury established firmly that there were not "but one reasonable inference other" than Mr. Barwick's but a plethora of contradictory evidence from the other expert witnesses leading to other reasonable inferences. According to *Voelker*, all you need is one other reasonable inference. Dr. Shure supplied evidence from experts Ray Ferrero and George Bunnell, as well as the testimony from those actually involved in the negotiated settlement, Robert Spector and Norman Klein.

On St. Paul's side, there was no direct evidence of bad faith other than the amount of the settlement and Barwick's opinion that it was made for "tactical reasons." If there was additional evidence, presumably St. Paul would have set it forth for this court to review. They have not because it does not exist.

What St. Paul has argued to be direct evidence is the testimony of Mr. Barwick. Most important about Mr. Barwick's testimony is that it did not establish the foundational inference to the exclusion of other reasonable inferences. That Mr. Barwick's testimony could not have established this foundational inference to be a fact is supported by the plethora of evidence which established that the case was not only settled in good faith, but that settlement was not only reasonable, but logical and rational, given the uncontradicted testimony of Mr. Spector and Mr. Klein.

However, St. Paul, instead of focusing on the totality of circumstances which went into the settlement decision, argues that "the testimony of a qualified expert who after spending in excess of forty hours reviewing all of the relevant materials, rendered the opinion, which opinion becomes direct evidence," that "those opinions were direct evidence as to the issue of whether or not the settlement between Dr. Shure and the Bingers was made for tactical reasons, and was not representative of Dr. Shure's fair share of his liability, and was therefore not a good faith settlement as defined in the jury instructions." [Petitioner's Br., pp.31-32]

So plainly stated the direct testimony is that bad faith is established because they settled the case for "tactical reasons" and for less than the "theoretical fair share." Not only is this not direct evidence of anything, at best it is a tautology.

In the next section of Dr. Shure's brief we will review what the evidence was before the court and jury. But first, one of St. Paul's statements must be set forth for this court to see the basic fallacy in their entire brief. St. Paul states that in the contribution action, "[t]he jury was provided with precisely the same information the attorneys and the parties had available to them in the underlying case." [Petitioner's Br., p.31] This is such an incorrect sweeping generalization and is similar to the Barwick mantra that his testimony was direct evidence. This new mantra is that the jury in the medical malpractice case and the jury in the contribution case had "precisely the same information." Did the contribution case jury hear the live testimony and have the

"same" opportunity to weigh the credibility of witnesses as they did in the medical malpractice action? How could they have had "precisely the same information"? Nor did they have St. Paul's and its lawyers' evaluation of the case prior to trial due to discovery being denied on that issue.

***The Evidence Presented in the Contribution Case or Was There A Good Faith Settlement?***

The evidence before the jury was that up until the day of trial, settlement negotiations between the parties were ongoing. St. Paul, on behalf of Dr. Schoenwald, had offered $750,000.00, to the Bingers to settle. This offer was rejected. [Tr. 388, Appendix III]

Dr. Shure's attorneys were also actively discussing a settlement with the Bingers, and the numbers changed as negotiations continued. Within a couple days of trial, the Bingers' attorney, Mr. Spector, informed Mr. Klein, Dr. Shure's attorney, that the Bingers would settle for $400,000.00. Therefore, even before the trial was to begin, Mr. Spector had turned down $750,000.00 from Dr. Schoenwald, yet was willing to settle for much less from Dr. Shure. Obviously the liability as to each doctor was different.

Mr. Klein testified that he thought he would win a verdict for Dr. Shure, but was willing to discuss settlement because of the uncertainties inherent in every trial. [Tr. 568-569, Appendix III] Mr. Klein then explained that settlement became more likely as the

trial approached and the realities became more clearly focused: [Tr. 569-570, Appendix III]

> Bob was working under the concept he knew he had a weaker case, far weaker case against me than he had against Womack. And that was the reason he was willing to - he was reducing his settlement demands.
>
> *    *    *    *
>
> So, with him at 400 and me at 200, I think I said to him, look, Bob, I'm not going to go above this. If $250,000 will settle it, fine, but that's it. Anything more, we're going to try the case. And we were at a posture where he believed that was true. And it was true because I wasn't - I didn't have any more authority from Harold Shapiro and I wasn't going to get any more authority. We decided it was worth it to us to pay a quarter of a million dollars on a case we believed we had no liability and to be finished with it, close the books, and not to have to expend any more money.
>
> If we had to spend any more money, it paid for us to try the case and win it. So, I offered him the 250,000. He said, I'll let you know. Came back in the morning and he said, all right, I'll take the 250.

*Dr. Schoenwald's Greater Liability*

Why was the case against Dr. Shure different than the case against Dr. Schoenwald? Experts for the Bingers had testified in the malpractice action that Dr. Schoenwald's notes revealed that a classic case of herpes symptoms had been missed. [Tr. 393-395, Appendix III] Other experts agreed that Dr. Schoenwald "failed to detect an obvious history of Herpes." [Tr. 424, Appendix III]

Then, why was Dr. Shure in the case at all? Because Mrs. Binger was his obstetrical patient and she had told him that her husband had burning upon urination. Dr. Shure had then advised her to have her husband looked at by a urologist "immediately." [Tr. 785, Appendix III] But, it was Dr. Schoenwald, the urologist, who

actually saw Mr. Binger's lesions and did not make the diagnosis of herpes.

Mrs. Binger testified, however, that she did tell Dr. Shure about the lesions on her husband's penis. Thus, between Dr. Shure and the Bingers there was a disagreement as to what Dr. Shure had been told. Norman Klein, testified that Dr. Shure was "... as firm as he [could] be, that he was never told the last symptoms, the growth or the blister or the something on the penis. He was only told pain on urination." [Tr. 503, Appendix III] And the notation in Dr. Shure's records supported his recollection that he was told by Mrs. Binger that her husband had pain or burning on urination. [Tr. 503, Appendix III]

Upon further questioning, Mr. Klein acknowledged that Dr. Shure himself stated that "if she told me and I didn't do anything about it, I was negligent." [Tr. 504, Appendix III] Thus the question of liability, i.e., Dr. Shure's negligence, turned upon whether Mrs. Binger did, in fact, tell Dr. Shure about lesions on her husband's penis.

Dr. Shure's notes made contemporaneously with the visit supported his recollection that Mrs. Binger did not tell him about the lesions, while other evidence clearly demonstrated that Dr. Schoenwald directly observed the lesions and made notations about them in his records. Other evidence revealed that Dr. Schoenwald also decided not to see Mr. Binger upon notification of a second occurrence. Based upon this evidence, Mr. Klein testified that he evaluated Dr. Shure's exposure in the case to be at best around ten

percent since Dr. Shure's records supported his recollection of what Mrs. Binger told him about the burning sensation. [Tr. 551-554, Appendix III]

Mr. Klein pointed out that there was no surprise in anything that was done in this case, the degrees of liability and the strengths and weaknesses of each party was known to all before the trial, and he explained why this is so regarding the lessening demands made by the Bingers to settle the case:

> It's not like these letters are in a vacuum, this is the only communication we have with each other. We're on planes going all over the country taking expert's depositions. And Vic (Womack) was involved in this. We're traveling with each other, we're having dinner with each other, talking to each other, we're talking about the case, what's the good part, what's the bad part.
>
> Bob Spector knew what he had-what his case was against me. And he knew what his case was against Victor [Womack]. There was no secret. There wasn't nothing we didn't all know.

[Tr. 555-556, Appendix III]

Mr. Klein also testified that during his own discussions with Mr. Womack, Mr. Womack never thought that Dr. Shure was more than even twenty five percent responsible for the liability to the Bingers. [Tr. 585, Appendix III] Mr. Klein stated that even the twenty five percent liability figure was wrong, but that Mr. Womack was "trying to put the best light on for his client." [8]

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[8] Assuming arguendo that Dr. Shure had the twenty-five percent liability that Mr. Womack thought he had, and also assuming that St. Paul's offer of $750,000.00, to settle before trial was made in good faith, then at the time Dr. Shure made his offer of $250,000.00, Dr. Shure was within the reasonable range of his proportional liability. $250,000.00 is twenty-five percent of the total offered amount of $1 million.

Agreeing with Mr. Klein's conclusion as to liability was the Bingers' attorney, Robert Spector, who testified that as discovery continued, his case against Dr. Shure looked weaker and weaker:

> I believe that as the discovery went on in the matter my chances got less, principally because I wasn't able to obtain what I considered a world class expert to testify against him, somebody either from a university setting, somebody who was well published. I was unable to find that.
>
> And they had retained, and I've taken the deposition of, a doctor named Harold Shullman, who I have subsequently used both as a plaintiff and defense expert, who is on the National Board of ACOG, which is the Association of Obstetrics and Gynecology, which many people belong to. He set up the rules and regulations for it. So, I found it more difficult as he came into the case. The local expert, I believe his name was Doctor Shatz, was nothing, no problem to deal with.
>
> But Shullman presented a major problem to me.

[Tr. 622-623, Appendix III] [emphasis supplied]

Mr. Spector assessed his chances of winning against Dr. Shure as no better than "50/50". [Tr. 623, Appendix III] Mr. Spector also emphasized that Dr. Schoenwald's exposure was far greater:

> In this case, it was my opinion that Dr. Schoenwald, by virtue of the fact that his records hung him, the fact he made a mediocre witness, and the fact by this point in time, although we've been in litigation for some point in time, Mr. Womack was not able to find a credible urologist to come in and testify on his behalf.

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Would the result have been any different if Dr. Shure would have agreed to the settlement demand of $400,00.00. No, Dr. Shure would be subject to the very same contribution argument, and more than likely, if the contribution jury knew the final verdict of $2,900,000.00 verdict in the medical malpractice case, the same jury verdict of bad faith would have occurred.

This is the kind of case which should be decided by the Court, as a matter of law. See *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal. 3d 488, 213 Cal. Rptr. 256, 698 P.2D 159, (Cal. 1985) and discussion infra at pp. 39-40.

> Rather, I found out that he got Dr. Schneck, who was a urologist with no academic credentials, no writing credentials, no teaching credentials, from a suburb of Orlando, who was also strangely enough, St. Paul insured, to come in and testify.
>
> I'd also gotten word from some people I attempted to contact at the University of Miami that Womack had contacted them and they refused to testify.

[Tr. 647-648, Appendix III]

Mr. Spector testified that the experts for the Bingers were superior to those of Dr. Schoenwald's, i.e., they were the heads of urology at major universities [Tr. 648, Appendix III] and he had "Doctor Klein, [who] had literally written the book used nationally on pediatric infectious diseases, and he made the best witness of any experts I ever had before or since." [Tr. 648-649, Appendix III]

On the flip side, Mr. Spector commented about the quality of the prime expert Dr. Shure had procured for his defense:

> He was head of OB/GYN for the University of New York at Winthrop. And he was on the board of directors at ACOG, [American College of Obstetrics and Gynecology] which is the policy making, although not standard setting, board for obstetrics and gynecology.

[Tr. 650, Appendix III]

And as for Dr. Schoenwald's ultimate liability in the case, Mr. Spector commented that Dr. Schoenwald was the only doctor who had personally witnessed a symptom of the herpes virus and that Dr. Schoenwald failed to have Michael Binger come in for a culture even though his records indicated that Mr. Binger called and informed Dr. Schoenwald that he had another outbreak. [Tr. 652, Appendix

III] Rather than culture the lesion, Dr. Schoenwald's records[9] indicated that he simply asked Mr. Binger to come into the office only if there was no improvement in the lesion. This was clearly negligent considering that herpes improves in a ten day period. [Tr. 653, Appendix III][10]

Mr. Spector testified that the dispositive reasons for settling with Dr. Shure for the $250,000.00 was 1) the "credibility" issue, 2) the experts for Dr. Shure were superior to those for Dr. Schoenwald, and 3) as discovery progressed his chances of winning against Dr. Shure diminished because "the words I needed were not in his records." [Tr. 659, Appendix III][11]

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[9] Mr. Spector testified that, "we took the chart and had it made into overheads and I went over it word by word with Doctor Schoenwald during his direct examination." [Tr. 653, Appendix III]

[10] George Bunnell, an expert for Dr. Shure, testified about the way Dr. Schoenwald handled the second call about the lesions on Mr. Binger's penis:

> I think the concern that I would have in representing this doctor is that, is this an appropriate way of dealing with the information that's been imparted to him over the telephone. Because the way he reacted to this, according to his own note, was that he gave-he did not see the patient and simply told the patient to use some ointment and come back. I would be worried about that. That would cause me considerable concern if I were defending him in the context of this case...where this wife is pregnant, this is the second time that something has developed on her husband's penis, where he simply says, without even seeing because he can't-without seeing it he can't evaluate whether it's the same thing that he saw before or something different than he saw before.

[Tr. 1123, Appendix III]

[11] Mr. Spector repeatedly testified that "Dr. Schoenwald hung himself with his own records" [Tr. 654, Appendix III], meaning that the words "lesion and "blister" were there in his records while there no indication of anything of this nature in Dr. Shure's

Ray Ferrero, testifying on behalf of Dr. Shure, stated that he also found that the Bingers "had a difficult case against Dr. Shure" and he explained that Dr. Schoenwald "was providing an almost insurmountable defense for Dr. Shure..[he] was saying that the Plaintiff's husband did not have herpes and had Dr. Shure contacted him that's what he would have told him":

> And had I been handling the case, I would have been very interested in removing that potential Defendant from the case, attempting to settle it on a reasonable basis, taking in all the considerations, but one of the considerations would have been that I felt that I would probably not have prevailed against Doctor Shure, whereas I felt from review of the depositions that I would have prevailed against Doctor Schoenwald.

[Tr. 1004, Appendix III]

George Bunnell also testified on behalf of Dr. Shure and summarized why the settlement was made in good faith based upon the evidence which Mr. Spector, on behalf of the Bingers, was required to consider in arriving at what was a fair settlement for his clients:

> So, the evidence, even the Bingers confirm that he did a number of things that are consistent with a doctor who if told something is going to act on it. And it is difficult for Mr. Spector. I can see Mr. Spector having a problem believing that he was going to be able to convince a jury that Doctor Shure was that conscientious about the gonorrhea and about sending to the urologist and all the rest of it and then he ignores the fact that she's told him the thing that would be the biggest red flag and that is that the husband had something on his penis.
>
> That is, what I would call, a hard sell. And I think Mr. Spector must have thought it was a pretty hard sell. In addition to that, I think Mr. Spector, and I just take

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records.

> his word for this, had the impression that Doctor Shure made a good appearance...
>
> In addition to that, he now, if he settles the case for this amount of money, he also assured himself that if his clients should lose the case completely, which he did not expect them to do, obviously, they at least will have all of their costs covered, the expenses they incurred in the case, and would not walk away with an empty pocket and owing money.
>
> So, those are all considerations that plaintiff's lawyers make. And I see that in my view that was a reasonable thing for him to do.

[Tr. 1111-1113, Appendix III]

Mr. Bunnell made this evaluation based upon his judgment that there was a significant difference in the liability against Dr. Shure as compared to Dr. Schoenwald:

> Insofar as Doctor Schoenwald was concerned, he had testimony that they had actually gone to this doctor and shown him what was on Mr. Binger's penis. That didn't happen with Doctor Shure. Doctor Shure never saw that. And he wouldn't be expected to understand as I understand the evidence because he's an obstetrician. He's a lady's doctor and not a doctor for the husband. Doctor Schoenwald, on the other hand, does see this. There's a dispute as to what he saw, but there's not dispute about the fact that they went to Doctor Schoenwald.
>
> The doctor knew she was pregnant. The doctor saw something. You can debate over exactly what it was that he saw. That he was given the history from the husband about what had transpired with the husband in California and everything that he gave. It occurred to him that it could be herpes. And he sat down, I think, with the Bingers and showed them some pictures and things. Mrs. Binger made a big point of that. So did Mr. Binger.
>
> And that he actually considered that as at least a differential diagnosis and ruled it out and told him that he did not think that they had anything to worry about. Now, it may be that was a reasonable thing for him to do, but there was plenty of testimony from the Plaintiffs' side that it was an unreasonable thing to do under the circumstances.

In addition to that, as in comparing Doctor Shure and Doctor Schoenwald, Doctor Shure did have some further information about what transpired after Mr. Binger went to Doctor Schoenwald. And he was told in a telephone conversation with Mr. Binger that it was - he was told it was okay, he was fine, nothing to worry about.

If that was a mistake, if he shouldn't have been told that, it's not Doctor Shure's mistake, it's Doctor Schoenwald's mistake. In addition to that, Mrs. Binger and Doctor Shure testified that later on when she next saw him, she reconfirmed that they had been told it was okay and nothing to worry about.

Again, if that was bad information, that's Doctor Schoenwald's problem, not Doctor Shure's problems. And then finally in June, I think it was, there was a <u>recurrence, according to the Bingers, of this problem. And Mr. Binger -- and they called Doctor Schoenwald about it and Doctor Schoenwald didn't even have him come in at that point.</u> According to that now, there's an issue, I think, about that. And then it occurred again later on, even just before the birth, where there was some - there was a second time that - a third actually, this would be now the third time that Mr. Shure - that Mr. Binger apparently had some visible problem on his penis or said he did.

And there was a later call to the doctor about that and nothing, so. <u>And according to the testimony of the Bingers, they never told Doctor Shure about any of these later subsequent problems.</u> They didn't tell him about the problem in June and October. <u>They only told Doctor Schoenwald that.</u>

So, all of that, when you look at it, there's a totally difference case insofar as it deals with Doctor Schoenwald as compared to Doctor Shure because Doctor Schoenwald is the one that sees the husband, is there to evaluate the husband's problem, and received the later phone calls from the husband.

[Tr. 1117-1120, Appendix III] [emphasis supplied]

*St. Paul's Expert Testimony*

The single expert called by St. Paul was Mr. Barwick. Mr. Barwick's testimony went to supporting St. Paul's theory of the case, i.e., that because Dr. Shure did not pay his theoretical

proportional share, the settlement was not entered into in good faith. Other than conclusionary sentences in the brief, St. Paul has not provided record citation to any of Mr. Barwick's testimony having to do with the other factors that could support a finding that the settlement was not entered into in good faith. The Fourth District commented on this omission in St. Paul's brief stating that, "[i]n its 30 page brief, St. Paul devotes only two paragraphs to Barwick, its only expert..."[12] On the issue of good faith the Fourth District then found that "counsel for St. Paul acknowledged that there was no evidence of collusion or that Dr. Shure testified improperly". [Op., p.3, Appendix I]

St. Paul also argues that Mr. Barwick's testimony was based upon the same information available to the settling parties. However, there is a critical distinction between the information which Mr. Barwick had available to him, or rather what he did in fact review, and what was available to the settling parties. Mr. Barwick testified that he reviewed some of the records, some of the depositions and the trial testimony, i.e., what was given to him by Mr. Womack, Dr. Schoenwald's attorney. [Tr. 730, Appendix III]

First and foremost, the trial testimony which Mr. Barwick reviewed occurred after the settlement, and thus was not available to the settling parties. Mr. Barwick himself acknowledged that he did not read the depositions which were the most critical of Dr. Schoenwald's care of Mr. Binger. [Tr. 837 (Dr. Crane), Tr. 839

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[12] The Fourth District finishes the quote with "...and characterizes it as follows...:" and then sets out the two paragraphs in full. See Op., p.3, Appendix I.

(Dr. Shullman), Tr. 840 (Drs. Freed and Klein), Tr. 841 (Drs. Shatz and Sloan), Appendix III]. However, this information certainly was available to the settling attorneys and influenced their determination as to what was Dr. Shure's exposure. Thus Mr. Barwick's testimony as to this settlement not being in good faith was based upon a restrictive review of the record and contained matters clearly outside of what the settling parties used in their evaluations of the case.

A good deal of Mr. Barwick's testimony went to explaining to the jury that the case was settled because "there was information that the Plaintiff needed in his case to prove to get to the jury to begin with that he can get from no other person in the world left except Dr. Shure." [Tr. 776, Appendix III] This was the "tactical reasons" for settlement, to get the information contained in the sworn statement having to do with Mrs. Binger's symptomatology of the herpes virus to the jury in the medical malpractice action.

Mr. Barwick was permitted to tell the jury that it was the Binger's attorney, Mr. Spector who brought this information to the jury during redirect examination. [Tr. 803, Appendix III] However, the transcript of the trial reveals clearly that the questions regarding the symptomatology of Mrs. Binger's herpes were made initially by Mr. Womack during his cross examination.[13] [See

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[13] Further, Mr. Barwick acknowledged that Dr. Shure was not the only one who commented at trial about the distinction between primary and recurrent herpes, that Dr. Klein had done so. [Tr. 863, Appendix III]

Dr. Shure's Trial Testimony in Tr. Med. Mal. case, Appendix II, pp.479-483 Cross by Defense counsel Womack and p.506 Re-direct by Plaintiffs counsel Spector]:

Mr. Womack: Doctor, under the protocol which you would have started, you say at about 32 weeks, knowing that Linda Binger is what we call an asymptomatic shedder, correct, sir? **She was an asymptomatic shedder?**

Dr. Shure: Based on the case as I know it now, looking back upon it, **the case is consistent with her being an asymptomatic shedder.**

* * * * * *

Mr. Womack: So now suppose, Doctor, that there was something that got you started that caused you to suspect Herpes and you started the cultures **on this lady who was an asymptomatic shedder,** and in doing your weekly cultures, what do you think the odds were back then of you getting a positive culture from her vaginal canal?

Dr. Shure: Less than one percent.

* * * *

Mr. Womack: Okay, now assume, however, that you go ahead with the vaginal delivery, and assume that one out of a hundred chance that the mother has the virus shedding occurs, one out of a hundred, do you know what the odds are for the baby contracting the disease as it travels through the vaginal canal?

Dr. Shure: Yes.

Mr. Womack: What?

Dr. Shure: **If it is a first case of herpes,** the baby has a 50 percent chance of getting this infection from the mother. **If it is recurrent herpetic problem,** the baby has a four percent risk of coming down with herpes assuming the shedding is going on. There is no shedding, the whole thing is academic, so we are talking 50 percent of one percent or four percent of one percent which goes into quite a few decimals.

[Tr. Med. Mal., pp. 479-483 Excerpted Testimony of Dr. Shure during Cross Exam by Womack, Defense Counsel found in Appendix II, pp.479-483] [all emphasis supplied]

As is plain from the transcript excerpt above, Mr. Womack,

St. Paul opened the door wide open on the issue of asymptomatic herpes and first occurrence versus a recurrent herpetic symptomology. Mr. Spector then asked a clarifying question regarding mortality rates concerning the asymptomatic shedder which focused on information already elicited during Mr. Womack's cross-examination:

Mr. Spector: Doctor, according to your statistics, sir, the chances of having problems with the cesarean section are lower than the chances of an **asymptomatic shedder's baby having symptoms**, isn't that correct, sir? You said it is approximately three out of 100,000 that have problems of mortality or morbidity in a cesarean section?

Mr. Womack: He said death, not problems, and I object to it.

Mr. Spector: Excuse me, death.

Dr. Shure: Well, the chances of death are three in 100,000, and I am doing that to the best of my recollection because I think the total mortality in this country for pregnant women is seven or eight per 100,000, and that involves ectopic pregnancy, that involves infection and that involves hemorrhaging.

That has nothing to do with cesarean section-maybe it did have, I would presume three out of those seven or right were cesarean section. **Now the likelihood of an asymptomatic shedder--Again if this was a recurrent infection** giving her baby a disease, it's not my statistics, it is from the American College of Obstetrics and Gynecology that recommends the protocol. They would just say do cesarean section if herpes were suspect, and I am assuming the risk benefit ratio when favorable to the protocol if no vaginal infection were there.

Mr. Spector: Doctor, **do you have an opinion as to what kind of infection Linda Binger had, whether it was primary or recurrent herpes?**

Dr. Shure: My opinion, I will emphasize, is that this was a first infection.

Mr. Spector: And that would have substantially increased the chances of the baby getting the virus if she was an **asymptomatic shedder?**

Dr. Shure: I am going backwards and using the arithmetic, in my opinion, the likelihood is greater for knowing that result.

[Excerpt of Dr. Shure's trial testimony in Tr. Med. Mal. case, Tr. pp.505-506, See Appendix II] [emphasis supplied]

Despite the fact that Mr. Womack was the counsel who elicited the information from Dr. Shure on symptomology and first or primary herpes versus recurrent herpes, Mr. Barwick told the jury that Mr. Womack did not ask these questions regarding symptomology and first versus recurrent herpes:

Mr. Bushman (co-counsel for St. Paul): Let's go back. **How was the testimony from Dr. Shure elicited, what parts of the trial, who was asking the questions?**

Mr. Barwick: Dr. Shure was called in the Plaintiff's case by Mr. Spector and was put on and asked a number of questions.

And then he was cross-examined by Mr. Womack.

And on redirect, the question was specifically asked as to whether or not he had an opinion as to whether the herpes that Mrs. Binger had was primary or recurrent. He said, yes, I do. What is your opinion? The answer was, it was primary.

Mr. Bushman: **Did Mr. Womack with respect to his cross-examination before that point open the door or in any way ask him or elicit a response of that nature?**

Mr. Barwick: **Not in my opinion.**

[Tr. of Contribution Action, p.803, Excerpt of Howard Barwick Testimony, Appendix III]

And further, the trial testimony reveals that the herpes virus symptomatology was not even at issue in the trial, <u>but was brought out only in the contribution action in order to support the inference that Dr. Shure gave a sworn statement in exchange for settling the case</u>.

## ARGUMENT:

## THE FOURTH DISTRICT'S OPINION WAS CORRECT

The Fourth District's affirmance was based on sound reasoning and is not in conflict with any other cases of this court or any of the other District's, including the Fourth. It is interesting that of the twelve cases cited in support of the Fourth District's opinion that St. Paul has chosen to discuss only one and that case appears at the end of their brief in a few scant paragraphs. [Petitioner's Br., p.37]

St. Paul has throughout its brief to this Court argued much as it did to the Fourth District, that because an expert conjectured that a tactical reason existed, (a conjecture that was proven false at trial) that a misguided and impermissible jury verdict should stand.

The key to understanding the Fourth District's affirmance of the trial court order granting Dr. Shure a JNOV is in its recognition of the underlying purpose of the Uniform Contribution Among Tortfeasor's Act which is to encourage settlements.[14] In discussing "whether the evidence presented by St. Paul was sufficient to create an issue of fact as to lack of good faith", the Fourth District court stated the following:

> In *Frier's Inc. v. Seaboard Coastline R.R. Co.*, 355 So. 2d 208 (Fla. 1st DCA 1978) the first district traced the history and purpose of the Uniform Contribution Among

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[14] This Court in *Wells v. Tallahassee Memorial Regional Medical Center, Inc.*, 20 FLW S278 (June 15, 1995) emphasized through citation to other states case law the importance of encouraging settlements.

> Tortfeasors Act. When it was first written in 1939 (although not yet adopted in Florida) its main purpose was to promote the equitable sharing of responsibility among those jointly liable to an injured person. It did not, however, discharge the settling tortfeasor from contribution, unless the plaintiff agreed to limit what plaintiff could recover from other tortfeasors. The Act was revised in 1955, with the addition of a provision discharging from contribution the tortfeasor who makes a *good faith settlement, in order to encourage settlements*. Id. at 211. The court also noted that the Commissioner's Comment to the 1955 revision provides that the good faith requirement allows the *court to "determine whether the transaction was collusive,* and if so there is not discharge." Id. [emphasis supplied]

[Op., at 8, Appendix I]

The Fourth District specifically noted the following language on the meaning of collusion from a California case which was also relied upon by the First District in *Frier's*:

> The notion of collusion advanced by the Uniform Law Commissioners implies something more than confederacy. Any negotiated settlement involves cooperation but not necessarily collusion. It becomes collusive when it is aimed to injure the interest of the absent tortfeasor. [citations omitted]

[Op., p.9, Appendix I][15]

The Fourth District traced the contribution cases in Florida since *Frier's* and found that the common element in good faith determinations was whether there was "evidence of collusion or other evidence of bad faith." [Fourth District quoting from *Seaboard System R.R. v. Goforth*, 545 So. 2d 482 (Fla. 5th DCA 1989)]

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[15] The Fourth District concluded its opinion stating that "there was no evidence of collusion or other misconduct..." [Op., p.11, Appendix I]

In *Seaboard*, the Fifth District in reviewing the cases on good faith that had been handed down since Florida adopted the Uniform Contribution Among Tortfeasor's Act found that in the cases where the district courts had held that there was some evidence of bad faith based on the settlement being less than a theoretical proportional share it was because the amount of the settlement was *minuscule* in relation to the damages:

> However, in each of those cases, there were substantial damages ($60,000 in *Metropolitan* and $83,186.96 in *Sobik's*) and the appellate court in those cases held in effect that the tort victim's <u>settlement with one of several tortfeasors for $1,000 was, under the circumstances, some evidence of bad faith</u>.

*Seaboard* at 483.

The *Seaboard* court went on to state that the case before them was different because of three factors which evidenced good faith, 1) the settlement amounts were substantial; 2) the deposition of the settling parties; 3) and no evidence of collusion:

> This is an entirely different case. The amount of the settlement, for which the releases were given in this case, was substantial, totaling $499,901, and constitutes some evidence of good faith. The deposition of the settling parties constitutes other evidence of good faith. At the hearing before the trial court on a motion for summary judgment, there was thus, affirmative evidence that the releases were given in good faith and there was no evidence of collusion or any other evidence of bad faith.

*Seaboard* at 483.

These are the same factors as found in the present case and although *Seaboard* was the affirmance of a summary judgment, it is one of the few Florida cases which even discusses the elements of good faith in a contribution action other than *Frier's*. And in

accord with its holding, the evidence below complied with the three *Seaboard* factors; 1) the settlement amount was substantial and was reasonably related to the liability of Dr. Shure as compared to Dr. Schoenwald; 2) both of the settling parties counsel, Mr. Spector and Mr. Klein testified as to how they arrived at the settlement figure in relation to Dr. Shure's exposure; and finally 3) there has been absolutely no evidence of any collusion on the part of Dr. Shure and the Bingers. See also, *International Action Sports v. Sabellico*, 573 So. 2d 928 (Fla. 3rd DCA 1991).

The most heavily relied upon contribution case in the nation is *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal. 3D 488, 213 Cal. Rptr. 256, 698 P.2d 159, (Cal. 1985),[16] which emphasized "the broad parameters of the "ballpark" within which settlements will be deemed to be in good faith". The *Tech-Bilt* court pointed out that settlements which are less than a theoretical proportionate share will be considered to be in good faith when they are reasonable in light of settlement imponderables:

> The danger that a low settlement violates the good faith clause will not impart uncertainty so long as the parties behave fairly and the courts maintain a realistic awareness of the settlement imponderables.

*Tech-Bilt* at 167.

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[16] California and Florida both adopted the Uniform Contribution among Tortfeasors Act. See *International*, footnote 10. Also see discussion of *Tech-Bilt* in the context of the nature of good faith hearings on the adequacy of settlements in, Kornhauser and Revesz, "Settlements Under Joint and Several Liability" 68 N.Y.U. L. Rev. 427 (1993) at 442-443.

The Court then explicated the parameters of the ballpark:

> The dissent is correct in observing that the inquiry contemplated by our opinion will extend of necessity beyond a simple determination of pro rata share. Indeed, it is precisely for that reason that we emphasize the broad parameters of the "ballpark" within which settlements will be deemed to be in good faith.

*Tech-Bilt* at 167, note 9.

Thus, if this court should find that the sole issue in this case is whether Dr. Shure paid his "fair share", then there is overwhelming evidence that he did. Dr. Shure did not pay a minuscule amount ($1,000.00) as in *Sobik's Sandwich Shops, Inc., v. Davis*, 371 So. 2d 709 (Fla. 4th DCA 1979), and there was no evidence of collusion to defeat the contribution statute, as in *International Action Sports*, rather, Dr. Shure's settlement was substantial and reasonably related to his share of the liability, as it appeared at the time of settlement.

***The Federal Approach***

In a well reasoned opinion out of the Ninth Circuit Court of Appeals, the court reviewed the "conundrum" which contribution cases can bring when it is necessary to balance the twin goals of encouraging settlements and apportioning fault among multiple defendants. In *Miller v. Christopher*, 887 F. 2d 902 (9th Circuit 1989), the court had to deal with a situation which is strikingly similar to the situation presented herein, i.e., <u>the arguments presented to the Ninth Circuit and that presented to this court by St. Paul are almost identical</u>. The appellant in *Miller* argued that

because the settling defendant's settlement fell outside the theoretical proportionate range, that it could not have been entered into in good faith.

The district court had held an evidentiary hearing on the issue of good faith,[17] at which it determined that the total value of the claim was $500,000.00. The first settling defendant settled the case for approximately $100,000.00. The court determined that the first settling defendant's liability had ranged from one-third to two-thirds. The district court concluded that the settlement was not collusive and was in good faith. The second settling defendant challenged the district court's ruling that this particular settlement was in good faith. *Miller* at 903.

Specifically the issue, as framed by the Ninth Circuit, was whether the district court was required to hold that a settlement was not in good faith because the settlement was discounted, i.e., it fell below the range of the actual damages which were only knowable after the trial.

The court concluded that this standard would require the settling plaintiff's to have "perfect foresight", and held further that the district court was not required to hold that the settlement was not in good faith because the settlement fell below the range of estimated actual damages assessable after trial:

> The appellant also contends that even if the use of a range of percentage of fault is permissible, the district court erred in finding that this particular settlement

[17] In both California and the Ninth Circuit the issue of good faith is one for the Court to determine as a matter of law. See *Tech-Bilt*, infra and *Miller*, infra.

> was in good faith. The district court estimated the plaintiff's total claim at $500,000 and the settling defendant's liability as between thirty-three and sixty-seven percent. The court, however, estimated the value of the settlement at $100,000[18], or just twenty percent of the value of the plaintiff's total claim. The appellant contends that the district court could not have found the settlement to be in good faith when the amount of the settlement represented a value discounted below the estimate range of liability. In other words, the <u>appellant contends that the district court was required to hold that the settlement was not in good faith if the settlement fell below the range of estimate actual damages accessible after trial.</u>
>
> Settlement amounts, however, <u>are often discounted</u> to reflect the cost of trial to the plaintiff, and the uncertainties of the trial's outcome. Further requiring perfect foresight on the part of the settling parties would not be in accordance with the agreed upon California "grossly disproportionate" standard which finds good faith in a settlement which "is in the ballpark."[19] [citations omitted] <u>The district court committed no error in finding the settlement in good faith even though the amount settled on represented a discounted liability outside the range hypothesized by the court.</u>

*Miller* at 907. [emphasis added]

The *Miller* court also commented specifically upon why it was necessary to bar contribution actions if the settlement was made in good faith:

> No defendant wants to settle when he remains open to contribution in an uncertain amount, to be determined on the basis of the judgment against another in a suit to which he will not be a party...It seems more important not to discourage settlements than to make an attempt of doubtful effectiveness to prevent discrimination by plaintiffs, or collusion in the suit.

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[18] The settlement had been for some real property and an automobile.

[19] This was the language contained in the jury instructions in the instant case.

*Miller* at 906.[20]

On the issue of the definition of 'good faith', the Fourth District turned to the law of other states, noting that the Massachusetts Appeals Court in *Noves v. Raymond*, 548 N.E.2d 196,199 (Mass. App. Ct. 1990) concluded "that lack of good faith under the Uniform Act means <u>collusion, fraud, dishonesty, and other wrongful conduct</u>." [emphasis supplied] [Op., p.11, Appendix I]

Construing the same issue *Stubbs v. Cooper Mountain*, 862 P.2d 978, 984 (Colo. Ct. App. 1993) was quoted approvingly by the Fourth District on the issue of the meaning of bad faith:

> We therefore hold in Colorado the appropriate test to determine if a settlement is made in bad faith is whether the agreement was the product of <u>collusive conduct</u> intended to prejudice the interests of the non-settling defendants. [emphasis supplied]

[Op., p.11, Appendix I]

The Fourth District concluded:

> Since in the present case, there was no evidence of collusion or other misconduct, the trial court correctly held as a matter of law that the settlement was in good faith.

[Op., p.11, Appendix I]

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[20] While not dealing with the precise issue here, i.e., whether good faith is determined by a lack of collusion or other bad faith behavior, the Supreme Court in *McDermott, Inc. v. AmClyde*, 114 S. Ct. 1461 (1994) endorsed a proportionate share approach based on equitable principles and rejected contribution actions as "discourag[ing] settlement and lead[ing] to unnecessary ancillary litigation", Id. at 1467, preferring to rely on the jury's determination of comparative fault.

The Supreme Court acknowledges both *Tech-Bilt* and *Miller* approaches for taking "into account the uncertainty of recovery at trial". Id. at 1468, note 19.

Thus, in accord with all the contribution cases cited to this court, Dr. Shure's settlement was made in good faith. It cannot be found to have not been made in good faith simply because it was for an amount less than St. Paul's idea of what Dr. Shure's theoretical proportional liability was. The overwhelming contradictory evidence established that the settlement was not made for "tactical reasons" and was not collusive. In other words, for St. Paul to argue to this court that Dr. Shure is liable for approximately $1.5 million (half of the Three Million settlement), when the highest realistic demand was for $400,000.00,[21] is outside the scope of all the cited case law and all notions of equity, as between these defendants.

## CONCLUSION

The Fourth District's opinion fully recognizes the underlying purpose of the Uniform Contribution Among Tortfeasors Act that settlements are to be encouraged:

> If we were to allow settlements to be set aside for no reason other than that the settlement was not proportional to the exposure--the only basis in this case--much of the incentive for the tortfeasor to settle would be eliminated.

[Op., p.11, Appendix I]

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[21] Even St. Paul's counsel, Mr. Womack, argued in his closing argument to the jury for a recommended verdict of $750,000.00. [Tr. Med. Mal., p. 1540, Appendix II] If the jury had returned that kind of verdict, this case would not be before this Court on review.

If this Court were to agree with St. Paul and reverse the JNOV and the affirmance by the Fourth District, then even when a defendant settles for the full demand amount, which in this case was at most for Dr. Shure $400,000.00 - his settlement would still be in bad faith, because it was still less than Dr. Schoenwald paid after the jury's verdict.

The policy implications of reversing this trial court's granting of the JNOV and Fourth District's affirmance in settlements in multiple defendant lawsuits is of great public importance. If this court reverses, it will send a clear message to defendants in multiple party litigation that it is not in their best interests to settle. And this will occur, because a defendant will not settle a case, even when settlement is in the best interests of all parties and is approved by the court because they will remain open to a contribution claim in an amount uncertain, an amount which will be determined on the basis of a judgment against another defendant in a suit in which the settling defendant was not a party, and not upon the factors present when the settlement was entered into.

Thus, a reversal by this court would effectively gut any reason or rationale for settlements. It is in direct contravention to both the spirit and the letter of the Uniform Contribution Among Tortfeasor's Act. The fourth district's opinion was well reasoned and fully supported by the most current case law. Dr. Shure respectfully requests that both lower court rulings be affirmed.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished by mail this 24th day of August, 1995, to: SCOTT H. MICHAUD, ESQUIRE/PAUL BUSCHMANN, ESQUIRE, Michaud, Buschmann, Fox, Ferrara & Mittelmark, P.A., Attorneys for Appellants/Petitioners, 33 Southeast 8th Street, Suite 400, Boca Raton, Florida, 33432.

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