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,

Petitioners/Plaintiffs,

vs.

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

Respondents/Defendants.
_____/

4TH DCA CASE NO.: 92-2446

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

RESPONDENTS' SUPPLEMENTAL BRIEF

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STATEMENT OF THE FACTS

The day before a medical malpractice trial was scheduled to begin, Dr. Shure, one of the defendants, settled with the Plaintiffs for $250,000.00. The other defendant, Dr. Schoenwald, went to trial. The jury returned a verdict of $2,900,000.00 and the case was settled for $3,000,000.00.[1]

St. Paul, Dr. Schoenwald's insurer, filed suit for contribution against Dr. Shure. On Motion by Dr. Shure, the trial court bifurcated the issues of *good faith* and contribution. [R. 3008] An Order of Bifurcation was entered on January 22, 1992. [R. 3021] The case went to the jury on the issue of whether the settlement entered into between the Plaintiffs and Dr. Shure was made in *good faith*. The jury found the settlement not to have been made in *good faith*.

The judge granted the directed verdict of Dr. Shure and entered a Judgment Notwithstanding the Verdict after appropriate motion, memoranda and hearing.

The Fourth District affirmed the trial court and set forth the central issue as being Dr. Shure's argument "that the determination of *good faith* in a contribution action should be decided by the court, not a jury." The Fourth District stated: "[a]fter reviewing the law in Florida, as well as in other jurisdictions, we have concluded that he is correct." 647 So. 2d 877, 879 (Fla. 4th DCA 1994)

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[1] *St. Paul Fire and Marine Insurance Company v. Shure*, 647 So. 2d 877 (Fla. 4th DCA 1994).

This case was accepted for review by this court and supplemental briefs were requested on the issue of "whether there is a right to a jury trial in a contribution action brought under Section 768.31". [Order of Supreme Court of Florida, Sept. 27, 1995]

SUMMARY OF ARGUMENT

What is a *contribution* case? According to the Uniform Contribution Among Tortfeasors Act [UCATA], if there has been a settlement, a *contribution* case is actually a two step process. The first step which one has to establish, as a threshold matter, is whether the settlement was made in *good faith*. Under the UCATA, if there was an absence of collusive conduct, then the settlement is presumptively in *good faith* and acts as a complete bar to the contribution action. If the settlement was made in bad faith, then the second step is triggered, which is the determination of pro rata or proportionate shares of liability among the tortfeasors. This second step is actually what is commonly referred to as a "*contribution*" case. This case involves the first step in the process, i.e., the finding of *good faith*, and whether this determination is properly a court or jury decision.

Those appellate level courts in this country who have considered how to best determine whether a settlement was made in *good faith* for purposes of barring an action for *contribution* have concluded, as did the Fourth District in *St. Paul*, that the decision is one for the court to make and not the jury.

The underlying rationale for having a court determine *good faith* is based upon the policy behind the UCATA itself, that is, of encouraging settlements. This policy has been best expressed in the statements made by the drafters themselves in their comments to the Act itself. The Fourth District's opinion also acknowledges that "one of the primary goals of the UCATA...is to encourage settlements." *St. Paul Fire and Marine Insurance Company v. Shure*, 647 So. 2d 877, 881 (Fla. 4th DCA 1994).

While St. Paul's arguments to this Court deal generally with the issue of *contribution*, they, however, focus on the second step in the analysis only. St. Paul's brief fails to address the first step in the analysis, the specific question at issue here, which is should the determination of whether a settlement has been made in *good faith* and thus a bar to *contribution* be made by the court or by a jury.

The majority of cases cited to this Court by St. Paul are *contribution* cases where a jury determined the relative degrees of fault as between joint tortfeasors, a second step analysis. However, the jury's decision in this case concerned only the first step in the analysis, i.e., the verdict went only to a finding of whether the settlement had been entered into in *good faith*. There was no determination as to the proportionate share of liability as between Dr. Shure and Dr. Schoenwald, as that issue had been bifurcated.

Dr. Shure's position is that the first step, the determination of whether a settlement was made in *good faith* and thus a bar to

contribution is a threshold or preliminary decision exclusively for the court. The decision as to relative degrees of fault, the step two analysis, while traditionally more properly before a jury is also properly a court decision as well.

If a court finds that a settlement was entered into in *good faith*, Florida's contribution statute, (which is identical to the Revised 1955 UCATA) unequivocally releases the settlor from an action in contribution:

> "...when a release or a covenant not to sue or not to enforce judgment is given in good faith...it discharges the tortfeasor to whom it is given from all liability for contribution..." Fla. Stat. 768.31(5)(b)

If this Court finds that it was within the jury's exclusive province to determine whether this settlement was made in *good faith*, and further finds that there was evidence to support the jury's verdict, thus overturning both the decision of the trial court and the Fourth District, then there will still need to be another trial to determine the relative degrees of fault as between Dr. Shure and Dr. Schoenwald.

Such a decision by this Court would place Florida in opposition to the majority of courts which have considered this issue as well as the drafters of the Uniform Law on Contribution.

This court should therefore affirm the Fourth District's finding that: "[s]ince, 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." [647 So. 2d. 877, 879.]

ARGUMENT

GOOD FAITH IS PROPERLY DECIDED BY THE COURT AND NOT A JURY

The issues decided by the jury verdict in St. Paul

The issue of *good faith* in a settlement is properly an equitable question which should be addressed by the court as a preliminary or threshold matter. If the court finds *good faith* there can be no action for *contribution*. It is only when the court finds that the settlement was entered into in bad faith that there can be an action for contribution to determine proportionate share of liability as between the settling and non-settling tortfeasors.

St. Paul's reliance upon *Fletcher v. Anderson*, 616 So. 2d 1201 (Fla. 2d DCA 1993) as dispositive on the issues before this Court is misplaced because the case is not a *good faith* case. In *Fletcher*, the Second District focused on apportioning relative degrees of fault as between co-obligors. ("...Thus, an obligor who has paid in excess of his pro rata share of the obligation, is entitled at law to contribution from the other obligors for their aliquot share.") See St. Paul's Supplemental Brief [p. 2].

St. Paul's reliance upon this Court's language in *Meckler v. Weiss*, 80 So. 2d 608 (Fla. 1955) "...when one of them pays more than his proportionate share..." [Petitioner's Supplemental Brief, p.3] as supportive of its position that a jury trial is mandated in all possible phases (Step one and Step two) of a contribution action is similarly misplaced as *Meckler*, like *Fletcher* concerned

allocation of proportionate share of liability. *Meckler* did not concern whether a court or a jury should determine whether a settlement was made in *good faith* and thus act as a bar to contribution.

The other cases cited by St. Paul [Supplemental Brief, p.4] all concern the issue of proportionate share, but as must be emphasized, proportionate share was not an issue resolved below. The issue below was the whether the settlement was entered into in *good faith*. St. Paul acknowledges this in their brief. [Petitioner's Supplemental Brief, p.5, note 3]

Good faith

The proper approach for deciding whether a settlement has been entered into in *good faith* for purposes of barring a claim for contribution has been the focus of a line of appellate cases as well as comments by the drafters of the Uniform Contribution Among Tortfeasors Act [UCATA]. *All* agree that the determination of *good faith* is one for the court to make.

In the Fourth District's opinion, below, the court relied upon the case of *Stubbs v. Copper Mountain, Inc.*, 862 P.2d 978, 984 (Colo. Ct. App. 1993) as authority for adopting the "collusive conduct" test of bad faith. This "collusive conduct" test was recently approved as the correct standard to use in determining whether a settlement was made in *good faith* by the Colorado Supreme Court in *Copper Mountain v. Poma of America*, 890 P.2d 100, 103 (Colo. 1995). In affirming the appellate court in *Stubbs*, the

Colorado Supreme Court provided an in-depth analysis on the issue of what constitutes *good faith* which is instructive on the issues facing this Court in the present case.

The Colorado Court began by examining what had been the most oft cited case on the issue of *good faith*, the approach formulated by the California Supreme Court in *Tech-Bilt v. Woodward-Clyde & Associates*, 698 P.2d 159 (Cal. 1985)[2]. The *Tech-bilt* Court had adopted a "ballpark or reasonable range"[3] standard which the Colorado Supreme Court found had:

> come under considerable criticism both for its potentially negative impact on the policy encouraging settlement...[citations omitted] and for the additional burdens it creates for trial courts in conducting evidentiary hearings to determine a party's likely proportionate liability.[4]

890 P.2d at 105. [emphasis supplied]

The Colorado Supreme Court thus rejected the California "reasonable range" approach, (which in essence had incorporated a determination of proportionate share within the *good faith* test) primarily because of its negative impact on the UCATA policy of encouraging settlements.

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[2] Also suggested as one possible approach by Dr. Shure in his Fourth District Brief.

[3] Dr. Shure does not abandon his argument that his settlement did fall within the "ballpark" of his proportionate share of liability. Thus, if this Court were to adopt the California approach, it can still affirm the district court's decision. Please see the original brief filed by Dr. Shure in this Court as well as the brief submitted to the Fourth District.

[4] This language also implicitly assumes that proportionate share is a decision to be made by the court and not a jury.

In adopting a "collusive conduct" standard, the Colorado Supreme Court relied upon the clear authority found in the drafters' unequivocal intent on the particular issue of *good faith*:

> The history behind the enactment of the UCATA indicates that the drafters intended the phrase "good faith" simply to require noncollusive conduct.

890 P.2d at 106.

The Colorado Supreme Court also noted that the comment to the uniform act intended the determination as to collusive conduct to be a decision made by a court:

> this comment plainly state[s] that the clause <u>is intended only to give the court</u> "occasion to determine whether the transaction was collusive,"

890 P.2d at 106 [emphasis supplied]

The Colorado Supreme Court emphasized that the encouragement of settlements was crucial to their adoption of the "collusive conduct" standard:

> Not only does this comment plainly state that the clause is intended only to give the court "occasion to determine whether the transaction was collusive," it also indicates that the <u>Commissioners had as their express purpose the facilitation of settlement,</u> a goal best fostered if the phrase in question is interpreted as requiring noncollusive conduct.

890 P.2d at 106. [emphasis supplied] [See Commissioner's Comment to section 1(d) of the UCATA, 12 U.L.A. §1 (1959)(Master Edition 1975)]

Citing the identical paragraph from *Noyes v. Raymond*, 548 N.E.2d 196, 199 (Mass. App. Ct. 1990) as the Fourth District did when it adopted the "collusive conduct" standard for determining

whether a settlement had been entered into in *good faith*,[5] the Colorado Supreme Court concluded that, "a settlement is reached in `good faith' in the absence of collusive conduct." 890 P.2d at 108. The Fourth District stated it thusly in its opinion in *St. Paul*:

> 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.

647 So. 2d at 881.

In *Mahathiraj v. Columbia Gas of Ohio, Inc.*, 617 N.E.2d 737 (Ohio Ct. App. 1992) the appellate court in Ohio considered the same issue, i.e., the adopting of the appropriate standard to test the *good faith* of a settlement as a condition precedent to that settlement acting as a bar to a contribution action under the UCATA. In doing so the question of this determination being a jury question was never considered. While the *Mahathiraj* court did not embrace the "collusive conduct" standard, opting instead for a "totality of the circumstances" test which placed the decision squarely "within the discretion of the trial court", 617 N.E. 2d at 741, much of the Ohio appellate opinion focuses on just how a court should go about making the decision about the *good faith* of a settlement under the new standard:

> In the final analysis, a totality of the circumstances standard enables the trial court to consider the potential proportionate liability of the parties in cases where such determinations are appropriate, but does not require the court to consider it in every case or in cases where such calculations would be of little value in

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[5] 647 So. 2d at 881.

> good faith determinations. As a result, parties have a greater incentive to settle than they would under a standard which forces them to defend their settlements whenever the mere allegation of a disproportionate settlement is made. At the same time, courts are free to police collusive settlements that unfairly saddle one tortfeasor with a disproportionate share of liability.

617 N.E.2d at 742 [emphasis supplied].

This statement by the *Mahathiraj* court addresses itself precisely to the situation Dr. Shure finds himself in, having to defend the settlement he made upon the "mere allegation of disproportionate settlement." Even Judge Lee [who tried the underlying medical malpractice case against Dr. Schoenwald] couldn't understand why Dr. Shoenwald didn't settle the case.[6] St. Paul's hindsight, after losing at the trial level on the medical malpractice claim, and the subsequent allegation made that Dr. Shure didn't pay his fair share, are exactly what the *Mahathiraj* court wanted to avoid through adoption of the "totality of the circumstances" test for *good faith*.

Although adopting a slightly different standard, the Ohio court in *Mahathiraj*, like the Colorado Supreme Court in *Stubbs* and the Fourth District in *St. Paul*, relied upon the case of *Noyes* as providing authority for following the UCATA's policy goal of encouraging settlement in making the *good faith* determination. *Noyes* is consistently relied upon in *good faith* cases because it was one of first appellate courts to grapple with and analyze the precise issue of *good faith*, the same issue presented in St. Paul.

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[6] See Dr. Shure's Brief to the Fourth District at p.2. Judge Lee's complete statement can be found at R. 1643-1646.

In doing so, the *Noyes* court commented on the paucity of cases on this issue before deciding that it would rely upon the comments made by the drafters of the UCATA on the issue:

> The statute neither defines "good faith" nor describes the burden of the party seeking to be discharged on the basis of a settlement. Although we would have expected those particular questions to have arisen with some frequency in tort litigation, to our knowledge, no appellate decision in this Commonwealth has addressed them. The purposes behind the statute have been discussed, however, and those discussions are of some guidance to us in resolving this appeal. Our courts have stated that the statute was intended to encourage settlements.

548 N.E.2d at 198.

The *Noyes* court explained why adopting a policy of routine court hearings on *good faith* is the preferred procedure in accord with the UCATA clear policy of encouraging settlements:

> If it were otherwise, a party seeking to avoid trial by settling a claim could rarely achieve that objective; either the issue of good faith would be the subject of a full trial or, as happened in this case, a defendant who settles with a plaintiff may, nevertheless, be forced to stand trial on the merits of the tort claim. Faced with such prospects, a defendant would have little incentive to enter into a settlement.

548 N.E.2d at 199.

In the Supreme Court of Arizona's case of *City of Tucson v. Superior Court*, 798 P.2d 374 (Ariz. 1990) a group of settling tortfeasors sued the single non-settling tortfeasor for contribution. What is enlightening about the decision by the Arizona Supreme Court for our case is how Arizona determines the *good faith* issue. It seems that in Arizona there is a codified rule that requires the "trial court to make a `formal determination whether the settlement is made in good faith'." 798 P.2d at 379.

Arizona thus clearly recognizes that the determination as to whether a settlement was made in *good faith* and thus a bar to contribution is, as a preliminary matter, a court decision by Rule 16.1(a).

The Cases Relied Upon By St. Paul

As Dr. Shure has already emphasized, the cases relied upon by St. Paul do not deal with the *good faith* issue nor do they focus on settlements in contribution actions. Rather they focus on jury trials where the issue litigated was the proportionate share of liability as between joint tortfeasors. St. Paul's key case is *Fletcher v. Anderson*, 616 So. 2d 1201 (Fla. 2d DCA 1993).

St. Paul argues that the following language "clearly articulates why jury trials are appropriate in contribution actions":

> The doctrine of equitable contribution is grounded on principles of equity and natural justice and not on contract. [citations omitted] The principle attempts to distribute equally among those who have a common obligation, the burden of performing that obligation.

St. Paul Supplemental Brief, p.2 citing *Fletcher*, 616 So. 2d at 1202.

As correct as St. Paul's assertions may be when directed to the issue of proportionate share in contribution actions, the second step in the analysis, this case is not authority at all, much less clear authority, on the issue which was tried below, the issue of *good faith*.

Fletcher concerns the difference between an aliquot share of contribution and the enlargement of a contribution share among solvent obligors. There is no discussion at all of any settlement, no discussion on *good faith* and no discussion of the Florida Statute or the UCATA provisions on *good faith*.

Fletcher is actually more supportive of Dr. Shure's argument and the Fourth District's opinion that a contribution action focused on the determination of proportionate liability is an equitable action not entitled to a jury trial:

> On the other hand, if petitioner seeks to enlarge the share of the solvent guarantors, it is an action in equity and he is not entitled to a jury trial.

616 So. 2d at 1202.

St. Paul's reliance upon this Court's decision in *Meckler v. Weiss*, 80 So. 2d 608 (Fla. 1955) is similarly inapposite in that its main focus is on proportionate shares of liability as between co-obligors. There is no mention of a settlement, no discussion of what constitutes *good faith* and no reliance upon Fla. Stat. 768.31(5)(b) or the UCATA.

While it may be a sincere statement that, "St. Paul was required to pay what it <u>believed</u> to be more than its pro rata share of a judgment" [St. Paul Supplemental Brief, p.4] this is not what was at issue in the trial court. The order of bifurcation made this trial one on the issue of *good faith*, not on comparative fault.

And St. Paul is simply wrong that "the essence of the [contribution] action remains the same - `to distribute equally

among those who have a common obligation, the burden of performing the obligation'." [St. Paul Supplemental Brief, p.5]

Florida is a comparative fault state and the burden as between co-tortfeasors is not a equal sharing of the burden but a proportionate liability approach. This is mandated as well by Florida's Contribution Statute, §768.31(3)(a) which states:

> (3)PRO RATA SHARES- In determining the pro rata shares of tortfeasors in the entire liability:
>
> (a) Their relative degrees of fault shall be the basis for allocation of liability.

Rather than cite this Court to contribution case law, St. Paul resorts to cases on usury [St. Paul Supplemental Brief, p. 6-10] to support its premature presumption that St. Paul paid in excess of its proportionate share. This is a determination yet to be made in this case.

When St. Paul does cite to contribution cases, they are cases that support a jury trial on the issue of pro rata shares. This issue of pro rate shares is an issue which is never reached if the agreement is found to be made in *good faith*. Thus St. Paul's reliance on *Lorf v. Indiana Insurance Co.*, 426 So. 2d 1225 (Fla. 4th DCA 1983) as supporting the right to a jury trial under the facts of this case is misplaced. [St. Paul Supplemental Brief, p.10] *Lorf* contains no discussion on how a settlement made in *good faith* precludes a jury's determination on pro rata shares. There is no consideration of Fla. Stat. 768.31(5)(b) which addresses itself to *good faith* settlements, rather the *Lorf* case turns on the issue of collateral estoppel and whether the pro rata shares of

liability which were determined in prior litigation could be re-litigated in a subsequent contribution action.

In the case at bar, the jury never made any determination on the proportionate liability as between Dr. Schoenwald and Dr. Shure, that is still an issue to be tried, and depending on this Court's determination, may well be a decision for the court below. Whatever the holding is on pro rata shares, the issue of *good faith* still remains within a court's exclusive jurisdiction and *Lorf* does not address itself to that issue.

St. Paul also cites *West America Ins. Co. v. Yellow Cab Co.*, 495 So. 2d 204 (Fla. 5th DCA 1986) to support its argument that all contribution cases are properly tried by a jury, however *West America* was actually a subrogation case, not a contribution case, and the Fifth District so held. The other cases cited by St. Paul are similarly infirm on the issue of *good faith* settlements.

The only case which St. Paul cites on the issue of whether a settlement under Section 768.31(5)(b) (1991), the *good faith* section, is properly submitted to a jury is the Fourth District's *Gold, Vann & White, P.A. v. DeBerry*, 639 So. 2d 47 (Fla. 4th DCA 1994).

In *Gold, Vann* the Fourth District did note that they were receding from dicta in a previous opinion "suggesting that the good faith/bad faith should be tried by the court without a jury, and before the main action." 639 So. 2d at 52, note 1. It is important to emphasize that the Fourth District's decision in *St. Paul* was handed down after *Gold, Vann* and *St. Paul* actually

clarifies what the intentions of the Fourth District were in *Gold, Vann* on the issue of good faith/bad faith although not referring to it directly.

In *Gold, Vann* the Fourth District definitely foreshadowed the approach they took shortly thereafter in *St. Paul*. *Gold, Vann* can be fairly read as demonstrating the Fourth District's inclination towards finally concluding in *St. Paul* that *good faith* was a court decision which should occur preliminary to any contribution action dealing with proportionate shares.

In *Gold, Vann* the *good faith* nature of the settlement was only one of a multitude of issues before the Fourth District. In the portion of the opinion that does focus on the settlement agreement the Fourth District found that it was reversible error to read the settlement agreement to the jury as edited.

However, the important point in *Gold, Vann* for this case is that the Fourth District affirmed the trial court's ruling that the settlement agreement was made in *good faith* and therefore properly determined the issue on the motion for directed verdict made by the doctor who had entered into the settlement agreement. The Fourth District specifically noted that, "[w]e base this determination primarily on the obstetrician's concession of no pre-agreement collusion." 639 So. 2d at 52. This holding is in full accord with its subsequent holding in *St. Paul*.

Other jurisdictions case law cited by St. Paul

St. Paul cites this Court to *Clark II v. Teevan Holding Company, Inc.*, 625 A.2d 869 (Del Ch. 1992), a Delaware case decided under specific Delaware law which has no analog in Florida. In Delaware there are two separate court divisions, a court of Chancery, and a Court of Law. Delaware has a specific statute which divests the Court of Chancery with jurisdiction over claims "wherein sufficient remedy may be had by common law, or statute, before any other court or jurisdiction of this State." 625 A.2d at 877. The Delaware court in *Teevan Holding* declined jurisdiction because "if an adequate remedy exists for it at law" there is no jurisdiction in the Court of Chancery. 625 A.2d at 876. Finding under Delaware law that while "equity has traditionally recognized a right to contribution among co-guarantors [citations omitted]" the situation in the instant case differs because there was no "claim to be a co-guarantor" rather the:

> essence of Teeven's claim for contribution is that Teevan, as an alleged **tortfeasor under state environmental statutes,** is legally entitled to contribution from third-party defendants who are alleged to be joint tort-feasors with Teeven.

625 A.2d at 877.

Thus the Delaware court finds that the trigger for the contribution action in this case is not an equitable trigger but a statutory trigger, i.e., the environmental statute and thus an adequate remedy exists in the law courts thus divesting it of its limited jurisdiction. There is no discussion of any settlement, or *good faith* or the drafters' intent as found in the UCATA on whether

a *good faith* determination properly lies rests with a court or jury.

St. Paul also cites *Paclawski v. Bristol Laboratories, Inc.*, 425 P.2d 452 (Okla. 1967) where the Oklahoma Supreme Court construed the UCATA as adopted in Arkansas in 1947, stating that the adoption of the uniform act "makes the allocation of the pro rata share of the damages among all tortfeasors a jury question." Dr. Shure cannot find this language in the Arkansas Code of 1987 Section 16-61-205 titled *Release - Effect on right of contribution.* Section 16-61-205 (1987) superseded section 34-1005 of the 1947 Arkansas Code, which is the code section cited by the Oklahoma court in *Paclawski*.

1947 Arkansas law, as construed by the Supreme Court of Oklahoma in 1967, is not adequate guidance on the approach which should be taken by this Court in resolving the issue of whether a court should decide as a preliminary matter, whether a settlement has been entered into in *good faith,* and thus a bar to a contribution action, pursuant to Fla. Stat. 768.31(5). Dr. Shure respectfully urges that this Court be guided instead by the *Stubbs* case, where the Colorado Supreme Court construed identical language to that of the UCATA and Florida Statute 768.31.

Whichever approach this Court takes, *Paclawski* is simply inapposite as the 1955 Revision of the Act soundly rejected the reasoning of the Act of 1939 which was construed by the court in Oklahoma in *Paclawski*. It is difficult to ascertain why St. Paul still urges this archaic and rejected reasoning to this Court. The

1955 Revision states in pertinent part why the revision was necessary[7]:

> Subsection (b). Effect on Contribution. The 1939 Act provided, in Section 5, that a release of any tortfeasor should not release him from liability for contribution unless it expressly provided for a reduction to the extent of the pro rata share of the released tortfeasor of the injured person's recoverable damages. **This provision has been one of the chief causes for complaint where the Act has been adopted, and one of the main objections to its adoption.** The requirement that the release or covenant be given in **good faith gives the court occasion to determine whether the transaction was collusive, and if so there is not discharge**.
>
> * * *
>
> Some reports go so far as to say that the 1939 Act has made independent settlements impossible...Such reports have reached other states, and have been responsible for a considerable part of the opposition to the 1939 Act.
>
> * * *
>
> 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.

UCATA 1955 Revised Act, Comment to Section 4, 1975 Main Volume, subsection (a).[emphasis supplied]

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[7] It is interesting to note that the language rejected in the 1939 Act as objectionable is precisely the language St. Paul urges this Court to adopt from the heavily relied upon *Paclawski v. Bristol Laboratories, Inc.*, 425 P.2d 454 (Okla. 1967) [See St. Paul Supplemental Brief, p.19-21]

ARGUMENT

A JURY TRIAL IS NOT ALWAYS APPROPRIATE EVEN WHEN THE INTENDED REMEDY IS THE AWARD OF MONEY DAMAGES

Dr. Shure has no argument with the general proposition that a right of jury trial exists under the Florida Constitution to those cases to which a jury trial was given at common law. It must be kept in mind however that this is a general proposition which has been made more specific in application as different facts are presented and courts decide whether a particular action is for a jury or for the court. The other argument made by St. Paul is that at common law a cause of action for money damages was also for the jury. This is also a general statement of law which has been subsequently finely tuned by decisional law to include some causes where money damages are awarded and some where they are not.

Accordingly this Court, when it took conflict jurisdiction to review *Smith v. Barnett Bank*, 350 So. 2d 358 (Fla. 1st DCA 1977) (overruled *Cerrito v. Kovitch*, 457 So. 2d 1021 (Fla. 1984)) with the Fourth District's *Cerrito v. Kovitch*, 423 So. 2d 1008 (Fla. 4th DCA 1982), held that "[n]ot all claims for money are legal actions triable by jury as a matter of right." 457 So. 2d at 1023. This Court went on to posit a distinction based upon whether a statute was predicated upon remedies and thus not creating a vested substantive right:

> "As we have stated before, `authority is legion to the effect that an action predicated on remedies ... creates no vested substantive right but only an enforceable penalty'."

457 So. 2d at 1023.

Is contribution a remedy or does it create a vested substantive right to a trial by jury? Are the legal and equitable issues so blurred that, as argued by St. Paul, they trigger a right to trial by jury under the U.S. Supreme Court's *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962)? Neither *Dairy Queen, Cerrito* or *Smith* are contribution actions and thus offer only general guidance. But they are all in agreement that a strictly equitable issue is for the court's discretion, not a jury.

In a contribution action where there has been a settlement, the preliminary issue for the court of whether the settlement was entered into in *good faith* is certainly an equitable question. That is why the cases which deal with *good faith* as well as the UCATA drafters themselves assume that the issue of *good faith* would be decided by a court, because its equitable nature was not in controversy. In contrast, the apportionment of comparative fault, i.e., proportionate share has traditionally been a jury function and thus presents a different issue.

St. Paul cites several contribution cases in support of its argument that contribution is traditionally a jury decision. As already discussed, infra, neither *Lorf* or *West American* deal with the *good faith* issue. In *City of Rivera Beach v. Palm Beach School Board*, 584 So. 2d 84 (Fla. 4th DCA 1991), the case was submitted to a jury on the issue of what the School Board's "proportionate liability" should be, 584 So. 2d at 85. The case contains no discussion of *good faith* or the effect of such settlements on rights of contribution. The case does not distinguish between a

jury's function in determining comparative fault and the court's function in determining *good faith*.

That the jury should be limited to determining relative or proportionate share of fault is supported by only two cases from other jurisdictions in addition to the cases already discussed in this brief. For example, in *Velazquez v. National Presto Industries*, 884 F.2d 492 (9th Cir. 1989), the Ninth Circuit held that the jury's sole responsibility under the UCATA was to determine whether contribution would be in equal shares or adjusted to reflect disproportionate fault levels. The Supreme Court of Tennessee decided that "the jury will determine the percentage of fault attributable to each of the defendants." *Bervoets v. Harde Ralls Pontiac-Olds, Inc.*, 891 S.W.2d 905, 907 (Tenn. 1994).

That is all the authority Dr. Shure was able to find on the issue of whether in the second phase of a contribution action a jury should determine proportionate share of liability. The "totality of the circumstances" approach favored by the Ohio Appellate Court in *Mahathiraj* would place enough discretion in a court's hands to handle most contribution actions without resort to a jury. But the right to having all possible phases of a contribution action tried before a jury finds no authority in the cases already decided. This is a case then of first impression for Florida courts.

Either a "collusive conduct" or "totality of the circumstances" would serve the twin functions of equity and justice for both sides. A settling tortfeasor who makes their settlement

in *good faith* has a right to rely upon the bar to contribution unequivocally found in the UCATA. To find bad faith because of a deviation below a theoretical pro rata share which St. Paul has divined somehow to be half is to make a sham of the clear wording and intent of the drafters of the UCATA.

Even if this Court adopts California's "reasonable range" approach, Dr. Shure's settlement was within a reasonable range of his projected liability as that appeared at the time of settlement.[8]

Other jurisdictions, other statutory enactments

Simply because money damages are paid, or a statutory enactment was unknown at common law, does not automatically trigger jury trial as a matter of right.

In Connecticut, the Supreme Court held that a jury trial was not required under the State Constitution for actions brought under the Connecticut UnFair Trade Practices Act (CUTPA). The Court found that the CUTPA created an essentially equitable cause of action not substantially similar to common-law claims triable to a jury at the time the Connecticut Constitution was adopted. See *Associated Inv. Co. Ltd. Partnership v. Williams Associates IV*, 645 A.2d 505 (Conn. 1994).

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[8] "The fact that the amount of settlement is low in comparison to the plaintiff's estimate of her own damages, by itself, is, however, not material. A relatively low settlement might well reflect uncertainty whether the settling party be found liable, uncertainty whether the damages would be proved, or the general unpredictability of juries on both liability and damages issues." *Noyes*, 548 N.E.2d at 199.

The Illinois Supreme Court held that the Illinois Consumer Fraud Act was a statutory proceeding unknown to common law, and thus under the Illinois Constitution there was no right to a jury trial. See *Martin v. Heinold Commodities, Inc.*, 643. N.E.2d 734 (Ill. 1994).

In Oregon, the appellate court found that a franchisee was not entitled to a jury trial for damages under the Oregon Franchise Act because the remedy provided in the Act was historically equitable, even though monetary in character. See *Goodyear Tire & Rubber Company v. Tualatin Tire & Auto, Inc.*, 879 P.2d 193 (Or. Ct. App. 1994)

Thus if this Court should be so inclined as to find that all possible phases of a contribution action, whether having to do with the preliminary matter of the *good faith* of a settlement or with the proportionate share of liability as between tortfeasors is a determination best made by the court rather than a jury, then the authority exists for such a decision. The cases establishing the equitable nature of contribution were properly cited in the Fourth District's opinion. Those cases fully supported their opinion that contribution, with its historically and essentially equitable nature, was a matter for the court and not a jury.

CONCLUSION

If money damages are the trigger for a jury trial, then determining whether a settlement has been entered into in *good faith* is not a jury question. Under any theory or rule found in this country's jurisprudence the *good faith* of the settlement should be determined by the court. Whether the court should also determine proportionate share is another matter, but the issue of *good faith* is clear. *Good faith* is strictly an equitable claim with no legal issue involved. The legal issue here, the recouping of monies already spent, is triggered only when there is a need for proportionate share allocation. But the recouping of monies already spent is in the nature of a remedy and thus does not trigger a substantive vested right to a jury trial. Most important in this case is having this Court continue the public policy which without question encourages non-collusive settlements.

If this Court does not continue to support this public policy, a jury hearing the proportionate share phase of this case could find that Dr. Shure was guiltless in his treatment of Mrs. Binger. According to St. Paul's argument then Dr. Shure should receive the $250,000.00 which he paid in settlement from St. Paul. The point is without a court making the decision there will be no certainty that any settlement, regardless of the amount, will not later be attacked simply because an allegation of deviation from theoretical proportionate share is made. A court determination on *good faith* protects the sanctity of non-collusive settlements. Making the

entire contribution case, whether the *good faith* phase or the proportionate share phase, a court decision, is the better approach, and the one urged by Dr. Shure.

The policy of encouraging settlements in the absence of collusion was correctly decided by the Fourth District and the other appellate courts in this country pursuant to the clear design of the UCATA. This Court should affirm the decision below.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 3rd day of November, 1995, to: MARC T. MILLIAN, ESQUIRE, Michaud, Buschmann, Fox, Ferrara & Mittelmark, P.A., Attorneys for Petitioners/Plaintiffs, 33 Southeast 8th Street, Suite 400, Boca Raton, FL, 33432.

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