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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,

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

APPELLANTS/PETITIONERS' INITIAL BRIEF

SCOTT H. MICHAUD, ESQ.
PAUL BUSCHMANN, ESQ.
MICHAUD, BUSCHMANN, FOX,
FERRARA & MITTELMARK, P.A.
33 Southeast 8th Street
Suite 400
Boca Raton, FL 33432
(407) 392-0540

Attorneys for Appellants/
Petitioners

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PREFACE

Petitioner, ST. PAUL FIRE AND MARINE INSURANCE COMPANY (hereinafter will be referred to as "ST. PAUL"). Respondent, WILLIAM J. SHURE, M.D. (hereinafter will be referred to as "SHURE").

References to the Record on Appeal will be signified by the prefix "R" followed by the appropriate page number.

References to the Trial Transcript will be signified by the prefix "T" followed by the appropriate page number.

References to the District Court's Opinion will be signified by the prefix "App", followed by the appropriate page of the Court's opinion.

STATEMENT OF THE FACTS AND OF THE CASE

I. THE ORIGINAL MALPRACTICE CASE

CHELSEA BINGER, a minor, brought a malpractice action against WILLIAM J. SHURE, M.D., MICHAEL SCHOENWALD, M.D., UROLOGY ASSOCIATES, DRS. MEYERS, STRAUCH & SCHOENWALD, P.A. and THE FLORIDA PATIENT'S COMPENSATION FUND alleging injuries as a result of the negligence of these Defendants.

DR. SHURE, an Obstetrician/Gynecologist, was alleged to have been negligent in the prenatal care and delivery, and post-delivery care of CHELSEA BINGER and her mother, LINDA BINGER, resulting in CHELSEA BINGER contracting herpes from her mother at the time of her vaginal birth on October 9, 1984.

DR. SCHOENWALD, a urologist, was alleged to have failed to diagnose genital herpes on MICHAEL BINGER, his patient, during LINDA BINGER's pregnancy, and for failing to contact DR. SHURE, who was caring for LINDA BINGER during her pregnancy.

DR. SHURE was also alleged to have been negligent in failing to confer with DR. SCHOENWALD regarding the condition of MICHAEL BINGER, after being told of MICHAEL BINGER'S symptoms, in order to protect LINDA BINGER and CHELSEA BINGER by prenatal testing of LINDA BINGER for herpes, and for failing to deliver CHELSEA BINGER by caesarean section.

DR. SHURE settled with the Plaintiffs for the sum of $250,000.00 on the morning of the first day of trial. DR. SHURE also gave a sworn statement to the Plaintiffs on the settlement date without notice to or the attendance of counsel for Co-

defendant, DR. SCHOENWALD.

The trial went forward with DR. SCHOENWALD and his professional association as the sole Defendants, and resulted in the jury finding DR. SCHOENWALD negligent and assessing damages in the amount of $2,900,356.89. A Final Judgment for damages, attorney's fees and costs was entered, and a settlement was agreed upon between the BINGERS and DR. SCHOENWALD in an amount of $3,000,000.00. A Satisfaction of Judgment for that amount was filed with the Court.

II. THE CONTRIBUTION CASE

A contribution action was filed by ST. PAUL FIRE AND MARINE INSURANCE COMPANY on behalf of DR. SCHOENWALD and his professional association (R.1537-1578) against WILLIAM SHURE, M.D. and his insurance carrier, THE SOUTH BROWARD HOSPITAL DISTRICT PHYSICIANS PROFESSIONAL LIABILITY INSURANCE TRUST, pursuant to the Florida Uniform Contribution Among Tortfeasors Act, Fla.Stat. §768.31 (1976).

The action was bifurcated by the Court (R.3021), and a two week jury trial was in May of 1992 on the sole issue of whether the $250,000.00 settlement between DR. SHURE and the BINGERS, the Plaintiffs in the underlying malpractice action, was a good faith settlement within the meaning of Fla. Stat. §768.31 (1976). A verdict for the Plaintiffs, ST. PAUL, was reached by the jury on May 28, 1992 wherein the jury specifically found that the settlement reached between the BINGERS and DR. SHURE was not a good faith settlement.

The trial court subsequently granted Defendant's Motion for Judgment Notwithstanding the Verdict (R.3644-3645), and a Final Judgment Notwithstanding the Jury Verdict was entered by the trial court. (R.3660-3661). A Notice of Appeal was filed by the Plaintiff, ST. PAUL, on August 13, 1992. (R.3662-3663) The Fourth District Court of Appeals upheld the decision of the trial court, and ST. PAUL's Motion for Rehearing, Rehearing en Banc, and Alternative Request for Certification were denied. St Paul's Petition for Review was granted by this Court.

SUMMARY OF THE ARGUMENT

The parties to this appeal agree upon very little. The evidence presented to the jury during the two weeks of trial in this contribution case has been described by the parties as direct evidence, as circumstantial evidence, as reasonable, as unreasonable, as inferential, as inferences upon inferences, as opinion, as fact, as disputed fact, as undisputed fact, as smoke and mirrors, as the truth, etc., etc.

The fact that the parties herein don't agree is not an unusual or novel situation that requires this Court's review. This Court's review is necessary to right an injustice to the Plaintiff, ST. PAUL, created by the order entered post-trial by the trial court and the opinion of the appellate court affirming the trial court's ruling. The trial court erroneously granted a Motion for Judgment Notwithstanding the Verdict for the Defendant, SHURE, after a jury had found in favor of the

Plaintiff, ST. PAUL. The Fourth District Court of Appeals further compounded the trial court's error by misapprehending the narrow issue on appeal and by failing to resolve that issue. Furthermore, the Fourth District erroneously interjected its incorrect view that a jury trial is not a right afforded to a party to a contribution case, and improperly substituted its opinion for that of the jury as to whether or not the settlement between DR. SHURE and the BINGERS in the underlying malpractice case was a good faith settlement.

In order to prevail in the contribution action that was tried in May of 1992, ST. PAUL was obliged to prove that the settlement entered into by DR. SHURE and his insurer with the BINGERS was not a good faith settlement. ST. PAUL put before the jury by way of direct evidence the very same information which was available to the parties and their counsel in the malpractice case at the time of the settlement. In addition, ST. PAUL put into evidence trial testimony from the underlying malpractice case, transcripts of hearings with the court, correspondence between the parties and their attorneys, and other relevant evidence, all of which enabled the jury to draw its own conclusion regarding DR. SHURE'S settlement.

Moreover, ST. PAUL presented extensive expert testimony at trial regarding the fact that DR. SHURE'S settlement did not represent his proportional share of the liability to the BINGERS, and further that the settlement was made for tactical reasons, as the BINGERS needed DR. SHURE's testimony to withstand DR.

SCHOENWALD's Motion for Directed Verdict in the underlying malpractice case to get to the jury. Such evidence and testimony is direct evidence of the material issue that was decided by the jury (i.e. was the settlement a good faith settlement), and was neither circumstantial nor speculative. The jury verdict was proper and correct, and the trial court erred in granting DR. SHURE'S motion for J.N.O.V.

The District Court's opinions that ST. PAUL did not present evidence sufficient to support the verdict of the jury is in direct conflict with and contradicts prior decisions of this Court and other appellate courts. See generally, Cromarty v. Ford Motor Company, 341 So.2d 507 (Fla. 1976), Wale v. Barnes, 278 So.2d 601 (Fla. 1973), LaBarbera v. Millan Builders, Inc., 191 So.2d 619 (Fla. 1st DCA 1966) and Zack v. Centro Espanol Hospital, 319 So.2d 34 (Fla. 2d DCA 1975), all of which hold that expert testimony is direct evidence, not circumstantial, and that such expert testimony will support a jury verdict.

Further, the Fourth District Court of Appeal's opinion in this contribution action prohibits a contribution plaintiff from a jury trial for contribution issues brought pursuant to the Uniform Contribution Among Tortfeasor Act, §768.31, Florida Statutes (1987). The basis opined by the fourth district for this prohibition and limitation is that contribution is an equitable remedy, and the right to a jury trial extends to actions at law only. The fourth district's opinion in this case is in direct conflict with the opinion of other Florida appellate

courts that have held that an action for contribution, even those equitable in nature, are in fact actions at law. See, Fletcher v. Anderson, 616 So.2d 1201 (Fla. 2d DCA 1993). The opinion also conflicts with other prior opinions by the Fourth District Court of Appeals as to the issue of whether a jury or judge is the appropriate trier of fact in contribution claims brought pursuant to the contribution act. Contribution actions should be decided by a jury and not a judge, as the right to contribution among joint tortfeasors is a creature of statute. The law of Florida is clear that contribution issues should be determined by a jury, not by a court. The decision of the Fourth District Court of Appeals should be reversed, and the case remanded to the trial court with instructions to reinstate the lawful verdict of the jury.

POINTS ON APPEAL

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

While this case may appear to be complex at first blush, it is really rather straight forward. DR. SCHOENWALD and DR. SHURE were both sued for malpractice in a "herpes baby" case. DR. SHURE and his insurer settled with the plaintiffs for $250,000 on the morning of the first day of trial. The trial continued against DR. SCHOENWALD, who ultimately paid $3,000,000 to settle the judgement entered against him. DR. SCHOENWALD and his insurer, ST. PAUL, felt that they had paid a disproportionate share of the BINGER's damages, and commenced a contribution action against DR. SHURE, as a joint tortfeasor, pursuant to

§768.31, Florida Statutes (1987). As this Court is aware, §768.31 shields a settling joint torfeasor from contribution claims, *if their settlement was made in good faith.* Thus, in order to prevail on their statutory cause of action, DR. SCHOENWALD and ST. PAUL had to prove; 1) that the DR. SHURE settlement was not made in good faith; 2) that DR. SHURE was negligent in his care and treatment of MRS. BINGER and CHELSEA BINGER; and 3) his proportionate share of fault. As previously noted, the trial court bifurcated the issues to be tried, and this case went to the jury on the sole issue of whether the DR. SHURE settlement was made in good faith.

As a review of the charge conference demonstrates (T.1317-1416), the parties sharply disagreed concerning the law to be applied to the "good faith" question. The defendants below received virtually every instruction they requested, resulting in a jury charge which was extremely favorable to the defendants. We discuss this issue now, because before discussing the error of the trial court's J.N.O.V. ruling, it is important to understand the context in which that ruling was made. The law regarding the issue of whether the settlement in question was a good faith settlement was given to the jury by the court as follows:

> The issue for your determination on the Plaintiffs' claim against the Defendants is whether DR. SHURE and his insurance company acted in good faith in making the settlement with the BINGERS.
>
> You are instructed that a settlement is in good faith if there is a reasonable basis for the settlement.
>
> An appropriate definition of good faith involves a

determination of whether the amount of the settlement is within the reasonable range of the settling party's proportional share of liability for the underlying injuries.

However, bad faith is not established by a showing that a settling defendant paid less than his theoretical proportionate or fair share because such a rule would unduly discourage settlement.

A settlement is reasonable if it is in the ball park.

When considering whether or not DR. SHURE's settlement was reasonable, you must look to what a reasonable and prudent person in DR. SHURE's position would have settled the BINGER case for.

Furthermore, you're required to make that evaluation on the basis of the information that was available at the time of the settlement.

Reasonableness and good faith are determined on a case by case basis.

For guidance a number of factors should be taken into account.

These factors include the degree of certainty of a settling party's liability, the risks of going to trial, the chances that a jury verdict may exceed the settlement offer, the unknown strengths and weaknesses of defenses, and the inexact appraisal of damage elements.

Additionally, you should consider the following factors:

A rough approximation of the injured party's total recovery and the settler's proportionate liability, the amount paid in settlement, and a recognition that a settling individual should pay less in settlement than he would if be were found liable after a trial.

Other relevant considerations include, but are not limited to, the financial conditions and the insurance policy limits of the settling defendants, as well as the existence of collusion, fraud or other wrongful conduct aimed to injure the interest of the non-settling defendants.

Collusion implies something more than confederacy.

Any negotiated settlement involves cooperation, but not necessarily collusion.

A settlement becomes collusive when it is aimed to injure the interests of the absent defendant.

Collusion is an agreement to defraud a person of his rights.

It implies the existence of fraud of some kind, the employment of fraudulent means or of lawful means for the accomplishment of an unlawful purpose.

If after considering these factors you find it was reasonable for DR. SHURE to settle and that DR. SHURE did settle in Good faith with the BINGERS, then you must find in favor of DR. SHURE and deny DR. SCHOENWALD's claim.

You must also consider that settlements are highly favored in the law and should be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits among themselves.

The parties are responsible for damages in direct proportion to the percentage of fault in causing the injuries.

Notwithstanding this underlying principle, settlements are also encouraged that might ultimately result in one defendant paying less than his share if the settlement is made in good faith.

You are instructed, counsel are free to speak to and record the statements of any witness who is willing to make them.

Circumstantial evidence is relied on in civil cases as a method of proof.

Any reasonable inference deducible therefrom which would authorize recovery must outweigh each and every contrary reasonable inference.

If that is to prevail, stacking one inference upon another as a method of establishing an ultimate fact is not permitted unless the first inference is established to the exclusion of any other reasonable theory.

(T.1523-1527)

With all of the above as a backdrop, the question then

becomes, how is any contribution plaintiff supposed to prove it's case. What kind of evidence could be presented in order to satisfy the burden established by the above instructions. The answer is that the contribution jury needs to be placed in essentially the same position as the jury in the underlying case. That is, the contribution jury needs to be able to evaluate the liability and damage issues which existed in the underlying case as to both defendants such that they can independently determine the respective degree of fault between the defendants; and they need to be able to evaluate the factors influencing the settlement in question and the conduct of the parties in bringing about the settlement.

In the instant case, of course, ST. PAUL successfully demonstrated to the jury that the settlement by DR. SHURE was not a good faith settlement, pursuant to the above-referenced jury instructions. ST. PAUL submitted a great deal of direct evidence to the jury. Depositions of all the parties to the underlying medical malpractice case, which included the depositions of LINDA BINGER, MICHAEL BINGER, DR. SHURE and DR. SCHOENWALD were introduced into evidence. Robert Spector, Esq. (counsel for the BINGERS), Norman Klein, Esq. (counsel for DR. SHURE in the underlying malpractice case), and Victor Womack, Esq. (counsel for DR. SCHOENWALD in the underlying malpractice case) were presented as witnesses by the Plaintiff, ST. PAUL.

ST. PAUL further read portions of the depositions of Hunter Handsfield, M.D., Alfred Kalodner, M.D., Sidney Siegel, M.D., Dr.

Freed, Jerome Klein, M.D., Neil Crane, M.D., William Sweeney, M.D., all of whom were experts in the underlying malpractice case, and all of whom testified that DR. SHURE fell below the standard of care in his care and treatment of LINDA BINGER. ST. PAUL also put into evidence portions of the depositions of Dr. Hendrix, Dr. Shatz, Dr. Shulman, Dr. Bercuson, Dr. Sloan, Dr. Schoeck, Dr. Arvin and Dr. Kalstone, all of whom were also expert witnesses in the underlying malpractice case. The medical records of DR. SHURE and DR. SCHOENWALD were also placed into evidence.

ST. PAUL additionally read portions of the trial transcript from the underlying medical malpractice case, along with hearing transcripts. Correspondence between the attorneys and parties, along with various pleadings and other court documents, including answers to interrogatories and requests for admissions were all placed into evidence during ST. PAUL's case in chief. ST. PAUL also called in their case in chief Harold Shapiro, the administrator of the South Broward Hospital District Physicians Professional Liability Insurance Trust, which insured DR. SHURE at the time of the BINGER claim, concerning the reasons for the settlement.

The jury was provided with an opportunity to independently evaluate the same factual data available to the parties and their attorneys during the underlying malpractice case. They were given an opportunity to review all of the factors which led to the settlement in question, including the conduct and events that

occurred subsequent to the settlement. Accordingly, the jury was provided with more than enough evidence to arrive at their own independent conclusion concerning whether the settlement between DR. SHURE and the BINGERS was a good faith settlement, as defined by the Court.

To be on the safe side, however, ST. PAUL also called Howard Barwick, Esq. as an expert witness. Mr. Barwick reviewed approximately twenty-eight depositions of the experts, parties, and other witnesses in the underlying malpractice case, the trial transcript, various pleadings, correspondence, and the medical records of DR. SHURE and DR. SCHOENWALD prior to his trial testimony. Mr. Barwick also reviewed various hearing transcripts, releases, and the sworn statement given by DR. SHURE to the attorney for the BINGERS on the first day of trial in the contribution action. (T.730-734)

Mr. Barwick testified that the settlement between the BINGERS and DR. SHURE was not made in good faith, was made for tactical reasons, and that the settlement did not fairly represent the true percentage of fault of DR. SHURE as it related to the facts of the underlying malpractice case. (T.774). Mr. Barwick also testified that the BINGERS settled for a smaller (lesser sum) amount of money than what the true percentage of exposure amounted to with respect to DR. SHURE in order to obtain certain testimony from DR. SHURE that would otherwise not be available to them, in an attempt to guarantee their chances of getting a large jury verdict against DR. SCHOENWALD. (T.776)

Mr. Barwick further testified without objection that the $250,000.00 settlement amount offered by DR. SHURE and accepted by the BINGERS was not reasonably related in any manner to a fair and reasonable apportionment of fault between DR. SHURE and DR. SCHOENWALD based on the facts of the case as they existed prior to the underlying medical malpractice trial at the time of the settlement. (T.814)

Defendant's Motion for J.N.O.V.

In moving for Judgment Notwithstanding The Verdict subsequent to the adverse jury verdict, DR. SHURE's argument, simply put, was that; 1) ST. PAUL's entire case was based solely on circumstantial evidence; 2) the "direct" evidence as to the reasonable basis of the settlement testified to by Attorney Robert Spector and Attorney Norman Klein was uncontradicted by other direct evidence;[1] and 3) ST. PAUL's case amounted to an impermissible stacking of inferences upon inferences.

In its order granting DR. SHURE'S motion for J.N.O.V., the trial court cited as authority Voelker v. Combined Insurance Company of America, 73 So.2d 403 (Fla. 1955); Reaves v. Armstrong World Industries, Inc., 569 So.2d 1307 (Fla. 4th DCA 1990); and Vecta Contract, Inc. v. Lynch, 444 So.2d 1093 (Fla. 4th DCA 1984).

While these cases and their inapplicability will be

[1]Not surprisingly, both Mr. Spector, who represented the BINGERS, and Mr Klein, who represented DR. SHURE, testified that they felt their settlement was in good faith. DR. SHURE has incorrectly characterized this opinion testimony as direct evidence.

discussed in detail below, it should first be noted that DR. SHURE relies upon these cases for the following basic proposition:

> Where circumstantial evidence is relied upon in a civil case, any reasonable inference deducible therefrom which would authorize recovery must outweigh every contrary reasonable inference if plaintiff is to prevail.
>
> Ordinarily, an ultimate fact may not be established in a civil action by basing one inference upon another, unless the basic inference is established to the exclusion of any other reasonable theory.

Voelker, 73 So.2d at 405, 406.

Plainly stated, DR. SHURE's assertion in their Motion for J.N.O.V. was that ST. PAUL's evidence, including the testimony of their expert Howard Barwick, was solely circumstantial and impermissibly stacked inference upon inference to arrive at the ultimate conclusion.

DR. SHURE's position is fatally flawed. Let us set aside the testimony of ST. PAUL's expert for a moment. As previously noted, the jury in the instant case was presented with direct evidence of a great multitude of facts concerning liability, damages, the settlement, etc. From this direct evidence, the jury could, and did, draw its own ultimate conclusion concerning the good faith nature of the settlement. If DR. SHURE's tortured interpretation of the prohibition against the stacking of inferences upon inferences were correct, virtually no plaintiff would be able to prove any case. In an auto negligence case, the jury is told about weather, speed, traffic conditions, etc., and ultimately concludes that the defendant was or was not negligent

in entering the intersection. In an insurance bad faith case, the jury is given information concerning the nature of the plaintiff's injuries, the amount of insurance coverage available, the conduct of the insurer in investigating the claim, the timing of any demands or offers of settlement, and ultimately concludes that the insurer's conduct did or did not amount to bad faith.

ST. PAUL was in no different position in the instant case. The jury was given facts from which they drew their ultimate conclusion. They were not required to, and did not, stack inferences upon inferences to reach their conclusion, any more than would the juries in the prior examples.

ST. PAUL did not stop with the presentation of the facts referenced above, however. They also put on the extensive testimony of attorney Howard Barwick, an expert in medical malpractice cases and settlements. It is well settled in Florida that an expert opinion will support a jury verdict so long as it is grounded in fact even though it involves a conclusion as to causation. See, e.g., Cromarty v. Ford Motor Company, 341 So.2d 507 (Fla. 1976).

As this Court held in Cromarty:

> We well agree with the District Court of Appeal that verdicts should not be based upon speculative and conjectural expert testimony with no basis in evidentiary fact. However, the expert opinion, that the automobile lost its steering before the accident, was based on the evidentiary fact that the adjuster nut was fractured and the conclusion that, since impact of the accident could not have caused the fracture, it must have been due to defective design. The controlling law in Florida is expressed in Wale, supra, where this court reversed a District Court affirmance of a directed verdict for a defendant in a medical

malpractice suit. The defendant was sued for damages stemming from subdural hematomas caused by his use of forceps in the birth of the plaintiff. The court saw error in taking the decision as to liability away from the jury when an expert had testified that the hematomas were caused by the defendant and that opinion was grounded on the fact that the defendant had used the wrong type of forceps. It has been held that an expert opinion may support a jury verdict, so long as it is grounded in fact, even though it involves a conclusion as to causation, in other opinions, as well. LaBarbera, supra, and Zack v. Centro Espanol Hospital, Inc., 319 So.2d 34 (Fla. 2d DCA 1975).

Id. at 508 - 509.

In LaBarbera v. Millan Builders, Inc., 191 So.2d 619 (Fla. 1st DCA 1966), cited by this Court in Cromarty, the court held:

> The issue of fact concerning the condition of the ceiling louver was established only by an inference drawn from circumstantial evidence. The direct evidence to the contrary was so overwhelming that it could not be said that the inference supporting the fact contended for by plaintiffs was so clear, convincing, and positive as to exclude all reasonable inferences to the contrary. Unquestionably, therefore, this inference cannot be said to have so risen to the status of an established fact as to support a second inference leading to the conclusion that defendant's negligence was the proximate cause of the fire. **It is our view, however, that the fact with respect to the nature and cause of the fire was not established by inferences drawn from circumstantial evidence, but was established by the direct evidence of plaintiff's expert....** [emphasis added].
>
> The expert opinion of this witness was based upon physical facts found to exist at the time of his inspection of the premises and examination of the heating unit on the day following the fire, which included the clogged condition of the ceiling louver. It is true that one of the facts assumed by this witness in reaching his conclusion was that the ceiling louver was clogged and obstructed before the fire occurred, which fact appeared only as an inference from other facts in evidence. The utilization of this inferred fact in reaching his unequivocal conclusion with regard to the origin and nature of the fire does not reduce the testimony of the witness to that of an inference drawn from circumstantial evidence.

> **Although a conclusion expressed by an expert witness in response to a hypothetical question may, in one sense, be characterized as an inference, we do not believe it to be the character of inference which falls within the prohibition against constructing an inference upon an inference to arrive at an ultimate conclusion. To hold otherwise would render incompetent every opinion of an expert witness given in response to a hypothetical question if it were found that one of the several facts forming the basis of the question consisted of an inference drawn from circumstantial evidence. Such a result would not comport with logic, reason, or the practicalities of the judicial process. [emphasis added].** Since the fact necessary to prove that defendant's negligence was the proximate cause of plaintiffs' damages was established by positive and direct evidence, and not by an inference drawn from circumstantial evidence, we do not consider that the inference upon inference rule propounded in Commercial Credit Corporation, supra, is applicable. We therefore conclude, and so hold, that the chancellor erred in rendering judgment in favor of defendant. [emphasis added].

Id. at 622.

This same issue was discussed by the court in the case of Zack v. Centro Espanol Hospital, 319 So.2d 34 (Fla. 2d DCA 1975). Zack was a medical malpractice case in which the plaintiff claimed that a nurse employed by the defendant hospital removed a foley catheter from the plaintiff with the cuff inflated, thereby causing injuries to Mrs. Zack. The nurse in question testified that she did remove the catheter, but denied removing it with the cuff inflated. The only testimony to the contrary were the opinions of the plaintiff's two expert witnesses. After reciting much of the language quoted from LaBarbera, the Zack court concluded:

> Under the law as established in LaBarbera, supra, the two expert witnesses opinions that the catheter was removed with the cup inflated becomes direct evidence and not an inference drawn from circumstantial

> evidence. When considering the expert opinions as direct evidence, the plaintiff made a prima facia case on the issue of causation, which issue was properly submitted to the jury.

Id. at 36. The Zack court goes on to quote from Wale v. Barnes, 278 So.2d 601 (Fla. 1973), which is in further support of the ST. PAUL's position.

Wale was also a case of medical malpractice. Therein, a child was delivered by an obstetrician through the use of Tucker-McClane forceps. After approximately three months, it was discovered that the child had subdural hematomas which led to significant problems with the child. At the close of the plaintiffs' case, the trial judge, upon motion, directed a verdict for the defendants. On appeal, the Third District in a split decision affirmed the directed verdict stating that the plaintiff had not made a prima facia case on the question of proximate causation.

The plaintiffs claimed that they had satisfied their burden through the testimony of one of their experts, Dr. Kahn, who testified that the use of forceps on the baby's "molded" head constituted a departure from the acceptable standard of care. In discussing this issue, this Court stated:

> Defendants, respondents herein, attack this testimony by arguing that it is "insufficient" inasmuch as Dr. Kahn said the forceps slipped and the uncontradicted testimony in the record demonstrates that the forceps did not slip. This argument, however, overlooks the impact of Dr. Kahn's testimony. There is evidence in the record indicating that the forceps did not slip; even so, Dr. Kahn expressed his own opinion that the forceps did in fact slip. In this factual setting, the question of whether the forceps slipped being fairly debatable, the opposing view points regarding this

slippage are for the jury's consideration.

...

According to the majority opinion, plaintiffs conceded that the forceps may not have caused the injury; and that the cause of Gary's injuries could have resulted from a non-negligent act, such as the trauma of merely being born or rough movement down the birth canal. In this context, the majority relied upon its previous decisions in LePrince v. McLeod, supra, and Lane v. White, supra, holding that since plaintiffs there failed to negate the possible non-negligent causes for the injuries, directed verdicts for the defendants were required.

In LePrince and Lane which deal with causation, the testimony did not pinpoint the cause of the injury in that there was no direct proof that the injury resulted from a definite negligent act or cause. The Third District in those cases said the defendants were entitled to directed verdicts because plaintiffs did not eliminate the possible non-negligent causes. Our case is factually distinguishable from LePrince and Lane inasmuch as there is direct medical evidence offered by Dr. Kaplan [one of plaintiffs' experts], which appears in the body of the district court opinion, attributing and pinpointing the cause of Gary's injuries to the forceps delivery, whereas no direct evidence is present in LePrince and Lane which supports the contention that the injuries resulted from a specific negligent act or cause. The direct medical evidence presented by Dr. Kaplan creates a prima facia case on the question of causation.

...

Succinctly stated, Dr. Kaplan opined that the use of forceps caused Gary subdural hematomas. Even though there is contrary medical evidence in the record indicating that the subdural hematomas may have been caused by trauma or a troublesome trip down the birth channel (non-negligent acts) the above-quoted testimony of Dr. Kaplan makes a prima facie case on the issue of causation. No further evidence is required on causation because Dr. Kaplan's testimony precisely and exactly attributes Gary's subdural hematomas to "the traumatic or injurious forceps delivery of this child in which the head was injured."...

Inasmuch as the testimony of Dr. Kaplan in and of itself makes a prima facie case relating to causation,

> we need not reach the issue of whether there is circumstantial evidence pertaining to causation; the direct testimony of Dr. Kaplan is sufficient in these circumstances.
>
> Based upon the foregoing, the trial court erred in directing a verdict for the defendants, and the district court was in error in affirming the judgment. Id. at 603 - 606.

Thus, it is clear from this Court's decisions in Wale and Cromarty, and the cases cited therein, LaBarbera and Zack, that the testimony of ST. PAUL's expert, Howard Barwick, was direct evidence of the fact that the subject settlement was not in good faith, and such testimony did not constitute an impermissible stacking of inferences.

Having considered all of the evidence referenced above, including but not limited to the expert testimony of Howard Barwick, (and for that matter, DR. SHURE's evidence and the testimony of his two experts), the unanimous conclusion of the jury was that the settlement entered into by DR. SHURE and his insurance company was not a good faith settlement, as defined by the trial court in its extensive jury instructions. While ST. PAUL agrees with the general principles of law as set forth in the cases relied upon by the trial court in granting DR. SHURE's motion, they have no application to the case at bar.

Let us begin with Voelker. Edward Voelker was insured under an automobile policy which provided a death benefit if his death was caused by injuries received in an automobile accident and if those injuries were the sole cause of his death. On the morning in question, a man and his wife discovered the automobile driven

the preceding evening by Mr. Voelker, which evidently had been involved in some type of accident, on the south side of a canal which borders State Road 80. There was physical evidence which appeared to indicate that the car veered off the road while crossing Six Mile Bridge and came to rest very close to the edge of a canal. The vehicle was physically damaged, the front door of the automobile was open, the car was out of gear, and the ignition and light switches were in the off position.

The Highway Patrolman investigating the accident found Mr. Voelker's body floating in the canal about eight feet in front of the car. Voelker's body was immediately embalmed and later sent to a funeral home in West Palm Beach. No witness who examined or observed the body of Mr. Voelker found or saw any marks or abrasions thereon or any other indications of external injuries. As indicated above, the defendants in Voelker were obliged to prove not only that Mr. Voelker's death was caused by injuries received in an automobile accident, but that the injuries thus received were the sole cause of his death.

One of the major distinguishing features between Voelker and the instant case is, as the Court noted therein, "all of the evidence relied upon by [the defendant was] circumstantial in character." Id. at 405. Indeed, there was no direct evidence of either the accident or how Mr. Voelker came to be in the canal.

But as the Court noted:

> The fact that circumstantial evidence is relied upon in a civil action at law does not alter either the rule that it is solely within the province of the jury to evaluate or weigh the evidence or that the burden of

> establishing a right of recovery by a preponderance of the evidence is upon the plaintiff. Consequently, in such a case if the circumstances established by the evidence be susceptible of a reasonable inference or inferences which would authorize recovery and are also capable of an equally reasonable inference, or inferences, contra, a jury question is presented.

Id. at 406.

The Court in Voelker was dealing with a case of circumstantial evidence only. In order to arrive at a conclusion which would permit recovery, the Voelker jury did, in fact, have to stack inference upon inference. The Court noted that the jury could properly infer from the physical evidence that Mr. Voelker experienced an accident while driving his automobile across Six Mile Bridge. Moreover, they held this inference to be sufficiently inescapable to rise to the level of an established fact. The Court went on to hold:

> [T]hat the jury would have been entirely justified to have inferred, from its prior inescapable inference that Voelker met with an accident, that he received bodily injuries "while actually driving or riding" in his automobile. The latter inference, however, is not the last which must be drawn before appellant may be said to have proven her right to recover under the policies of insurance here involved.
>
> Appellant is not entitled to a favorable decision unless the inference that Voelker received bodily injuries "while actually driving or riding" in his automobile is the only reasonable inference which may be drawn from the prior inference that Voelker met with an accident. In other words, this second inference must meet the test of the criminal rule, as did the first inference, if it is to be a proper predicate for the further inference that "bodily injuries" were the sole cause of the loss of Voelker's life. Is this second inference one which may be said to exclude all other reasonable theories? We think not.
>
> In view of the fact that no bruises or abrasions were found upon Voelker's body, it is equally reasonable to

> assume that he received no bodily injuries and that he "as aforementioned, walk around to the edge of the canal to appraise the situation, slipped or tripped into the waters of the canal and drowned, or that he and the person driving the other car involved in the accident had an altercation and that such person pushed or shoved Voelker, intentionally or unintentionally, into the canal, and fled the scene, whereupon Voelker met his death by drowning.
>
> The theory that Voelker met his death by drowning cannot be excluded, for there is no evidence upon the question whether water was found in his lungs and none which even suggest that credence should be given to the supposition that the body of a person who meets death by drowning will not float until sufficient time has elapsed for decomposition of said end. If indeed this supposition be more than folk-lore, it is not an open and notorious fact of which this Court can take judicial notice. There may be other reasonable inferences, which we do not at the moment envisage, that they be drawn up from the inescapable inference that Voelker had an accident with another motor vehicle. However, 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 407 - 408.

With no direct evidence, the plaintiffs in Voelker were required to prove: 1) that Mr. Voelker was in an automobile accident; 2) that he received physical injuries in that accident; 3) that the physical injuries received were the cause of his death; and 4) that the physical injuries were the sole cause of his death. Each successive inference had to form the foundation for the next. It was probably inescapable from the circumstantial evidence that Mr. Voelker had been driving his car when it was in an accident. To 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. As the court discussed in detail, there were many alternative explanations for Mr. Voelker's death, which were just as likely as the plaintiff's theory.

These facts, however, bear no relationship to the facts in the case at bar. The Voelker case would be much more 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, as was the case herein. The instant case involved no material dispute as to the basic facts of the underlying malpractice case, or the various transactions which took place which brought about DR. SHURE's settlement with the BINGERS.

The sole dispute below was whether, given a generally agreed-upon set of facts, DR. SHURE's $250,000 settlement was or was not a good faith settlement. That is a decision which the jury would have been entitled to make in this case without the aid of expert testimony, and they most assuredly were entitled to make that decision with the aid of the direct evidence provided in the form of the testimony of ST. PAUL's expert, Howard Barwick. Thus, it becomes obvious that reliance of the trial court and DR. SHURE on Voelker in support of the Judgment Notwithstanding the Verdict in this case is grossly misplaced.

The second case cited by the trial court in its ruling was that of Vecta Contract, supra. Therein, Mr. Lynch sued Vecta Contract in a product liability action for personal injuries occasioned by the collapse of a defectively designed chair allegedly manufactured by Vecta Contract.

The record revealed that the chairs of the genre that collapsed under the plaintiff were originally manufactured by a company named Burke, Inc. That company, together with the right to manufacture the chairs, was acquired by Vecta. It was thus incumbent upon the plaintiff to show that the particular chair which collapsed beneath him was manufactured by the defendant Vecta rather than by Burke. This was accomplished by the plaintiff attempting to show (1) the approximate date on which Vecta acquired the manufacturing rights; and (2) that the chair was manufactured subsequent to that date.

As to point one, the plaintiff's put on the testimony of a manufacturers representative who had dealt with both Burke and Vecta chairs, whose sole testimony on this point was that she "believed" that Vecta acquired Burke "in the late '60's'".

As the Court went on to explain:

> The second element of proof, the date of manufacture of the chair, was attempted to be established by the testimony of David Jenkins, an engineer on the faculty of a university. His pertinent testimony, responding to cross examination, was as follows:
>
> Q. Do you have any idea, Dr., any opinion as to the age of the chair?
>
> A. No, sir, I do not.

Q. You don't know if it was a new chair or it if was a chair that was 10 years old, do you?

A. From the appearance of the other chairs in the photograph I would say they are not terribly old. They weren't 10 years old, I don't believe, simply because they were clean, free of scratches and stains and things like that. But, that's the only way I can -

Q. Which photographs are you talking about that show they are clean and free of scratches?

A. That would be exhibit 1.

Q. Are you able to tell from this exhibit 1, Dr., plaintiff's exhibit 1, whether there are any scratches on the base or the metal shaft?

A. It's really quite difficult to say.

Q. Yes. Now, with respect to the plastic that's shown, wouldn't you really need magnification to see if there was any damage of any kind to that?

A. That's correct, yes.

Q. You haven't told us about using a magnifying glass in examining the pictures. Did you use one?

A. I did not.

Id. at 1094 - 1095.

After having reviewed this testimony, the Court went on to conclude

> There was testimony, then, regardless of its weight, that Vecta acquired Burke in the late '60's and that chairs presumably purchased at the same time as the defective chair (which was not available for inspection) were not

> more than 10 years old. The accident occurred in 1977. The chairs were therefore manufactured between 1967 and 1977.
>
> It is true that the jury could have placed the date of acquisition as 1968 or 1969 and the date of manufacture as any time subsequent to that presumed date. On the other hand, the evidence supports an inference that acquisition occurred in 1969 and manufacture in 1968. There is no legal justification for tipping the scales in favor of either alternative. The choice amounts to rank speculation. This a jury is not permitted to do.

Id. at 1095.

To suggest that the Vecta case bears any relationship to the case at bar, let alone is controlling thereof, would be woefully misguided. In Vecta, the Plaintiff had no direct evidence on one of the most basic elements of their cause of action, to wit: that the Defendant they had sued had in fact manufactured the defective product. For the Plaintiff to then be permitted to attempt to prove who manufactured the chair by the testimony of a sales representative who thinks the sale of the company occurred sometime in the '60's, and matching that up with testimony of an expert engineer who said he has no idea of the age of the chair but it doesn't look like its 10 years old, would be absurd.

There is no question that the Court in Vecta was correct in its conclusion. In Vecta, as with Voelker, we are dealing with a case in which there was no direct evidence of a material element of the plaintiff's cause of action, and the circumstantial evidence on which plaintiff attempted to rely was not only speculative, but in no way supported the proposition for which it

was offered.

The final case relied upon by the trial court in granting DR. SHURE's motion is the case of Reaves, supra. ST. PAUL is candidly unsure how this case formed a basis of the trial court's opinion, other than the fact that the case cited the "stacking one inference upon another" language from the Voelker case. Reaves was an asbestos exposure case brought against three asbestos manufacturers by Mr. Reaves. The court therein specifically found that the plaintiff was unable to identify the brand name or manufacturer of any of the asbestos products he claimed he was exposed to while working in a Monsanto plant. The plaintiff attempted to rely upon the testimony of a fellow worker in the maintenance section of Monsanto who testified that he recognized the plaintiff and "saw him on occasion" doing cleaning up of asbestos litter left by maintenance crews. The plaintiff then put on the testimony of an employee of an outside subcontractor who performed some installation work at the Monsanto plant. He did not testify that he knew or recognized the plaintiff and in fact testified that the Monsanto laborers did not clean up debris for him or his coworkers.

The Court concluded that:

> The evidence was clear that asbestos products manufactured by the three remaining Defendants were not the only asbestos products in this plant. With 200 maintenance workers tearing out old insulation (where there was no testimony determining who was the manufacturer) and installing new insulation and 150 to 200 men engaged in the cleanup duties, it was certainly permissible for the jury to infer that the plaintiff was exposed to asbestos dust. However, the proof of whose asbestos dust and who manufactured those products

> was speculative at best. It is incumbent upon the plaintiff to establish by the greater weight of the evidence that the plaintiff was exposed to the asbestos products of each of the three remaining defendants and that this exposure contributed substantially to producing the injury complained of."

Id. at 1309.

The Court went on to hold that:

> The Court finds here, as a matter of law, that the inference of exposure to asbestos as the basis for the inference of plaintiff's being in close proximity to Hudson and/or Garrison at the time they were using defendant's specific products; as the basis for the further inference that the negligence of these defendants in failing to place warning labels on packaging caused said exposure; as the basis for the ultimate proximate causation inference that Reaves would not have contracted asbestosis absent the negligence of these defendants, constitutes the type of compounding inference on inference prohibited under the case law of the State of Florida.

Id. at 1309 - 1310.

Of interest in the Reaves case is the fact that the above conclusion was not necessary to the court's determination. Prior to making the above observations, this Court specifically found that the Plaintiff failed to meet the standards set forth in Gooding v. University Hospital, 455 So.2d 1015 (Fla. 1984). In so holding, the Court noted:

> The medical testimony on causation was presented by Dr. Horst Baier, a pulmonary physician who examined the plaintiff at the request of plaintiff's counsel. The doctor testified that every exposure to asbestos contributes to the plaintiff's abnormalities, but was unable to state whether or not, "but for" the exposure to asbestos during the three years 1958 through 1961, that injury would have been incurred. Conversely, he was unable to state within reasonable medical probability that the relevant three year period alone would have been sufficient to cause the injury. His only response in that regard was that "it is conceivable". The equivocal demeanor of the doctor

> while testifying indicated to the court that the witness was unwilling to state more than that. This testimony is insufficient, as a matter of law, to support a jury finding of proximate causation. [(citation omitted)].

Id. at 1309.

Thus, the Court in Reaves was dealing with a case wherein, even if the plaintiff was able to prove his exposure to the defendant's products, his medical causation expert was unable to state within a reasonable degree of medical probability that the alleged exposure would have been sufficient to cause the injury.

A plain reading of any of the cases cited by the trial court as support for granting DR. SHURE's motion reveals they are not only distinguishable, but are wholly inapplicable to the facts of the instant case. Not one of them deals with direct evidence being provided by an expert witness, as was the case herein.

One more time: the only issue to be decided by the jury in the instant case was whether the $250,000.00 settlement by DR. SHURE was a good faith settlement. The jury was provided with precisely the same information the attorneys and the parties had available to them in the underlying case and therefore could, and clearly did, arrive at their own conclusions with respect to that issue. Frankly, ST. PAUL contends that putting on that evidence and testimony alone would have been sufficient to support the jury's verdicts. Nonetheless, ST. PAUL also put forth the testimony of a qualified expert witness, who after spending in excess of forty hours reviewing all of the relevant materials (T.- 733), rendered the opinions previously discussed, and 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. Nothing contained within Voelker, Vecta, or Reaves, even remotely supports the trial court's taking this decision out of the hands of the jury.

As this court is no doubt aware, the trial court does not have unfettered discretion in its' consideration of a motion for Judgment Notwithstanding the Verdict. The standards regarding this particular motion have been most clearly stated by this court in the case of Stirling v. Sapp, 229 So.2d 850 (Fla. 1968):

> Motions for judgment notwithstanding the verdict, like motions for directed verdict, should be resolved with extreme caution since the granting thereof holds that one side of the case is essentially devoid of probative evidence. The trial judge is authorized to grant such motion only if there is no evidence or reasonable inferences to support the opposing position. [Citation omitted.] [Emphasis in original.] The rules governing motions for judgments notwithstanding the verdict are substantially the same as those which guide the disposition of a motion for directed verdict. This Court in Nelson v. Ziegler, 89 So.2d 780 (Fla. 1956) said:
>
> > A party moving for a directed verdict admits not only the facts stated in the evidence presented but he also admits every conclusion favorable to the adverse party that a jury might freely and reasonably infer from the evidence. It is ordinarily the function of the jury to weigh and evaluate the evidence. This is particularly so in negligence cases where reasonable men often draw varied conclusions from the same evidence. In a case of this nature, unless the evidence as a whole with all reasonable deductions to be drawn therefrom, points to but one possible conclusion, the trial judge is not warranted

> in withdrawing the case from the jury and substituting his own evaluation of the weight of the evidence.

Id. at 852. See also, Tynan v. Sea Board Coast Line Railroad, 254 So.2d 209 (Fla. 1971); Macrellis v. George, 202 So.2d 107 (Fla. 4th DCA 1967); Landry v. Sterling Apartments, 231 So.2d 225 (Fla. 4th DCA 1969); and B & H Sales v. Jewel Builders, 353 So.2d 653 (Fla. 4th DCA 1977).

It does not lie within the province of the either the trial court or the appellate court to weigh evidence or determine questions of credibility. Where there is the possibility of different conclusions or inferences from the evidence, the court should submit the issue to the jury. Montgomery v. Florida Jitney Jungle Stores, 281 So.2d 302 (Fla. 1973); Dania Jai Alai Palace,Inc. v. Sykes, 450 So.2d 1114 (Fla. 1984).

Indeed, it has been held that even if the testimony and evidence in a case is not in conflict, the question is still for the jury if differing reasonable inferences could be drawn from the evidence. Bruce Construction v. State Exchange Bank, 102 So.2d 288 (Fla. 1958).

This court has held in Caledonian American Insurance v. Coe, 76 So.2d 272, 273 (Fla. 1954):

> If there is any substantial evidence supporting plaintiffs' claim, the question is for the jury, and where intelligent and fair minded men may reasonably differ in the conclusion to be drawn from the evidence, it cannot be said there is not evidence to support plaintiff's claim.

The Petitioners, ST. PAUL and DR. SCHOENWALD, did in fact provide substantial evidence, both circumstantial and direct, on

each material element of their cause of action. The jury was entitled to find, and was in fact correct in finding, that the settlement between DR. SHURE and the BINGERS was not a good faith settlement pursuant to the Florida Uniform Contribution Among Tortfeasors Act, Fla. Stat. 768.31(5)(b)(1976).

II. THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA IMPROPERLY AFFIRMED THE ORDER OF THE TRIAL COURT GRANTING THE DEFENDANT'S MOTION FOR J.N.O.V. AND INCORRECTLY HELD THAT A CONTRIBUTION ACTION BROUGHT PURSUANT TO FLORIDA'S UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT SHOULD BE DECIDED BY THE COURT AND NOT A JURY.

As previously discussed, the trial court granted the defendant's Motion for J.N.O.V. on the basis that ST. PAUL's evidence constituted an impermissible stacking of inferences. Inexplicably, the District Court did not even discuss that issue, the sole issue on appeal. Instead, the District Court substituted its opinion for that of the jury and reweighed the evidence. More importantly, the District Court reweighed the evidence using a completely different standard than that given to the jury below.

The jury instructions in the case below were, almost without exception, those requested by DR. SHURE. DR. SHURE did not cross appeal to the Fourth District, and the correctness of the trial court's instructions to the jury has never been at issue. As the court held in Eley v. Moris, 478 So.2d 1100 (Fla. 3d DCA 1985), "Absent clear showing to the contrary, it must be presumed that the jury followed the court's instructions and applied the law to the facts as it found them." Indeed, the trial court even gave

the jury an instruction on the impermisability of stacking an inference upon an inference. With all due respect, in addition to not resolving the sole issue on appeal, it is clear that the learned judges of the Fourth District exceeded the scope of proper appellate review in arriving at their conclusions.

The greatest departure, however, is found in the District Court's conclusion that actions for contribution should be decided by the court and not a jury. Florida's Uniform Contribution Among Tortfeasors Act provides the only method by which one joint-tortfeasor can recover from another joint-tortfeasor those amounts paid in excess of the pro-rata share of the common liability. Section 768.31(5)(b), Florida Statutes (1985), states that a release given in good faith to another also liable in tort for the same injury discharges the tortfeasor to whom it is given from all liability for contribution. Where a settlement has been made, and a release given, in any subsequent action for contribution under the above statute, the contribution issues, including the issue of whether or not the release was given in good faith, is a jury issue, and not one to be decided by the Court.

The Fourth District Court of Appeal's decision in this case holding that a contribution Plaintiff has no right to a trial by jury is not only based upon a faulty premise, but is also in conflict with decisions by other Florida District Courts of Appeal, and prior decisions of the Fourth District itself.

As the Fourth District recognized in its opinion, there existed no common-law right to contribution among joint

tortfeasors. This right is granted only by statute, specifically the Florida Uniform Contribution Among Tortfeasors Act, Fla. Stat. §768.31(5)(b)(1976). As an action at law, ST. PAUL's contribution action, as well as all other contribution actions brought pursuant to the statute, entitles the parties to trial by jury. The correctness of the above assertion is made obvious by simply looking at any of a number of contribution cases.

In Lotspeich Company v. Neogard Corporation, 416 So.2d 1163 (Fla. 3d DCA 1982) the tort victim sued the tortfeasor, who brought a third-party claim for contribution against the third-party defendant. A directed verdict by the trial court on the third-party contribution claim was reversed, as the third district held that the evidence presented was sufficient to be submitted to the jury. The West American Insurance Company v. Yellow Cab Company of Orlando, Inc., 495 So.2d 204 (Fla. 5th DCA 1986) case involved a post settlement contribution claim brought by the insurer of one tortfeasor, where the contribution action was submitted to the jury. The insurer had previously paid the tort victim on behalf of its insured, and brought the subsequent contribution claim alleging that; 1) the settlement amount was reasonable; 2) a complete release was given for all tortfeasors; and 3) the insurer had paid more than its insured's pro-rata share of any potential common liability. Similarly, in Florida Farm Bureau Insurance Company v. Government Employees' Insurance Company, 371 So.2d 166 (Fla. 1st DCA 1979), a counterclaim for contribution in an automobile accident case was tried by the jury

along with the liability and damages issues.

The Fourth District Court of Appeals in Dawson v. Scheben, 351 So.2d 367 (Fla. 4th DCA 1977) reversed a summary judgment granted by the trial court on the third-party contribution claim by the defendant/third-party plaintiff, stating that in view of the factual issues and possibilities that different inferences might be drawn even from some undisputed facts, summary judgment was improper and a jury issue was presented.

Recently the Fourth District Court of Appeals in Gold, Vann and White, P.A. v. DeBerry By and Through DeBerry, 639 So.2d 47 (Fla. 4th DCA 1994), a case factually similar to this case, discussed the question of whether contribution issues were properly decided by a jury. This medical malpractice case had multiple defendants who the plaintiff alleged were negligent as it related to the events surrounding the birth of the minor plaintiff. Several of the defendants settled before trial, and prior to trial, one of the remaining physician/defendants filed a cross-claim against the remaining defendants for contribution. After the cross-claim was filed, one of the remaining physician/defendants entered into a settlement agreement with the plaintiff. The answer by the same cross-claim defendant asserted as an affirmative defense that the settlement agreement was made in "good faith", and the contribution action was therefore barred by the terms of the contribution statute.

At the close of the evidence, the trial court directed a verdict on behalf of the cross-claim contribution defendant, who

had previously entered into the settlement agreement with the plaintiff, finding that no evidence had been presented that the settlement was not entered into in good faith. While the fourth district upheld the directed verdict on the contribution claim, the court stated:

> Dr. Klomp argued that he, rather than Dr. Thornton, should have been granted a directed verdict on the good faith issue. However, he does not argue that the "good faith" issue should have gone to the jury.
>
> We expressly recede from the dicta contained in our September 15, 1993 opinion, suggesting that the good faith/bad faith issue should be tried by the court without a jury, and before the main action.

639 So.2d at 52.

Additionally, in City of Riviera Beach v. Palm Beach County School Board, 584 So.2d 84 (Fla. 4th DCA 1991) the Fourth District Court of Appeals reversed a directed verdict on a contribution claim stating that a jury issue had been presented.

While common-law contribution is an equitable remedy, even actions to enforce equitable contribution rights are enforceable in actions at law. The Second District Court of Appeals in Fletcher v. Anderson, 616 So.2d 1201 (Fla. 2d DCA 1993) has stated:

> The Doctrine of Equitable Contribution is grounded on principles of equity and natural justice and not a contract ... While the principle arose in equity, it is generally enforceable in actions at law.

616 So.2d at 1202.

In Beaches Hospital v. Lee, 384 So.2d 234 (Fla. 1st DCA 1980) a contribution action was tried by the jury on a third-

party contribution claim filed by the hospital against Doctor Lee. The verdict was for Doctor Lee, the third-party defendant, and the hospital appealed. The verdict of the jury was affirmed by the appellate court stating that it was proper that the issues on the contribution action were presented to the jury.

The right to trial by jury is a significant one, as was stated by this court in Drahota v. Taylor Construction Company, 89 So.2d 16 (Fla. 1956): "The constitutional right to jury trial demands that particular care be allowed in this field, to the end that controverted issues of fact be resolved not upon pleadings and depositions but by a jury functioning under proper instructions." Id.

The Fourth District Court of Appeal's opinion in the case at bar effectively denies the right of a trial by jury to ST. PAUL and those other contribution plaintiffs that file a contribution action in a separate lawsuit subsequent to the original action. The rationale given that contribution is an equitable remedy and therefore a jury should not be permitted to decide the issues is not supported by the cases cited by courts of this state. Moreover, the Fourth District Court's opinion in this regard is not rendered in response to any properly preserved appellate issue. DR. SHURE never objected at the trial court level to ST. PAUL receiving a jury trial on it's contribution claim. Neither did they do anything to raise or preserve this issue during or after trial.

CONCLUSION

The Petitioner, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, presented more than ample probative evidence, both direct and circumstantial, that the settlement between DR. SHURE and the BINGERS was not in good faith, as that term was defined by the trial court. Petitioner therefor respectfully requests that the decision of the Fourth District Court of Appeal of Florida be reversed and the case remanded to the trial court for reinstatement of the jury's verdict.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to NORMAN S. KLEIN, ESQ., Klein & Tannen, Attorneys for Appellees, 4000 Hollywood Blvd., Suite 620 North, Hollywood, FL 33021 this 7th day of July, 1995.

MICHAUD, BUSCHMANN, FOX,
FERRARA & MITTELMARK, P.A.
Attorneys for Appellants/
Petitioners
33 Southeast 8th Street
Suite 400
Boca Raton, FL 33432
(407) 392-0540

BY: _____
SCOTT H. MICHAUD, ESQ.
Florida Bar No. 302929
PAUL BUSCHMANN, ESQ.
Florida Bar No. 359262