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.
_____/

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

PETITIONERS' JURISDICTIONAL BRIEF

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JURISDICTIONAL STATEMENT

This case concerns the issue of whether a claim for contribution brought subsequent to the original suit by the Plaintiff should be decided by the Court, and not by a jury, and whether Petitioner, ST. PAUL, did in fact provide evidence sufficient to provide for a factual issue for the jury on the contribution issues presented. The Fourth District Court of Appeals has stated herein that contribution is an equitable remedy, and because the right to a jury trial only extends to actions at law, and not to suits in equity, a claim for contribution brought subsequent to the original suit by the Plaintiff should be decided by the Court, not a jury. The Appellate Court upheld the Trial Court's ruling on the Respondent/ Defendants' Motion for Judgment Notwithstanding the Verdict erroneously labeling the Order as one for a Motion for Directed Verdict, and its ruling affirming the Trial Court conflicts with other decisions of other District Courts of Appeals and the Florida Supreme Court. This decision also conflicts with prior decisions of the Fourth District Court of Appeals and other District Courts of Appeal in this state which have held that the contribution issue is to be decided by a jury. Because of the significance of the issues presented, including those arising out of the Uniform Contribution Among Tortfeasors Act, and because the right to a trial by jury for claims brought under the Uniform Contribution Among Tortfeasors Act has yet to be addressed by the Supreme Court, this Court should exercise its

discretionary jurisdiction to review this case.

STATEMENT OF THE CASE AND FACTS

This contribution action arose out of a medical malpractice action wherein the plaintiffs sought damages on behalf of their minor daughter against William Shure, M.D., the treating obstetrician/gynecologist for Mrs. Binger and Chelsea Binger, and Michael Schoenwald, M.D., the treating urologist for the father, Michael Binger, as a result of the plaintiff acquiring herpes and suffering permanent brain damage after a vaginal delivery at the time of her birth. Dr. Shure settled with the plaintiffs on the first day of the trial for $250,000.00. The jury ultimately found Dr. Schoenwald, the only remaining Defendant, negligent and awarded the plaintiffs $2,900,000.00. The case was settled on appeal for $3,000,000.00. A contribution claim was filed against Dr. Shure and his insurer pursuant to the Uniform Contribution Among Tortfeasors Act, §768.31, Florida Statutes (1985), that alleged that the settlement in question was not made in good faith, and that Dr. Shure and his carrier had in fact not paid their fair share of the damages awarded to the plaintiff and her parents. The case was bifurcated before trial with the issue of whether or not the settlement between the plaintiffs and Dr. Shure was made in good faith as the sole issue to be presented to the jury. After two weeks of trial, the jury returned a verdict in favor of St. Paul and Dr. Schoenwald finding that the settlement was not a good faith settlement.

The Trial Court granted Dr. Shure's Motion for Judgment

Notwithstanding the Verdict on the basis that St. Paul, the contribution Plaintiff herein, had failed to provide any evidence as to the issue of whether or not the settlement was a good faith settlement, and further found that the evidence presented was an impermissible stacking of an inference upon an inference, and was circumstantial as opposed to direct evidence on this issue.

The Fourth District Court of Appeals affirmed the Trial Court on two grounds. First, it held that the contribution issues should be decided by the Court, and not by a jury, and second, that the evidence presented by St. Paul was insufficient as a matter of law to provide a jury issue as to whether or not the settlement was in good faith as the contribution statute requires for immunity from contribution claims from joint tortfeasors. The Motions for Rehearing, Rehearing En Banc and Request for Certification were denied. This request for discretionary jurisdiction follows.

SUMMARY OF ARGUMENT

This Court should exercise its' discretionary jurisdiction to review this opinion by the Fourth District Court of Appeals as the opinion in question prohibits and limits a party bringing an action for contribution under the Uniform Contribution Among Tortfeasors Act, §768.31, Florida Statutes (1987), as to its' right to a jury trial. The basis opined by the Court 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 opinion is in conflict with opinion by other Florida

Appellate Courts that state that an action for contribution, while equitable in nature, is in fact an action at law. Fletcher v. Anderson, 616 So.2d 1201 (Fla. 2d DCA 1993). The opinion also conflicts with other 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.

The decision also held that no factual issues were created by the evidence proffered by St. Paul as it relates to the issue as to whether Dr. Shure and the Bingers settlement in the underlying malpractice case was made in good faith.

The Appellate Court's opinion that no evidence was presented is in direct contradiction with prior decisions of the Florida Supreme Court and other Appellate Courts in 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 said expert testimony will support a jury verdict.

ARGUMENT

The Uniform Contribution Among Tortfeasors Act provides the only method by which one tortfeasor can recover from another 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, should be a jury issue, and not decided by the Court.

The Fourth District Court of Appeals' decision in this case holding that a contribution Plaintiff has no right to a trial by jury is in conflict with decisions by other District Courts of Appeal, and prior decisions of the Fourth District itself.

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 appellate court 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 (1) that the settlement amount was reasonable; (2) that a complete release was given for all tortfeasors; and (3) that 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 claims 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, that 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 similar to this case, discussed the question of contribution issues being decided by a jury. This medical malpractice case had multiple defendants, who plaintiffs alleged were negligent as it relates 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 District Court of Appeals upheld the trial judge granting a directed verdict on the contribution claim, the court stated on page 52 of the opinion:

> "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." (Footnote 1)
>
> Footnote (1) further stated:
>
> > "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 contribution is an equitable remedy, actions to enforce contribution rights are enforceable in actions at law. The District Court of Appeals, Second District, 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 the Florida Supreme 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."

The Fourth District Court of Appeals' ruling in this action that denies the right of trial by jury to those contribution Plaintiffs bringing the contribution action subsequent to the original suit is in conflict with those cases cited above, and with the Fourth Districts own Gold, Vann and White, P.A. v. DeBerry By and Through DeBerry opinion. (639 So.2d 417)

The second issue for review is the affirmance of the Trial Court's granting of the Motion for Judgment Notwithstanding the

Verdict for Defendant/Respondent, SHURE, post-trial after jury verdict of Plaintiff/Petitioner, ST. PAUL. For this outcome, the Fourth District Court of Appeals had to in effect rule that the evidence presented, including the testimony by Plaintiff/ Petitioner's expert, Howard Barwick, Esq., didn't occur.

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. Cromarty v. Ford Motor Company, 341 So.2d 507 (Fla. 1976). See also, Wale v. Barnes, 278 So.2d 601 (Fla. 1973) (Testimony by expert witness is direct evidence as to issues testified upon.) Further, in LaBarbera v. Millan Builders, Inc., 191 So.2d 619 (Fla. 1st DCA 1966), cited by the Supreme Court in Cromarty, above the Court said:

> "It is our view, however, that the fact with respect to the nature and cause of the fire was not established by inference drawn from circumstantial evidence, but was established by the direct evidence of Plaintiff's expert...

191 So.2d 622.

In Zack v. Centro Espanol Hospital, 319 So.2d 34 (Fla. 2d DCA 1975) the same issue of direct versus circumstantial evidence was discussed. Zack was a malpractice case which involved whether or not a nurse employed by the defendant hospital removed a foley catheter with the cuff inflated or not. Plaintiff contended that the removal of the catheter with the cuff inflated caused the plaintiff's injuries. The nurse denied that the cuff was inflated at the time of the removal, and the only contrary

testimony was that of the plaintiff's experts. The Zack court concluded:

> Under the law as established in LaBarbera, supra, the two expert witnesses opinions that the catheter was removed with the cuff 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.

319 So.2d at 36.

It is clear that the decision in this case is in conflict with the above decisions. The prima facia case as to the issue of whether the settlement by DR. SHURE and the plaintiffs was made in good faith should have and did go to the jury, and the trial court's granting of the Motion for Judgment Notwithstanding the Verdict and affirmance by the Fourth District Court of Appeals should be reviewed.

CONCLUSION

Because the Fourth District Court of Appeals decision conflicts with and is in opposition to numerous decisions of other district courts in this state, as well as decisions of the Florida Supreme Court, Petitioners' request this Court to exercise its discretionary jurisdiction to address the following issues:

> Whether a claim for contribution brought subsequent to the original lawsuit by the Plaintiff should be decided by the Court, and not by a jury.
>
> Whether testimony by an expert witness during a jury trial as to the issues to be decided is direct evidence sufficient to withstand a post-

trial Motion for Judgment Notwithstanding the Verdict filed by the party against whom the verdict is rendered.

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 Respondents/Defendants, 4000 Hollywood Blvd., Suite 620 North, Hollywood, FL 33021 this 16TH day of MARCH, 1995.

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