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

RESPONSE TO PETITIONERS' JURISDICTIONAL BRIEF

Ricki Lewis Tannen, Esquire
Klein, Tannen & Cohen, P.A.
4000 Hollywood Boulevard
Suite 620 North
Hollywood, Florida 33021
Telephone: (305) 963-1100

Attorneys for Respondents/
Defendants

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JURISDICTIONAL STATEMENT

The Petitioner's jurisdictional claims are based upon two distinct reasons why this Court should exercise its discretionary jurisdiction. First, the Petitioner states that the District court's ruling "conflicts with other decisions of other District Courts of Appeals and the Florida Supreme Court." [Petitioner's Brief, p.1] In the same paragraph Petitioner then states that the reason this court has discretionary jurisdiction is because the issue presented "has yet to be addressed by the Supreme Court." [Petitioner's Brief, p.1] These statements are contradictory. Either the case is in conflict with "other decisions ... of the Florida Supreme Court" or it is an issue "yet to be addressed."

This confusion as to the proper basis for discretionary jurisdiction permeates the jurisdictional brief. For example, nowhere in the jurisdictional statement proffered does the Petitioner set forth precisely why the case provides for jurisdiction. Further, as Respondent's argue, the Petitioner has not supported either of their claims for jurisdiction with citation to relevant case law.

STATEMENT OF THE CASE AND THE FACTS

The Respondent adopts the basic statement set forth by Petitioner with the following changes.

The Petitioner in its Statement of the Case and Facts [Petitioner's Brief, p.2] misapprehends the decision of the Fourth District Court and presents a skewed rendition to this Court. The Fourth District very clearly held that "we affirm because we

conclude that *St. Paul* did not establish that the settlement was not in good faith." [Opinion, p.2][1] It is only after stating this that the District Court then holds that "the issue of good faith *here* was for the court to decide, not a jury." [Opinion, p.2] [emphasis added]

The District Court opinion does not, as Petitioner argues, "prohibit[s] and limit[s] 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. There are no such broad policy statements in the Fourth District's opinion, rather the Fourth District held that *in this case* the trial court was correct in holding "as a matter of law that the settlement was in good faith" because there was "no evidence of collusion or other misconduct". [Opinion, p.11]

SUMMARY OF THE ARGUMENT

Petitioners argument that this case is in conflict with other decisions of the district courts as well as the Florida Supreme Court is in error because the cases cited in support of conflict jurisdiction do not deal with the precise issue herein, *the lack of any evidence tending to demonstrate that the settlement was not made in good faith.* The case cited as being in conflict from the Fourth District actually fully support the subsequent *St. Paul* decision and thus provides no basis for jurisdiction.

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[1] All references to the Fourth District Court of Appeal's Opinion are to the Opinion found in the Appendix to Petitioner's Jurisdictional Brief.

Further, the issue herein, does not support this Court's exercise of its discretionary jurisdiction because courts throughout the country as well as those within the state of Florida which have considered this issue are in agreement that there must be some evidence tending to demonstrate that a settlement was not made in good faith before a jury question is presented. Those cases have been fully discussed by the Fourth District in its opinion. (Opinion, p.8-11)

As to Petitioner's argument that this Court should accept jurisdiction because it is an issue which "as yet to be addressed" by this Court, this invitation should be declined as well since there is no need for a general policy statement from this Court that there needs to be *evidence* of bad faith before a jury question has been raised.

The decision made by the Fourth District - that a lack of good faith under the contribution statute requires evidence of collusion, fraud or other wrongful conduct - is in full accord with the other courts throughout the country which have considered the question. [See e.g., Opinion p.10-11] Since there was no evidence presented as to collusion, the trial court's directed verdict was proper under Florida law and there is no reason for this court to exercise its discretionary jurisdiction for the purpose of restating what is already well accepted throughout the country. [See Opinion, p.10-11]

ARGUMENT

THE SUPREME COURT SHOULD EXERCISE ITS DISCRETION TO DECLINE REVIEW OF THIS CASE

Conflict Jurisdiction

Petitioner seems to rely primarily upon conflict jurisdiction to supply the basis for this Court's exercise of its discretion to review the cases, however the cases cited for conflict are inapposite to the issue.

Petitioner's lead case, *Lotspeich Company v. Neogard Corporation*, 416 So. 2d 1163 (Fla. 3d DCA 1982) focuses on the reversal of a directed verdict due to, in the Third District's words, "the trial court's personal dislike for the terms of a good faith settlement," [*Lotspeich* at 1164] *not on any jury issue*. Petitioner however relies for conflict on the single reference in the *Lotspeich* decision regarding evidential issues being sufficient for submittal to a jury. [*Lotspeich* at 1165] ("There is evidence, although conflicting, or susceptible to different reasonable inferences, tending to prove third party plaintiff's case, therefore the issues should have been submitted to the jury.") Most importantly *there is no discussion at all by the Third District as to the precise issue in the case at bar*, that is, whether in the absence of any evidence of collusion or other misconduct, whether the trial court held correctly as a matter of law that the settlement was in good faith. [Opinion, p.11] The Petitioner's argument concerning general and inapposite dicta

regarding the jury function does not place Lotspeich in conflict with *St. Paul*.

Another case relied upon by Petitioner, *West American Insurance Company v. Yellow Cab Company of Orlando, Inc.*, 495 So. 2d 204 (Fla. 5th DCA 1986) is even further afield from the issues in this case. In *West American* the issue concerned whether subrogation was the proper cause of action rather than one for contribution where the trier of fact finds that the non-settling tortfeasor was 100% responsible for the tort which the second party had paid in full. There is not a single reference to the issue presented herein, whether in the absence of any evidence of collusion or other misconduct, whether the trial court held correctly as a matter of law that the settlement was in good faith. [Opinion, p.11]

The other cases cited by Petitioner are similarly infirm. For example, the issue presented in *Florida Farm Bureau Insurance Company v. Government Employees' Insurance Company*, 371 So. 2d 166 (Fla. 1st DCA 1979) [Petitioner's Brief, p.6] as stated by the court in its per curiam affirmance was whether "a family exclusion clause ... barred recovery of a third party contribution claim against its insured..." *Florida Farm* at 166. There is no discussion or reference to the issue presented here, i.e., whether in the absence of any evidence of collusion or other misconduct, whether the trial court held correctly as a matter of law that the settlement was in good faith. [Opinion, p.11]

The Petitioner also cites *Dawson v. Scheben*, 351 So. 2d 367 (Fla. 4th DCA 1977) and argues that the Fourth District held that "summary judgment was improper and a jury issue was presented" [Petitioner's Brief, p.6] yet nowhere in the reported decision is the statement about the jury issue to be found nor does the Petitioner's brief supply citation. What the court in *Dawson* said was "[t]he record shows that factual issues exist which preclude summary judgments." *Dawson* at 367. There is no discussion or reference to the issue presented here.

Petitioner also argues that the Fourth District is in conflict with its own prior decision in the medical malpractice case of *Gold, Vann and White, P.A. v. DeBerry By and Through DeBerry*, 639 So. 2d 47 (Fla. 4th DCA 1994).

In *Gold, Vann* the contribution issue was considered during the actual trial of the negligence issues but was not presented to the jury for fact finding because the trial court, at the close of evidence, directed a verdict in favor of one doctor "finding that no evidence had been presented that the settlement was not entered into in good faith." [*Gold, Vann* at 50-51]

The Fourth District affirmed the directed verdict, stating that an absence of evidence on collusion was the dispositive factor in affirming the trial courts decision:

> The bottom line is that we disagree with the appellant's contention that there were factual issues on the contribution claim to go to the jury which precluded a directed verdict. We base this determination primarily on the obstetrician's concession of no pre-agreement collusion."

Gold, Vann, p.52 (emphasis added)

The Fourth District specifically noted in its decision in *Gold, Vann* that the defendant who complained that the directed verdict should have been granted to him instead of to the doctor to which it was granted "does not argue that the "good faith" issue should have gone to a jury." *Gold, Vann* at 52.

It is footnote one which the Petitioner here has focused on as providing the basis for jurisdiction, rather than the main part of the case. In note one the Fourth District does state that they are receding from their previously published opinion in the case "suggesting that the "good faith/bad faith should be tried by the court without a jury and before the main action." *Gold, Vann* at 52.

This is a two part suggestion, i.e., good faith is to be tried without a jury and before the main action. In *St. Paul*, the Fourth decided "that a claim for contribution brought subsequent to the original suit by the plaintiff should be decided by the court, not the jury." [Opinion, p.8] Thus the Fourth District actually clarified its decision in *Gold, Vann* by specifically holding that a trial court was to make the determination on contribution when that case is brought "subsequent to the original suit." Most importantly, the Fourth District in *Gold, Vann* affirmed the trial court decision to direct a verdict on the good faith issue and thus *Gold, Vann* rather than providing conflict fully supports the Fourth District's decision subsequent affirmance of the trial court directing a verdict due to lack of evidence in *St. Paul*.

In the Fourth District's opinion in *City of Riviera Beach v. Palm Beach County School Board*, 584 So. 2d 84 (Fla. 4th DCA 1991) which the Petitioner's cite for a contribution claim being a jury question, [Petitioner's Brief, p.7] the Opinion's focus is entirely upon the foreseeability of the accident which occurred. There is no discussion at all on the point at issue in this case. There is also no discussion about the point on appeal herein in *Beaches Hospital v. Lee*, 384 So. 2d 234 (Fla. 1st DCA 1980) another case cited by Petitioner. In *Beaches*, the court stated, as to the contribution issue, "we conclude that when one tortfeasor seeks contribution from the other, neither the doctor nor any other health care provider may benefit from it." *Beaches* at 238.

The Directed Verdict

Petitioner argues that *Zack v. Centro Espanol Hospital*, 319 So. 2d 34 (Fla. 2d DCA 1975) concerned "the same issue of direct versus circumstantial evidence..." [Petitioner's Brief, p.9] First, the *Zack* case dealt with expert testimony in a medical malpractice case not with expert testimony in a contribution action. Secondly, the Court in *Zack* specifically pointed out that the two expert witnesses opinions were to be considered direct testimony because "the plaintiff made a prima facie case on the issue of causation." *Zack* at 36.

The Fourth District's analysis of the evidence presented in *St. Paul* rested upon the foundation of this being a contribution action (unlike *Zack*) and thus the focus was upon whether there was

collusion involved in obtaining the settlement. [Opinion, p.3, p.8-10] After reviewing the pertinent cases regarding the elements of a collusive arrangement the Fourth District concluded that:

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

Opinion at p.10.

The Fourth District then concluded that "there was no evidence of collusion or misconduct..." [Opinion, p.11] Earlier in the Fourth District's opinion it specifically noted that "[a]t the post-trial hearing on renewed motion for directed verdict, counsel for *St. Paul acknowledged that there was no evidence of collusion or that Dr. Shure had testified improperly.*" [Opinion, p.3] [emphasis added]

The Fourth District stated as to this evidence that:

> The essence of *St. Paul's* argument is that since it presented an expert who testified that the settlement was not in good faith, a jury issue was presented. *Significantly, St. Paul does not cite one contribution case to support its argument.*"

Opinion at p.5. (emphasis supplied)

The Fourth District also noted that St. Paul's expert testified that the settlement was not in good faith because it was made for tactical reasons. [Opinion, p.3] But as the Fourth District points out repeatedly in their opinion, the test of good faith is collusion, and there was no evidence supporting collusion and thus there was no issue of fact. [Opinion, p.5]

CONCLUSION

The Fourth District's decision is not in conflict with any decision of the other District Court's of Appeal and not in conflict with any decision of this Court. The decision made by the Fourth District - that the lack of any evidence tending to demonstrate that the settlement was not made in good faith - is in full accord with the other courts throughout the country which have considered the question. Since there was no evidence presented as to bad faith, such as collusion, the trial court's directed verdict was proper under Florida law and there is no reason for this court to exercise its discretionary jurisdiction.

The Petitioner's request for this court to invoke its discretionary jurisdiction should be declined.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petitioners' Jurisdictional Brief was mailed this 5th day of April, 1995, to: PAUL BUSCHMANN, ESQUIRE, Michaud, Buschmann, Fox, Ferrara & Mittelmark, P.A., Attorneys for Petitioners/Plaintiffs, 33 Southeast 8th Street, Suite 400, Boca Raton, Florida, 33432.

KLEIN, TANNEN & COHEN, P.A.
Attorneys for Respondents/Defendants
4000 Hollywood Boulevard
Suite 620 North - Presidential Circle
Hollywood, Florida 33021
Telephone: (305) 963-1100

BY: Ricki Tannen
RICKI LEWIS TANNEN
Florida Bar No.: 340103