OA 12-8-95

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.
_____/

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

PETITIONERS' SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

INDEX OF CITATIONS AND AUTHORITIES

CITATIONS

TABLE OF AUTHORITIES

I. A CONTRIBUTION ACTION BROUGHT UNDER SECTION 768.31, FLORIDA STATUTES, MAY BE ENFORCED IN AN ACTION AT LAW AND MAY THEREFORE BE DETERMINED BY A JURY.

The recent case of Fletcher v. Anderson, 616 So.2d 1201 (Fla. 2d DCA 1993) is dispositive of the issue of whether jury trials are appropriate in contribution actions. In Fletcher, the plaintiff filed a complaint for contribution and demanded a jury trial. The defendants filed a motion to strike the plaintiff's demand arguing that an action for equitable contribution constitutes an action in equity for which there is no right to a jury trial. Id. at 1202. The trial court granted the defendants' motion. The plaintiff appealed.

The Second District Court of Appeal of Florida in Fletcher refused to conclude that simply because contribution is grounded on principles of equity, the right to a jury trial for a contribution action must be denied.[1] The Second District's analysis, which the Fourth District in the case *sub judice* either disregarded or

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[1]The Fourth District's decision in the case *sub judice* concluded that a right to a jury trial extends only to actions at law and since contribution is an "equitable remedy" and jury trials do not extend to suits in equity, a claim for contribution brought subsequent to the original suit should be decided by the court. St. Paul Fire and Marine Insurance Company v. Shure, 647 So.2d 877, 880 (Fla. 4th DCA 1994). Part of the court's decision was based on the fact that this Court in a prior decision, used the words "equitable" and "equity" when discussing contribution. Id. at 879.

overlooked[2], clearly and concisely articulates why jury trials are appropriate in contribution actions. The Second District stated:

> The doctrine of equitable contribution is grounded on principles of equity and natural justice and not on contract. See, 2 Samuel Williston & Walter H. E. Jaeger, A *Treatise on the Law of Contracts* Sec. 345 (3d ed. 1959). The principle attempts to distribute equally among those who have a common obligation, the burden of performing that obligation.

Fletcher, 616 So.2d at 1202. However, the Second District was not convinced that a contribution action should be heard by a judge and not a jury simply because it is the type of action that seeks "equitable justice". The court went on to state:

> While the principle arose in equity, it is generally enforceable in actions at law. Id.; Meckler v. Weiss, 80 So.2d 608 (Fla. 1955). Thus, an obligor who has paid in excess of his pro rata share of the obligation, is entitled at law to contribution from the other obligors for their aliquot share.

Id. (citations omitted) (emphasis added). The Second District reversed the trial court order and held that to the extent the plaintiff sought his aliquot share of contribution, the trial court departed from the essential requirements of law by striking the plaintiff's demand for a jury trial. Id. Even though a contribution action brought under Section 768.31, Florida Statutes, may be grounded on principles of equity, as discussed in Fletcher,

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[2]The Second District's decision in Fletcher is not cited in the Fourth District's opinion, nor is conflict cited with that opinion.

an action for contribution is generally enforceable in an action at law and properly tried by a jury.

The Supreme Court of Florida in Meckler v. Weiss, 80 So.2d 608 (Fla. 1955), essentially reached the same conclusion as the Second District in Fletcher. In fact, the Fletcher decision cited Meckler when it stated that, "while the principle [of contribution] arose in equity, it is generally enforceable in actions at law." Fletcher, 616 So.2d at 1202.

In Meckler, the plaintiff and defendant were co-tenants of real estate. The plaintiff personally discharged the mortgage on the real estate and subsequently sought his proportionate share of the mortgage debt from the defendant. Id. at 608. This Court held that the facts were sufficient to establish a right to a lien on the defendant's interest in the real estate by way of subrogation in equity. Id. at 608-609. This Court then stated:

> This result conforms to the general rule applicable to co-obligors that as between them, when one of them pays more than his proportionate share of the debt owed by both, the payer is entitled to contribution from the other. . . .

Id. at 609. This Court then equated the plaintiff's right of contribution to that of an action at law for restitution.

> [W]here the entire obligation has been discharged, the payor in addition to an action at law for restitution, is entitled to be subrogated to the position of the creditor but his right of recovery . . . is limited to contribution.

Id. These cases merely crystallize what has always been the law in Florida, that is, cases involving contribution are entitled to be heard by a jury.

As this Court is well aware, the concept of "contribution" has been recognized by the State of Florida long before it adopted the Uniform Contribution Among Tortfeasors Act, Section 768.31, Florida Statutes. It has been the long-standing rule in Florida that:

> [b]etween co-obligors, when one of them pays more than his proportionate share of the debt owed by both, he is entitled to a contribution from the other, even to the extent of establishing an equitable lien.

Berkan v. Brown, 242 So.2d 207 (Fla. 3d DCA 1970), cert. den., 246 So.2d 111 (Fla. 1971), citing Meckler, 80 So.2d at 609; See also, Mintz v. Ellison, 233 So.2d 156, 157 (Fla. 3d DCA 1970) (a tenant in common may make payment of charges and maintain an action to recover the proportionate share from other tenant in common).

Contribution has been defined as:

> a payment made by each, or by any, of several having a common interest or liability, of his share in the loss suffered or in the money necessarily paid by one of the obligors in [sic] behalf of the others. The principle of contribution is based on a principle of justice and equity, that one person should not be singled out of several who are equally liable, to pay the whole demand; it is a principle of equality in bearing a common burden.

12 Fla. Jur. 2d, *Contribution, Indemnity and Subrogation*, Section 1 (1979).

In the case *sub judice*, the ST. PAUL was required to pay what it believed to be more than its pro rata share of a judgment

obtained against it by the underlying plaintiff. Consequently, the ST. PAUL brought a contribution action pursuant to Section 768.31, Florida Statutes, against its settling co-defendant, DR. SHURE. The ST. PAUL demanded a trial by jury to which DR. SHURE never objected. The contribution case was properly tried by the jury over a three-week period resulting in a verdict in ST. PAUL's favor.[3]

Just because a joint tortfeasor's right to contribution from another joint tortfeasor was statutorily created, the principles upon which contribution have been recognized have not changed. Whether contribution is sought by a joint tortfeasor under Section 768.31, Florida Statutes, or by a co-tenant or co-obligor under common law, the essence of the action remains the same -- "to distribute equally among those who have a common obligation, the burden of performing that obligation". Fletcher, 616 So.2d at 1202. In the case of a contribution action under Section 768.31, the obligation is the payment of money -- one joint tortfeasor seeks his aliquot share of contribution from another joint tortfeasor. Accordingly, the right to a jury trial afforded to a co-obligor who seeks contribution should be equally afforded to a joint tortfeasor who pursues contribution under Section 768.31.

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[3]Pursuant to Section 768.31, it was necessary for ST. PAUL to prove that the settlement entered into between the plaintiff in the underlying medical malpractice case and DR. SHURE, the settling defendant in the underlying medical malpractice case, was not made in good faith. This issue was presented to the jury and a verdict was returned in favor of ST. PAUL after the jury concluded that the settlement between DR. SHURE and the plaintiff was not made in good faith.

II. A JURY TRIAL IS APPROPRIATE WHEN THE INTENDED REMEDY OF A CAUSE OF ACTION IS THE AWARD OF MONEY DAMAGES.

The rationale used by the court in Smith v. Barnett Bank of Murray Hill, 350 So.2d 358 (Fla. 1st DCA 1977), overruled, Cerrito v. Kovitch, 457 So.2d 1021 (Fla. 1984), is also instructive if not dispositive of the issue of whether there is a right to a jury trial in a contribution action brought under Section 768.31. In Smith, the defendants filed a counterclaim pursuant to Section 687.04, Florida Statutes (1975), and requested a jury trial.[4] The trial court denied the defendant's request and set the counterclaim for trial without a jury. The defendants appealed.

On appeal, the First District noted:

> The Declaration of Rights secures the right of jury trial for cases in which a jury trial was traditionally afforded at common law. Article I, Section 22, Florida Constitution. . . . [A]n action for the recovery of money as damages was among the class of cases in which the common law afforded a right of jury trial.

Smith, 350 So.2d at 359 (citations omitted). The First District held that since the right of action afforded by Section 687.04 was a right of action for money damages, a jury trial was appropriate. Id. The court stated that it was "insignificant to the determination of counterclaimants' right to a jury trial that the right of action they assert is created by statute rather than by common law." Id. After reading the following statement made by

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[4]Section 687.04 affords penalties for a violation of the Florida usury laws.

the First District, there should be no question that there is a right to a jury trial in a contribution action brought under Section 768.31:

> If the rule [the right to a jury trial in an action for money damages] were otherwise, claims for money damages based on modern legislation would be subject to denial of a jury trial, and the right to jury trial would shrink as time and legislation change the citizen's rights of redress and access to the courts.

Id.

The above-quoted passages from Smith are equally applicable to an action for contribution under Section 768.31. An action for contribution under Section 768.31 is brought for one reason -- to collect money from a joint tortfeasor that was paid by another joint tortfeasor in excess of the latter's pro rata share. Therefore, an action for contribution under Section 768.31 is nothing more than an action for money damages. There is no "equitable remedy" in the strict sense of that phrase. The sole remedy sought is money.

The Fourth District Court of Appeal, in Cerrito v. Kovitch, 423 So.2d 1008, 1009 (Fla. 4th DCA 1982), app'd, 457 So.2d 1021 (Fla. 1984), agreed with the rationale of Smith and stated:

> We agree with the court's rationale with one important, and indeed determinative, exception. We disagree that the usury statute creates a cause [right] of action for money damages.

Cerrito, 423 So.2d at 1009 (emphasis added).

The Fourth District, in Cerrito, disagreed with Smith to the extent Smith held that the usury statutes created a cause of action

for money damages. The Fourth District held that Section 687.04 created an equitable affirmative defense, rather than an independent cause of action for money damages. The Supreme Court of Florida accepted review of Cerrito based on conflict jurisdiction.[5]

Upon review of Cerrito, this Court took the position that not all claims for money are legal actions triable by jury as a matter of right. Cerrito v. Kovitch, 457 So.2d 1021, 1022 (Fla. 1984). This Court then examined the language in Section 687.04. It made significant mention of the language in that statute which states that a person who violates the usury statutes shall forfeit the usurious interest to the party from whom the usurious interest had been taken. Id. This Court then noted that "[b]y requiring that usurious interest be forfeited, the legislature made it clear that the main purpose of the statute was to prevent violators from benefiting by charging usurious interest." Id. Section 687.04 provides a remedy of "forfeiture", and the recovery of money is not the sole remedy provided for by the statute. Interestingly enough, this Court concluded by holding:[6]

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[5]The sole issue considered by this Court in Cerrito was whether a jury trial is constitutionally guaranteed in a mortgage foreclosure proceeding when usury is raised in a counterclaim. Cerrito, 457 So.2d at 1022.

[6]This Court in Cerrito noted that the usury statutes created no vested substantive right, but only an enforceable penalty. Cerrito, 457 So.2d at 1023. Section 768.31 does not create any enforceable "penalties".

> Except when usurious interest has already been paid and the party is seeking its return plus the statutory penalties . . . we conclude that Section 687.04 does not create a legal cause of action triable by jury.

Id. (citations omitted) (emphasis added).

By its own words, this Court has already decided that if an action is brought for the sole purpose of seeking money damages, a legal cause of action triable by a jury is appropriate. Nevertheless, this Court disapproved Smith to the extent Smith stood for the wholesale proposition that when money damages are incidental to a cause of action, the action inherently carries with it the right to a jury trial.[7] Compare Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), where the Supreme Court of the United States held that a jury trial must be accorded to the person requesting it even though the legal issues are incidental to the equitable issues. However, Justice Ehrlich disagreed with the majority in Cerrito and dissented with an opinion.

> The unambiguous language of the statute creates a cause of action for a money judgment where, as was alleged in this case, usurious interest has been paid. Regardless of its common law antecedents, the statute contemplates an action at law which would invoke the constitutional right to a trial by jury.
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> I would approve Smith v. Barnett Bank and quash the opinion of the Fourth District in this case.

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[7]Notwithstanding this Court's disapproval of Smith, it has subsequently cited that case for the proposition that the Florida Constitution "secures the right to a jury trial in all cases that traditionally afforded a jury trial at common law. Broward County v. LaRosa, 505 So.2d 422 (Fla. 1987).

Id. at 1023 (Ehrlich, J., dissenting).

The only remedy provided for by Section 768.31, Florida Statutes, is the recouping of money one joint tortfeasor paid in excess of his rightful pro rata share. Unlike Florida's usury laws, it does not create an enforceable penalty. The only remedy available to the joint tortfeasor is money damages. Following this Court's holding in Cerrito, when a joint tortfeasor seeks the return of money he paid in excess of his pro rata share, a "legal" cause of action triable by a jury is created. Cerrito, 457 So.2d at 1022.

III. FLORIDA HAS LONG RECOGNIZED THE RIGHT TO A JURY TRIAL FOR CONTRIBUTION ACTIONS BROUGHT UNDER SECTION 768.31, FLORIDA STATUTES.

The right to have a jury hear a contribution action pursuant to Section 768.31, Florida Statutes, was never questioned in Florida. In fact, the right to a jury trial in a contribution action brought under Section 768.31 has been accepted by the Florida courts, including the Fourth District, ever since Florida adopted the Uniform Contribution Among Tortfeasors Act in 1975. See, e.g., Lorf v. Indiana Insurance Company, 426 So.2d 1225 (Fla. 4th DCA 1983); See also, West American Insurance Company v. Yellow Cab Company, 495 So.2d 204 (Fla. 5th DCA 1986), rev. den., 504 So.2d 769 (Fla. 1987).

Nevertheless, ST. PAUL has been asked by the Supreme Court of Florida to address the issue of whether there is a right to a jury trial in a contribution action brought under Section 768.31,

Florida Statutes. Although this issue was first raised on appeal by DR. SHURE, the Fourth District Court of Appeal, in the case *sub judice*, still entertained the issue.[8] On this issue, the Fourth District held that:

> [b]ecause 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, we conclude that a claim for contribution brought subsequent to the original suit by the plaintiff should be decided by the court, not a jury.

St. Paul Fire and Marine Insurance Company v. Shure, 647 So.2d 877, 880 (Fla. 4th DCA 1994).

Although suits in equity are often heard by the court and not a jury, there are many exceptions to that rule. The right to a jury trial in a contribution action, whether standing alone, brought in a crossclaim, brought in a counter-claim, or brought in a third party claim, has long been recognized in Florida. Not only has the Fourth District recognized the right to a jury trial for a contribution action when it is brought with other legal claims, it has even permitted contribution actions brought pursuant to Section 768.31, Florida Statutes, to be heard by a jury when those actions were brought subsequent to the underlying litigation. See, Lorf, 426 So.2d at 1226.

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[8]As will be discussed in Section VI of this Brief, ST. PAUL adamantly contends that DR. SHURE's right to have this issue heard by the appellate court was waived since he did not raise it at the trial level, nor did he even file a cross-appeal on the issue. See, Sundale Associates, Ltd. v. Southeast Bank, N.A., 471 So.2d 100, 102 (Fla. 3d DCA 1985).

In West American, the West American Insurance Company brought a post-settlement contribution action against Yellow Cab alleging that the settlement West American paid on behalf of its insured was reasonable, and that it had paid more than its insured's pro rata share of the potential common liability. Id. at 205. This action for contribution, standing alone, was heard by a jury.

In the City of Riviera Beach v. Palm Beach County School Board, 584 So.2d 84 (Fla. 4th DCA 1991), the plaintiff sued the City of Riviera Beach for injuries she sustained while disembarking a float on school property. The parties settled and the City brought a subsequent action for contribution against the School Board. The relevance this case has to the case *sub judice* is the fact that the Fourth District Court of Appeal, once again acknowledged that when sufficient evidence is presented by the plaintiff, a contribution action, standing alone, may be submitted to a jury. Similarly, the Fourth District in its decision of Dawson v. Scheben, 351 So.2d 367 (Fla. 4th DCA 1977), acknowledged, albeit indirectly, that a contribution action may be decided by a jury.

The issue of whether a settlement under Section 768.31 was made in good faith has also been routinely submitted to a jury.[9] Interestingly enough, the Fourth District Court of Appeal recently

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[9]It is important to note that the Fourth District in the case *sub judice*, did not hold that the good faith determination issue of a contribution claim is a matter for the court and not a jury. Rather, the court held, as is evident from its opinion, that any contribution claim under Section 768.31 should be decided by the court and not a jury.

reviewed a case before it factually similar to this case. In Gold, Vann and White, P.A. v. DeBerry, 639 So.2d 47 (Fla. 4th DCA 1994), one of a number of issues on appeal was whether the trial court properly directed a verdict in favor of a settling defendant (a pediatrician) in a contribution claim brought by a non-settling defendant (an obstetrician). Although the issue of the good faith settlement never made it to the jury because of the lack of evidence presented by the non-settling defendant, the Fourth District in reviewing the case made it a point to state in a footnote:

> 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.

Id. at 52 n.1. Unfortunately, in the case *sub judice*, the Fourth District did not refer to its opinion in the Gold, Vann case, nor did it comment on the above quoted footnote. In any event, the Gold, Vann case is evidence that the Fourth District has permitted contribution actions to be submitted to a jury, barring a directed verdict for lack of evidence.[10]

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[10]Note that the settlement agreement which resulted in the claim for contribution in the Gold, Vann case was entered into five years before the case was tried. The settlement in the case *sub judice* which resulted in ST. PAUL's claim for contribution occurred on the eve of trial leaving ST. PAUL no time to file a crossclaim, unless an emergency Motion for Continuance had been filed.

IV. THE FOURTH DISTRICT COURT OF APPEAL ERRONEOUSLY CONCLUDED THAT THERE IS NO RIGHT TO A JURY TRIAL FOR A JOINT TORTFEASOR WHO BRINGS AN ACTION FOR "EQUITABLE CONTRIBUTION".

Contribution is premised on equitable principles. As noted by the Fourth District Court of Appeal of Florida in the case *sub judice*, the terms "equity" and "equitable" are used throughout opinions that define contribution. St. Paul Fire and Marine Insurance Company v. Shure, 647 So.2d 877, 879 (Fla. 4th DCA 1994). However, this should not be misinterpreted to mean that the only remedy for a contribution action is an equitable remedy and that as such an action for contribution should be heard by the court and not a jury. Unfortunately, this was the erroneous conclusion reached by the Fourth District.[11]

In contribution actions, equity is achieved by returning one to the "state of equality". The only way to accomplish this in a contribution action is by awarding money damages. This must be distinguished, and should have been distinguished by the Fourth District, from other forms of equitable remedies where money damages are not sought. It is those cases where "equitable remedies" are sought and provided for by statute that are properly heard by the court and not a jury. See Cerrito, 457 So.2d at 1022.

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[11]The Fourth District concluded that "[b]ecause 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, we conclude that a claim for contribution brought subsequent to the original suit by the plaintiff should be decided by the court, not a jury." St. Paul Fire and Marine Insurance Company, 647 So.2d at 880.

The Fourth District Court of Appeal's reliance on the assumed fact that contribution is an "equitable remedy" and therefore must be heard by a court and not a jury, is simply unfounded. Although contribution is based on principles of "equity", the end result of such an action is not an "equitable remedy". There is apparently a difference between an "equitable remedy" and an action at law where one seeks money damages; the latter being applicable to contribution claims. That is why one pursues contribution. The action is brought when one has paid more than his pro rata share of common liability. Section 768.31(2)(b), Florida Statutes. It is brought in anticipation of obtaining a judgment for money. The use of the terms "equity" or "equitable" when referring to contribution actions are merely equivalent to the words "principles of fairness or justice". Clark II v. Teeven Holding Company, Inc., 625 A.2d 869 (Del. Ch. 1992).

The Fourth District Court of Appeal in the case *sub judice* cites this Court's decision in Lopez v. Lopez, 90 So.2d 456, 458 (Fla. 1956), when it defined equitable contribution. In Lopez, a surviving widow brought an action against her husband's executor for contribution with respect to amounts due on a purchase money mortgage. Id. at 457. This Court adopted the definition of equitable contribution contained within American Jurisprudence. Id. at 458. ST. PAUL does not disagree with this Court's definition of equitable contribution as defined in Lopez. However, ST. PAUL cannot agree with the Fourth District's leap to the conclusion that:

> As is apparent from the court's reference to the doctrine in Lopez as "equitable contribution", contribution is an equitable remedy . . . .

St. Paul Fire and Marine Insurance Company, 647 So.2d at 879. The Fourth District apparently overlooked, or simply did not consider, the subsequent case law set forth by this Court, the Fourth District itself, and other District Courts of Florida (cited herein) which were decided subsequent to Lopez.

The Fourth District in the case *sub judice* then attempted to support its conclusion by explaining how the Uniform Contribution Among Tortfeasors Act modified the rule against contribution between joint tortfeasors. Id. at 879. The Fourth District stated that "the Uniform Act was thus a modification of the common law equitable doctrine of contribution." Id. Common law equitable doctrine is a misnomer. Actions at law, which derive from the common law, guarantee the right to a jury trial. On the other hand, actions in equity, which do not derive from the common law, do not automatically guarantee one the right to a jury trial.

Actions recognized at common law afford a moving party the right to money damages or other forms of compensation. Actions at equity afford the moving party "equitable remedies". The doctrine of contribution has been recognized at common law prior to Florida's adoption of the Uniform Contribution Among Tortfeasors Act. When the legislature modified a joint tortfeasor's right to contribution from another joint tortfeasor, it did not intend to change the essence of the doctrine. As has been continuously stated, there are no "equitable remedies" provided by Florida's

Uniform Contribution Among Tortfeasors Act. Money damages are the sole remedy. The term "equitable" is used to indicate principles of fairness and justice.

The Fourth District's reliance on Lincenberg v. Issen, 318 So.2d 386, 393 (Fla. 1975) is equally misplaced. By simply relying on the fact that the terms "equitable" and "equity" are used "throughout the [Lincenberg] opinion" the Fourth District erroneously arrived at the conclusion that

> [b]ecause 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, we conclude that a claim for contribution brought subsequent to the original suit by the plaintiff should be decided by the court, not a jury.

St. Paul Fire and Marine Insurance Company, 647 So.2d at 880. Although a contribution action under Section 768.31 is in fact based on equitable principles, the essence of the doctrine of contribution has not changed. Therefore, a party that brings a contribution action pursuant to the statute, is entitled to a jury trial.

The right to a jury trial in a contribution action has also been addressed by other States in the Union that have adopted the Uniform Contribution Among Tortfeasors Act. Delaware adopted the Uniform Contribution Among Tortfeasors Act in 1949. In Delaware, as was the case in Florida, there was no right of contribution among joint tortfeasors until the Uniform Contribution Among Tortfeasors Act was adopted. Delaware was recently faced with the same issue this Court is faced with today: whether or not a claim

for contribution under the Uniform Contribution Among Tortfeasors Law should be heard by the Court of Chancery or the Court of Law, i.e., is there a right to a jury trial. Since Delaware still divides its judicial system between courts of chancery and courts of law, its analysis and conclusion on this issue are instructive.

In Clark II v. Teeven Holding Company, Inc., 625 A.2d 869 (Del. Ch. 1992), the Court of Chancery was faced with the issue of whether it or the Court of Law should preside over a claim for contribution and indemnity brought under Delaware's Uniform Contribution Among Tortfeasors Law. The court noted that the substantive right to contribution among joint tortfeasors was created by the Uniform Contribution Among Tortfeasors Act. Id. at 877, citing Distefano v. Lamborn, 81 A.2d 675, 678 (Del. Super. Ct. 1951), aff'd, 83 A.2d 300 (1951). The court further noted that "since the substantive right to contribution among joint tortfeasors [in Delaware] was not created until the adoption of the Act in 1949, that right was never a part of equity's traditional jurisdiction in Delaware." Id.

The Court of Chancery held that it would "not exercise jurisdiction over claims 'wherein sufficient remedy may be had by common law, or statute, before any other court or jurisdiction of this State'". Id. Since the court noted that contribution among joint tortfeasors was available under the Uniform Contribution Among Tortfeasors Law of Delaware, the moving party had an adequate remedy at law and the case should have been brought in Delaware's Court of Law, rather than the Court of Chancery.

Although the next section of the Clark II opinion discussed a party's right to indemnification, the language used by the Court of Chancery within that discussion is significant and instructive as well. The term "equitable principles", the court held, did not necessarily mean that indemnity among the alleged joint tortfeasors is a cause of action or remedy cognizable in equity. Id. at 878. "The use of the term 'equitable principles', in that context, is merely equivalent to the words 'principles of fairness or justice.' This court does not hold a monopoly on deciding cases based on 'equitable principles'". Id.

The concept of contribution among joint tortfeasors in Florida is based on equitable principles. However, as discussed in the above-cited Delaware opinion, simply because a claim is based on equitable principles, does not automatically mean that a claim is solely cognizable in equity and there is no adequate remedy at law. Unquestionably, the opposite is the better view since, as discussed above, the only remedy available to a party who brings a contribution action under Section 768.31, Florida Statutes, is money damages.

Similarly, in Paclawski v. Bristol Laboratories, Inc., 452 P.2d 452 (Okla. 1967), the Supreme Court of Oklahoma interpreted the Uniform Contribution Among Joint Tortfeasors Act, as adopted by Arkansas in 1941. The case was governed by Arkansas law because the incident which was being sued upon occurred in Arkansas.[12] The

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[12]Because one of the co-defendants lived in Oklahoma, the case was brought in Oklahoma.

Supreme Court of Oklahoma held that the Uniform Contribution Among Joint Tortfeasors Act

> [r]everses the common law rule against contribution among joint tortfeasors and makes the allocation of the pro rata share of the damages as among joint tortfeasors a jury question, although all tortfeasors remain jointly and severally liable for the total amount of the damages insofar as the injured party is concerned.

Id. at 453 (emphasis added). Based on the foregoing, the Fourth District erroneously concluded that contribution is an "equitable remedy" and therefore, such an action should be decided by the court, not a jury.

V. PERMITTING THE JURY TO HEAR THE CONTRIBUTION ACTION DID NOT CONSTITUTE REVERSIBLE ERROR.

To deny one the right to a jury trial on issues traditionally triable by a jury as a matter of right, is a departure from the essential requirements of the law. Hobbs v. Florida First National Bank of Jacksonville, 480 So.2d 153, 155 (Fla. 1st DCA 1985). The right to a jury trial is protected by the clear mandate of the Florida Constitution. *Article I, Section 22, Florida Constitution.* To the contrary, the right to a non-jury trial is not protected by a mandate of the Florida Constitution or by any other law. There is no injustice when an issue which may otherwise be determined by the court is determined by a jury. Such is the case with a

contribution action brought under Section 768.31, Florida Statutes.[13]

It is uncontradicted that when an equitable cause of action and an action at law are brought in the same claim, a jury may hear both issues. Cerrito, 457 So.2d at 1022, citing Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962) (a jury trial must be accorded to the person requesting it even though the legal issues are incidental to the equitable issues). This is clearly evident in tort litigation when a contribution action is brought via a third party complaint, a crossclaim or a counterclaim. See, e.g., R & S Partnership v. Martin Schaffel Enterprises, Inc., 529 So.2d 794 (Fla. 3d DCA 1988); Lotspeich Company v. Neogard Corp., 416 So.2d 1163 (Fla. 3d DCA 1982); Beaches Hospital v. Lee, 384 So.2d 234 (Fla. 1st DCA 1980), rev. den., 392 So.2d 1371 (Fla. 1980); Florida Farm Bureau Insurance Company v. Governmental Employees Insurance Company, 371 So.2d 166 (Fla. 1st DCA 1979); and Dawson v. Scheben, 351 So.2d 367 (Fla. 4th DCA 1977).

When a contribution claim is brought with a legal claim, the contribution claim is consistently submitted to a jury with the legal claim. We have been unable to locate or find any case law or statutory law which prohibits a contribution action from being submitted to a jury under such circumstances. This issue has never been addressed because there is no injustice that results from such

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[13]For purposes of this argument only, we will assume that a contribution action is an "equitable" issue as opposed to a "legal" issue.

a procedure. On the other hand, permitting the contribution action to go to the jury promotes judicial economy and avoids inconsistent verdicts.

The ST. PAUL will continue to rely on the other sections of this Brief which support its argument that there is a right to a jury trial in a contribution action brought under Section 768.31, Florida Statutes. However, even if this Court were to agree with the Fourth District's analysis in the case *sub judice* and conclude that a contribution action should be decided by the court and not a jury, if such an action were heard by a jury, that in and of itself does not constitute reversible error. As stated above, contribution claims are routinely heard by juries when brought as part of an action that contains legal issues. Since there is no inherent injustice by having a subsequent contribution claim decided by a jury, any objection to having a contribution claim heard by a jury must be raised prior to the jury trial. See Sundale Associates, Ltd. v. Southeast Bank, N.A., 471 So.2d 100, 102 (Fla. 3d DCA 1985). If it is not, it is a right that is waived and should not be permitted to be raised for the first time on appeal. Id.

VI. THE ISSUE OF WHETHER THERE IS A RIGHT TO A JURY TRIAL IN A CONTRIBUTION ACTION BROUGHT UNDER SECTION 768.31, FLORIDA STATUTES, WAS NOT TIMELY RAISED BY DR. SHURE AND SHOULD NOT BE CONSIDERED ON APPEAL.

ST. PAUL has been asked by this Court to address in further detail the issue of whether there is a right to a jury trial in a

contribution action brought under Section 768.31, Florida Statutes. This Supplemental Brief thoroughly addressed that issue. However, two very important issues must be addressed as well.

First, DR. SHURE never questioned at the trial level whether ST. PAUL had a right to a jury trial. In fact, a three-week jury trial was conducted in this contribution action, and a unanimous verdict in ST. PAUL's favor was rendered by the jury. Neither DR. SHURE or the trial court on its own motion objected to the jury trial. The only trial order appealed was the order granting DR. SHURE's JNOV, and that appeal was filed by ST. PAUL. Moreover, DR. SHURE did not even file a cross-appeal in an attempt to raise this issue. Consequently, DR. SHURE cannot raise this issue for the first time on appeal. If DR. SHURE believed ST. PAUL was not entitled to a jury trial, he was obligated to raise his objection at any time prior to the commencement of the jury trial.

In Sundale Associates, Ltd. v. Southeast Bank, N.A., 471 So.2d 100, 102 (Fla. 3d DCA 1985), the counter-defendant claimed for the first time on appeal that he should not be bound by a jury verdict since the verdict was on an issue he claimed should have been decided by the court. The Third District held that since the counter-defendant did not object to the jury trial at the trial court level, his objection was not preserved for appeal and it could not be successfully presented for the first time in the appellate court. Id. at 102.

The alleged error in Sundale Associates is the same alleged error DR. SHURE now complains of for the first time. DR. SHURE

never requested that the court instead of the jury hear ST. PAUL's contribution claim. The first time the issue was raised was in DR. SHURE's Answer Brief that he filed below with the Fourth District Court of Appeal of Florida. Since DR. SHURE failed to object to the jury trial at any time during the lower court proceedings, he is estopped from raising it for the first time on appeal.

This Court has consistently held that the Florida appellate courts and this Court should not and will not consider issues that have not been raised and/or considered at the trial court level. Jones v. Neibergall, 47 So.2d 605 (Fla. 1950); Lipe v. City of Miami, 141 So.2d 738 (Fla. 1962); City of Lake Worth v. First National Bank in Palm Beach, 93 So.2d 49 (Fla. 1957). The only exception to this tenet is in the case of "fundamental error". Fundamental error is considered on appeal regardless of whether it was preserved for appeal in the lower court. Fundamental error is error which goes to the foundation of the case or to the merits of the cause of action. Sanford v. Rubin, 237 So.2d 134 (Fla. 1970). Such fundamental error does not exist here.

Second, while this Court will presumably arrive at a decision on this "issue", ST. PAUL would further point out that even if it determines the trial court should have decided this case instead of the jury, this Court must consider the fact that the trial court did not weigh the evidence ST. PAUL presented at trial; the jury did. As was discussed in ST. PAUL's Initial Brief to this Court, the trial court granted the JNOV, not based on the weight of the evidence presented, but rather on the erroneous conclusion that ST.

PAUL did not provide any direct evidence at trial. This latter issue was thoroughly addressed in ST. PAUL's Initial Brief and will not be readdressed here.

CONCLUSION

Based on the foregoing, ST. PAUL would contend that there is a right to a jury trial in a contribution action brought under Section 768.31, Florida Statutes.

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 October, 1995.

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