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.
_____/

APPELLANTS/PETITIONERS' SUPPLEMENTAL REPLY BRIEF

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I. THE ISSUE BEFORE THIS COURT IS WHETHER ANY CONTRIBUTION ACTION BROUGHT PURSUANT TO SECTION 768.31, FLORIDA STATUTES, SHOULD BE DETERMINED BY THE COURT AND NOT A JURY.

Pursuant to Section 768.31, Florida Statutes, when two or more persons become jointly or severally liable in tort for the same injury to a person, there is a right of contribution among them even though judgment has not been recovered against all or any of them. Section 768.31(2)(a). Under Section 768.31, there are a number of situations which may give rise to a cause of action for contribution. A contribution action may arise when a plaintiff settles with and releases a tortfeasor and at the same time releases a co-tortfeasor even though he did not settle with the latter. Under this scenario, the settling tortfeasor may bring a subsequent contribution action against the non-settling tortfeasor for that portion of the settlement the settling tortfeasor paid in excess of his pro rata share. Section 768.31(2)(d).

Another scenario under which a contribution action arises occurs when the plaintiff brings an action solely against one tortfeasor and obtains a judgment against that tortfeasor. Under this scenario, the tortfeasor may bring a subsequent contribution action against any other non-party tortfeasor for the amount of any judgment the initial tortfeasor paid in excess of his pro rata share of liability. Section 768.31(4)(a).

A third scenario which gives rise to a contribution action occurs when one tortfeasor settles with the plaintiff before trial, but a co-tortfeasor does not. If judgment is entered against the non-settling co-tortfeasor, he may pursue a contribution action against the

settling tortfeasor if he can show that the settlement between the plaintiff and the settling tortfeasor was not made in good faith. Section 768.31(5).

Each of these three scenarios represents an example of when a claim for contribution brought under Section 768.31 may be brought subsequent to the original suit by the plaintiff. The Fourth District's Opinion in the case *sub judice* was apparently referring to each of these scenarios since its final conclusion stated:

> Because 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 (emphasis added).

Nevertheless, DR. SHURE characterizes a contribution action brought under Section 768.31 as a two-step process. He argues that the first step which must be determined is whether the settlement was made in good faith. DR. SHURE's Supplemental Brief at page 2. This he refers to as the "threshold matter". Id. He then claims that if there was an absence of collusive conduct, the settlement is presumptively in good faith and as such acts as a complete bar to the contribution action. Id. If the settlement, however, was not made in good faith, he argues, the second step of the process is triggered; the determination of pro rata or proportionate shares of liability among the tortfeasors. Id. It is this second step which he refers to as the "contribution" case, and it is this second step

he even acknowledges has traditionally been more properly submitted to a jury. DR. SHURE's Supplemental Brief at 4, 12 and 21.

DR. SHURE has limited his interpretation of the Uniform Contribution Among Joint Tortfeasors Act to Section 768.31(5)[1]. As discussed above, there are other circumstances which give rise to a contribution action under the Act. This was recognized by the Fourth District as is apparent from its holding quoted above. When a contribution action is brought pursuant to these other scenarios, the issue of "good faith" has no part in the process. It is only under the latter scenario, and that which DR. SHURE specifically addresses, when the determination of "good faith" becomes an issue. The court did not make any specific references in its final analysis to the specific issue of "good faith" determination.

This Court has asked both ST. PAUL and DR. SHURE to file Supplemental Briefs on the issue of "whether there is a right to a jury trial in a contribution action brought under Section 768.31...." ST. PAUL has thoroughly briefed this issue in its Initial Supplemental Brief. Although there are sections of DR. SHURE's Reply Brief which need to be addressed with regard to that issue, ST. PAUL will attempt to avoid repeating what it has already addressed.

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[1]ST. PAUL continuously objected to DR. SHURE's request to the trial court to bifurcate the "good faith" and "pro rata share" determinations. DR. SHURE argued that bifurcation of the issues would drastically reduce the length of the trial. It is incomprehensible how he can now suggest to this Court that if it were to reverse the decision of the trial court and the Fourth District, the court would be burdened with "another trial to determine the relative degrees of fault" as between DR. SHURE and DR. SCHOENWALD. DR. SHURE's Supplemental Brief at 4.

II. THE FLORIDA CASE LAW CITED BY THE ST. PAUL SUPPORTS THE ARGUMENT THAT CONTRIBUTION ACTIONS UNDER SECTION 768.31 MAY BE DECIDED BY A JURY.

DR. SHURE argues that ST. PAUL's reliance upon Fletcher v. Anderson, 616 So.2d 1201 (Fla. 2d DCA 1993) as dispositive of the issues is misplaced because Fletcher was not a good faith case. DR. SHURE's Supplemental Brief at page 5. As expected, ST. PAUL disagrees.

Although DR. SHURE correctly points out that the Fourth District in the case *sub judice* stated that "[t]he issue of good faith here was for the court to decide, not a jury", this statement was made at the outset of the Fourth District's Opinion, and the analysis which followed did not address this "conclusion". St. Paul Fire and Marine Insurance Company v. Shure, 647 So.2d 877 (Fla. 4th DCA 1994). In fact, as is fully set out above, the court's final conclusion held that "a claim for contribution brought subsequent to the original suit by the plaintiff should be decided by the court, not a jury." Id. at 880 (emphasis added). The court did not, in its analysis, focus on whether the determination of good faith should be made by a court or a jury. Rather, the analysis and resulting conclusion focused on the equitable nature of contribution actions brought under Section 768.31. Id. at 879-880.

It is interesting to note that the Fourth District reprimands ST. PAUL for not citing "[o]ne contribution case to support its argument." [2] Id. at 879. With all due respect, the Fourth District does not cite one case to support the argument that the issue of good faith

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[2]Whether the case should have been decided by the Court or a jury was not even an issue on appeal.

should be decided by a court and not a jury. Rather, the Fourth District relied on cases that discussed the equitable nature of contribution and on that basis, concluded that any claim for contribution brought subsequent to the original suit should be heard by the court and not a jury. Those cases that were cited by the Fourth District were thoroughly discussed and analyzed in ST. PAUL's Initial Supplemental Brief and will not be repeated here. Based on the reasoning behind the Fourth District's holding, ST. PAUL would contend that Fletcher does in fact lend compelling support to why claims for contribution brought under section 768.31 should be heard by a jury.

DR. SHURE then claims that ST. PAUL's reliance upon this Court's language in Meckler v. Weiss, 80 So.2d 608 (Fla. 1955) as supportive of its position that a jury trial is mandated in all possible phases of a contribution action is also misplaced. First, ST. PAUL has never suggested that a jury trial is mandated in all possible phases of a contribution action. ST. PAUL simply argues that a jury trial is appropriate in a contribution action, and has clearly supported its argument with case law and public policy. Second, although neither Meckler or Fletcher are concerned with whether a court or a jury should determine whether a settlement was made in good faith, they do support the proposition that actions seeking "equitable remedies" may be submitted to a jury.

DR. SHURE further argues that ST. PAUL's reliance upon Meckler is inapposite because not only is there no mention of a settlement or discussion of what constitutes good faith, but its main focus is on proportionate shares of liability as between co-obligors. DR. SHURE's Supplemental Brief at 13. ST. PAUL's reliance upon Meckler, and the

numerous other cases cited in its Initial Supplemental Brief, is no different than the Fourth District's reliance on Lopez v. Lopez, 90 So.2d 456 (Fla. 1956).

Lopez dealt with a surviving spouse's entitlement to contribution or exoneration from the estate of her deceased spouse as to amounts due under a Purchase Money Mortgage. There is no discussion of good faith or of the Florida Statutes, or of the UCATA provisions on good faith in that opinion. Lopez was cited by the Fourth District to support its proposition and resultant conclusion that contribution is an equitable remedy and should therefore be decided by the court. St. Paul Fire and Marine Insurance Company, 647 So.2d at 879. As discussed in ST. PAUL's Initial Supplemental Brief, the rationale behind Lopez has been indirectly questioned by subsequent case law. ST. PAUL's Supplemental Brief at 14-17.

ST. PAUL contends that a jury trial in a contribution action is even more appropriate when the case is tried before a jury without objection from the opposing side. That is exactly the case that is before this Court today. Regardless of what "phase" as DR. SHURE would put it, is tried before a jury, DR. SHURE acquiesced to such a trial, never objected to such a trial, and did not appeal the fact that a three-week jury trial was held. The first time DR. SHURE raised the issues he is now presenting to this Court was in an oblique fashion in his Answer Brief to the Fourth District Court of Appeal of Florida.

He has no standing to raise this issue at this time in the proceedings. Sundale Associates, Ltd. v. Southeast Bank, N.A., 471 So.2d 100, 102 (Fla. 3d DCA 1985).

III. THE TRIAL COURT DID NOT ERR WHEN IT INSTRUCTED THE JURY ON THE "REASONABLE RANGE" STANDARD AND SUBMITTED THE CASE TO THE JURY.

At the request of this Court, ST. PAUL, in its Initial Supplemental Brief, thoroughly addressed the issue this Court asked to be further briefed: whether a contribution action under Section 768.31, Florida Statutes, should be decided by a judge or a jury. DR. SHURE's Supplemental Answer Brief has subtly avoided that question. Nevertheless, DR. SHURE does address issues in his Supplemental Answer Brief to which ST. PAUL feels compelled to respond.[3]

DR. SHURE dedicates an entire section in his Supplemental Brief to the discussion of what standard should be applied when deciding whether a settlement has been entered into in good faith and whether that good faith determination should be made by the court or a jury. As DR. SHURE points out, three standards have generally been recognized throughout the country. The first standard is known as the "reasonable range" test. This test was adopted by California in the case of Tech-Bilt, Inc. v. Woodward-Clyde & Associates, 698 P.2d 159 (Cal. 1985). The second standard has often been referred to as the "totality of the circumstances" test. This standard has been adopted by Ohio. See, Mahathiraj v. Columbia Gas of Ohio, Inc., 617 N.E.2d 737 (Ohio App.Ct. 1992). The third standard is often referred to as the "collusive conduct" test which has been adopted by

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[3]ST. PAUL adamantly contends that these issues are not properly before the Court because they were not preserved at the trial level, they were not noticed for appeal, nor did this Court ask to be briefed on these issues.

Colorado. See, Copper Mountain, Inc. v. Poma of America, Inc., 890 P.2d 100 (Colo. 1995).

In the case *sub judice*, the trial court accepted the "reasonable range" test as the standard to be used and instructed the jury accordingly. This was the standard agreed upon by both ST. PAUL and DR. SHURE. In fact, during the Charge Conference, DR. SHURE requested a portion of the Jury Instruction come from language taken directly from the Tech-Bilt case.[4] (R. 1325). The instruction given to the jury was as follows:

> 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 showing that a settling defendant paid less than his theoretical proportionate or fair share because such a rule would unduly discourage settlements. 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.
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> 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

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[4]It is interesting to note that DR. SHURE, in his Initial Answer Brief to this Court, refers to the Tech-Bilt case as "[t]he most heavily relied upon contribution case in the nation." DR. SHURE's Answer Brief at 39. However, in his Supplemental Brief to this Court, he now argues that the standard set forth in Tech-Bilt is not the proper standard to be followed due to its "potentially negative impact on the policy encouraging settlement." DR. SHURE's Supplemental Brief at 7, quoting Copper Mountain v. Poma of America, 890 P.2d 100, 105 (Colo. 1995).

> certainty of a settling party's liability, the risk 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 he 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 interests of 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.

(R. 1523 - 1526).

This was the instruction that set forth the standard which the jury applied in this case. DR. SHURE did not object to the use of this standard, and, in fact, proposed this standard to the trial court. DR. SHURE first raised an objection to the standard in this Court, after the Fourth District rendered its Opinion in the case *sub judice* and apparently opted to retroactively impose the collusive conduct test.

At the trial level, ST. PAUL presented evidence which met the reasonable range standard, with which the jury was instructed. The collusive conduct standard was never an issue. ST. PAUL was under no obligation to present evidence to meet a standard which was not applied at trial.

DR. SHURE next argues that the determination of good faith is one for the court to make. For that proposition, he cites to a line of appellate cases, as well as comments by the drafters of the Uniform Contribution Among Joint Tortfeasors Act. DR. SHURE's Supplemental Brief at page 6.

As DR. SHURE states, "[m]uch of the Ohio appellate opinion" in Mahathiraj v. Columbia Gas of Ohio, Inc., 617 NE 2d, 737 (Ohio Ct. App. 1992), focuses on what standards a court should apply when faced with a claim that a settlement was not made in good faith. It does not focus on why the court and not a jury should make that determination. That is the issue DR. SHURE has presented to this Court. Why, not how. The question is, should we allow the court to make that determination, or the jury. The question is not what standard should be applied, but who should apply that standard.[5]

DR. SHURE then cites City of Tucson v. Superior Court, 798 P.2d 374 (Arizona 1990) to support why a court should make that determination and not a jury. However, as DR. SHURE correctly pointed out, Arizona has a codified rule that requires the trial court to make a formal determination of whether a settlement is made in good faith. Florida has not codified any such rule. If the legislature believes that public policy dictates that a court

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[5]Addressing the issue of who should apply the "standard" should in no way be interpreted to mean that ST. PAUL believes this issue is properly before this Court on appeal.

should determine whether a settlement was entered into in good faith, the legislature should take the initiative and enact such a rule. However, the Florida Legislature has not enacted such a rule as of this date.

ST. PAUL does not dispute the fact that the Uniform Contribution Among Tortfeasors Act was enacted in order to promote settlements. However, simply because the Act is helpful in promoting settlements, does not automatically dictate that what has traditionally been within the province of the jury should be removed from the jury in order to promote such settlements. DR. SHURE argues that this Court should adopt either the "collusive conduct" test or the "totality of circumstances" test in order to determine whether a settlement was entered into in good faith. DR. SHURE's Supplemental Brief at 22. Regardless of which test, if either, this Court would adopt in determining whether a settlement was entered into in good faith, it does not automatically follow that the test is to be applied by the court and not a jury.

The essence of the three standards cited above which have been applied by other jurisdictions in determining whether a settlement has occurred in good faith, are by their own terms, questions of fact. Questions of fact are to be submitted to a jury. Therefore, ST. PAUL contends that the determination of good faith can be and should be submitted to a jury and not decided by a judge. Nonetheless, even if this Court should agree with DR. SHURE and hold that good faith should be decided by the court and not a jury, such a ruling should not affect this case, not only because such a rule should be prospective in application, but more importantly, because having the issue heard by a jury was never objected to by DR. SHURE, nor was it timely raised on appeal.

DR. SHURE next discusses the cases cited by the Fourth District's Opinion in the case *sub judice* to support its proposition that contribution cases should be heard by the court and not a jury. However, the Fourth District did not rely upon these cases now relied upon by DR. SHURE as rationale for the proposition that contribution cases or the issue of good faith should be heard by the court and not a jury. These cases cited by the Fourth District and DR. SHURE were cited in the Fourth District's Opinion with regard to the second issue in the case *sub judice* – "[w]hether the evidence presented by ST. PAUL was sufficient to create an issue of fact as to lack of good faith." This issue was decided after the Fourth District determined that, since contribution was an equitable remedy, it should be decided by a court and not a jury.

If our legislature intended for contribution actions (or as DR. SHURE approaches it, the threshold matter of good faith) to be decided by a court, the legislature could have enacted a law such as that found in California's statute or Arizona's statute, that requires the trial court to make a determination of whether a settlement was in good faith. See, Tech-Bilt; See also, City of Tucson. If the drafters of the Uniform Contribution Among Tortfeasors Act intended for the court to decide, without exception, the issue of good faith, such a provision would have been adopted in the Act. However, there is no such provision in the Act. If such a provision was intended to be part of the Act it would not have been necessary for states such as California and Arizona to modify their adoption of the Act to include a specific provision for a court determination of good faith/bad faith.

CONCLUSION

It is inappropriate for DR. SHURE to argue for the first time before this Court (or the Fourth District Court of Appeal for that matter), that an inappropriate standard was given to the jury with regard to good faith settlements. The reasonable range standard was requested by DR. SHURE and submitted to the court in his proposed Jury Instructions. It would be a grave injustice to ST. PAUL if this Court were to take the Jury Verdict away from ST. PAUL based upon a standard they would at this time decide to adopt as the future law of Florida. Such a ruling would simply be wrong.

Regardless of what standard should be applied, it is also wrong for DR. SHURE to argue for the first time on appeal that the issue of good faith should be determined by the court and not a jury. DR. SHURE never objected to a jury hearing the issue below, nor did he even attempt to cross-appeal that issue before the Fourth District. The first time he raised that issue was in his Answer Brief to the Fourth District. By failing to object at the trial level, he waived his right to do so on appeal.

Finally, although a claim for contribution under Section 768.31 may be grounded on "principles of equity", for the reasons stated above and in ST. PAUL's Initial Supplemental Brief, such claims are properly decided by a jury.

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/Respondents, 4000 Hollywood Blvd., Suite 620 North, Hollywood, FL 33021 this 17th day of November, 1995.

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