

IN THE SUPREME COURT OF FLORIDA

JOHN M. GOUTY,

Petitioner/Plaintiff,

vs. CASE NO.: SC00-1853  
Lower Tribunal No: 1D99-1337

J. ALAN SCHNEPEL,

Respondent/Defendant.

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**AMENDED CERTIFICATE OF SERVICE AND CERTIFICATE OF FONT**

Harris Brown  
Florida Bar No.: 242535

BROWN, OBRINGER, BEARDSLEY  
& DECANDIO, P.A.  
12 East Bay Street  
Jacksonville, FL 32202  
(904)354-0624  
Attorneys for Respondent  
Defendant

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**PRELIMINARY STATEMENT**

In this Brief, Respondent J. Alan Schnepel, Defendant below, will generally be referred to as "Schnepel" or Respondent. Former defendant, Glock, Inc., will be referred to as "Glock". Petitioner John M. Gouty, Plaintiff below, will generally be referred to as "Gouty" or Petitioner. References to the Record on Appeal will be by the symbol "R: ", followed by the volume number and page.

All emphasis herein is supplied unless otherwise indicated.

**STATEMENT OF THE CASE AND FACTS**

Respondent generally agrees with the Statement of the Case and Facts submitted by Petitioner, however, Petitioner submits the following statement so that all issues may be fully set forth to the court.

Gouty sued Schnepel and Glock alleging liability for negligence in causing him injury. The complaint alleged that the gun and case manufactured by Glock were defective and that the defect was a proximate cause of the accident which resulted in injury to Gouty. The complaint also alleged that Schnepel was negligent in handling

the gun and case. (R1: 01-03) Prior to trial, Glock settled with Gouty for \$137,500.00. Gouty executed a release in favor of Glock as a result of the settlement. (R2: 258-261).

Subsequent to the Release being executed, but prior to trial, Schnepel filed a Motion for Clarification of Trial Issues requesting that the Court rule that Gouty was estopped from denying that Glock was at fault in causing Gouty's injuries. (R1: 142-143) Schnepel admitted liability in the pretrial stipulation. Accordingly, Schnepel contended that the jury should determine the percentage of negligence of Schnepel and Glock, not whether Glock was liable at all. The Court ruled to the contrary, holding that Gouty could contend that Glock was not liable despite Gouty's allegation of Glock's liability in the Complaint, receipt of \$137,500.00 in settlement from Glock, and execution of a release in favor of Glock.

Gouty proceeded to trial against Schnepel. Both Schnepel and Glock, pursuant to Section 768.81, Florida Statutes, were placed on the verdict form. (R1: 179-180) The jury found Schnepel solely liable and assessed damages in the total amount of \$250,000.00. (R1: 179-180) Of the \$250,000.00, economic damages were assessed in the amount of \$125,000.00 and non-economic damages in the amount of \$125,000.00. (R1: 179-180)

Post-trial, Schnepel filed a Motion for Remittitur (R: 192-193), Motion for Set-Off (R1: 186-189), and Motion for New Trial (R1: 190-191), arguing, among other things, that he should be entitled to set-



off that portion of the amounts paid to Gouty by Glock which represented the percentage of economic damages (50%) found by the jury pursuant to Wells v. Tallahassee Memorial Regional Medical Center, Inc, 659 So.2d 249 (Fla. 1995). The Court denied Gouty's motions. (R1: 199-200) An appeal to the First District Court of Appeals followed. (R: 265-271).

The First District Court of Appeals reversed as to the set-off issue and certified the following question:

Where the Plaintiff has delivered a written release or covenant not to sue to a settling defendant allegedly jointly and severally liable for economic damages, should the settlement proceeds apportionable to economic damages be set off against any award for economic damages even if the settling defendant is not found liable.

### SUMMARY OF THE ARGUMENT

The decision of the First District Court Of Appeal was correct and should be affirmed.

The First District Court of Appeal correctly interpreted Sections 46.015 (2) and 768.041(2), Florida Statutes, and the Supreme Court's ruling in Wells v. Tallahassee Memorial Medical Center, Inc., 659 So.2d 249 (Fla. 1995), in holding that a non-settling defendant is entitled to a set-off from judgment for economic damages paid by a settling co-defendant to obtain a release. The appellate court followed this Court's holding in Wells in ruling that Schnepel is entitled to a set-off for that portion of the jury's verdict which constituted economic damages for which both Schnepel and Glock were sued. Wells reaffirmed the applicability of the set-off statutes, Sections 46.015, 768.041, 768.31, Florida Statutes, as to the set-off for economic damages. The settling and non-settling defendants remain jointly liable for economic damages. The jury verdict determines the percentage of economic and non-economic damages and that percentage is applied to the amount paid by the settling co-defendant to determine the applicable set-off for economic damages. The set-off for economic damages is available to the non-settling defendant, regardless of his percentage of liability.

However, the First District Court of Appeal erred in declining to address the merits of Schnepel's argument that Gouty was judicially estopped from contending at trial that Glock was not negligent in causing Gouty's injury. The record on appeal was fully adequate to reach the legal issue of judicial estoppel. The trial

court's pre-trial order was clear and unequivocal in ruling that estoppel was not applicable. In that the estoppel issue was not tried, there was no mechanism for Schnepel to have preserved that issue at trial. Gouty pled that Glock was liable in its manufacture and design of a defective gun and case which combined with the negligence of Defendant, Schnepel, in causing injury to Gouty. Based on these allegations, Gouty settled with Glock for \$137,500.00 and provided a release to Glock. Having clearly benefited from his prior position, specifically that Glock was liable, the trial court should not have allowed Gouty to assert a contrary position at the trial of this case to potentially obtain a windfall double recovery. Schnepel admitted liability. Accordingly, since the liability of Schnepel was not at issue and Gouty should have been estopped from denying that Glock was liable, the only issue which should have been presented to the jury was the respective percentage of liability of Schnepel and Glock. The trial court erred in allowing the jury to determine the liability of Glock, rather than merely assessing the relative percentage of liability of Glock and Schnepel. The District Court erred in failing to consider that issue and, therefore, erred in affirming the trial court's ruling as to estoppel.

#### **ARGUMENT**

- I. THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE BECAUSE THE SET-OFF STATUTES ARE APPLICABLE TO ECONOMIC DAMAGES REGARDLESS OF WHETHER A SETTLING DEFENDANT IS FOUND LIABLE AT TRIAL.**
  - A. THE SET-OFF STATUTES ARE NOT RESTRICTED TO CASES WHERE JOINT AND SEVERAL LIABILITY IS DETERMINED AT TRIAL AS TO A SETTLING DEFENDANT.**

In this case, the First District Court of Appeal correctly interpreted the set-off statutes to apply to settlements by co-defendants alleged to be jointly liable for economic damages, even if

a settling co-defendant is not found liable at trial. Petitioners incorrectly attempt to shift the Court's focus away from the clear statutory language of the set-off statutes, contrary to this Court's holding in Wells.

The First District Court correctly recognized that the set-off statutes are not impaired by the Tort Reform Act. As this Court recognized in Wells v. Tallahassee Memorial Regional Medical Center, 659 So.2d 249 (Fla. 1995), the set-off statutes are applicable to economic damages recovered in negligence suits.

This Court, in Wells, begins its analysis by noting the continuing applicability of Sections 46.015, 768.041, and 768.31, Florida Statutes. Wells holds that these set-off statutes remain applicable as to economic damages and states the following:

The set-off provisions, which were enacted before Section 768.81, presuppose the existence of multiple defendants jointly liable for the same damages. Consequently, the set-off provisions do not apply to non-economic damages for which defendants are only severally liable...Of course, the set-off statutes do apply to economic damages for which parties continue to be subject to joint and several liability.

Wells, at 249.

The Court then addressed how the economic damage portions of a payment made by a settling defendant should apply as a set-off against the non-settling defendant. This Court rejected the contention that the settlement agreement between the settling defendant and plaintiff should govern the apportionment of economic and non-economic damages. The Court stated that the apportionment of economic and non-economic damages should be resolved by the jury's

determination in the suit against the non-settling defendant. Wells held as follows:

A fairer solution is to have the allocation based upon the jury verdict. Thus, we hold the settlement proceeds should be divided between economic and non-economic damages in the same proportion as the jury's award.

Id. at 254.

Petitioner contends in its brief that the clear language of Section 768.81(3) and the holding in Wells should be disregarded in the present case because the jury found no liability as to Glock in the trial against Schnepel. Petitioner argues that Glock, having paid \$137,500.00 based on a pleading in which Plaintiff claimed that Glock was negligent, which negligence concurred with that of Schnepel, is not a joint tortfeasor.

Respondent respectively submits that Petitioner's citation and description of portions of the Wells decision are misleading and incorrect. At page 10 of Petitioner's Initial Brief, Petitioner recites that portion of the opinion in which this Court stated that the set-off provisions "presuppose the existence of multiple defendants jointly liable for the same damages." However, that section of the opinion actually discusses the disposition of non-economic damages. The entire quote is as follows:

"Under Section 768.81(3), each defendant is solely responsible for his or her share of non-economic damages. The set-off provisions which were enacted before Section 768.81, presuppose the existence of multiple defendants jointly liable for the same damages. Consequently, the set-off provisions do not apply to non-economic damages for which defendants are only severally liable." 659 So.2d at 252-253.

On the same page of that opinion, after a discussion of the set-off statutes, the Supreme Court unequivocally holds as follows:

"Of course, the set-off statutes do apply to economic damages for which parties continue to be subject to joint and several liability."

Accordingly, the portion of the Wells opinion cited by Petitioner merely discusses the distinction between economic and non-economic damages after the enactment of Section 768.81, Florida Statutes. That portion of the Wells decision, read in context, shows that the Court is contrasting economic damages, for which the parties remain jointly liable, with non-economic damages for which the parties are not jointly liable.

Petitioner also quotes a portion of the concurring opinion of Justice Anstead at page 13 of Petitioner's Initial Brief. Again, read in context, Justice Anstead's concurring opinion expresses concern over the difficulty of the Court in reconciling Section 768.81(3) with the preexisting set-off statutes. Justice Anstead suggests that the legislature could clarify this issue. Obviously, Justice Anstead's comments in the concurring opinion do not constitute a holding in the Wells case. See Greene v. Massey, 384 So.2d 24 (Fla. 1980); Dozier v. Wild, 659 So.2d 1103 (Fla. 4<sup>th</sup> DCA 1995). As explained above, the majority decision in Wells held that the set-off statutes remain applicable to economic damages and reconciled the set-off statutes with Section 768.81(3), Florida Statutes by holding that the set-off statutes were not applicable to non-economic damages for which the parties are not jointly liable.

In summary, the holding in Wells is clear. The set-off statutes remain applicable to economic damages. Petitioner's inaccurate quotation and interpretation of portions of the Wells decision demonstrates Petitioner's futile attempt to avoid the clear holding of this Court's decision.

Petitioner's actual argument is that the set-off statutes do not apply in the absence of a determination of joint liability at trial. Petitioner impliedly contends that the enactment of Section 768.81, the comparative fault statute, effectively repealed the set-off statutes. This contention clearly is unfounded. It is well-settled in Florida that courts disfavor construing a statute as repealed by implication. See, e.g., Woodgate Development Corp. v. Hamilton

Investment Trust, 351 So.2d 14 (Fla. 1977); Mann v. Goodyear Tire and Rubber Co., 300 So.2d 666 (Fla. 1974). Section 768.81(3), Florida Statutes, governs apportionment of fault as follows:

(3) Apportionment of damages -- In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.

Section 768.81(3), by its express terms, does not require a finding of joint liability to apply a set-off for economic damages. Instead, the statute clearly states that set-off for economic damages shall be applied to a defendant whose percentage of liability exceeds the claimant "on the basis of joint and several liability." Accordingly, (1) the nature of the damages (economic) and (2) comparative liability of plaintiff and defendant trigger the applicability of joint and several liability; not a finding of joint liability between the settling and non-settling defendants.

By way of explanation, Petitioner seeks to rewrite §768.81(3) as follows:

(3) Apportionment of damages -- In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint

and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability, if that party is determined to be jointly and severally liable with some other party.

Obviously, the additional condition of a finding of joint and several liability was not contemplated by the legislature in enacting §768.81(3). Instead, the legislature clearly asserted that if a defendant is found to have a higher percentage of fault than a claimant, economic damages will necessarily be determined "on the basis of the doctrine of joint and several liability."

The First District Court correctly rejected the argument that §768.81(3) expressly or impliedly repealed the set-off statutes. The set-off statutes are effective as to all settlements. In pertinent part, Sections 46.015, 768.041, and 768.31 [hereafter referred to as the "set-off statutes"], state the following:

**46.015. Release of parties**

(1) A written covenant not to sue or release of a person who is or may be jointly and severally liable with other persons for a claim shall not release or discharge the liability for the balance of such claim.



(2) At trial, if any person shows the court that the plaintiff, or his or her legal representative, has delivered a written release or covenant not to sue to any person in partial satisfaction of the damages sued for, the court shall set-off this amount from the amount of any judgment to which the plaintiff would be otherwise entitled at the time of rendering judgment.

**768.041 Release or covenant not to sue**

(1) A release or covenant not to sue as to one (1) tortfeasor for property damage to, personal injury of, or the wrongful death of any person shall not operate to release or discharge the liability of any other tortfeasor who may be liable for the same tort or death.

(2) At trial, if any defendant shows the court that the plaintiff, or any person lawfully on her or his behalf, has delivered a release or covenant not to sue to any person, firm, or corporation in partial satisfaction of the damages sued for, the court shall set-off this amount of any judgment to which the plaintiff would be otherwise entitled at the time of rendering judgment and enter judgment accordingly.

(3) The fact of such release or covenant not to sue, or that any defendant has been dismissed by order of the court shall not be made known to the jury.

**768.31 Contribution among tortfeasors**

(1) Short title.--This act shall be cited as the "Uniform Contribution Among Tortfeasors Act."

.....

(5) Release or covenant not to sue.--When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,

(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

By their terms, these set-off statutes apply when one of two or more defendants settle with a plaintiff and obtain a release or satisfaction of the damages sued upon. That is the exact situation which exists in this case, and the set-off statutes govern the settlement between Glock and Gouty.

Prior to the Tort Reform Act, Florida cases uniformly held that all amounts paid by a settling party should be set-off against any amount assessed against a remaining defendant. This was true because the settling and non-settling parties were jointly and severally liable for damages recovered by the plaintiff, even though the liability of the settling defendant had not been judicially resolved, but had been concluded through settlement and execution of a release. City of Jacksonville v. Outlaw, 538 So.2d 1360 (Fla. 1st DCA 1989); and Lauth v. Olsten Home Health Care, Inc., 678 So.2d 447 (Fla. 2d DCA 1996).

The set-off statutes were held to provide a set-off for the remaining non-settling defendant, regardless of the merit of the liability claim against the settling defendant. The existence of a release is conclusive as to the applicability of a set-off for damages for which the settling and non-settling parties could have been jointly and severally liable.

For example, in Outlaw, the settling co-defendant was the adjoining property owner to a damaged sidewalk. The plaintiff was injured while walking on the sidewalk. Although the Court noted that an adjoining landowner is not generally liable for the condition of a sidewalk, the Court noted that it was possible that the property

owner could be liable if he "damaged the sidewalk or committed other acts that rendered him jointly liable to the plaintiff." Outlaw, 538 So.2d at 1361. This Court held that the existence of the release and settlement was conclusive as to the liability of the settling defendant and applicability of the set-off. In Lauth, a full set-off was applied as to the amount paid by a settling co-defendant, even though the jury verdict found no liability as to the settling co-defendant. Accordingly, Lauth is directly analogous to the present case, confirming that the liability of a settling co-defendant is conclusively determined by the settlement and release as to damages for which a settling and non-settling defendants are jointly liable.

In Department of Transportation v. Webb, 409 So.2d 1061 (Fla. 1st DCA 1991), this Court held that the applicability of a set-off for settling co-defendants was distinct from the jury's determination of the comparative negligence of the parties. In Centex-Rooney Construction Co., Inc. v. Martin County, 706 So.2d 20 (Fla. 4th DCA 1997), a negligent construction case, the Court applied a full set-off to the construction manager defendant for amounts paid by the settling co-defendants, architect and masonry construction company, prior to trial. In this post-Wells case, a full set-off was allowed pursuant to the set-off statutes, without regard to the relative liability of the settling and non-settling defendants for the economic damages which were the subject of the construction claim for which all defendants were jointly liable.

A finding of liability, rather than a settlement, as to the settling defendant is not required. All three statutes contain express language clearly stating that the existence of the release triggers the effectiveness of the statutes providing a set-off.

Section 46.015(2) provides for a set-off "if any person shows the Court that the Plaintiff, or his or her legal representative has delivered a written release." Section 768.041(2) provides that a set-off occurs if "at trial...any defendant shows the Plaintiff, or any person lawfully on her or his behalf has delivered a release." Section 768.31(5) provides that a set-off occurs "when a release or covenant not to sue or not to enforce judgment is given." The Outlaw, Lauth, Webb, and Centex-Rooney decisions, reached before and after the enactment of Section 768.81 and the holding in Wells, are cited to demonstrate that the set-off statutes have been consistently interpreted to provide for a set-off based upon a settlement and release, without a judicial determination of fault.

Petitioner cites Dade County School Board v. Radio Station WOBA, 24 Fla. L. Weekly S71 (Fla. Feb. 4, 1999); McKenzie Tank Lines, Inc. v. Empire Gas Corp., 538 So.2d 482 (Fla. 1<sup>st</sup> DCA 1989); Metropolitan Dade County v. Frederic, 698 So.2d 291 (Fla. 3<sup>rd</sup> DCA 1997), and Devlin v. McMannis, 231 So.2d 194 (Fla. 1970), and Shufflebarger v. Galloway, 668 So.2d 996 (Fla. 3d DCA 1995), in support of his argument that a judicial determination is required to establish that parties are jointly liable. A careful reading of those decisions shows that they do not support the contentions of Petitioner.

Dade County, and McKenzie Tank Lines hold that a party defendant who has made payment to a claimant may be reimbursed fully by a co-defendant who has been found to be the active tortfeasor. Neither of those decisions discuss the applicability of a set-off. Instead, the decisions merely hold that, while contribution was not applicable because the party seeking

reimbursement was not jointly liable with the active tortfeasor, reimbursement was nonetheless applicable under other theories of indemnity or equitable subrogation. However, these decisions do require a finding of joint liability to activate the right to contribution set forth in Section 768.31(2)(a), which explicitly requires that the parties "become jointly or severally liable in tort."

Devlin v. McMannis held that distinct settlements of survivor and estate claims as to a settling defendant should be set-off based upon the differentiated amounts recovered by the survivors and estate in the trial against the non-settling defendant. The court emphasized that the statute "must be interpreted so as to preserve the identity of separate causes of action." Id. at 196. Devlin anticipated Wells in holding that a distinction as to the type of damages recovered as to a settling defendant should be retained in assessing the available set-offs as to the non-settling defendant. Accordingly, Devlin strongly supports Appellee's contentions in this case.

Petitioner also confusingly cites Metropolitan Dade County and Shufflebarger allegedly in support of its position. Neither case addresses the issue presented in this case. Frederic merely interprets Section 768.81(3) to hold that, when a Plaintiff's percentage of liability exceeds that of a non-settling defendant, the non-settling defendant is not jointly and severally liable for economic damages. Obviously, the Frederic case does not touch on the applicability of the set-off statutes to economic damages under the circumstances of the present case. In Shufflebarger, the court held that, on retrial to determine the liability of a settling

defendant, the liability of the non-settling defendant should not be relitigated. In dicta, the Court notes that if the settling defendant is found at fault, the trial court should apportion damages. Obviously, that sentence of the opinion is referring to non-economic damages, the only damages for which apportionment is applicable. The Court then states that "the trial court will then compute the settlement set-off in accordance with the dictates of Wells." Petitioner contends that the use of the word "then" necessarily refers to the prior sentence concerning whether the settling defendant is found at fault. Respondent respectfully submits that it is more reasonable and consistent with Wells to conclude that the use of the term "then" means that the set-off for economic damages provided by Wells should occur at the conclusion of the trial of the settling defendant, regardless of the apportionment of non-economic damages, if any. In any event, the last paragraph of the Shufflebarger decision constitutes speculation as to what may occur upon retrial and is not a holding. Obviously, this dicta in Shufflebarger cannot contradict the clear holding of the Supreme Court in Wells.

Petitioner's Brief then misstates and misquotes the applicable provisions of §46.015 and §768.041 so as to create confusion where none exists. Although the release provisions of Section 768.31(5) are tied to "two or more persons liable in tort for the same injury," the operative sections of Section 46.015 and Section 768.041 do not refer to joint liability. At pages 10-11 of Petitioner's Brief, Petitioner quotes subsection (1) of the respective statutes which state that a release of one party does not release another party "who is or may be jointly and severally

liable" (46.015(1)) or "any other tortfeasor who may be liable for the same tort" (768.041(1)). In both instances, the subsection addressing the effect of a release as to set-off is subsection (2), which does not require joint liability. Section 768.041(2) states as follows:

- (2) At trial, if any Defendant shows the Court that the Plaintiff, or any person lawfully on his or her behalf has delivered a release or covenant not to sue to any person, firm, or corporation, in partial satisfaction of damages sued for, the Court shall set-off this amount from the amount of any judgment to which a Plaintiff would be otherwise entitled at the time of rendering judgment and entering judgment accordingly."

Section 46.015(2), states the following:

- (2) At trial, if any person shows the court that the Plaintiff or his or her legal representative has delivered a written release or covenant not to sue to any person in partial satisfaction of the damages sued for, the Court shall set-off this amount from the amount of any judgment to which the Plaintiff would be otherwise entitled at the time of rendering judgment.

Accordingly, the operative sections of both §768.041 and §46.015 refer to a release which constitutes "partial satisfaction" of the damages assessed against a non-settling defendant. Neither statute, in subsection (2) concerning set-off, refers to joint liability.

In summary, the set-off statutes, in their provisions concerning set-off, contain distinct language. Section 768.31(5) does relate the set-off to "two or more persons liable in tort." Sections 46.015(2) and 768.041(2) do not contain any such language. Dade County School Board, and McKenzie Tank Lines, cited by Petitioner, adhere to the requirement of a finding of joint liability to a party

affirmatively seeking relief for contribution pursuant to the contribution statute. However, those decisions do not negate the set-off provisions of Section 46.015(2) and 768.041(2), the continuing validity of which as to economic damages is clearly set forth in this Court's decision in Wells.

In summary, Petitioner's attempt to circumvent the clear language of the set-off statutes fails for the reasons set forth above. This Court in Wells clearly held that the set-off statutes remain applicable to economic damages for which settling and non-settling defendants are jointly liable. Section 768.041(2) and 46.015(2) do not require joint liability for the application of a set-off, but instead require that the payment made by the settling party be in "partial satisfaction" of the damages and that a release has been delivered. In the present case, Gouty delivered a release to Glock in exchange for \$137,500.00 for the damages sued for against Schnepel. Under these circumstances, Sections 46.015(2) and 768.041(2) are directly applicable to provide a set-off for economic damages.

Wells and subsequent Florida cases following the Wells holding have uniformly allowed a full set-off for that portion of the settling defendant's payment which represented economic damages. In Wells, the jury found the non-settling defendant ninety percent (90%) at fault. Accordingly, the plaintiff was allowed to recover ninety percent (90%) of the non-economic damages from that defendant. However, as to economic damages, a set-off was allowed from the amounts paid by the settling co-defendant based upon the percentage



of economic damages relative to non-economic damages in the jury verdict against the non-settling defendant.

In Metropolitan Dade County v. Fredrick, 698 So.2d 291 (Fla. 3d DCA 1997), the non-settling defendant was found 17.5% at fault, while the plaintiff was found fifty-five percent (55%) at fault. Under these circumstances, pursuant to Section 768.81(3), Florida Statutes, the non-settling defendant was not jointly and severally liable for economic damages because the plaintiff's fault exceeded the percentage of fault attributed to the non-settling defendant. Accordingly, no set-off was applicable for economic damages because the non-settling defendant was not jointly and severally liable. Pursuant to Wells, the set-off was also not applicable as to non-economic damages. The Court allowed the plaintiff in Frederick to recover 17.5% of all damages without any set-off. In the present case, there was no comparative negligence plead or assessed against the plaintiff and, accordingly, the doctrine of joint and several liability was applicable as to the economic damage claim.

In Wiggins v. Braman Cadillac, Inc., 669 So.2d 332 (Fla. 3d. DCA 1996), the non-settling defendant was found to be ten percent (10%) at fault. The percentage of the jury's award allocated to economic damages was 51.87%. Accordingly, the non-settling defendant received a set-off as to economic damages of 51.87% of the amount paid by the non-settling defendants. The non-settling defendant was only liable for 10% of the non-economic damages awarded by the jury.

In Yellow Cab Company of St. Petersburg, Inc. v. Betsey, 696 So.2d 769 (Fla. 2d DCA), the non-settling defendant in a second impact was, in dicta, allowed a set-off for 100% of the settlement by a settling defendant in the first impact because all damages awarded were economic. However, because the case was reversed for a new trial, the Court noted that the set-off should then be based upon the jury's apportionment of economic and non-economic damages in the new trial.

In Olson v. M. Cole Construction, Inc., 681 So. 2d 799 (Fla. 2d DCA 1996) the Court explains that the set-off statutes remain applicable to economic damages "because defendants continue to be liable for these on a joint and several basis." Id. at 800. The Court in Olson reduced the non-economic damages to the percentage of liability of the non-settling defendant. However, as to the economic damages, the Court applied the Wells formula so that the full amount of economic damage paid by the settling co-defendant, based upon the percentage of economic/non-economic damages, was available as a set-off.

Similarly, in Cohen v. Richter, 667 So.2d 899 (Fla. 4th DCA 1996), the Fourth District reconfirmed the Wells holding that "the set-off statutes do not apply to non-economic damages but do apply to economic damages." Cohen, 667 So.2d at 900. Once again, the Court followed the Wells formula, applying a reduction for economic damages paid by the settling co-defendant based upon the jury's assessment of economic/non-economic damages.

This Court always has stressed the importance of interpreting two statutes to give full effect to both to the extent possible. As this Court stated in Palm Harbor Special Fire Control District, 516 So.2d 249 at 250 (Fla. 1987):

The courts' obligation is to adopt an interpretation that harmonizes two related, if conflicting, statutes while giving effect to both, since the legislature is presumed to pass subsequent enactments with full awareness of all prior enactments and an intent that they remain in force.

In this case, Section 768.81, the comparative fault statute, and Sections 46.015 and 768.041, the set-off statutes, can be read to give full effect to both. Section 768.81 provides that the court shall enter judgment against each party liable on the basis of such party's percentage of fault. However, an exception exists for economic damage if the defendant's percentage of liability equals or exceeds that of the claimant.<sup>1</sup> In that circumstance, economic damages are automatically assessed "on the basis of joint and several liability," §768.81(3). The set-off statutes, §768.041 and §46.015, provide that the court shall set-off the amount given for a release or covenant not to sue from the amount of any judgment to which the plaintiff would be otherwise entitled at the time of rendering judgment. Accordingly, joint liability is retained by §768.81(3) as to economic damages under these circumstances. The set-off statutes do not negate the comparative fault statute, nor does the comparative fault statute override the set-off statutes. The statutes can be read in harmony, as this Court clearly so determined in Wells.

Petitioners urge this Court to hold that enactment of tort reform "impliedly repealed" the set-off statutes. However, this Court repeatedly and rightly has maintained the Constitutional

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<sup>1</sup> In the present case, Schnepel admitted liability and did not contend that the claimant, Gouty, was comparatively negligent.

distinction between its function to interpret and apply the law and the Legislature's function to enact or repeal the law. Accordingly, repeal of a legislative act by implication is highly disfavored. Palm Harbor Special Fire Control District, *supra*, at 250.

In this case, the applicable statutes are clear and unambiguous. This Court in Wells, correctly interpreted §768.81, and the set-off statutes to give full effect to the statutes. Accordingly, as to economic damages, a set-off is applicable as to a non-settling defendant regardless of a finding of joint and several liability as to the settling defendant. Therefore, this Court should answer the certified question "yes" and uphold the decision of the First District Court of Appeal.

**A. THE FIRST DISTRICT COURT CORRECTLY HELD THAT THIS CASE INVOLVES A QUESTION OF STATUTORY CONSTRUCTION. THEREFORE, AUTHORITY FROM OTHER JURISDICTIONS IS NOT RELEVANT. THE CASES CITED BY PETITIONERS ARE DISTINGUISHABLE. AUTHORITIES INTERPRETING COMPARATIVE FAULT STATUTES SIMILAR TO THE FLORIDA STATUTE HAVE RULED CONSISTENTLY WITH THE FIRST DISTRICT IN THIS CASE.**

Petitioner contends that Florida's interpretation of its set-off and comparative fault statutes should be determined by the case law of other states interpreting their distinct comparative fault statutes. Petitioner claims that "each state that has adopted comparative fault . . . has refused to apply a set-off where the settling defendant is determined by the finder of fact to have 0% fault." Amended Initial Brief of Petitioner at P. 19-20. However, a closer reading of the cases relied on to allegedly establish petitioner's contention shows that they are invariably distinguishable and irrelevant. All authorities cited by Petitioner which discuss the set-off issue are addressed and categorized below.

The First District Court began its discussion of this issue by rejecting the contention that Petitioners should receive a double recovery under the circumstances of this case. The First District Court stated:

"We reject any argument implying that justice would be better served if Mr. Gouty received \$387,500.00 (\$137,500.00 plus \$250,000.00) instead of \$318,750.00 (\$137,500.00 plus \$181,250.00) as compensation for an

injury the jury found damaged him in the amount of \$250,000.00".

The Court then cites at length from the decision in Goldsen v. Simpson, 2000 WL 432856 (Ala. Civ. App. April 21, 2000) which recites an argument in support of a double recovery for Plaintiff. The First District Court then states that it need not address the policy arguments discussed in the Goldsen case, because the present case turns on statutory construction. Accordingly, the First District Court did not, in any sense, ratify or prove any of the legal arguments contained in the cited portion of the Goldsen case. Instead, the First District clearly held that, in their view, justice would not be served by allowing for a double recovery.

Interestingly, the Goldsen case was reversed by the Supreme Court of Alabama in Ex Parte Goldsen, 2000 WL 1137370 (Ala. 2000). Consistent with Appellee's arguments, as set forth below, the Supreme Court of Alabama ruled that a refusal to apply a set-off was not appropriate in that Alabama has not yet enacted a pure comparative fault statute. Pursuant to the common law at which the parties remain jointly and severally liable, the Alabama Supreme Court ruled that a set-off was applicable. The court explained as follows:

Alabama has not adopted the doctrine of comparative negligence. ... We disagree with the Court of Civil Appeals; we conclude that the nonsettling defendant is not getting a windfall,

but is simply paying the portion of the damages owed to the Plaintiff that remains after the settlement.

This court has consistently held that compensatory damages are designed to make the plaintiff whole by reimbursing him or her for the loss or harm suffered. ... Furthermore, we have also stated, "It is a universal rule that a plaintiff, although entitled to a full compensation for an injury, is entitled to only one recovery for a single injury caused by two or more tortfeasors." ... In those cases where one tortfeasor settles, we have allowed the nonsettling tortfeasor to have the jury award reduced by the amount of any pro tanto settlement. ... In light of the purpose of compensatory damages in Alabama, we see no reason why this rule should not be extended to settling parties that are determined, after they have been dismissed from the case, to have had no liability. [citations omitted] In re Goldsen, supra

At common law, tortfeasors were jointly and severally liable. Under those circumstances, the majority view throughout the United States was that a set-off was available to a non-settling defendant, regardless of the liability of the settling defendant. Ex Parte Goldsen, 2000 WL1137370 (Ala. 2000); Rosenbaum vs. First American National Bank, 690 S.W. 2d 383, (N.D. 1963); Berg vs. Footer, 673 A.2d 1244, (App. D.C. 1996); Layne vs. United States, 460 F.2d 409, (9<sup>th</sup> Cir. 1972); Duncan vs. Pennington County Housing Authority, 283 N.W. 2d 546, (S.D. 1979); Mullinix vs. Saydel Consolidated School District, 376 N.W. 2d 109, (Iowa App. 1985); See also, Anunti vs. Payente, 268 N.W. 2d 52, (Minn. 1978); and Rambaum vs. Swisher, 435 N.W. 2d 19, (Minn. 1989) which deny set-off based on statutory interpretation of the Minnesota set-off statute.

Some jurisdictions interpreting contribution among joint tortfeasor statutes strictly construe those statutes and require a finding of joint liability in order to allow a set-off to a nonsettling defendant, Nichols vs. M.D. - Continent Pipeline Company, 933 P.2d 272, (Okla. 1996); Rogers vs. Spady, 371 A.2d 285, (N.J. 1976); Kiss vs. Jacob, 650 A.2d 336, (N.J. 1994); Fidel Moltz vs. Peller, 690 N.E. 2d 502, (Ohio 1998).

Some states have adopted pure comparative negligence statutes which abolish joint liability for all damages. In states where pure comparative negligence statutes have been adopted, many courts have ruled that a set-off is either not available to a non-settling defendant or is only available for the proportionate share of



liability of a settling defendant. Since a non-settling defendant is only liable for his percentage of the damages awarded, a full set-off is unnecessary and inapplicable. Glenn vs. Fleming, 732 P.2d 750, (Kan. 1987); Nelson vs. Johnson, 599 N.W. 2d 246, (N.D. 1999); Robbins vs. Giant Eagle Markers, 522 A.2d 1, (Pa. 1987); Roland vs. Bernstein, 828 P.2d 1237, (Ariz. App. 1991); Thomas vs. Solberg, 442 N.W. 2d 73, (Iowa 1989); Stratton vs. Parker, 793 S.W. 2d 817, (Ky. 1990); Maderlie vs. Sondgeroth, 866 P.2d 703, (Wyo. 1993); Varner vs. Perryman, 969 S.W. 2d 410, (Tenn. App. 1997); Wilson vs. Galt, 668 P.2d 1104, (N.M. 1983).

Florida's comparative fault statute does not abolish joint liability for economic damages. The only state, California, with a similar comparative fault statute which retains joint liability for economic damages has held, consistently with the First District, that a set-off remains available for economic damages for which the settling and non-settling defendants remain jointly liable. Because the settling and non-settling defendants retain the detriment of joint liability for economic damages, they are provided the benefit of a set-off for the amounts paid for economic damages by the settling defendant. McComber vs. Wells, 85 Cal. Rptr. 2d 376, (1999);

McComber is directly analogous and indistinguishable from the present case. California's comparative fault statute is as follows:

§1431.2 Several liability for non-economic damages

(a) In any action for personal injury, property damage, or

wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

(b)(1) For purposes of this section, the term "economic damages" means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.

(2) For the purposes of this section the term "non-economic damages" means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.

California's set-off statute states the following: §  
877. Release of one or more joint tortfeasors or co-  
obligors; effect upon liability of others

Where a release, dismissal, with or without  
prejudice, or a  
covenant not to sue or not to enforce judgment is  
given in good faith before verdict or judgment to one  
or more of a number of tortfeasors claimed to be  
liable for the same tort, or to one or more other co-  
obligators mutually subject to contribution rights,  
it shall have the following effect:

(a) It shall not discharge any other such party from  
liability  
unless its terms so provide, but it shall reduce the  
claims against the others in the amount stipulated  
by the release, the dismissal or the covenant, or in  
the amount of the consideration paid for it whichever  
is the greater.

Accordingly, California's statutory scheme is identical to  
Florida. Generally, pursuant to § 877, a set-off is applicable  
when the Plaintiff has released a settling defendant. Further,  
pursuant to § 1431.2, Defendants remain jointly liable for  
economic damages, but are severally liable for non-economic  
damages.

In McComber, the settling defendants were determined to be not liable in the trial against the non-settling defendants. The California court notes that the complaint contended that the negligent conduct of the various defendants acted in combination to cause Plaintiff's injury. The court concluded that a set-off was applicable regardless of the finding of no liability as to the settling defendants, stating " it is irrelevant the jury ultimately found the settling defendants were not negligent".

The California court then adopted the identical method of assessing the amount of the set-off for economic damages as established by this court in the Wells decision. Specifically, the court applied a set-off for the amount received from the settling defendant based upon the "percentage of the economic damages award in relationship to the total award of damages". No set-off was applicable for non-economic damages in that "each defendant is solely responsible for its share of non-economic damages" pursuant to § 1431.2.

In summary, the California court held that the California set-off statute remained applicable for economic damages for which the settling and non-settling defendants remained jointly liable pursuant to California law. The set-off statute applied regardless of a finding of liability of the settling defendants in that the settling and non-settling defendants were jointly liable for economic damages. As to non-economic damages for which the parties are severely liable, no set-off was applicable. In McComber, the California court interpreted an identical statutory scheme under an identical factual situation as the present case. The McComber court ruled entirely consistently with the First District Court of Appeals in this case.

Petitioners attempt to distinguish McComber is to no avail. Petitioner first contends that the California comparative fault statute is distinguishable because it only specifically

abrogates joint liability for non-economic damages and has been interpreted by California courts to retain joint liability for economic damages. §768.81 Florida Statutes does allow for some circumstance in which several liability would apply to economic damages and is, therefore, different than California's statute. However, as to the issue raised by this case, the difference is meaningless. In applying Florida's statute to the circumstances of this case, the parties are jointly liable for economic damages as they would be in all circumstances pursuant to the California statute. The McComber decision and First District Court of Appeals decision in this case both interpret a circumstance in which the settling and non-settling defendants are jointly liable for economic damages. Although under some circumstances, the Florida statute could provide a different result, those hypothetical situations are irrelevant to a determination of the issues presented by this case.

Petitioner next perports to distinguish the California set-off statute in that it allows a set-off when a release has been given to a settling defendant "claimed to be liable for the same tort". As noted at length above in this brief, Florida's set-off statutes, §48.015(2) and §768.041(2), are broader than the California statute in that they provide that a set-off is applicable when a release is given "to any person in partial satisfaction of the damages sued for". Accordingly, the Florida set-off statutes do not even require that the settling defendant receiving a release was "claimed to be liable" and are, therefore, more expansive in scope than the California set-off statute.

**II. THE APPELLATE COURT ERRED IN DECLINING TO RULE THAT GOUTY WAS ESTOPPED TO DENY THE LIABILITY OF SETTLING CO-DEFENDANT, GLOCK.**

As explained above, the trial court denied Schnepel's Motion requesting that Gouty be estopped to contend that Glock was not

liable in its Order Determining Absence of Estoppel. (R.148-149). Accordingly, the trial court erred in submitting the issue of Glock's liability to the jury, rather than merely instructing the jury to apportion the relative liability of Schnepel and Glock.

The District Court erred in not considering the question of judicial estoppel, on the bases that (1) the trial transcript was not included in the appellate record, and (2) Gouty's amended complaint alleged both negligence and strict liability in tort against Glock<sup>2</sup>. However, the record on appeal is fully adequate for the appellate court to resolve this issue. The trial court's Order Determining Absence of Estoppel (R 148-149) unequivocally ruled on this issue, prohibiting application of estoppel at trial.

The First District cited Phillips vs. State, 476 So.2d 194, (Fla 1985) and Applegate vs. Barnett bank of Tallahassee, 377 So.2d 150, (Fla 1979) in support of the proposition that the estoppel issue was not properly preserved for appeal. Respondent respectfully submits that neither of those authorities support the First District's decision. In Applegate, this court held that an appellate court could not review the sufficiency of the evidence to determine whether the trial court's judgment was supported by the evidence if there was not an adequate record of the evidence at trial. The trial court's ruling in the present case concerning estoppel involved the resolution of a legal issue and did not constitute a finding based upon disputed evidence. Accordingly, Applegate is irrelevant

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<sup>2</sup> Respondent does not understand the significance of the First District's comment as to this issue. Both negligence and strict liability state causes of action in tort. The Tort Reform Act, §768.71-768.81, Florida Statutes, is expressly stated in 768.71 to apply "to any action for damages, whether in tort or in contract". Accordingly, with the First District's comment that the claim against Glock was alleged both for negligence and strict liability appears to be irrelevant.

in that a factual record is irrelevant and unnecessary for appellate review of the trial courts legal ruling concerning the estoppel issue. In Phillips, a pretrial ruling was made on a Motion in Limine as to an evidentiary matter. Subsequently, the trial court admitted in evidence those matters which had previously been allowed pursuant to the denial of the Motion in Limine. This court held that it was necessary to object to the admissibility of the objectionable evidence at trial so as to preserve the issue for appellate review. Again, Phillips is irrelevant to the present case in that the trial court's pretrial ruling as to the estoppel issue did not involve the admissibility of evidence. Instead, the ruling as to estoppel was a pure legal ruling which defined the manner in which the issues would be presented to the jury. Respondent had no opportunity to object to any specific item of evidence at trial, concerning the trial court's pretrial ruling as to estoppel.

Interlocutory orders entered as a necessary step in the proceeding are appealable when the final judgment is appealed. Auto Owners Insurance Company vs. Hillsborough County Aviation Authority, 153 So.2d 722, (Fla. 1963); Winkelman vs. Toll, 632 So.2d 130, (Fla. 4<sup>th</sup> DCA 1994); Estate of Dorsey vs. Campbell, 114 So.2d 430, (Fla. 2<sup>nd</sup> DCA 1959); Roberts vs. State, 566 So.2d 848, (Fla. 5<sup>th</sup> DCA 1990). In Auto Owners, this court held that an interlocutory order holding a statute unconstitutional was appealable as part of a summary judgment ultimately entered. In Winkelman, the court explained that a non-appealable order which is merely prefatory to an appealable final order may be reviewed for correctness when the ultimate order is appealed. In Chapman, the court explained that a pretrial order determining the manner in which the trial would be conducted, such as a determination of the burden of proof, was not an appealable interlocutory order. In Roberts, a pretrial ruling on a Motion to Suppress was appealable as part of appellate review of a final judgment resulting from a plea of no contest.

When the pleading of record contain all information necessary to dispose of an appeal, a transcript of the evidentiary portions of the proceedings is redundant and unnecessary. This is obviously true when the ruling being appealed was a matter of law, as opposed to an evidentiary ruling. Miller vs. Balcanoff, 566 So.2d 1340, (Fla. 1<sup>st</sup> DCA 1990); Sugerman vs. Street, 198 So.2d 57, (Fla. 3<sup>rd</sup> DCA 1967); Seal Products vs. Mansfield, 705 So.2d 973, (Fla. 3<sup>rd</sup> DCA 1998).

In the present case, all pleadings necessary for the court's full understanding of both the estoppel and set-off issues were transmitted with the record. Certainly, no useful purpose would be served by burdening the appellate court with an unnecessary trial transcript. This court commended brevity and completeness in Holland vs. State, 10 So.2d 338, (Fla. 1942) as follows:

The record in this case is the shortest that has ever appeared in this court. It contains barely five pages including the clerk's certificate, but it contains everything essential to adjudicate the question raised. It cost less than five dollars and was brought up by stipulation under paragraph 5 of Rule 11. Counsel are to be commended for its brevity and completeness.

In summary, non-final orders are appealable when an appealable final judgment is entered in an action. As noted in the authorities cited above, this principle is clearly applicable when the interlocutory order concerns a legal matter ruling on an issue which ultimately effects the manner in which the case is resolved in the final judgment. In the present case, the trial court's pretrial order concerning estoppel directly effected the manner in which the case was tried in that the jury was allowed to consider whether Glock was liable, rather than merely assessing a relative percentage of liability of Schnepel and Glock. Accordingly, the trial court's pretrial order on estoppel is appealable from the final judgment. The pretrial order did not order on an evidentiary manner and, accordingly, Respondent could not have objected to any specific



introduction of evidence at the trial. Accordingly, an additional objection at trial was not necessary and is not a prerequisite for this court's appellate review of the propriety of the trial court's order determining absence of estoppel.

The doctrine of estoppel precluded Gouty from asserting at trial that Glock was not at fault in that Gouty plead that Glock was liable, settled with Glock for \$137,500.00, and released Glock. The trial court erred when it did not apply estoppel in this case. The Court further erred in submitting to the jury the issue as to whether Glock was liable, rather than the respective percentages of liability of Glock and Schnepel.

The doctrine of estoppel prevents a party from asserting an inconsistent position in judicial proceedings. Palm Beach Co. v. Palm Beach Estates, 148 So. 544, 548 (Fla. 1933); Kaufman v. Lassiter, 616 So.2d 491, 493 (Fla. 4th DCA 1993); Salcedo v. Asociacion Cubana, Inc., 368 So.2d 1337, 1338 (Fla. 3rd DCA 1979); Grauer v. Occidental Life Insurance Co., 363 So.2d 583, 585 (Fla. 1st DCA 1978) United Contractors, Inc. v. United Construction Corp., 187 So.2d 695, 701-702 (Fla. 2nd DCA 1966); Federated Mutual Implement and Hardware Insurance Company v. Griffin, 237 So.2d 38, 42 (Fla. 1st DCA 1970). In other words, a party cannot, in the course of litigation, occupy inconsistent and contradictory positions. Montero v. Compugraphic Corp., 531 So.2d 1034, 1036 (Fla. 3rd DCA 1988).

The doctrine of judicial estoppel is based upon the theory that, where a party alleges facts which he asserts are true, the party initially alleging the facts is estopped to thereafter alter his position. Id. See, Pearson v. Harris, 449 So.2d 339 (Fla. 1st DCA 1984). Whether or not the party alleging the facts as true is

ultimately successful in obtaining a judgment does not alter the application of estoppel against him. Id. at 549; Grauer, 363 So.2d at 585. It also is not necessary to show strict proof of reliance on another's act or statement in order to claim judicial estoppel. Wooten v. Rhodus, 470 So.2d 844, 847 (Fla. 5th DCA 1985).

This rule of estoppel is in keeping with condemnation of the "gotcha school of litigation." Salcedo, 368 So.2d at 1339. As stated by the court in Wooten, 470 So.2d at 847, asserting a position inconsistent with one previously taken in litigation is "the old 'shell game,' played by the craftier upon the less crafty, but it ill-becomes the player nonetheless." The Salcedo court stated the principle as follows:

In earlier times, the rule we apply in this case was said to reflect the feeling that a party may not "mend his hold," Ohio & M.R. Co. v. McCarthy, 96 U.S. 258,268, 24 L.Ed. 693 (1878), or "blow hot and cold at the same time" or "have his cake and eat it too." Federated Mutual Implement & Hardware Co. v. Griffin, *supra*, at 237 So.2d 42; State v. Board of Commissioners of Clinton County, 166 Ind. 162, 76 N.E. 986, 1001 (1906). Today, we might say that the courts will not allow the practice of the "Catch-22" or "gotcha!" school of litigation to succeed. Salcedo, 368 So.2d at 1339.

As noted in Federated Mutual Implement & Hardware Co., 237 So.2d at 42, the essence of the estoppel rule is the integrity of our system of justice.

In Kautzmann v. James, 66 So.2d 36 (Fla. 1953), plaintiff alleged facts to support a cause of action which were determined both by the trial and appellate courts to be legally insufficient. In a subsequent suit, plaintiff changed the factual allegations so as to

attempt to state a claim. The Florida Supreme Court held that the Plaintiff was estopped to change his position by altering the essential allegations of the action and stated:

It must be presumed that when, in his first complaint, the plaintiff alleged an injury as having occurred in a certain manner he alleged the fact truthfully, and he will not be heard in a subsequent suit to allege that his injury occurred in a different manner, and thereby put the defendant to the defense of a second suit bottomed upon an alleged cause of action that was set at rest by a judgment in the first suit...

Id. at 39-40.

In Salcedo v. Asociacion Cubana, Inc., 368 So.2d 1337 (Fla. 3d DCA 1979), a defendant successfully contended that a plaintiff's claim was a medical malpractice case and, therefore, mediation was required. The trial court agreed and the case was submitted to mediation which would have tolled the medical malpractice statute of limitations. After mediation was concluded, plaintiff attempted to sue and defendant inconsistently contended that the claim was not a medical malpractice action and, therefore, the statute of limitations had run while the mediation was pending. The Third District held that the defendant was estopped from taking these inconsistent positions, noting that "the most elementary principles of equity and good conscience" prohibit a party from changing its position in this manner for its benefit. Salcedo at 1338.

In this case, Gouty should not be allowed to profit from asserting inconsistent positions. As will be discussed below, the trial court's allowing him to do so severely prejudiced Schnepel, and

permitted Gouty to make a double recovery to which he is not entitled.

Estoppel is particularly applicable when a party has benefited from his prior position. Lambert v. Nationwide Mutual Fire Insurance Company, 456 So.2d 517 (Fla. 1st DCA 1984); Crowder v. Jacksonville Transportation Authority, 669 So.2d 1101 (Fla. 1st DCA 1996); Safecare Medical Center v. Howard, 670 So.2d 1020 (Fla. 4th DCA 1996).

In Lambert v. Nationwide Mutual Fire Insurance Co., 456 So.2d 517 (Fla. 1st DCA 1984), plaintiff sued three alleged tortfeasors in Federal Court in Alabama for automobile negligence in causing his parents' death. All of the defendants settled with the plaintiff, and the plaintiff's underinsured motorist carrier consented to the settlement. Subsequently, plaintiff filed suit against the underinsured motorist carrier, alleging that only one vehicle was at fault, in order to obtain underinsured motorist coverage. The court held that plaintiff was estopped from asserting inconsistent and contradictory positions with respect to the same matter. Id. at 518. In holding that the plaintiff could not assert inconsistent positions, the Court stated:

We hold in this case that when ... [plaintiff] ... alleged in the Alabama action the existence of three tortfeasors, and upon such allegations successfully secured payment from more parties than he is now claiming are liable, he precluded himself from later taking an inconsistent position in order to seek further recovery from ... [the underinsured motorist carrier].

Id. at 519.

In Crowder v. Jacksonville Transportation Authority, 669 So.2d 1101 (Fla. 1st DCA 1996), a worker's compensation claimant was involved in two accidents. The settlement of the second accident claim was based upon a permanent impairment, resulting from that accident. Subsequently, the claimant attempted inconsistently to assert that she was entitled to wage loss benefits from the initial injury because the second injury was only a temporary exacerbation. The First District held that, when the claimant sought wage loss benefits based upon a permanent injury from the employer and second insurance carrier for the second accident, and then successfully settled that claim for wage loss benefits, she precluded herself from later taking the position that she did not suffer a permanent impairment with regard to that second injury. Id. at 1104-1105.

In Safecare Medical Center v. Howard, 670 So.2d 1020 (Fla. 4th DCA 1996), plaintiff sued Safecare Medical Center and its employee, Howard, for medical negligence, asserting claims against Safecare both for its own independent negligence and vicarious responsibility for Howard's actions as an employee. Howard settled the claim with the plaintiff. In the continuing action against Safecare, Safecare successfully asserted that plaintiff could not claim vicarious liability for Howard's actions against it because of Howard's settlement in the amount of \$150,000 and an executed release pursuant thereto. Subsequently, Safecare settled with plaintiff for \$40,000. Contending that its settlement was based on Howard's actions, Safecare sued Howard for indemnity. In holding that Safecare was

estopped from alleging a contrary position from that previously asserted, the court stated:

Safecare had taken advantage of the \$150,000 Howard paid and the release he obtained to avoid legal responsibility for his conduct. Safecare could only have been found negligent at trial for its own conduct, a result which would have barred an indemnity action against Howard under Houdaille and its progeny. Having elected to settle when the case was in such a posture Safecare is estopped from manipulating the basis of its settlement and from asserting a liability position in this case contrary to the one it had successfully maintained on the first appeal. [citations omitted]

Id. at 1022-1023.

In the present case, Gouty alleged the existence of two tortfeasors, Schnepel and Glock, and upon those allegations successfully secured payment from Glock. As in Lambert, Crowder, and Safecare, Gouty should have been estopped from taking the inconsistent position at trial that Glock was not liable.

Gouty should have been estopped from asserting inconsistent positions with regard to Glock's fault, particularly after benefiting from his prior position by receiving a settlement in the amount of \$137,500.00. The jury should have only assessed the respective liability of Schnepel and Gouty, and should not have had the option of determining that Glock was not liable. Because Gouty was not estopped from denying Glock's liability, coupled with the Court's subsequent refusal to allow a set-off of settlement amounts paid by Glock to Gouty, Gouty received a windfall double recovery. This result is inequitable and contrary to existing Florida law. The Court's Order Determining Absence of Estoppel should be reversed.

Petitioner contends that Florida public policy encourages settlement. That statement is correct, but has no bearing on the

issues raised by the present case. A party settling with one defendant is not prohibited from obtaining a full and fair recovery from any remaining defendants. Section 768.81, Florida Statutes, as interpreted by Messmer v. Teacher's Insurance Company, 598 So.2d 77 (Fla. 1992) and Wells v. Tallahassee Memorial Regional Medical Center, Inc., 659 So.2d 249 (Fla. 1995), creates and allows a fair method for a party to settle against one co-defendant and obtain a full recovery from the remaining defendants. No deterrent effect would occur by applying estoppel to a Plaintiff who has settled and obtained a financial benefit, when the Plaintiff can obtain a full and fair resolution of the liability and damages recoverable from remaining Defendants.

In summary, application of the doctrine of judicial estoppel to the circumstances of this case would not be a deterrent to settlement of prospective cases. Moreover, the overriding principles upon which judicial estoppel is based, specifically prevention of fraud, injustice, and unfair advantage, are compelling and require the application of that doctrine to the circumstances presented by this case. The judicial estoppel sought in this case does not prohibit subsequent litigation or attempt to disturb the prior settlement. Instead, judicial estoppel merely provides a fair and equitable method of resolving the remaining liability issues against the non-settling defendant without allowing the plaintiff to obtain unfair advantage by taking inconsistent positions.

The trial court erred in failing to apply judicial estoppel to this case and this action should be reversed for a new trial as to liability.

#### **CONCLUSION**

The First District Court of Appeals was correct in ruling that a set-off was applicable for that portion of the verdict which represented economic damages, consistent with the courts ruling in Wells.

However, the District Court of Appeals erred in failing to reverse the trial court's ruling that estoppel must not be applied as to the liability of settling co-defendant Glock.

This case should be remanded for a new trial only as to the respective percentage of liability of Schnepel and Glock, in which Gouty would be estopped to deny that Glock is liable.



**AMENDED CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Edward McCarthy, Esquire, One Independent Drive, Suite 3200, Jacksonville, Florida, 32202 this \_\_\_ day of December 2000, and also certify that this document is formatted in the Courier New 12 font.

\_\_\_\_\_  
Attorney

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