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.
_____/

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Petitioner/plaintiff, John M. Gouty, will be referenced as "Gouty" and the Respondent/defendant, J. Alan Schnepel, will be referenced as "Schnepel." The settling defendant, Glock, Inc. will be referenced as "Glock." The record on appeal will be referenced as ("R.___"), followed by volume number and page number. The Answer Brief of Respondent/defendant Schnepel will be referenced as "Schnepel Brief, at p. _____", followed by the page number of the Answer Brief.

ARGUMENT

I. SCHNEPEL IGNORES THE PLAIN LANGUAGE OF SECTION 768.81, THE SET-OFF STATUTES, AND THIS COURT'S OPINION IN WELLS, WHICH REQUIRE A FINDING OF JOINT AND SEVERAL LIABILITY IN ORDER FOR THE SET-OFF STATUTES TO APPLY TO ECONOMIC DAMAGES.

In his Answer Brief, Schnepel's sole basis for claiming a right to set-off is the last sentence of Section 768.81(3) Fla. Stat. (1997):

> "...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."
>
> (Emphasis supplied). (Schnepel Brief at p. 10)

Schnepel argues that, even though he was found 100% liable, as long as his liability exceeded that of the plaintiff then joint and several liability exists for economic damages. Clearly, Schnepel fails to recognize the plain meaning of the phrase "on the basis of the doctrine of joint and several liability."[1] Under the doctrine, another entity still must be found liable to create joint and several liability.[2] If a

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[1]As is evidenced by his repeated misquotes of this last sentence by omitting the words "of the doctrine" from the phrase: "on the basis of joint and several liability" (Schnepel Brief at pp. 10 and 24).

[2]Schnepel asserts that we seek to rewrite § 768.81(3) by adding the language emphasized below:

> "...the court shall enter judgment with respect to economic damages against that party on the basis of the

defendant is found 100% liable, then the doctrine states that joint and several liability cannot exist and judgment must be entered against the non-settling tortfeasor for 100% of the economic and non-economic damages.

The language of the set-off statutes allows for no other interpretation. In fact, Schnepel concedes that the most recently enacted set-off statute, Section 768.31(5), requires a finding of joint and several liability. Schnepel then tries to distinguish Section 768.31(5) from the two older set-off statutes to assert that those two statutes control and do not require a finding of joint and several liability (Schnepel's Brief at pp. 19 and 20.)[3] Contrary to this argument, this Court has previously held that all three of the set-off statutes are to be read in *pari materia* in concluding that the application of any setoff pre-supposes "the existence of multiple defendants jointly liable for the same damages." Wells v. Tallahassee Memorial Regional Medical Center, Inc., 659 So.2d 249, at 252-53 (Fla.

> doctrine of joint and several liability, if that party is determined to be jointly and severally liable with some other party." (Emphasis in original) (Schnepel Brief at p. 11).

That assertion lacks merit because the emphasized language is redundant and merely restates the doctrine of joint and several liability referred to in the previous line.

[3]Of course statutory construction would require that most recently enacted and more specific statute, § 768.31(5), would govern if a conflict in the language of the set-off statutes were found.

1995) (emphasis supplied).

Similarly, Schnepel's assertions that the joint liability references in sub-sections (1) of § 46.015 and § 768.041 should be ignored and that sub-sections (2) do not require joint liability are without merit. When read in context, the language of these statutes places the burden on the non-settling defendant to "show the court" that the settling defendant's release was in "partial satisfaction of the damages [the non-settling defendant was] sued for." If the non-settling defendant is found 100% at fault, then he is liable for 100% of the damages and, under § 768.041 and 46.015, the settlement dollars cannot be considered in partial satisfaction of the damages that the non-settling defendant was sued for. See, e.g., Rambaum v. Swisher, 435 N.W.2d 19 (Minn. 1989) (holding that settlement "payments" refer "only to payment for that portion of plaintiff's damages representing the settling defendant's share of the liability.")

The cases cited by Schnepel to support his claim that a finding of joint and several liability is not required under the set-off statutes (See Schnepel Brief at pp. 13-16 and 21-23), do not apply because they either (1) predate Fabre and Wells,[4] (2)

[4] See e.g., Department of Transportation v. Webb, 409 So.2d 1061 (Fla. 1st DCA 1981) (because of cross-claims and counterclaims, settling defendants remained on verdict form and all were found liable); also, City of Jacksonville v. Outlaw, 538 So.2d 1360 (Fla. 1st DCA 1989) (language of the release also specifically stated that the settling defendant was not "releasing any other joint tortfeasor.").

involve a jury assigning fault to the settling defendant,[5] (3) involve contract claims not subject to Chapter 768,[6] or (4) fail to consider the effect of Wells and § 768.81.[7]

II. THIS STATE'S ADOPTION OF COMPARATIVE FAULT AND THE UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT SHIFTED THE PRIMARY FOCUS FROM THE SINGLE RECOVERY RULE TO THE APPORTIONMENT OF FAULT RULE. OTHER STATES THAT HAVE ADOPTED SIMILAR STATUTORY SCHEMES AND HAVE ADDRESSED THIS ISSUE HAVE FOUND NO JOINT AND SEVERAL LIABILITY AND THUS NO SET OFF. BECAUSE OF SIGNIFICANT STATUTORY DIFFERENCES, THE CALIFORNIA STATUTES AND CASE LAW HAVE NO APPLICATION HERE.

In adopting the language of § 768.81 (".... the court shall

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[5] See e.g.,Wiggins v. Bramlin Cadillac, Inc., 669 So.2d 332 (Fla. 3rd DCA 1996) (settling defendants 55% and 25% at fault); Yellow Cab Company of St. Petersburg v. Betsy, 696 So.2d 769 (Fla. 2nd DCA) (settling defendant 10% at fault); Olsen v. Cole Construction, Inc., 681 So.2d 799 (Fla. 2nd DCA 1996) (settling defendant negligent); and Cohen v. Richter, 667 So.2d 899 (Fla. 4th DCA 1996) (settling defendant 25% at fault); Wells, supra. (Settling defendant 10% at fault)

[6] See, Centex-Rooney Construction Company v. Martin County, 706 So.2d 20 (Fla. 4th DCA 1997). In Centex, the breach of contract claims survived, but the negligence claims were dismissed. § 768.81 did not apply and nothing precluded § 46.015 from applying to contractual matters not subject to Chapter 768.

[7] See, Lauth v. Olsten Home Healthcare, Inc., 678 So.2d 447 (Fla. 2d DCA 1996). Although Wells had been decided more than one year earlier, the Lauth court failed to apportion the settlement and instead set off the entire amount of the settlement pursuant to § 768.041 with no reference to § 768.81 or economic and non-economic division. Because the parties in Lauth apparently failed to raise the issues before this Court, or reached some other agreement, the precedential value of Lauth is limited at best, as evidenced by the fact that no subsequent case has cited to Lauth.

enter judgment against each party liable on the basis of such party's percentage of fault ..."), the legislature of this state shifted its policy focus from the plaintiff - the single recovery rule - to the defendant - the apportionment of fault rule. This evolutionary shift in policy focus began with Florida's adoption of the Uniform Contribution Among Tortfeasor's Act at § 768.31. Wells, supra.

As of 1998, 44 jurisdictions had adopted some form of comparative negligence and thereby abrogated or severely limited the application of joint and several liability. Lee A. Wright, *Utah's Comparative Apportionment: What Happened to the Comparison?* 1998 Utah L. Rev. 543, 550 *n57* (1998). Of these jurisdictions, two subgroups can be delineated: (1) states such as Florida that permit the allocation of fault to settling tortfeasors and non-party defendants, and (2) jurisdictions that permit allocation of fault only to parties to the action.

Of the first subgroup, eleven jurisdictions, including Florida, have also adopted the Uniform Contribution Against Tortfeasors Act. While the Ohio and Florida courts have yet to

address this issue,[8] eight of the remaining nine jurisdictions[9] have held that a non-settling defendant is not entitled to a set-off of amounts paid by a settling defendant to secure a release where the settling party is found with no fault.[10]

Of the remaining jurisdictions in subgroup (1), California appears to be the only state that has adopted both comparative fault and a form of contribution, and still permitted a set off

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[8] The Ohio Supreme Court, however, has held that a rule precluding setoff in the absence of a showing of liability is the more reasoned view where comparative fault is an issue. Fidelholtz v. Peller, 690 N.E.2d 502 (Oh. 1998).

[9] Idaho reached the opposite conclusion in Quick v. Crane, 727 P.2d 1187 (Id. 1986) based in large part on the rationale of Levi v. Montgomery, 120 N.W.2d 383 (N.D. 1963). The Levi opinion has been superceded by North Dakota's subsequent adoption of comparative fault as noted by the North Dakota Supreme Court in Bartles v. City of Williston, 276 N.W.2d 113 (N.D. 1979).

[10] See, Varner v. Perryman, 969 S.W.2d 410 (Tenn.Ct.App. 1997); Scalf v. Payne, 583 S.W.2d 51 (Ark. 1979) (0% negligent party cannot be joint tortfeasor and setoff provisions are not applicable); Neil v. Kavena, 859 P.2d 203 (Ariz.Ct.App. 1993) (setoff cannot occur in the absence of joint and several liability); Smith v. Zufelt, 880 P.2d 1178 (Col. 1994) (proportional setoff as determined by jury's apportionment of fault, rather than *pro tanto* setoff, is appropriate in absence of joint and several liability); Medical Center of Delaware, Inc. v. Mullins, 637 A.2d 6 (Del. 1994) (jury's determination of settling defendant's fault is dispositive and setoff is not available where settling defendant is exonerated by jury); Wilson v. Galt, 668 P.2d 1104 (N.M.Ct.App. 1983) (consideration paid for settlement satisfies that party's apportioned fault only and no setoff is available to non-settling parties); Nelson v. Johnson, 599 N.W.2d 246 (N.D. 1999) (setoff based upon proportion of fault is appropriate when comparative fault precludes finding of joint and several liability); Charles v. Giant Eagle Markets, 522 A.2d 1 (Pa. 1987) (amount paid by the settling tortfeasor is irrelevant in absence of joint and several liability).

under the subject circumstances, McComber v. Wells, 85 Cal.Rptr.2d 376, 378 (Cal. Ct. App. 1999).[11] As set forth in the Amended Initial Brief, any reliance on the McComber opinion is misguided. First, the McComber opinion noted that California's comparative fault statute has not abolished or modified joint and several liability for economic damages in any way. In contrast, §768.81 has abolished joint and several liability for economic damages except under specified circumstances.

Second, and perhaps more importantly, California included a short but significant passage in the set-off provision of their contribution act requiring a set-off where a release is given to one "claimed to be liable for the same tort." Cal. Civ. Code Section 877.2. The California Supreme Court emphasized its reliance on the "claimed to be liable" language to apply a set off without regard to the settling defendant's apportioned fault because the settling defendants were claimed to be liable in the pleadings. McComber, supra. The Florida set-off statutes contain no such language.

As Schnepel points out in his brief, §§ 768.041 and § 46.015 not only refer to joint and several liability but require that

[11] One would be remiss in not pointing out the error in Respondent's contention that California is the only other state with a similar comparative fault scheme. For example, Ohio has adopted a comparative fault statute similar to Florida's in that it retains joint and several liability for economic damages only under certain designated circumstances. See, § 2307.31, Ohio Rev. Code (2000).

the release be given "in partial satisfaction of damages sued for." Remarkably, Respondent argues that the quoted language is somehow the equivalent of California's "claimed to be liable" language and thus should have the same effect. Under this language, however, if the jury exonerates the settling defendant then the release cannot be in partial satisfaction of the damages that the remaining defendant has been sued for.[12] Accordingly, the McComber holding is not applicable.

As a result, the "prevailing view" among the states that have adopted comparative fault is that no set-off applies under the instant facts.

III. THE APPELLATE COURT CORRECTLY RULED THAT SCHNEPEL WAIVED HIS ESTOPPEL ARGUMENT BY FAILING TO PROVIDE THE TRIAL TRANSCRIPT TO SHOW THAT AT TRIAL HE PRESERVED THE ARGUMENT FOR APPEAL. REGARDLESS, IN THE ABSENCE OF JUDICIAL ACT, OR ADMISSION, OR DETRIMENTAL RELIANCE BY SCHNEPEL, ESTOPPEL DOES NOT APPLY HERE.

Respondent challenges the First District's refusal to rule on the estoppel issue on two bases: (1) that the Applegate and Phillips opinions cited by the First District are irrelevant because the estoppel ruling was a "pure legal ruling" aimed at defining "the manner in which the issues would be presented to the jury," and (2) that the pretrial order on estoppel was appealable. (Schnepel Brief at p. 36). Addressing the second

[12] While the opposite may be true in California, in Florida the pleadings do not establish liability or have the effect of an admission. Gilbert v. NICA, 742 So.2d 688 (Fla. 2nd DCA 1999).

argument first, the issue presented by the First District opinion is not whether the order was *appealable*, but rather whether the issue was *properly preserved* for appeal, which it was not.

On the first argument, Schnepel's "Motion for Clarification of Trial Issues"[13] sought to limit the evidence and conduct (e.g. argument of counsel) used at trial and, thus, was in substance a motion in limine. Adkins v. Seaboard Coastline Railroad Co., 351 So.2d 1088 (Fla. 2D DCA 1977); Linchen v. Everett, 338 So.2d 1294 (Fla. 1st DCA 1976). Because the motion was denied, to properly preserve the issue for appeal, Schnepel was required to object at trial when the evidence or argument was presented. Horne v. Hudson, 25 Fla.L.Weekly D2442 (Fla. 1st DCA 2000); Phillips v. State, 476 So.2d 194 (Fla. 1985).

In the absence of a stipulation the failure to provide the trial transcript to meet this burden is fatal to this portion of the appeal. Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979). One can only presume that the transcript was not provided and stipulation not sought because the issue was not preserved at trial. Even if preservation was not an issue here, the trial transcript was still necessary to determine whether (1) any of the evidence introduced, or arguments made, by Gouty at trial would have been subject to the estoppel order sought by

[13]This motion was originally brought as a motion for partial summary judgment which the court refused to hear; it was then redrafted in its ultimate form. (R.117-118 and 142-143).

Schnepel or (2) the jury could have found Glock not liable based solely on Schnepel's failure to meet his burden of proof (without regard to Gouty's actions at trial). See e.g., Mead v. Mead 726 So.2d 825 (Fla. 1st DCA 1999) (the trial court's ruling is presumed correct and the "absence of a transcript precludes intelligent review of the [appellant's] claims that the trial court erred").

Regardless, in the absence of judicial act or admission or detrimental reliance by Schnepel (which has not been suggested or alleged by Schnepel at any point in this appeal)[14], estoppel does not apply here. The First DCA, quoting from the Florida Supreme Court, defined when judicial estoppel, as alleged by Schnepel, applies:

> [When a party] ... successfully assumes a factual position on the record to the prejudice of his adversary, whether by verdict, findings of fact, or admissions in his adversary's pleadings operating as a confession of facts he has alleged..." Federated Mutual Implement and Hardware Insurance Co. v. Griffin, 237 So.2d 38, 42 (Fla. 1st DCA 1970) (emphasis supplied); also, Kaufman v. Lassiter, 616 So.2d 491 (Fla. 4th DCA 1993).

Nothing of the sort occurred in this case. There was no court order, prior finding of fact, prior judgment, prior appeal,

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[14] Nor could he; Schnepel never changed his position or relied in any way on Gouty's settlement with or release of Glock. Schnepel was not a party to the settlement or the release (R.2-259), did not participate in the negotiation of the settlement or release, and did not rely on the settlement or release to change his position in any way. (R.1-04). Any equitable estoppel theory or cases cited by Schnepel in support thereof are inapplicable.

or prior admission inconsistent with Gouty's position; nor did the settlement constitute an admission or factual determination: A settlement, although it may imply an assertion to be true, falls "short of such a determination, by admission or otherwise." Gilbert v. Florida Birth-Related Neurologic Injury Compensation Ass'n, 724 So.2d 688 at 690 (Fla. 2d DCA 1999).[15] As a result, appellant's claim for judicial estoppel must fail.[16]

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[15] Although Gilbert discussed settlement in the context of election of remedies, the discussion is instructive here. In finding that the election was not barred by the doctrine of election of remedies, the Second DCA further stated: "the fact that the defendants in the civil action elected to 'buy their way out' of possible liability in no way adversely affects NICA. NICA has no more or no less liability now then it did absent the civil action." Id. at 691. The same is true here. Schnepel was in no way prejudiced by the Glock settlement, the settlement caused Schnepel's liability to be no more or no less than before the settlement, and the settlement did not constitute an admission or factual determination concerning Glock's liability. In fact, the release specifically stated that the settlement was not an admission of liability by Glock. (R.2-259).

[16] In arguing that a party cannot assert inconsistent or contradictory positions in judicial proceedings or in the course of litigation, (Schnepel's Brief at p. 39), Schnepel misstates the law and overlooks basic Florida law:

> inconsistent statements in a pleading do not bind the party that submitted the pleadings ... the Florida Rules of Civil Procedure permit inconsistency in pleadings as to either statements of fact or legal theories adopted.

F.E. Booker v. Sarasota, 707 So.2d 886 at 888 (Fla. 1st DCA 1998). In fact, permitting inconsistent pleadings is the crux of Rule 1.110(g), Florida Rules of Civil Procedure:

> It is clear in Florida that a party may state as many separate claims or defenses as he has irrespective of consistency ... the inconsistency permitted in pleadings may be either in the statement of the facts

The cases cited by Schnepel in his brief support no other conclusion. A brief review of the judicial estoppel cases cited by Schnepel follows and shows that they all involve parties who took positions inconsistent with (1) a prior court order, (2) a prior verdict or judgment, (3) a prior appeal, (4) a prior admission, or (5) prior settlement with the same party, none of which occurred here:

(1) ● Salcedo v. Association Cubana, Inc., 368 So.2d 1337 (Fla. 3d DCA 1979) (defendant who received court order requiring pre-suit mediation on claim that action based in medical malpractice as opposed to a general negligence, was estopped from later asserting against the same party that action was a general negligence action for purposes of statute of limitations);

● Safecare Medical Center v. C. Howard, D.O., 670 So.2d 1020 (Fla. 4th DCA 1996) (hospital estopped from seeking indemnity from doctor as a result of settlement with plaintiff where hospital used plaintiff's prior settlement with doctor to obtain a binding ruling from court eliminating possibility of vicarious liability for doctor's negligence);

(2) ● Kautzman v. James, 66 So.2d 36 (Fla. 1953) (applying the doctrine of res judicata to hold that the plaintiff could not take position in second action inconsistent with position in the first action for which it received a judgment against the same defendant);

● Montero v. CompuGraphic Corporation, 531 So.2d 1034 (Fla. 3rd DCA 1988) (holding that defendant could not obtain

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or in the legal theories adopted .... `The salutary purpose of the rule would be emasculated, if not completely destroyed, if the allegations of fact contained in an alternative and inconsistent statement of a cause of action or defense could be used in evidence against the pleader as proof of the facts alleged in such pleading' (cites omitted).
Ogden v. Groves, 241 So.2d 756 at 759 (Fla. 1st DCA 1970).

summary judgment and then maintain an inconsistent position to the summary judgment on appeal.

- Grauer, *supra* at 585 (plaintiff obtained a judgment against his insurer for disability benefits total disability and was estopped from asserting, in a subsequent lawsuit against the same insurer, that he was able to work after the accident);

- Pearson v. Harris, 449 So.2d 339 (Fla. 1st DCA 1984) (after plaintiff obtained worker's compensation judgment, he was estopped from filing subsequent suit against the same employer alleging position that plaintiff was an independent contractor and not an employee);

- Federated Mutual Implement and Hardware Insurance Company v. Griffin, 237 So.2d 38 (Fla. 1st DCA 1970) (wife of deceased employee obtained judgment on theory that husband was engaged in course of his employment at time of his death and could not then assert that her husband was not engaged in course of employment in a subsequent action against the same insurer);

(3) - Kaufman, *supra* (a party cannot take a position inconsistent with position successfully asserted on previous appeal against same adversary);

(4) - Wooten v. Rhodus, 470 So.2d 844 (Fla. 5th DCA 1985) (in reliance on defendant's position, the plaintiff dismissed its claim and brought it in a later petition and in the later petition against the same party the defendant was estopped to argue that the claim should have been brought in the prior action);

(5) - Crowder v. Jacksonville Transit Authority, 669 So.2d 1101 (Fla. 1st DCA 1996) (plaintiff, after settling worker's compensation claim based on position that he suffered a permanent injury, was, in a subsequent worker's compensation claim against the same employer, precluded from asserting that the subject accident caused no permanent injury);

- Lambert v. Nationwide Mutual Insurance Company, 456 So.2d 517 (Fla. 1st DCA 1984). At an Alabama mediation, plaintiff settled with the three tortfeasors, recovering the policy limits of one tortfeasor, Cassidy, and less than the policy limits of the other two tortfeasors. As plaintiff's uninsured motorist carrier and Cassidy's liability carrier, Nationwide, was present at mediation and approved the

> settlement. Plaintiff was estopped from alleging that only Cassidy was negligent in a subsequent uninsured motorist action against Nationwide. Essential to this holding was the fact that Nationwide, was a party to the mediation, and had to approve the settlement as Lambert's uninsured motorist carrier. Lambert, supra. at p. 519 and fn.1. At the time of Lambert, no opportunity existed for a jury to address the issue of whether there was fault attributable to the settling defendants. Today, finality of a judicial determination exists because the settling defendant's name may appear on the verdict form so a jury can determine fault. Fabre, supra.

Furthermore, the 1984 Lambert holding is rendered obsolete by § 768.81, Florida Statutes (1986) and the Florida Supreme Court's ruling in Fabre v. Marin in 1993. As the First District acknowledged:

> "Our examination of Florida law does not reveal a decision directly on point with this case, in which a prior allegation in a legal proceeding set up the opportunity for a party to gain a financial advantage **without the finality of a judicial determination**. However, the extension of this estoppel concept, **which is more in the nature of a rule of procedure or judicially estopped policy**, is found in other jurisdictions."
> Lambert, supra. at 518. (Emphasis supplied).

Not only is Schnepel's position unsupported by the law, it contradicts the express intent of the legislature and the courts to encourage settlement. Crosby v. Jones, 705 So.2d 1356 at 1358 (Fla. 1998); also see Wells, supra at 252. Under Schnepel's position, no plaintiff would settle with one of several defendants or potential defendants because no matter how small the settlement, plaintiff would be estopped from arguing that the settling party was not at fault. Only where it is undisputed by

all parties that the settling party is liable or the amount offered exceeds any possible fault of that defendant, would a settlement occur - a very rare occasion indeed and obviously not a result intended by the legislature's passing of § 768.81 and the Florida Supreme Court's holding in Fabre, supra.

As a result, even if this Court considered Schnepel's estoppel argument on the merits, the trial court's refusal to apply estoppel should be affirmed, the First DCA ruling reversed, Judge Van Nortwick's dissent adopted, the certified question answered in the negative, and the set-off disallowed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Petitioner has been furnished by hand delivery to Harris Brown, Esquire, 12 East Bay Street, Jacksonville, FL 32202 this _____ day of January, 2001.

_____
Attorney

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