IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-33

PHILIP C. D'ANGELO, M.D., and
PHILIP C. D'ANGELO, M.D., P.A.,

Petitioners,

vs.

JOHN J. FITZMAURICE and
CAROLE M. FITZMAURICE,

Respondents.
_____/

ON DISCRETIONARY REVIEW OF A CERTIFIED QUESTION FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
SECOND DISTRICT

# RESPONDENTS' BRIEF ON THE MERITS

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## AUTHORITIES

## I.
## STATEMENT OF THE CASE AND FACTS

On August 23, 1997, John Fitzmaurice, a 70-year old retired Army Colonel, underwent a routine appendectomy at Charlotte Regional Medical Center -- the first abdominal surgery he had undergone in his life (T. 714-18, 888).[1/] The surgeon was Philip D'Angelo, M.D. (T. 893). There were no immediate complications from the surgery (T. 954-56). Eight months later, however, in May, 1998, Mr. Fitzmaurice became badly constipated and distended, and he sought emergency medical attention (T. 722-24). After a series of enemas, x-rays, and two endoscopic procedures performed under general anesthesia, it was determined that Mr. Fitzmaurice's colon was totally obstructed by a standard surgical "laparotomy pad" (or "laparotomy sponge") -- a cotton towel measuring 18" by 18" on a side, located 45 to 60 centimeters upstream from his anus (T. 512, 543, 596-97, 726-29, 958-60, 1019-26).

Because the two endoscopic procedures were unsuccessful in removing the laparotomy pad, another operation was performed, in which the pad and seven centimeters of Mr. Fitzmaurice's colon were surgically removed by Dr. D'Angelo's partner, with Dr. D'Angelo participating (T. 727-29, 956-60, 1019-26, 1034). Mr. Fitzmaurice was hospitalized for 19 days and was required to wear a colostomy bag for three months while the surgical wounds healed (T. 565-66, 766-67, 730-33). A

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[1/] R.: Record on appeal
T.: Separately paginated transcript of trial, at Volumes X-XVII of the record.

subsequent surgery was required to reverse the colostomy (T. 733). Two serious infections ensued, which were not resolved until November, 1998 -- and Mr. Fitzmaurice was in considerable pain throughout the nearly eight-month ordeal (T. 570-73, 731-38, 770). It was not until March 3, 1999, that Mr. Fitzmaurice felt like he had fully recovered (T. 738-39, 772-73).

Mr. and Mrs. Fitzmaurice reached a pre-suit settlement with the hospital in August, 1999 (R. 1037-41). The settlement consisted of an undifferentiated lump sum payment of $200,000.00, and the hospital relieved Mr. Fitzmaurice of its outstanding bill in the amount of $88,603.18. Dr. D'Angelo was unwilling to settle, however, and the Fitzmaurices were therefore forced to file suit against him (and his P.A.) in March, 2000, alleging that he was negligent in failing to remove the laparotomy pad during the appendectomy he performed in August, 1997 (R. 1-5). As medical malpractice cases go, the case was a simple one -- aided by a statutory presumption that fit the facts like a surgical glove: ". . . [T]he discovery of the presence of a foreign body, such as a sponge . . . or other paraphernalia commonly used in surgical . . . procedures, shall be prima facie evidence of negligence on the part of the health care provider." Section 766.102(4), Fla. Stat. (1997).

At the pre-trial conference -- and notwithstanding that the central thrust of Dr. D'Angelo's defense at trial would be that, *if* a laparotomy pad had been left in Mr. Fitzmaurice during the appendectomy, it was the fault of the hospital nurses charged with performing the "sponge count" -- defense counsel withdrew her motion to amend the defendant's answer to add a "*Fabre* defense" naming the hospital as a joint

tortfeasor, in order to ensure that the hospital's share of liability would *not* be a subject for determination by the jury on the verdict form (R. 1191, 1213-14; T. 278-85, 1136-64). She later explained on the record that this was a "strategic decision," designed to prevent the jury from splitting the blame between Dr. D'Angelo and the hospital's nurses and to accept her "all or nothing" defense that the plaintiffs had sued the wrong party (R. Vol. XVIII, p. M106). And that is essentially what she argued to the jury at the close of the case -- that Dr. D'Angelo had done nothing wrong; that the hospital's nurses were *entirely* to blame; and that the Fitzmaurices had sued the "wrong party" (T. 1136-64).

The strategem was unsuccessful. Predictably, the jury returned a verdict finding that Dr. D'Angelo had negligently caused damage to Mr. and Mrs. Fitzmaurice (R. 1008; T. 1183-84).[2/] Because defense counsel had withdrawn her "*Fabre* defense" prior to trial, the verdict contained no finding of fault on the part of the hospital; rather, 100% of the blame was assigned to Dr. D'Angelo. Because Dr. D'Angelo's counsel had *stipulated* to the admission into evidence of Mr. Fitzmaurice's medical bills totaling $128,732.81 (which included the debt relieved by the hospital), the jury awarded him that amount in economic damages (T. 775-77, 1129-30, 1183). It also awarded him $200,000.00 for six elements of his past intangible damages, and not a

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[2/] Because the district court rejected Dr. D'Angelo's multiple challenges to this finding of fact, and because none of those issues on appeal have been resurrected in this Court, Dr. D'Angelo's negligence is now an established fact. His lengthy exposition upon the testimony of the several expert witnesses at trial was therefore unnecessary, and adds nothing of any relevance to the narrow issue before the Court.

penny in future damages (T. 1183). And it awarded Mrs. Fitzmaurice $50,000.00 for the loss of her husband's consortium in the past, and not a penny in future damages (T. 1183-84). Judgment was initially entered on the verdict (R. 1044).

Following trial, Dr. D'Angelo asked the trial court to set off the entire amount, all $288,603.18, of the Fitzmaurices' pre-suit settlement with the hospital -- both the $200,000.00 paid to the Fitzmaurices and the $88,603.18 debt that was relieved. It was the Fitzmaurices' position that, because Dr. D'Angelo did not add the hospital as a "*Fabre* defendant" and the jury therefore returned no finding that the hospital was a joint tortfeasor with Dr. D'Angelo, *none* of the settlement proceeds could be set off against the jury's damage awards (R. 1064-81). The trial court "split the baby," so to speak. It set off 33.99% (or $67,980.47) of the $200,000.00 settlement proceeds, and declined to set off any portion of the debt relieved (R. 1101) -- and an amended judgment was entered for the reduced amount (R. 1101, 1122).

Dr. D'Angelo appealed to the District Court of Appeal, Second District, contending (among numerous other things) that the trial court erred in declining to set off the entire amount of the Fitzmaurices' settlement with the hospital. The Fitzmaurices cross-appealed, contending that the trial court should not have set off any portion of the settlement proceeds. The district court rejected all of Dr. D'Angelo's contentions, and agreed with the Fitzmaurices. Relying upon *Gouty v. Schnepel*, 795 So.2d 959 (Fla. 2001), it held that, because Dr. D'Angelo had been found 100% liable for the Fitzmaurices' damages as a result of his counsel's "admitted . . . tactical decision," he was not entitled to any setoff -- and it ordered the entry of a judgment

in the Fitzmaurices' favor in the full amount of the jury's damage awards. *D'Angelo v. Fitzmaurice*, 832 So.2d 135 (Fla. 2d DCA 2002). It also certified the question that has given rise to this proceeding. For the reasons that follow, we respectfully submit that the district court's decision was correct, and that it should be approved.[3/]

## II.
## ISSUE PRESENTED FOR REVIEW

The following certified question is before the Court for resolution:

> Is it appropriate to set-off against the damages portion of an award against one tortfeasor in a medical malpractice action the amount recovered from settlement from another for the same incident causing the injury where the settling alleged tortfeasor was not included on the verdict form?

Dr. D'Angelo contends that the question should be rephrased by converting the words "alleged tortfeasor" into the words "another tortfeasor." Since no finder-of-fact ever found that the hospital was a joint tortfeasor with Dr. D'Angelo, we disagree with this self-serving reformulation of the question. If the Court is of a mind to rephrase the question, we submit that the following reformulation would be more appropriate:

> Is it appropriate to set-off against the damages portion of an award against one tortfeasor in a medical malpractice action the amount recovered from settlement from another for the same incident causing the injury where the settling alleged tortfeasor

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[3/] In the decision under review, the district court also denied the Fitzmaurices' motion for appellate attorney's fees and certified a conflict to the Court on that issue. That aspect of the decision is before the Court in a separate proceeding, *Fitzmaurice v. D'Angelo*, case no. SC03-97.

was not included on the verdict form because the tortfeasor deliberately and knowingly waived his right to plead as an affirmative defense and to prove the joint liability of the alleged tortfeasor, resulting in a finding that the tortfeasor was 100% liable for his victims' damages.

## III.
## SUMMARY OF THE ARGUMENT

The answer to the certified question is controlled by three prior decisions of this Court: *Wells v. Tallahassee Memorial Regional Medical Center, Inc.*, 659 So.2d 249 (Fla. 1995); *Nash v. Wells Fargo Guard Services, Inc.*, 678 So.2d 1262 (Fla. 1996); and *Gouty v. Schnepel*, 795 So.2d 959 (Fla. 2001). In *Wells*, the Court reconciled the facial inconsistencies between §768.81, Fla. Stat., and the "setoff statutes"; rejected the "double recovery" argument made by Dr. D'Angelo and his amicus here; and held that the "setoff statutes" no longer applied to non-economic damages for which defendants are only severally liable. Because Dr. D'Angelo's liability for the Fitzmaurices' non-economic damages of $250,000.00 is several rather than joint, none of the hospital's settlement can be set off against that amount.

In *Nash*, the Court was confronted with the question of how a defendant could obtain a determination of its several liability for its share of a plaintiff's total non-economic damages within the context of the lawsuit itself. It held that a defendant has the burden of pleading and proving the liability of a joint tortfeasor; that the failure to do so is a waiver of the right to apportion a plaintiff's non-economic damages into their several parts; and that a defendant who fails to plead and prove the liability of a joint tortfeasor is liable for 100% of a plaintiff's non-economic damages. Because Dr.

D'Angelo deliberately and knowingly waived his right to plead and prove the liability of the hospital, he is liable for 100% of the Fitzmaurices' non-economic damages, and none of the hospital's settlement can be set off against that amount.

In *Gouty*, the Court reiterated the reconciliation of §768.81 and the "setoff statutes" it had announced in *Wells*; rejected once again the "double recovery" argument that Dr. D'Angelo and his amicus have resurrected here; and held that a defendant who fails to prove the liability of an alleged joint tortfeasor who has settled with the plaintiff is not entitled to a setoff against a plaintiff's economic damage award. *Gouty* is not distinguishable from the instant case. If pleading but failing to prove the liability of an alleged joint tortfeasor results in no setoff, then failing both to plead and to prove the liability of an alleged joint tortfeasor must result in no setoff as well. The combination of these three decisions simply compelled the district court's conclusion that Dr. D'Angelo was not entitled to a setoff of *any* portion of the Fitzmaurices' settlement with the hospital, economic or non-economic.

Dr. D'Angelo's contention that he can avoid this Court's jurisprudence on the subject by "electing" between §768.81 and the "setoff statutes" is untenable, for reasons we will explain in our argument. And unless this Court is prepared to overrule *Wells*, *Nash*, and *Gouty* -- each of which was decided without a single dissent -- the certified question must be answered in the negative, and the portion of the district court's decision holding that Dr. D'Angelo was not entitled to a setoff must be approved.

## IV.
## ARGUMENT

THE DISTRICT COURT CORRECTLY CONCLUDED THAT, BECAUSE OF DR. D'ANGELO'S DELIBERATE AND KNOWING WAIVER OF HIS RIGHT TO PLEAD AS AN AFFIRMATIVE DEFENSE AND TO PROVE THE JOINT LIABILITY OF THE HOSPITAL, RESULTING IN A FINDING THAT HE WAS 100% LIABLE FOR THE FITZMAURICES' DAMAGES, HE WAS NOT ENTITLED TO SET OFF ANY PORTION OF THE FITZMAURICES' SETTLEMENT WITH THE HOSPITAL.

### A. The answer to the certified question is controlled by three prior decisions of the Court.

In our judgment, the certified question has already been answered by this Court, in three unanimous decisions: *Wells v. Tallahassee Memorial Regional Medical Center, Inc.*, 659 So.2d 249 (Fla. 1995); *Nash v. Wells Fargo Guard Services, Inc.*, 678 So.2d 1262 (Fla. 1996); and *Gouty v. Schnepel*, 795 So.2d 959 (Fla. 2001). And to answer the question as Dr. D'Angelo and his amicus propose, the Court will have to overrule all three of them. Amicus is at least candid about this, suggesting that both *Wells* and *Gouty* were wrongly decided. Dr. D'Angelo has adopted a different approach. He contends that he can avoid this Court's prior decisions by "opting out" of the comparative fault scheme imposed by §768.81, Fla. Stat., and thereby "elect" to proceed as if Florida's "setoff statutes" were not modified in any way by §768.81's abrogation of joint and several liability. The contention, in our judgment, is untenable.

There was a time, of course, when Dr. D'Angelo's claim of entitlement to a setoff of the entire amount of the hospital's settlement might have been correct. Florida's

"setoff statutes" were enacted at a time when the doctrine of joint and several liability applied to all cases involving multiple tortfeasors – and where two tortfeasors were equally liable for the whole, a settlement with one had to be set off against a recovery from the other. All of that changed with the enactment of §768.81, however, in which the legislature abrogated the doctrine of joint and several liability and replaced it with a "comparative fault" scheme in which joint and several liability no longer existed with respect to non-economic damages (and with other exceptions not pertinent here). Unfortunately, the legislature overlooked the need to modify the "setoff statutes" to make them consistent with the abrogation of joint and several liability effected by §768.81.

The inconsistency reached this Court in *Wells*. In that case, a defendant made the identical argument made by Dr. D'Angelo and his amicus here, contending that the "setoff statutes" survived enactment of §768.81, and that enforcement of their literal language was necessary to prevent a "double recovery" or a "windfall" to the plaintiff. This Court, recognizing that multiple tortfeasors were no longer jointly and severally liable for non-economic damages, and that each tortfeasor now owed no more than his percentage share of the plaintiff's non-economic damages, rejected the argument and harmonized the conflicting statutes as follows:

> Before this Court, [the plaintiff] argues that with respect to noneconomic damages, the notion that each party is only responsible for his or her share of the damages dictates that payment by one tortfeasor should only extinguish that tortfeasor's liability and have no effect on another tortfeasor's liability. She asserts that the setoff statutes are only applicable where there

is common liability, as in the case of economic damages. Thus, where liability is determined by the jury as a percentage of fault, the comparative fault statute, section 768.81(3), would apply and there would be no setoff.

On the other hand, [the defendant] argues that the purpose of the setoff provisions is to prevent duplicate or overlapping compensation for identical damages. The abolition of joint and several liability by section 768.81(3), [the defendant] argues, did not alter this long-established prohibition against double recovery. [Defendant] points out that a contrary holding would permit [the plaintiff] to recover an amount in excess of her damages, as determined by the jury.

. . . .

Several other states, which have abolished joint and several liability in certain respects and require the apportionment of damages between all entities responsible for the accident regardless of whether they are joined as defendants, have already addressed the questions before us. In *Hoch v. Allied-Signal, Inc.*, 24 Cal. App.4th 48, 29 Cal. Rptr.2d 615 (1994), a California court held that setoff statutes much like those of Florida applied only in cases of joint and several liability. The court explained that to apply setoff provisions in situations of several liability would discourage rather than encourage settlement:

> If the settlement was "low" the plaintiff will recover less than the noneconomic damages awarded by the jury. If the settlement was "high," the nonsettling defendant will reap the benefit, paying less than their fault-share of the noneconomic damages. This would be inequitable and would provide "little incentive for the injured person to settle with one or fewer than all of the tortfeasors."

. . . .

Arizona courts also refuse to require a setoff of settlement amounts where the liability of the defendants is several rather than joint and several. *Neil v. Kavena*, 176 Ariz. 93, 859 P.2d 203 (Ct. App. 1993); . . . In rejecting the argument that the plaintiff will receive an impermissible double recovery if the total amount paid in settlement is not set off, the court in *Neil* pointed out:

> The single-recovery rule, which historically permitted defendants a credit for amounts paid in settlement by other defendants to prevent a plaintiff's excess recovery, was adopted when courts could not allocate liability among defendants; a settling defendant could only offer to pay for a plaintiff's entire, indivisible injury. Now, the respective shares of the liability of multiple defendants can be determined. Each defendant may settle his portion and such settlement neither affects the amount of harm caused by the remaining defendants nor the liability. The settling defendant simply has paid an agreed amount to "buy his peace" and the nonsettling defendant has no right to complain that the settling defendant paid too much.

. . . The court also rejected the suggestion that the plaintiff will receive a "windfall" if the total amount paid in settlement is not set off:

> Settlement dollars are not synonymous with damages but merely a contractual estimate of the settling tortfeasor's liability; they include not only damages but also the value of avoiding the risk and expense of trial. Given these components of a settlement, "there is no conceptual inconsistency in allowing a plaintiff to recover more from a settlement or partial settlement than he could receive as damages."

. . . .

> We are persuaded by the logic of what is clearly the majority rule. Moreover, we are convinced that the language of section 768.81(3) and the setoff statutes lead to this result. . . .
>
> . . . .
>
> . . . Under section 768.81(3), each defendant is solely responsible for his or her share of noneconomic damages. The setoff provisions, which were enacted before section 768.81, presuppose the existence of multiple defendants jointly liable for the same damages. Consequently, the setoff provisions do not apply to noneconomic damages for which defendants are only severally liable.
>
> . . . .
>
> . . . Of course, the setoff statutes do apply to economic damages for which parties continue to be subject to joint and several liability.

*Wells*, 659 So.2d at 251-53.[4/] Given this conclusion, and with respect to the instant case, because Dr. D'Angelo's liability for the Fitzmaurices' non-economic damages of $250,000.00 is *several* rather than joint, *none* of the hospital's settlement can be set off against that amount; and the most that could be set off would be .3399 x $288,603.18, or $98,096.22 -- *provided* that the hospital was a joint tortfeasor with Dr. D'Angelo, which brings us to *Nash*.

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[4/] Amicus complains that this Court had no authority to reach such a conclusion -- that only the legislature could act in this area. We must respectfully disagree. When faced with two facially conflicting statutes, it is plainly this Court's function to reconcile or harmonize them if possible -- and that is all that the Court did in *Wells*.

Having recognized in *Wells* that a tortfeasor cannot obtain a setoff against an award of non-economic damages, the Court was next confronted with the question of how a defendant could obtain a determination of its several liability for its share of the plaintiff's total non-economic damages within the context of the lawsuit itself. It answered that question in a perfectly straightforward way:

> . . . The instant case . . . provides us with the opportunity to address the extent of the pleading and proof required under *Fabre* in order for a defendant to have noneconomic damages apportioned against a nonparty.
>
> Florida Rule of Civil Procedure 1.140(h) requires a defendant to give proper notice of all defenses the defendant intends to assert. Rule 1.140(h)(1) states:
>
> > A party waives all defenses and objections that the party does not present either by motion under subdivisions (b), (e), or (f) of this rule or, if the party has made no motion, in a responsive pleading except as provided in subdivision (h)(2).
>
> While this Court has not previously addressed this issue in the context of a request for apportionment pursuant to *Fabre*, the Second District Court of Appeal has recently held that a nonparty's name could not be placed on the verdict form if the named defendant has failed to plead the negligence of the nonparty or raise the matter at pretrial. . . . We agree and now hold that in order to include a nonparty on the verdict form pursuant to *Fabre*, the defendant must plead as an affirmative defense the negligence of the nonparty and specifically identify the nonparty. The defendant may move to amend pleadings to assert the negligence of a nonparty subject to the requirements of Florida Rule of Civil Procedure 1.190. However, notice prior to trial is necessary because the assertion that noneconomic damages should be apportioned against a nonparty may affect

> both the presentation of the case and the trial court's ruling on evidentiary issues.
>
> In addition to the pleading requirement, the defendant has the burden of presenting at trial that the nonparty's fault contributed to the accident in order to include the nonparty's name on the jury verdict. . . .

*Nash*, 678 So.2d at 1264.

And because the defendant in *Nash* did not plead the negligence of a non-party, the Court held that it had waived its right to apportionment under §768.81, and that it was therefore liable for 100% of the plaintiff's non-economic damages. Given this conclusion, and with respect to the instant case, because Dr. D'Angelo deliberately and knowingly waived his right to have the Fitzmaurices' non-economic damages apportioned with the hospital (and is entitled to no setoff against those damages, according to *Wells*), he is plainly liable for 100% of those damages. The question that remains is whether he is nevertheless entitled to a *Wells*-type setoff of the 33.99% of the settlement that represents the hospital's share of the Fitzmaurices' economic damages -- which brings us to *Gouty*.

In that case, the plaintiff, Mr. Gouty, who had been shot with a gun owned by Mr. Schnepel, sued both Mr. Schnepel and the gun's manufacturer, Glock, Inc. He settled with Glock prior to trial for $137,500.00, but Glock remained on the verdict form as a "*Fabre* defendant." The jury returned a verdict against Schnepel, but found no fault on the part of Glock, and awarded Mr. Gouty $250,000.00 -- 50% of which was economic damages and 50% of which was non-economic damages. Mr. Schnepel

sought a setoff in the full amount of the settlement with Glock, just as Dr. D'Angelo did in the instant case. The trial court denied the setoff. A majority of the district court panel concluded that Mr. Schnepel was entitled to a *Wells*-type setoff of 50% of the proceeds of the settlement with Glock, notwithstanding that Glock was not found liable as a joint tortfeasor. *Schnepel vs. Gouty*, 766 So.2d 418 (Fla. 1st DCA 2000), *quashed*, 795 So.2d 959 (Fla. 2001).

The majority's explanation for this conclusion sounds a great deal like the argument that Dr. D'Angelo and his amicus have made here. Judge Van Nortwick dissented from the majority's conclusion, however, rejecting the "double recovery" and "windfall" arguments as follows:

> . . . I conclude that the majority opinion's interpretation of sections 46.015(2) and 768.041(2), Florida Statutes (1997), to require a set-off of settlement proceeds where the jury finds the settling defendant without liability is contrary to the construction of those statutes in *Wells*. Accordingly, I must respectfully dissent to the holding of the majority opinion on the set-off issue. . . .
>
> In *Wells*, the Supreme Court interpreted sections 46.015(2) and 768.041(2), Florida Statutes, holding that those set-off statutes do not apply to noneconomic damages, but do apply to economic damages for which parties continue to be subject to joint and several liability. . . . The *Wells* court based this holding on the rationale that the set-off statutes "presuppose the *existence* of multiple defendants jointly liable for the same damages." . . . Under *Wells*, it is the actual "existence," not the mere allegation, of joint and several liability that is the foundation of the application of the set-off statutes. Here, the jury has found that Schnepel is 100% at fault. Thus, there can be no joint and several liability as between Schnepel and Glock. Accordingly, under the

> rationale of *Wells*, set-off would be inappropriate in the case before us.
>
> In the briefs and oral argument, much was made about whether either Schnepel or Gouty would receive a windfall by virtue of the application of the proceeds of Gouty's settlement with Glock. Schnepel argues that, if no set-off is required, Gouty, in effect, would receive a "double recovery" by virtue of the settlement and the judgment. The majority agrees. On the other hand, Gouty argues that, if a set-off is mandated, Schnepel, the tortfeasor, would receive a windfall from the settlement.
>
> Obviously, either Gouty or Schnepel must benefit from the settlement with Glock. Logically, it would seem preferable to have the person who was injured and who successfully negotiated the settlement, rather than a tortfeasor, obtain the benefit. . . .

766 So.2d at 424-25.

Because of the internal disagreement of the panel, the district court certified the following question to this Court:

> 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?

766 So.2d at 419. In *Gouty*, 795 So.2d at 960, this Court agreed with Judge Van Nortwick; it "answer[ed] the certified question in the negative and quash[ed] the First District's decision."

In the course of its opinion, the Court reiterated the reconciliation of §768.81 and the "setoff statutes" it had announced in *Wells*; rejected once again the "double

recovery" and "windfall" arguments that Dr. D'Angelo and his amicus have resurrected here; and repeated its conclusion in *Wells* (with emphasis) that "[t]he setoff provisions, which were enacted before section 768.81, *presuppose the existence of multiple defendants jointly liable for the same damages*." 795 So.2d at 963. It then concluded its opinion with an explanation which, in our judgment, simply compelled the conclusion reached by the district court in the decision under review:

> As analyzed by Judge Van Nortwick, our decision in *Wells* was based upon the rationale that the setoff statutes "presuppose the *existence* of multiple defendants jointly liable for the same damages." . . . Where a defendant is found 100% liable for the plaintiff's damages, the settling defendant *who is not found liable* cannot be considered a joint tortfeasor. . . .
>
> We reject Schnepel's argument that the existence of a release is conclusive as to the applicability of a setoff for damages for which the settling and nonsettling defendants could have been jointly and severally liable. Under the First District's interpretation, if a plaintiff executes a release in favor of one of multiple defendants, the fact that there was a settlement automatically would create joint and several liability for economic damages. Moreover, under the First District's decision, a defendant would always be entitled to a setoff from an award of economic damages, even if . . . the defendant was not held jointly and severally liable for the economic damages under section 768.81-(3), because its percentage of fault was less than the plaintiff's. This would be contrary to our reasoning in *Wells* that predicated both the existence of contribution and the setoff statutes on the defendant paying more than its percentage of fault.
>
> We conclude, following our reasoning in *Wells*, that the applicability of the setoff statutes is predicated on the existence of other tortfeasors *who are liable* for the same injury as the settling party. The language of the setoff statutes does not suggest a different result in this case. Although the Legislature amended

> section 768.81(3) in 1999, . . . the Legislature enacted the setoff statutes before it enacted the comparative fault statute and the language of the setoff statutes has not changed since *Wells*. *See State v. Hall*, 641 So.2d 403, 405 (Fla. 1994) ("Because the legislature has failed to make any substantive changes to the pertinent statutory language, we must assume that it has no quarrel" with this Court's interpretation of the statute.).
>
> In this case, Schnepel was found 100% liable for Gouty's injuries and the jury expressly rejected a finding that Glock was a joint tortfeasor. The judgment against Schnepel for both economic and noneconomic damages was not based upon joint and several liability, but on Schnepel's percentage of fault, which in this case was found to be 100%.
>
> Accordingly, Schnepel was not entitled to the benefit of a setoff from the award of economic damages. . . .

795 So.2d at 965-66 (emphasis partially supplied).[5/]

There is one, but only one, difference between *Gouty* and the instant case. In *Gouty*, the defendant accepted the pleading burden placed upon it by *Nash* to obtain a finding of liability against Glock, but Glock was found not liable. In this case, Dr. D'Angelo deliberately and knowingly waived his right to obtain a finding of liability

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[5/] More recently, in *Chester v. Doig*, 28 Fla. L. Weekly S126 (Fla. Feb. 6, 2003), the Court quashed a decision of the Fifth District that had relied upon Florida's "setoff statutes" and a "double recovery" argument to order a setoff against a plaintiff's recovery against a non-settling physician in a Chapter 766 arbitration proceeding. Although the result reached in that decision is consistent in every way with *Gouty*, we cannot rely upon it directly at this point in our argument because it turns on Chapter 766's definition of "collateral sources," rather than upon the failure of the physician to obtain a finding of liability against the settling non-party. We *will* rely upon it later in our argument, however, when we address Dr. D'Angelo's miscellaneous contention that, at minimum, he was entitled to a setoff of the debt forgiven by the hospital under Florida's "collateral source" statute, §768.76, Fla. Stat.

against the hospital, and the hospital was therefore not found liable. But that is plainly a distinction without a difference. In neither case did the defendant prove the liability of the settling party, and in neither case was the settling party found to be a joint tortfeasor with the non-settling defendant, so the result must be the same -- because "[t]he setoff provisions . . . *presuppose the existence of multiple defendants jointly liable for the same damages*." 795 So.2d at 963. Put another way, absent a finding of joint liability, there can be no setoff -- and because Dr. D'Angelo waived his right to obtain a finding of joint liability with the hospital in this case, he is not entitled to a setoff of *any* portion of the Fitzmaurices' settlement with the hospital, economic or non-economic.

Although we think *Gouty* is perfectly clear on the point, Dr. D'Angelo insists that it is "distinguishable." For his contention that it has no bearing on the question before the Court, he relies exclusively on its factual and procedural background. And he argues that *Gouty* applies *only* where a "*Fabre* defendant" has been placed on the verdict form and has been "found not liable" -- that *Gouty* does not apply where a settling defendant has not been placed on the verdict form and is therefore "not found liable." In our judgment, this is a terribly crabbed reading of *Gouty*. It's a little like arguing that, because *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973), was an automobile accident case, principles of comparative negligence apply only in automobile accident cases, and contributory negligence remains an absolute bar in other negligence cases. Cases have legal principles that extend beyond their specific factual and procedural backgrounds, and *Gouty* clearly announces a general principle that extends well

beyond its specifics. The principle that it announces is that, absent a factual determination that a settling entity was in fact liable to the plaintiff and therefore a joint tortfeasor with the non-settling defendant, there can be no setoff for economic damages.

At least one other panel of the Second District has read *Gouty* that way, in a factual and procedural background quite different than that in *Gouty* itself. In *Fernandez vs. School Board of Hillsborough County, Florida*, 824 So.2d 193 (Fla. 2nd DCA 2002), the non-settling defendant named a settling entity as a "*Fabre* defendant" but failed to present a prima facie case of liability against it. The trial court therefore directed a verdict in the plaintiff's favor on the issue of the settling entity's liability, and thereby withdrew the apportionment issue from the jury. As a result, the settling entity was "not found liable" in the verdict returned against the non-settling defendant by the jury. The district court held that, because the settling entity had not been found liable as a joint tortfeasor, the non-settling defendant was not entitled to a setoff. That is an application of the *principle* of *Gouty* in a procedural context quite different than the one presented in *Gouty* itself, and it is perfectly consistent with everything we have argued here.[6/]

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[6/] Dr. D'Angelo argued below that *Fernandez* is "factually distinguishable" because a directed verdict amounts to "an express finding of no liability . . . in favor of the settling tortfeasor" (answer brief, p. 13). We disagree. The directed verdict in *Fernandez* did not amount to an "express finding" of anything. Because the non-settling defendant failed to present a prima facie case of liability against the settling defendant, the directed verdict simply withdrew the apportionment issue from the jury, and the jury therefore returned no finding at all, one way or the other, on the issue of

Most respectfully, the combination of *Wells*, *Nash* and *Gouty* really leaves Dr. D'Angelo very little wiggle room here -- and we think he recognizes as much, because he attempts to avoid the answer to which they undeniably point in a most unconventional way. He argues that he can avoid this Court's established jurisprudence on the subject by *electing* between the principles of comparative fault embodied in §768.81 and the "setoff statutes" (which now "presuppose the existence of multiple defendants jointly liable for the same damages"). This election, he claims, can be made by the simple expedient of not raising an affirmative defense alleging the joint liability of another.[7/] While Dr. D'Angelo was certainly free to elect not to raise an affirmative defense alleging the joint liability of another, he was not free to elect between §768.81 and the "setoff statutes" -- and there are two things that are very wrong with his attempted finesse of *Wells*, *Nash* and *Gouty*.

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the settling entity's liability as a joint tortfeasor. Instead, it found the non-settling defendant 100% liable for the plaintiffs' damages so the non-settling defendant was not entitled to a setoff. The circumstance presented in the instant case is no different in principle than the circumstance presented in *Fernandez*.

[7/] This notion, that a defendant can elect between §768.81 and the "setoff statutes" by waiving his right to obtain a finding of liability against an alleged joint tortfeasor, appears to be an afterthought of appellate counsel. This was not trial counsel's purpose in declining to name the hospital as a "*Fabre* defendant"; her admitted purpose was to prevent the jury from apportioning blame between the hospital and Dr. D'Angelo -- to force it into an "all or nothing" choice -- in the hope that it might place all the blame on the hospital and none on Dr. D'Angelo. We could therefore legitimately argue that the position taken by appellate counsel was not preserved for appellate review. The Court has been presented with a certified question that deserves an answer, however, so we will not press that point.

First, the doctrine of joint and several liability is dead, replaced by the comparative fault principles of §768.81. For better or worse, §768.81 is now the law governing the liability of multiple tortfeasors, and it contains no "opt out" provision by which a tortfeasor can elect to have his liability governed by the doctrine it expressly abrogated. Contribution among joint tortfeasors is no longer governed by the "setoff statutes"; contribution between joint tortfeasors is now effected by the apportionment scheme of §768.81 -- and there can really be no legitimate debate about that.

Second, to permit Dr. D'Angelo to "opt out" of §768.81 as he proposes will turn the statute upside down and create enormous mischief in its application. What Dr. D'Angelo has argued here, in actuality, is that a defendant can elect not to name a settling defendant as a "*Fabre* defendant" and thereby obtain a setoff in the amount of *100%* of the settlement -- and if the plaintiff wishes to *avoid* the result of this tactical maneuver after *Wells* and *Gouty*, the *plaintiff* must raise the apportionment issue and plead and prove the liability of the non-party with whom he has settled, and must prove the non-party's liability in some amount less than 100%. Actually, if Dr. D'Angelo is correct, the plaintiff must plead the liability of the non-party with whom he has settled, and then *defend* that non-party at trial in an effort to reduce the non-party's liability to the smallest amount that he can. On its face, this makes absolutely no sense. No plaintiff in the history of Florida's jurisprudence has ever been required to plead and prove the liability of a non-party with whom he has settled (with the object being to prove as little liability as possible -- indeed, to prove zero liability if he can -- in order to reduce the amount of the setoff required by the settlement).

The jurisprudence of Florida may have been changed in significant respects by §768.81, but §768.81 does not require a plaintiff to plead and prove the liability of a non-party for any reason, much less to avoid a tactical maneuver by a gambling defendant. This Court made it perfectly clear in *Nash* that the apportionment permitted by §768.81, in lieu of the contribution remedies provided by the "setoff statutes" when joint and several liability was the law, is an *affirmative defense* that *must* be pled and proved by *the defendant*.

And that is precisely what was required in the instant case. If Dr. D'Angelo wished the benefit of a setoff for any portion of the Fitzmaurices' settlement with the hospital, it was incumbent upon him to invoke the apportionment remedy provided to him by §768.81; to name the hospital as a "*Fabre* defendant" in his affirmative defenses; and to obtain a factual finding on the verdict form that the hospital was, in fact, a negligent cause of the Fitzmaurices' damages and therefore a joint tortfeasor with him. As a tactical gamble, his counsel elected not to do so. This gamble did *not* shift the burden to the Fitzmaurices to plead and prove that the hospital was a joint tortfeasor in order to avoid having the full amount of their settlement set off against the jury's damage award. And because Dr. D'Angelo's election withdrew the apportionment issue altogether from the jury, the jury found him 100% responsible for the Fitzmaurices' damages, and the hospital was not found liable for any portion of those damages. Therefore, according to *Wells*, *Nash* and *Gouty*, Dr. D'Angelo was *not* entitled to a setoff in any amount.

### B. The miscellaneous aspects of Dr. D'Angelo's arguments are without merit.

It remains for us to address some miscellaneous aspects of Dr. D'Angelo's argument. He argues that, notwithstanding that *he* failed to obtain a finding of liability against the hospital as this Court's decisions required, *we* conceded below that the hospital's nurses were negligent and we are therefore estopped from "arguing that the hospital is not at fault" (Petitioners' brief, p. 26, n. 11). He then expands the point as follows:

> . . . Permitting the Plaintiffs to deny that the hospital from whom they received a substantial settlement was negligent represents exactly the type of "mockery of justice" and "playing fast and loose with the courts" the judicial estoppel doctrine was intended to prevent. Having successfully maintained the position that the hospital was negligent to the extent of obtaining a large settlement, the Plaintiffs are prohibited from taking a contrary position to the detriment of DR. D'ANGELO. . . .

(*id.*). To this rather insulting charge (which could as easily have been directed to the plaintiffs in *Wells* and *Gouty*), we plead not guilty.

To begin with, the sentence from which Dr. D'Angelo purports to extract our concession of negligence is only partially quoted (without the ellipses needed to flag the omissions). The context from which the snippet was extracted has also been omitted. The sentence appears in our response to Dr. D'Angelo's third issue on appeal, in which he claimed that ". . . it was error to give [a "concurring cause"] instruction because the negligent cause of damages claimed by the plaintiffs (Dr. D'Angelo's failure to remove the laparotomy pad) and the negligent cause claimed by

the defendant (the nurses' failure to count the removed pads accurately) did not occur 'simultaneously' . . . ." (Appellees' brief, p. 27). After demonstrating that the two things *did* occur "simultaneously," we wrote the following (in which we will underscore the snippet that Dr. D'Angelo has extracted as our "concession"):

> In any event, and just as importantly, when two causes combine to cause a single injury -- as they plainly did in this case -- "they need not be simultaneous, as a literal reading of the instruction might infer [sic imply?]." [Citations omitted]. Rather, the purpose of giving a concurring cause instruction is to "negate . . . the idea that a defendant is excused from the consequences of his negligence by reason of some other cause concurring in time and contributing to the same damage." Note on Use to Fla. Std. Jury Instn. (Civ.) 5.1b. And that, of course, is precisely why the instruction was *required* in this case -- so that the jury would understand that it could not excuse Dr. D'Angelo from the consequences of his own negligence in failing to remove the laparotomy pad simply because the nurses' back-up count of the pads was also negligent (or because the nurses may have been deemed more negligent that Dr. D'Angelo), as defense counsel urged the jury to do in closing argument.
>
> Most respectfully, a concurring cause instruction is *mandated* in all cases *where the evidence proves that there may have been more than one cause of the plaintiff's injury* -- whether that additional cause be a pre-existing condition of the plaintiff, the comparative negligence of the plaintiff, the negligence of a co-defendant, the negligence of a non-party, or even an "act of God" -- and precise, split-second "simultaneity" is simply not required where multiple causes combine and contribute to a single injury.
>
> The cases so holding are legion. [Citation of 18 decisions omitted].

> According to this *long* line of decisions (which we see no need to parse in detail at the Court's expense), *because the evidence in this case proved* that *both* Dr. D'Angelo and the hospital's nurses were negligent causes of the single fact that a laparotomy pad was left in Mr. Fitzmaurice's abdomen during his appendectomy the trial court would have committed reversible error if it had *not* given the instruction of which the defendant complains. It plainly follows that the trial court committed no error in giving the instruction, and that this issue on appeal is utterly meritless.

(Appellees' brief, pp. 28-30; emphasis partially supplied). Most respectfully, this is *not* a concession that the hospital's nurses were in fact a negligent cause of the Fitzmaurices' damages (and no fact-finder ever reached that conclusion). It is simply an argument that, because Dr. D'Angelo presented evidence of and argument upon the nurses' negligence (in support of his "all or nothing" defense), we were entitled to an instruction on "concurring cause."[8/] We leave it to the Court to determine who is "playing fast and loose with the courts" here.

In any event, we have never denied, and we do not now deny, that the hospital's nurses may have been negligent. Indeed, they probably were -- which is why we

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[8/] Although we are somewhat off the subject here, we should point out that defense counsel's "all or nothing" argument went well beyond acceptable bounds in this case. She argued that the plaintiffs had the right to sue the hospital, but didn't; that she was not responsible for that; that the plaintiffs had sued the wrong party; that the plaintiffs should have sued the hospital; and that the hospital should be paying all of the plaintiffs' damages (p. 1136, 1148, 1153, 1164). Given the abrogation of joint and several liability and the establishment of pure *several* liability for non-economic damages effected by §768.81, not to mention that the hospital had settled with the plaintiffs, this argument was highly improper -- and it provides a good illustration of why the Court should stick to the pleading and proof requirements it announced in *Nash*.

alleged the hospital's negligence in the pre-suit proceedings, and which is why the hospital settled with the Fitzmaurices before suit was filed. But the fact remains that, once the hospital settled, we had no burden to plead and prove that the hospital was a joint tortfeasor with Dr. D'Angelo in order to enable Dr. D'Angelo to apportion his liability with that of the hospital. According to *Nash*, it was Dr. D'Angelo's burden to plead and prove that the hospital was a joint tortfeasor if he wished to apportion liability with the hospital. And according to *Wells* and *Gouty*, because he failed to establish as a fact that the hospital was a joint tortfeasor, he was not entitled to any setoff from the proceeds of the Fitzmaurices' settlement with the hospital. That has been our consistent position throughout the case; it remains our position here; and Dr. D'Angelo's contention that we should be "estopped" from taking an "inconsistent position" in this case simply because the hospital settled its potential liability is both unsupported by the record and utterly meritless.

Finally, we must address Dr. D'Angelo's and his amicus' fall-back position, that all else failing and at the very least, the Fitzmaurices should not have been permitted to recover the amount of the hospital bill that was forgiven in their settlement with the hospital. This issue was presented in the trial court in the following way. Prior to trial, defense counsel stated that she had reviewed the case law; that she was satisfied by her reading of *Paradis v. Thomas*, 150 So.2d 457 (Fla. 2nd DCA 1963), that free services can be requested as damages from the jury; and that the question of whether the hospital's forgiveness of the debt should be treated as a "collateral source" to which Dr. D'Angelo was entitled to a setoff would be resolved post-trial (R. 1285-91).

Plaintiffs' counsel and the trial court agreed to this procedure (*id.*). Dr. D'Angelo therefore stipulated at trial to the admission into evidence of the hospital's bill (T. 775-76). And the jury's damage awards included the amount of that bill as a result. Having *stipulated* that the jury could award that amount, Dr. D'Angelo is simply in no position to complain here that the verdict included that amount.

After trial, Dr. D'Angelo moved the trial court to reduce the verdict by the amount of the forgiven hospital bill, contending that he was entitled to a setoff under the "setoff statutes" and Florida's "collateral source" statute, §768.76, Fla. Stat. (R. 1031, 1035, 1059). We have already demonstrated that Dr. D'Angelo was not entitled to a setoff under the "setoff statutes" because of *Wells*, *Nash* and *Gouty*. It remains for us to demonstrate that Dr. D'Angelo was also not entitled to a setoff of the forgiven debt by §768.76. Section 768.76(2) defines "collateral sources" as "any payments made to the claimant, or made on the claimant's behalf, by or pursuant to" -- and then contains four subparagraphs specifying the type of third-party benefits that can be set off against a plaintiff's damage award. Not one of those subparagraphs can fairly be read to include a settlement by a hospital with an injured patient, or the forgiveness of

a hospital bill as part of the settlement.[9/] Dr. D'Angelo was therefore not entitled to a setoff of the forgiven debt by §768.76.

Fortunately, because of this Court's recent unanimous decision in *Chester v. Doig*, 28 Fla. L. Weekly S126 (Fla. Feb. 6, 2003), no extended argument on this point is necessary. The question presented in that case was whether a physician found negligent in a Chapter 766 arbitration proceeding could set off as a "collateral source" the amount of the plaintiff's pre-suit settlement with a hospital. The Court examined Chapter 766's "collateral source" statute -- §766.202(2), Fla. Stat. -- and concluded that the settlement with the hospital did not fall within its definition of "collateral sources," and that the physician was therefore not entitled to a setoff for the settlement with the hospital. A comparison of §766.202(2) and §768.76(2) will reveal that they are essentially identical. And unless this Court is prepared to overrule *Chester* before its ink has dried, it must reach the same conclusion in this case -- that the hospital's forgiveness of the debt in its settlement with the Fitzmaurices was not a "collateral source" as defined in §768.76(2), and that Dr. D'Angelo was therefore not entitled to a setoff in the amount of the forgiven debt.

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[9/] Moreover, by paying the medical expenses itself, the hospital had subrogation rights to the medical expenses recovered from Dr. D'Angelo by the plaintiffs, a fact which prevents reduction by collateral sources under the statute. Section 768.76(1), Fla. Stat. And the fact that those subrogation rights were waived by the hospital in the settlement does not change the result. *See Bruner v. Caterpillar, Inc.*, 627 So.2d 46 (Fla. 1st DCA 1993); *Sutton v. Ashcraft*, 671 So.2d 301 (Fla. 5th DCA 1996); *Horton v. Channing*, 698 So.2d 865 (Fla. 1st DCA 1997).

Most respectfully, the combination of *Wells*, *Nash*, *Gouty*, and *Chester* simply compelled the conclusion reached by the district court below. And unless the Court is prepared to overrule all four of those unanimous decisions, the district court's decision must be approved. We rest our case.

## V.
## CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the certified question should be answered in the negative, and that the portion of the district court's decision holding that Dr. D'Angelo was not entitled to a setoff should be approved.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 7th day of March, 2003, to: Esther E. Galicia, Esq., George, Hartz, Lundeen, et al., 3rd Floor - Justice Building East, 524 South Andrews Avenue, Fort Lauderdale, FL 33301; and to Wendy Lumish, Esq., Carlton Fields, P.A., 4000 Bank of America Tower, 100 S.E. 2nd Street, Miami, FL 33131.

## CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I hereby certify that the type style utilized in this brief is 14 point Times New Roman proportionally spaced.

By:_____
JOEL D. EATON