IN THE SUPREME COURT
STATE 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 FROM THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT, STATE OF FLORIDA

PETITIONERS' INITIAL BRIEF ON THE MERITS

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INTRODUCTION

The Petitioners, PHILIP C. D'ANGELO, M.D., and PHILIP C. D'ANGELO, M.D., P.A. (collectively referred to as "DR. D'ANGELO"), were the Defendants at the trial court and the Appellants/Cross-Appellees at the Second District. The Respondents, JOHN J. FITZMAURICE and CAROLE M. FITZMAURICE, were the Plaintiffs at the trial court and the Appellees/Cross-Appellants at the Second District. The parties will be referred to by proper name or by the position they occupied in the trial court.

References to the Record on Appeal will be designated by the letter "R." followed by the corresponding volume and page numbers.

All emphasis in Petitioners' Initial Brief on the Merits is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND OF THE FACTS

This Court has jurisdiction to review this case pursuant to Article V, Section 3(b)(4) of the Florida Constitution. The Second District Court of Appeal in D'Angelo v. Fitzmaurice, 27 Fla. L. Weekly D2217 (Fla. 2d DCA October 9, 2002), certified the following question to this Court as one of great public importance:

> 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?

27 Fla. L. Weekly at D2218.[1]

Plaintiffs filed a medical malpractice action against DR. D'ANGELO on March 3, 2000. [R. Vol.1, pp. 1-5]. They alleged that a laparotomy pad was left in Plaintiff, Mr. Fitzmaurice's abdominal cavity during the appendectomy DR. D'ANGELO performed on August 23, 1997. [R. Vol. 1, pp. 1-5]. DR. D'ANGELO denied all

[1] The Second District also certified inter-district conflict after denying Plaintiffs' Motion for Appellate Attorney's Fees because Plaintiffs' Offer of Settlement failed to state the amount and terms due to each Plaintiff. *Id.* Plaintiffs have invoked this Court's discretionary jurisdiction based on the certified conflict. *See* Fitzmaurice v. D'Angelo, Case No. SC03-97.

material allegations and asserted several affirmative defenses. [R. Vol. 1, pp. 6-7].

Seven months earlier, in August of 1999, Plaintiffs settled their claim against Charlotte Regional Medical Center, the hospital where the operation was performed, for personal injuries and damages arising from the same August 23, 1997 appendectomy and laparotomy pad incident. [R. Vol. 7, pp. 1037-1041]. Under the terms of the settlement, Plaintiffs received an undifferentiated lump sum payment of $200,000.00 and the hospital "discharge[d] any further obligations for payment of any outstanding bills which are due or owing" to the hospital for services rendered as a result of the August 23, 1997 procedure. [R. Vol. 1, pp. 1038]. Plaintiffs, in the Answer Brief they filed with the Second District, conceded and "realistic[ally] view[ed]" their settlement with the hospital "in substance if not form, ... as a settlement in the amount of $288,603.18, from which the plaintiffs paid the hospital's bill."[2] [Answer Brief, p. 44, fn. 11].

I. THE TRIAL

Plaintiffs' lawsuit against DR. D'ANGELO was tried before a jury over the course of four days. [R. Vol. 10 - Vol. 17]. As is typical of most medical malpractice

[2] Plaintiffs argued that, as a result, DR. D'ANGELO had "no legitimate claim to a reduction for a 'collateral source'." [Answer Brief, p. 44, fn. 11].

trials, it was a battle of experts.

A. Testimony of Plaintiffs' Standard of Care Expert.

Dr. Barry Palder, a general pediatric surgeon, was Plaintiffs' standard of care expert. [R. Vol. 12, pp. T358, T360-T361]. Dr. Palder testified that DR. D'ANGELO was the person responsible for placing and removing the laparotomy pads. [R. Vol. 12, pp. T385-T386, T388-T389]. In his opinion, DR. D'ANGELO did not remove all of the pads used during the appendectomy. [R. Vol. 12, pp. T388-T389]. Moreover, Dr. Palder opined that the pad found in Mr. Fitzmaurice in May of 1998 was the same pad left behind during the August 23, 1997 operation. [R. Vol. 12, pp. T397-T401]. Dr. Palder was also of the opinion that Mr. Fitzmaurice did not ingest the pad or insert it rectally. [R. Vol. 12, pp. T403-T406, T512].

With regard to the pad/sponge count, Dr. Palder testified that the hospital's nurses were responsible for counting the pads prior to and after the surgery. [R. Vol. 12, pp. T410-T411]. The standard of care, according to Dr. Palder, nevertheless required a back-up system to the nurses' count. [R. Vol. 12, p. T411]. The back-up system would include the use of a tag attached to the end of the laparotomy pad which would hang outside the abdominal cavity and alert the physician that a pad is still inside. [Vol. 12, pp. T411-T416]. In those instances where the tag could not

physically remain outside the abdominal cavity, Dr. Palder testified that the standard of care requires a physician to use a medical supply which enables the doctor to recognize that there is a pad in the cavity. [R. Vol. 12, pp. T413-T414]. Dr. Palder also stated that the standard of care requires a doctor to always sweep (i.e., look and feel) the surgical area to make sure nothing is left behind prior to closing the patient. [R. Vol. 12, pp. T414-T415]. Dr. Palder further opined that DR. D'ANGELO's failure to use a tag system and leaving a pad in the abdominal cavity constituted departures from the standard of care. [R. Vol. 12, pp. T411-T416; R. Vol. 13, pp. T498, T548-T550].

B. Testimony of DR. D'ANGELO's Standard of Care Expert.

Dr. Rappaport is a board certified general surgeon, an associate professor of surgery and DR. D'ANGELO's standard of care expert. [R. Vol. 14, pp. T626-T628]. Dr. Rappaport, like Dr. Palder, testified that the nurses are responsible for all laparotomy pad counts. [R. Vol. 14, pp. T640-T642, T687-T688]. He stated the surgeon does not get involved in actually performing the sponge or pad counts. [R. Vol. 14, p. T641]. Furthermore, once the operation is completed and the surgeon starts to close the patient, the circulating nurse begins the pad or sponge counts. [R. Vol. 14, p. T641].

In Dr. Rappaport's opinion, DR. D'ANGELO did not fall below the standard of care with regard to any aspect of the appendectomy procedure. [R. Vol. 14, pp. T643-T645]. DR. D'ANGELO closed the patient only because the laparotomy pad count was reported to him as correct, twice. [R. Vol. 14, p. T645]. Moreover, DR. D'ANGELO irrigated the operative site and checked for homeostasis prior to closing the patient. [R. Vol. 14, p. T644]. In other words, DR. D'ANGELO's inspection of the surgical area prior to closing was adequate. [R. Vol. 14, p. T686]. Dr. Rappaport further opined that there was nothing DR. D'ANGELO should have done differently that would have made a difference in terms of meeting the standard of care. [R. Vol. 14, p. T645]. "I think DR. D'ANGELO inspected the area, he did what he was supposed to do to prevent it." [R. Vol. 14, p. T688].

On cross examination, Dr. Rappaport opined that a pad used during the appendectomy was the one that ended up in Mr. Fitzmaurice's colon. [R. Vol. 14, pp. T652-T653]. Dr. Rappaport also opined that "it's negligence . . .when a lap sponge is left in." [R. Vol. 14, p. T674]. According to Dr. Rappaport, it was highly unlikely that the laparotomy pad was intentionally inserted into the rectum and migrated retrograde. [R. Vol. 14, p. T674]. Dr. Rappaport also stated that the pad would have been retrieved if a tag had been hanging off the pad and out of the abdomen. [R. Vol.

14, pp. T678-T679]. Finally, Dr. Rappaport indicated that a physician falls below the standard of care if he does not properly look for the laparotomy pad during his inspection of the abdominal cavity. [R. Vol. 14, p. T679].

C. Testimony of Dr. Philip D'Angelo.

DR. D'ANGELO, as a surgeon, does not get involved in the laparotomy pad counts. [R. Vol. 16, p. T941]. Pad counts are the responsibility of the circulating nurse and the scrub tech. [R. Vol. 16, pp. T941, T997]. DR. D'ANGELO heavily relies on those individuals to keep track of the items going in and to accurately count the items coming out. [R. Vol. 16, p. T941]. DR. D'ANGELO nevertheless recognized that it was his responsibility to remove all laparotomy pads used during the surgery. [R. Vol. 16, pp. T977-T980]. DR. D'ANGELO testified he did not use, and he has never used, silver rings at the end of laparotomy pads to keep track of them. [R. Vol. 16, p. T945].

DR. D'ANGELO closed Mr. Fitzmaurice's abdomen **only** after he had thoroughly checked the surgical area and after the circulating nurse told him the pad counts were correct times two. [R. Vol. 16, pp. T942-T943]. As a result, DR. D'ANGELO thought it was extremely unlikely that the laparotomy pad ultimately found in Mr. Fitzmaurice's colon was one of the pads DR. D'ANGELO used during

the appendectomy. [R. Vol. 16, pp. T954-T955]. DR. D'ANGELO summarized his position as follows:

> I, as the surgeon, inspect the area and make sure everything is okay, but the final count is what determines whether there is a suspicion that something is amiss. There's nothing else I can do but to rely on the nurses to do that. I do my job; I look. A backup system is the counts. If the counts are wrong, then a backup system is x-ray. But if the counts are right, there is nothing I can do except rely on their professionalism and to do their job as they should.

[R. Vol. 16, p. T968].

D. Testimony of Dr. Mark Petrites.

Dr. Petrites was the surgeon who removed the laparotomy pad from Mr. Fitzmaurice, and who Plaintiffs called as their rebuttal witness. [R. Vol. 16, p. T1018]. He was shown an exact copy of the laparotomy pad used during Mr. Fitzmaurice's operation. [R. Vol. 16, p. T1025]. Dr. Petrites testified that the blue tag attached to the laparotomy pads is supposed to be left outside the operative area. [R. Vol .12, pp. T384-T385; R. Vol. 16, pp. T1025, T1036]. Dr. Petrites was trained to leave the tag out so that he would not lose the pad. [R. Vol. 16, p. T1006].

II. THE VERDICT

The jury returned a verdict finding that DR. D'ANGELO was negligent. [R. Vol. 7, pp. 1008-1009; R. Vol. 17, pp. T1183]. The jury awarded Mr. Fitzmaurice $128,732.81 in past medical expenses and $200,000 for past noneconomic damages. [R. Vol. 7, pp. 1008-1009; R. Vol. 17, p. T1183]. Additionally, the jury awarded Mrs. Fitzmaurice $50,000 in past damages associated with her loss of consortium claim. [R. Vol. 7, pp. 1008-1009; R. Vol. 17, pp. T1183-T1184].

III. POST-TRIAL MOTIONS AND RULINGS

DR. D'ANGELO timely responded to the jury's verdict with several motions. [R. Vol. 7, pp. 1010-1030, 1031-1032, 1033-1034, 1035-1041, 1059-1063]. DR. D'ANGELO moved for a new trial, remittitur and/or for judgment in accordance with his Motion for Directed Verdict. [Vol. 7, pp. 1010-1030]. The trial court denied those three motions. [R. Vol. 7, p. 1099].

DR. D'ANGELO's Motion and Amended Motion to Determine Set-Offs were granted, in part. [R. Vol. 7, pp. 1031-1032, 1035-1041, 1059-1066, 1101-1102]. DR. D'ANGELO requested that Plaintiffs' settlement with Charlotte Regional Medical Center, consisting of $88,603.18 in discharged past hospital expenses and a $200,000.00 undifferentiated lump sum payment, be set-off in its entirety. [R. Vol. 6, p. 922; R. Vol. 7, pp. 1031-1032, 1035-1041, 1059-1063]. The trial court, however,

only reduced the economic damages portion of the verdict by 33.99% of the $200,000.00 lump sum payment or, in other words, $67,980.47. [R. Vol. 7, pp. 1101-1102]. As a result, the Amended Final Judgment entered against DR. D'ANGELO awarded Mr. Fitzmaurice $260,752.34 and Mrs. Fitzmaurice $50,000.00 in damages. [R. Vol. 7, pp. 1122-1123].

DR. D'ANGELO timely appealed to the Second District and Plaintiffs cross-appealed the trial court's set-off determination. [R. Vol. 7, pp. 1124-1130, 1131-1139, 1153-1154]. The Second District rejected the five issues raised by DR. D'ANGELO; agreed with the Plaintiffs' position on cross-appeal; reversed the trial court's set-off order; and certified the above-quoted question of great public importance to this Court. *See* D'Angelo v. Fitzmaurice, 27 Fla. L. Weekly at D2218. DR. D'ANGELO accordingly timely invoked this Court's discretionary jurisdiction.

QUESTION PRESENTED

The question certified by the Second District to this Court as one of great public importance is as follows:

> 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?

D'Angelo v. Fitzmaurice, 27 Fla. L. Weekly D2217, D2218 (Fla. 2d DCA October 9, 2002).

DR. D'ANGELO submits that the certified question should be rephrased as follows to more accurately reflect the facts of this case:

> IS IT APPROPRIATE TO SET-OFF AGAINST THE DAMAGES PORTION OF AN AWARD AGAINST ONE TORTFEASOR IN A MEDICAL MALPRACTICE ACTION THE FULL VALUE OF THE SETTLEMENT WITH ANOTHER TORTFEASOR FOR THE SAME INCIDENT CAUSING THE INJURY WHERE THE SETTLING TORTFEASOR WAS NOT INCLUDED ON THE VERDICT FORM?

SUMMARY OF THE ARGUMENT

A jury awarded Plaintiffs $378,732.81 in damages arising from the appendectomy DR. D'ANGELO performed. The jurors were only asked and only determined whether DR. D'ANGELO was at fault. The jury was not asked to and did not determine the fault of the hospital where the operation was performed. Plaintiffs had, years earlier, settled their claim against the hospital arising from the same incident and for the same damages. The settlement consisted of an undifferentiated lump sum payment of $200,000.00 and the discharge of $88,603.18 in outstanding hospital bills. Post-trial, DR. D'ANGELO sought but was denied a set-off of the full value of the settlement, $288,603.18, against the jury's verdict. DR. D'ANGELO submits he is entitled to the requested set-off for the following reasons.

This case is governed by Florida's set-off statutes - Sections 768.041(2), 46.015(2) and 768.31(5)(a), Florida Statutes (1997). The purpose of those statutes is to prevent double recoveries or overlapping compensation where, as here, a claimant has already received settlement monies in partial satisfaction of the same damages the nonsettling defendant is sued for. Furthermore, since the settling hospital in the instant case was not listed on the verdict, neither Section 768.81(3), Florida Statutes (1997), nor the allocation principles enunciated by this Court in Wells v. Tallahassee Memorial

Regional Medical Center, Inc., 659 So. 2d 249 (Fla. 1995), apply. *See* Wells, 659 So. 2d at 255 (Justice Wells, concurring specially). The only way to prevent a double recovery is to set-off the full value of Plaintiffs' settlement, $288,603.18, from the jury's verdict.

Incidentally, this Court's decision in Gouty v. Schnepel, 795 So. 2d 959 (Fla. 2001), does not require a different result, contrary to the Second District's and Plaintiffs' interpretation of that decision. The Gouty decision merely holds that a settlement may not be set-off from the award against the nonsettling defendant when a jury is **specifically asked** whether the settling defendant/tortfeasor was negligent and the jury **specifically determines** that the settling defendant/tortfeasor was not negligent. The jury in the instant case was **not** asked to and **did not** decide whether the settling hospital was at fault or negligent. Gouty therefore does **not** apply to preclude a set-off in this case.

In conclusion, granting DR. D'ANGELO the requested set-off means that Plaintiffs still recover the $378,732.81 the jury of their peers determined was just and reasonable compensation for their damages. However, if this Court adopts the Second District's reasoning (and Plaintiffs' anticipated arguments), Plaintiffs' ultimate recovery is $667,335.99 or almost twice the jury award. Such a result is undeniably

contrary to the purpose and intent of Florida's set-off statutes, namely: the prevention of double recoveries or overlapping compensation.

ARGUMENT

IT IS APPROPRIATE TO SET-OFF AGAINST THE DAMAGES PORTION OF AN AWARD AGAINST ONE TORTFEASOR IN A MEDICAL MALPRACTICE ACTION THE FULL VALUE OF THE SETTLEMENT WITH ANOTHER TORTFEASOR FOR THE SAME INCIDENT CAUSING THE INJURY WHERE THE SETTLING TORTFEASOR WAS NOT INCLUDED ON THE VERDICT FORM.[3]

Seven months before suing DR. D'ANGELO, Plaintiffs settled all claims against Charlotte Regional Medical Center, the hospital where DR. D'ANGELO performed the August 23, 1997 appendectomy, for personal injuries and damages arising from the care and treatment rendered to Mr. Fitzmaurice during the 1997 operation. [R. Vol. 7, pp. 1037-1041]. In exchange for a release of all claims, the hospital gave Plaintiffs an undifferentiated lump sum payment of $200,000.00 and discharged Plaintiffs' obligation to pay $88,603.18 in outstanding hospital bills. [R. Vol. 7, pp. 1037-1041]. Plaintiffs have never contested or disputed the fact that the full value of their settlement with the hospital constitutes anything other than a "partial satisfaction of the damages [DR. D'ANGELO was] sued for," as required for a set-off under Sections 768.041(2),

[3] DR. D'ANGELO's argument heading is factually consistent with how DR. D'ANGELO submits the certified question should be rephrased.

46.015(2) and 768.31(5)(a) of the Florida Statutes (1997). The trial court, however, denied DR. D'ANGELO's post-trial motions to set-off the Plaintiffs' settlement with the hospital, in its entirety. [R. Vol. 7, pp. 1101-1102]. Instead, the trial court **only** set-off 33.99% (or $67,980.47) of the $200,000.00 lump sum payment from the economic damages ($128,732.81) portion of the jury's verdict.[4] [R. Vol. 7, pp. 1101-1102]. On appeal and cross-appeal, the Second District reversed the trial court's set-off Order, held that DR. D'ANGELO was not entitled to any set-off because the hospital was not included on the verdict form for apportionment of fault purposes and certified the issue to this Court as one of great public importance. *See* D'Angelo v. Fitzmaurice, 27 Fla. L. Weekly D2217 (Fla. 2d DCA October 9, 2002). Most respectfully, DR. D'ANGELO submits that the Second District's resolution of the set-off issue is erroneous and should be quashed for the following reasons.[5]

The jury in this case was **not** asked to apportion fault in accordance with Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993), and its interpretation of Section 768.81(3). [R. Vol. 7, pp. 1008-1009; R. Vol. 17, pp. T1170-T1179]. The comparative fault of the

[4] The trial court used a hybrid version of the Wells set-off formula.

[5] Rulings concerning set-offs are decisions of law subject to the *de novo* standard of review. *See* City of Jacksonville, *infra;* Kay, *infra;* Madden, *infra.*

settling tortfeasors - (Charlotte Regional Medical Center and its nurses) - was not, in other words, determined by the jury's verdict. [R. Vol. 7, pp. 1008-1009]. Since the settling tortfeasors were not listed on the verdict, neither Section 768.81(3), Florida Statutes (1997), nor the allocation principles of Wells v. Tallahassee Memorial Regional Medical Center, Inc., 659 So. 2d 249 (Fla. 1995), apply. *See* Wells, 659 So. 2d at 255 (Justice Wells, concurring specially).

Florida's set-off statutes, Sections 46.015(2), 768.041(2) and 768.31(5)(a), Florida Statutes (1997), do, on the other hand, apply.[6] Those statutes are designed

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[6] Section 46.015(2) provides, in pertinent part:

> At trial, if any person shows the court that the plaintiff ... has delivered a written release ... 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.

§46.015(2), Fla.Stat. (1997) (emphasis added).

Section 768.041(2) provides, in pertinent part:

> At trial, if any defendant shows the court that the plaintiff ... has delivered a release ... to any person, firm or corporation 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 and enter judgment accordingly.

to prevent duplicate or overlapping compensation for identical damages and thus require a set-off of any settlement monies received in partial satisfaction of the damages sued for. *See* City of Jacksonville v. Outlaw, 538 So. 2d 1360, 1361 (Fla. 1st DCA 1989) (settlement proceeds set-off where for same injuries and damages plaintiff sued defendant); Kay v. Bricker, 485 So. 2d 486, 487 (Fla. 3d DCA 1986) (same); Madden v. Rodovich, 367 So. 2d 1083, 1084 (Fla. 4th DCA 1979) (same). Accordingly, the set-off statutes require that the full value of Plaintiffs' settlement,

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§768.041(2), Fla.Stat. (1997) (emphasis added).

Finally, Section 768.31(5)(a) provides, in pertinent part:

> (5) RELEASE OR COVENANT NOT TO SUE - When a release ... 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 in the amount of the consideration paid for it, whichever is greater ....

§768.31(5)(a), Fla.Stat. (1997).

$288,603.18, which is, without dispute, for the same damages sought from DR. D'ANGELO, be set-off in its entirety.

The applicability of Florida's set-off statutes, and the inapplicability of Wells and Section 768.81(3), is evidenced by the certified question this Court answered in Wells. The certified question was:

> IS A NON-SETTLING DEFENDANT IN A CASE TRIED UNDER SECTION 768.81(3) ENTITLED TO SETOFF OR REDUCTION OF HIS APPORTIONED SHARE OF THE DAMAGES, AS ASSESSED BY THE JURY, UNDER THE PROVISIONS OF SECTIONS 768.041(2), 46.015(2) OR 768.31(5)(a), BASED UPON SUMS PAID BY SETTLING DEFENDANTS IN EXCESS OF THEIR APPORTIONED LIABILITY AS DETERMINED BY THE JURY?

Wells, 659 So. 2d at 250 (emphasis added). That question clearly presupposed an actual and specific apportionment of fault by the jury between the settling and nonsettling defendants/tortfeasors; the facts in Wells. In fact, Justice Wells, in his concurring specially opinion, stated: "It is my view that the majority's interpretation of these statutes is correct in cases in which the jury is instructed to apportion fault in accordance with *Fabre's* interpretation of section 768.81(3)." Wells, 659 So. 2d at 255 (Justice Wells, concurring specially) (emphasis added). Justice Anstead likewise stated that Florida's set-off provisions are not needed when fault is apportioned under

Section 768.81(3). Wells, 659 So. 2d at 256 (Justice Anstead, specially concurring). Consequently, the set-off statutes apply where, as here, the jury was **not** asked to apportion fault pursuant to Section 768.81(3).

Furthermore, DR. D'ANGELO submits that the Fifth District's reasoning in Doig v. Chester, 776 So. 2d 1043 (Fla. 5th DCA 2001), *quashed*, Chester v. Doig, 2003 Fla. LEXIS 164 (Fla. February 6, 2003), with regard to set-off when fault is not apportioned is persuasive and the correct resolution of the set-off issue in this case, notwithstanding this Court's recent decision in Chester, *supra*.[7] The Fifth District held that the settlement proceeds should be set-off and stated:

> That is because there was no allocation of fault and Dr. Doig is responsible jointly and severally for all non-economic damages found by the arbitration panel. We believe that the rule in *Wells* limiting offsets to only economic damages simply cannot rationally be applied unless there has been a determination by a court as to the total amount of non-economic damages suffered and an appropriate allocation of fault between the various parties and any non-parties found to be partially responsible for the loss.

[7] This Court in Chester quashed Doig because the arbitration provisions of the Medical Malpractice Act do not provide for the set-off of settlements against arbitration awards. Chester, 2003 Fla. LEXIS 164, *4-9. The instant case was tried before a jury, not arbitrated, and Chester thus does **not** preclude the requested full set-off.

Doig, 776 So. 2d at 1047 (emphasis added). The Doig court further reasoned as follows:

> [I]f a plaintiff collects the largest award for non-economic damages (not reduced by an allocation of fault) that he can establish, he has been fully compensated for his non-economic damages and may not collect a second time from another also responsible for *the incident* resulting in his loss.

Doig, 776 So. 2d at 1046 (italics in the original).

Equally instructive is the Fourth District's original decision in Anderson v. Ewing, 25 Fla. L. Weekly D1379 (Fla. 4th DCA June 7, 2000). The Anderson court originally held that the nonsettling defendant was entitled to have the jury's award reduced by the full amount of the plaintiff's settlement with the settling tortfeasors because the jury did **not** determine the settling tortfeasors' comparative fault. The court reasoned that Section 768.041(2), not Section 768.81(3) and Wells, applied in that situation. On rehearing, the Fourth District, however, withdrew that Opinion because the nonsettling defendant did not request a set-off of the settlement proceeds against the noneconomic damages and, the settling tortfeasors were specifically listed on the verdict form and the jury expressly found them not liable. *See* Anderson v. Ewing, 768 So. 2d 1161, 1166 (Fla. 4th DCA 2000), *rev. dismissed*, 779 So. 2d 269 (Fla. 2001). Those facts are not, very importantly, present in the instant case.

Specifically, neither Charlotte Regional Medical Center nor its nurses were listed on the verdict form and DR. D'ANGELO **did** request a set-off as to the noneconomic damages. [R. Vol. 7, pp. 1008-1009, 1031-1032, 1035-1041, 1059-1063]. The reasoning of the Fourth District in its original but withdrawn Opinion in Anderson thus applies here.

Here, Plaintiffs were awarded $128,732.81 in economic damages and $250,000.00 in noneconomic damages, the largest amounts they were able to establish. [R. Vol. 7, pp. 1008-1009]. The jury was **not** asked to allocate fault among tortfeasors and DR. D'ANGELO is accordingly 100% liable for the entire amount awarded. Having already collected $288,603.18 of those damages, Plaintiffs "may not collect a second time from another also responsible for *the incident* resulting in [their] loss." Doig, 776 So. 2d at 1046. In other words, the only way to prevent a double recovery is to set-off the full value of the settlement, $288,603.18, from the jury's verdict. DR. D'ANGELO's liability to the Plaintiffs should thus be reduced to and should not exceed $90,129.63.[8]

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[8]Setting-off the $88,603.18 in discharged hospital expenses is further supported by the body of case law which does not permit a plaintiff to recover more than the actual amount of medical expenses that he owes. *See* Hollins v. Perry, 582 So. 2d 786 (Fla. 5th DCA 1991) (plaintiff not entitled to recover hospitalization expenses which

The Second District, however, disagreed with the foregoing analysis and actually reversed the trial court's partial set-off based on this Court's decision Gouty v. Schnepel, 795 So. 2d 959 (Fla. 2001).[9] DR. D'ANGELO respectfully submits that the Second District's reliance, as well as Plaintiffs' anticipated continued reliance, on Gouty is simply misplaced. The Second District and Plaintiffs have overlooked the facts in Gouty and consequently misunderstand and/or misinterpret this Court's

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hospital agreed to reduce from bill and not charge plaintiff); Suhor v. LaGasse, 770 So. 2d 422, 427 (La. Ct. App. 2000) (plaintiff could not recover written-off medical expenses; "cannot be allowed to recover a nonexistent debt"); Terrell v. Nanda, 759 So. 2d 1026, 1031 (La. Ct. App. 2000) (contractually adjusted or written-off medical expenses are not recoverable; "a plaintiff may not be compensated for damages which he has not suffered"); Hanif v. Housing Authority of Yolo County, 200 Cal. App. 3d 635 (Cal. Ct. App. 1988) (award of past medical expenses may not exceed the actual amount paid).

[9] The certified question in Gouty, answered in the negative, was:

> 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?

795 So. 2d at 960.

holding in Gouty. The Second District and Plaintiffs have, in particular, failed to interpret Gouty in the context of the facts upon which the Gouty decision was based.

The plaintiff in Gouty was injured by a gunshot and sued the gun owner and gun manufacturer. The gun manufacturer settled pre-trial, but was listed on the verdict form for purposes of apportioning fault. The jury returned a verdict finding the gun owner 100% liable and exonerating the gun manufacturer altogether. Gouty, 795 So. 2d at 960. In other words, "the jury expressly rejected a finding that [the gun manufacturer] was a joint tortfeasor." *Id*., at 966. Post-trial, the gun owner moved to reduce the verdict by the amount of plaintiff's settlement with the gun manufacturer. The trial court denied the motion and First District reversed.

The Supreme Court quashed the district court's decision and stated:

> The core issue in this case is whether the setoff statutes may be used in circumstances where the jury finds a non-settling defendant liable for economic damages, but finds that the settling defendant is not liable.

Gouty, 795 So. 2d at 961 (emphasis added). The Gouty court's answer to the "core issue" it phrased was "that the setoff statutes are inapplicable to a settling defendant who is found to have no liability." *Id*. (emphasis added). In other words, the Gouty decision merely holds that the settlement of a settling defendant/tortfeasor may not be

set-off from the award against the nonsettling defendant when a jury is **specifically asked** whether and **determines** that the settling defendant/tortfeasor is fault-free. Stated differently (and to paraphrase the Second District), "there must be a finding of no liability to preclude [set-off]." D'Angelo v. Fitzmaurice, 27 Fla. L. Weekly D2217, D2218 (Fla. 2d DCA 2002).

DR. D'ANGELO submits that the Second District erroneously interpreted Gouty as standing for the proposition that a nonsettling defendant is not entitled to a set-off when the settling defendant/tortfeasor is not included on the verdict form. Simply put, the Second District's view of Gouty is not supported by the facts or this Court's holding in Gouty.

Moreover, the Gouty court's interchange of the phrases "not found liable" and "found not liable" is a distinction without a difference and one which the Plaintiffs have played verbal gymnastics with to cloud and confuse the issues. A "finding" is defined in *Webster's II New College Dictionary* 420 (1995) as a "conclusion reached after investigation or examination." Thus, whether the word "not" is used before or after the word "found," the settling defendant's fault **must** be presented to and specifically "reached" and decided by the jury before Gouty applies. The jury in Gouty expressly

"reached" the "conclusion" that the gun manufacturer was fault-free after examining the evidence. The jury in the instant case was **not** asked to and did **not** decide whether the settling hospital was at fault. Gouty therefore does **not** apply to preclude a set-off in this case.

The Second also overlooked the fact that nothing within the four corners of the set-off statutes requires a finding of fault on the part of the settling defendant/tortfeasor to trigger the nonsettling defendant's right to a set-off. *See* §§ 46.015(2), 768.041(2) and 768.31(5)(a), Fla. Stat. (1997). Set-offs have always been permitted **without** a finding, tantamount to a condition precedent, that the settling party was at fault, as long as the settlement was "in partial satisfaction of the damages sued for."[10] *Id; see also* City of Jacksonville v. Outlaw, 538 So. 2d 1360, 1361 (Fla. 1st DCA 1989) (settlement proceeds set-off where for same injuries and damages plaintiff sued defendant); Kay v. Bricker, 485 So. 2d 486, 487 (Fla. 3d DCA 1986) (same); Madden v. Rodovich, 367 So. 2d 1083, 1084 (Fla. 4th DCA 1979) (same). Plaintiffs implicitly concede and do **not** dispute the fact that the hospital's settlement

[10] Under Gouty, a finding that the settling defendant/tortfeasor is at fault is a prerequisite to set-off **only** when the jury is **actually asked** to assess the fault of the settling defendant/tortfeasor. Gouty, 795 So. 2d at 961.

with them was "in partial satisfaction of the damages sued for." Furthermore, Plaintiffs argued "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."[11] [Answer Brief filed with the Second District, p.30

[11] The doctrine of judicial estoppel accordingly prohibits Plaintiffs from taking inconsistent positions and now, after accepting $288,603.18 in settlement of their claim against the hospital, arguing the hospital was not at fault. *See* Blumberg v. USAA Casualty Ins. Co., 790 So. 2d 1061 (Fla. 2001); Lambert v. Nationwide Mutual Fire Ins. Co., 456 So. 2d 517 (Fla. 1st DCA 1984). As this Court explained in Blumberg:

> "Judicial estoppel is an equitable doctrine that is used to prevent litigants from taking totally inconsistent positions in separate judicial, including quasi-judicial, proceedings." Smith v. Avatar Properties, Inc., 714 So. 2d 1103, 1107 (Fla. 5th DCA 1998). The doctrine prevents parties from "making a mockery of justice by inconsistent pleadings," American Nat'l Bank v. Federal Deposit Ins. Corp., 710 F.2d 1528, 1536 (11th Cir. 1983), and "playing fast and loose with the courts." Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990).

790 So. 2d at 1066. 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. *Cf.* Bogosian v. State Farm Mutual Automobile Ins. Co., 817 So. 2d 968 (Fla. 3d DCA 2002) ("Plaintiff sued D.O.T. for negligence and accepted a payment in settlement of that claim. Having done so, plaintiff will not be heard to say in defense of the Fabre claim

(emphasis added)].

Furthermore, were this Court to adopt the Second District's and Plaintiffs' interpretation of Gouty, this Court would judicially abrogate the set-off statutes in those cases where the jury is **not** asked to determine the fault of the settling defendant/tortfeasor. The impropriety of this course of action is evidenced by the fact that Florida's Legislature has had almost 16 years since the enactment of Section 768.81 to amend or repeal the set-off statutes but has not done so. In fact, Justice Anstead in Wells specifically noted "that the legislature left the [set-off statutes] largely intact when it adopted section 768.81(3)." Wells, 659 So. 2d at 256 (Justice Anstead, specially concurring). This Court in Gouty also pointed out that "the language of the setoff statutes has not changed since *Wells.*" Gouty, 795 So. 2d at 966. DR. D'ANGELO submits the Legislature's inaction and the continued viability of the set-off statutes in cases like this one, where the jury is **not** asked to apportion fault among the settling and nonsettling defendants/tortfeasors, is due to the fact that this Court has **only** held that a set-off is not permitted when the settling defendant/tortfeasor is

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that D.O.T. was entirely without fault.").

specifically and expressly found to be fault-free or to have no liability.

Notably, the Second District expressly acknowledged and recognized the windfall Plaintiffs receive because "the forgiven hospital bill was part of the past medical bills awarded to the Fitzmaurices by the jury," while rejecting DR. D'ANGELO's set-off arguments. D'Angelo, 27 Fla. L. Weekly at D2218, n.2. DR. D'ANGELO submits that Florida's set-off statutes, which have **not** been repealed, and the foregoing case law and analysis are the authority to grant a set-off for both the $88,603.18 in discharged hospital expenses and the $200,000.00 undifferentiated lump sum settlement payment.[12] A full set-off eliminates any windfall, prevents a double recovery and still guarantees Plaintiffs their jury-assessed damages.

Finally, the Second District's concern that accepting DR. D'ANGELO's full or 100% set-off argument discourages settlements is simply unfounded and unrealistic. As was the case before the enactment of Section 768.81, a plaintiff will always at least

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[12] The medical bills windfall recognized by the Second District would, alternatively, be eliminated if this Court agrees with DR. D'ANGELO that he was not required to include the settling tortfeasor hospital on the verdict form in order to be entitled to a set-off, but rejects the full set-off argument and chooses to apply the Wells set-off formula. Under Wells, the set-off would be 33.99% of $288,603.18 or $98,096.22. DR. D'ANGELO nevertheless submits this result is also contrary to the set-off statutes.

ultimately recover the jury's valuation of the damages if a full set-off is granted. In other words, a plaintiff will never be prejudiced when the jury's award is reduced by the full amount of a prior settlement for the same damages. In this case, a full set-off means that Plaintiffs still recover the $378,732.81 the jury of their peers determined would compensate them for the damages they sustained.[13] However, were this Court to adopt the Second District's reasoning (and Plaintiffs' anticipated arguments), Plaintiffs will recover $667,335.99 or almost 177% of the assessed damages. Stated differently, Plaintiffs will receive $288,603.18 more than the amount the jury determined would compensate them. This is clearly contrary to the longstanding and still viable goal of Florida's set-off statutes, to-wit: preventing duplicate or overlapping recoveries.

[13] Plaintiffs will, in fact, be fully compensated in a matter of days when DR. D'ANGELO pays Plaintiffs $90,129.63, plus interest, pursuant to this Court's February 3, 2003 Order.

CONCLUSION

Based upon the foregoing arguments, the Petitioners, PHILIP D'ANGELO, M.D., and PHILIP D'ANGELO, M.D., P.A., respectfully request this Court to quash the April 9, 2001 Amended Final Judgment and the Second District's October 9, 2002 Opinion, and remand for a set-off of $288,603.18, the full value of Plaintiffs' settlement with Charlotte Regional Medical Center for the same damages Plaintiffs subsequently sought and recovered from the Petitioners.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF TYPEFACE COMPLIANCE

THE UNDERSIGNED COUNSEL certifies that, in accordance with Florida Rule of Appellate Procedure 9.210(a)(2), the foregoing Brief contains 14 point Times New Roman typeface.

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