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' REPLY BRIEF ON THE MERITS

ESTHER E. GALICIA
Florida Bar No.: 510459
GEORGE, HARTZ, LUNDEEN, FULMER, JOHNSTONE, KING & STEVENS
Attorneys for Petitioners, PHILIP C. D'ANGELO, M.D., and PHILIP C. D'ANGELO, M.D., P.A.
3rd Floor - Justice Building
524 S. Andrews Avenue
Fort Lauderdale, Florida 33301

(954) 462-1620

TABLE OF CONTENTS

PAGE(S)

TABLE OF CITATIONS

CASES **PAGE(S)**

PAGE(S)

STATUTE(S)

OTHER

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' Reply Brief on the Merits is supplied by counsel unless otherwise indicated.

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.[1]

The question certified by the Second District has never been, contrary to Plaintiffs' contention, presented to, much less answered by, this Court. Moreover, holding that DR. D'ANGELO is entitled to have the full value of Plaintiffs' settlement with the non-party tortfeasor Hospital set-off against the jury's verdict does **not** require this Court to overrule its decisions in 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). Wells, Nash and Gouty do **not** require a defendant to submit the issue of a settling non-party tortfeasor's fault to the jury. Wells, Nash and Gouty likewise do **not** preclude setting off the entire amount/value of the non-party's settlement (pursuant

[1] DR. D'ANGELO submits that Plaintiffs' reformulated certified question is factually and legally inaccurate, as well as self-serving.

to Florida's "set-off statutes")[2] when that settling tortfeasor's fault is **not** specifically presented to and **not** expressly determined by the fact-finder. [3]

Additionally, Florida's Legislature did not need to modify the set-off statutes, as Plaintiffs argue, when it enacted Section 768.81. This Court similarly does not need to reconcile or harmonize those statutes if deemed conflicting. The Legislature specifically addressed this issue and stated that if Section 768.81 "is in conflict with any other provision of the Florida Statutes, such other provision shall apply." § 768.71(3), Fla. Stat. (1997) (emphasis added); *see* Fabre v. Marin, 623 So. 2d 1182, 1186 (Fla. 1993) ("such other provisions shall prevail"). That legislative pronouncement clearly and unambiguously indicates that the set-off statutes did survive the enactment of Section 768.81 and are alive and well today. The Legislature has never, in fact, repealed the set-off statutes in the more than 16 years since Section 768.81 was enacted.

---

[2] The "set-off statutes" are Sections 768.041(2), 46.015(2) and 768.31(5)(a) of the Florida Statutes (1997). The pertinent text of those statutes is quoted in Petitioners' Initial Brief on the Merits. For the sake of brevity, DR. D'ANGELO will collectively refer to those three provisions as the "set-off statutes" throughout this Reply Brief on the Merits.

[3] Nash did not, incidentally, deal with setting off a non-party's settlement with the plaintiff and is thus inapposite.

The set-off statutes clearly apply when, in particular, the jury is **not** asked to apportion fault among all participants to an accident. The clear and unambiguous language of Section 768.81 establishes that joint and several liability is abrogated **only** to the extent that fault among the participants to an accident is apportioned. The set-off statutes, not Section 768.81, thus apply in the instant case because the jury was not asked to and did not apportion liability. Stated differently, DR. D'ANGELO's liability under the facts of this case is, as Plaintiffs concede was the case before Section 768.81 was enacted, joint and several, and DR. D'ANGELO is, moreover, entitled to set-off 100% of any settlement Plaintiffs received in partial satisfaction of the same damages DR. D'ANGELO was sued for.

In support thereof, DR. D'ANGELO relies on this Court's statement in Gouty that "if the defendant is required to pay damages on the basis of joint and several liability, that defendant's rights of contribution and set-off remain unchanged [by the enactment of Section 768.81(3)]." Gouty, 795 So. 2d at 964. In so opining, the Gouty court mentioned "the underlying rationale of *Wells* that the operation of the setoff statutes was premised upon the determination that the defendant was jointly and severally liable for the same damages." Gouty, 795 So. 2d at 965. The fault of the settling and nonsettling tortfeasors was assessed and apportioned in both Gouty and

Wells, and the nonsettling defendant's liability for noneconomic damages therefore was not joint and several. Where, as here, the jury does **not**, as this Court stated in Fabre v. Marin, 623 So. 2d 1182, 1185 (Fla. 1993), compare the defendant's "percentage [of fault] to all of the other entities who contributed to the accident," the defendant's (i.e., DR. D'ANGELO's) liability is joint and several (not just several) for both economic and noneconomic damages.[4] Wells and Gouty therefore require DR. D'ANGELO's requested full set-off pursuant to the set-off statutes.

As Amicus correctly points out, apportionment of fault under Section 768.81 is optional, not mandatory, and Section 768.81 is **not** self-executing. DR. D'ANGELO therefore had the right but not the obligation to request a determination of the settling Hospital's percentage of fault in order to reduce the percentage of his liability for non-economic damages. Having chosen not to seek apportionment, neither Wells, Nash or Gouty apply.[5] Instead, the set-off statutes apply.

---

[4] Plaintiffs relied on Gouty below and argued that the Hospital was "not found liable." They never argued, as they do now, that DR. D'ANGELO was not entitled to a set-off because of the "several" liability for noneconomic damages under Wells and Nash.

[5] Plaintiffs' contention that DR. D'ANGELO failed to preserve or waived the argument that he can elect between the set-off and comparative fault remedies was actually waived and **not** preserved by Plaintiffs. Plaintiffs never argued waiver or failure to preserve during the proceedings before the Second District and should not

Notwithstanding the foregoing, DR. D'ANGELO respectfully submits that the applicability of the set-off statutes is actually **only** dependent upon whether the settlement is "in partial satisfaction of the damages sued for." In other words, the **only** thing the set-off statutes presuppose is a settlement in partial satisfaction of the damages the defendant was sued for.[6] Plaintiffs have never contested or disputed the fact that the full value of their settlement with the tortfeasor Hospital was in partial satisfaction of the same damages DR. D'ANGELO was sued for. The set-off statutes therefore require that the full value of Plaintiffs' settlement with the Hospital be set-off

---

be permitted to make such arguments at this late stage. In fact, in their Answer Brief at the Second District, Plaintiffs stated:

> . . .[W]e believe the ["all or nothing"] tactic was also designed to support the argument made <u>both below and here</u> -- that, having elected not to invoke the apportionment remedy provided to the defendant by § 768.81, § 768.81 became irrelevant, and Florida's setoff statutes therefore required that the full amount of the hospital's settlement be set off against the verdict. (emphasis added)

[Plaintiffs' Answer Brief (2d DCA), p. 43]. Moreover, DR. D'ANGELO's trial counsel did seek a full set-off after electing to forego apportionment of fault based on the jury's verdict finding DR. D'ANGELO negligent. [R. Vol. 6, p. 922; R. Vol. 7, pp. 1031-1032, 1033-1034, 1035-1041, 1059-1063].

[6] Respectfully, Florida's Legislature, not Plaintiffs or this Court, is the only entity authorized to rewrite the set-off statutes.

from the jury's award against DR. D'ANGELO.

The foundation of Plaintiffs' contention that DR. D'ANGELO was not "free to elect between § 768.81 and the 'setoff statutes'" is faulty. [Answer Brief on the Merits, p. 21]. Specifically, joint and several liability has been eliminated **only** to the extent that fault among the participants is expressly apportioned. In this regard, Florida's statutes and Nash and its progeny do **not** require a defendant to place a settling tortfeasor on the verdict form in order to be entitled to a full set-off. Furthermore, a defendant who exercises his right to a set-off pursuant to the set-off statutes, instead of his right to have fault apportioned, does not, as Plaintiffs would have this Court believe, impose upon a plaintiff a pleading and evidentiary burden the plaintiff would not have if apportionment had been chosen. In other words, regardless of which option a defendant chooses, a plaintiff will always try to prove that the nonsettling defendant was wholly responsible **and** that the settling tortfeasor was hardly at fault, if at all. Contrary to Plaintiffs' historical account of Florida jurisprudence, ever since Section 768.81 was enacted and whenever a defendant asserts the comparative fault principles of Section 768.81 as an affirmative defense, the plaintiff always seeks to "avoid" this affirmative defense by proving the non-existent or minimal liability of the

settling tortfeasor.[7] In fact, that is exactly what the plaintiffs successfully did in Wells and Gouty. If anything, election of the set-off option actually has the potential effect of eliminating, rather than creating, a burden upon the plaintiff. Specifically, when a defendant elects the set-off remedy, a plaintiff who is **not** driven by greed can altogether avoid pleading and proving the settling tortfeasor's lack of fault by simply agreeing to accept a full set-off of the proceeds plaintiff received from the settling tortfeasor "in partial satisfaction of the damages sued for."

The only general principle announced in Gouty, contrary to Plaintiffs' contention, is that a defendant is not entitled to a set-off when the jury or trier-of-fact **specifically** and **expressly concludes** that the settling tortfeasor was **not** at fault or liable. In fact, this Court in Gouty essentially agreed with Judge Van Nortwick's dissent in part in Schnepel v. Gouty, 766 So. 2d 418, 424 (Fla. 1st DCA 2000) (emphasis added), *quashed*, 795 So. 2d 959 (Fla. 2001), that requiring "a set-off of settlement proceeds where the jury finds the settling defendant without liability is

---

[7]The settling tortfeasor's minimal or non-existent liability is thus an avoidance or affirmative defense to an affirmative defense which should be pled whether the defendant's affirmative defense is set-off or apportionment of fault under Section 768.81. *Cf.* Moore Meats, Inc. v. Strawn, 313 So. 2d 660 (Fla. 1975) (a plaintiff seeking to avoid or raise a defense to an affirmative defense should file a reply containing the avoidance).

contrary to the construction of [the set-off] statutes in *Wells*." *See* Gouty, 795 So. 2d at 961, 965-966. The jury in Gouty expressly "exonerated" the settling tortfeasor. Gouty, 795 So. 2d at 960; Schnepel, 766 So. 2d at 420. The jury in the instant case was **not** presented with the apportionment of fault issue and therefore did **not** reach the conclusion Gouty holds precludes a set-off.

Plaintiffs' reliance on Fernandez v. School Board of Hillsborough County, 824 So. 2d 193 (Fla. 2d DCA 2002), in support of their erroneous interpretation of Gouty is unavailing. A directed verdict against the defendant on the issue of the settling tortfeasor's liability, as occurred in Fernandez, is an adjudication on the merits and is tantamount to a jury verdict exonerating the settling tortfeasor.[8] The settling Hospital in the instant case was **not** exonerated by either the judge or the jury. Neither Gouty nor Fernandez thus apply to bar DR. D'ANGELO's requested 100% set-off.

In an effort to create a smoke screen with regard to the fact Plaintiffs have **never** disputed that their settlement with the non-party tortfeasor Hospital was "in partial satisfaction of the damages [DR. D'ANGELO was] sued for," Plaintiffs

[8] Black's Law Dictionary defines a directed verdict as a "judgment entered on the order of a trial judge who takes over the fact-finding role of the jury because the evidence is so compelling that only one decision can reasonably follow or because it fails to establish a prima facie case." *Black's Law Dictionary* 1555 (7th ed. 1999).

mischaracterize and misrepresent DR. D'ANGELO's argument on pages 25 and 26 of his Initial Brief on the Merits.[9] DR. D'ANGELO only argued that Plaintiffs implicitly conceded that their settlement with the Hospital was "in partial satisfaction of the damages sued for." [Initial Brief on the Merits, p. 25]. As far as the negligence of the Hospital's nurses is concerned, DR. D'ANGELO correctly represented that Plaintiffs argued to the Second District that "*both* Dr. D'Angelo and the hospital's nurses were negligent causes." *Id.* The fact Plaintiffs made that argument with regard to the propriety of the concurring cause jury instruction does **not** now permit them to disavow or disassociate themselves from the position they asserted at the Second District (and at the trial court) with regard to the nurses' negligence in order to take an inconsistent position before this Court.[10] Additionally, Plaintiffs' acceptance of the

---

[9] Plaintiffs further divert this Court's attention from the certified question by now, for the first time, challenging DR. D'ANGELO's trial counsel's closing argument. [Answer Brief on the Merits, p. 26, n. 8]. Defense counsel's **unobjected-to** closing argument was simply proper and authorized "empty chair" argument. *See* Black v. Montgomery Elevator Co., 581 So. 2d 624, 625 (Fla. 5th DCA 1991) (permissible to argue that non-party is responsible for plaintiff's injuries); Webb v. Priest, 413 So. 2d 43, 46 (Fla. 3d DCA 1982) (same); Clement v. Rousselle Corp., 372 So. 2d 1156, 1157-1158 (Fla. 1st DCA 1979) (defendant correctly allowed to argue that plaintiff's non-party employer was negligent), *cert. denied*, 383 So. 2d 1191 (Fla. 1980).

[10] Notably, Plaintiffs have conceded that the Hospital's nurses "probably were [negligent]." [Answer Brief on the Merits, p. 26]. DR. D'ANGELO's "exposition"

significant and substantial settlement with the tortfeasor Hospital bars and precludes them from arguing that the Hospital's nurses were fault-free. *Cf.* Bogosian v. State Farm Mutual Automobile Ins. Co., 817 So. 2d 968 (Fla. 3d DCA 2002) (plaintiff's acceptance of a settlement payment precludes argument that settling tortfeasor was entirely without fault).

In sum, the set-off statutes do **not** require apportionment of fault and Section 768.81 does **not** preclude a set-off in the absence of a jury determination apportioning fault. Additionally, no Florida statute or reported decision requires that a settling tortfeasor be included on the verdict form for future set-off purposes. Accordingly, DR. D'ANGELO submits that unless a jury or the trier-of-fact expressly finds a settling defendant/tortfeasor fault-free, there must be a set-off. The amount of the set-off is, in turn, dependent upon whether the jury was asked to apportion fault among the settling and nonsettling defendants/tortfeasors. Where apportionment was requested, the set-off calculations set forth in Wells v. Tallahassee Memorial Regional

---

in his Initial Brief on the Merits of the experts' testimony was, contrary to Plaintiffs' opinion, very relevant to the "fault" issue and was set forth in an effort to defuse Plaintiffs' "not found liable" argument.

Medical Center, Inc., 659 So. 2d 249 (Fla. 1995), apply.[11] When the settling defendant/tortfeasor was not placed on the verdict form and it is undisputed, as here, that the settlement proceeds were "in partial satisfaction of the damages sued for," the entire amount/value of the settlement "shall" be set-off pursuant to Sections 768.041(2), 46.015(2) and 768.31(5)(a) of the Florida Statutes (1997). [12]

[11] Plaintiffs implicitly concede that the appropriate set-off amount if Wells applies is $98,096.22, not the $67,980.47 the trial court calculated. [Answer Brief on the Merits, p. 12].

[12] DR. D'ANGELO is not relying on Section 768.76 of the Florida Statutes for purposes of setting off the discharged hospital expenses portion of Plaintiffs' settlement with the tortfeasor Hospital in light of this Court's recent decision in Chester v. Doig, 28 Fla. L. Weekly S126 (Fla. February 6, 2003).

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,

GEORGE, HARTZ, LUNDEEN, FULMER,
JOHNSTONE, KING & STEVENS
Attorneys for Petitioners
3rd Floor - Justice Building East
524 South Andrews Avenue
Fort Lauderdale, Florida 33301
(954) 462-1620

By: _____

ESTHER E. GALICIA
Fla. Bar No. 510459

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing Petitioners' Reply Brief on the Merits was mailed this _____ day of April, 2003, to: **WELDON E. BRENNAN, ESQ.,** Wagner, Vaughan & McLaughlin, P.A., Attorneys for Respondents/Plaintiffs, 601 Bayshore Boulevard, Suite 910, Tampa, FL 33606; **JOEL D. EATON, ESQ.,** Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., Attorneys for Respondents/Plaintiffs, 25 W. Flagler Street, Suite 800, Miami, FL 33130; and, **WENDY LUMISH, ESQ**., and **ALINA ALONSO, ESQ**., Carlton Fields, P.A., Attorneys for Amicus Florida Defense Lawyers Association, 4000 International Place, 100 SE Second Street, Miami, FL 33131.

GEORGE, HARTZ, LUNDEEN, FULMER,
JOHNSTONE, KING & STEVENS
Attorneys for Petitioners
3rd Floor - Justice Building East
524 South Andrews Avenue
Fort Lauderdale, Florida 33301
(954) 462-1620

By:_____

ESTHER E. GALICIA
Fla. Bar No. 510459

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.

GEORGE, HARTZ, LUNDEEN, FULMER, JOHNSTONE, KING & STEVENS
Attorneys for Petitioners, PHILIP C. D'ANGELO, M.D., and PHILIP C. D'ANGELO, M.D., P.A.
3rd Floor - Justice Building East
524 South Andrews Avenue
Fort Lauderdale, Florida 33301
(954) 462-1620

By: _____
ESTHER E. GALICIA
Fla. Bar No. 510459