IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUL 1 1992
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

MARIE G. FABRE, ET VIR,

Petitioner,

vs. CASE NO. 79,869

ANN MARIN,

Respondent.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

vs. CASE NO. 79,870

ANN MARIN,

Respondent.

BRIEF OF THE STATE OF FLORIDA, DEPARTMENT OF INSURANCE, DIVISION OF RISK MANAGEMENT AS AMICUS CURIAE IN SUPPORT OF PETITIONER

On Appeal from the Third District Court of Appeal

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ISSUE ON APPEAL

Whether the lower court erred in making the defendant liable for the fault of persons who were not parties to the action under the language of Section 768.81(3), Florida Statutes.

STATEMENT OF THE CASE AND FACTS

The State of Florida, Department of Insurance, Division of Risk Management, as amicus curiae, adopts the statement of the case and facts set forth by the appellant in her brief.

SUMMARY OF ARGUMENT

The language of Section 768.81(3), Florida Statutes, is clear and unambiguous. In the face of such express legislative intent, it is not the duty or the prerogative of the courts to modify or shade the intent so as to uphold a policy favored by the court.

The intent of this statute, as noted by this court in *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987) and by the Fifth District Court of Appeal in *Messmer v. Teacher's Ins. Co.*, 588 So.2d 610 (Fla. 5th DCA 1991), is to make a defendant responsible only for his proportionate share of fault for non-economic damages and not to make him responsible for the fault of other persons who shared in the wrongdoing.

The legislature has met in session since the *Smith* and *Messmer* opinions and since they have not amended this statute to reflect a different intent, that is presumed to be the intent of the legislature. *See Gulfstream Park Racing Association v. Department of Business Regulation*, 441 So.2d 627 (Fla. 1983).

Based on the foregoing reasons, the decision of the lower court should be reversed and the defendant's liability should be limited to his proportionate share of fault and he should not be made responsible for the fault of persons who were not parties to the action.

ARGUMENT

THE LOWER COURT ERRED IN MAKING THE DEFENDANT LIABLE FOR THE FAULT OF PERSONS WHO WERE NOT PARTIES TO THE ACTION UNDER THE CLEAR AND UNAMBIGUOUS LANGUAGE OF SECTION 768.81(3), FLORIDA STATUTES

Contrary to the opinion of the lower court in this case, the language of Section 768.81(3), Florida Statutes, is clear. This statute abrogates the doctrine of joint and several liability in regard to non-economic damages and provides that a party is only responsible for his share of the fault.

Section 768.81(3), Florida Statutes, provides:

> In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; . . .

The Fifth District Court of Appeal, in *Messmer v. Teacher's Ins. Co.*, 588 So.2d 610 (Fla. 5th DCA 1991), held:

> The court is of the opinion that the language of the statute supports defendant's contention that a party's percentage of the total fault of all participants in the accident is the operative percentage to be considered. The use of the word 'party' simply describes an entity against whom judgment is to be entered and is not intended as a word of limitation. Had the legislature intended the apportionment computation to be limited to the combined negligence of those who happened to be parties to the proceeding, it would have so stated. The plain meaning of the word percentage is a proportionate share of the whole, and this meaning should apply in the absence of any language altering or limiting the plain meaning. *See Holly v. Auld*, 450 So. 217 (Fla. 1984).

Id. at 611.

In the face of the clear and unambiguous language of this statute there is no necessity for the courts to attempt to construe or interpret the statute. As this court noted in *State v. Egan*, 287 So.2d 1, 4 (Fla. 1973):

> Surely, the purpose of all rules relating to the construction of statutes is to discover the true intention of the law. But such rules are useful only in case of doubt and should never be used to create doubt, only to remove it. Where the legislative intent as evidenced by a statute is plain and unambiguous, then there is no necessity for any construction or interpretation of the statute, and the courts need only give effect to the plain meaning of its terms.

In the instant case, the lower court's strained and confusing interpretation of this statute is unnecessary and contrary to this established rule of statutory construction. The language is clear and unambiguous and there is no necessity for any interpretation or construction.

This Court has held that Section 768.81(3), Florida Statutes, involves an express legislative pronouncement. In *Conley v. Boyle Drug Co.*, 570 So.2d 275 (Fla. 1990), this Court noted that joint and several liability has been abrogated except to the extent specified in Section 768.81(3), Florida Statutes. *Id.* at 285. This Court held that:

> In light of this express legislative pronouncement, incorporation of this doctrine [of joint and several liability] into a market share theory of liability would be contrary to the policy of this state.

Conley, 570 So.2d at 285. The opinion in *Messmer* correctly stated that the legislature meant to determine a defendant's liability

based upon the defendant's percentage of the wrongdoing of all participants and not to make a defendant responsible for the fault of other persons not a party to the lawsuit. To construe this statute otherwise would effectively hold the sole defendant jointly and severally liable and the legislature has specifically provided that this must not be done.

Section 768.81(3), Florida Statutes, clearly provides that judgment will only be entered against a party. However, the statute does not provide that a defendant's liability should be determined as a proportionate share of the parties only. To the contrary, the statute provides that a party's liability is based on his proportionate share of the fault and not on the basis of joint and several liability. "Fault" is defined as "responsibility for wrongdoing" and so the percentage of fault would merely mean that party's proportionate share of the whole responsibility for wrongdoing. See Webster's New Collegiate Dictionary 418 (rev. 5th ed. 1977). This definition is consistent with the legislature's intent to abrogate joint and several liability for non-economic damages. As the court noted in *Messmer, supra*:

> To exclude from the computation the fault of an entity that happens not to be a party to the particular proceeding would thwart this intent. The subject case is a perfect example. If the court were to adopt plaintiff's view, although defendant was only chargeable with 20% of the fault, it would be required to pay 100% of the damages, both economic and non-economic. This becomes the equivalent of joint and several liability, which the legislature obviously was intending to eliminate.

588 So.2d at 612.

In *Smith v. Department of Insurance*, 507 So.2d 1080, 1090 (Fla. 1987) and *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973), this Court went through an in-depth analysis of the history leading up to Florida's enactment of a comparative negligence standard. In *Hoffman v. Jones*, *supra*, this Court abandoned the theory of contributory negligence in favor of comparative negligence and stated that:

> If fault is to remain the test of liability, then the doctrine of comparative negligence which involves apportionment of the loss among those whose fault contributed to the occurrence is more consistent with liability based on a fault premise.

280 So.2d at 437. The focus of this statute is to limit the liability of the defendant to his share of the fault and not against whom judgment should be entered.

This Court discussed the historical development of comparative negligence in *Smith*, *supra*, and specifically addressed the modification of joint and several liability under Section 768.81(3), Florida Statutes. The relevant portion of this discussion follows:

> Further, it is argued that, in accordance with the philosophy of *Hoffman*, the principles of fairness require the elimination of joint and several liability by making each part's liability dependent upon his degree of fault--not on the solvency of his codefendants--and that fairness requires at least a modification of joint and several liability in order to balance the system. In response, it is argued that, given a choice between requiring an innocent plaintiff to incur the loss or requiring a defendant to pay more than his

> proportionate share, the choice should be the defendant because he is better able to spread the loss among all consumers by the insurance conduit.
>
> The real question in the joint and several liability problem is who should pay the damages caused by an insolvent tortfeasor. . . . In addressing this difficult issue, the legislature chose not to abolish joint and several liability in its entirety. Instead, the doctrine was modified by this act and continues to exist as to economic damages when a defendant's negligence is equal to or exceeds the plaintiff'. In this circumstance, each defendant is liable for only his own percentage share of *noneconomic* damages.
>
> * * *
>
> In answering the question of who should pay damages for the insolvent tortfeasor, the legislature chose a middle ground: both the plaintiff and the solvent defendant.

507 So.2d at 1080. The interpretation of the lower court in this case cannot stand in light of the legislative intent noted by this Court in *Smith*. To apply the lower court's interpretation would result in a defendant paying more than his own percentage share of non-economic damages. It would result in the defendant also paying the proportionate share of any person not a party to the action. Such a result is clearly contrary to the legislative intent.

Since this Court's opinions in *Conley* and *Smith*, *supra*, and the Fifth District Court of Appeal's decision in *Messmer*, *supra*, the legislature has met in session and has not amended the language of the statute in issue.

> When the legislature reenacts a statute which has a judicial construction placed

> upon it, it is presumed that the legislature is aware of the construction and intends to adopt it, absent a clear expression to the contrary. *Deltona Corp. v. Kipnis*, 194 So.2d 295 (Fla. 2nd DCA 1966).

Gulfstream Park Racing Association v. Department of Business Regulation, 441 So.2d 627 (Fla. 1983). *See also Advisory Opinion To The Governor*, 96 So.2d 541, 546 (Fla. 1957) and *Depfer v. Walker, et al.*, 169 So. 660, 664 (Fla. 1936). Since the courts' opinions, the legislature has not amended this language and so it must be presumed that this is the intent of the legislature.

As this Court has stated:

> [I]t is not the court's duty or prerogative to modify or shade clearly expressed legislative intent in order to uphold a policy favored by the court. *See McDonald v. Roland*, 65 So.2d 12 (Fla. 1953).

Holly v. Auld, 450 So.2d 217, 219. Accordingly, the courts should apply the express intent of Section 768.81(3), Florida Statutes, as did the court in *Messmer*.

CONCLUSION

The district court of appeal erred in failing to recognize the clear and unambiguous language of Section 768.81(3), Florida Statutes, and in holding the defendant responsible for the fault of persons who were not parties to the action. For these reasons, the decision of the lower court should be reversed.

Respectfully submitted,

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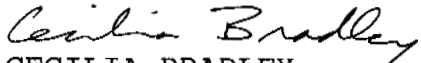

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF THE STATE OF FLORIDA, DEPARTMENT OF INSURANCE, DIVISION OF RISK MANAGEMENT AS AMICUS CURIAE IN SUPPORT OF APPELLANT has been furnished by U.S. Mail to JOEL D. EATON, ESQUIRE, Podhurst, Orseck, Josefsberg, et.al, 25 West Flagler Street, Suite 800, Miami, Florida 33130; MARC R. GINSBERG, ESQUIRE, Mandina & Ginsberg, P.A., Second Level, 2964 Aviation Avenue, Miami, Florida 33133; and JAMES K. CLARK, ESQUIRE, Barnett, Clark and Barnard, Biscayne Building, Suite 1003, 19 W. Flagler Street, Miami, Florida 33130; ROSALIND HERSCHTHAL, ESQUIRE, Grossman and Roth, P.A., Penthouse One, 2665 South Bayshore Drive, Miami, Florida 33133; ARTHUR COHEN, ESQUIRE, 44 West Flagler Street, Suite 406, Miami, Florida 33130; and BONITA KNEELAND, ESQUIRE, Fowler, White, Gillen, Boggs, Villareal & Bander, P.A., Post Office Box 1438, Tampa, Florida 33601, this 30th day of June, 1992.

Cecilia Bradley