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IN THE SUPREME COURT
OF THE STATE OF FLORIDA
TALLAHASSEE, FLORIDA

MARIE G. FABRE and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioners,

v.

ANN MARIN,

Respondent.

CONSOLIDATED CASE NOS.
79,869 and 79,870

BRIEF OF AMICUS CURIAE OF THE
FLORIDA ASSOCIATION FOR INSURANCE REVIEW
SUPPORTING POSITION OF PETITIONERS,
MARIE G. FABRE AND STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY

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MISCELLANEOUS

INTEREST OF THE FLORIDA ASSOCIATION FOR INSURANCE REVIEW AS AMICUS CURIAE

This amicus brief is submitted by the Florida Association for Insurance Review on behalf of the Defendants/Petitioners, Marie G. Fabre and State Farm Mutual Automobile Insurance Company. The Florida Association for Insurance Review is a non-profit organization consisting of insurance company's doing business in the State of Florida.

The purposes and objectives of this association are two-fold: First, the Association provides a regular educational forum to discuss current developments in Florida law affecting the claims submitted to casualty insurance companies and the insurance coverage typically provided in casualty insurance policies. Secondly, the Association submits amicus briefs to assist Florida courts concerning major issues which affect casualty insurance coverage and the claims which are payable by that coverage.

The issue which is presented in this proceeding is of substantial interest to the Florida Association for Insurance Review, as this case concerns whether, under the Tort Reform Act, a non-party's fault should be considered by a jury in determining a defendant's ultimate liability to an injured plaintiff.

STATEMENT OF THE CASE AND FACTS

This amicus will rely upon the statement of the case and facts as contained in the Petitioners' initial briefs on the merits filed by the Defendants/Petitioners, Marie G. Fabre and State Farm Mutual Automobile Insurance Company.

ISSUE ON APPEAL

Amicus Curiae, The Florida Association for Insurance Review, respectfully submits the following point on appeal:

> WHETHER, UNDER THE TORT REFORM ACT, NONPARTY TORT-FEASORS' FAULT SHOULD BE DETERMINED BY A JURY IN ORDER TO ASSESS PROPERLY THAT PORTION OF A PLAINTIFF'S DAMAGES ATTRIBUTABLE TO A PARTY DEFENDANT?

SUMMARY OF THE ARGUMENT

The position of amicus curiae, the Florida Association for Insurance Review, regarding the issue on appeal is as follows: For decades, plaintiffs have enjoyed the deep pockets of insured tort-feasors, even when these tort-feasors had only minor responsibility for the plaintiffs' injuries or loss. Recognizing this inequity, the legislature has wisely modified the law in Florida with the enactment of tort reform legislation such as section 768.81(3), Florida Statutes to create a far more balanced state of affairs. The statute is not ambiguous, but simply mandates a common-sense solution to the financial crisis in the liability insurance industry in Florida that precipitated the passage of the Tort Reform Act.

Under the provisions of section 768.81(3) Florida Statutes, the plaintiff's damages are obviously the "whole" to be apportioned among all entities who participated in contributing to the plaintiff's injuries or loss. Under this court's view in Smith v. Dept. of Insurance, 507 So.2d 1080, 1091 (Fla. 1987), the statute is constitutional because the plaintiff has no right to recover "for injuries beyond those caused by the particular defendant." Since a party defendant can only be held responsible for that portion of the plaintiff's damages which he caused, the jury must be permitted, under the statute, to apportion the responsibility for the plaintiff's losses among all participants responsible for the plaintiff's damages, including non-parties.

ARGUMENT

I.

UNDER THE TORT REFORM ACT, NONPARTY TORTFEASORS' FAULT SHOULD BE DETERMINED BY A JURY IN ORDER TO ASSESS PROPERLY THAT PORTION OF A PLAINTIFF'S DAMAGES ATTRIBUTABLE TO A PARTY DEFENDANT.

This petition involves a conflict between two district courts of appeal regarding the interpretation of legislation passed pursuant to the Tort Reform Act. The following statutory provisions are at issue in this cause:

> 768.81 Comparative fault --
>
> (2) EFFECT OF CONTRIBUTORY FAULT -- in an action to which this section applies, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and non-economic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.
>
> (3) APPORTIONMENT OF DAMAGES -- 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; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.

Under section 768.81(3), Florida Statutes, the apportionment of a plaintiff's damages is directly tied to a defendant's percentage of fault. The statute is not framed in terms of apportioning the plaintiff's total damages only among the plaintiff and party defendants. Nothing in the statute imposes such a restriction.

In its decision below, the Third District Court of Appeal certified that its decision to limit percentages of negligence on verdict forms to the plaintiff and party defendants only was in direct conflict with Messmer v. Teacher's Insurance Company, 588 So.2d 610 (Fla. 5th DCA 1991). The Messmer court rejected an interpretation of section 768.81(3), Florida Statutes which would require apportionment of damages only as to the actual parties to litigation or arbitration. Id. at 611. The court found that a party's percentage of total fault based on all participants in an accident is the operative percentage to be considered. Id. The use of the word "party," the court held, simply described an entity against whom judgment was to be entered, but did not limit the consideration of total fault based on all participants. Id. The court found that the statute was not only unambiguous, but that the purpose of the legislature in adopting the statute was the partial abrogation of the doctrine of joint and several liability, particularly to non-economic damage. Id. at 612. The Messmer court concluded that "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." Id.

This amicus believes that the result reached by the Third District below, which conflicts with Messmer, is incorrect for several reasons: First, as stated in Messmer, the reference in the statute to entry of judgment against each "party" liable on the basis of each "party's" percentage of fault does not require that the trial court enter judgment against non-parties, as was

concluded below. "Party" is simply an existing party defendant against whom judgment may be entered. In reality, the major focus of the statutory provision is on requiring a party defendant to pay only his percentage of responsibility for the plaintiff's injuries, i.e., damages. The Messmer court recognized this distinction.

Second, Fabre held that the statute was "ambiguous" because it did not set out the quantity or total the court should utilize to factor the "percentage of fault," whether it includes only party defendants or all participants in the injury. It is obvious on the face of the statute, however, that the plaintiff's damages are the key. It logically follows that a defendant's percentage of fault is equal to that portion of the plaintiff's damages which are attributable to that particular defendant. The plaintiff's damages are the entire pie, the "whole" to be apportioned. That being the case, all entities who participated in contributing to the plaintiff's damages, including nonparties, must have their fair percent of responsibility determined by the jury.

This court has already explicitly adopted this reasoning in Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987). In Smith, this court observed that originally, the doctrine of joint and several liability was based on the assumption that injuries were not divisible and that there was no means available to apportion fault. Id. at 1091. This court noted that the justification for the legislature's modification of joint and several liability is that it should not apply under pure

comparative negligence principles which allow the divisibility of a plaintiff's injuries. Id. Significantly, this court then commented with respect to insolvent "tort-feasors" (Note: not insolvent "defendants"):

> The real question in the joint and several liability problem is who should pay the damages caused by an insolvent tort-feasor. The problem is substantially compounded when the plaintiff is also at fault. 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's. In this circumstance, each defendant is liable for only his own percentage share of non-economic damages.

Id. In Smith, this court also concluded that Section 60 of the Tort Reform Act (now section 768.81(3), Florida Statutes) did not violate the due process or equal protection clause or deny a litigant's access to the court for the following reason:

> We find no violation of the right of access to the court because that right does not include the right to recover for injuries beyond those caused by the particular defendant.

Id. at 1091 (emphasis added).

Thus, it appears that this court has already recognized that a party defendant should only be held responsible for that portion of the plaintiff's damages which he caused. According to this court in Smith, the plaintiff has no right to recover for injuries from the defendant beyond those which that particular defendant caused. Under this accepted view, it is illogical to prevent the jury from also apportioning the responsibility for the

plaintiff's damages among non-party tort-feasors who contributed to the plaintiff's losses. Therefore, the liability of all entities who caused injuries to the plaintiff must be figured into the equation.

Section 768.81(3), Florida Statutes was enacted as part of the Tort Reform Act to avoid the unjust and outrageous results of Walt Disney World v. Wood, 515 So.2d 198 (Fla. 1987), wherein this court implied that, with the passage of section 768.81(3), Florida Statutes, the legislature was correcting the unfairness of having an entity who is responsible for only 1% of the damages pay 86% of the damages. This court also noted in Wood that the 1986 tort reform legislation modified the doctrine of joint and several liability to a substantial degree by providing for apportionment of fault under certain circumstances. Id. at 201. Even before Smith, this court recognized that the plaintiff's damages should be the "whole" to be fairly apportioned among those causing the damages. As then-Chief Justice McDonald reflected in his dissent, basing a defendant's liability on the ability of others to pay runs counter to the pronouncement in Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) that the liability of the defendant should not depend on what damages were suffered, but on what proportion of the total damages the defendant caused the plaintiff. Id. at 202. In his dissent, Justice Overton, also observed:

> Our tort system is founded on the principle of fault, with the one whose fault caused injury being liable for the damages he or she caused.

Id. at 206.

The fact that section 768.81(2), Florida Statutes states that the comparative negligence of the claimant is not a "bar" to recovery only codifies the rule that, even under this statute, contributory fault of a plaintiff is still not a complete bar to recovery in Florida. Certainly including all participants on the jury form does not "bar" the recovery of the plaintiff as long as the remaining defendant or defendants in the case are found to be negligent by any percentage whatsoever. The fact that a party's recovery is reduced by the percentage of negligence of a non-party who happens to be immune from suit, or is otherwise not a defendant, is not an unreasonable consequence as long as the remaining defendant(s) is required to pay his appropriate share of the plaintiff's damages. The plaintiff would only be "barred" from recovery entirely if the remaining defendant(s) were found to be completely non-negligent. This would happen regardless of the inclusion of non-parties on the verdict form.

In Marin's brief to the Third District below, she constructs a scenario wherein a plaintiff would receive nothing from a 50% liable party defendant if the plaintiff has already settled with another 50% liable tort-feasor for half the amount of the judgment because of "set-off" statutes, such as section 768.31(5), Florida Statutes. However, Marin ignores the obvious purpose of set-offs --to prevent plaintiffs from obtaining a double recovery of damages. Thus, any common sense application of the set-off statutes would negate this "problem." The party defendant(s) would be entitled to a set off only to the extent that

the plaintiff would not be permitted to recover total damages (after adding together the verdict award and any prior settlements) in excess of the damages awarded by the jury.

Other "horribles" in Marin's "parade of horribles" are equally non-existent. For example, Marin makes much of a scenario in which the negligence of a tort-feasor requires medical treatment which leads to subsequent medical malpractice. Marin states that under the Messmer ruling, the doctor would have to be included on the verdict form, resulting in a medical malpractice case joined to the proceedings. However, if one looks realistically at this scenario, one realizes that the doctor need not be brought into the action or included on the verdict form. This is so because the party defendant is already responsible under the law for subsequent medical malpractice damages and thus for that "piece of the pie" as to the plaintiff's damages. See Stuart v. Hertz Corp., 351 So.2d 703 (Fla. 1977). On the other hand, in a case where only one doctor is sued for malpractice, he should obviously be permitted to include on the verdict form other entities involved in the alleged malpractice because he would not be responsible for that portion of the plaintiff's damages caused by other medical tort-feasors. In such case, there is already a medical malpractice case being tried and no harm done in expanding it.

Upon careful examination, Marin's cries of injustice against plaintiffs rings hollow when it is compared to the past injustices against defendants under the law prior to this tort reform. The plaintiffs, for decades, have enjoyed the deep pockets

of insured tort-feasors regardless of their minor responsibilities for the plaintiff's injuries. In numerous instances, the plaintiff could settle with the major tort-feasor for minimal amounts and proceed against a heavily-insured, but relatively minor tort-feasor for the remaining major portion of his damages. Recognizing this inequity, the legislature has wisely modified the law in Florida to create a far more balanced state of affairs with the enactment of tort reform legislation.

The idea is not new. In the numerous states[2/] that have adopted a statute similar to Florida's, the courts have construed the law to require that all entities involved in causing the plaintiff's injuries be included on the jury form, including entities not sued, immune from suit, those who had settled, and phantom tort-feasors. See e.g., Prince v. Lessona Corporation, Inc., 720 F.2d 1166 (10th Cir. 1983) (construing Kansas law); Bartlett v. New Mexico Welding Supply, Inc., 646 P.2d 579 (N.M.App. 1982); Paul v. N.L. Industries, Inc., 624 P.2d 68 (Okla. 1980); Frey v. Snelgrove, 269 N.W.2d 918 (Minn. 1978). In the Frey decision, for example, the Supreme Court of Minnesota stated the general rule as follows:

> In almost every case, the trial court should submit to the jury the fault of all parties, including settling defendants, even though they have been dismissed from the lawsuit.
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> If there is evidence of conduct which, if believed by the jury, would constitute

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2/ For example, Kansas; Minnesota; Wyoming; Oklahoma; California; New Mexico; Wisconsin; Hawaii; North Dakota; Idaho; and West Virginia.

> negligence [or fault] on the part of the person . . . inquired about, the fault or negligence of that party should be submitted to the jury.[3/]

Id. at 923.

Discussing a comparative negligence statute similar to Florida's, the Kansas Supreme Court in Brown v. Keill, 580 P.2d 867, 873-74, 876 (Kan. 1978), reasoned as follows:

> The legislature intended to equate recovery and duty to pay to degree of fault. Of necessity, this involved a change of both the doctrine of contributory negligence and of joint and several liability. There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental agency, and if by reason of some competing social policy, the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the co-defendant to pay more than his fair share of the loss. The same is true if one of the defendants is wealthy and the other is not. Previously, when the plaintiff had to be totally without negligence to recover and the defendants had to be merely negligent to incur an obligation to pay, an argument could be made which justified putting the burden of seeking contribution on the defendants. Such an argument is no longer compelling because of the purpose and intent behind the adoption of the comparative negligence statute.
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> * * *
>
> [T]he intent and purpose of the legislature . . . was to impose individual liability for

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3/ In context, when the Supreme Court of Minnesota referred to a "party" in this quote, it was referring to a participant in causing the plaintiff's damages, not a "party defendant".

> damages based on the proportionate fault of all parties to the occurrence which gave rise to the injuries and damages even though one or more parties cannot be joined formally as a litigant or be held legally responsible for his or her proportionate fault.

In Bartlett v. New Mexico Welding Supply, Inc., 646 P.2d at 584, the court discussed the origin of the old rule whereby a joint tort-feasor was responsible for all damages to the plaintiff caused by all tort-feasors. The court points out that the article, Prosser, "Joint Torts Several Liability", 25 Cal.L.Rev. 413 (1936-37), states that the rule holding a concurrent tort-feasor liable for the entire loss "grew out of the common law concept of the unity of the cause of action; the jury could not be permitted to apportion the damages, since there was but one wrong." The "unity" concept, in turn, was based on common law rules of pleading and joinder. Prosser, Law of Torts, 4th ed., ch. 8. The Bartlett court then refers to the article, "Torts--Liability of Joint Tort-Feasors--Apportionment of Damages Between Joint Tort-Feasors by Verdict of Jury," 14 Va.L.Rev. 677 (1927-28), at 680-81, which states that the cases which retain joint and several liability under relaxed American rules of joinder and in cases where causes of injury are concurrent, rather than concerted:

> seem to consider the question, not from the standpoint of whether it is just and reasonable to hold a person liable for all the damages occasioned by a joint tort in which his individual part may have resulted in little or no damage, but rather from the viewpoint of the unity of a cause in the old technical common law sense. That as the tort-feasors committed the tort together, and a single writ was brought against them, and they were sued in a single action and found guilty,

> then the damages should be rendered in a single sum. For, as the action was a unit and all found guilty of the same amount of wrong, they must be equally guilty of the same amount of wrong . . . But with the broadening in modern times of the legal conceptions regarding real consistency in the law as distinguished from mere technicality, the reasoning which appeared so persuasive to the old English jurists has lost much, if not all, of its force.

The article also states that the old doctrine "cannot be said to be based on any sound reason," and that "the few attempts by American authorities to justify the rule on reason cannot be said to be absolutely satisfactory." Id.

The tort reform statute is neither unjust nor ambiguous. Marin urges this court to conclude that the statute is both and to examine staff analysis reports to determine the "true" intent of the statute. However, this court has instructed courts to look at the plain meaning of statutory language as the first consideration of statutory construction, "rendering superfluous what the legislative staffs may have intended." Shelby Mutual Insurance Co. of Shelby, Ohio v. Smith, 556 So.2d 393, 395 (Fla. 1990); White v. Pepsico, Inc., 568 So.2d 886 (Fla. 1990); St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071 (Fla. 1982).[4/] Only when the language in and of itself is of doubtful meaning should any matter

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[4/] It is a also questionable practice to place heavy reliance on a staff report, normally a summary written by a non-legislature staff employee whose credentials are unknown, or who may be a legal intern. See McClellan v. State Farm Mutual Insurance Co., 366 So.2d 811 (Fla. 4th DCA 1979), disapp'd. on other grounds, South Carolina Co. v. Kokay, 398 So.2d 1355 (Fla. 1981), wherein the court refused to consider even the affidavit of a member of the legislature as to the intent of a statutory provision.

extrinsic to the statute alone be consulted. St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d at 1073. See also Dept. of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So.2d 879 (Fla. 1983).

Courts are not empowered to construe unambiguous statutes in a way which would extend, modify, or limit the expressed terms contained therein. Holly v. Auld, 450 So.2d 217 (Fla. 1984). In Heredia v. Allstate Insurance Co., 358 So.2d 1353, 1354-55 (Fla. 1978), this court stated:

> It is neither the function nor prerogative of the courts to speculate on constructions more or less reasonable, when the language itself conveys an unequivocal meaning.

Section 768.81(3), Florida Statutes unequivocally pronounces that, as to apportionment of damages, each party is liable only on the basis of such party's percentage of fault. In Smith, this court clearly concluded that percentage of fault is equated to only those injuries caused by the particular defendant. There is absolutely no need to look beyond the plain language of the statute to determine some missing "whole", i.e., all participants causing the injuries or only party defendants, from which to determine percentages of fault. The "whole" consists, of course, of the plaintiff's damages. There is no need for more specificity in the statute.

Further, this court has ruled that it will not require the legislature to draft laws with such specificity that the intent and purpose of the law may be easily avoided. Southeastern Fisheries Assn., Inc. v. Dept. of Natural Resources, 453 So.2d 1351

(Fla. 1984). However, statutes should be construed in light of the manifest purpose to be achieved by the legislation. Tampa, Hillsborough County Expressway Authority v. K. E. Morris Alignment Service, Inc., 444 So.2d 926 (Fla. 1983). A statute should be construed in light of the evil to be remedied and the remedy conceived by the legislature to cure such evil. Brown v. Griffin, 229 So.2d 225 (Fla. 1969). The evil to be corrected here was tort law that unfairly burdened heavily insured, but minimally negligent tort-feasors.

Recently, in Dafonte v. Up-right, Inc., 7 Cal.Rptr. 2d 238 (Cal. 1992), the Supreme Court of California, sitting en banc, construed a statute substantially similar to the Florida statute. The statute was challenged because it did not specifically state that non-party tort-feasors were to be included in determining proportional responsibility for the plaintiff's damages. The court concluded:

> The statute neither states nor implies an exception for damages attributable to the fault of persons who are immune from liability or have no mutual joint obligation to pay missing shares. On the contrary, section 1431.2 expressly affords relief to every tortfeasor who is a liable "defendant" and who formerly would have had full joint liability.
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> * * *
>
> The statute contains no hint that a "defendant" escapes joint liability only for noneconomic damages attributable to fellow "defendant" while remaining jointly liable for noneconomic damages caused by others.

Id. at 243 [emphasis supplied by the court]. The California Supreme Court went on to state that it found no ambiguity in the statute and that:

> [T]he only reasonable construction of section 1431.2 is that a "defendant['s]" liability for noneconomic damages cannot exceed his or her proportionate share of fault as compared with all fault responsible for the plaintiff's injuries, not merely that of "defendant[s]" present in the lawsuit...damages must be apportioned among a "universe of tort-feasors" including "non-joined defendants".

Id. at 244 [emphasis supplied by the court].

In sum, section 768.81(3), Florida Statutes is not unfair or ambiguous, but is simply a common sense solution to the tort and insurance crisis in Florida which precipitated the passage of the Tort Reform Act, of which this statute is a part. The preamble of the Act notes that section 768.81(3), Florida Statutes was enacted because there was a financial crisis in Florida's liability insurance industry. See Chapter 86-160, Laws of Florida. At least as to economic damages, the legislature has retired the old, unfair rule and replaced it with a rule far more consistent with the concept of comparative fault.

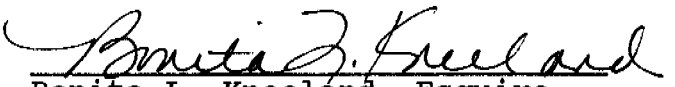
As this court acknowledged in Smith, 507 So.2d at 1091, the new law recognizes that pure comparative negligence principles allow the divisibility of a plaintiff's injuries. The problem with Marin's position is that it fails to recognize that the statute was enacted for the purpose of finally treating all defendants fairly. In order that the purpose of tort reform legislation be honored, all entities involved in causing the plaintiff's damages should be

included on the jury form for proper determination of fault and apportionment of damages.

CONCLUSION

The decision of the Fifth District Court of Appeal in Messmer v. Teacher's Insurance Company, 588 So.2d 610 (Fla. 5th DCA 1991) should be approved. The decision of the Third District Court of Appeal in the instant case should be disapproved. Under section 768.81(3), Florida Statutes, all entities involved in causing the plaintiff's damages should be included on the jury form for a proper determination of fault and apportionment of damages.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **Marc R. Ginsberg, Esquire,** 2964 Aviation Avenue #2, Miami, Florida 33133; **Joel D. Eaton, Esquire,** 800 City National Bank, 25 W. Flagler Street, Miami, Florida 33130; **James K. Clark, Esquire,** 19 W. Flagler Street, Suite 1003, Miami, Florida 33130; **Rosalind Herschthal, Esquire,** Grand Bay Plaza, Penthouse 1, 2665 S. Bayshore Drive, Miami, Florida 33133; and **Arthur A. Cohen, Esquire,** 44 West Flagler Street, #406, Miami, Florida 33130, on June 30, 1992.

Bonita L. Kneeland, Esquire