IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,869

MARIE G. FABRE, et al,

Petitioners,

-vs.-

ANN MARIN,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

AMICUS CURIAE BRIEF OF THE DADE COUNTY TRIAL LAWYERS ASSOCIATION

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STATEMENT OF THE CASE AND OF THE FACTS

The DADE COUNTY TRIAL LAWYERS ASSOCIATION (DCTLA) accepts the version of the Statement of the Case and of the Facts set forth by the Petitioner as it may have been supplemented and corrected by the Respondent.

SUMMARY OF THE ARGUMENT

Section 768.81(3), Fla. Stat. does not apply to the situation in which a culpable person or entity is immune from any liability to the Plaintiff, because that statute abrogated the doctrine of "joint and several liability." The doctrine of "joint and several liability" requires the existence of some (albeit often unequal) liability on the part of at least two tortfeasors. The abrogation of joint and several liability does nothing to other principles of the law in existence, such as the principle which holds a Defendant liable for the whole of the damages, notwithstanding the existence of some concurrent cause for the Plaintiff's injuries which cause is not a joint tortfeasor.

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ARGUMENT

SECTION 768.81, FLA. STAT. DOES NOT APPLY TO REDUCE A PLAINTIFF'S RECOVERY BY THE PERCENTAGE OF FAULT OF AN IMMUNE PERSON OR ENTITY, BECAUSE THAT STATUTE ABROGATED THE DOCTRINE OF "JOINT AND SEVERAL LIABILITY," WHICH DOCTRINE REQUIRES THE EXISTENCE OF TWO OR MORE DEFENDANTS LIABLE TO THE PLAINTIFF

The Petitioners seem to accept as a given the threshold proposition that prior to the enactment of §768.81, Fla. Stat., the common law doctrine of "joint and several liability" had some applicability to the situation in which there was were two culpable causes of a Plaintiff's injury: one subject to liability and one which was not by virtue of immunity. The Petitioners proceed from that starting point to discuss why they believe that the Florida Legislature meant to bring such cases within the ambit of that statute. As will be addressed in greater detail, DCTLA rejects that premise which seems to underlie all Petitioners' research and writing on the issue at bar, and states that the doctrine of joint and several liability (in its former form) did not have any applicability to a case such as this one. Therefore, the statute which abrogated that inapplicable doctrine has no application here either.

The liability for the whole of a Plaintiff's damages of a lone defendant tortfeasor who is the sole party susceptible to suit--in spite of the existence of a non-liable yet culpable concurring cause--has nothing to do with the doctrine of joint and several

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liability. Such a tortfeasor is (and always was) liable to pay all of the Plaintiff's damages under a theory different from the theory of joint and several liability,

There have been three increasingly-liberal definitions of "joint tort" for purposes of imposing "joint and several liability" for the whole damages upon one of the joint tortfeasors, none of which apply to the present case in which one the two culpable causes of the injuries is not a "tortfeasor" at all because of immunity. DCTLA suggests as an aside that the term "tortfeasor" implies liability to a Plaintiff, not merely culpable but non-actionable conduct by an actor. For that reason, DCTLA is using terms like "culpable actor" for one whose negligence which causes injury but who may or may not be liable because of immunity.

The first of the three definitions of "joint tort" in the English common law is described as follows: "The original meaning of 'joint tort' was that of vicarious liability for concerted action. All persons who acted in concert to commit a trespass, in pursuance of a common design, were held liable for the entire result." W. Prosser, Handbook of the Law of Torts §46 (4th Ed. 1971). There is, of course, no indication that Ramon Marin and Marie Fabre were persons acting in concert in causing the injuries to the Plaintiff below, so without reaching the issue of whether liability of two persons is a condition to the applicability of the doctrine of "joint and several liability," that first and most restrictive test of a "joint tort" has been shown to be inapplicable.

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The law concerning "joint and several liability" became more liberalized after the adoption of the Field Code in 1848, and led to the second meaning of "joint tort" described as follows: " A second meaning of a joint tort is that two or more persons may be joined as defendants in the same action at law. . . . Thus in the common case where the vehicles of two defendants collide and injure the plaintiff, it is held in most jurisdictions that there may be joinder under the codes." Id. §47. Plainly the case at bar and others like it--which involve culpable actors who contribute to cause accidents, but who are not susceptible to being "joined as defendants" in the suits because of immunity from prosecution--do not fall within this second definition for the purpose of ascertaining the existence of "joint and several liability."

The furthest limit of the definition of "joint tort" or "joint tortfeasor" in Florida jurisprudence was reached by this Court in Louisville & Nashville R. Co. v. Allen, 67 Fla. 257, 65 So. 8 (1914). In that decision this Court traced the evolution of the meaning of "joint tortfeasor" from the concert-of-action theory, through the joinder-in-one-action theory, and carried that evolutionary process one last step. That last step, however, was taken with full recognition of the need for that essential element for "joint and several liability" which is missing in the present case: the liability to the plaintiff of at both of the culpable actors whose negligence caused the injury. This Court held:

> The plaintiff further contends that the defendant and the Pensacola Electric Company were not, and could not be held to be, joint tortfeasors because they could not be

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> joined in the same action for the reason that the liability of the Pensacola Electric Company was founded upon the common law . . . while the liability of the defendant is founded upon the . . . Federal Employers' Liability Act. We have carefully examined the argument of plaintiff upon this point and we are of the opinion that his contention is without merit. The mere fact that a plaintiff might not be able to sue all the tort-feasors in the same forum or join them in the same action would not of itself change the liability of such joint tort-feasor or prevent them from being jointly liable. The plaintiff has confused the question of right of action or liability with the question of remedy.

Id.[1](emphasis added). Thus, while a Plaintiff may have to seek a remedy against one of several joint tortfeasors in a FELA action or some other forum, the outer limit of joint and several liability requires that the Plaintiff have some judicial recourse against a culpable actor for that actor to be categorized as "jointly and severally liable." Where, as here, there is absolute immunity in favor of one of the culpable actors, he does not meet this Court's test[2].

By now, DCTLA hopes that it has demonstrated that the doctrine under which a Defendant such as Fabre has been held liable to a Plaintiff for the whole damages is not the doctrine of "joint and

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[1]DCTLA apologizes for not citing to the page within the decision on which quotations were taken, but the only copy of the L&N v. Allen case available at the time of writing this brief was from the LEXSEE computer service, which does not give page numbers after the first page.

[2]Granted, this Court noted "that to frame a definition of joint tort-feasor that could be university [sic] applied or which would fit all cases would be a difficult task, if not one impossible of performance and we shall not attempt it." However, the description of joint tortfeasor which was given (which requires some form of liability on the part of that actor) is not said to be for only some limited purpose.

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several liability," because the applicability of that doctrine requires the existence of at least two jointly-liable tortfeasors, and where one of the two culpable actors is immune, there is no joint tortfeasor. Very briefly, DCTLA will offer a way to think of the concept of Fabre's liability for the whole damages which is not "joint and several liability." It is the doctrine of concurrent causation.

A negligent Defendant cannot be heard to attempt to avoid liability for a portion of the Plaintiff's damages, on the ground that there is some other concurrent cause for those damages other than a "joint tortfeasor." As Dean Prosser noted: "If the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result, since such causes, innumerable, are always present." Prosser, supra, §41. While Dean Prosser goes on to discuss the fact that "the law of joint tortfeasors rests very largely upon recognition of the fact that each of two or more causes may be charged with a single result" (id.), it should be noted that the doctrine of concurrent causation does not stem from the doctrine of joint and several liability; it is the other way around. The doctrine of joint and several liability can be abolished altogether, but that would do not violence to the doctrine of concurrent causation which holds a Defendant liable for the whole damages, notwithstanding the existence of some non-liable cause.

Section 768.81(3), Fla. Stat. does not purport to abolish the

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common law of concurrent causation. Instead, it expressly refers to the doctrine which it changes as "the doctrine of joint and several liability." Id. (emphasis added). This Court has stated that the statute "modifies the doctrine by abrogating joint and several liability." Smith v. Department of Insurance, 507 So. 2d 1080, 1090 (Fla. 1987)(emphasis added). Such abrogation has nothing to do with the issue in this case, where joint and several liability could not ever have been an applicable theory. The statute on which the Petitioners rely makes no reference to abrogating the doctrine of concurrent causation, so it still exists in the common law.

If we could retrace the evolutionary steps of the joint and several liability theory to a time prior to the recognition of the primitive concert-of-action vicarious liability, we surely would find that concurrent causation preceded it in time. Therefore, we can go back to the first day that joint and several liability was recognized and abrogate the doctrine ab initio. That still leaves, however, the doctrine of concurrent causation by which Fabre will be liable for the whole of Plaintiff's damages.

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CONCLUSION

WHEREFORE, the doctrine of joint and several liability being inapplicable where one of two culpable actors which caused the injury is not liable under any theory to the plaintiff, the statutory abrogation of that doctrine has no application to the case at bar. Section 768.81 only abrogated the theory of joint and several liability, and not the doctrine of concurrent causation, so that statute does not apply to reduce the Plaintiff's damages. The decision under review should be approved.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof was served by mail, upon Joel D. Eaton, Esq., Suite 800 City National Bank Building, 25 West Flagler Street, Miami, FL 33130; Marc R. Ginsberg, Esq., 2964 Aviation Avenue, Second Level, Miami, FL 33133; Grossman & Roth, 2665 South Bayshore Drive, Miami, FL 33133, James K. Clark, Esq., 19 West Flagler Street, Miami, FL 33130; Bonita Kneeland, Esq., P.O. Box. 1438, Tampa, FL 33601; Barbara Green, Esq., 2964 Aviation Avenue, Third Level Miami, FL 33133; Cecilia Bradley, AAG, Department of Legal Affairs, Suite 1502 The Capitol, Tallahassee, FL 32399-1050; and Marguerite H. Davis, Esq., 106 East College Avenue, Tallahassee, FL 32301, on this, the 10th day of September, 1992.

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