IN THE SUPREME COURT OF FLORIDA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

ANN MARIN; MARIE G. FABRE and EDDY W. FABRE,

Respondents.
_____/

CASE NO. 79,870

MARIE G. FABRE and EDDY W. FABRE,

Petitioners,

v.

ANN MARIN and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondents.
_____/

CASE NO. 79,869

BRIEF OF AMICUS CURIAE ACADEMY OF FLORIDA TRIAL LAWYERS SUPPORTING POSITION OF RESPONDENT, ANN MARIN

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STATEMENT OF THE CASE AND FACTS

The Academy of Florida Trial Lawyers adopts the statements of facts appearing in the brief of the Respondent filed below, and in the decision of the Third District Court of Appeal.

SUMMARY OF THE ARGUMENT

The Academy adopts the arguments appearing in the scholarly briefs of the Respondent in the court below and in this Court, and in the well reasoned decision of the Third District Court of Appeal.[1]

The decision below is well supported by all of the legal and policy reasons stated by the Third District and the Respondent. Because the Respondent has so thoroughly covered the arguments supporting her position, we will focus on just one of the many important reasons to approve Fabre v. Marin, 597 So.2d 883 (Fla. 3d DCA 1992) and disapprove Messmer v.Teacher's Ins. Co., 588 So.2d 610 (Fla. 5th DCA 1991).

That reason is simply this: Messmer forces the plaintiff to protect herself by suing everyone the defendant might contend contributed to her injuries. Fabre does not. Messmer promotes excessive litigation. Fabre does not. The legislature's intent was to reduce litigation and its costs. Fabre is consistent with that intent. Messmer is not.

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[1] We also agree with the point made by the Florida Association for Insurance Review in its amicus brief at 11, that the statute was not intended to change the rule of such cases as Stuart v. Hertz Corp., 351 So.2d 703 (Fla. 1977), that the initial tortfeasor is liable for damages caused by subsequent medical malpractice in the treatment of the injuries.

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ARGUMENT

THE MESSMER DECISION IS CONTRARY TO THE PUBLIC POLICY OF THIS STATE AND THE LEGISLATIVE INTENT OF THE TORT REFORM ACT OF MAKING INSURANCE MORE AVAILABLE BY MINIMIZING THE AMOUNT AND COST OF LITIGATION.

This case presents square conflict between the decision in Messmer v. Teacher's Ins. Co., 588 So.2d 610 (Fla. 5th DCA 1991) and the decision below, Fabre v. Marin, 597 So.2d 883 (Fla. 3d DCA 1992). Messmer interprets §768.81(3),[2] Florida Statutes, to reduce a defendant's share of liability by the percentage of fault of "all participants in the accident", 588 So.2d at 611, even if they are not parties and cannot be made parties. Fabre holds that the statute "is not to be construed as contemplating a reduction in a claimant's recovery by the percentage of liability assigned to individuals who are not defendants in the lawsuit" 597 So.2d at 886.

The conflict between the two district court decisions is undeniable evidence of the ambiguity of §768.81(3). The section is ambiguous because it does not state whether the word "parties" refers to "participants in the accident", as the Fifth District

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[2] (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.

held, or participants in the lawsuit, as the Third District determined. The petitioners and their amici cannot simply wish away this unmistakable ambiguity.[3]

Since the statute is ambiguous, the Court must construe it. It must be construed consistently with its purpose. Fabre is consistent with the statute's history and purpose, and with the established policy of this State. Messmer is not.

In trying to determine what the Legislature did, the Court is, of course, informed by what the Legislature intended to do. The Petitioners, and the amici appearing on their side, have focused solely on the history of the doctrine of joint and several liability in Florida. But since §768.81(3) was but a tiny part of a much larger enactment, it cannot be interpreted without reference to its entire context.

Section 768.81(3) was part of the Tort Reform and Insurance Act of 1986. The Act was a response to a perceived crisis in the insurance industry. The Legislature's intent was to make liability insurance more available and more affordable. One of the vehicles it chose to achieve this goal was the enactment of provisions

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[3] Additional evidence of the ambiguity is the presence of several different definitions of the word in Black's Law Dictionary. It can mean, as in Messmer, a party to a transaction. But it also has "a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought . . .". Black's Law Dictionary at 1010 (5th Ed. 1979).

designed to reduce litigation. See Smith v. Dept. of Insurance, 507 So.2d 1080, 1084 n.2 (Fla. 1987). [4]

The legislature's efforts were consistent with longstanding Florida policy encouraging the efficient and inexpensive administration of justice, and the reduction of the number of suits. See, e.g., Lawrence v. Hethcox, 283 So.2d 41 (Fla. 1973) (public policy favors "elimination of multiplicity of suits"); Fla. R. Civ. P. 1.010 (rules to be "construed to secure the just, speedy and inexpensive determination of every action").

As consistent as the legislature's efforts in the 1986 Act are with these longstanding policies, they are not consistent with Messmer. Under Messmer, plaintiffs will be highly motivated to sue everybody in sight, and even those who are not in sight, if they might in any way be deemed "participants in the accident".

Messmer encourages frivolous litigation because it requires plaintiffs to sue everyone who even remotely might be found responsible. A plaintiff who sues less than everyone runs the risk of getting less than a full recovery because the defendant still would be free to tell the jury that someone else was partly at fault. If the jury believed the defendant, the plaintiff's recovery would be reduced, even if the plaintiff were without fault.

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[4] One clear example of this choice is the encouragement of settlement by significantly increasing the risk of pursuing litigation in the face of a settlement offer, by making payment of attorneys fees the penalty for refusal of a reasonable offer of settlement. §768.79, Florida Statutes.

When a suit is filed, plaintiff and counsel have conducted an investigation, but usually have not obtained any discovery. The plaintiff often has no idea where the defendant will attempt to lay the blame for the accident. Even after suit has been filed, it is not uncommon for a defendant to delay disclosure of such matters. See generally, e.g., Green v. Ed Ricke & Sons, Inc., 584 So.2d 1101 (Fla. 3d DCA 1991) (after nine years of litigation and appeals, defendant disclosed contention that someone else installed defective boiler). To avoid having a large portion of liability allocated to someone whom the plaintiff cannot sue because of the expiration of the statute of limitations, the plaintiff will have to sue anyone a jury conceivably might find contributed to the injury.

This effect will be most egregious -- and most injurious to the system of justice -- when the plaintiff's injury is a result of a complicated fact pattern. Consider, for example, the famous case of Palsgraf v. Long Island Railroad, 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928). Mrs. Palsgraf was injured when the railroad's employees negligently assisted a passenger running to catch one of its trains. The employees caused the passenger to drop his package on the tracks. The package contained fireworks. The fireworks exploded when they hit the tracks. The explosion knocked over some

scales, many feet away. The scales fell on Mrs. Palsgraf, injuring her.[5]

Under the Messmer decision, Mrs. Palsgraf would have to sue everyone who might be considered a "participant in the accident" before the statute of limitations expired. In an abundance of caution, she would sue not only the railroad, but:

(1) the passenger who dropped the fireworks [the railroad might argue that he should not have carried such a dangerous commodity in a busy railroad station];

(2) the manufacturer of the fireworks [the railroad might argue that they should not have exploded when dropped];

(3) the owner of the scales [the railroad might argue that they should not have fallen over so easily];

(4) the janitors who cleaned the floor [the railroad might argue that the slipperiness of the floor contributed to the spill];

(5) the person who made the passenger late [the railroad might argue that this is what caused him to rush with his dangerous package].

It literally could go on forever.

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[5] We acknowledge that ultimately, the New York court held that the railroad was not liable to Mrs. Palsgraf. We offer the case simply as a classic example of a complex fact pattern, to illustrate the difficulty in determining who are the "participants in the accident". Such complex fact patterns are how accidents really happen. One writer has described this as the "butterfly effect". An infinite and unknowable number of factors combine to create a result. "When a butterfly flaps its wings in Peking, the weather changes in New York". M. Crichton, Jurassic Park at 74 (Ballantine 1990).

Mrs. Palsgraf would not sue these "participants in the accident" because she wanted anything from them. She would sue them to protect herself. If Mrs. Palsgraf did not sue all of these people before the statute of limitations ran, Messmer would still allow the railroad to argue that any or all of them were partly responsible for her injury. If Mrs. Palsgraf did not sue them, she would run the risk of a jury determination reducing the railroad's share of liability because of the negligence of these non-parties, and she would have no remedy for part of her injury.

These additional defendants might be able to get out of the lawsuit early on summary judgment. Mrs. Palsgraf might be held responsible for their costs or attorneys fees under §57.105, Florida Statutes.

For a seriously injured plaintiff, that penalty probably would be far less than the risk of less than a full recovery. But it is a cost that plaintiffs should not be required to pay to gain access to the courts of this State for full redress for their injuries. Article I, §21, Florida Constitution.

For plaintiffs whose injuries do not greatly exceed these potential costs, Messmer's chilling effect is paralyzing. If plaintiffs sue everyone who remotely could be implicated, they risk having to pay out whatever they do recover in §57.105 fees to the other defendants. If plaintiffs sue only the principal defendant, they risk having any recovery reduced below their own costs because of the negligence of non-parties.

Of course, whether or not the plaintiff sues all of the "participants in the accident", under Messmer their responsibility will be a litigated issue. Consequently, under Messmer, the plaintiff will be in the position of either prosecuting or defending all of these "participants in the accident", with all of the attendant costs of experts and other discovery for both sides.

This would be true even if the "participants in the accident" were immune, as was the Respondent's husband in this case. Immunity is granted to spouses and others as a matter of public policy, often to preserve the sanctity of a relationship such as marriage. But under Messmer, plaintiffs will be forced to litigate the negligence of their spouses, whether they want to or not.

One shudders to think of the effect of such a rule on the litigation that is sure to arise from the recent hurricane disaster. Builders who put on roofs with staples instead of nails will try to argue that building inspectors were negligent in failing to discover and prevent such a clear violation of the building code. But under Trianon Park Condominium v. City of Hialeah, 468 So.2d 912 (Fla. 1985), the inspectors, and the government entities that employ them, would be immune from liability. Innocent homeowners who have lost their roofs, or their homes, might have their recoveries substantially reduced by the percentage of fault attributed to people they will never be able to sue. At the very least, they will be put to the added time and expense of litigating these issues when they already have lost everything.

There has been much talk in recent years of a purported "litigation explosion". Messmer forces every plaintiff to turn every lawsuit into a litigation explosion. No longer can a plaintiff make a reasoned judgment about whom to sue. Instead, the plaintiff must guess at every "participant in the accident" whom the defendant might blame, and sue all of them to protect herself.

Each of these defendants will have to notify its liability carrier. Each carrier will have to defend, because the duty to defend does not depend on the insured's ultimate liability. E.g., Logozzo v. Kent Ins. Co., 464 So.2d 605 (Fla. 3d DCA 1985); Accredited Bond Agencies v. Gulf Ins. Co., 352 So.2d 1252 (Fla. 1st DCA 1978). The increased litigation will send insurance rates up, not down.

The result might be the first instance really justifying the use of that well-worn phrase, "skyrocketing insurance costs". But it cannot be what the Legislature intended when it enacted the Tort Reform Act.

CONCLUSION

The statute is ambiguous. It must be construed to be consistent with the Legislature's intent and with the policy of this State. That policy mandates that litigation and its costs be reduced. The Third District's interpretation of the statute is consistent with legislative intent and with public policy. The Academy respectfully urges this Court to hold that §768.81(3) requires the jury to apportion fault only among the defendant

tortfeasors, and not among some amorphous group of "participants in the accident".

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to Marc R. Ginsberg, Esq., Attorney for Appellants, 2964 Aviation Ave., Second Floor, Coconut Grove FL 33133; Grossman & Roth, 2665 South Bayshore Dr., Miami FL 33133; Joel D. Eaton, Esq., Attorney for Appellees, 25 W. Flagler St., Suite 800, Miami FL 33130; James K. Clark, Esq., Attorney for State Farm Insurance, 19 W. Flagler Street, Suite 1003, Miami FL 33130; Bonita Kneeland, Esq., Attorney for Florida Association for Insurance Review, P.O. Box 1438, Tampa FL 33601; Cecilia Bradley, AAG, Attorney for State of Florida Dept. of Insurance, Dept. of Legal Affairs, The Capitol, Suite 1502, Tallahassee FL 32399-1050; and Marguerite H. Davis, Esq., Attorney for American Insurance Assoc., 106 East College Ave., Tallahassee FL 32301, this 10 day of September, 1992.

By Barbara Green
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