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SID J. WHITE
JUN 25 1992
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,869

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

Appellants,

v.

ANN MARIN,

Appellee.
_____/

APPELLANTS' FABRE INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Petitioners, **MARIE G. FABRE** and **EDDY W. FABRE**, were Defendants in the trial of this matter. Co-Petitioner, Defendant, **STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY**, was the Plaintiff's Uninsured/Underinsured Motorist Carrier. Initially, both Ann Marin, and Ramon Marin, her husband, were Plaintiffs, but Ramon Marin voluntarily dismissed his claim at trial. **(T.94)**

Petitioners, **MARIE G. FABRE** and **EDDY W. FABRE**, substantially adopt the Statement of the Case and Facts as set forth in the brief of Appellee, Ann Marin, filed in the Third District Court of Appeal and as set forth below, with some modification.

On January 29, 1989, Ann Marin was a passenger in an automobile being driven by her husband, Ramon Marin. **(T.103-13, 142-43)** The Marin's were proceeding Northbound in the left of five traveling lanes of I-95 when, in the vicinity of N.W. 103rd Street, Mr. Marin was forced to take evasive action to avoid an automobile which had cut directly in front of him while changing into his lane. **(id.)** Although Mr. Marin successfully avoided a collision with this automobile, he lost control of his own vehicle during the evasive maneuver, and struck the concrete median wall. **(id.)** Mrs. Marin was seriously injured and Mr. Marin suffered minor injuries. **(T.113-20)**

Mr. & Mrs. Marin thereafter filed suit against Marie Fabre, alleging that she was driving the automobile which cut them off while changing into their lane, and that her negligence was a cause

of their injuries. **(R.2-5)** Mrs. Fabre's husband, Eddy Fabre, was joined as a Defendant because he was the owner of the automobile which Mrs. Fabre was driving at the time. **(R.2-5;T.250)** The Fabre's filed an Answer denying every allegation of the Marins' Complaint and alleged Affirmative Defenses, including Comparative Negligence of both Mr. & Mrs. Marin. **(R.6-7)** The Answer and Affirmative Defenses of the Fabre's did not specifically allege Florida Statute 768.81. The Answer and Affirmative Defenses of State Farm included an allegation that the Marins' recoveries should be reduced pursuant to Florida Statute 768.81 by the percentage of fault attributable to the negligence of a third party **(R.46-48)** State Farm's Answer did not contain the specific allegation that Mrs. Marin's recovery should be reduced by the negligence of Mr. Marin. **(id.)**

On the first day of trial, Mr. Marin's claim was voluntarily dismissed; Mr. Marin was dropped as a Plaintiff and the trial proceeded on Mrs. Marin's claim alone. **(T.94)** On the liability issue, the jury was presented with two conflicting versions of the accident. Mr. Marin, a certified public accountant and councilman for the City of North Miami Beach, testified that he was driving in the leftmost traveling lane of Interstate 95 at 55-65 miles per hour; that Mrs. Fabre's vehicle was in the lane to his right; that Mrs. Fabre pulled into his lane, directly in front of him; that he had to take evasive action to avoid a collision; that he swerved to his right; that he avoided a collision with Mrs. Fabre's

automobile; that he noticed as he was swerving around Mrs. Fabre's vehicle that it had a flat tire; that he apparently over corrected for the swerve when he straightened the steering wheel; and that he hit the concrete median wall as a result. **(T.101-23)** Mrs. Marin recalled that "the car" moved into their lane. **(T. 142-43)** According to Mr. Marin, after Mrs. Fabre had stopped her car in the emergency lane next to the retaining wall, she approached him and said, "I am sorry", but she denied being the cause of the accident. **(T.121)**

Mrs. Fabre told an entirely different story. According to her, she was proceeding Northbound on I-95 in the second traveling lane from the left at 45-50 miles per hour, when her car had a flat tire. **(T.32-41)** She had no difficulty controlling her car, and she pulled over to the left and parked the car in the emergency lane. **(T.34-45)** Thereafter, she stood beside her car watching the Northbound traffic for someone she knew to come along. **(T.46-52)** After four or five minutes, she observed a red car, followed by the Marins' car traveling Northbound in the third traveling lane from the left. **(id.)** According to Mrs. Fabre both cars attempted to change lanes to the right, but the Marins' car "swayed" to the left, and then hit the median wall. **(id.)** There was an adult witness in Mrs. Fabre's car at the time, but neither the Plaintiff nor the Defendants called her to testify. **(T.42-44;163)**

At the Jury Charge Conference, the Defendants requested that the verdict form allow the jury to apportion blame for the accident

between Mr. Marin and Mrs. Fabre. **(T.268-79)** The Plaintiff's objected and the Trial Court declined the Defendants' request ruling that Section 768.81 authorized apportionment only between parties to the action. **(id.)** To obviate the necessity of a re-trial if this ruling later proved to be erroneous, the Marins agreed to have the issue of Mr. Marin's negligence submitted to the jury, subject to a post trial determination of whether any affirmative finding on that issue should result in a reduction of Mrs. Marin's recovery in the Judgment ultimately entered. **(T.290-93)** The jury thereafter returned a verdict finding both Mrs. Fabre and Mr. Marin fifty percent at fault. **(R.126-28)**

State Farm filed timely post trial motions including a Motion for Reduction of Mrs. Marin's recovery by fifty percent. **(R.129, 132,143)** State Farm's Motion for New Trial was denied but the Trial Court granted State Farm's Motion for Remittur, and then ordered a remittur of $5,000.00 in the economic damages awarded to Mrs. Marin (which Mrs. Marin accepted); the initial Final Judgment was vacated, and an Amended Final Judgment was entered in the reduced amount against both the Fabres and State Farm. **(R.145,147,161,Fabre's Appendix to Initial Brief filed with Third District Court of Appeal)**

Both the Fabres, and State Farm timely filed their Notice of Appeal of the Amended Final Judgment. **(R.150-53)**

Both the Fabres and State Farm raised several issues on appeal to the Third District Court of Appeal, including improper reference

by the Plaintiff to a traffic citation, a prejudicial closing argument, and failure to give a requested jury instructions. The Fabres do not seek review by this Court of those Appellate issues.

However, with regard to the apportionment of liability issue, the Third District Court of Appeal issued its opinion certifying direct and express conflict with **Messmer v. Teacher's Insurance Company, 588 So.2d 610 (FLA. 5th DCA 1991).** The Fabres timely filed their Notice to Invoke the Discretionary Jurisdiction of the Supreme Court pursuant to Florida Rule of Appellate Procedure 9.120. Similarly, State Farm timely filed their Notice to Invoke the Discretionary Jurisdiction and the two appeals have been consolidated by Order of the Supreme Court.

ISSUE ON APPEAL

1. **Whether Florida Statute 768.81 requires the fact finder to apportion liability between the named defendants, and unnamed tortfeasors who were parties to the incident giving rise to the negligence action.**

SUMMARY OF ARGUMENT

Florida Statute 768.81(3) in clear and unambiguous terms provides that a Defendant shall only be liable to a Plaintiff for the Defendant's own percentage of fault and specifically not on the basis of joint and several liability.

Assuming statutory ambiguity, accepted statutory construction jurisprudence requires this Court to interpret the Statute in accordance with the Legislative intent to hold a named defendant liable for only its proportionate share of liability without regard to Joint and Several Liability.

Other State and Federal Courts interpreting State law have uniformly held that the negligent unnamed Defendant who may have contributed to a Plaintiff's injuries must be considered in determining a named Defendant's percentage of liability to a Plaintiff.

ARGUMENT

Preamble

The essential question is whether the Florida Legislature effectively replaced the Common Law Doctrine of Joint and Several Liability with the legal concept of Apportionment of Liability.

Florida Statute 768.81(1989) provides:

768.81 Comparative fault.--

(1) DEFINITION. -- As used in this section, "economic damages" means past lost income and future lost income reduced to present value; medical and funeral expenses; lost support and services; replacement value of lost personal property; loss of appraised fair market value of real property; costs of construction repairs, including labor, overhead, and profit; and any other economic loss which would not have occurred but for the injury giving rise to the cause of action.

(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 noneconomic 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.

(4) APPLICABILITY. --
(a) This section applies to negligence cases. For purposes of this section, "negligence cases" includes, but is not limited to, civil actions for damages based upon theories of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories. In determining whether a case faills within the term "negligence cases," the court shall look to the substance of the action and not the conclusory terms used by the parties.

(b) This section does not apply to any action brought by any person to recover actual economic damages resulting from pollution, to any action based upon an intentional tort, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by chapter 403, chapter 498, chapter 517, chapter 542, or chapter 895.

(5) APPLICABILITY OF JOINT AND SEVERAL LIABILITY. -- Notwithstanding the provisions of this section, the doctrine of joint and several liability applies to all actions in which the total amount of damages does not exceed $25,000.

(6) Notwithstanding anything in law to the contrary, in an action for damages for personal injury or wrongful death arising out of medical malpractice, whether in contract or tort, when an apportionment of damages pursuant to this section is attributed to a teaching hospital as defined in s.395.502(22), the court shall enter judgment against the teaching hospital on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability.

Prior to the enactment of the above Statute, this Court considered the issue of Apportionment of Liability in **Walt Disney World v. Wood, 515 So.2d 198 (FLA 1987).** The "Walt Disney Case" arose from a 1971 accident occurring at Walt Disney World, where

Ms. Wood was injured at the Grand Prix attraction, when her fiancee Daniel Wood rammed from the rear the vehicle which Ms. Wood was driving. Ms. Wood filed suit against Disney. The jury returned a verdict finding Ms. Wood 14 percent negligent, Daniel Wood 85% negligent, and Disney 1% negligent. The Circuit Court entered Judgment against Disney for 86% of the total damages. Disney sought to alter the Judgment to reflect the jury's finding that Disney was only 1% at fault.

This Court in its final paragraph stated,

"While recognizing the logic in Disney's position, we cannot say with certainty that joint and several liability is an unjust doctrine or that it should necessarily be eliminated upon the adoption of comparative negligence. In view of the public policy considerations bearing on the issue, this Court believes that the viability of the doctrine is a matter which should best be decided by the Legislature."

The Messmer Case

Messmer, supra arose from a motor vehicle accident wherein Ann Messmer was occupying an automobile being driven by her husband, Arthur, which collided with an uninsured pick-up truck. Ann Messmer's uninsured motorist carrier, Teacher's Insurance Company, issued a $300,000.00 dollar policy on the Messmer vehicle including uninsured motorist coverage. The uninsured motorist claim was submitted to arbitration, pursuant to the policy requirements.

The arbitrators found that the uninsured motorist was 20% responsible for causing the accident.

Teacher's Insurance Company paid the economic damages in full, but only paid 20% of the arbitrators' non-economic damage award.

The Circuit Court granted a Summary Judgment in favor of

Teacher's Insurance holding that Teacher's had fully satisfied the arbitrator's award by payment of 20% of the non-economic damages.

Messmer appealed to the Fifth District Court of Appeal, who affirmed the Summary Judgment holding that Florida Statute 768.81(3) requires apportioning liability among all participants to the accident.

The Fabre Case

Fabre arose from a motor vehicle accident in which Ann Marin was a passenger in a motor vehicle owned an operated by her husband, Ramon Marin. State Farm was the Marin's underinsured motorist carrier. Ann Marin alledged that the negligence of Mrs. Fabre caused her husband to vere into a concrete median wall, resulting in injuries to Ann Marin.

At trial, the jury determined Mrs. Fabre to be fifty percent at fault; and Ramon Marin fifty percent at fault. Accordingly, State Farm filed a post trial motion requesting the trial court to enter judgment for non-economic damages against Mrs. Fabre and State Farm based on the fifty percent negligence attributed to Mrs. Fabre. The trial court denied the motion and both State Farm and Mrs. Fabre appealed to the Third District Court of Appeal.

The Third District Court of Appeal affirmed the trial court's denial of the motion holding that Florida Statute 768. 81(3) was ambiguous and therefore held that liability could only be apportioned among non-immune defendant tortfeasors.

A. THE STATUTE MUST BE GIVEN IT'S PLAIN MEANING AND EFFECT.

In 1986, the Florida Legislature enacted Florida Statute

768.81 which in **subsection 3**, in clear and unambiguous terms 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.

When the language of a Statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to resort to the Rules of Statutory Interpretation; the Statute must be given its plain and obvious meaning. **Holly v. Auld, 450 So.2d 217 (FLA. 1984).**

Where the intent of the Legislature is clear and unmistakable from the language used in the Statute, it is the Court's duty to give effect to that Statute as expressed. **Engelwood Water District v. Tate, 334 So.2d 626 (FLA. 2nd DCA 1976)**

Recently, in **Silva v. Southwest Florida Blood Bank, Inc., 17 FLWS 303 (FLA. May 28, 1992)**, acknowledged that it is the Supreme Court's initial responsibility when construing a Statute to give the words their plain meaning and ordinary meaning. Quoting from **Tropical Coach Line, Inc. v. Carter, 121 So.2d 779,782 (FLA. 1960)**, this Court wrote:

In making a judicial effort to acertain the Legislative intent implicit in a Statute, the Courts are bound by the plain and definite language of the Statute and are not authorized to engage in semantic niceties or speculations. If the language of the Statute is clear and unequivocal, then the Legislative intent must be derived from the words used without involving incidental rules of construction or engaging in speculation as to what the judges might think that the Legislators intended or should have intended.

Moreover, citing **Shelby Mutual Insurance Company v. Smith, 556 So.2d 393,395 (FLA. 1990)** this court stated,

"A court must not resort to sources outside a Statute to interpret clear and unambiguous words the Legislature chose to employ."

Adopting this Court's method of analysis in **Silva**, supra, the Petitioners would show that Florida Statute 768.81(3) uses clear and unambiguous language. The operative words of **subsection 3** are **"party", "liable,** and **"fault". Webster's New Collegiate Dictionary (1973) at page 836, 661, 418)** defines these words:

PARTY 1 : a person or group taking one side of a question, dispute, or contest 2 : a group of persons organized for the purpose of directing the policies of a government 3 : a person or group participating in an action or affair: Participant <to - the transaction>

LIABLE 1 a: obligated according to law or equity; Responsible b: subject to appropriation or attachment 2 a: being in a position to incur - used with to < - to diseases> b: exposed or subject to some usu. adverse contingency or action:

FAULT 4 : responsibility for wrongdoing or failure

Black's Law Dictionary (1983) defines these words as follows:

PARTY, n. A person concerned or having or taking party in any affair, matter, transaction, or proceeding considered individually. A "party" to an action is a person whose name is designated on record as plaintiff or defendant. Term, in general, means one having right to control proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from judgment.

LIABLE. Bound or obliged in law or equity; responsible; chargeable; answerable, compellable to make satisfaction, compensation, or restitution. Obligated; accountable for or chargeable with. Condition or being bound to respond because a wrong has occurred. Condition out of which a legal liability might arise. Justly or legally responsible or answerable.

FAULT. Negligence; an error or defect of judgment or of conduct; any deviation from prudence, duty, or rectitude; any shortcoming or neglect of care or performance resulting from inattention, incapacity, or pervisity; a wrong tendency, course or act; bad faith or mismanagment; neglect of duty. The word connotes an act to which blame, censure, impropriety, shortcoming or culpability attaches.

As is evidenced from the above definitions, there is no ambiguity to clarify in the words **"party", "liable",** and **"fault".**

Subsection 3 means precisely what it says: **"THE COURT SHALL ENTER JUDGMENT AGAINST EACH PARTY LIABLE ON THE BASIS OR SUCH PARTY(S) PERCENTAGE OF FAULT AND NOT ON THE BASIS OF THE DOCTRINE OF JOINT AND SEVERAL LIABILITY."** (Emphasis ours).

Clearly, the only means of determing a party's percentage of fault is to compare that party's actions against all other parties to the transaction, incident, or accident.

Accordingly, the Fifth District Court of Appeal in Messmer, supra, reached the correct result when it held that all participants to the transaction or accident, must be considered in determining a liable party's percentage of fault; notwithstanding the fact that such other participant may in fact be the spouse of the claimant or otherwise immune from liability.

B. RULES OF STATUTORY CONSTRUCTION SUPPORT APPORTIONMENT BETWEEN ALL POTENTIAL TORTFEASORS.

Assuming arguendo that **Subsection 3** is ambiguous, the rules of statutory construction support apportionment between all potential tortfeasors.

The Legislative intent of a Statute is the primary factor of importance in construing that statute. **Tyson v. Lanier, 156 So.2d 833 (FLA. 1963), Deltona Corp. v. Florida Public Service Commission, 220 So.2d 905 (FLA. 1969), Florida Industrial Commission v. Manpower Inc. of Miami, 91 So.2d 197 (FLA. 1956)** This intent must be determined primarily from the language of the Statute. **State v. Atlantic CLR Company, 47 So. 969 (FLA. 1908);**

Vanpelt v. Hilliard, 78 So. 693 (FLA. 1918); SRG Corp. v. Department of Revenue, 365 So.2d 687 (FLA. 1987)

To understand the Statute's intent and purpose, this Court may consider the history of the Statute, the subject to be regulated, the evil it is intended to correct, and the object it is designed to attain. Scarborough v. Neusum, 7 So.2d 21 (FLA. 1942)

Section 768.81(3) was enacted as part of the **Tort Reform and Insurance Act of 1986, Chapter 860-160 Laws of Florida.** The preamble to this Act begins:

WHEREAS, the Legislature finds that there is in Florida a financial crisis in the liability insurance industry, causing a serious lack of availability of many lines of commercial liability insurance,...

WHEREAS, the Legislature finds that the current tort system has significantly contributed to the insurance availability and affordability crisis, and...

WHEREAS, the magnitude of this compelling social problem demands immediate and dramatic legislative action...

Clearly, the preamble to the Act indicates that it was the intent of the Legislature to make fundamental changes to the tort system within the State of Florida. Accordingly, **Section 2** of the Act provides in relevant part:

The Legislature finds and declares that a solution to the current crisis in liability insurance has created an overpowering public necessity for a comprehensive combination of reforms of both the tort system and insurance regulatory system. This act is a remedial measure and is intended to cure the current crises and to prevent the recurrence of such a crises.

The Legislative intent is clear. Florida Statute 768.81 was enacted to abrogate joint and several liability and replace it with Apportionment of Liability.

The operative word in the above cited Statute is **"fault"**. In order to determine a party's percentage of fault for an accident, the actions and conduct of all parties involved in the accident or incident must be considered in order to determine the named party's percentage of fault. If we ignore the actions and conduct of some person or entity involved in an incident or accident, we are not apportioning the liability; rather the case is being decided based upon the legal doctrine of Joint and Several Liability, which the Statute expressly states shall not be the basis for liability.

Clearly, as it expressly stated, the Legislature intended to modify existing legal doctrines. And in fact, the Legislature in **Subsection 3** of **Florida Statute 768.81** did state that a party's liability would not be determined on the basis of Joint and Several Liability but upon that party's percentage of fault. Within our State, both the Fifth District Court of Appeal and the Fourth District Court of Appeal found that the fact finder should consider the liability of all those who participated in a negligent act in determining a party defendant's "percentage of fault". **Dosdourian v. Carsten, 580 So.2d 869 (4th DCA 1991); Messmer v. Teacher's Insurance Company, 588 So.2d 610 (5th DCA 1991).**

C. OTHER STATE AND FEDERAL COURTS HAVE APPLIED APPORTIONMENT STATUTES CONSISTENT WITH THIS BRIEF.

Florida is not alone among States whose Legislature's have opted for the abolition of Joint and Several Liability in favor of Apportionment of Liability based on percentage of fault.

The Supreme Court of Wisconsin in **Connar v. West Shore Equipment of Milwaukee, Inc., 227 N.W.2d 660 (WIS. 1975)** was required to determine whether the negligence of Plaintiff's employer, who is not a named party defendant in the suit, should be considered by the jury to determine the percentage of negligence chargeable to the named defendant. The Supreme Court of Wisconsin held:

It is established without doubt that, when apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the Plaintiff or to the other tortfeasor either by operation of law or because of a prior release. Connar at 662.

In 1978, the Supreme Court of Kansas in **Brown v. Keill, 580 P.2d 867 (KAN. 1978)** Kansas' highest court found:

After having answered the preliminary questions in having applied the rules of statutory construction previously set forth in this opinion we conclude the intent and purpose of the legislature in adopting KSA60-258a was to impose individual liability for 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 formerly as a litigant or be held legally responsible for his or her proportionate fault. Brown at 876.

The Supreme Court of Minnesota in **Lines v. Ryan, 272 N.W.2d 896 (MINN. 1978)**, relying in part on **Connar,** supra, essentially held that in order to properly apportion negligence, the jury must have the opportunity to consider the negligence of all parties to the transaction whether or not they be parties to the law suit and whether or not they can be liable to other tortfeasors because of a prior release.

The Supreme Court of Idaho in **Pocatello Industrial Park**

Company v. Steel West, Inc., 621 P.2d 399 (IDA. 1980) similarly adopted the reasoning of the **Connar** decision, supra, and additionally quoted from **Heft and Heft Comparative Negligence Manual, Section 8.131, at page 12, 1978:**

The reason for such a rule is true apportionment cannot be achieved unless that apportionment includes all tortfeasors guilty of negligence either causing or contributing to the occurrence in question, whether or not they are parties to the case. Pocatello at 403.

Further, the **Pocatello** Court observed, **"Apparently, only Florida has adopted a contrary rule".** In 1980 it was true that Florida had a contrary rule, **joint and several liability;** however, with the enactment of **Florida Statute 768.81 in 1986,** it is clear that Florida intended to join the unanimity of states who have replaced joint and several liability with an **apportionment of liability.**

The Supreme Court of Oklahoma in **Paul v. NL Industries, Inc., 624 P.2d 68 (OKLA. 1980)** held that the negligence of tort feasers who are not parties to the law suit should be considered by the trial jury in order to properly apportion the negligence of those tort feasers who are parties. Specifically, the **Paul** Court stated:

To limit the jury to viewing the negligence of only one tort feasor and then ask it to apportion that negligence to the overall wrong is to ask it to judge a forest by observing just one tree. It cannot and more important should not, be done. It simply is not fair to the tort feasor which Plaintiff chooses to name in his law suit. It bypasses the teachings of "Laubach" [1]

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1 **Laubach** refers to **Laubach v. Morgan, 588 P.2d 1071 (OKLA. 1978),** which held that the negligence of tortfeasors not parties to the lawsuit should be considered by the trial jury in order to properly apportion the negligence of those tortfeasors who are parties.

In 1981, the Supreme Court of Appeals of West Virginia, in **Bowman v. Barns, 282 SE.2d 613 (W.V. 1981)** wrestled with the absent party's role in comparative negligence, ultimately concluding:

> **For the foregoing reasons, we hold that in order to obtain a proper assessment of the total amount of the Plaintiff's contributory negligence under our comparative negligence rule, it must be ascertained in relation to all of the parties whose negligence who contributed to the accident, and not merely those defendants involved in the litigation. Bowman at 621.**

The United States Court of Appeals, eighth circuit, in **Johnson v. Niagara Machine and Tool Works, 666 F.2d 1223 (8th Circuit 1981)** interpreting Minnesota law, held that the fault or negligence of an unnamed party to the law suit should be submitted to the jury.

The United States Court of Appeal, Tenth Circuit in **Prince v. Leesona Corporation, Inc., 720 F.2d 166 (10th Cir. 1983),** interpreting Kansas Law, held that the negligence of the Plaintiff's employer is not a named party to the litigation, may be used to reduce the liability of a third party tort feasor. **Prince** at 1172.

The Supreme Court of Oklahoma had a second opportunity to consider apportioning liability among an unnamed party tortfeasor in **Bode v. Clark Equipment, 719 P.2d 824 (OKLA. 1986)** upon receipt of a Federal certified question. Again, the Supreme Court of Oklahoma held that the negligence of a party defendant must be combined with the percentage of negligence attributable to non-party tortfeasor, even if the employer is immune from common law tort liability because of exclusivity the workers compensation remedy.

The Supreme Court of Wyoming in **Burton v. Fisher Controls Company, 713 P.2d 1137 (WYO. 1986)**, confronted with the issue of whether the degree of negligence of settling parties should be considered by the jury held;

"While settling actors cannot be designated in the instructions or verdict form as "defendants" or "parties", it is readily conceded that, under our Comparative Negligence Statute, Sec. 1-1-109, WS1977, it is imperative for the court to include settling causative participants, such as Fisher and Pierce, on the jury form. This is so because, in a comparative negligence case where relative fault is an issue, the jury must not only consider causative negligence of the parties to the litigation, but it must also ascertain the percentage of fault for all the participants in the negligent conduct which causes injury. Burton at 113.

The United States Court of Appeals, 5th Circuit in **Nance v. Gulf Oil Corporation, 817 F.2d 176 (5th Circuit 1987)** interpreting Louisiana law held that the District court in an injured worker's suit against an oil platform owner misapplied Louisiana comparative fault laws by failing to include on the verdict form a question pertaining the percentage of fault attributable to the injured worker's employer, even though the employer was not a party to the suit. Under Louisiana comparative fault law, the employer's percentage of fault could have both reduced the percentage of fault attributable to the platform owner and its ultimate liability to the worker.

Clearly, it is apparent that most, if not all states, that have considered this issue, have ultimately held that the negligence of all participants to the incident, transaction or accident arising into an injury must be considered by the fact finder to determine a named party's percentage of fault.

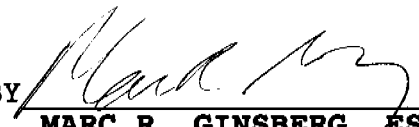
CONCLUSION

For the foregoing reasons, Petitioner Marie G. Fabre and Eddie W. Fabre, respectfully request that this court reverse the decision of the Third District Court of Appeal and remand the matter to the trial court with instructions to reduce the Final Judgment as entered against Petitioners herein by the percentage of negligence attributed by the jury to Marie Fabre.

BY _____
MARC R. GINSBERG, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this **24th** day of **June, 1992** to : **JOEL EATON, ESQUIRE**, Podhurst, Orseck, Josefsberg, et. al, 25 West Flagler Street, Suite 800, Miami, Florida 33130; **JAMES CLARK, ESQUIRE**, Barnett, Clark and Barnard, 19 West Flagler Street, Suite 1003, 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; **BONITA KNEELAND, ESQUIRE**, Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Post Office Box 1438, Tampa, Florida 33601; and **CECILIA BRADLEY, Assistant Attorney General**, Department of Legal Affairs, The Capitol, Suite 1502, Tallahassee, Florida 32399-1050.

BY 

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