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IN THE SUPREME COURT OF FLORIDA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs. CASE NO. 79,870

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

Respondents.
_____/

MARIE G. FABRE AND EDDY W. FABRE,

Petitioners,

vs. CASE NO. 79,869

ANN MARIN and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondents.
_____/

BRIEF OF RESPONDENT ANN MARIN ON THE MERITS

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-and-
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I.
STATEMENT OF THE CASE AND FACTS

We accept the Fabres' statement of the case and facts as essentially accurate.

II.
ISSUE PRESENTED FOR REVIEW

WHETHER THE TRIAL COURT WAS CORRECT IN DECLINING TO APPORTION THE PLAINTIFF'S DAMAGES BETWEEN THE DEFENDANTS AND A NON-PARTY TO THE ACTION, AND IN ENTERING JUDGMENT AGAINST THE DEFENDANTS IN THE FULL (REMITTED) AMOUNT OF THE VERDICT AS A RESULT.

III.
SUMMARY OF THE ARGUMENT

Because our argument will be intricate, complex, and lengthy, we can only superficially outline it here. Our initial contention will be that §768.81(3) is not unambiguous, as the defendants insist. In fact, the statute is lacking an essential piece, and it is therefore quintessentially ambiguous. Although the statute provides for the assessement of liability "on the basis of such party's percentage of fault," *it nowhere defines the whole by which the percentage is to be determined.* One cannot "determine a percentange of . . . ," of course; one must determine a percentage of *something* -- a total which amounts to a *whole* -- and in the absence of a definition of the whole, the statute is undeniably ambiguous, and its meaning must therefore be determined by resort to settled rules of statutory construction.

In our judgment, at least three settled rules of statutory construction require the Court to read the statute as narrowly as possible, and to define "the (missing) whole" to be *all parties to the lawsuit* -- rather than all persons or entities who contributed to the plaintiff's injuries, whether parties to the action or not, and even if they could not have been found directly liable to the plaintiff, either severally or jointly with the defendants. The primary rule of statutory construction is, of course, to determine the legislative intent -- and it is appropriate to consult a statute's legislative history to determine its meaning. As we will

explain in the argument which follows, the legislative history which is available for the enactment of §768.81(3) fully supports our proposed construction of the statute, rather than the defendants'.

The second rule of statutory construction which is implicated here is that a statute in derogation of the common law is to be construed strictly, to do as little damage to the common law as possible, and the common law will not be deemed repealed unless the statute clearly and explicitly announces such an intent. As we will demonstrate at considerable length in the argument which follows, the construction of the statute proposed by the defendants does *enormous* damage to the common law in *numerous* areas. On the other hand, our proposed construction of the statute does only limited damage to the common law. The Court should therefore be guided by the settled rule that an ambiguous statute will be construed to do as little damage to the common law as possible, and it should define "the (missing) whole" as narrowly as possible to preserve those areas of the common law not explicitly abolished by the statute -- by defining "the whole" as "the parties to the lawsuit."

There is a third rule of statutory construction which is implicated here -- the settled rule that repeals by implication are not favored, and that two (or more) statutes should be construed in such a way as to preserve the force of each, and to render them consistent if at all possible. That rule is squarely implicated here because, when it enacted §768.81(3), the legislature did *not* repeal any of several existing statutes which are plainly inconsistent with the defendants' proposed construction of the statute. In order to avoid an implied repeal of those statutes, and to render those statutes consistent with §768.81(3), the only available definition of "the (missing) whole" is the one which we have proposed here.

In short, there are several settled rules of statutory construction which simply require the narrowest definition of "the (missing) whole" which the Court can supply. And to reinforce the *clear need* for application of those rules to produce that narrow construction,

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we will ask the Court to consider a number of "horribles" which would accompany acceptance of the defendants' proposed definition. We will also explain that the reasons given for the Fifth District's recent conflicting decision in *Messmer v. Teacher's Insurance Co.*, 588 So.2d 610 (Fla. 5th DCA 1991), *review denied*, 598 So.2d 77 (Fla. 1992), were *non sequiturs*.

Finally, we will argue alternatively to the Court that even if it remains unpersuaded that our narrow construction of the statute is the correct one, there is a middle ground available to it which would at least minimize the damage to existing common and statutory law -- defining "the (missing) whole" as all persons and entities with whom the defendant could have been found jointly and severally liable to the plaintiff under the doctrine of joint and several liability. If that alternative construction of the statute is to be adopted by the Court, then the result reached by the trial court in this case remains correct, because Mr. Marin was simply not a "joint tortfeasor" who could have been found liable to his wife under the doctrine of joint and several liability in the first place, whether a party to her lawsuit or not -- and the defendants' remedy was an action under §768.31 for contribution, according to the decisional law, and the statutory law which is still in place. Most respectfully, if either of our alternative constructions of §768.81(3) is to be adopted here, the district court correctly affirmed Mrs. Marin's judgment for the full amount of her (remitted) damages.

IV.
ARGUMENT

THE TRIAL COURT WAS CORRECT IN DECLINING TO APPORTION THE PLAINTIFF'S DAMAGES BETWEEN THE DEFENDANTS AND A NON-PARTY TO THE ACTION, AND IN ENTERING JUDGMENT AGAINST THE DEFENDANTS IN THE FULL (REMITTED) AMOUNT OF THE VERDICT AS A RESULT.

A. Resolution of the problem presented here depends upon a definition of "the whole" by which a "party's percentage of fault" is to be determined

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-- a definition which is missing from §768.81(3).

The defendants (and their numerous amici) contend that §768.81(3), Fla. Stat., required the trial court to apportion Mrs. Marin's intangible damages between (1) the Fabres (and State Farm, which stands in the Fabres' shoes), and (2) Mr. Marin, a non-party to the action. We intend to demonstrate that §768.81(3) does not require that result, but before we analyze the statute it is necessary to place the issue presented here in its proper historical and legal context. Context is important, because the defendants' approach to the issue presented here is both superficial and simplistic, and does not even contain a hint of the exceptional complexity which lurks beneath its surface. Most respectfully, because the doctrine of joint and several liability has been a cornerstone of Florida tort law for nearly a century, numerous tort doctrines have been constructed upon it and accommodated to it over the years, and resolution of the issue presented here will therefore have enormous and profound consequences upon numerous areas of the law. And because there is *considerably* more at stake here than merely whether State Farm and the Fabres pay all of Mrs. Marin's damages or only half, we intend to provide the Court with considerable context as we proceed.

Prior to the enactment of §768.81(3), the facts presented by this case would have implicated the following settled principles of law:

(1) Mr. Marin could not have been found liable to Mrs. Marin, either severally or jointly with the Fabres, because suit against him would have been barred at the threshold by the doctrine of interspousal immunity. *Raisen v. Raisen*, 379 So.2d 352 (Fla. 1979), *cert. denied*, 449 U.S. 886, 101 S. Ct. 240, 66 L. Ed.2d (1980).

(2) In an action by Mrs. Marin against the Fabres, Mr. Marin's negligence could not have been imputed to Mrs. Marin to reduce her recovery. *Bessett v. Hackett*, 66 So.2d 694 (Fla. 1953).

(3) In an action by Mrs. Marin against the Fabres, the Fabres' remedy for

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apportioning Mrs. Marin's damages between themselves and Mr. Marin would have been an action against Mr. Marin for contribution under §768.31, Fla. Stat. (for which Mr. Marin would have been indemnified by his own liability insurance carrier, State Farm). *Shor v. Paoli*, 353 So.2d 825 (Fla. 1977).

(4) In an action by Mrs. Marin against the Fabres (in which contribution against Mr. Marin had not been sought by joining him as a third-party defendant under §768.31), the issue of Mr. Marin's negligent contribution to his wife's injuries could not have been submitted to or determined by the jury. *See Metropolitan Dade County v. Yearby*, 580 So.2d 186 (Fla. 3rd DCA), *review denied*, 589 So.2d 291 (Fla. 1991); *Blocker v. Wynn*, 425 So.2d 166 (Fla. 1st DCA 1983). *Cf. Dudley v. Carroll*, 467 So.2d 706 (Fla. 5th DCA), *review dismissed*, 469 So.2d 749 (Fla. 1985).[1]

In short (and if these settled legal principles continue to apply), because Mr. Marin was not a party below, either as a counterdefendant or as a third-party defendant in a contribution action, (1) the issue of his negligent contribution should not have been submitted to the jury; (2) Mrs. Marin was entitled to recover the full amount of her (remitted) damages from the Fabres (and State Farm, which stands in the Fabres' shoes); and the Fabres' (and State Farm's) remedy for apportionment lay in a subsequent contribution action against Mr. Marin (which would have been unnecessary, since State Farm provided Mr. Marin's liability insurance coverage as well). In other words, Mrs. Marin would have recovered the full amount of her (remitted) damages by recovering $10,000.00 from the Fabres' liability insurance carrier and the balance from State Farm, and that would have

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[1] If Mrs. Marin had been a child of Mr. Marin, rather than his spouse, the governing legal principles would have been somewhat different. A child can sue a parent, but only to the extent of liability insurance coverage. *Ard v. Ard*, 414 So.2d 1066 (Fla. 1982). And in an action by a child against a non-parent, the non-parent can recover contribution from the parent, but only to the extent of liability insurance coverage. *Joseph v. Quest*, 414 So.2d 1063 (Fla. 1982).

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been the end of the matter.

The defendants contend that all of the foregoing was changed by enactment of §768.81(3), Fla. Stat. -- and that a defendant may now reduce its liability to a plaintiff, not by an action for contribution against a party to the lawsuit, but simply by deducting the adjudicated contributions of negligent persons who are not even parties to the suit, even if those persons could have incurred no liability to the plaintiff in the first place. The propriety of this contention depends, of course, upon §768.81(3) -- which reads as follows:

> (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.

The defendants contend that this statute is plain and unambiguous, but it clearly is not. In fact, the statute is lacking an essential piece; it is woefully incomplete; and it is therefore quintessentially ambiguous. Although the statute provides for the assessment of liability "on the basis of such party's percentage of fault," *it nowhere defines the whole by which the percentage is to be determined.* One cannot "determine a percentage of . . . ," of course; one must determine a percentage of *something* -- a total which amounts to a *whole* -- and in the absence of a definition of the whole, the statute is, in our judgment, essentially gibberish. It has therefore fallen to this Court (as it often does) to give the legislature's handiwork a workable meaning by defining "the whole" by which a "party's percentage of fault" is to be determined -- and that unfortunate task simply cannot be avoided here. *See Garden v. Frier*, 17 FLW S381 (Fla. July 2, 1992) (where legislature failed to define the term "professional" in §95.11(4), Fla. Stat., Court was forced to supply a workable definition).[2/]

[2/] Although the district court identified the absence of a definition of "the whole" as an

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In essence, the defendants have asked the Court to supply the missing piece of the statute by defining "the whole" to be this: *all persons or entities who contributed to the plaintiff's injuries*, whether parties to the action or not, and even if they could not have been found directly liable to the plaintiff, either severally or jointly with the defendants. If that is to be the definition of "the whole" by which the Fabres' ultimate liability to Mrs. Marin is to be determined, then the defendants are correct that they should only have been held liable for 50% of Mrs. Marin's intangible damages. For two alternative reasons, however, we believe that the result reached by the trial court and the district court in the instant case was correct.

First, for the several reasons which follow, we believe the trial court and the district court correctly supplied the missing piece of the statute by defining "the whole" to be this: *all parties to the lawsuit* who contributed to the plaintiff's injuries -- and the bulk of our argument will be directed to convincing the Court that that is the more sensible construction of the statute, and the construction which the legislature most probably intended.[3/] Second, we will argue alternatively that, even if "the whole" is to be defined to include non-parties to the lawsuit, the result in this case was nevertheless correct -- because "the whole" can

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ambiguity in the statute, it also found ambiguity in the absence of the definition of the word "party." According to the district court, the word "party" could reasonably be read in context to mean a party to the accident, a party defending the lawsuit, or any party to the lawsuit. Although we agree with this analysis, we think the two ambiguities identified by the district court are simply two ways of looking at a single, larger ambiguity. As a result, and for ease of discussion, we will focus in the text on the statute's absence of a definition of "the whole," and simply adopt the district court's decision for our argument on the additional ambiguity which may be inherent in the statute's lack of a definition of the word "party."

[3/] Actually, the district court defined "the whole" in §768.81(3) to be all party-defendants to the lawsuit. That was technically correct, because the plaintiff is included in "the whole" by a separate subsection of the statute, §768.81(2). "The whole" created by both subsections of the statute is therefore "all parties to the lawsuit." For ease of discussion we will utilize this phrase as our definition of "the whole," and draw no distinction beween the two subsections which create "the whole."

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include only those non-parties who could have been found jointly and severally liable to Mrs. Marin, which (because of the doctrine of interspousal immunity) *excludes* Mr. Marin.

B. Settled rules of statutory construction require a narrow construction of §768.81(3) limiting "the (missing) whole" to parties to the lawsuit.

1. The statute *is* ambiguous.

Although the ambiguity in the statute seems obvious to us, the defendants (and their numerous amici) have insisted that the statute is plain and unambiguous, that its clear meaning jumps straight off the page, and that it therefore requires no construction by this Court at all. Our first task must therefore be to convince the Court that the defendants are wrong on this point. That the defendants are *clearly* wrong on this point is easily demonstrated, we think, by comparing the work of other state legislatures which knew how to draft a comparative fault statute without omitting essential definitions. In the several states which have adopted a form of the Uniform Comparative Fault Act, for example, the statutes explicitly allow apportionment only between claimants, named defendants, persons who have been released from the action, and third-party defendants -- and they expressly exclude all others. *See, e. g.*, 12 Unif. Laws Ann., p. 42 (1992 Supp.); *Selchert v. State*, 420 N.W.2d 816, 4 A.L.R. 5th 1129 (Iowa 1988); *Lake v. Construction Machinery, Inc.*, 787 P.2d 1027 (Alaska 1990); Conn. Gen. Stats. Ann. §52-572h. *See generally* Wade, *Should Joint and Several Liability of Multiple Tortfeasors be Abolished?*, 10 Am. J. Trial Advoc. 193 (1986).

In contrast, the several state legislatures which have determined that apportionment should be extended beyond these groups to include non-parties have plainly said so. For example, Arizona's comparative fault statute reads in pertinent part as follows: "In assessing percentages of fault the trier of fact shall consider the fault of all persons who contributed to the alleged injury, death or damage to property, regardless of whether the person was, or could have been, named as a party to the suit. . . ." Section 12-2506B, Ariz. Stat. (1991).

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The Court will find additional statutes like this, also perfectly unambiguous, in the several decisions upon which the defendants (and their numerous amici) have relied here. (These decisions add next to nothing to the issue to be decided here, of course, because each of them turns upon specific statutory language which is *different* than the language of §768.81(3), Fla. Stat., and they therefore provide no clue whatsoever as to what the Florida legislature intended when it enacted the statute in issue here.)[4]

If §768.81(3) had taken *either* of these explicit forms, the question presented here would have been perfectly simple. The problem, of course, is that §768.81(3) is expressed in *neither* of these forms. It is simply silent as to whether a "party's percentage of fault" should be determined from a whole which includes non-parties (like the Arizona statute), or which excludes non-parties (like the statutes patterned upon the Uniform Comparative Fault Act). And because a definition of "the whole" is obviously critical to the meaning of the statute, the absence of such a definition clearly renders the statute ambiguous. Most respectfully, §768.81(3) is undeniably ambiguous, as the district court correctly held, and its meaning must therefore be determined by resort to settled rules of statutory construction.

2. If "fairness" is a relevant consideration, it supports a narrow construction.

Before we discuss the specific rules of statutory construction which are implicated here, we should briefly address the defendants' insistence that their proposed construction of the statute is mandated by notions of "fairness." Actually, because the Court is being asked to determine the meaning of a legislative enactment rather than to determine a principle of the common law, arguments about the relative "fairness" of the proposed constructions which are in competition here are probably irrelevant. In any event, to the

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[4] To keep things in proper perspective here, we should also note that many states, perhaps even a majority, have *retained* joint and several liability/contribution as the more sensible and equitable solution to the problem presented here. *See, e. g.*, Ill. Ann. Stat., ch. 70, para. 301-04; N.Y. Civ. Prac. L. & R. 1401-04; 14 Maine Rev. Ann. Stats. §156.

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extent that "fairness" is a relevant consideration, we remind the Court that, for nearly a century before the legislature was finally duped by the hyperbolic and often unfounded claims of the insurance industry into partially shifting the risk of an insolvent joint tortfeasor from the joint wrongdoer to the innocent victim, Florida's judiciary had consistently viewed the doctrine of joint and several liability (coupled with the right of contribution) as the "fairest" solution of all. *See Walt Disney World Co. v. Wood*, 515 So.2d 198 (Fla. 1987).

In point of fact, as the judiciary of this state long recognized, the construction of §768.81(3) which the defendants are urging here is not even arguably "fair." The point is succinctly made in a recent article by Dean Emeritus John W. Wade as follows:

> The [recent] assault on joint and several liability has taken two principal lines of attack: . . . (2) that the rule of joint and several liability is intrinsically unfair since it allows the plaintiff to pick out a single defendant, often designated as "Mr. Deep Pocket," and collect the whole amount of the judgment from him alone. Described in this stark fashion, the argument becomes very forceful, and it has been highly convincing to legislators and citizens who may have influence with the legislature. The campaign has succeeded, however, in producing legislative changes that are far more unfair.
>
> . . . .
>
> [A final] step is now being promoted in the current tort reform campaign. Under it, the apportionment described in step 7 becomes final and conclusive. Each defendant pays only the sum apportioned to him and no more. The liability is therefore several or separate, not joint and several. "Mr. Deep Pocket" is thus protected from mistreatment and can rely on the assurance that he has fully performed his duty in paying his allocated portion.
>
> The situation may arise when one or more of the tortfeasors is financially incapable of paying his allocated portions and neither "Mr. Deep Pocket" nor any of the other defendants is responsible for that portion. The injured party must then bear the loss resulting from nonpayment by an insolvent tortfeasor. *If it was unfair to impose that loss on "Mr. Deep Pocket" or any of the other negligent defendants, can it be fair to cast the burden on an innocent, or even negligent, injured party? Surely this question is*

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not even debatable.

> In some states that unfairness is grossly augmented by assessing the percentage of negligence for any other person who may have been involved in the harmful occurrence but who was not made a party to the suit, and letting the responsibility for that assessment also fall on the injured party. . . .

Wade, *Should Joint & Several Liability of Multiple Tortfeasors be Abolished?*, 10 Am. J. Trial Advoc., 193, 193, 197-98 (1986) (emphasis supplied). Most respectfully, if "fairness" is relevant at all here, the defendants' proposed construction of §768.81(3) can lay no claim whatsoever to such a characterization -- and with that off our chest, we return to the rules of statutory construction which are implicated here.

3. The rules of statutory construction require a narrow construction.

The first thing we ask the Court to observe is that §768.81(3) does not mention the word "non-party"; instead, it mentions only the word "party," and it mentions the word four times. Unfortunately, the legislature's repeated use of this word does not compel any particular definition of the "the whole" by which a "party's percentage of fault" should be determined, since either of the competing definitions of "the whole" urged by the parties here can be accommodated by the present language of the statute. We mention the point nevertheless, because the legislature's repeated use of the word "party," coupled with the absence of any reference to non-parties, at least suggests that it probably did not have in mind the more expansive definition of "the whole" urged by the defendants here -- and we think that suggestion ought to be placed up front here, for whatever weight it might bring to bear upon the more important rules of statutory construction by which the Court must ultimately be guided.

The primary rule of statutory construction is, of course, to determine the legislative intent -- and when a statute is ambiguous, it is appropriate to consult its legislative history to determine its meaning. *See* 49 Fla. Jur.2d, *Statutes*, §§114, 157, 160 (and numerous

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decisions cited therein). To aid the Court in that respect, we have included in our appendix the legislative staff analyses of Ch. 86-160 (and the bills which created it).[5/] The final staff analysis of Ch. 86-160 prepared for the House Committee on Health Care and Insurance contains the following discussion of §768.81(3):

> Pursuant to the doctrine of joint and several liability, if two or more *defendants* are found to be jointly responsible for causing the plaintiff injuries, the plaintiff can recover the full amount of damages from any of the *defendants* who, in turn, can attempt to seek recovery in a contribution action against the *co-defendants* for their equitable share of the damages.
>
> The act's modified version of joint and several liability applies to all negligence cases which are defined to include, but not be limited to, civil actions based upon theories of negligence, strict liability, products liability, professional malpractice, breach of warranty, and other like theories. In such cases in which the award for damages does not exceed $25,000, joint and several liability applies to all of the damages. In cases in which the award of damages is greater than $25,000, liability for damages is based on *each party's proportionate fault*, except that each *defendant* who is equal to or more at fault than the claimant is jointly and severally liable for all economic damages. The act's modified version of joint and several liability would not apply to actions based upon intentional torts or in which the legislature has mandated that the doctrine apply, specifically chapter 403 (environmental pollution), chapter 498 (land sales), chapter 517 (securities), chapter 542 (antitrust) and chapter 895 (RICO).

(A. 2; emphasis supplied). Although this analysis is arguably as ambiguous as the statute itself, there is at least no mention of "non-parties" in it -- and fairly read, it strongly suggests that "the whole" by which a party's percentage of fault is to be determined is limited, just as the doctrine of joint and several liability itself was initially applied, only to parties to the lawsuit.

[5/] Staff analyses of legislative enactments are considered appropriate sources of legislative history. *See, e. g., Public Health Trust of Dade County v. Menendez*, 584 So.2d 567 (Fla. 1991); *Comnenos v. Family Practice Medical Group, Inc.*, 588 So.2d 629 (Fla. 1st DCA 1991); *Pershing Industries, Inc. v. Vista Memorial Gardens*, 591 So.2d 991 (Fla. 1st DCA 1991).

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An earlier Senate staff analysis of §768.81(3) is more explicit and considerably less ambiguous on the point:

> The principles of comparative negligence are also applicable in cases involving multiple defendants, with fault being apportioned *among all negligent parties* and the plaintiff's total damages being divided among *those parties* according to their proportionate degree of fault. However, in these cases, one or more of the defendants may ultimately be forced to pay more than their proportionate shares of the damages, pursuant to the doctrine of joint and several liability. Under this doctrine, if two or more defendants are found to be responsible for causing the plaintiff's injuries, the plaintiff can recover the full amount of damages from any one of them.
>
> Under the bill, joint and several liability applies to all cases in which the award for damages does not exceed $25,000. In cases in which the award of damages is greater than $25,000, liability for damages is based on *each party's proportionate fault*, except that each defendant who is more at fault than the claimant is jointly and severally liable for all economic damages. The bill's modified version of joint and several liability would also not apply to actions which the Legislature has mandated that the doctrine apply; specifically chapter 403 (environmental pollution), chapter 498 (land sales), chapter 517 (securities), chapter 542 (antitrust) and chapter 895 (RICO).
>
> Under the bill, neither the court nor the attorneys would be permitted to discuss joint and several liability in front of the jury. The trier of fact would be required to specify the amounts awarded for economic and noneconomic damages, in addition to *apportioning percentages of fault among the parties*. . . .

(A. 4-5; emphasis supplied).

This analysis also makes no mention of "non-parties"; indeed, it explicitly states that, under the statutory provision in issue here, the jury is to apportion percentages of fault only "*among the parties*" to the lawsuit, according to "*each party's proportionate fault.*" Most respectfully, in the absence of any contrary analysis, we think these analyses must be accepted as a valid statement of the legislative intent in enacting §768.81(3); and if we are correct about that, then the *only* definition of "the whole" which is available to this Court is

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the definition we have urged here -- the parties to the lawsuit -- and the more expansive definition urged by the defendants here should be rejected as contrary to the stated legislative intent.

There is an additional, thoroughly settled rule of statutory construction which is squarely implicated here:

> Statutes in derogation of the common law are to be construed strictly . . . . they will not be interpreted to displace the common law further than is clearly necessary. Rather, the courts will infer that such a statute was not intended to make any alteration other than was specified and plainly pronounced. A statute, therefore, designed to change the common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard. . . .

Carlile v. Game & Freshwater Fish Commission, 354 So.2d 362, 364 (Fla. 1977). *Accord State v. Egan*, 287 So.2d 1 (Fla. 1973); *MacIntyre v. Hark*, 528 So.2d 1276 (Fla. 3rd DCA 1988); *Bacon v. Marden*, 518 So.2d 925 (Fla. 3rd DCA 1987); *Graham v. Edwards*, 472 So.2d 803 (Fla. 3rd DCA 1985), *review denied*, 482 So.2d 348 (Fla. 1986); *Goodman v. Kendall Gate-Investco, Inc.*, 395 So.2d 240 (Fla. 3rd DCA 1981). *See generally* 49 Fla. Jur.2d, *Statutes*, §192 (and decisions cited therein).

Unlike the construction of §768.81(3) which we have urged here, which does only limited damage to the common law between parties to a lawsuit, the construction which the defendants have urged here does *enormous* damage to the common law in *numerous* areas. In the instant case, for example, if the defendants' definition of "the whole" is written into the statute, Mrs. Marin recovers only half the damages which she would have recovered under the common law, notwithstanding that she was not at fault in any way; she loses the benefit of the liability insurance coverage which would have been available to her husband in a contribution action against him, notwithstanding that he was 50% at fault in causing her injuries; and State Farm ends up paying roughly half of her damages, notwithstanding that

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it insured both tortfeasors for all but $10,000.00 of the entire amount of her damages.

The same unconscionable result would follow in the more typical case of a defendant like Mrs. Fabre who, unlike Mrs. Fabre, was fully insured. In that scenario, under the common law, the defendant's insurer would pay all of Mrs. Marin's damages and recover half of that payment from Mr. Marin's insurer in an action for contribution, thereby equitably apportioning the damages between the two tortfeasors. If the defendants' proposed definition of "the whole" is written into §768.81(3), however, the defendant's insurer would pay only half of Mrs. Marin's damages and Mr. Marin's insurer would pay nothing, notwithstanding that Mr. Marin was 50% at fault for causing her injuries, thereby inequitably relieving Mr. Marin's insurer from all liability for the damages he caused and leaving Mrs. Marin with only half a loaf.

Of course, the legislature *could* have mandated these inequitable results if it had wished, but the point is that the statute which it enacted does not explicitly replace the equitable results mandated by the common law with the inequitable results which would flow from the defendants' proposed construction of the statute, and the Court should therefore not be quick to assume that the legislature meant what the defendants say it meant when it enacted §768.81(3). Instead, the Court should be guided by the settled rule that an ambiguous statute will be construed to do as little damage to the common law as possible, and it should define "the (missing) whole" as narrowly as possible to preserve those areas of the common law not explicitly abolished by the statute -- by defining "the whole" as "the parties to the lawsuit." There will be time enough for the legislature to disagree with such a construction if the Court has supplied an unintended definition, and it can change that construction if it wishes to mandate the inequities required by the defendants' proposed construction of the statute; but until such time as the legislature makes the defendants' definition of "the whole" explicit in the statute, settled rules of statutory construction simply require the narrowest definition of "the whole" which the Court can supply.

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There is a third rule of statutory construction which is implicated here -- the settled rule that repeals by implication are not favored, and that two (or more) statutes should be construed in such a way as to preserve the force of each, and to render them consistent if at all possible. *See Palm Harbor Special Fire Control District v. Kelly*, 516 So.2d 249 (Fla. 1987); *Garner v. Ward*, 251 So.2d 252 (Fla. 1971). *See generally* 49 Fla. Jur.2d, *Statutes*, §213 (and numerous decisons cited therein). That rule is squarely implicated here because, when it enacted §768.81(3), the legislature did *not* repeal any of several existing statutes which are plainly inconsistent with the defendants' proposed construction of the statute. The most obvious example is §768.31, Fla. Stat., entitled "Contribution among tortfeasors," which codifies the contribution remedy initially recognized in the common law by *Lincenberg v. Issen*, 318 So.2d 386 (Fla. 1975). If the defendants are correct that "the whole" means all persons or entities who contributed to the plaintiff's injuries, whether parties to the action or not (and even if they could not have been found directly liable to the plaintiff), then tort defendants will rarely be in need of the remedy of contribution again, and §768.31 has become largely surplusage (except in the limited areas in which the doctrine of joint and several liability has been retained). *See Walt Disney World Co. v. Wood*, 515 So.2d 198 (Fla. 1987) (observing that the "pure apportionment" doctrine urged by the defendants here is totally inconsistent with the contribution remedy provided by §768.31). On the other hand, §768.31 will continue to have a significant purpose under the narrower definition of "the whole" we have proposed, because it will continue to be available to named defendants to enable them to make unnamed tortfeasors parties to the lawsuit, and because it will be available post-judgment to adjust the equities between defendants and unnamed tortfeasors who were not made parties to the suit.

In this connection, we should note that §768.81(3) is contained in Part II of Chapter 768, Fla. Stat., which begins with three "applicability" provisions, one of which reads as follows: "If a provision of this part is in conflict with any other provision of the Florida

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Statutes, such other provision shall apply." Section 768.71(3), Fla. Stat. (1991). In other words, because the contribution statute still exists, *it* must be utilized to obtain apportionment of damages among joint tortfeasors, irrespective of what §768.81(3) may say. As a result, although the Court could accept the defendants' proposed definition of "the (missing) whole," it would ultimately be required to ignore that definition in favor of enforcement of the contribution statute, so the definition proposed by the defendants itself amounts to mere meaningless surplusage. *See Gurney v. Cain*, 588 So.2d 244 (Fla. 4th DCA 1991), *review denied*, 599 So.2d 656 (Fla. 1992) (declining to allow apportionment of damages under §768.81(3) where specific provision of §768.20 prohibited reduction required by §768.81(3); no issue raised as to whether apportionment could be made with reference to non-parties, because defendants brought initially unnamed tortfeasor into the suit in a contribution action). The more sensible thing to do, of course, is to define "the (missing) whole" as narrowly as possible, as we have proposed, and require party-tortfeasors to obtain apportionment of damages with non-party tortfeasors as §768.31 plainly requires. In no event, given the "applicability" provision of §768.71(3), can the Court define "the (missing) whole" in such a way that §768.31 is rendered largely meaningless.

The defendants may respond by pointing out (as we have conceded) that §768.31 is not rendered *entirely* meaningless by their construction of §768.81(3), since joint and several liability remains for *economic* damages in at least some cases, for which the remedy of contribution should remain viable. That observation will be correct, but it will not be dispositive -- because at least one aspect of §768.31 is so plainly inconsistent with the defendants' proposed construction of §768.81(3) as to render that proposed construction perfectly absurd. Assume that a plaintiff is injured in an automobile accident by the negligence of defendants A and B, each of whom is equally to blame, and that the plaintiff suffers damages in the amount of $200,000.00. The plaintiff settles with defendant A for $100,000.00, gives him a release, and dismisses him from the lawsuit. The case proceeds to

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trial against defendant B, who is found liable for the plaintiff's damages, and the plaintiff's total damages are assessed at $200,000.00.

On these perfectly ordinary facts, the plaintiff's damages are sensibly apportioned between the two defendants by §768.31(5), §768.041(2), and §46.015(2).[9] According to the plain language of these three statutes, defendant B would be given a credit for the $100,000.00 paid by defendant A; defendant B would not be entitled to any contribution from defendant A; and defendant B would owe the plaintiff only half her damages, or $100,000.00 -- which is exactly the right result, by any reasonable measure which can be brought to bear on the apportionment problem. *See Weddle v. Voorhis*, 586 So.2d 494 (Fla. 1st DCA 1991).

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[9] Section 768.31(5) reads as follows:

> (5) RELEASE OR COVENANT NOT TO SUE. -- When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
> (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless it terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,
> (b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

Section 768.041(2) reads as follows:

> (2) At trial, if any defendant shows the court that the plaintiff, or any person lawfully on his behalf, has delivered a release or covenant not to sue to any person, firm, or corporation in partial satisfaction of the damages sued for, the court shall set off this amount from the amount of any judgment to which the plaintiff would be otherwise entitled at the time of rendering judgment and enter judgment accordingly.

Section 46.015(2) is nearly identical to §768.041(2).

If the defendants' proposed construction of §768.81(3) is correct, however, defendant B would be entitled to have the jury assess 50% of the blame against defendant A, notwithstanding that he had settled with the plaintiff and was no longer a party to the action; defendant B would obtain automatic contribution by obtaining a reduction of the verdict against him in the amount of defendant A's contribution to the accident; and defendant B's liability to the plaintiff would be limited to $100,000.00. Subsequent to that result, however -- and because §768.31(5), §768.041(2), and §46.015(2) are still on the books -- the trial court would be required to set off the $100,000.00 received from defendant A against the $100,000.00 owed by defendant B, resulting in a recovery against defendant B of zero dollars. The plaintiff would therefore recover only half her damages, and defendant B would pay nothing, notwithstanding that he was 50% responsible for the plaintiff's $200,000.00 loss.

There are only two ways to avoid the perfectly absurd "double reduction" inherent in this result. One is to accept the defendants' proposed construction of §768.81(3), ignore the "applicability" provision of §768.71(3), and assume that the legislature meant to repeal §768.31(5), §768.041(2), and §46.015(2) in the process. The other is to define "the (missing) whole" in §768.81(3) narrowly, as "parties to the lawsuit," and assume that the legislature meant what it did when it left §768.31(5), §768.041(2), and §46.015(2) on the books.[7]

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[7] At first blush, it would appear that there is a third way to avoid the absurdity of the "double reduction" presented by our hypothetical: (1) first determine the amount of the judgment which would have been entered against defendant B before the set off was taken into account; (2) then reduce the plaintiff's total damages by the amount of the payment received from defendant A; (3) then, if the amount computed under step two exceeds the amount computed under step one (because defendant A paid less than his adjudicated share), enter judgment against defendant B in the amount computed under step one; or (4) if the amount computed under step two is less than the amount computed under step one (because defendant A paid more than his adjudicated share), enter judgment against defendant B in the amount computed under step two (although this would result in a judgment against defendant B in *less* than his proportionate share of the fault -- a result which some courts do not permit). *See, e. g., Shelby v. Action Scaffolding, Inc.*, 171 Ariz. 1, 827 P.2d 462 (1992); *Roland v. Bernstein*, 828 P.2d 1237 (Ariz. App. 1991), *review denied* (May 5, 1992). The language of §768.31(5) might be construed to accommodate this type

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Either approach cures the problem presented by the non-party joint tortfeasor with whom a plaintiff has settled prior to trial, but only one of them is consistent with the well-settled rule of statutory construction that repeals by implication are not favored, and that two (or more) statutes should be construed in such a way as to preserve the force of each, and to render them consistent if at all possible. Most respectfully, the only way that §768.31(5), §768.041(2), and §46.015(2) can be given effect and rendered consistent with §768.81(3) is to define "the (missing) whole" in the latter statute narrowly, as "parties to the lawsuit" -- and because the defendants' proposed construction of "the whole" results in the absurdity of a "double reduction" in every case in which a plaintiff has settled with a joint tortfeasor, the narrow definition which we propose is simply the only definition which makes any sense.[8/]

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of jury-rigged adjustment in the interest of equitable results, but the language of §768.041(2) and §46.015(2) would appear to flatly prohibit it (since these statutes require that the settlement proceeds be set off "from the amount of any judgment to which the plaintiff would be otherwise entitled at the time of rendering judgment . . .") -- so, in the final analysis, the statutes requiring a set off simply cannot be harmonized by manipulation with the defendants' proposed construction of §768.81(3).

[8/] The problem presented by our hypothetical was presented, but not resolved, in *Williams v. Arai Hirotake, Ltd.*, 931 F.2d 755 (11th Cir. 1991). Since the trial court in that case had simply dismissed the non-settling defendant because of the plaintiff's settlement with other defendants, the Court of Appeals limited itself to reversing the dismissal, and it did not reach the question of how the plaintiff's damages were to be determined against that reinstated defendant after trial. In the process of reaching its conclusion, however, the Court of Appeals squarely rejected the non-settling defendant's contention that §768.31(5), §768.041(2), and §46.015(2) had been impliedly repealed by enactment of §768.81(3).

The problem was also presented, but not resolved, in *Dosdourian v. Carsten*, 580 So.2d 869 (Fla. 4th DCA 1991), in which the settling defendant remained in the lawsuit as a defendant and the issue of his liability was submitted to the jury with the issue of the non-settling defendant's liability. Although the issue on appeal was whether the settlement agreement had to be disclosed to the jury, the non-settling defendant took the position that she was entitled to have her liability reduced in two successive steps: first, by the settling defendant's percentage of liability (per §768.81(3)), and second, by the amount paid to the plaintiff by the settling defendant (per §768.31(5)). The district court did not reach this contention because it had not been raised below -- but that disposition was "without prejudice to the appellant to seek a set off in the trial court upon remand." 580 So.2d at 870 n. 1.

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A similar problem is presented by the continuing existence of §440.39, Fla. Stat., which provides employers (and their workers' compensation carriers) with liens upon their employees' third-party tort recoveries. To illustrate, assume that an employee is injured in the amount of $200,000.00 by the combined negligence of his employer and a third-party tortfeasor, and that each contributes roughly equally to the injury. The employer thereafter pays workers' compensation benefits of, say $50,000.00. If the defendants are correct that §768.81(3) allows the liability of the employer to be litigated in the third-party action which follows (notwithstanding that it is immune from suit), then the third-party tortfeasor will owe the plaintiff only half his damages, or $100,000.00. If the plaintiff were entitled to keep this amount, this would be an arguably acceptable resolution of the problem. However, because §440.39 presumes a joint and several recovery of the plaintiff's damages in the third-party action (and because the fault of the employer is deemed irrelevant), it authorizes the employer to recoup the workers' compensation benefits which it paid. In our hypothetical, because the plaintiff has recovered only half his damages from the third-party tortfeasor as a result of §768.81(3), the employer's lien would be reduced to half as well, but that would still require the plaintiff to pay his employer $25,000.00 from the $100,000.00 received from the third-party tortfeasor.

Most respectfully, this makes sense *only* if the third-party tortfeasor has paid *more* than his share of the plaintiff's damages. It makes no sense at all if the third-party tortfeasor's liability has been reduced by the percentage of fault attributable to the employer, since the plaintiff can suffer, in effect, up to a double reduction under the combined effect of the two statutes. There are arguably two ways to resolve this conundrum as well. First, the Court could accept the defendants' construction of §768.81(3) and announce the implied repeal of the lien rights established by §440.39. Alternatively, the Court could define "the (missing) whole" in §768.81(3) narrowly, as "parties to the lawsuit," and assume that the legislature meant what it did when it left §440.39 on the books. Once again, of course, only

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the latter alternative is consistent with the well-settled rule of statutory construction that repeals by implication are not favored, and that two statutes should be construed in such a way as to render them both consistent and sensible if at all possible -- and the narrow definition which we propose is therefore the only definition which makes any sense.

In this connection, we note again that the Fourth District has recently refused to apply §768.81(3) even among parties to a lawsuit, where the result would conflict with the result required by another statute which the legislature left on the statute books. *See Gurney v. Cain*, 588 So.2d 244 (Fla. 4th DCA 1991); *review denied*, 599 So.2d 656 (Fla. 1992). While that decision does not address the question presented here -- whether "the whole" contemplated by §768.81(3) should include non-parties to the suit -- the Fourth District's reluctance to read §768.81(3) as an implied repeal of another statute at least reinforces our position here that "the whole" should be defined as narrowly as possible to avoid the implied repeal of other existing statutes, and we commend *Gurney* to the Court for that limited purpose.

Some additional observations in the area of statutory construction deserve mention. Although this Court has yet to construe §768.81(3) in any binding way, it *has* announced at least a tentative construction of the statute -- in its adoption of an added sentence to Fla. Std. Jury Instn. (Civ.) 6.1b. That new jury instruction reads as follows:

> [In entering a judgment for damages based on your verdict against [either] [any] defendant, the court will take into account the percentage of that defendant's [negligence] [fault] as compared to the total [negligence] [fault] of *all parties to this action*.]

In Re Standard Jury Instructions, 540 So.2d 825, 829 (Fla. 1989) (emphasis supplied). That, of course, is precisely the construction of §768.81(3) which we have urged upon the Court here, and if it was good enough for the Court when it revised the standard jury instructions to explain the effect of §768.81(3), it ought to be good enough for the Court in disposing of

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the issue presented here.[9/]

We should also note that the very Act which contained §768.81(3) created the Academic Task Force for Review of the Insurance and Tort Systems, and charged it with the responsibility of evaluating the statute and making recommendations for its change. Ch. 86-160, Laws of Florida. In undertaking that evaluation, the Academic Task Force understood the statute to be, and characterized it as, a modified form of "pure several liability which provides that a defendant is only liable for a proportionate share of the judgment based upon a comparison of its relative degree of fault *compared with the other defendants*." Academic Task Force, etc., *Final Recommendations*, pp. 52-53 (March 1, 1988; emphasis supplied). (For the convenience of the Court, a copy of the relevant portion of this report is included in the appendix to this brief.) The Academic Task Force thereafter recommended that "this balanced policy should be given a chance to work," and recommended only that the $25,000.00 statutory threshold be raised to $50,000.00. *Id.* at p. 54. Although we are speculating to some extent here, we cannot help but think that the recommendations would have been considerably different if the Task Force had understood the statute to mean what the defendants now claim it means. At minimum, because the Task Force's recommendation to the legislature to retain the statute was based upon its understanding that it contained the considerably narrower definition of "the whole" which we have urged here, this Court can legitimately insist that the legislature be far more explicit about its intent before it will enforce the present statute in the manner insisted upon by the defendants.

4. There is a compelling *need* for a narrow construction of the statute.

[9/] Recently, the Committee on Florida's Standard Jury Instructions considered a request to change this instruction to track the defendants' construction of §768.81. The committee declined the request, and stuck by its initial reading of the statute.

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In short, there are several settled rules of statutory construction which simply require the narrowest definition of "the (missing) whole" which the Court can supply. And to reinforce the *clear need* for application of those rules to produce that narrow construction, we ask the Court to consider several additional "horribles" which would accompany acceptance of the defendants' proposed definition. Consider, for example, the not infrequent case where a defendant has negligently injured a plaintiff (in, say, an automobile accident) and the plaintiff's injuries have been aggravated (or additional injuries have been caused) thereafter by the negligence of his treating physician. According to well-settled principles of the decisional law, the initial tortfeasor is responsible for *all* of the plaintiff's damages, because the possibility of malpractice in treatment of the injuries is reasonably foreseeable. *See Stuart v. Hertz Corp.*, 351 So.2d 703 (Fla. 1977). Query whether this rule survives the defendants' construction of §768.81(3)? In all likelihood, and notwithstanding that the rule is bottomed upon proximate causation rather than upon the doctrine of joint and several liability, it does not.

More importantly for our purposes here, *Stuart prohibits* the defendant from bringing the negligent physician into the plaintiff's lawsuit if the plaintiff has chosen to exclude him, for perfectly sound public policy reasons:

> An active tortfeasor should not be permitted to confuse and obfuscate the issue of his liability by forcing the plaintiff to concurrently litigate a complex malpractice suit in order to proceed with a simple personal injury suit. To hold otherwise would in effect permit a defendant to determine the time and manner, indeed the appropriateness, of a plaintiff's action for malpractice. This decision eliminates the traditional policy of allowing the plaintiff to choose the time, forum and manner in which to press his claim. [Citation omitted].
>
> The choice of when and whether to sue his treating physician for medical malpractice is a personal one which rightfully belongs to the patient. A complete outsider, and a tortfeasor at that, must not be allowed to undermine the patient-physician relationship, nor make the plaintiff's case against the original

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> tortfeasor longer and more complex through the use of a third-party practice rule which was adopted for the purpose of expediting and simplifying litigation.
>
> The complex issues of liability to be resolved in a medical malpractice action are foreign to the resolution of liability in the typical personal injury suit. . . .
>
> In summary, to allow a third-party action for indemnity, as in the case *sub judice*, would . . . expand the applicability of the third-party rule and make it a tool whereby the tortfeasor is allowed to complicate the issues to be resolved in a personal injury suit and prolong the litigation through the filing of a third-party malpractice action.

Stuart, supra at 706.

If the defendants' proposed construction of §768.81(3) is to be accepted here, this salutary policy will be dead letter. The plaintiff may elect not to sue his physician, but the defendant can drag the physician into the lawsuit (in name only, without service of process) and have his "percentage of fault" adjudicated by the jury. The physician will not be there to defend himself, of course, which is bad enough -- but it gets worse: the *plaintiff* will be forced to defend what amounts to a medical malpractice suit against his physician, at the enormous cost which such a defense normally entails (and, of course, the trial will be lengthened considerably at enormous cost to judicial resources). In addition, a jury verdict finding that the physician committed malpractice could damage the physician's reputation; it could cause an increase in the physician's malpractice insurance premiums; and it could even result in disciplinary action by the Department of Professional Regulation. *See generally* §458.331, Fla. Stat. (1991). All of these things are possible, notwithstanding that the physician was not even a party to the lawsuit, and that his defense was provided at trial by his *victim* (who may then find himself in the ironic position of thereafter having to sue the physician he previously defended).

This type of problem will not be limited to cases involving facts like those in *Stuart*

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v. Hertz Corp. Indeed, in *every* case in which the plaintiff elects not to sue a particular tortfeasor for one reason or another -- because he does not believe he can prove a *prima facie* case, because he does not wish to incur the added expense or complexity, because he does not wish to sue his girlfriend or grandmother, because he has already settled with the tortfeasor, or for any other heretofore perfectly legitimate reason -- the defendant may drag that tortfeasor into the litigation without process, litigate its liability, and have its "percentage of fault" determined by the jury. Worse still, the defendant can drag persons and entities into the lawsuit who could not have been sued by the plaintiff at all -- like phantom tortfeasors, immune tortfeasors, dissolved tortfeasors, tortfeasors discharged in bankruptcy, tortfeasors over which jurisdiction cannot be obtained, and the like. The result of this process will be that two-day trials will become two-week trials; two-week trials will become two-month trials; and the judiciary will simply be overwhelmed by the enormous burden involved in adjudicating the liability of nearly everyone on the planet.[10]

There is also considerably more at stake here than a mere expansion in the number of persons and entities whose liability may have to be litigated in any given suit. To allow a defendant to reduce his liability by litigating the liability of a non-party phantom tortfeasor, for example, will cause fundamental changes in many well-recognized torts. Consider the ordinary slip and fall case. Because a landowner owes its invitees a duty of care to keep its premises in a reasonably safe condition, it is responsible for cleaning up slip and fall hazards

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[10] The obvious hyperbole in this statement is not entirely unjustified. Because undersigned counsel receives numerous telephone calls from around the state seeking legal advice on the problem at issue here, he is aware of many cases in which defendants have attempted to add more than a few non-parties to verdict forms. In one case presently pending in Tallahassee, for example, the single medical malpractice defendant sued by the plaintiff is attempting to add 18 unnamed health care providers to the verdict form. If this ploy succeeds, the plaintiff will be required to prove one medical malpractice case and defend 18 others. While this is an extreme example, it is nevertheless illustrative of the enormous damage which the defendants' proposed construction of §768.81(3) will inflict on the litigants and judiciary of this state.

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created by its customers, and when it negligently fails to do so and another customer is injured by that negligent act, it is responsible for the customer's damages. If the defendants' proposed construction of §768.81(3) is accepted, however, this long-settled principle of liability will be slashed at least in half, and probably much deeper than that -- since the landowner will now be able to reduce its liability for the plaintiff's damages by whatever "percentage of fault" it can convince a jury to assign to the phantom customer who dropped the substance which it negligently failed to clean up.

The same fundamental change will occur in all other torts in which the defendant's liability is bottomed upon a failure to protect a plaintiff from the foreseeable conduct of a third person, like those involving claims of "inadequate security," "inadequate supervision," and the like. The focus in all these types of cases will be on the conduct of the non-party phantom tortfeasor, rather than on the conduct of the defendant, and the defendant's ultimate liability to the plaintiff will depend not so much upon its own conduct, but upon its success in passing off the blame to a person who exists only in concept and who cannot even be given a name. (Indeed, given the financial bonus to any defendant who can pass part of the blame off upon a phantom tortfeasor, phantom tortfeasors are likely to become regular entries upon verdict forms in many tort cases.)

Most respectfully, before the Court opens this Pandora's box, it should search long and hard in §768.81(3) for explicit language requiring litigation of the liability of non-parties -- and if no such language can be found (and it is not there), then the statute's (missing) whole should be defined as narrowly as possible, in the manner in which we have proposed here. There will be time enough for the legislature to disagree with that construction if it wishes, and open the Pandora's box which the defendants' proposed construction represents -- but until the legislature declares its explicit intent to open the box in that manner, this Court should keep the lid firmly in place. *See Selchert v. State*, 420 N.W.2d 816, 4 A.L.R. 5th 1129 (Iowa 1988) (declining to interpret Iowa's comparative fault statute -- which is

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explicitly limited in the narrow fashion we have urged here -- to require joinder of all potential tortfeasors in one action because of the enormous burden which it would impose upon the state's limited judicial resources).

The defendants' proposed construction of "the (missing) whole" creates other baffling conundrums. Consider, for example, the plaintiff who is injured by the joint negligence of a governmental defendant and a private defendant. Because of the notice provisions of §768.28, the plaintiff may not be able to sue the governmental defendant when he wishes, and the untolled statute of limitations governing his claim against the private defendant may force him to file suit against the private defendant while waiting six months for the governmental defendant to deny his claim. The governmental defendant may also have a venue privilege requiring that it be sued in a venue which would be improper for the private defendant. The plaintiff therefore sues the private defendant in, say, Dade County. Six months later he sues the governmental defendant in, say, Leon County. If the defendants' proposed construction of §768.81(3) is accepted here, the governmental defendant will insist upon litigating the liability of the private defendant in the Leon County suit, and the private defendant will insist upon litigating the liability of the governmental defendant in the Dade County suit.

Because the liability of the two defendants will be tried in each suit, the costs of the suit and the expenditure of judicial resources will be doubled -- and inconsistent results are clearly more probable than not. Assume that the jury in the Leon County suit finds the governmental defendant 10% at fault and the private defendant 90% at fault. Assume that the jury in the Dade County suit finds the private defendant 10% at fault and the governmental defendant 90% at fault. If the defendants' proposed construction of "the (missing) whole" is the law, the plaintiff will ultimately recover 10% of his damages from each defendant, or a total of only 20% of his damages, notwithstanding that the findings of each of the two juries would have required the defendants to pay the plaintiff 100% of his

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damages if the two defendants could have been named as parties to a single suit. This result is, of course, perfectly ludicrous -- and it simply should not be mandated by this Court in the absence of explicit language in §768.81(3) which would clearly require it. That language simply is not there, and if for no other reason than to avoid this type of ludicrous result in cases in which a plaintiff cannot join all potential tortfeasors in one suit, the only construction of the statute which can even arguably be considered sensible here is the one we have proposed.

As ludicrous as the result in our hypothetical is, we do not believe that our hypothetical is at all fanciful. There are several types of cases where pre-suit notice requirements have been imposed upon plaintiffs, and where suit cannot be brought until the potential defendant acts in some way upon the notice. Medical malpractice and governmental tort cases are the most obvious examples. There are also a number of venue privileges which not infrequently require that separate suits be filed against joint tortfeasors. And it is occasionally necessary to file separate suits against joint tortfeasors because of the inability to obtain personal jurisdiction over one of them in the only forum which can assert jurisdiction over the other. The results in some of these "split cases" can also be even more ludicrous than our hypothetical suggests. For example, two juries hearing "split cases" might exonerate the party-defendant altogether and assign 100% of the fault to the non-party. In that event, the plaintiff will recover nothing, notwithstanding that he would have recovered 100% if he had been able to join both defendants in a single lawsuit. Most respectfully, these types of ludicrous results simply should not be mandated by this Court absent explicit language in §768.81(3) which would clearly require them -- and the only construction of the statute which can even arguably be considered sensible here is the one we have proposed.

We should also note briefly that the Rules of Civil Procedure will have to be extensively revised if the defendants' proposed construction of §768.81(3) is accepted here. That will be necessary because, unlike the typical "empty chair" case in which a defendant

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simply seeks a "not liable" verdict based upon the previously-pleaded denial of the plaintiff's claim in the defendant's answer, the construction of §768.81(3) proposed by the defendants here contemplates an affirmative finding that the "empty chair" was at fault in causing the plaintiff's damages in a certain percentage of the whole. In that circumstance, and at minimum, since notice and an opportunity to defend is required by the due process clause, some method will have to be devised for pleading claims against non-parties, both affirmatively and defensively (which did not happen in the instant case). *See Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So.2d 561 (Fla. 1988). Some method will also have to be devised for a plaintiff to obtain a directed verdict on a claim against a non-party, where the evidence is insufficient to present a jury question on the claim. The judiciary will also have to determine whether the non-party should be given notice that a claim has been raised against him which may result in an affirmative finding of liability on his part, since that person ought to be given an opportunity to appear and defend his good name if he wishes, even though the result may not be binding upon him in a legal sense. In short, if the defendants' construction of §768.81(3) is adopted here, both the substantive and procedural law will require extensive reinvention, from the ground up.

Our "parade of horribles" could go on and on, of course. If we have not made the point by now, however, it cannot be made -- so we will desist. The Court will find a thoughtful discussion of these and other "horribles" accompanying the defendants' proposed construction of §768.81(3) in a recent article by the late Dean Prosser's successor as the "Dean of Torts," Dean Emeritus John W. Wade. *See* Wade, *Should Joint and Several Liability of Multiple Tortfeasors be Abolished?*, 10 Am. J. Trial Advoc. 193 (1986).

5. The reasoning of *Messmer* is flawed.

A final word is in order concerning the Fifth District's recent decision in *Messmer v. Teacher's Insurance Co.*, 588 So.2d 610 (Fla. 5th DCA 1991), *review denied*, 598 So.2d 77

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(Fla. 1992). In that case, which is neither factually nor legally distinguishable from the instant case, the defendants' proposed construction of §768.81(3) was accepted -- lock, stock, and barrel, and without even a mention of the enormous consequences which would follow from that construction of the statute. In our judgment, the reasons given for this holding were *non sequiturs*. As its first reason, the district court adopted the trial court's reasoning, which went like this:

> Section 768.81(3) provides that 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 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. . . .

588 So.2d at 611-12.

With all due respect to both the trial court and the district court in *Messmer*, this reasoning does not purport to find any definition of "the whole" in the language of the statute itself. It simply *assumes* that "the whole" was meant to be "all participants in the accident," and its announcement that the legislature could have explicitly limited the apportionment effected by the statute to "parties to the proceeding" is simply a makeweight. It can just as easily be *assumed* that "the whole" was meant to be "all parties to the proceeding," and this conclusion can just as easily be justified by noting that, if the legislature had meant the statute to apply to "all participants in the accident," "it would have so stated." In other words, this reasoning is not reasoning at all; it is simply a *non sequitur* which entirely misses the point. The point is that the legislature did *not* define "the whole" at all, so the

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statute is missing an essential definition and is therefore quintessentially ambiguous. And when the settled rules of statutory construction upon which we have relied here are applied to this ambiguity, the only construction of the statute which is justified in a judicial forum is the narrow construction which we have proposed.

In their second announced reason for defining "the whole" to be "all participants in the accident," the trial court and the district court in *Messmer* purported to look to the "legislative intent." However, the two courts simply ignored the staff analyses with which we began our argument (at least one of which explicitly contradicts their ultimate reading of the statute). Instead, they simply announced that the statute's obvious purpose, which was "to partially abrogate the doctrine of joint and several liability," would be "thwarted" by anything but the broad construction of "the whole" previously assumed by both courts. 588 So.2d at 612. We disagree with this reasoning as well, because the doctrine of joint and several liability *is* partially abrogated by our reading of the statute. In fact, the doctrine of joint and several liability is *fully* abrogated among all parties to the lawsuit under our proposed construction of the statute. The question is how far the legislature meant to extend its partial abrogation of the doctrine -- to parties to the lawsuit, or to all persons and entities who were participants in the accident -- and that question simply cannot be answered by merely noting that the purpose of the statute was to partially abrogate the doctrine. That question cannot be answered without supplying a definition of "the (missing) whole" -- and when the settled rules of statutory construction upon which we have relied here are applied to supply this missing definition, the only construction of the statute which is justified is the narrow construction which we have proposed.

The *Messmer* Court also purported to find a third support for its reading of §768.81(3) in this Court's recent decision in *Conley v. Boyle Drug Co.*, 570 So.2d 275 (Fla. 1990). In our judgment, the district court's reliance upon that decision was entirely inapt. In *Conley*, this Court adopted the "market share" theory of liability in actions against drug

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companies producing DES, where the plaintiff is unable to identify the particular manufacturer whose product was ingested by her mother. Under that theory, the plaintiff is allowed to recover against party-defendants who may not even have supplied her mother with the product, and all defendants must contribute to the recovery in the percentage of their market share of sales of the product.

The question in *Conley* was whether each defendant should be held jointly and severally liable for the plaintiff's total damages, or whether each defendant should be held only severally liable for a percentage of the plaintiff's damages represented by its market share. In answering this question, the Court first noted that joint and several liability would be contrary to the very premise upon which the market share theory is based, namely that no manufacturer should be held liable for more harm than it *statistically* could have caused in its respective market, where it cannot be proven that the manufacturer actually caused any injury at all. Secondly, the Court noted that §768.81(3) had partially abolished joint and several liability, and that the public policy of the state therefore suggested that only several liability should attach under the market share theory.

Most respectfully, this conclusion says little at all of relevance to the different issue presented here -- whether "the (missing) whole" in §768.81(3) should be broadly defined as all persons or entities contributing to the plaintiff's injuries, or narrowly defined as all parties to the lawsuit. In fact, as the *Conley* decision elsewhere makes clear, the market share theory of liability is both anomalous and unique, because it allows a plaintiff to recover from a defendant who has caused the plaintiff no injury at all -- so the common law doctrine of joint and several liability does not mesh with the theory in the first place, and applying it to mulct an *innocent* defendant of more than his market share percentage of the plaintiff's damages would be illogical in the extreme. Quite a different question is presented, of course, when determining how to apportion a plaintiff's damages between tortfeasors whose liability depends upon proof of actual fault and causation, and the fact that the doctrine of

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joint and several liability does not mesh with the market share theory of liability is no indication, one way or the other, of how the legislature intended that damages be apportioned in the more ordinary type of tort case presented here.

In any event, when the *Conley* decision is read a little more carefully than the *Messmer* Court read it, the Court will discover that it actually supports *our* proposed construction of §768.81(3), not the defendants'. According to *Conley*, there is an initial presumption under the market share theory of liability that the defendants sued by the plaintiff comprise 100% of the market, and the named defendants' market shares must therefore total 100%. The named defendants may reduce their market share thereafter by increasing the market to include unnamed manufacturers of the drug -- but *not* (as the *Messmer* Court concluded that §768.81(3) authorized) by litigating the liability of those non-party manufacturers and factoring their market shares into the total market. Instead, the party-defendants must *implead* the non-party manufacturers and make them *parties to the lawsuit* before they can be utilized to increase the market and reduce the party-defendants' market shares. Moreover, any impleaded manufacturer which is "insolvent or defunct" *cannot* be utilized to increase the market and reduce a defendant's share of the 100% which will be allocated among the parties to the lawsuit. 570 So.2d at 286. Most respectfully, this is essentially the construction of §768.81(3) which *we* have proposed to the Court in this case, so we fail to see how *Conley* supports the *Messmer* Court's reading of the statute in any way.[11/]

[11/] *Conley* does contain at least a tiny wrinkle which would appear to be somewhat inconsistent with our reading of §768.81(3). If a named defendant is unable to implead a non-party manufacturer (who is neither insolvent nor defunct) because it is not amenable to suit in Florida, the named defendant may nevertheless obtain a reduction of his proportionate share of the market by proving the actual market share of that non-party manufacturer. This does not hurt the plaintiff, however, because the plaintiff can presumably recover the missing piece of the pie by suing that manufacturer in a jurisdiction in which it is amenable to suit. In our judgment, because the plaintiff's total recovery under the market share theory of liability thus depends upon simple, statistically provable market

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In short and in sum, *Conley's* reference to §768.81(3) contains no definitive answer to the question presented here, and if it suggests any answer at all, it suggests that *our* proposed construction of §768.81(3) is far more sensible than the construction placed upon it by the *Messmer* Court. And in the final analysis, of course, the answer to the question presented here must depend, not on *Conley's* analysis of the unique market share theory of liability at issue there, but on the settled rules of statutory construction by which the meaning of the quintessentially ambiguous statute in issue here must be determined. As we trust we have made clear, those settled rules require the Court to define "the (missing) whole" as narrowly as possible, to do as little damage to the common and statutory law as possible -- and because the defendants' proposed construction of the statute will be analogous to a nuclear explosion (or a hurricane Andrew) in every legal library of this state, we respectfully submit that the construction we have proposed is the only sensible construction available to the Court. As we have said before, there will be time enough for the legislature to disagree with that construction if it does not reflect the legislature's actual intent, but until the legislature explicitly states its intent to open Pandora's box in that fashion, this Court should keep its lid firmly in place.[12/] Most respectfully, the Court should decline to follow *Messmer*,

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shares of existing, solvent manufacturers who are amenable to suit in one jurisdiction or another, this tiny wrinkle does not present *any* of the enormous number of problems which will flow from the defendants' proposed construction of §768.81(3), so it ought to be considered essentially irrelevant to the issue before the Court.

[12/] While we are on this subject, we should briefly respond to the Attorney General's suggestion that, because the legislature did not amend §768.81 after the *Messmer* decision, it must be presumed that the legislature agreed with the *Messmer* Court's construction of it. There are three reasons why this suggestion is silly. First, the principle of law upon which the Attorney General relies for this suggestion applies only when the legislature *re-enacts* a statute without changing a prior judicial construction of it, and §768.81 has not been *re-enacted* since *Messmer* was decided. Second, the Court knows enough about the legislative process that it need not be reminded that legislative *inaction* in a particular area is proof of nothing about legislative intent. Finally, the legislatuare has met since the district court decided the instant case, and it did not amend §768.81 at that time, so the Attorney General's suggestion therefore amounts to a suggestion that the legislature has approved

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and "the (missing) whole" should be defined as the district court defined it below -- as "parties to the lawsuit."

C. Alternatively, "the (missing) whole" should be defined to include only those non-parties who could have been found jointly and severally liable to the plaintiff in the first place.

If we have persuaded the Court that the broad construction given to §768.81(3) by the *Messmer* Court is insupportable, but the Court remains unpersuaded that our narrow construction of the statute is the correct one, there is a middle ground available to it which will at least minimize the damage to existing common and statutory law. The primary purpose of the doctrine of joint and several liability (coupled with the doctrine of contribution between joint tortfeasors) was, of course, to place the risk of an insolvent joint tortfeasor on the joint wrongdoer, rather than on the innocent victim. *See Walt Disney World Co. v. Wood*, 515 So.2d 198 (Fla. 1987). The obvious primary purpose of §768.81(3) was, in turn (and as bad as it sounds), to shift the risk of an insolvent joint tortfeasor from the joint wrongdoer to the innocent plaintiff. *See Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987); *Messmer v. Teacher's Insurance Co., supra*.

It logically follows that a joint tortfeasor should find himself in no better position after enactment of §768.81(3) than he would have been where contribution was available from a *solvent* joint tortfeasor after the doctrine of joint and several liability was applied, even if §768.81(3) requires apportionment of damages among both non-party joint tortfeasors and joint tortfeasors named as parties to the suit. Under the *Messmer* Court's construction of the statute, however, a joint tortfeasor is, in some circumstances at least, far better off than

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both *Messmer* and the decision under review here -- which is an impossibility. Clearly, the legislature's failure to provide a definition of "the (missing) whole" while the judiciary has been struggling to define the concept provides no answer whatsoever to the question presented here, and the Court simply cannot avoid its obligation to interpret the statute as a result. *See Garden v. Frier*, 17 FLW S381 (Fla. July 2, 1992).

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he would have been under the old regime (where every joint tortfeasor was *solvent*), because he may now obtain what amounts to automatic contribution from persons with whom he could not have been held jointly and severally liable to the plaintiff in the first place.

Consider, for example, the not infrequent case in which a plaintiff is injured in the course of his employment by both his employer and a third-party tortfeasor.[13] (Any immune defendant will do for our hypothetical, of course -- and there are a number of them: employers, co-employees, governmental defendants, employees of governmental defendants, spouses, parents, children, *et cetera*.) Under settled principles of the law, both decisional and statutory, the employer is immune from suit by the plaintiff. Indeed, the employer is not even considered a "joint tortfeasor" under the law because of its immunity, so it also cannot be sued for contribution by the third-party tortfeasor. *See Seaboard Coast Line Railroad Co. v. Smith*, 359 So.2d 427 (Fla. 1978); *Blocker v. Wynn*, 425 So.2d 166 (Fla. 1st DCA 1983). *See generally* 57 Fla. Jur.2d, *Workers' Compensation*, §312 (and decisions cited therein). As a result, in such a case, the third-party tortfeasor's liability does not even implicate the doctrine of joint and several liability; the third-party tortfeasor is simply held liable for the damages he caused to the plaintiff, and abrogation of the doctrine of joint and several liability would not change that result in any way.

Under the *Messmer* Court's construction of §768.81(3), however, the third-party tortfeasor may litigate the employer's contribution to the plaintiff's injuries in the plaintiff's lawsuit, and obtain a reduction of his liability for the percentage contribution of the plaintiff's employer. The third-party tortfeasor therefore obtains automatic contribution from an entity with which he was not even a "joint tortfeasor," as that concept is defined by the doctrine of joint and several liability. Whatever the legislature may actually have intended when it enacted §768.81(3) without defining "the whole" by which a "party's

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[13] This is the scenario in the related §768.81(3) case recently certified to this Court by the United States Court of Appeals for the Eleventh Circuit: *Fox v. Allied-Signal, Inc.*

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percentage of fault" is to be determined, the very most that the statute reflects is an intent to (partially) abolish the doctrine of joint and several liability. As a result, that should be the very broadest manner in which "the (missing) whole" can legitimately be defined -- as all persons and entities with whom the defendant could have been found jointly and severally liable to the plaintiff under the doctrine of joint and several liability.

Although this construction of the statute still does enormous damage to both the common law and existing statutory law, it is at least a more sensible construction of the statute than the one provided by the *Messmer* Court (with far more equitable results, since the remedy of contribution remains for those instances in which contribution is available) -- and we therefore commend it as an alternative construction of the statute here. *See Lake v. Construction Machinery, Inc.*, 787 P.2d 1027 (Alaska 1990) (in absence of explicit legislative intent, declining to allow an immune employer's fault to be used to reduce a defendant-tortfeasor's liability to a plaintiff under Alaska's proportionate fault statute).

We say again, there will be time enough for the legislature to disagree with that construction if it does not reflect its actual intent, but until the legislature explicitly states its intent to inflict the enormous damage represented by the *Messmer* Court's construction of §768.81(3), the statute's (missing) whole should be defined as narrowly as the Court can be persuaded to define it. And if our alternative construction of the statute is to be adopted by the Court, then the result reached by the trial court in this case remains correct, because Mr. Marin was simply not a "joint tortfeasor" who could have been found liable to his wife under the doctrine of joint and several liability in the first place, whether a party to her lawsuit or not -- and the defendants' remedy was an action under §768.31 for contribution, according to the decisional law, and the statutory law which is still in place. Most respectfully, if either of our alternative constructions of §768.81(3) is to be adopted here, the district court correctly affirmed Mrs. Marin's judgment for the full amount of her (remitted) damages.

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V.
CONCLUSION

It is respectfully submitted that the district court's decision should be approved.

Respectfully submitted,

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