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FILED
SID J. WHITE
SEP 24 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

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.

_____/

PETITIONER'S REPLY BRIEF

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ISSUE ON APPEAL

Whether Florida Statute 768.81(3) requires the fact finder to apportion liability between the named party defendants, and unnamed tortfeasors who were parties to the incident giving rise to the negligence action.

SUMMARY OF ARGUMENT IN REPLY

Essentially, the Respondent seeks to avoid the legal effect of the legislatively created doctrine of **APPORTIONMENT OF LIABILITY** on the purported basis that the statute creating this new legal doctrine is ambiguous. The Respondent attempts to support her position by attempting to create ambiguity by suggesting that the "whole" was undefined by the legislature. Thereafter, the Respondent contends that the innocuous legislative history supports her position. Lastly, the Respondent employs "fear" tactics in a purported attempt to discourage this court from upholding an otherwise clear and unambiguous statute.

ARGUMENT

A. Florida Statute 768.81(3) is not ambiguous.

The Respondent has gone to great lengths to attempt to create an ambiguity in an otherwise unambiguous statute. The Respondent concedes that the statute provides for the assessment of liability "on the basis of such party's percentage of fault." (Respondent's brief, page 6). The Respondent claims the purported ambiguity resulted from the legislature's failure to define the "whole" by which the percentage is to be determined. The Respondent, must

necessarily, overlook the plain simple fact that if the words are given their plain and ordinary meaning, the statute is clear and unambiguous. It is only by semantic nicety and speculation that the Respondent attempts to create ambiguity in an otherwise unambiguous statute.

As demonstrated in this petitioner's initial brief, the operative statutory words; "party", "liable", and "fault"; if given their plain and ordinary meaning result in absolutely no ambiguity in the subject statute.

Of note, is the fact, that the Respondent has not addressed or challenged the plain and ordinary meanings of these operative words as defined in both Webster's Collegiate Dictionary, and Black's Law Dictionary. (See petitioner's initial brief at page 11). The legislative history does not support the Respondent's argument. Nowhere does the history suggest that Florida Statute 768.81(3) was intended to apply to parties to the litigation only.

B. Potential conflict with other statutes was adequately addressed by the legislature.

The Respondent argues that apportioning liability among all participants to the accident, rather than to all parties to the law suit; will result in conflict with other statutes, particularly 768.31-Contribution Among TortFeasors. The legislature, obviously recognized the potential for conflict and therefore adopted Florida Statute 768.71(3) providing that in the event a provision of this part is in conflict with any other provision of the Florida

Statutes, such other provisions shall apply. Therefore, if the Defendant elects to bring a third party complaint or counter claim for contribution, the contribution statutes will apply. However, in the absence of such election, Florida Statute 768.81(3) would apply.

Therefore, in the hypothetical outlined by the Respondent at page 17 of her brief:

> "Assume that a Plaintiff is injured in an automobile accident by the negligence of Defendants A & B, each of whom is equally to blame, and that the Plaintiff suffers damage 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 law suit. The case proceeds to 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."

The Respondent contends that because of Florida Statute 768.81(3) the Plaintiff in the above hypothetical would be subject to a "double reduction. " However a double reduction could not occur because once the Plaintiff elected to settle with Defendant A in accordance with Florida Statute 768.31(5); Florida Statute 768.71(3) resolves the conflict in favor of Florida Statute 768.31.

Moreover, in the above hypothetical, had the Plaintiff not settled with Defendant A, Florida Statute 768.81(3) would apply and Defendant B would be liable in relation to his percentage of negligence alone. This result would apply even where Plaintiff chose not to join Defendant A in the law suit.

C. Purported conflict with successor tortfeasor common law- Stuart v. Hertz Corp. 351 So. 2d 703(FLA.1977).

The Respondent contends that the common law created by **Stuart**

v. Hertz, Corp. 351 So.2d 703(FLA.1977); that the initial tortfeasor is responsible for all of the Plaintiff's damages despite subsequent negligence by a third party; will not survive Florida Statute 768.81(3). This is simply not the case. Florida Statute 768.81(3) abrogates joint and several liability only. Stuart clearly held that the initial tortfeasor and the subsequent treating physician tortfeasor were distinct and independent tortfeasors; not joint tortfeasors. Stuart at 705. Accordingly, as Florida Statute 768.81(3) confines itself to joint and several liability only, this purported "horrible" is a meritless fiction created by the Respondent.

D. Purported conflict with Governmental Joint Tortfeasor

Similarly, the Respondent's governmental tort hypothetical is exaggerated. While it is true that a Plaintiff must wait the statutory period prior to filing suit against a governmental tortfeasor, the ability of Plaintiff to prosecute the action is maintained. Florida Statute 768.81(3) has no effect on our state venue laws, in fact, even prior to the enactment of Florida Statute 768.81(3) Florida courts have had to resolve governmental-private tortfeasor venue issues. See **Board of County Commissioners of Madison County vs. Grice**, 438 So.2d 392(FLA.1983), **Wagner vs. Nova University, Inc.,**397 So.2d 375(4th DCA 1981).

E. Purported Workman's Compensation Lien Conflict.

The Respondent's phantom workman's compensation lien problem is also misplaced. This Court would not be required to announce

the implied repeal of the lien rights established by Section 440.39, as argued by the Respondent. Rather, as an element of determining the amount a worker's compensation carrier is entitled for its statutory lien, the negligence of the employer should be considered by the trial court in determining the lien amount.

Therefore, assuming arguendo the Florida Statute 768.31(3) is ambiguous, this court, by adopting the legislature's intended effect of abrogating the doctrine of joint and several liability; the "horribles" predicted by the Respondent will not occur. Therefore, whether this statute is given its plain meaning and effect; or this court gives effect to the legislature's intent to apportion negligence among all potential tortfeasors, this statute required the trial court to enter judgment against petitioner Fabre in accordance with the percentage of negligence charged to her by the jury.

CONCLUSION

For the foregoing reasons, the decision of the 3rd District Court of Appeal should be reversed, with instruction to remand the matter to the trial court for entry Final Judgment in accordance with the percentage of negligence charged by the jury to petitioner Marie G. Fabre and Eddie W. Fabre as owner of the vehicle.

BY _____
MARC R. GINSBERG

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 22nd day of September, 1992 to: **JAMES CLARK, ESQUIRE**, Barnett, Clark and Barnard, 19 West Flalger Street, Suite 1003, Miami, Florida 33130; **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; **MARGUERITE H. DAVIS, ESQ.**, 106 East College Avenue, Suite 1200, Tallahassee, Florida 32301; **BARBARA GREEN, ESQUIRE**, 2964 Aviation Avenue, Grove Place, Third Floor, Coconut Grove, Florida 33133; **LAW OFFICES OF KAREN J. HAAS**, 13805 S.W. 83rd Court, Miami, Florida 33158-1027; **ROBERT BUTTERWORTH, ATTORNEY GENERAL**, Department of Legal Affairs, The Capitol, Suite 1502, Tallahassee, Florida 32399-1050; and **JOEL D. EATON, ESQUIRE**, Podhurst, Orseck, Josefsberg, et. al, 25 West Flalger Street, Suite 800, Miami, Florida 33130.

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