IN THE SUPREME COURT OF FLORIDA

CASE NO. : 79,870

FILED
SID J. WHITE
SEP 30 1992
CLERK, SUPREME COURT
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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs.

ANN MARIN,

Respondent.

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# REPLY BRIEF OF THE PETITIONER, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

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## POINT ON APPEAL

WHETHER §768.81(3), FLORIDA STATUTES, ABROGATES JOINT AND SEVERAL LIABILITY IN TORT IN SITUATIONS WHERE ONLY ONE OF TWO NEGLIGENT TORTFEASORS ARE AMENABLE TO SUIT?

## SUMMARY OF ARGUMENT

The Respondent argues, in her Brief on the Merits, that the statute abrogating joint and several liability in negligence actions in all but limited circumstances is ambiguous. Further, the Respondent argues that the plain meaning of the words of this statute would lead to unfairness. Finally, the Respondent argues that there is a "parade of horribles" which would occur should the Respondent's arguments not be accepted by this Court.

In response to these categories of argument, the Petitioner would argue that the statute in question is not ambiguous. It is obvious, from the plain wording of that statute, that the legislature made a conscious decision to shift the focus away from the damages sustained by a particular claimant in order to concentrate on the extent to which a particular Defendant caused those damages. This is the essence of the abrogation of joint and several liability.

There is nothing inherently fair about a Defendant who is only partially at fault paying a claimant 100% of the loss involved. In enacting the statute in question, the legislature attempted to balance the interests of an individual injured party against the interests of society as a whole. Although the abrogation of the

doctrine might appear to an individual claimant to be "unfair" at times, it is the interest of society that is served in the abrogation of the doctrine, to the extent that that interest has been recognized by the legislature.

Finally, the "parade of horribles" indicated in Respondent's Brief on the Merits would simply not occur. The statute in question has a unique feature where it provides that if any part of the statute conflicts with any other provision of the Florida law, such other provision applies. This "conflict" provision operates to resolve many of the contradictions that the Respondent attempts to place between §768.81(3) and other provisions of the Florida law. In actuality, the "conflict" provision works neatly to create a consistent scheme for a fair loss allocation in this state. As a result, many of the scenarios set forth by the Respondent would simply not occur. Further, there would be no great burden imposed on claimants in this state in requiring them to prove not only the qualitative issue of whether a particular Defendant was negligent, but also the quantitative issue of how much negligence rested with that particular Defendant.

In short, the clear and unambiguous terms of the statute display the legislative intent to abolish joint and several liability in tort in all but a few chosen exceptions in this state. Those clear and unambiguous terms should be given affect in this case and the decision of the District Court.

## ARGUMENT IN REPLY

In her appeal for "fairness" in this case, the Respondent resorts to vitriol in characterizing the passage of the Tort Reform and Insurance Act of 1986 as the result of the legislature being "finally duped" by the "hyperbolic and often unfounded" claims of the insurance industry. (Brief of Respondent, at Page 10). This vituperation is, of course, nonsense. It is also demeaning to the good faith efforts of those who labored long and hard to find a workable solution to what was obviously a serious problem facing this state at the time.

If "fairness" is an issue in this appeal then it requires, from all, a calm analysis of the legal question before this court.

Essentially, the arguments of the Respondent can be grouped in three (3) different categories: that the statute in question is ambiguous; that a literal reading of the statute does not promote "fairness"; and, that there is a "parade of horribles" that will ensue should the Respondent's position not be accepted by this court.

A reply to each of these categories of argument follows.

a.

### AMBIGUITY?

Sometimes one of the more difficult legal arguments to make is that a statute, or other written document, means simply what it says. It may appear at times that "ambiguity" is in the eyes of the beholder. It is respectfully urged that the position of the

Respondent and her amici that the statute in question in this case is ambiguous is itself an obfuscation.

At the risk of redundancy, it is important to look at the words of the statute in question. It provides, in pertinent part:

> "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."
>
> §768.81(3), Florida Statutes (1987).

The Respondent struggles to find a "whole" in the language of this statute from which to determine a party's ultimate responsibility. Certainly, however, it is obvious from the title to the section that the "whole" is the "damages" of the claimant which are to be apportioned. The statute, in clear terms, proceeds to state that from this "whole" an at-fault party's responsibility is limited to "such party's percentage of fault". Certainly, the language "percentage of fault" is not ambiguous. See, for example, the recommended verdict form in Model Charge No. 6, Florida Standard Jury Instructions in civil cases.

It is obvious, from the plain wording of the statute, that the legislature made a conscious decision, in negligence cases, to shift the focus away from the damages sustained by a particular claimant to the extent that a particular Defendant caused those damages. Indeed, this is the sum and substance of the effect of the abrogation of the Joint and Several Liability Doctrine. It is consonant with this court's determination that the "desirable end"

in the field of tort law is approached when a tortfeasor pays only the proportion of the total damages he has caused the other party. Hoffman v. Jones, 280 So.2d 431,437 (Fla. 1973).

b.

**"FAIRNESS"**

The Respondent argues that the "fair" end in the field of tort law is where a "deep pocket" is available to bear the entire loss to an injured claimant regardless of its extent of fault. This argument, however, completely ignores the trend in our tort law to equate fault with liability. In response to this argument, STATE FARM would call the court's attention to the analysis of the evolution of the equation of fault with liability as set forth in its Initial Brief on the Merits. The "fairness" question was commented upon by this court in its reference to the decision of the Kansas Supreme Court in Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978), found in this court's decision in Walt Disney World Co. v. Wood, 515 So.2d 198 (Fla. 1987):

> "There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental agency and if by reason of some competing social policy, the Plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the co-defendant to pay more than his fair share of the loss. The same is true if one of the defendants is wealthy and the other is not."
>
> (Emphasis supplied).

In the decision in Smith v. Department of Insurance, 507 So.2d 1080,1091 (Fla. 1987), upholding the constitutionality of the Tort Reform and Insurance Act of 1986, the court held:

> "We find no violation of the right of access to the court because that right does not include the right to recover for injuries beyond those caused by the particular defendant."

Again, it is respectfully suggested that, in abrogating Joint and Several Liability in certain circumstances in Florida, the legislature chose to shift the focus from the totality of the damages sustained by the claimant to the proportion of those damages that a particular Defendant caused. By so doing, the legislature attempted to balance the interests of an individual injured party against the interests of society as a whole. Where the abrogation of Joint and Several Liability might appear to an individual claimant to be "unfair" at times, it is the interest of society as a whole that is served, as that interest has been recognized by the legislature.

c.

**"PARADE OF HORRIBLES"**

The Respondent spends a great deal of time in her Brief conjuring up what she considers to be a "parade of horribles" that would ensue if the court rejects her arguments.

It is respectfully suggested, that these "horribles" just do not exist.

In her analysis as to how the enactment of the abrogation of Joint and Several Liability in certain circumstances affects existing statutes, the Respondent has forgotten that one of the characteristics of the Tort Reform and Insurance Act of 1986 is the unique feature that:

> "If a provision of this part is in conflict with any other provision of the Florida Statute, such other provision shall apply."
>
> §768.71(3), Florida Statutes (1987).

Because of this "conflict" provision, the imagined difficulties in reading §46.015(2), §768.31(5), or §768.041(2), in pari materia with §768.81(3) just do not exist. If an individual tortfeasor were to prevail upon a court to apply those provisions to a case in which §768.81(3) would also apply, it is manifest that §768.81(3) would yield to the other sections.

It is suggested, however, that the instances where §768.81(3) would be implicated with the other statutes would be rare. Indeed, the statutes can be read together to form a complete scheme for fair loss allocation. For instance, as the Tort Reform and Insurance Act of 1986 still recognizes Joint and Several Liability in certain situations involving economic damages, the provisions of the Contribution Act (§768.31) would neatly fit to create a consistent scheme of loss allocation as to these damages.

In like manner it is obvious that the statutory provisions regarding set-offs for amounts paid by settling co-Defendants would not operate in the same cases that would be governed by the provisions of §768.81(3).

The "parade of horribles" argument culminates in a fantastic scenario where the Respondent indicates that a claimant would literally have to "sue the entire world" in order to insure collectability of her damages. This is patently not the case. For many years now, since the adoption of the comparative negligence rule in Florida, claimants have had to prove not only the qualitative issue of whether a particular Defendant was negligent, but also the quantitative issue of how much negligence rests with that Defendant. It is submitted that it imposes no great burden upon a claimant to prove not only that a person was negligent but also to what extent.

The Respondent, and her amici, fear that Defendants will "spring" the defense that they are not completely at fault so as to prejudice a claimant. This, however, cannot be the case. As indicated in Arky, Freed, Stearns, Watson, Greer, Weaver and Harris, P.A. v. Bowmar Instrument Corp., 537 So.2d 561 (Fla. 1988), litigants, from the outset, "must be compelled to state their pleadings with sufficient particularity for a defense to be prepared".

By requiring a Plaintiff to plead to what extent the negligence of a particular Defendant caused an injury, and concomitantly to require a Defendant to plead only partial responsibility in a negligence issue would seem to promote fairness, dispense with "trial by ambush", and require all parties to "lay their cards on the table".

It is respectfully suggested that in most situations it is going to be manifestly obvious at an early point in the litigation, if not before the litigation is filed, what negligent actors contributed to a particular event. In car accident cases, as here, it will be known immediately how many vehicles were involved, or whether a traffic light was operating, or whether the brakes failed on an automobile. Certainly, this will be the most common eventuality. In those rare cases where there is an unknown negligent actor, diligent discovery and a requirement of ample notice in the pleadings, should forestall any prejudice which may result.

As seen, then, the imagined "horribles" set forth by the Respondent and her amici simply do not exist. The Act, through its "conflict" provision, provides for a application of the language of the Act in a manner which is consistent with, and in harmony with, the other aspects of tort law still recognized in this state.

## CONCLUSION

It is respectfully urged, for all of the reasons stated in Petitioner's Initial Brief on the Merits and in this Reply Brief, that this Court adopt the position of the Fifth District Court of Appeal as stated in Messmer v. Teacher's Insurance Co., 588 So.2d 610 (Fla. 5th DCA 1991), and reverse the decision of the Third District Court of Appeal in the case sub judice, and remand this matter to the District Court with instructions to order a reduction

of the Final Judgment entered against the Petitioner herein by the percentage of negligence attributed by the jury to the actions of MARIE FABRE.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing was mailed this 29th day of September, 1992, to: ROSALIND HERSCHTHAL, ESQUIRE, Grossman and Roth, P.A., Penthouse One, Grand Bay Plaza, 2665 South Bayshore Drive, Miami, Florida 33133. Telephone: (305) 852-1811; ARTHUR A. COHEN, ESQUIRE, Arthur A. Cohen, P.A., 44 West Flagler Street, Suite 406, Miami, Florida 33130. Telephone: (305) 374-8919; JOEL D. EATON, ESQUIRE, Podhurst, Orseck, Josefsberg, et. al, 25 West Flagler Street, Suite 800, Miami, Florida 33130. Telephone: (305) 358-2800; MARC R. GINSBERG, ESQUIRE, Mandina & Ginsberg, P.A., Second Level, 2964 Aviation Avenue, Miami, Florida 33133; BONITA L. KNEELAND, ESQUIRE, Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Post Office Box 1438, Tampa, Florida 33601. Telephone: (813) 228-7411; and, CECILIA BRADLEY, Assistant Attorney General, Department of Legal Affairs, The Capitol - Suite

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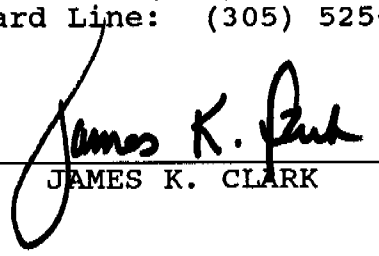
BY: 
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