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SUPREME COURT OF FLORIDA

ALLIED SIGNAL, INC., et al.

Appellant,

v. CASE NO. 80181

KEVIN FOX,

Appellee.

ON CERTIFIED QUESTION FROM THE UNITED STATES
CIRCUIT COURT OF APPEALS, ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE, AMERICAN INSURANCE ASSOCIATION, IN SUPPORT OF APPELLANT

MARGUERITE H. DAVIS
Florida Bar No. 136563
Katz, Kutter, Haigler, Alderman,
Davis & Marks, P.A.
Highpoint Center, Suite 1200
106 East College Avenue
Tallahassee, Florida 32301
(904) 224-9634

ATTORNEYS FOR AMICUS CURIAE AMERICAN INSURANCE ASSOCIATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

PREFACE

Amicus Curiae, American Insurance Association, an association of 254 member insurance companies which underwrite approximately 35% of the commercial insurance coverage written in Florida, have filed an uncontested motion to appear as amicus curiae requesting permission to file a brief in support of Appellant's position, which motion was granted by Order of this Court. The purpose of this amicus curiae brief is to aid this Court in the determination of the issue certified by United States Court of Appeals, Eleventh Circuit.

STATEMENT OF THE CASE AND FACTS

Amicus adopts the Statement of the Case and facts set forth in the Brief of Appellant. Briefly, the facts pertinent to the issue certified follow. On March 9, 1990, while working for Eastern Airlines as a technician on an aircraft fan, Appellee, Plaintiff-below, Kevin Fox, caught his fingers in the rotating blades of the fan. Allied's maintenance and service manual did not indicate that a safety screen or guard needed to be used over the fan while it was being serviced, and Eastern Airlines and Mr. Fox failed to place a guard or screen over the fan. Eastern Airlines, however, was aware of the OSHA requirement that guarding be placed over rotating machines to protect operators from hazards. In fact, Eastern had established a system for using safety screens, had instructed its employees on the use of such screens, and had

regularly scheduled maintenance programs to educate its employees on these procedures. Because Fox had been employed in this type of work for only a short time and during the time that a strike was ensuing against Eastern, the Eleventh Circuit opined that there is a serious question regarding the adequacy of the training which he received. Eastern Airlines was immune from suit pursuant to the Workers' Compensation Act, i.e., section 440.11, Florida Statutes (1989).

The federal trial court denied Allied's request to allow the jury to consider and assess non-party Eastern's percentage of fault, if any, under Florida's Tort Reform Act, section 768.81, Florida Statutes (1989). At the time of the trial, no published appellate decision had been rendered in Florida to guide the federal district court in its interpretation of Florida law. The trial court interpreted this statute to allow apportionment of fault only among the parties to the suit. The jury then found Allied to be seventy percent negligent and Mr. Fox to be thirty percent comparatively negligent.

Due to the conflict of decisions between the fifth and third districts in Florida on the issue of whether the interpretation of section 768.81(3) (1989) requires consideration by the jury of a non-party's comparative fault in order to determine a party's liability, the United States Circuit Court of Appeals, Eleventh Circuit, has certified this question to this Court for its resolution in accordance with Rule 9.150,

Florida Rules of Appellate Procedure, which provides that a United States Court of Appeals may certify a question to this Court whenever the answer is determinative of the cause and there is no controlling precedent from this Court.

These conflicting district court decisions are Messmer v. Teachers Insurance Co., 588 So.2d 610 (5th DCA 1991), review denied, 598 So.2d 77 (Fla. 1992) wherein the fifth district held that section 768.81 mandates consideration of a non-party's comparative fault in apportioning the liability of the parties to the suit, and Fabre v. Marin, 597 So.2d 883 (Fla. 3d DCA 1992), wherein the third district affirmed the decision of a trial court that did not reduce a jury damage award by fifty percent, the percentage of negligence the jury attributed to a non-party. Fabre is presently pending before this Court as consolidated Case Nos. 79,870 and 79,869. This Court earlier denied review of Messmer.

SUMMARY OF THE ARGUMENT

By the plain language of section 768.81(3), Florida Statutes (1989), an integral part of Florida's Tort Reform Act, the Florida Legislature abolished joint and several liability for non-economic damages in negligence actions, such as the present case, in which total damages exceed $25,000.00. Abrogating this common law doctrine in this context, the statute requires courts to apportion liability based on one's percentage of fault.

In those cases where section 768.81(3) applies, it provides that a defendant's judgment liability is to be limited by, and equal to, that defendant's "percentage of fault." No where does this statute limit "percentage of fault" to percentages allocated among those who are parties to the suit when the judgment is entered. Reading such an artificial restriction on whose causative fault is to be considered would be to rewrite the statute and to retreat from all of this Court's developing case law principles commencing with Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) and Lincenberg v. Issen, 318 So.2d 386 (Fla. 1975), which equate liability with fault. The extent of one's causative fault becomes fixed at the time of the last causative negligent act of the last negligent actor, and it does not change solely on the basis of who is or is not a party to the lawsuit. Under the clear and express language of section 768.81(3), plaintiffs must take each defendant as he or she finds him or her.

In addition to the plain language of section 768.81(3), its legislative history further reveals that the legislature purposefully intended that a plaintiff take each defendant as he or she finds him. When a defendant is insolvent, the judgment liability of another defendant is not increased. Section 768.81(3) requires the same result where one potential defendant is not or cannot be joined as a party to the lawsuit. By clear legislative pronouncement, liability is

determined on the basis of each party's own fault and not on the basis of solvency or amenability to suit of other potential defendants.

Courts in other jurisdictions construing similar statutes have interpreted them in such a manner as to consider the causative fault of all negligent actors when determining a defendant's "percentage of fault" even if doing so resulted in the plaintiff realizing less than full recovery for his or her injuries.

Consequently, this Court should advise the United States Circuit Court of Appeals, Eleventh Circuit, that its answer to the certified question is in the affirmative, i.e. section 768.81(3) requires consideration by the jury of a non-party's comparative fault in order to determine a party's liability.

ARGUMENT

THE PROPER INTERPRETATION OF SECTION 768.81(3), FLORIDA STATUTES (1989) REQUIRES CONSIDERATION BY THE JURY OF A NON-PARTY'S COMPARATIVE FAULT IN ORDER TO DETERMINE A PARTY'S LIABILITY.

Reacting to the financial crisis in the liability insurance industry in Florida and the multitude of problems that the civil litigation system was facing, the legislature passed the Tort Reform and Insurance Act in 1986. A primary change embodied in section 768.81 was the abolition of the doctrine of joint and several liability under many circumstances, including the situation presently pending before this Court. Section 768.81(3), Florida Statutes, (1989) provides:

> In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; 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. [Emphasis added].

Where section 768.81(3) applies, with regard to non-economic damages, joint and several liability has been expressly replaced by a requirement that each defendant's liability be governed solely by, and equal to, only his percentage of causal fault. It is not disputed that section 768.81(3) controls in the present case where the total damages exceeded $25,000 and where the claim did not fall within any

of the exceptions to the abrogation of joint and several liability set forth in section 768.81.

Relative to a defendant's liability for economic damages, under section 768.81(3), this liability is again governed by and equal to his percentage of fault, unless that defendant is at least as much at fault as the plaintiff. Where section 768.81(3) applies, it is only relative to these economic damages where a defendant is at least as much at fault as the plaintiff that joint and several liability governs.

Consistent with the express language of section 768.81(3), a defendant's percentage of fault does not and cannot change after the fact merely because another at-fault negligent actor is not a party to the lawsuit when the judgment is entered by the trial court. Under this present statutory scheme, plaintiff takes each negligent actor as he finds him and the percentage of fault is fixed (although inchoate until entry of judgment) at the time of the last causal negligent act by the last negligent actor.

In tort actions based upon negligence in which the total damages exceed $25,000.00, section 768.81(3) directs the courts to apportion non-economic damages "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 plain language of section 768.81(3) mandates that trial courts not employ the doctrine of joint and several

liability in apportioning liability for non-economic damages but rather base any such liability on the percentage of an individual's fault. That is, the statute plainly states that the legislature expressly rejected the idea that a tortfeasor could be liable for non-economic damages that he did not proximately cause if the total damages exceed $25,000.00.

There being no ambiguity in this language, the fifth district correctly applied this unambiguous language in Messmer v. Teacher's Insurance Co., 588 So.2d 610 (5th DCA 1991), review denied, 598 So.2d 77 (Fla. 1992). The third district, however, erroneously found an ambiguity where none existed and adopted a different and incorrect interpretation in Fabre v. Marin, 597 So.2d 883 (Fla. 3d DCA 1992).

The fifth district, in Messmer, held that the plain and unambiguous language of section 768.81(3) provides that the statutory percentage of fault is that of all entities whose acts or omissions causally contributed to plaintiff's injuries. It correctly rejected the contention that the statute required consideration of only the actual parties to the arbitration or litigation and held that "a party's percentage of the total fault of all participants in the accident is the operative percentage to be considered." 588 So.2d at 611.

A different and erroneous conclusion was reached by the third district in Fabre because it improperly dissected section 768.81(3) instead of reading it as a whole as it is

required to do by rules of statutory construction. In dissecting the statute, the third district focused on the legislature's use of the term "party" and ignored the remaining key phrases of this statute: "on the basis of such party's percentage of fault" and "not on the basis of joint and several liability." Having severed the term "party" from the remainder of the sentence, the third district found it to be ambiguous because it concluded that the term "party" was capable of carrying multiple meanings.

The third district erred further when it held that section 768.81(3)'s meaning "depends on the definition assigned to the term 'party.'" Fabre, 597 So.2d at 885. Assuming arguendo that 768.81(3) lacks clarity, which it does not, defining the term "party" does not resolve its ambiguity. Rather, resolution of the dispute at hands should depend solely on the definition of the term "fault." Section 768.81(3) is clear when it states that liability is derived by a party's "percentage of fault." Therefore, this Court need not search for some "whole" or some "something" out of which to take a percentage; the percentage, states the legislature, must be taken out "of fault." Should this Court decide to delve into legislative history, staff analyses, etc., its focus should be on how the legislature defined "fault" not on how it defined "party."

To find a so-called ambiguity, the third district enunciated three possible definitions of the term "party." If

the definition of party does turn this issue, then only one of the three definitions offered in Fabre is compatible with section 768.81(3) when read as a whole. To reiterate, section 768.81(3) reads:

> [i]n 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[] . . . .

The third district opined that the term "party" is ambiguous because it could refer to all persons involved in an accident, defendants in a lawsuit, or all litigants in a lawsuit at the time the case reaches the jury.[1] Despite the third district's contentions, however, only one of these definitions is consistent with the language of the statute being interpreted. Adopting the Fabre logic and then applying one of the last two definitions is not consistent with either the plain meaning or legislative intent of section 768.81(3) because joint and several liability would be imposed on a named defendant in the event that any negligent party were not a party to the proceeding at the time the case was submitted to the jury.

As previously explained, the legislature decreed that the common law doctrine of joint and several liability was not to be employed in this situation. On the other hand, the first definition, that the term "party" refers to all persons

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[1] The distinction between all litigants in a lawsuit and all litigants in a lawsuit at the time the case reaches the jury may be an important one, for in the instant case Mr. Marin was originally a litigant in this action but was later dismissed.

involved in an accident, is logical because it is the only one which (if you draw the conclusion that "party" turns the construction of section 768.81(3)) always apportions damages on the basis of a person's percentage of fault and which would avoid the doctrine of joint and several liability.

Because the last two definitions offered by the third district in Fabre and as applied by that court are offensive to the legislature's decree that, when section 768.81(3) applies, one's liability should be based upon one's fault and that joint and several liability is not to be imposed, these definitions are contrary to the express provisions of section 768.81 and are thus untenable. Consequently, reading section 768.81(3) in its totality, if this Court believes that resolution depends on the definition assigned to "party," this Court should determine that the term "party" can have only one meaning--referring to all of the persons involved in the accident, whether joined in the proceeding or not. Any other reading would result in the application of joint and several liability and the apportionment of one's damages in excess of the amount of his negligence and would clearly defeat the legislature's intent in enacting this legislation.

Also, the issue of whether the use of the term "party" in a comparative negligence statute refers to all parties involved in an incident or just those parties actually involved in a suit has been expressly addressed in other courts. See Pocatello Industrial Park Co. v. Steel West,

Inc., 101 Idaho 783, 621 P.2d 399 (1980). In rejecting the notion that "party" only referred to litigants in a lawsuit, the court explained that "party" actually referred to all of the parties involved in the accident giving rise to the litigation. Id. at 403 n.4 (citing Lines v. Ryan, 272 N.W.2d 896 (Minn. 1978), which reached the same conclusion). The court reached this decision because true apportionment is not possible unless it includes all negligent tortfeasors whether they are immune from suit or not a party to the suit. Id. at 403. This same rationale applies in Florida.[2]

Because the terms "party" and "fault" are together only capable of one interpretation which is consistent with the remainder of section 768.81(3), section 768.81(3) is not ambiguous.

It is axiomatic that a clear and unambiguous statute must be given its plain meaning and that it is this Court's duty to effectuate legislative intent as enunciated in the statute's language. See, e.g., Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984); S.R.G. Corp. v. Department of Revenue, 365 So.2d 687 (Fla. 1978). To do otherwise constitutes an improper invasion of the province of the legislature and constitutes a prohibited substitution for the wisdom of the legislature. E.g., Holly, 450 So.2d at 219. Furthermore, while it is recognized

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[2] It should be noted that even the third district agreed that "[t]he legislature promulgated [section 768.81(3)] to limit liability to a defendant's degree of fault." Fabre, 597 So.2d at 885.

that statutes in derogation of the common law are to be strictly construed, see 49 Fla. Jur. 2d, Statutes § 192 (1984), this principle does not change the result. "Where a statute is clearly designed to supersede or modify the common law, [its purpose should] be effectuated." Id. Because section 768.81(3) is not ambiguous--clearly stating that each party should be held liable "on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability"--section 768.81(3) in its strictest sense demands just what it says: A party's percentage of fault should not be based on the common law doctrine of joint and several liability.

Assuming arguendo, however, that section 768.81(3) is ambiguous, any ambiguities should be resolved by determining the legislature's underlying intent in using that language. See, e.g., Tyson v. Lanier, 156 So.2d 833 (Fla. 1963). In discerning this intent, this Court should consider the history of the statute, the subject to be regulated, the evil to be corrected, and the object designed to be attained. E.g., Scarborough v. Newsome, 150 Fla. 220, 7 So.2d 321 (1942). Moreover, the legislature is presumed to know the law, and it is presumed that statutory changes were made for a purpose. Ryder Truck Rental, Inc. v. Bryant, 170 So.2d 822 (Fla. 1964). As hereinafter explained, these factors support this Court's approval of the fifth district's decision in Messmer and its disapproval of the third district's decision Fabre because the

fifth district's decision advances the legislature's intent while the third district's decision thwarts the legislature's intent in adopting section 768.81(3).

The history of section 768.81(3) indicates that the legislature purposely abolished joint and several liability in all situations where it is not expressly retained.

In the seminal case of Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), this Court abolished the doctrine of contributory negligence and embraced comparative negligence. The Court opined that, in the area of tort law, the most equitable result that can ever be attained is the equation of liability with fault. It decided that, if fault were to remain the test of liability, a doctrine that apportions the loss among those whose fault contributed to the occurrence was more consistent with liability based on the premise of fault. The purposes of the comparative negligence rule adopted in Hoffman were to allow a jury to apportion fault between negligent parties whose negligence was part of the legal and proximate cause of any loss or injury and to apportion the total damages resulting from the loss or injury according to the proportionate fault of each party.

In Lincenberg v. Issen, 318 So.2d 386 (Fla. 1975), this Court emphasized its earlier pronouncement in Hoffman that, when the negligence of more than one person contributes to the occurrence of an accident, each should pay the proportion of total damages which he has caused the other party. Id. at 391.

Later in Walt Disney World Co. v. Wood, 515 So.2d 198 (Fla. 1987), this Court reaffirmed its purposes for adopting comparative negligence.

This Court, in Lincenberg v. Issen, abolished the rule which precluded contribution among joint tortfeasors and expressly acknowledged that doctrine's inconsistency with the purposes of the rule of comparative negligence. The Court established that "no contribution" was no longer a viable principle in Florida and confronted the problem of determining what procedure would most fully effectuate the principle that each party should pay the proportion of the total damages which he has caused to the other party. Because the legislature had enacted section 768.31 during the pendency of this Court's review of the lower court's decision, this Court deferred to the legislature's approach to address the appropriate mechanism to implement this principle.

The legislature later amended the Contribution Among Joint Tortfeasors Act, which now provides that, in determining the pro rata shares of tortfeasors, their relative degree of fault is the basis for the allocation of their liability.

Rather than totally abrogating the doctrine of joint and several liability itself, this Court in Walt Disney World Co. v. Wood, 515 So.2d 198, 202 (Fla. 1987),[3] noted that the

[3] Although this case was decided in 1987, the injury giving rise to this action occurred in 1971; consequently, the provisions of the Tort Reform and Insurance Act of 1986 were not addressed. Nevertheless, this Court acknowledged that while this case was pending the legislature had substantially modified the doctrine of

determination of the continued viability of that doctrine was best left within the legislative realm. Since that case did not involve the application of section 768.81, because the injury giving rise to the action occurred in 1971, this Court did not address whether the doctrine of joint and several liability was abrogated under the facts now presented where section 768.81(3) indisputably applies. In fact in Wood, this Court noted that the enactment of section 768.81 did substantially modify the doctrine of joint and several liability, and that, although it did not entirely abolish it, the legislature in the Tort Reform and Insurance Act of 1986 did provide for apportionment of fault under certain circumstances. This legislative solution is now squarely before this Court because the application of 768.81(3) to the present case is not in question.

Facing what it perceived to be a "financial crisis" in the liability insurance industry in the mid 80's, the legislature recognized that action needed to be taken. Ch. 86-160, Laws of Fla. Noting that the current tort system was largely responsible for this crisis, the legislature saw that an overhaul of that system was necessary. Id. This overhaul manifested itself in the Tort Reform and Insurance Act of 1986, of which section 768.81 is a subcomponent. This act impacted on a number of areas of tort law. Of particular importance are the changes which it brought to the doctrine of

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joint and several liability. See 515 So.2d at 201.

joint and several liability.

In construing these changes, this Court noted that the Act disfavors joint and several liability to such a degree that it survives only in those limited situations where it is expressly retained. Conley v. Boyle Drug Co., 570 So.2d 275, 285 (Fla. 1990). Furthermore, this Court has recognized that under section 768.81, a plaintiff may, under certain circumstances, be unable to secure full compensation for his or her injuries. See id. at 286; see also Smith v. Department of Ins., 507 So.2d 1080, 1091 (Fla. 1987) (stating that the right to access to courts "does not include the right to recover for injuries beyond those caused by the particular defendant").

Adoption by the legislature of the principle of proportionate liability creates a situation that a plaintiff takes each negligent entity contributing to his injury as he finds him. This corresponds to the long standing pronouncement in Florida that a defendant takes the plaintiff as he finds him. If a defendant who is 20% at fault is insolvent, under proportionate liability, plaintiff simply does not recover the 20% of his damages caused by the insolvent defendant; the risk-shifting effects of joint and several liability do not apply. Legislative adoption of the proportionate liability plan provided by section 768.81 is easily justifiable: if plaintiff is injured by a single defendant, plaintiff necessarily bears the risk of that defendant's insolvency or tort immunity; simply because more

than one defendant contributed to the injury is not a rational justification for shifting that risk from plaintiff to another defendant.

Despite the history of section 768.81, its express language, and this Court's prior interpretations of it, the third district in Fabre erroneously held that a defendant not fortunate enough to be cloaked with immunity is liable for the negligence of any and all immune tortfeasors. Although the third district admitted that "[t]he legislature promulgated [section 768.81(3)] to limit liability to a defendant's degree of fault[,]" it reasoned that doing so would result in "[u]nreasonable consequences." 597 So.2d at 885. Consequently, the third district concluded that the legislature must have intended a more reasonable result and found that a plaintiff's recovery could be diminished only by his or her own fault and then proceeded to rewrite the law.

The "unreasonable consequences" that the third district envisioned can clearly be offset by an equally, if not more compelling, parade of horribles going the other way. In Wood, for instance, a defendant was liable for eighty-six percent of the plaintiff's damages even though it was only one percent negligent. 515 So.2d at 198.[4] See also, e.g., Brown v. Keill, 224 Kan. 195, 580 P.2d 867, 874 (Kan. 1978) (stating that "[t]here is nothing inherently fair about a [d]efendant who is 10% at fault paying 100% of the loss, and there is no

[4] The plaintiff was 14% negligent.

social policy that should compel [d]efendants to pay more than their fair share of the loss[]"). Further examples are available but unnecessary because the legislature has already contemplated the consequences of the doctrine of joint and several liability and its abrogation in the context of non-economic damages in negligence actions when the total damages exceed $25,000.00. This being the case, it is the courts' duty to effectuate this legislative directive whether they consider the results to be "unreasonable" or not. It is well settled that it is not within the prerogative of a court to substitute its judgment for that of the legislature. See, e.g., Holly, 450 So.2d at 219.

The fifth district reached the right result for the right reasons in its decision of Messmer v. Teacher's Insurance Co., 588 So.2d 610 (5th DCA 1991), review denied, 598 So.2d 77 (Fla. 1992), the decision which poses express and direct conflict with the third district's decision Fabre. In Messmer, the fifth district carefully reviewed the historic trend towards equating the extent of liability with the extent of fault and opined that section 768.81 demonstrated the legislature's intent to continue that trend by partially abrogating joint and several liability. In that case Messmer argued that section 768.81(3) required apportionment for non-economic damages only as to the actual parties to the litigation or arbitration, and that where her husband could not be held liable because of spousal immunity, the joint

tortfeasor who was a party to the suit should be held liable for the entire amount of plaintiff's damages.

The trial court had rejected Messmer's argument, as did the fifth district. The trial court and the fifth district held that section 768.81(3) militates against the Messmer's position. It reasoned that the language of the statute supported 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 and that the use of the word "party" is not intended as a word of limitation. It further explained that had the legislature intended the apportionment computation to be limited to the combined negligence of those who only happened to be parties to the proceeding, it would have so stated.

The fifth district opined that the plain meaning of the word "percentage" is a proportionate share of the whole, and that the legislature's purpose for adopting section 768.81(3) was to implement a system of equating fault with liability, at least as to non-economic damages. To exclude from the computation the fault of an entity that happens not to be a party to the particular proceeding, the fifth district held, would thwart the legislature's intent for the enactment of this provision.

Because the history of section 768.81 reveals that it was passed as part of a legislative effort to overhaul the tort system, this Court should once again conclude that the impact

of this overhaul on the common law doctrine of joint and several liability was intentional. With this in mind, this Court should continue to adhere to its view that the legislature abrogated the doctrine of joint and several liability in all cases except those in which it is expressly retained. Thus, because section 768.81(3) does not retain joint and several liability for non-economic damages arising under the instant facts, this Court should not impose such liability. The mere fact that effectuating this legislative intent may leave some plaintiffs without full redress of compensation for their injuries does not command retreating from the legislature's decree in an attempt to reach a different result. See Conley, 570 So.2d at 286; see generally Messmer, 588 So.2d at 610; Dosdourian v. Carsten, 580 So.2d 869 (Fla. 4th DCA 1991) (where party's liability was limited to his negligence even though this resulted in less than full recovery for plaintiff because of plaintiff's previous settlement with other defendant).

In construing similar statutes, courts from other jurisdictions have concluded that such language *mandates* that liability be based upon percentage of fault, even if doing so results in the plaintiff realizing less than full recovery for his or her injuries. Not only do the plain language and the history of section 768.81(3) require a ruling that a non-party's negligence must be factored-in when determining the percentage of fault attributable to the defendant, but also

similar statutes have been construed to compel this result in numerous jurisdictions.

The case of Nance v. Gulf Oil Corp., 817 F.2d 1176 (5th Cir. 1987), is illustrative. In Nance the fifth circuit noted that the finder-of-fact must consider the negligence of all persons involved in an incident--even immune non-parties to the suit--because an immune non-party's negligence reduces a defendant's ultimate liability to the plaintiff. 817 F.2d at 1180. This case is not an anomaly. See, e.g., Prince v. Leesona Corp., Inc., 720 F.2d 1166 (10th Cir. 1983) (finding that defendant's liability was reduced by immune employer's percentage of fault under Kansas law); Johnson v. Niagara Machine & Tool Works, 666 F.2d 1223 (8th Cir. 1981) (under Minnesota law a jury must consider an immune party's negligence even if that party is not a party to the suit); Connar v. West Shore Equip. of Milwaukee, Inc., 227 N.W.2d 660, 662 (Wis. 1975) (in apportioning negligence, the negligence of all parties must be considered, whether or not they are parties to the lawsuit and whether or not they can be liable). See also: Kirby Building Systems v. Mineral Explorations Co., 704 P.2d 1266 (Wyo. 1985); Burton v. Fisher Controls Co., 713 P.2d 1137 (Wyo. 1986); Paul v. N.L. Industries, Inc., 624 P.2d 68 (Okla. 1980); Bowman v. Barnes, 282 S.E.2d 613 (W.Va. 1981); Frey v. Snelgrove, 269 N.W.2d 918 (Minn. 1978).

The plain language, the legislative history, and the

interpretation given similar language in other jurisdictions buttress Appellant's position that, under section 768.81(3), if applicable to a given circumstance as is the present case, one cannot be held liable for any damages exceeding his percentage of fault.

All applicable axioms of statutory construction support the conclusion that the legislature abolished joint and several liability under the circumstances existing in the present case. Moreover, this Court has recently held that under section 768.81(3), (4), (5), joint and several liability is abrogated except in the case of economic damages with respect to any party whose percentage of fault equals or exceeds that of a particular claimant and in any action brought by any person to recover actual economic damages resulting from pollution, to any action based upon an intentional tort, or to any cause of action to which application of the doctrine of joint and several liability is specifically provided by chapter 403 (pollution control), chapter 498 (land sale practices), chapter 517 (security transactions) chapter 542 (antitrust), or chapter 895 (RICO Act) and as to all actions in which the total amount of damages does not exceed $25,000. See Conley, 570 So.2d at 285.

Nevertheless, the third district in Fabre, in effect, improperly found defendants to be jointly and severally liable for all injuries sustained by Mrs. Marin even though Mrs. Fabre was only fifty percent at fault because the third

district believed finding Mrs. Fabre only fifty percent liable would be an "unreasonable" consequence. Just as the courts of other jurisdictions have recognized that courts are not to substitute their opinions or judgment for that of the legislature, so has this Court, and it should do so again by rejecting the holding in Fabre and by adopting the ruling of the fifth district in Messmer.

The phrases "on the basis of such party's percentage of fault" and "not on the basis of joint and several liability" tell this Court all it needs to advise the Eleventh Circuit that the answer to its question is in the affirmative.

CONCLUSION

This Court should advise the Eleventh Circuit that, under Florida law, the proper interpretation of section 768.81(3), Florida Statutes (1989) requires consideration by the jury of a non-party's comparative fault in order to determine a party's liability.

Respectfully submitted,

MARGUERITE H. DAVIS
Florida Bar No. 136563
Katz, Kutter, Haigler, Alderman,
Davis, Marks & Rutledge, P.A.
Highpoint Center, Suite 1200
106 East College Avenue
Tallahassee, Florida 32301
(904) 224-9634

ATTORNEYS FOR AMICUS CURIAE, AMERICAN INSURANCE ASSOCIATION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. mail, to **Kathleen M. O'Connor,** Esquire, 2950 S.W. 27th Avenue, Suite 100, Miami, Florida 33133, and **G. William Bissett, Jr.**, Esquire, Preddy, Kutner, Hardy, et al., 501 N.E. 1st Avenue, Miami, Florida 33132, this 8th day of October, 1992.

Marguerite H. Davis

MARGUERITE H. DAVIS