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SUPREME COURT OF FLORIDA

CASE NO.: 80,~~811~~ 181

ALLIED SIGNAL, INC.,

Appellant,

v.

KEVIN FOX,

Appellee.
_____/

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

AMICUS CURIAE BRIEF OF THE FLORIDA DEFENSE LAWYERS ASSOCIATION, IN SUPPORT OF APPELLANT

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PRELIMINARY STATEMENT

AMICUS CURIAE, FLORIDA DEFENSE LAWYERS ASSOCIATION, ["FDLA"], an association of approximately one thousand (1,000) members comprised of attorneys licensed to practice law in Florida who devote a substantial proportion of their practice to defense practice, have filed an uncontested motion to appear as amicus curiae requesting permission to file a brief in support of Appellant Allied Signal, Inc.'s position. The motion is being filed simultaneous with the instant brief. The purpose of this amicus curiae brief is to aid this court in the determination of the issues certified by the United States Court of Appeals, Eleventh Circuit.

STATEMENT OF THE CASE AND FACTS

The FLORIDA DEFENSE LAWYERS ASSOCIATION, ["FDLA"], adopts the Statement of the Case and Facts set forth in the Initial Brief of the Appellant. The FDLA also adopts the briefly stated facts set forth in the brief of amicus curiae, American Insurance Association.

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 OSCHA 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 a strike was ensuing against Eastern, the Eleventh Circuit opined that there was a serious question regarding the adequacy of the training which he received. Eastern Airlines was immune from suit pursuant to the Workers' Compensation Act, section 440.1 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 the fault only among the parties to the suit. The jury then found Allied to be seventy percent (70%) negligent and Mr. Fox to be thirty percent (30%) comparatively negligent.

Due to the conflict of decisions between the Fifth and Third District Courts of Appeal 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, certified this question to this Court for its resolution in accordance with Rule 9.150, Florida Rules of Appellate Procedure. Rule 9.150 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 Company, 588 So.2d 610 (Fla. 5th DCA 1991), wherein the fifth district held that section 768.81 mandates consideration of a non-party's 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 (50%), the percentage of negligence the jury attributed to a non-party. Fabre is presently pending before this court as consolidated case numbers 79,870 and 79,869. This Court earlier denied review of Messmer.

SUMMARY OF THE ARGUMENT

Florida's system of "comparative negligence" sought to distribute tort damages proportionately among all who caused the harm. However, even after judicial adoption of the comparative fault system, every culpable tort defendant, regardless of his or her degree of fault, remained "jointly and severally liable" to pay any damages attributable to the fault of others who failed to contribute the proportionate share.

Walt Disney World v. Wood, 515 So.2d 198 (Fla. 1987), is a prime example of the extremes to which a court would go in order to make sure a plaintiff received money for his damages, no matter who was at fault. Walt Disney World was found to be only one percent (1%) at fault but was forced to pay eighty six percent (86%) of the damages. The citizens of Florida, speaking through their legislators, decided that there was something inherently unfair about a defendant who was, for example, ten percent (10%) at fault paying one hundred percent (100%) of the loss and therefore, enacted section 768.81(3) Florida Statutes.

An avowed purpose and intent of section 768.81(3) was to abolish joint and several liability in cases involving money damages over twenty five thousand dollars ($25,000). The statute decries the unfairness and costs of the "deep pocket" rule which is nothing but an exploitation of relatively blameless defendants who are perceived to have substantial financial resources or insurance coverage. Section 768.81(3) was enacted in order to remedy those inequities.

To carry this intent into effect, section 768.81(3) declares plainly and clearly that in cases to which the section applies, no "party" shall have "joint" liability for non-economic damages, **and** each "party" shall be liable "on the basis of each party's percentage of fault." The statute neither states nor implies an exception for damages attributable to the fault of persons who are immune from liability or have no mutual joint obligation to pay missing shares. Reading subsection (3) in light of the plain and clear wording plus keeping in mind the intent of the legislature in enacting this section, the term "party" means parties to the transactions, not parties to the lawsuit. One's percentage of fault cannot be determined unless it is determined and based on all actors to the transaction. To hold otherwise is to obliterate what the legislature did in enacting section 768.81(3). The FDLA is simply requesting this Honorable Court to give full force and effect to what the legislature intended by enacting this statute.

The only reasonable construction of section 768.81(3) is that a party's liability for non-economic damages cannot exceed his or her proportionate share of fault **as compared with all fault responsible for the plaintiff's injuries** not merely that of parties present in the law suit. "If we are ever to achieve a just and equitable tort system, we must predicate a party's liability upon his or her blame worthiness, not upon his or her solvency or co-defendants susceptibility to suit. Those who argue for favoring the plaintiff merely because he or she is a plaintiff has lost sight of the paramount goal of comparative negligence." Walt

Disney World v. Wood, 515 So.2d 198 at 205, (McDonald C.J. dissenting only).

ARGUMENT

POINT ON APPEAL

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.

Prior to 1973, Florida adhered to the legal doctrine of "contributory negligence." Contributory negligence provided that a plaintiff who was partially responsible for injuries caused by a negligent defendant could be totally barred from recovering from that defendant. In 1973, the Florida supreme court abolished contributory negligence and adopted the doctrine of "comparative negligence." Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). Comparative negligence allows a plaintiff who is partially responsible for his injuries to recover from a negligent defendant. Under comparative negligence, a plaintiff's total judgment against a negligent defendant is reduced by the percentage of the plaintiffs fault.

Under the doctrine of joint and several liability, however, if two or more defendants were found to be jointly responsible for causing the plaintiff's injuries, the plaintiff could recover the full amount of damages from any of the defendants, who, in turn, could attempt to seek recovery in a contribution action against the co-defendants for their equitable share of the damages. See Walt Disney World Co. v. Wood, 515 So.2d 198 (Fla. 1987). However, the Florida Legislature, in an attempt to ameliorate the commercial liability insurance crisis, enacted the Tort Reform Act which modified certain legal doctrines that aggravated the insurance

crisis. The Act specifically modified joint and several liability. The Act provided that in cases where the award of damages was greater than twenty five thousand dollars ($25,000), liability for damages was based on each party's proportionate fault, except that each defendant who was equal to or more at fault than the claimant was jointly and severally liable for all economic damages.

In 1988, the Academic Task Force for Review of the Insurance and Tort Systems ["Task Force"] made final recommendations. (Appendix 1).[1] The Task Force decreed that the balance to policy choices made by the Act should continue. In so declaring, the Task Force noted that comparative negligence imposed numerous secondary policy choices for decision-makers. The most important issue was how multiple tortfeasors share the financial liability for injuries to the claimant.

Important to the instant issue is that the Task Force noted that the traditional common law approach was one of "joint and several liability" in which any one of the defendants were liable for the entire amount of the plaintiff's judgment. "The plaintiff could collect only once for damages, but his recovery of full damages was facilitated even in the event that one of the co-defendants was judgment proof or beyond the jurisdiction of the court." (Id. at p. 2). The FDLA submits that it is important to note that the Task Force used the term "co-defendants" to mean parties to the transaction rather than parties to the lawsuit. The

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[1]The Task Force was referred to in Walt Disney World v. Wood, supra, 515 So.2d at 201 n.5.

term co-defendants could not have been defined as parties to the lawsuit since the Task Force noted that they could be beyond the jurisdiction of the court. This supports the FDLA's position that section 768.81(3) does not apply just to parties of the lawsuit but to parties to the transaction involved in the lawsuit.

The Task Force then noted that some courts and legislatures in recent years had taken the opposite approach of pure several liability which provides that a defendant is liable only for a proportionate share of the judgment based upon a comparison of its relative degree of fault compared with the other defendants. Remembering that they had previously defined co-defendants as being ones outside the jurisdiction of the court, the Task Force then declared that Florida's 1986 Act adopted "several," meaning proportionate, liability, except for intentional torts, designated statutory torts, negligence judgments not exceeding twenty five thousand, and for economic damages against a defendant who was not less negligent than the plaintiff. Joint and several liability was retained for the excepted categories.

The Task Force further noted that the basic argument in favor of abolishing joint and several liability was that, once the comparative fault principal was accepted as governing liability, "no defendant should have to pay more than the share of damages that corresponds to his share of fault." This can only be interpreted to mean his total share of fault, not just his fault as compared to the parties to the lawsuit. The FDLA submits that this is the only interpretation that makes any sense.

Florida's 1986 Act is a hybrid statute which strives for some appropriate balance between the competing policies against joint and several liability and those for retaining joint and several liability. "The retention of joint and several liability for smaller cases attempts to enhance collection and avoid complexity in those cases, while still providing protection against potential inequity of 'deep pocket' liability for the entire judgment in larger cases where it there is more likely to be a serious problem. The retention of joint and several liability for economic damages, as applied to a high-fault defendant, recognizes an implicit priority for economic losses and applies it so as to avoid the potential inequity of 'deep pocket' liability for a defendant who is less at fault then the plaintiff." (Id. at p. 4). If this Court were to find in favor of the Appellee's position it would be declaring that a defendant would have to pay more than the share of damages that corresponds to his share of fault and obliterate the protection against the inequity of "deep pocket" liability that the 1986 Act provided. In other words, to give the statute the strained interpretation advanced by the Appellee would be to counter the express purpose of the Tort Reform Act of 1986.

The fifth district in Messmer gave the statute its plain and unambiguous meaning. In adopting the trial court's opinion, the fifth district properly defined the phrase "court shall enter judgment against each party liable on the basis of such parties percentage of fault and not on the basis of doctrine of joint and several liability" to mean a party's percentage of the total fault

of all participants in the accident. Messmer v. Teachers Insurance Company, supra, 588 so.2d at 611.

> 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 proceedings, 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. See Holly v. Auld, 450 So.2d 217 (Fla. 1987).

Id. at 611-612.

The court continued that the obvious purpose of section 768.81(3) was to partially abrogate the doctrine of joint and several liability by barring its application 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 would thwart that intent. The instant case is a perfect example. Although the Eleventh Circuit opined that there was a serious question regarding the adequacy of the training that Fox received, Allied had to pay seventy percent (70%) of the total amount of Fox's damages [Fox was found to be thirty percent (30%) negligent] although Eastern was responsible for a percentage of the damages to Fox because of its inadequate training. But because Eastern was immune from suit pursuant to the Workers' Compensation Act, their proportionate share of fault was not allowed to be presented to the jury. The result was the equivalent of joint and several liability, which the legislature was expressly attempting to eliminate in section 768.81(3).

The FDLA submits that the title to section 768.81(3),

"apportionment of damages," additionally supports Allied's position in light of holdings from other state courts. Other state courts that have dealt with apportioning damage or fault have consistently held that the jury must consider negligence of **all parties to the transaction** whether or not they are a party to the lawsuit or whether they are statutorily immune from suit. DaFonte v. Up-Right, Inc., 7 Cal.Rptr.2d 238 (Cal. 1992); Burton v. Fisher Controls Company, 713 P.2d 1137 (Wyo. 1986); Bode v. Clarke Equipment Company, 719 P.2d 824 (Okl. 1986); Kirby Building Systems v. Mineral Explorations Company, 704 P.2d 1266 (Wyo. 1985); Taylor v. Delgarno Transportation, Inc., 100 N.M. 138, 667 P.2d 445 (1983); Bowman v. Barnes, 282 S.E.2d 613 (W.Va. 1981); 624 P.2d 68 (Okl. 1981); Lines v. Ryan, 272 N.W.2d 896 (Minn. 1978); Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978); Connar v. West Shore Equipment of Milwaukee, Inc., 227 N.W.2d 660 (Wis. 1975); Nance v. Gulf Oil Corporation, 817 F.2d 1176 (5th Cir. 1987); Prince v. Leesona Corporation, Inc., 720 F.2d 1166 (10th Cir. 1983); Johnson v. Niagara Machine and Tool Works, 666 F.2d 1223 (8th Cir. 1981).

DaFonte v. Up-Right, Inc., supra, 7 Cal.Rptr.2d 238, is instructive as to both the intent of the legislature and the meaning of proportionate share of fault. In DaFonte, an employee who was injured when his arm was thrown into a moving conveyor belt of a mechanical grape harvester brought negligence and product liability claims against the manufacturer of the harvester. It was consolidated with the insurer's subrogation action against the

manufacturer to recover worker's compensation benefits paid to the employee.

California's system of "comparative fault", like Florida's, sought to distribute tort damages proportionately among all who caused the harm. However, even after the judicial adoption of the comparative fault system, every culpable tort defendant, regardless of his or her degree of fault, remained jointly and severally liable to pay any damages attributable to the fault of others who failed to contribute the proportionate share. Again, like Florida's, the rule of joint and several liability applied not only to the injured person's "economic" damages, such as medical costs and lost earnings, but to "non-economic damages" like emotional stress, pain, and suffering.

The same year that Florida adopted the Tort Reform Act, 1986, the voters in California adopted Proposition 51, an initiative measure designed to modify the doctrine of joint and several liability in tort cases. Among other things, Proposition 51 added section 1431.2 to the Civil Code. Section 1431.2, like section 768.81(3), Florida Statutes, provided that any action for wrongful death, personal injury, or property damage, each defendant's liability for the plaintiff's "non-economic" damages were to be several, not joint, and that each defendant should be liable only for the percentage of "non-economic" damages which corresponded to the defendant's proportionate share of fault.

The DaFonte court held that the plain language of section 1431.2 eliminated a third party defendant's joint and several

liability to an injured employee for unpaid economic damages attributable to the fault of the employer who was statutorily immune from suit. Id. at 239.

After reviewing the history of the joint - and - several - liability rule, the court concluded that by 1986 the courts had eliminated certain inequities of the former tort recovery system, but so-called "deep pocket" defendants whose fault was slight could still be saddled with large damage awards mainly attributable to the greater fault of others who were able to escape their full proportionate contribution. Proposition 51 sought to modify the system of recovery.

The statute, like the Academic Task Force for the Review of the Insurance and Tort Systems, decried the unfairness and cost of the "deep pocket" rule to both governmental and private defendants and cited the exploitation of relatively blameless defendants who were perceived to have substantial financial resources or insurance coverage. Section 1431.1 declared that in order to remedy those inequities and avoid catastrophic financial consequences to public and private individuals and entities, "defendants in tort actions shall be held financially liable in closer proportion to their degree of fault."

Section 1431.2 was added and declared that in actions for wrongful death, personal injury or property damage based on comparative fault, "the liability of each defendant for non-economic damages shall be several only and shall not be joint." The statute further specified that "each defendant shall be liable

only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount." Although the wording of section 1431.2 varies slightly from section 768.81(3), the variance is minimal. Consequently, for all intents and purposes, they can be considered one and the same.

Section 768.81(3) declares that "each party liable in the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability." Instead of referring to "party", section 1431.2 declares it in terms of "defendant." "Defendant" certainly has a more legal connotation than the word "party." The California supreme court did not limit the word "defendant" to mean a defendant to the lawsuit. This court should likewise not limit the word "party" to parties to the lawsuit. The word "party" should contain the same meaning as "defendant" and that is parties or defendants to the transaction.

Also of importance to the instant case is the California supreme court's discussion of the intent of the legislation. The court held that in order to determine the intent of legislation, the court must first consult the word themselves, giving them their usual and ordinary meaning. Id. at 242. As in Florida, the law in California is that when statutory language is clear and unambiguous there is no need for construction and the court should not indulge in it. Just as the California supreme court found that section 1431.2 declared plainly and clearly that in tort actions for

personal harm or property damage, no "defendant" shall have "joint" liability for "non-economic" damages, and "[e]ach defendant" shall be liable "only" for those "non-economic" damages directly attributable to his or her own "percentage of fault," section 768.81(3) Florida Statutes, is clear and therefore, there is no need for statutory construction. The third district's finding of ambiguity in the word "party" is erroneous.

The Fabre court found the term "party" to be ambiguous by finding that the term "party" could not refer to all persons involved in an accident because the court lacks jurisdiction against non-parties. The court based this statement on section 768.81(3) which provides that in cases in which this section applies, the court shall enter judgment against each party liable on the basis of each parties percentage of fault. No defendants have ever contended that any court should enter judgment against a non-party. What the defendants do contend is that it is impossible to determine a party defendant's percentage of fault, as required by the statute, without taking into consideration the fault of all parties involved in the transaction.

Section 768.81(3) declares plainly and clearly that in cases to which the section applies no "party" shall have "joint" liability for non-economic damages, **and** each "party" shall be liable "on the basis of each party's percentage of fault." The statute neither states nor implies an exception for damages attributable to the fault of persons who are immune from liability or have no mutual joint obligation to pay missing shares. Accord,

Bowman v. Barnes, supra, 282 S.E.2d at 620 (despite the fact the phrase "person against whom recovery sought" would suggest only a party to the litigation, the statute meant all parties to the occurrence; there may be situations where the absent party can not be brought into the suit, either because the party is beyond the courts jurisdiction, or has the benefit of some immunity, such as governmental immunity, or the benefit of the employer's defense in workmen's compensation).

In Prince v. Leesona Corp., Inc., supra, 720 F.2d 1166, the court, applying Kansas law, held that the employer's percentage of fault must be considered in determining the percentage of fault attributable to the defendant. In that case, the jury had been permitted to consider the liability of the parties and of the employer, and returned a verdict for two hundred thousand dollars ($200,000) in damages, allocating thirty five percent (35%) of the fault to plaintiff, five percent (5%) to the defendant, and sixty percent (60%) to the employer. Plaintiff was thus awarded a net recovery of ten thousand dollars ($10,000) [equal to the defendant's five percent (5%) of the two hundred thousand ($200,000) damages]. The Prince court observed that, under Kansas law, all parties to an occurrence must have their fault determined in one action, even though some could not be formally joined or held legally responsible. The same principles apply to employers, the court said, concluding that it would not be rational to increase another defendant's liability above the level of his own fault simply because workers' compensation was involved. Since

the purpose of the Kansas comparative negligence act was to hold each defendant liable only in proportion to that defendant's fault, the court affirmed the trial court's decision.

The same principles have been applied in cases holding that the fault of non-parties other than the employer must be considered in determining the percentage of a defendant's fault in order to properly allocate liability under statutes equating percentage of fault with percentage of liability. Thus, in Brown v. Keill, supra, 224 Kan. 195, 580 P.2d 867, the Supreme Court of Kansas affirmed an award of ten percent (10%) of plaintiff's total damages where, after a bench trial, the court had found that the plaintiff was guilty of no negligence, the non-party driver was responsible for ninety percent (90%) of the causal negligence, and the defendant was responsible for ten percent (10%) of the causal negligence. The intent of the Kansas legislation, the Kansas Supreme Court said, was to equate each defendant's liability with his own degree of fault. Indeed, the court observed, any other interpretation of the statute would destroy the fundamental conceptual basis for the abandonment of contributory negligence. Specifically rejecting the contention that proportionate liability should not apply where a party could assert immunity defenses, the court concluded that the intent of the legislature was to impose individual liability for damages based on the proportionate fault of **all** parties to the occurrence giving rise to the injury, even of some of them could not be joined formally as litigants or be held legally responsible for their proportionate fault.

In Bartlett v. New Mexico Welding Supply, Inc., 98 N.M. 152, 646 P.2d 579 (N.M. App. 1982), cert. den., 98 N.M. 336, 648 P.2d 794 (N.M. 1982), the New Mexico court reached the same result.[2] That case involved a three-car collision in which the driver of the first car was unknown. The trial court instructed the jury that it could consider, in determining the defendant's percentage of fault, both the plaintiff's fault and that of the unknown driver. The jury returned a verdict for one hundred thousand dollars ($100,000), finding plaintiff not negligent, defendant thirty percent (30%) causally negligent, and the unknown driver seventy percent (70%) causally negligent. Thereafter, the trial court ordered a new trial on the basis that this instruction should not have been given and that the defendant would be jointly and severally liable for damages caused by the defendant and the unknown driver. On appeal, the case was reversed and remanded with instructions to enter judgment against the defendant for thirty percent (30%) of the plaintiff's damages. Ruling that joint and several liability would not be retained under the pure comparative negligence system in effect in New Mexico, the appellate court held that the trial court had properly instructed the jury to consider negligence of the unknown driver in allocating percentages of fault.

Courts in other jurisdictions have likewise held, in a variety of other contexts, that the negligence of an immune employer must

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[2]Bartlett was specifically recognized and affirmed by the Supreme Court of New Mexico in Taylor v. Delgarno Transportation, Inc., 100 N.M. 138, 667 P.2d 445, 447 (N.M. 1983).

be considered in allocating the percentages of fault attributable to defendants. Thus, for instance, in Connar v. West Shore Equipment of Milwaukee, Inc., 68 Wis.2d 42, 227 N.W.2d 660 (Wis. 1975), the Supreme Court of Wisconsin held that an employer's percentage of fault must be considered in determining the percentages of fault of the defendants.

In Heldt v. Nicholson Manufacturing Co., 72 Wis.2d 110, 240 N.W.2d 154 (Wis. 1976), the Supreme Court of Wisconsin affirmed a decision dismissing a complaint following a jury determination that plaintiff's negligence exceeded that of any of the defendants. The trial court had, sua sponte, submitted a jury question relating to the negligence of the non-party employer of the plaintiff. The jury found plaintiff forty four percent (44%) causally negligent and his employer fifty six percent (56%) causally negligent, with neither defendant having been negligent at all. Observing that the employer's liability was limited to workers' compensation as an exclusive remedy, the court rejected a contention that the trial judge had erred in including a special verdict question respecting the employer's negligence, and specifically stated it would have been error for the judge to have failed to include the employer in the negligence proration of the verdict, citing Connar v. West Shore Equipment of Milwaukee, Inc., supra.

In Espaniola v. Cawdry Mars Joint Venture, 707 P.2d 365 (Haw. 1985), the Supreme Court of Hawaii, overruling a prior decision,[3]

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[3]Sugue v. F.L. smith Machine Co., Inc., 56 Haw. 598, 546 P.2d 527 (1976)

held that evidence of the negligence of the employer, who was immune from liability to the plaintiff employer, would be admissible to enable the trier of fact to decide the degree of each actor's fault, so as to determine whether a third party's action against the employer would be permitted.

Again, in Beaudoin v. Texaco, Inc., 653 F.Supp. 512 (D. N.D. 1987), the court, applying North Dakota law, held that the negligence of the non-party employer must be included in calculating the percentage of fault. In that case, plaintiff sued Texaco, the employer being immune from suit. The jury apportioned sixty percent (60%) of the causal negligence to the employer, thirty percent (30%) to plaintiff, and ten percent (10%) to defendant Texaco. Applying the North Dakota comparative negligence statute (which permits a negligent plaintiff to recover only where plaintiff's negligence is less that the combined negligence of all other negligent actors), the court held that the employer's negligence must be considered in allocating percentages of fault, even though the employer was immune from liability. Thus, since plaintiff's negligence was less than the combined negligence of all other actors, although greater than the negligence of the named defendant, the court held that plaintiff was entitled to recover.

In Bode v. Clark Equipment Co., supra, 719 P.2d 824, the Supreme Court of Oklahoma held that the negligence of the employer must be considered in determining comparative fault even if the employer is immune from common law tort liability. Accordingly, the court held, where plaintiff had been found nine percent (9%)

negligent, defendant United States one percent (1%) negligent, and plaintiff's employer, a non-party, ninety percent (90%) negligent, plaintiff would be entitled to collect one percent (1%) of his damages from defendant United States. As in Beaudoin, supra, the applicable statute permitted a negligent defendant to recover so long as his own negligence was not greater than the combined negligence of all other entities causing the damage. Thus, if only the defendant's negligence could be considered, plaintiff, who had been found nine (9) times as negligent as defendant, would have been precluded from recovery. By including the non-party employer's negligence, however, recovery was permissible since, under the applicable comparative negligence statute, plaintiff was entitled to recover from each tortfeasor that portion of his damages attributable to that tortfeasor. In other words, the FDLA's position would also benefit plaintiffs in situations such as those found in Bode.

Again, in Johnson v. Niagara Machine & Tool Works, supra, 666 F.2d 1223, the court, applying Minnesota law, held that the evidence of the immune employer's negligence had to be determined by the jury since, under the Minnesota comparative negligence statute, if there was evidence of conduct which would constitute fault on the part of an entity, that fault should be submitted to the jury even though the entity was not a party to the lawsuit. Accordingly, a district court decision attributing one hundred percent (100%) of the fault to the immune employer was affirmed.

In Pocatello Industrial Park Co. v. Steel West, Inc., 101

Idaho 783, 621 P.2d 399 (1980), the Supreme Court of Idaho held that an immune employer's negligence must be considered in determining comparative fault. In the course of determining whether a prior action between an injured workman and a landowner collaterally estopped relitigation of issues between the workman's employer and that landowner, the Idaho supreme court observed that the trial court in the initial action erred if it had felt that it was precluded from apportioning any negligence to the employer due to its status as a non-party. Inclusion of non-parties in the special verdict was required, the court said, in order to properly allocate the negligence of all parties to the transaction, whether or not they were parties to the lawsuit and whether or not they could be liable to the plaintiff or other tortfeasors.

Finally, courts in a number of jurisdiction have held, in a variety of contexts, that the negligence of non-parties (other than plaintiff's employer) must be considered in allocating fault. See, for instance, Lines v. Ryan, supra, 272 N.W.2d 896 (negligence of one party to a three-car collision should be included in comparing negligence, even though that party settled and was no longer a party to the case); Kirby Building Systems v. Mineral Explorations Co., supra, 704 P.2d 1266 (negligence of settling parties must be considered, even though they were no longer parties, in determining whether recovery would be permitted under statute which permitted recovery of plaintiff's negligence was not as great as that of party against whom recovery is sought); Burton v. Fisher Controls Co., supra, 713 P.2d 1137 (observing that percentage of causal

negligence attributable to settling entities must be included in verdict form in order to assure valid comparison between plaintiff's negligence and that of remaining defendants, as well as for purposed of later contribution actions); Paul v. N.L. Industries, Inc., 624 P.2d 68 (Okla. 1980)(negligence of entities who had been dismissed without prejudice from the suit must be considered in order to properly apportion negligence of tortfeasors who remained parties, under statute denying recovery if plaintiff's negligence was greater than defendants', in order to avoid defeating the purposes of proportionate liability by incurring risk that, due to the absence of such entities, a defendant only slightly negligent would bear the entire financial burden); Frey v. Snelgrove, 269 N.W. 2d 918 (Minn. 1978)(negligence of settling defendants must be considered in determining fault of all entities involved in incident in order to properly allocate negligence).

As declared by Justice McDonald, the Florida supreme court in Hoffman v. Jones, supra, 280 So.2d 431, set the goal of creating a tort system that fairly and equitably allocated damages. Walt Disney World v. Wood, supra, 515 So.2d at 202, 205, (McDonald, C.J. dissenting). Justice McDonald continued that, "If we are ever to achieve a just and equitable tort system, we must predicate a party's liability upon his or her blame worthiness, not upon his or her solvency or co-defendant's susceptibility to suit. [citation omitted.] Those who argue for favoring the plaintiff merely because he or she is a plaintiff has lost sight of the paramount goal of comparative negligence." Id.

The third district in Fabre declared that it could not agree that the legislature's intent in promulgating subsection (3) was to deprive a fault free innocent plaintiff of recovery. However, as stated by Justice McDonald, "Between one plaintiff and one defendant, the plaintiff necessarily bears the risk of the defendant being insolvent. I fail to see the justice in shifting the risk simply because there are two defendants, one of whom is solvent or otherwise subject to suit." Id.

As succinctly declared by the court in Brown v. Keill, supra, 204 So.2d at 203, 580 P.2d at 874:

> There is nothing inherently fair about a defendant who is ten percent at fault paying one hundred percent 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.

The tort system originated in order for an injured party to be able to be compensated for the wrong caused by another. However, over the years, the purpose and intent of the tort system strayed greatly from what it was intended. The system ended up at a point where even if a defendant was only responsible for one percent of the damages to the plaintiff, the plaintiff could receive the entire amount of his damages from that one percent negligent defendant. Obviously, the Florida legislature attempted to bring Florida's tort system more in line with the purpose and intent of

a tort system. It did so by enacting section 768.81(3), Florida Statutes. What the appellee is now advocating, and what Fabre in fact did, is to return Florida to pre-section 768.81(3) times. The FDLA is simply requesting this court to give full force and effect to what the voice of the people, as spoken through the legislature, has mandated, i.e., that each defendant be liable only for the amount of damages occasioned by the percentage of his fault. This court has already basically held such in Conley v. Boyle Drug Company, 577 So.2d 275 (Fla. 1990)(a drug company should be liable only for its percentage share of the damages, recognizing that such a result was required under section 768.81).

CONCLUSION

Based on the foregoing arguments and authorities supported therein, the FDLA respectfully requests that this Honorable Court answer the certified question from the United States Courts of Appeal for the Eleventh Circuit in the affirmative and hold that section 768.81(3) Florida Statutes, requires consideration by the jury of a non-party's percentage of fault in order to properly determine what portion of a plaintiff's damages is attributable to a party defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 9th day of Oct., 1992, to: KATHLEEN M. O'CONNOR, ESQUIRE, Thornton, David, Murray, Alderman, Richards, & Davis, P.A., 2950 Southwest 27th Avenue, Suite 100, Miami, Florida, 33133-3704; MARGUERITE H. DAVIS, Esquire, Katz, Kutter, Haigler, Davis, Marks & Rutledge, P.A., Highpointe Center, Suite 1200, 106 East College Avenue, Tallahassee, Florida 32301; DONALD T. NORTON, ESQUIRE, Cohen & Cohen, P.A., 2525 North State Road 7 (441), Hollywood, Florida 33021 and to; G. WILLIAM BISSETT, JR., ESQUIRE, Preddy, Kutner, Hardy, et al., 501 N.E. 1st Avenue, Miami, Florida 33132.

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SUPREME COURT OF FLORIDA

CASE NO.: 80,811

ALLIED SIGNAL, INC.,

Appellant,

v.

KEVIN FOX,

Appellee.

APPENDIX TO
AMICUS CURIAE BRIEF OF THE
FLORIDA DEFENSE LAWYERS ASSOCIATION,
IN SUPPORT OF APPELLANT
