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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

Case No. 80,181

ALLIED-SIGNAL, INC.,
formerly known as GARRET
AIRESEARCH MANUFACTURING
COMPANY OF CALIFORNIA

Appellant,

vs.

KEVIN FOX,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE, KEVIN FOX

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STATEMENT OF THE CASE AND OF THE FACTS

(A)

Nature of the Case and Proceedings Below

Plaintiff, KEVIN FOX ("Fox"), initiated this products liability action against the Defendant, ALLIED-SIGNAL, INC. ("Allied"), in Federal District Court for the Southern District of Florida seeking the recovery of damages for permanent personal injuries he sustained when four of the fingers of his left hand were sucked into a fan manufactured by Allied and severed while he was on the job (R. 1-5). Fox sought to recover on the basis of proof that Allied was negligent in its design of the fan and in its preparation of the fan's instruction and maintenance manual. Id. The case was ultimately tried to a jury beginning on March 25, 1991 (R. 1-17-19). Three days later, a verdict was returned by the jury finding that Allied was seventy (70%) per cent negligent, that Fox was thirty (30%) per cent comparatively negligent, and that Fox's total damages were in the amount of $350,000.00 (R. 1-21). A final judgment conforming to the jury verdict was entered in the net amount of $245,000.00 (R. 1-25).

Allied thereafter filed a timely motion for a new trial and supporting memorandum of law (R. 1-27-28). After receipt of memoranda of law from the parties, the trial judge entered an order denying Allied's motion (R. 1-42). Allied appealed to the Eleventh Circuit, claiming entitlement to a new trial on both

liability and damages.[1] In seeking a new trial on liability, Allied argued that the trial court had committed a reversible abuse of discretion when it rejected Allied's proposed non-standard interrogatory verdict form which included a blank space where the jury could state the percentage of Fox's damages it found to have been caused by "other persons or companies," namely Fox's employer, Eastern Airlines. In arguing against Allied's attempt to secure a new trial on liability, Fox argued that: (1) Section 768.81(3), Florida Statutes (1990 Suppl.)[2] did not require the trial court to include a non-party negligence apportionment defense on the verdict form; and (2) even if it did, then the trial court's failure to do so did not entitle Allied to a new trial because: (a) Allied's proposed verdict form was not sufficient, standing alone, to properly and completely present that defensive issue to the jury; and (b) the evidence presented at trial was insufficient, as a matter of law, to support Allied's non-party negligence defense.[3]

Following briefing and the presentation of oral argument in the case, the Eleventh Circuit issued an order asking this Court

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[1]Allied's request for a new trial on the issue of damages was based upon the assertion that the trial court abused its discretion in allowing the jury to consider as an element of Fox's damages any loss or diminishment of his earning capacity in the future. The propriety of the trial court's ruling in this regard is not involved in these proceedings.

[2]Section 768.81(3) of the Florida Statutes, captioned "Apportionment of Damages", generally provides that in cases to which the 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 ...."

[3]The only action taken by Allied at the trial court level to present its non-party negligence issue to the jury was the submission of its non-standard verdict form. Allied tendered no

to exercise its discretionary jurisdiction[4] to answer the following certified question:

> WHETHER THE INTERPRETATION OF FLA. STAT. §768.81(3) (1989) REQUIRES CONSIDERATION BY THE JURY OF A NON-PARTY'S COMPARATIVE FAULT IN ORDER TO DETERMINE A PARTY'S LIABILITY?
>
> Fox v. Allied-Signal, Inc., 966 F.2d 626, 628 (11th Cir. 1992).

(B)

Statement of the Operative Facts

The instant lawsuit had its genesis on March 9, 1990. On that fateful day, 26-year old Fox was employed as a technician by Eastern Airlines performing maintenance and overhaul on the electrical systems of airplanes.[5] (R. 2-7-10). On that day, Fox

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special jury instructions relating to or explaining its non-party negligence affirmative defense, nor did it tender any accompanying instructions to explain its proposed verdict form to the jury. For this and other reasons to be outlined below, resolution of the legal question certified to this Court by the Eleventh Circuit concerning the "interpretation" of §768.81(3) will not necessarily be determinative of the real appellate issue raised in Allied's appeal (much less "determinative of the cause of action") -- whether the trial court abused its discretion in refusing to submit a non-party negligence issue to the jury in the unexplained manner suggested by Allied.

[4]The Eleventh Circuit has asked this Court to exercise its discretionary jurisdiction pursuant to Article V, Section 3(b)(6), Florida Constitution (1980) and Rule 9.150, Florida Rules of Appellate Procedure. We submit that an answer by this Court to the certified question will not be "determinative of the cause of action." Answering the certified question will at best only guide the Eleventh Circuit in determining whether the Appellant is entitled to a new trial on liability.

[5]Prior to becoming employed by Eastern in November of 1987, Fox had been a United States Marine. During his stint with the Marine Corp., he became a fully qualified aircraft electrician and a quality assurance inspector. After leaving the Marine Corp. in June of 1987, he started working as a line technician repairing systems on aircrafts for Gulf Air (R. 2-2-6).

was assigned to work in the electrical section of the maintenance department and was directed to overhaul an Allied 73 FA18 fan, which had been removed from a DC9 aircraft. Fox performed the overhaul and testing in strict accordance with the written and pictorial directions contained in the Allied-prepared maintenance and service manual. The manual indicated that the overhaul and testing of the fan was to be performed without any screen or guard over the fan blades[6] (R. 2-10-25, 29). At one point during a strobing test on the fan, Fox had his left hand resting on the side of the running fan to check for excessive vibration, and while reaching with his other hand to pick up a strobe testing instrument from a nearby cart, the tremendous suction generated by the fan drew the fingers of his left hand into the rotating blades, resulting in multiple amputations (R. 2-17-25). The Allied manual contained no warnings regarding the fan's extreme suction and the dangers it presented to technicians performing repairs in accordance with the procedures outlined in the manual (R. 2-10-28).

Fox was immediately transported to the hospital and underwent emergency plastic surgery in an attempt to reattach two of the four fingers which had been amputated. Fox's other two fingers were disintegrated by the fan blades and beyond repair. Fox was hospitalized for four and one-half days. After discharge, he went through lengthy rehabilitative therapy and suffered extreme pain. Fox did not return to work for nearly four months after the accident (R2-25-38).

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[6]Pursuant to Federal Aviation Administration ("FAA") regulations, equipment maintenance personnel are required to perform their tasks in strict accordance with the manufacturer-supplied

On liability, the jury was instructed that the issue for it to determine was whether Allied negligently failed to instruct Fox in its maintenance manual to test the fan with a safety screen in place or whether Allied negligently failed to warn Fox of the enormous amount of suction generated by the fan when operating, and, if so, whether such negligence was a legal cause of Fox's damages (R. 1-20-7a). Pursuant to the evidence and the instructions, the jury found that Allied "... was negligent in the manner claimed by [Fox] ... and that such negligence was a legal cause of damage to [Fox]". (R1-21). The sufficiency of the evidence to support the jury's conclusion that Allied was negligent is not challenged on appeal.

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manuals. The strobing procedure which Fox was about to perform required that the fan blades be unobstructed. The jury in this case was instructed as to the FAA regulation, as well as a seemingly contradictory OSHA general guarding regulation, and it apparently was asked to reconcile the patent conflict between the requirements of the two (no guard vs. guard).

SUMMARY OF ARGUMENT

I.

This Court should answer the question certified by the Eleventh Circuit in the negative, holding that §768.81(3) was not intended by the Florida Legislature to create a non-party apportionment defense. The words utilized in the statute itself, which statute is in derogation of the common law and therefore must be strictly construed, do not expressly state that in entering "judgment against each party liable on the basis of such party's percentage of fault" the party's percentage of fault is to be compared with or take into consideration "non-parties to the lawsuit." It is only by reading words into the statute itself that a conclusion in favor of Allied can be reached. In Florida, it has traditionally been improper to require the jury to determine by special verdict interrogatory whether a non-party to the suit was negligent, and if so, the degree of such negligence. In the six years that §768.81(3) has been on the books, the only revisions to the Florida Standard Jury Instructions and Verdict Forms which have been approved indicate that the "apportionment of damages" contemplated by §768.81(3) is an apportionment based only upon the comparative fault of the parties to the lawsuit. See, In Re Standard Jury Instructions, 540 So.2d 825, 829 (Fla. 1989) (approving additions to Florida Standard Jury Instruction 6.1b).

Since the statute at issue is ambiguous, resolution of the certified question requires application of at least three settled rules of statutory construction. Application of those three

settled rules of statutory construction require this Court to read the statute as narrowly as possible, that is to define and interpret §768.81(3) as requiring a comparison of the percentages of fault of the parties to the lawsuit only, without allocation of any responsibility to non-parties to the suit. The goal of statutory construction is to determine the legislative intent, and in determining such intent, it is appropriate to look to legislative history. The available legislative history relating to the enactment of §768.81(3) fully supports our construction, not the construction advocated by Allied.

The second rule of statutory construction which is implicated here is that a statute in derogation of the common law is to be strictly construed so as to do as little damage to the common law as possible. Therefore, the common law will not be found to have been abrogated or altered unless a statute clearly and explicitly announces such a legislative intent. The construction of the statute proposed by Allied runs rampant over numerous areas of the common law. Our proposed construction of the statute, in contrast, does only limited damage to the existing common law.

The third rule of statutory construction to be applied here is that repeals by implication are not favored, and that two or more statutes should be construed in such a way as to preserve the force and area of operation of each and to render them consistent and harmonious, if at all possible. This rule squarely impacts on the instant issue because, when it enacted §768.81(3), the Legislature did not repeal any of several existing statutes which became plainly inconsistent with §768.81(3) if Allied's proposed construction is adopted.

Indeed, in §768.71(3), Florida Statutes, the Legislature provided that if §768.81(3) was "in conflict with any other provision of the Florida Statutes, such other provision shall apply." The interpretation of §768.81(3) being advanced by Allied either directly conflicts with or otherwise renders meaningless the Contribution Statute, various set off statutes, and, most importantly, with §440.39, which provides for worker's compensation liens to be asserted against employees' recoveries from third-party tortfeasors. All of these various considerations compel the conclusion that the proper interpretation of the Apportionment of Damages Statute is the most narrow interpretation, that is our interpretation under which the comparative fault of non-parties to a lawsuit are not material in determining the extent of a named defendant's ultimate liability to the plaintiff.

II.

Fox additionally argues that if this Court decides to exercise its discretionary jurisdiction so as to answer the question certified by the Eleventh Circuit, then it should also proceed to determine all other issues in the case related to the certified question. Determination of the certified question in the abstract will not be "determinative of the cause" (as Article V, §3(b)(6) requires) unless this Court also proceeds to determine whether under the facts presented, Allied is entitled to a new trial.

In this regard, Allied is not entitled to a new trial on liability since even if this Court holds that a non-party appor-

tionment affirmative defense exists by virtue of §768.81(3), Allied nevertheless did not sufficiently present that affirmative defense in the trial court by way of any requested special jury instructions, nor did it adduce sufficient competent evidence to create an issue of fact on that affirmative defense.

ARGUMENT

I.

THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE AND HOLD THAT §768.81(3), FLORIDA STATUTES, DOES NOT ENTITLE A PARTY DEFENDANT TO PARTIALLY REDUCE ITS LIABILITY TO THE PLAINTIFF ON THE BASIS OF THE COMPARATIVE FAULT OF A NON-PARTY TO THE LAWSUIT.

(A)

Introduction

Allied (and its numerous amici) contend that the trial court committed reversible error in preventing Allied from presenting a non-party apportionment affirmative defense to the jury. Allied's argument with respect to the interpretation and application of §768.81(3), Florida Statutes, is both superficial and simplistic, and understandably ignores the exceptional complexity of the various questions which must be addressed in resolving the certified question. Allied's view regarding the interpretation and application of §768.81(3) must be carefully analyzed, since numerous profound changes in existing law are implicated.

Allied premises its "non-party" apportionment defense on Florida Statute §768.81(3), which provides that:

> (3) Apportionment of Damages. - In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.

Without any reference to the specific wording of the statute itself, Allied posits that the statute mandates that the liabi-

lity of all "joint tortfeasors" be apportioned so that one tortfeasor does not bear a greater amount of the damages simply because the other tortfeasors were not joined as parties.[7] The "mandate" to which Allied alludes certainly cannot be gleaned from the actual words utilized in the statute itself.

The statute itself directs its focus to a "party", a "party liable" and the "entry of judgment." The statute contains no hint that the Florida Legislature intended to allow "a party liable," such as Allied, to reduce its legal obligation to the claimant by the percentage of negligence, if any, attributable to "non-parties" (i.e. - entities or individuals as to which the court is not being asked "to enter a judgment"). See, Fabre v. Marin, 597 So.2d 883, 885-86 (Fla. 3d DCA 1991). Without question, the Legislature in utilizing the term "party" was referring to "party defendants." Fabre, 597 So.2d at 885-86.[8] Cf., Smith v. Department of Insurance, 507 So.2d 1080, 1090-91 (Fla. 1987) (where, in discussing the three categories of exceptions to the Legislature's abrogation of the doctrine of joint and several liability in §768.81(3), the court noted that "joint and several liability shall still apply for economic damages 'with respect to any party [defendant] whose percentage of fault equals or exceeds that of a particular claimant.'" [Bracketed portion of quote contained in original]).

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[7]It is important to note that in making this argument, Allied apparently overlooks the fact that under Florida substantive law, Fox's employer, Eastern, is not considered to be a "joint tortfeasor." See, Seaboard Coast Line R.R. Co. v. Smith, 359 So.2d 427, 429 (Fla. 1978).

[8]We do recognize that Allied's position regarding the interpretation and application of §768.81(3) finds support in the decision and opinion of the Fifth District Court of Appeal in

Allied and its amici contend that §768.81(3) is plain and unambiguous, but it clearly is not. The statute was properly found to be ambiguous by the Third District in Fabre. Although the statute provides for the assessment of liability "on the basis of such party's percentage of fault," it nowhere defines "the whole" by which the "party's percentage" is to be determined. One cannot "determine a percentage" without knowing what "the whole" is of which the percentage constitutes only a part. Here, "the whole" has nowhere been directly or by reasonable inference defined by the statute. It is therefore incumbent upon this Court to determine what constitutes "the whole" from which a "party's percentage of fault" is to be determined.[9]

There are multiple reasons which inexorably lead to the correct conclusion, the one reached by the Third District in Fabre, that: "the legislature, in discarding joint and several liability, intended to apportion liability among defendant tortfeasors to the extent each was determined to be at fault ...." (e.s.). [597 So.2d at 886].

(B)

Settled Rules of Statutory Construction Require a Narrow Construction of §768.81(3), Limiting Its Application to Parties to the Lawsuit

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Messmer v. Teachers Ins. Co., 588 So.2d 610 (Fla. 5th DCA 1991). In that opinion, the Fifth District found that "the language of the statute supports defendant's contention that a party's percentage of the total fault of all participants in the accident is the operative percentage to be considered." We believe, however, that Messmer was wrongly decided and will not ultimately represent Florida law on the subject. (See, Argument Section I.C. infra).

[9]Although the district court in Fabre identified the absence of a definition of "the whole" as one ambiguity in the statute, it also found ambiguity in the absence of any definition of the word

(1)

The Statute is Ambiguous

We believe that one must initially conclude, as the Third District correctly did in Fabre, that the statute at issue is ambiguous. Two different district courts of appeal have construed the statute, with diametrically opposed results. The Eleventh Circuit in this case likewise felt there was ambiguity in the statute since it has certified a question which asks for the correct "interpretation of" §768.81(3).

Contrary to Allied's assertion, the statute at issue is not plain and unambiguous. This is most easily demonstrated by comparing Florida's statute with the various provisions which other state legislatures have drafted. Some states have drafted comparative fault statutes similar in form to the Uniform Comparative Fault Act, under which the jury is directed to apportion only between claimants, named defendants, persons who have been released from the action, and third-party defendants -- they expressly exclude all others. See, e.g., 12 Unif. Laws Ann. p. 42 (1992 Supp.); Selchert v. State, 420 N.W.2d 816, 4 ALR 5th 1129 (Iowa 1988); Lake v. Construction Machinery, Inc., 787 P.2d 1027 (Alaska 1990); Conn. Gen. Statutes Ann. §52-572h. See generally, Wade, "Should Joint and Several Liability of

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"party." The two ambiguities identified by the district court are simply two ways of looking at a single, larger ambiguity. As a result, and for ease of discussion, we will focus in the text on the statute's absence of a definition of "the whole," and simply adopt the district court's decision in Fabre for our argument on the additional ambiguity which may be inherent in the statute's lack of a definition of the word "party."

Multiple Tortfeasors be Abolished?", 10 Am.Jur. Trial Advocate 193 (1986).

In other states, legislatures have determined that apportionment of responsibility should extend beyond consideration of only the negligence of the claimants, named defendants, persons who have been released from the action, and third-party defendants, so as to include consideration of the negligence of non-parties. However, the legislatures in these states have specifically and unambiguously provided for such a result. See, e.g., §12-2506B Ariz. Statutes (1991) (which provides that "[i]n assessing percentages of fault the trier of fact shall consider the fault of all persons who contributed to the alleged injury, death or damage to property, regardless of whether the person was, or could have been, named as a party to the suit ....").

If the Florida Legislature had intended to factor a non-party's negligence into the apportionment equation, it could have very easily done so in express language. The Comparative Fault Act adopted in Indiana in 1983 provides a prime example. Unlike §768.81(3), Indiana's legislation specifically provides for consideration of the negligence of a non-party:

> The jury shall determine the percentage of fault of the claimant, of the primary defendant, and of any person who is a non-party and whose fault contributed to cause of death, injury or property damages for which suit is brought. The percentage of fault figures of parties to the action may total less than one hundred percent (100%) if the jury finds that fault contributing to cause the claimant's loss has also come from persons who are not parties to the action.

Ind. Code §34-4-33-5(a)(1) (1984). Indiana's Act requires the jury verdict to state the name of any non-party to whom fault is

allocated and the percentage of that fault, and it properly recognizes that a "non-party" shall not include the employer of the claimant. Ind. Code §34-4-33-2(a) and §34-4-33-6 (1984). Finally, the Indiana Act states that the burden of proof on a non-party defense is upon the defendant. Ind. Code §34-4-33-10 (1984).

The wording of §768.81(3) is obviously a far stretch from the very specific language utilized by the Indiana Legislature. Nevertheless, the court in Messmer, without any in-depth analysis or consideration of how other courts across this country have approached the issue, read §768.81(3) to provide for the same non-party apportionment defense as that specifically set forth in the Indiana Act. Such a radical break with past law on an issue as substantial as this should not be lightly undertaken. Review of the manner in which numerous other courts across this country have treated the issue militates against this Court adopting the simplistic and erroneous result reached by the Fifth District in Messmer. See, Lake v. Construction Machinery, Inc., 787 P.2d 1027 (Alaska 1990); National Farmers Union Property and Casualty Co. v. Frackelton, 662 P.2d 1056 (Colo. 1983), Jarrett v. Dunkin Thecker Assoc., 417 A.2d 1064 (Super. Ct. N.J. 1980); Ramos v. Browning Ferris Industries, 476 A.2d 304 (Super. Ct. N.J. 1984); Mills v. Brown, 735 P.2d 603 (Or. 1987); Sugue v. F.L. Smithe Machine Co., 546 P.2d 527 (Haw. 1976); Correia v. The Firestone Tire and Rubber Company, 446 NE.2d 1033 (Mass. 1983); Heckendorn v. Consolidated Rail Corporation, 465 A.2d 609 (Pa. 1983).

(2)

The Rules of Statutory Construction Require a Strict, Narrow Construction of §768.81(3)

Section 768.81(3) does not mention the word "non-party" at any point. Instead, it only utilizes the word "party," and it utilizes that word four separate times. Although the legislature's repeated use of the word "party" does not compel any particular definition of "the whole" from which a "party's percentage of fault" should be determined, the legislature's repeated use of the word "party," coupled with its failure to refer to "non-parties" at any point, at least suggests that the legislature probably did not intend the more expansive definition of "the whole" urged here by Allied.

In situations where statutory "construction" or "interpretation" is necessary, the courts are called upon to determine the legislative intent. When a statute is ambiguous, such as here, it is appropriate to consult that statute's legislative history for assistance in determining its meaning. See, 49 Fla. Jur.2d, Statutes, §§114, 157, 160 (and numerous decisions cited therein). The available legislative history with respect to the statute at issue is the Legislative Staff Analysis of Chapter 86-160 (and the bills which created it).[10] The Final Staff Analysis of Chapter 86-160 prepared by the House Committee

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

on Health Care and Insurance (a copy of which is included in our appendix) contains the following discussion of §768.81(3):

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

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

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

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

(A. 4-5; emphasis supplied).

This analysis also makes no mention of "non-parties." Indeed, it explicitly states that, under the statutory provision in issue here, the jury is to apportion percentages of fault only "among

the parties" to the lawsuit, according to "each party's proportionate fault." In the absence of any contrary analysis, these analyses should be accepted as a valid statement of the legislative intent in enacting §768.81(3): that "the whole" consists of the "parties to the lawsuit." The more expansive definition urged by Allied should be rejected as contrary to the stated legislative intent.

Another settled rule of statutory construction is squarely implicated here:

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

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

The construction of §768.81(3) which we are advocating results in only limited changes to existing common law, the changes the legislature appears to have intended. In contrast,

the construction which Allied urges necessitates substantial changes in the common law in numerous areas. This Court should be guided by the settled rule that an ambiguous statute must be construed to do as little damage to the common law as possible, and therefore it should define "the (missing) whole" as narrowly as possibly so as to preserve those areas of the common law not explicitly abolished by the statute -- by defining "the whole" as including only "the parties to the lawsuit."

An additional rule of statutory construction applicable here is the settled rule that repeals by implication are not favored and that two (or more) statutes should be construed in such a way as to preserve the force of each, and to render them consistent if at all possible. See, Palm Harbor Special Fire Control District v. Kelly, 516 So.2d 249 (Fla. 1987); Garner v. Ward, 251 So.2d 252 (Fla. 1971). See generally, 49 Fla. Jur.2d, Statutes, §213 (and numerous decisions cited therein). Unquestionably, this rule of construction is squarely implicated in the present proceedings, because, when it enacted §768.81(3), the Florida Legislature did not repeal any of several existing statutes which are plainly inconsistent with Allied's proposed construction of §768.81(3).

The most obvious example is Florida's contribution statute [§768.31, Fla. Stat. (1990 Supp.)], under which one joint tortfeasor who has been required to pay in excess of its pro rata share of a common liability is entitled to seek contribution from other joint tortfeasors. If, in fact, §768.81(3) is interpreted so as to create a non-party apportionment defense, then there

would appear to be no continuing reason for Florida to have a statute allowing for contribution among joint tortfeasors. On the other hand, §768.31 will continue to have a purpose and an effect in our body of law under the narrower definition of "the whole" Fox is proposing -- the contribution statute will continue to be available to named defendants to enable them to make unnamed tortfeasors parties to the lawsuit, and it will still be available post-judgment to adjust the equities between defendants and unnamed tortfeasors who were not made parties to the suit.

It is important to note that §768.81(3) is contained in Part II of Chapter 768, Fla. Stat., which begins with three "applicability" provisions, one of which requires that "[i]f a provision of this part [part II] is in conflict with any other provision of the Florida Statutes, such other provisions shall apply." §768.71(3), Fla. Stat. (1991). Thus, because the contribution statute still exists, it must be utilized to obtain apportionment of damages among joint tortfeasors, irrespective of what §768.81(3) may say. Cf., Gurney v. Cain, 588 So.2d 244 (Fla. 4th DCA 1991), review denied, 599 So.2d 656 (Fla. 1992) (declining to allow apportionment of damages under §768.81(3) where specific provision of §768.20 prohibited reduction required by §768.81(3); no issue was raised as to question of non-party apportionment because defendants brought initially unnamed tort-feasor into the suit in a contribution action). In order to allow the Apportionment of Damages Statute and the Contribution Statute to remain harmonious and be allowed to operate in their respective spheres, the Apportionment of Damages statute should

be given its most narrow interpretation, one which excludes its applicability to "non-parties" to a lawsuit.

The applicability provision also comes into play because §768.81(3) must be interpreted in light of §768.31(5), §46.015(2) and §768.041(2). These three statutes provide generally that if a defendant shows the court that the plaintiff has delivered a release or covenant not to sue to a non-party to the lawsuit in partial satisfaction of the damages sued for, the court shall set off this amount from the amount of any judgment against the defendant. Under Allied's approach, a defendant would not only be given a set off for all settlement amounts pursuant to these statutes, but the defendant would also be entitled to have the jury further reduce any judgment entered by the percentage of negligence assigned by the jury to the non-party who already settled.

The only way that §768.31(5), §768.041(2), and §46.015(2) can operate as intended and be rendered consistent with §768.81(3) is to narrowly define "the whole" in the latter statute so as to include only "parties to the lawsuit." Allied's proposed construction of "the whole" to include "non-parties to the lawsuit" results in an obviously inequitable "double reduction" in every case in which a plaintiff has settled with a non-party joint tortfeasor. Thus, the narrow definition we propose is the most sensible. It also is the only one that avoids this Court having to tinker with these various statutes in an effort to resolve the inequities created by Allied's proposed definition.

The instant case provides a perfect example of the head-butting problem presented by Allied's broad interpretation of §768.81(3), which includes "non-parties to the lawsuit" as part of the apportionment equation. Since Fox's injury occurred on the job, his third-party lawsuit against Allied was subject to §440.39(3)(a), Florida Statutes, under which Eastern Airlines or its compensation carrier is entitled to assert a lien for the compensation benefits paid. The only reduction in the amount of the lien is for the carrier's pro rata share of court costs and attorney's fees. Otherwise, the employer or carrier:

> [S]hall recover from the judgment, after costs and attorney's fees incurred by the employee or dependent in that suit have been deducted, 100% of what it has paid and future benefits to be paid, unless the employee or dependent can demonstrate to the court that he did not recover the full value of damages sustained because of comparative negligence or because of limits of insurance coverage and collectibility. (e.s.)

Allied's broad interpretation of the Apportionment of Damages Statute so as to include immune, non-party employers in the apportionment equation thus sets the stage for the employee either having his recovery against the third-party tortfeasor double reduced or for the employer/carrier's lien being extinguished. There are only two ways to resolve the problem. First, this Court could accept Allied's construction of §768.81(3) and hold that the statute impliedly repealed the lien rights established by §440.39. Alternatively, this Court could define "the whole" in §768.81(3) narrowly, as including only "parties to the lawsuit." Again, the second alternative is the

only one which is consistent with the rule of statutory construction which states that repeals by implication should be avoided and that two statutes should be construed in such a way as to render them both consistent and meaningful if at all possible.

The recent decision of the California Supreme Court relied upon so heavily by Allied does not undermine our position. While it is true that the California Supreme Court in DaFonte v. Up-Right, Inc., 2 Cal. 4th 593, 7 Cal. Rptr. 238, 828 P.2d 140 (1992) did conclude that a statute similar in wording to Florida's required consideration by the jury of an immune, non-party employer's comparative negligence in the employee's third-party tort suit. However, Florida's workmen's compensation statute and its interaction with third-party tortfeasor liability is dramatically different from California's. Compare, Manfredo v. Employers Casualty Ins. Co., 560 So.2d 1162 (Fla. 1990) with Engle v. Endlich, 9 Cal. App. 4th 1152 (2d Dist. 1992).

Review of California law reflects a case-by-case approach in the workmen's compensation lien area, with the courts continually having to make ad hoc adjustments as each new case presents a slightly different factual variant. Florida law in this area is simply not comparable with California law, and therefore this Court cannot transplant the California Supreme Court's holding in DaFonte into the existing body of Florida law without first finding that §440.39 has been impliedly repealed or at least drastically modified by §768.81(3).

Although this Court has yet to construe §768.81(3) in any binding way, it has announced at least a tentative construction

of the statute by virtue of its approval of an additional sentence to Florida's Standard Jury Instruction 6.1b. That new jury instruction reads as follows:

> [In entering a judgment for damages based on your verdict against [either] [any] defendant, the court will take into account the percentage of that defendant's [negligence] [fault] as compared to the total [negligence] [fault] of all parties to this action.] (e.s.)
>
> In Re Standard Jury Instructions, 540 So.2d 825, 829 (Fla. 1989).

This newly approved jury instruction mirrors the construction of §768.81(3) we are urging this Court to adopt. Moreover, the Committee on Florida's Standard Jury Instructions recently considered a request to change the instruction just quoted to include consideration and comparision of the fault of both parties and non-parties. The Committee declined to adopt the requested change, and continued to adhere to its initial, and we believe correct, reading of the statute.

Finally, the very Act which contains §768.81(3) also created the Academic Task Force for Review of the Insurance and Tort Systems, and charged that body with the responsibility of evaluating the statute and making recommendations, if necessary, for its change. Ch. 86-160, Laws of Florida. In undertaking that evaluation, the Academic Task Force understood the statute to be, and characterized it as, a modified form of "pure several liability which provides that a defendant is only liable for a proportionate share of the judgment based upon a comparison of its relative degree of fault compared with the other defendants."

Academic Task Force, Etc., Final Recommendations pp. 52-53 (March 1, 1988) (for the convenience of the Court, we have included a copy of the relevant portion of the Task Force report in the appendix to this brief at A. 7-8). It thus appears that the Task Force understood the statute to be one under which the relative degrees of fault are compared only as between the various parties to the lawsuit.

(C)

The Reasoning of Messmer is Flawed

In an effort to avoid duplication, we will adopt as our own argument and incorporate by reference that portion of the brief of Respondent, Ann Marin, in State Farm Mutual Automobile Ins. Co. v. Marin, Case No. 79,870, which discusses the various flaws in the reasoning of the Messmer court. (We have included the relevant excerpts from Respondent Marin's brief in our appendix at A. 10-17).

(D)

Under the Circumstances of this Case, Concepts of Fairness Favor Fox's Position

In concluding our argument on this point we would suggest to the Court that Allied's approach does not, as it asserts, represent fundamental fairness. To the contrary, to accept Allied's approach would result in an enormous detriment to Fox and an undeserved windfall to Allied. Allied conveniently overlooks the fact that it was able at trial to reduce its overall exposure to Fox by virtue of the substantial payments in workman's compen-

sation benefits made to Fox by Eastern Airlines' insurer, since Fox did not seek to recover those amounts in his suit against Allied. If Eastern had not made those workman's compensation payments as it was required to by statute, then Allied itself would have been held liable for those same amounts as damages in the instant case. Moreover, since the benefits payable under the statutory workman's compensation scheme do not in most instances represent full compensation to the injured employee, the employee has no choice but to sue the third-party tortfeasor, such as Allied in this case. To allow the third-party tortfeasor to reduce its legal liability to the claimant in direct proportion to the alleged negligence attributable to an immune non-party employer would undermine Florida's desire to allow for full compensation to injured employees.

Under Allied's approach, the employee is denied the ability to file a tort suit against the employer because of workman's compensation immunity yet, when suing the third-party tortfeasor, his recoverable damages would be diminished in direct proportion to the percentage of negligence attributed by the jury to that immune non-party employer. Such a situation certainly does not coincide with any rational concept of fundamental fairness and would effectively allow Allied an undeserved double reduction in its liability to Fox. This Court should not permit Allied to obtain such an undeserved windfall at Fox's expense.

II.

IF THIS COURT DECIDES TO EXERCISE ITS DISCRETIONARY JURISDICTION TO ANSWER THE ELEVENTH CIRCUIT'S CERTIFIED QUESTION, THEN IT SHOULD ALSO PROCEED TO DETERMINE ALL OTHER ISSUES IN THE CASE RELATED TO THAT CERTIFIED QUESTION.

The Eleventh Circuit has asked this Court to exercise its discretionary jurisdiction to answer the legal question of "Whether the interpretation of Fla. Stat. §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 Eleventh Circuit's request seeks to invoke jurisdiction under Article V, Section 3(b)(6) of the Florida Constitution, which provides that this Court:

> (6) May review a question of law certified by ... a United States court of appeals which is determinative of the cause and for which there is no controlling precedent of the Supreme Court of Florida. (e.s.)

As our statement of the facts reveals, this Court's resolution of the question which has been certified to it in the abstract by the Eleventh Circuit will not be "determinative of the cause." Determination of this cause will require that this Court first determine the certified question and then apply that determination to the facts presented by Allied's appeal to the Eleventh Circuit. In other words, for a response to the certified question to be "determinative of the cause", this Court will not only have to answer the certified question, but it must also proceed to determine whether under the facts presented, Allied is entitled to a new trial on the issue of liability.

Even assuming arguendo that this Court determines that §768.81(3) requires consideration by the jury of a non-party's comparative fault in order to determine a party defendant's liability, Allied's success on appeal (and therefore "determination of the cause") is still dependent upon its first overcoming multiple preservation and factual hurdles. First, we would point out that the only action taken by Allied at the trial court level to present its non-party negligence defense to the jury was the submission of its non-standard verdict form. Allied tendered no special jury instructions relating to or explaining its non-party negligence affirmative defense, nor did it tender any accompanying instructions to explain its proposed verdict form to the jury.

If this Court determines that §768.81(3) requires consideration by the jury of a non-party's comparative fault, then it must proceed further and declare that the mere submission of an otherwise unexplained verdict form which does nothing more than include a blank space for the jury to state the percentage of the plaintiff's damages it finds to have been caused "by other persons or companies" is insufficient to establish reversible error. A non-party apportionment defense is clearly an affirmative defense as to which the defendant carries the burden of proof, and this burden unquestionably must be explained to the jury.

Secondly, the recognition of a non-party comparative fault affirmative defense is subject to the same sufficiency of proof standards generally applicable to other affirmative defenses. In

the instant case, the record brought up fails to sufficiently establish a competent factual basis upon which a jury would have been entitled to find that Eastern was guilty of any negligence for purportedly violating an OSHA general machine guarding regulation. There is no testimony or other evidence in the instant record establishing that the subject OSHA guarding regulation was intended to apply to the type of fan overhaul and testing procedures such as were being performed by Fox.

On the contrary, the regulation upon which both Allied and the Eleventh Circuit have seized to generate the non-party negligence issue has on several occasions been held to be inapplicable, as a matter of law, to situations in the work place where the machine or equipment which is unguarded is undergoing maintenance, overhaul or testing. See, e.g., Secretary of Labor v. Allis Chalmers Corp., OSHRC Docket No. 8274, 40 OSHC (BNA) 1876 (1976) (general machine guarding standard [29 CFR 1910.212(a)(1)] does not apply to hazards created by rotating wheels of tractor undergoing testing following final assembly, because the standard is directed at machines used in the manufacturing process, not to machines undergoing testing process); Secretary of Labor v. Grayson Lumber Co., OSHRC Docket No. 793, 1 OSHC (BNA) 1234 (1973) (OSHA general guarding standard does not apply in situations where the only employees affected by lack of guarding on apparatus would be maintenance personnel while performing maintenance on it). Here, no expert witness testified that the OSHA guarding regulation applied under the circumstances in which Fox was injured. Indeed, Fox's supervisor at Eastern

testified that as far as he knew, no report was issued by OSHA to Eastern as a result of its investigation of Fox's accident (R. 3-20).

Third, and most importantly, the evidence at trial affirmatively demonstrated that at the time of his injury, Fox was specifically following the step-by-step procedures outlined in Allied's maintenance manual, which manual instructed Fox to perform the procedure he was performing without a guard on the fan (R. 2-10-29). Thus, Allied finds itself in the unenviable position of having to argue that Fox and Eastern were negligent for failing to disregard the specific procedures dictated by Allied's own maintenance manual. Yet, under FAA regulation, as to which the jury was instructed, employers and maintenance personnel are not permitted to deviate from the specific instructions and procedures set forth in the maintenance manual provided by the manufacturer (R. 1-20-8c; R. 2-10-11).

Thus, the record before this Court simply fails to demonstrate any factual basis to support Allied's assertion that the jury might have found Eastern to have been negligent. Allied has therefore failed to show that its non-party apportionment defense was an issue which was properly before the jury under the facts presented. Accordingly, if this Court answers the certified question in the affirmative and therefore determines that §768.81(3) requires consideration by the jury of a non-party's comparative fault in order to determine a party's liability, then it should also proceed to review the entire case and hold that under the facts presented, Allied failed at the trial level to

sufficiently present the non-party negligence affirmative defense, and it also failed to adduce sufficient competent evidence to create an issue of fact on that affirmative defense.

CONCLUSION

Based upon the record presented, as well as the reasoning and citations of authority set forth above, it is respectfully submitted that this Court should answer the certified question in the negative and hold, as did the Third District in Fabre, that §768.81(3) does not include within its scope the consideration of the negligence of non-parties to a lawsuit. Alternatively, if this Court answers the certified question in the affirmative, then it should nevertheless proceed to find that Allied is not entitled to a new trial on the basis of the record presented.

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 3rd day of December, 1991 to KATHLEEN M. O'CONNOR, ESQ., Thornton David Murray Richard & Davis, P.A., Attorneys for Defendant, 2950 SW 27th Avenue, Suite 100, Miami, FL 33133 and to DONALD T. NORTON, ESQ., Cohen & Cohen, Co-counsel for Plaintiff, 2525 N. State Road 7, Hollywood,

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BY: _____
G. WILLIAM BISSETT
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INDEX TO APPENDIX

Date: July 15, 1986
Revised: _____
Final: July 16, 1986

HOUSE OF REPRESENTATIVES
COMMITTEE ON HEALTH CARE AND INSURANCE
STAFF ANALYSIS

BILL #: Ch. 86-160, Laws of Florida, (CS/CS/SB 465, 349, 592, 698, 69 700, 701, 702, 956, 977, & 1120)

RELATING TO: Tort Reform and Insurance

SPONSOR(S): Senate Committees on Judiciary-Civil and Commerce and Senator Hair and others

EFFECTIVE DATE: Multiple Effective Dates

COMPANION BILL(S): CS/HB 1344

OTHER COMMITTEES OF REFERENCE: (1) Senate Commerce

(2) Senate Judiciary-Civil

****

I. SUMMARY:

INSURANCE REFORMS

In summary, CS/CS/SB 465 makes the following changes to the insura laws:

(1) Additional authority is provided to the Department of Insurance as to the review and approval of property and casualty insuranc rates. Significant changes include the elimination of "a lack a reasonable degree of competition" as a necessary element in finding a rate to be excessive; greater authority to consider investment income in approving underwriting margins; and the requirement that insurers either file their rates 60 days befor they are to become effective, subject to disapproval by the Department, or to file their rates 30 days after they are used, subject to disapproval and an order by the Department to rebate excessive rates.

(2) Creation of an excess profits law for commercial property and casualty insurance that returns excess profits to eligible policyholders who comply with risk management guidelines.

(3) Establishment of a joint underwriting association that guarantee the availability of property and casualty insurance to:

(a) any person who is required by Florida law to have such insurance and who has been rejected by the voluntary market, or

Section 60. 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 negli defendant could be totally barred from recovering from that defendant. 1973, the Florida Supreme Court abolished contributory negligence and adopted the doctrine of "comparative negligence". See Hoffman v. Jones 280 So.2d 431 (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 plaintiff's fault. The act codifies the comparative negligence law.

Pursuant to the doctrine of joint and several liability, if two or more defendants are found to be jointly responsible for causing the plaintif injuries, the plaintiff can recover the full amount of damages from any of the defendants who, in turn, can attempt to seek recovery in a contribution action against the co-defendants for their equitable share the damages.

The act's modified version of joint and several liability applies to all negligence cases which are defined to include, but not be limited to, ci actions based upon theories of negligence, strict liability, products liability, professional malpractice, breach of warranty, and other like theories. In such cases in which the award for damages does not exceed $25,000, joint and several liability applies to all of the damages. In cases in which the award of damages is greater than $25,000, liability f damages is based on each party's proportionate fault, except that each defendant who is equal to or more at fault than the claimant is jointly severally liable for all economic damages. The act's modified version o joint and several liability would not apply to actions based upon intentional torts or in which the Legislature has mandated that the doctrine apply, specifically chapter 403 (environmental pollution), chapt 498 (land sales), chapter 517 (securities), chapter 542 (antitrust) and chapter 895 (RICO).

Section 61. This section amends s. 57.105, F.S., to provide that when th court assesses attorney's fees against the losing party because that party's claim or defense completely lacked a justiciable issue, that the losing party's attorney pay one-half of the attorney's fees so assessed. It provides an exception for an attorney who has acted in good faith, bas upon the representations of his client.

Section 62. Under present law, in s. 768.13, F.S., immunity is establish for any person who, in good faith, renders emergency care or treatment at the scene of an emergency where the person acts as an ordinary, reasonabl prudent man would have acted under the same circumstances.

The act provides additional immunity for any person licensed to practice medicine who renders emergency care in response to a "code blue" emergency within a hospital or trauma center, if he acts as a reasonably prudent person licensed to practice medicine who would have acted under the same c similar circumstances.

Section 63. This section creates a five-member Academic Task Force for Review of the Insurance and Tort Systems consisting of the president of

DATE: June 6, 1986 Page 1

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

	ANALYST	STAFF DIRECTOR		REFERENCE	ACTION
1.	Grange	Fort	1.	COM	Fav/CS
2.	Plante	Lester	2.	JCI	Fav/CS/CS
3.			3.		

SUBJECT: Liability Insurance/Tort Reform

BILL NO. AND SPONSOR: Analysis of CS/CS/SBs 465, 349, 592, 698, 699, 700, 701 702, 956, 977 & 1120 by Commerce Committee and Senators Hair, Barron, Kirkpatrick, Vogt, Crawford and others

SUMMARY:

Present Situation and Effect of Proposed Changes:

CS/CS/SB 465, 349, 592, 698, 699, 700, 701, 702, 956, 977, & 1120 (hereinafter CS/CS/SB 465), cited as the Tort Reform and Insurance Act of 1986, is intended to ameliorate the current commercial liability insurance crisis by making commercial liability insurance more available, by increasing the regulatory authority of the Department of Insurance (department), and by modifying legal doctrines that have aggravated the crisis.

Among other things, the bill:

1) authorizes financial institutions to participate in reinsurance and Florida insurance exchanges (sec. 3);

2) authorizes commercial liability risks to be group insured (sec. 6);

3) requires the appellate court to set aside a final order of the department in certain rate-related proceedings (sec. 7);

4) significantly increases the department's rate review and enforcement authority (sec. 9);

5) creates a property casualty insurance excess profits law (sec. 10);

6) authorizes creation of a commercial property/casualty joint underwriting association (sec. 13);

7) expands the types of health care providers that can self-insure and authorizes CPAs, architects, engineers, and veterinarians, land surveyors, and insurance agents to self-insure (secs. 14 & 15);

8) establishes notice requirements for cancellation, nonrenewal, and renewal of premium of commercial liability policies (sec. 16);

9) authorizes the creation of commercial self-insurance funds (secs. 26-41);

could not be accepted later than 10 days before the date of trial.

Section 59.

Other than under ch. 440, F.S., which exempts employers who maintain workers' compensation insurance for the benefit of their employees from all liability for damages arising out of work-related injuries, s. 627.737, F.S., relating to the automobile no-fault law, is the only statute which limits the recovery of noneconomic damages by injured persons. In all other types of personal injury cases, there is no limit to the amount of noneconomic damages a plaintiff may recover.

The bill sets a maximum amount of noneconomic damages that may be awarded to any person entitled thereto in any action for personal injury or wrongful death at $450,000. The provisions of this section would apply to any cause of action filed on or after July 1, 1986.

Section 60.

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". See Hoffman v. Jones, 280 So.2d 431 (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 plaintiff's fault.

The principles of comparative negligence are also applicable in cases involving multiple defendants, with fault being apportioned among all negligent parties and the plaintiff's total damages being divided among those parties according to their proportionate degree of fault. However, in these cases, one or more of the defendants may ultimately be forced to pay more than their proportionate shares of the damages, pursuant to the doctrine of joint and several liability. Under this doctrine, if two or more defendants are found to be responsible for causing the plaintiff's injuries, the plaintiff can recover the full amount of damages from any one of them.

Under the bill, joint and several liability applies to all cases in which the award for damages does not exceed $25,000. In cases in which the award of damages is greater than $25,000, liability for damages is based on each party's proportionate fault, except that each defendant who is more at fault than the claimant is jointly and severally liable for all economic damages. The bill's modified version of joint and several liability would also not apply to actions which the Legislature has mandated that the doctrine apply; specifically chapter 403 (environmental pollution), chapter 498 (land sales), chapter 517 (securities), chapter 542 (antitrust) and chapter 895 (RICO).

Under the bill, neither the court nor the attorneys would be permitted to discuss joint and several liability in front of the jury. The trier of fact would be required to specify the

amounts awarded for economic and noneconomic damages, in addition to apportioning percentages of fault among the parties. This section would apply to all cases filed on or after July 1, 1986.

Section 61.

This section amends s. 57.105, F.S., to provide that when the court assesses attorney's fees against the losing party because that party's claim or defense completely lacked a justifiable issue, that the losing party's attorney pay one-half of the attorney's fees so assessed. Provides an exception for an attorney who has acted in good faith, based upon the representations of his client.

Section 62.

Under present law, in s. 768.13, F.S., immunity is established for any person who, in good faith, renders emergency care or treatment at the scene of an emergency where the person acts as an ordinary, reasonably prudent man would have acted under the same circumstances.

The bill provides additional immunity for any person licensed to practice medicine who renders emergency care in response to a "code blue" emergency within a hospital or trauma center, if he acts as a reasonably prudent person licensed to practice medicine who would have acted under the same or similar circumstances.

Section 63.

This section creates, a five-member Academic Task Force for Review of the Insurance and Tort Systems consisting of the president of each state university having a law school, the president of a private university having a law school and a medical school, and two others to be appointed by the three. The task force would be charged with evaluating the state's insurance and tort laws in terms of certain specifically enumerated parameters.

Section 64.

This section requires insurers to submit to the Department of Insurance detailed information regarding court actions in which they were involved from 1981-1985.

Section 65.

This section provides for the sunset of sections 768.73, 768.74, 768.80, and 768.81, Florida Statutes, created by this act, requires prior legislative review, and requires the legislature, in its review, to consider the findings of the Academic Task Force created by this bill, specifically to the costs and benefits of tort reform.

Section 67.

Changes the sunset dates for s. 458.320, F.S., (MD financial responsibility) and s. 459.0085, F.S., (DO financial responsibility) from January 1, 1989 to October 1, 1996.

Section 68.

ACADEMIC TASK FORCE FOR REVIEW OF THE INSURANCE AND TORT SYSTEMS

FINAL RECOMMENDATIONS

March 1, 1988

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Based upon a consideration of all these factors, the Task Force recommends that the comparative fault provisions[17] of the 1986 Act should be replaced with modified comparative fault provisions that incorporate the following features.

1. No plaintiff may recover in an action brought in negligence, product strict liability, and breach of implied warranty, including wrongful death actions brought under those theories, if the plaintiff's percentage of fault was more than the cumulative percentage of fault allocated to all defendants in the action.
2. The jury should be informed of the effects of its findings on the entitlement of the plaintiff to recover.

b. Joint and Several Liability

Both basic forms of comparative negligence impose numerous secondary policy choices for decision-makers. The most important issue is how multiple tortfeasers share the financial liability for injuries to the claimant. The traditional common law approach was one of "joint and several" liability in which any one of the defendants was liabile for the entire amount of the plaintiff's judgment. The plaintiff could collect only once for his 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. In recent years, some courts[18] and legislatures[19] have taken the opposite approach of pure several liability[20] which provides that a defendant is only liable for a proportionate share of the judgment based upon

a comparison of its relative degree of fault compared with the other defendants. Mosts states currently retain joint and several liability,[21] but a few statutes impose only several (proportionate) liability upon a defendant whose negligence was less than the plaintiff's and joint and several as to all the rest.[22]

A survey of 1987 legislation shows that fourteen states enacted laws modifying the common law of joint and several liability. Five of these adopted pure several (proportionate) liability, two adopted some version of reapportioned several liability, and seven adopted some kind of hybrid, modifying joint and several liability short of pure proportionate liability.[23]

Florida's 1986 Act[24] adopts several (proportionate) liability, except for intentional torts, designated statutory torts, negligence judgments not exceeding $25,000, and for economic damages as against a defendant who is not less negligent than plaintiff. Joint and several liability is retained for the excepted categories.

The Task Force has considered a range of alternatives, including joint and several liability, several (proportionate) liability, reapportioned (percent of a percent) several liability, several (proportionate) liability for defendants less at fault than plaintiff, no liability for defendants less at fault than plaintiff, as well as retaining the basic scheme of the 1986 Act.

The basic argument in favor of abolishing joint and several liability is that, once the comparative fault principle is

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accepted as governing liability, no defendant should have to pay more than the share of damages that corresponds to his share of fault. The argument for retaining joint and several liability emphasizes that each defendant was a necessary cause of plaintiff's indivisible injury (regardless of how relative fault is assigned) and should be held accountable so as to provide the optimal opportunity for plaintiff to collect his net damage award (after the appropriate deduction for his comparative negligence).

Hybrid statutes, like Florida's 1986 Act, obviously strive for some appropriate balance between these competing policies, as recommended by the American Bar Association's Report on the Action Commission to Improve the Tort Liability Systems (1987).[25] 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 the potential inequity of "deep pocket" liability for the entire judgment in larger cases where that 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 than the plaintiff.

The Task Force generally believes that this balanced policy choice should be given a chance to work. It recommends that the statutory threshold should be raised from $25,000 to $50,000, in order to approximate more closely the point at which overriding concerns about the potential inequity of "deep pocket" liability are likely to become important.

IN THE SUPREME COURT OF FLORIDA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs. CASE NO. 79,870

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

Respondents.
_____/

MARIE G. FABRE AND EDDY W. FABRE,

Petitioners,

vs. CASE NO. 79,869

ANN MARIN and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondents.
_____/

BRIEF OF RESPONDENT ANN MARIN ON THE MERITS

GROSSMAN & ROTH, P.A.
2665 South Bayshore Drive, Penthouse One
Grand Bay Plaza
Miami, Fla. 33133
-and-
PODHURST, ORSECK, JOSEFSBERG,
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(305) 358-2800

By: JOEL D. EATON
Fla. Bar No. 203513

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

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

5. The reasoning of *Messmer* is flawed.

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

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

> Section 768.81(3) provides that the court shall enter judgment against 'each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability.' The court is of the opinion that the language of the statute supports defendant's contention that a party's percentage of the total fault of all participants in the accident is the operative percentage to be considered. The use of the word 'party' simply describes an entity against whom judgment is to be entered and is not intended as a word of limitation. Had the legislature intended the apportionment computation to be limited to the combined negligence of those who happened to be parties to the proceeding, it would have so stated. The plain meaning of the word percentage is a proportionate share of the whole, and this meaning should apply in the absence of any language altering or limiting the plain meaning. . . .

588 So.2d at 611-12.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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