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** Florida Bar No. 333761

INITIAL BRIEF OF APPELLANT, ALLIED-SIGNAL, INC.

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STATEMENT OF THE CASE

This product liability action was filed by Plaintiff-Appellee, Kevin Fox ("Fox"), in the United States District Court for the Southern District of Florida. (R1-1)[1] Fox sued Allied-Signal, Inc. ("Allied"), a fan manufacturer, alleging negligence for injuries to his fingers which occurred in an accident at his workplace. (R1-5)[2] The case was tried before a jury for two days. (R1-18; R1-19).

Although Fox's employer, Eastern Airlines, was not joined as a party defendant because of statutory immunity under the Florida Workers' Compensation Act, Section 440.11, Florida Statutes (1989), the evidence demonstrated that Eastern was at fault in causing Fox's injury by permitting the blades on the fan in question to be exposed. (R2-17-19, 22-23, 29; R3-20) In fact, the trial court instructed the jury that operation of the fan without a screen is in violation of federal law governing an employer's responsibility for employee safety in the workplace. Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 654 (West 1985), 29 C.F.R. § 1910.212 (1991). Specifically, under OSHA, Fox and his employer were required to, but did not, install a guard on the fan to prevent exposure to the fan blades. (R1-20-10-11) In addition, because Fox was employed during a strike against Eastern, and had only been on the job for a short period of time, the evidence raised a question as to whether Eastern had adequately trained Fox as a mechanic.

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1 Record references are to the record transmitted by the United States Court of Appeals for the Eleventh Circuit. References to the documents in the court file are to the volume, document number and page number, i.e. R1-1-1; references to the trial transcript are to the volume and page number, i.e. R2-1.

2 The amended complaint will be referenced as the operative pleading.

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Allied requested that the jury be permitted to consider and assess the percentage of Eastern's fault in apportioning the fault of the parties to the suit. (R1-20-23-24) Allied submitted a proposed jury verdict form which included a place for the jury to apportion Eastern's fault. (R1-20-23-24) Allied argued that such a procedure was required under Florida's Tort Reform Act, Section 768.81, Florida Statutes (1989). The trial court denied the request and the jury was only permitted to apportion the fault of the parties to the suit, Fox and Allied. (R1-21)

The jury returned a verdict finding Fox thirty percent (30%) negligent and Allied seventy percent (70%) negligent and assessing damages of $350,000.00. (R1-21) The trial court reduced the award by the amount of Fox's comparative negligence and entered an amended final judgment for Fox in the amount of $245,000.00. (R1-25)

Allied's motion for new trial was denied and an appeal ensued to the United States Court of Appeals for the Eleventh Circuit. (R1-27; R1-28; R1-42; R1-43) During the pendency of the appeal, Florida's Fifth District Court of Appeal decided *Messmer v. Teachers Insurance Co.*, 588 So. 2d 610 (Fla. 5th DCA 1991), *rev. denied,* 598 So. 2d 77 (Fla. 1992), and ruled that Section 768.81, Florida Statutes, requires consideration of a non-party's fault in apportioning liability of the parties to the suit.[3] Just prior to oral argument before the Eleventh Circuit, the Third District Court of Appeal held that the liability of a non-party should not be considered in apportioning liability of parties to a suit. *Fabre v. Marin,* 597 So. 2d 883 (Fla. 3d DCA 1992).[4]

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[3] This Court denied review in *Messmer.*

[4] The *Fabre* case is presently pending before this Court. *See* Consolidated Case Nos. 79,870 and 79,869.

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Based on the conflict of decisions between the Fifth and Third Districts, the Eleventh Circuit Court of Appeals certified the following issue to this Court, pursuant to Article 5, Section 3(b)(6) of the Florida Constitution and Rule 9.150, Florida Rules of Appellate Procedure:

> 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 (11th Cir. 1992).

STATEMENT OF THE FACTS

On March 9, 1990, Kevin Fox, a mechanic at Eastern Airlines, was injured when his fingers were caught in the rotating blades of a fan he was servicing. The fan, model number 73FA18, was manufactured by Allied-Signal, Inc. Fox was employed as a general mechanic by Eastern Airlines during a strike in 1989. (R2-8, R3-7) When Fox was first hired by Eastern, he testified that he and about 100 other new hirees were put through a two and a half day indoctrination session, which consisted of instruction on Eastern's manuals and procedures. (R2-8) He was not given any formal training as a mechanic by Eastern. (R2-9) Fox testified that, in accordance with the normal routine at Eastern, he would be given a part to service or repair and a manual for reference. (R2-9) In mid-February of 1990, Fox first began working on fans. (R2-10) Fox had been working on fans for approximately three weeks prior to his accident. (R2-12)

On the date of the accident, Fox testified that he followed the procedures in the manual provided by Eastern, and that the manual did not call for use of a screen when testing the fan. (R2-17-19) The manual included instructions from the manufacturer. (R2-21) Fox testified

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that after servicing the fan, he let it run for approximately ten minutes. He was preparing to perform a speed test, when he reached over to the left side of the fan to pick up a strobe light, which was used for checking the speed. (R2-23) Fox testified that as his left hand passed the outer rim of the fan it was sucked into the fan blades. (R2-24) Four fingers on the hand were injured. (R2-25-26)

Fox's supervisor testified that in training Fox to work on fans he instructed Fox to always use a safety screen. (R3-14-15) The supervisor testified that it was Eastern's policy to require use of a safety screen when testing fans and that use of a screen was mandated by OSHA. (R3-15) The supervisor testified that the purpose of a screen is to prevent the mechanic from being injured, as well as to keep objects from getting into the fan. (R3-17)

Although evidence of Eastern's negligence was presented to the jury, the trial court did not permit the jury to apportion any fault for Fox's accident to Eastern.

ISSUE

WHETHER, IN DETERMINING A PARTY'S "PERCENTAGE OF FAULT" PURSUANT TO SECTION 768.81(3), FLORIDA STATUTES, IT IS NECESSARY TO CONSIDER THE FAULT OF ALL PARTIES INVOLVED IN AN ACCIDENT, NOT JUST THOSE PARTIES NAMED AS DEFENDANTS IN A LAWSUIT.

SUMMARY OF ARGUMENT

Plaintiff Fox was injured while on the job when his fingers were caught in a fan which was not covered with a protective screen to shield the blades. The evidence at trial demonstrated that Fox's employer, Eastern Airlines, violated the federal Occupational Health and Safety Act by failing to ensure the safety of its employees when it allowed fan blades to be exposed. Eastern, however, could not be sued by Fox because he obtained Workers'

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Compensation benefits and therefore, was precluded from bringing suit by the Florida Workers' Compensation Act. Accordingly, Allied, the manufacturer of the fan, was the only named party defendant.

Allied argued to the trial court that the jury should be allowed to consider the fault of Eastern, the non-party joint tortfeasor, under Section 768.81(3), Florida Statutes, which is part of the comprehensive Tort Reform Act. That statute requires that the court enter judgment against each party liable *on the basis of such party's percentage of fault,* and not on the basis of joint and several liability. The trial court refused to allow the jury to apportion the fault of the non-party.

Subsequent to the trial court's denial of Allied's motion for new trial, the Fifth District Court of Appeal of Florida addressed the question of whether Section 768.81, Florida Statutes mandates consideration of a non-party's comparative fault in apportioning the liability of the parties to the suit. In *Messmer v. Teacher's Insurance Co.*, 588 So. 2d 610 (Fla. 5th DCA 1991), *rev. denied,* 598 So. 2d 77 (Fla. 1992), the court answered the question in the affirmative holding that a party to the lawsuit is only liable for its percentage share of the fault. The conclusion in *Messmer* is supported by the unambiguous language of the statute and the legislative intent to completely abolish joint and several liability for non-economic damages and partially abolish the doctrine for economic damages.

Subsequently, in *Fabre v. Marin,* 597 So. 2d 883 (Fla. 3d DCA 1992), the Third District Court of Appeal held that the liability of a non-party could not be considered in apportioning liability of parties to a lawsuit. The court found that the term "party," as used in Section 768.81(3) was ambiguous. The court incorrectly concluded that because the statute

directs a court to "enter judgment against each party liable," the statute only permits apportionment among parties to a lawsuit, because a court has no jurisdiction to enter a judgment against a non-party. The appellant is not, however, contending that a court should enter judgment against a non-party. The statute provides that a judgment must be based on a party's "percentage of fault," and it is impossible to determine that percentage without considering the fault of all parties involved in an accident. In *Fabre,* the court disregarded the clear and unambiguous language of Section 768.81(3) and concluded that a party should be held liable for more that its "percentage of fault."

Courts in other jurisdictions have recognized that true apportionment must include consideration of the fault of all parties involved in an accident. In considering a statute virtually identical to Section 768.81(3), Florida Statutes, the California Supreme Court unanimously held that the statute was unambiguous and required consideration of all fault responsible for a plaintiff's injuries, not just the fault of defendants present in a lawsuit.

For the foregoing reasons, this Court should answer the certified question from the Eleventh Circuit in the affirmative and hold that Section 768.81(3), Florida Statutes, requires consideration of a non-party's fault in order to accurately determine a party defendant's "percentage of fault."

ARGUMENT

IN DETERMINING A PARTY'S "PERCENTAGE OF FAULT" PURSUANT TO SECTION 768.81(3), FLORIDA STATUTES, IT IS NECESSARY TO CONSIDER THE FAULT OF ALL PARTIES INVOLVED IN AN ACCIDENT, NOT JUST THOSE PARTIES NAMED AS DEFENDANTS IN A LAWSUIT.

In 1986, Florida enacted Section 768.81(3), Florida Statutes (1989), which is part of a comprehensive Tort Reform Act. That section provides:

> (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.

Under the Act, "the court shall enter judgment against each party liable *on the basis of such party's percentage of fault.*" Section 768.81(3), Florida Statutes (emphasis added). The language of the statute completely abolished joint and several liability for non-economic damages and partially abolished joint and several liability for economic damages.

Two District Courts of Appeal in Florida have considered whether Section 768.81(3) permits consideration of a non-party's fault in apportioning the liability of party defendants. The Fifth District ruled that a non-party's fault could be considered in *Messmer v. Teacher's Insurance Co.*, 588 So. 2d 610 (Fla. 5th DCA 1991), *rev. denied,* 598 So. 2d 77 (Fla. 1992). The Third District held to the contrary in *Fabre v. Marin,* 597 So. 2d 883 (Fla. 3d DCA 1992). Appellant will show the Court that the *Messmer* case was correctly decided and should be approved by this Court.

A. The case of *Messmer v. Teacher's Insurance Co.* was correctly decided.

In *Messmer v. Teacher's Insurance Co.*, 588 So. 2d 610 (Fla. 5th DCA 1991), *rev. denied,* 598 So. 2d 77 (Fla. 1992), the Fifth District Court of Appeal of Florida held that the language of Section 768.81(3) mandates apportionment based upon fault. In *Messmer,* plaintiff was in an automobile accident while riding as a passenger with her husband. The driver of the other vehicle had no liability insurance and therefore, plaintiff filed a claim against her uninsured motorist carrier. The claim was submitted to arbitration which resulted in an award

in favor of plaintiff. The arbitrators, however, had determined that the uninsured motorist was only twenty percent at fault, while plaintiff's husband was eighty percent at fault. Accordingly, in the proceeding to enforce her award, the trial court found that the insurance company was only responsible for the uninsured motorist's percentage of fault - twenty percent. The Fifth District upheld the ruling, finding that Section 768.81, Florida Statutes requires apportionment according to *fault* rather than *joint and several liability* for the total amount of plaintiff's damages. On appeal, the plaintiff argued that the term "party" as used in the statute meant party to the lawsuit. The court rejected that argument stating:

> 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. *See Holly v. Auld,* 450 So. 2d 217 (Fla. 1984).

Messmer, 588 So. 2d at 611-12. Therefore, the court correctly focused upon the term "percentage," and held that "a party's percentage of the total fault of all participants in the accident is the operative percentage to be considered." *Id.*

The appellate court also based its opinion on the legislative intent behind the statute, which "was to implement a system of equating fault with liability" and to partially abrogate joint and several liability. *Messmer,* 588 So. 2d at 612. Under joint and several liability, a Plaintiff is permitted to recover one hundred percent of his damages from any of several joint tortfeasors, whether or not one tortfeasor is more or less at fault than the others. *See generally* Prosser and Keeton, *The Law of Torts* 322-28 (W. Keeton 5th ed. 1984). The Florida legislature amended Section 768.81 to partially abrogate joint and several liability as part of a

larger effort to alleviate the tort and liability insurance crisis. 1986 Fla. Sess. Law Serv. 86-160 (West). Thus, the court in *Messmer* reasoned:

> The obvious purpose of the statute was to partially abrogate the doctrine of joint and several liability by barring its application to non-economic damage. To exclude from the computation the fault of an entity that happens not to be a party to the particular proceeding would thwart this intent. The subject case is a perfect example. If the court were to adopt plaintiff's view, although defendant was only chargeable with 20% of the fault, it would be required to pay 100% of the damages, both economic and non-economic. This becomes the equivalent of joint and several liability, which the legislature obviously was intending to eliminate.

Messmer, 588 So. 2d at 612.

In *Messmer,* the court also noted that the legislative intent was reflected by this court's pronouncement in *Conley v. Boyle Drug Co.*, 570 So. 2d 275 (Fla. 1990), which adopted a market share theory of liability in DES cases. In *Conley,* the court determined that a drug company should be held liable only for its percentage share of the damages, recognizing that such a result is required under Section 768.81. In effect, the court in *Conley* recognized that the market share approach could result in a plaintiff recovering less than his entire amount of damages assuming all party defendants proved their actual degree of fault or "share." *See Messmer,* 588 So. 2d at 612.

Furthermore, in *Messmer* as here, the non-party was immune from suit. Nevertheless, the *Messmer* court held "the fact that [one] is not amenable to suit because of interspousal immunity (*or any other ground*) is irrelevant." *Messmer*, 588 So. 2d at 612 (emphasis added); *accord* Prosser, *supra,* at 475-76 ("the failure to consider the negligence of all tortfeasors, *whether parties or not,* prejudices the joined defendants who are thus required to bear a greater portion of the plaintiff's loss than is attributable to their fault.")

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B. The case of *Fabre v. Marin* was wrongly decided.

In *Fabre v. Marin,* 597 So. 2d 883 (Fla. 3d DCA 1992), a jury determined that the plaintiff's husband was fifty percent at fault for the injuries she sustained as a passenger in his automobile and that the defendant, Marin, the driver of the automobile which cut off the Fabre vehicle in traffic was fifty percent at fault. Mrs. Marin could not sue her husband because of the doctrine of interspousal immunity. The trial court refused to limit the defendant's liability to 50% of the damages awarded, and the Third District affirmed.

In *Fabre,* the Third District Court of Appeal ruled that Section 768.81(3) does not permit consideration of the fault of a non-party in determining the percentage of fault of parties to a lawsuit. The court reached this conclusion by holding that the statute was ambiguous. In particular, the court found that the term "party" was ambiguous, as used in Section 768.81(3), which provides:

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

597 So. 2d at 885.

The court found that the term "party" did not refer to all persons involved in an accident because a court lacks jurisdiction to enter a judgment against non-parties. The court simply missed the point. No defendants are contending 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 an accident.

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In *Fabre,* the court correctly noted that, "the legislature promulgated subsection three to limit liability to a defendant's degree of fault." *Id.* Despite recognition of that clear legislative intent, the court incorrectly rejected the argument that "the judgment against [defendants] should be equated to their percentage of fault." In refusing to limit liability to the defendant's percentage of fault, the court stated, "We do not agree that the legislature's intent in promulgating this subsection was to deprive a fault-free innocent plaintiff of recovery."[5] *Id.* The court noted that subparagraph (2) of Section 768.81 provides for reduction of a claimant's award by the percentage of the claimant's contributory negligence. The court was apparently of the opinion that in every instance a fault-free plaintiff should recover one hundred percent of his or her damages and that a plaintiff's recovery may not be diminished by any amount except the percentage of the plaintiff's own fault. The court stated that the "legislature provides for a reduction in the claimant's recovery only as a result of the claimant's own fault." *Id.*

Subsection (2) is simply a codification of *Hoffman v. Jones,* 280 So. 2d 431 (Fla. 1973), in which this court adopted the doctrine of comparative negligence. It is not a legislative guarantee that a fault-free plaintiff will always recover one hundred percent of his or her damages. In *Fabre,* the court overlooked the fact that there are many situations where a "fault-free innocent plaintiff" does not recover one hundred percent of his or her damages. For instance, where a claimant is injured due to the negligence of an uninsured judgment-proof tortfeasor, that "fault-free innocent plaintiff" will recover zero percentage of his or her damages. Based on the decision in *Fabre,* and based on the doctrine of joint and several

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[5] In the case at bar, the jury found the plaintiff was 30% at fault. The jury was not permitted to determine the fault of plaintiff's employer, Eastern.

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liability, if a claimant sues a defendant that is even one percent liable, the plaintiff will get a windfall and recover one hundred percent of his or her damages.

In *Fabre,* the Third District focused *solely* on the plaintiff and decided it would be unfair "[t]o reduce Mrs. Marin's recovery by half, through no fault attributable to her. . ." *Id.* at 886. What the court totally ignored was that the effect of its decision would be to *double* the liability of the defendant and require it to pay an additional fifty percent of plaintiff's damages through no additional fault attributable to the defendant. The inequity of forcing a defendant to bear liability in excess of its fault is exactly why the legislature adopted Section 768.81(3). The clear and unambiguous language of the statute should be given effect and the intent of the legislature "to limit liability to a defendant's degree of fault" should be carried out.

Under the doctrine of joint and several liability, a tortfeasor with a deep pocket could be forced to pay damages for the negligence of a tortfeasor with an empty pocket. *See Walt Disney World Co. v. Wood,* 515 So. 2d 198 (Fla. 1987) (operator of amusement park required to pay 86% of damages sustained by driver of bumper car who was injured when her car was struck by a car driven by her fiance, despite jury's determination that driver was 14% at fault; her fiance was 85% at fault; and the park operator was only 1% at fault.) In the *Wood* case this court declined the opportunity to abolish the doctrine of joint and several liability, finding "the viability of the doctrine is a matter which should best be decided by the legislature." *Id.* at 202.

The legislature has clearly and unambiguously provided that "the court shall enter judgment against each party liable on the basis of such party's percentage of fault. . . ." That percentage can *only* be determined by considering the fault of all parties to an accident. If a

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defendant is forced to pay more that its true percentage of liability, then that defendant is being held jointly and severally liable, in direct contravention of the statute and in total disregard of the legislature's intent. Despite the Third District's conclusion to the contrary, there is nothing unfair about apportionment. The Third District focused exclusively on the plaintiff and determined that she should receive one hundred percent of her damages, while totally ignoring the fact that the defendant was only responsible for fifty percent of those damages.

As aptly noted by then Chief Justice McDonald, dissenting in *Walt Disney World v. Wood, supra:*

> If we are ever to achieve a just and equitable tort system, we must predicate a party's liability upon his or her blameworthiness, not upon his or her solvency or a codefendant's susceptibility to suit. [Citation omitted.] Those who argue for favoring the plaintiff merely because he or she is the plaintiff have lost sight of the paramount goal of comparative negligence.
>
> By adopting pure comparative negligence in *Hoffman* [*v. Jones,* 280 So. 2d 431 (Fla. 1973)], this Court set for itself the goal of creating a tort system that fairly and equitably allocates damages. [Citation omitted.] Basing a defendant's liability upon the ability of others to pay runs counter to *Hoffman's* pronouncement that liability of the defendant should not depend upon what damages were suffered, but upon what damages the defendant caused. [Citation omitted.]

515 So. 2d at 205-6 (McDonald, J., dissenting).

The decision of the Third District in *Fabre,* which would require a fifty percent liable defendant to pay one hundred percent of plaintiff's damages, is wrong because "liability of the defendant should not depend upon what damages were suffered, but upon what damages the defendant caused." *Hoffman,* 280 So. 2d at 439. Section 768.81(3) clearly and unambiguously provides for entry of a judgment based on a party's "percentage of fault." That percentage of fault cannot be determined without consideration of the fault of all *parties involved in an*

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accident. There is no language whatsoever in Section 768.81(3) which provides that apportionment is limited to the *parties involved in a lawsuit.*

C. Courts in other jurisdictions recognize that true apportionment must include all parties to an accident.

Courts in other jurisdictions have consistently recognized that true apportionment cannot be achieved unless that apportionment includes all parties guilty of negligence, whether or not they are parties to the lawsuit. *See, e.g., Prince v. Leesona Corp., Inc.*, 720 F.2d 1166, 1168-69 (10th Cir. 1983) (applying Kansas law); *Johnson v. Niagara Machine & Tool Works,* 666 F.2d 1223, 1226 (8th Cir. 1981) (applying Minnesota law); *DaFonte v. Up-Right, Inc.*, 2 Cal. 4th 593, 7 Cal. Rptr. 2d 238, 243-45, 828 P.2d 140 (Cal. 1992); *Bode v. Clark Equipment Co.*, 719 P.2d 824, 827 (Okla. 1986); *Bowman v. Barnes,* 168 W. Va. 111, 282 S.E. 2d 613, 621 (W. Va. 1981); *Pocatello Industrial Park Co. v. Steel West, Inc.*, 101 Idaho 783, 621 P.2d 399, 402-03 (Idaho 1980); *Paul v. N.L. Industries, Inc.*, 624 P.2d 68, 70 (Okla. 1980); *Lines v. Ryan,* 272 N.W. 2d 896, 902 (Minn. 1978); *Brown v. Keill,* 224 Kan. 195, 580 P.2d 867, 875-76 (Kan. 1978); *Connar v. West Shore Equipment of Milwaukee, Inc.*, 68 Wis. 2d 42, 227 N.W. 2d 660, 662 (Wis. 1975); *Payne v. Bilco Co.*, 54 Wis. 2d 424, 195 N.W. 2d 641, 645-46 (Wis. 1972). As recognized by the Supreme Court of Oklahoma in *Paul, supra:*

> To limit the jury to viewing the negligence of only one tortfeasor and then ask it to apportion that negligence to the overall wrong is to ask it to judge a forest by observing just one tree. It cannot, and more important should not, be done. It simply is not fair to the tortfeasor which plaintiff chooses to name in his lawsuit.

624 P.2d at 70.

The decision of the California Supreme Court in *DaFonte v. Up-Right, Inc., supra,* is of particular importance because it is factually and legally indistinguishable from the case at bar. In that case the plaintiff, *DaFonte,* was injured on the job when his arm was sucked into a moving conveyor belt on a grape harvester. The plaintiffs brought a product liability action against the manufacturer of the harvester. 828 P.2d at 141. There was evidence that the harvester lacked a guard and that the plaintiff was inadequately supervised by this employer. In a special verdict, the jury allocated fault as follows: 15 percent to the plaintiff; 45 percent to the employer and 40 percent to the manufacturer. 828 P.2d at 141-42.

In considering whether the fault of the non-party employer should have been apportioned by the jury, the California Supreme Court examined the history leading up to California's partial abrogation of joint and several liability. The court noted that even after judicial adoption of a comparative negligence system in California, the doctrine of joint and several liability remained viable. This is, of course, identical to the situation in Florida, where this Court judicially adopted comparative negligence in *Hoffman v. Jones,* 280 So. 2d 431 (Fla. 1973) and adhered to the doctrine of joint and several liability in *Walt Disney World Co. v. Wood,* 515 So. 2d 198 (Fla. 1987).

In 1986, the voters in California adopted Proposition 51, an initiative measure designed to modify the doctrine of joint and several liability. Proposition 51 added Section 1431.2 to the California Civil Code, which provides that in actions for wrongful death, personal injury or property damage:

> [T]he liability of each defendant for non-economic damages shall be several only and shall not be joint."
>
> * * *

> Each defendant shall be liable only for the amount of 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.

828 P.2d at 143. [Emphasis supplied.]

Similarly, in 1986, the Florida legislature enacted a comprehensive Tort Reform Act, including Section 768.81(3), which provides:

> [T]he 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. . . .

[Emphasis supplied.]

In holding that Section 1431.2 was *not* ambiguous, a unanimous California Supreme Court stated:

> Section 1431.2 declares plainly and clearly that in tort suits 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." 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. On the contrary, section 1431.2 expressly affords relief to every tortfeasor who *is* a liable "defendant," and who formerly *would* have had full joint liability.
>
> * * *
>
> [S]ection 1431.2 itself contains no ambiguity which would permit resort to . . . extrinsic constructional aids. The statute plainly attacks the issue of joint liability for noneconomic tort damages root and branch. In every case, it limits the joint liability of every "defendant" to economic damages, and it shields every "defendant" from any share of noneconomic damages beyond that attributable to his or her own comparative fault. The statute contains no hint that a "defendant" escapes joint liability only for noneconomic damages attributable to fellow "defendants" while remaining jointly liable for noneconomic damage caused by others.

828 P.2d at 145.

Noting that the purpose of Proposition 51 was to limit liability to a defendant's percentage of fault, the court stated:

> The express purpose of Proposition 51 was to eliminate the perceived unfairness of imposing "all the damage" on defendants who were "found to share [only] a fraction of the fault." (§ 1431.1, subd. (b).) In this context the only reasonable construction of section 1431.2 is that a "defendant['s]" liability for noneconomic 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 "defendant[s]" present in the lawsuit.

Id. at 146. [Emphasis supplied.]

The decision of the California Supreme Court in *DaFonte* is thoughtful, well reasoned and logical. Appellee, Fox, would have this court reject the California court's decision and fashion a more liberal rule for the benefit of plaintiffs. This Court should find, as the court did in *DaFonte,* that the apportionment statute is clear and unambiguous and requires a consideration of the fault of all parties responsible for plaintiff's injuries, not just the parties present in the lawsuit.

CONCLUSION

This Court should answer the certified question from the United States Court of Appeals 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

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 9th day of October, 1992, to: DONALD T. NORTON, ESQ., Cohen & Cohen, P.A., (Co-counsel for Appellee), 2525 North State Road 7 (441), Hollywood, FL 33021; G.

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