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IN THE SUPREME COURT OF FLORIDA

LINDA McGHEE,

Petitioner,

v. CASE NO. 85,636

DEPARTMENT OF CORRECTIONS,

Respondent.

BRIEF OF FLORIDA DEFENSE LAWYERS ASSOCIATION, AMICUS CURIAE

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PRELIMINARY STATEMENT

In this brief, Respondent State of Florida, Department of Corrections, defendant in the trial court, will be referred to as "the Department." Petitioner Linda McGhee, plaintiff in the trial court, will be referred to as "McGhee." Third party defendants Bruner and Wollard, inmates who escaped from the custody of the Department, will be referred to as "the inmates."

All emphasis herein is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

For purposes of this Amicus Curiae Brief,[1] the pertinent facts are simple and straightforward. McGhee sued the Department, charging that the Department was negligent in maintaining custody of the inmates, resulting in their escaping and intentionally inflicting injury on McGhee. The Department filed a third-party claim against the inmates. The inmates' acts in inflicting injury on McGhee were intentional torts. The Department requested the trial court to include the inmates' fault in the jury's apportionment of fault under Section 768.81, Florida Statutes. The trial court did so, and the jury allocated 50% of the fault to the Department and 25% of the fault to each of the inmates.

This appeal ensued, and McGhee cross-appealed, asserting that the fault of the inmates should not have been considered in the

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[1]The interest of Florida Defense Lawyers Association in this case is limited to the issue concerning the proper application of Section 768.81, Florida Statutes. We take no position on any other issue involved in this cause.

jury's allocation of fault or the resulting judgment. The District Court of Appeal reversed the trial court on other grounds, holding that no common law or statutory duty existed in favor of McGhee, and certified that question as being of great public importance. The majority opinion of the District Court did not reach the issue addressed in this brief; Judge Ervin, concurring and dissenting, would have affirmed the trial court on this issue.

In her Initial Brief in this Court, McGhee does not raise the issue addressed in this brief, other than to request leave to file a supplemental brief if the Court decides to address this issue. Initial Brief at 10. Having accepted jurisdiction, the Court has the authority to rule on this issue, as McGhee implicitly recognizes. See Marley v. Sanders, 249 So.2d 30 (Fla. 1971). Accordingly, we will address the issue at this point. We will assume that, in any such supplemental briefs, McGhee and the Academy will make the same arguments they raised in the District Court of Appeal and that the Academy made in Stellas v. Alamo Rent-A-Car, Inc., Case No. 94-2583, Third District Court of Appeal, and we will respond to those arguments. Since the issue addressed in this brief need not be reached unless this Court answers the certified question in the affirmative, we have assumed for purposes of argument that the Department may be liable to McGhee for breaching a duty to maintain custody and control of the inmates.

SUMMARY OF THE ARGUMENT

For several decades, Florida's jurisprudence has been moving towards a system in which a negligent party's liability is measured

by the extent of fault, rather than the extent of wealth. Under Section 768.81, Florida Statutes, the jury must now consider the relative fault of all entities involved, even if the entity is not a party to the litigation. McGhee's claim against the Department in the instant case sounds in negligence, and thus the fault of all entities -- including intentional tortfeasors -- must be considered in determining the extent of the Department's fault and resulting liability.

A negligent defendant is entitled to have the fault of other entities considered by the jury, so as to reduce that defendant's liability, even if that other entity is immune from suit. A negligent defendant is entitled to the benefits of this statute if the other at-fault entity is negligent. There can be no principled justification for depriving that same defendant of the benefits of the statute when the other entity is instead an intentional tortfeasor. A defendant's liability should not be arbitrarily increased because some other party behaved more egregiously than the defendant.

The language of Section 768.81, Florida Statutes, does not compel such an absurd result. The statutory benefits are not available of an intentional tortfeasor, but they remain fully available to a negligent defendant who, along with the intentional tortfeasor, was at fault in causing plaintiff's injury.

That result is fully consistent with analogous case law interpreting the contribution statute. Like Section 768.81, Florida Statutes, the contribution statute allocates liability

based on extent of fault, but its benefits are not available to intentional tortfeasors. Contribution actions can nonetheless be maintained by a negligent defendant against an intentional tortfeasor. The same result should follow under the instant statute. The benefits of the proportionate liability statute are not available to an intentional tortfeasor, but a negligent defendant is entitled to those benefits even if an intentional tortfeasor is also involved in causing plaintiff's injury. The trial court should be affirmed on this issue.

ARGUMENT

WHERE THE CLAIM AGAINST DEFENDANT SOUNDS IN NEGLIGENCE, SECTION 768.81, FLORIDA STATUTES, REQUIRES THAT THE ALLOCATION OF FAULT INCLUDE ALL ENTITIES WHOSE FAULT CONTRIBUTED TO PLAINTIFF'S INJURY.

For a number of years, the jurisprudence of Florida has been moving towards a system in which the extent of a party's liability is measured by the extent of that party's fault, not by the extent of that party's wealth. In Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), this Court discarded the rule of contributory negligence and replaced it with comparative negligence, reasoning that the most equitable result that could ever be reached is the equation of liability with fault. If fault is to remain the test of liability, the Court reasoned, a doctrine which apportions the loss among those whose fault contributed to the occurrence is more consistent with liability based on a fault premise.

The purposes of adopting comparative negligence were: (1) to allow a jury to apportion fault as it sees fit between those whose fault was part of the legal and proximate cause of any loss or injury; and (2) to apportion the total damages resulting from the loss or injury according to the proportionate fault of each party. Walt Disney World Co. v. Wood, 515 So.2d 198 (Fla. 1987); Hoffman v. Jones, supra.

Two years later, in Lincenberg v. Issen, 318 So.2d 386 (Fla. 1975), this Court abolished the rule precluding contribution among joint tortfeasors, recognizing that the doctrine was inconsistent with the purposes of comparative negligence. In its place, the

Court adopted the principle of pro rata contribution, consistent with the Legislature's then-recent enactment of Section 768.31, Florida Statutes. It would be undesirable, the Court reasoned, to retain a rule that, under a system based on fault, casts the entire burden of a loss for which several may be responsible on only one of those at fault. Lincenberg v. Issen, supra.

Thereafter, the Legislature amended the Contribution Among Joint Tortfeasors Act. In its present form, Section 768.31(3), Florida Statutes, provides that in determining the pro rata contribution shares of tortfeasors, their relative degrees of fault shall be the basis for the allocation of liability.

Subsequently, the Legislature enacted Section 768.81, Florida Statutes, which substantially modified the doctrine of joint and several liability. Where this statute applies,[2] joint and several liability is replaced by a system under which each defendant's liability for non-economic damages is governed solely by, and is equal to, its percentage of causal fault. Likewise, each defendant's liability for economic damages is governed by and equal

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[2]Essentially, the statute applies to negligence cases. Section 768.81(4), Florida Statutes. It does not apply to causes of action which arose before July 1, 1986. Chapter 86-160, Sections 49, 50, 60, Laws of Florida. It does not apply where the total damages do not exceed $25,000. Section 768.81(5), Florida Statutes. Certain medical malpractice actions are apparently governed by the provisions of Section 766.112, Florida Statutes, rather than by the provisions of Section 768.81, Florida Statutes. Finally, it provides 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 the claimant's economic damages against that party on the basis of the doctrine of joint and several liability. Section 768.81(3), Florida Statutes.

to its percentage of causal fault unless that defendant is at least as much at fault as the plaintiff -- in which case, that defendant's liability for economic damages is governed by the doctrine of joint and several liability.

Recently, this Court in Wells v. Tallahassee Memorial Regional Medical Center, Inc., 20 F.L.W. S278 (Fla. 1995), continued the trend of equating percentage of liability with percentage of fault by holding that a non-settling defendant was entitled to a setoff for amounts paid by settling defendants only to the extent that such settlements represent payment of amounts for which the settling and non-settling defendants would have been jointly and severally liable. Thus, to the extent that a non-settling defendant's judgment liability represents his or her own percentage of fault, that fault-based allocation of liability is not affected by settlements reached with other at-fault entities. Each defendant's percentage of fault remains the measure of that defendant's liability.

It is now settled that this statutory provision requires jury consideration of the extent of fault of every entity involved in causing the plaintiff's injuries, even if that entity is not (or cannot be) a party to the lawsuit. Fabre v. Marin, 623 So.2d 1182 (Fla. 1993); Allied-Signal, Inc. v. Fox, 623 So.2d 1180 (Fla. 1993); Messmer v. Teacher's Insurance Co., 588 So.2d 610 (Fla. 5th DCA 1991), rev. den., 598 So.2d 77 (Fla. 1992).

The scope of the Court's decisions in Fabre and Allied-Signal is not limited solely to negligence actions, but includes, for

instance, actions sounding in strict liability. See, American Aerial Lift, Inc. v. Perez, 629 So.2d 169 (Fla. 3d DCA 1993). This is in accord with the statutory language of Section 768.81(4)(a), Florida Statutes, which provides, in pertinent part:

> For purposes of this section, 'negligence cases' includes, but is not limited to, civil actions for damages based upon theories of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories. In determining whether a case falls within the term 'negligence cases,' the court shall look to the substance of the action and not the conclusory terms used by the parties.

In the instant case, it is clear that the substance of McGhee's claim against the Department is a negligence case within the meaning of Section 768.81, Florida Statutes. The Department is in no way charged with any intentional wrongdoing, but rather is charged with negligence in not maintaining custody and control of the inmates. It is the inmates -- not the Department -- who are charged with intentional wrongdoing in this case. It is the negligent party -- not the intentional tortfeasor -- which invokes the provisions of Section 768.81, Florida Statutes.

In arguing in the District Court that the present case is one "based upon an intentional tort" because the inmate's acts were intentional torts, McGhee and the Academy wholly overlooked the fundamental fact that McGhee's own claim against the Department is based on negligence by the Department. If McGhee is to recover against the Department, it is because the Department was negligent, not because the Department committed any intentional tort.

In claiming below that, because the inmates' acts were intentional, it is irrelevant that the Department's liability is based on negligence, McGhee and the Academy overlooked clear indications in the statute that such was not the legislative intent. Section 768.81(3), Florida Statutes, repeatedly speaks in terms of "percentage of fault," not in terms of "percentage of negligence" -- a clear sign that the legislature intended the statute to be applicable where some form of fault other than negligence was involved.[3] To ensure that intentional tortfeasors did not obtain the benefits of the statute, Section 768.81(4)(b), Florida Statutes, expressly makes apportionment inapplicable to actions based on intentional torts; as discussed below, that language serves to prohibit apportionment in favor of an intentional tortfeasor, but does not preclude application of the statute in favor of a negligent defendant in the same action.

In the course of its decision in Fabre, the Court quoted with approval from Brown v. Keill, 580 P.2d 867, 874 (Kan. 1978), as follows:

> There is nothing inherently fair about a defendant who was 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental

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[3]It is the failure to note this crucial distinction which lead the court astray in Doe v. Pizza Hut of America, Inc., Case No. 93-709, U.S. Dist. Ct., M.D. Fla. (1994). In the only paragraph of that four-page opinion touching on application of Section 768.81, Florida Statutes, where an intentional tort is involved, the court held that damages can only be apportioned among negligent parties found to be at fault. As we will demonstrate, that conclusion is erroneous.

> agency, and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the codefendant to pay more than his fair share of the loss.

Application of Section 768.81, Florida Statutes, in the present case continues the long-standing Florida trend of equating the extent of liability with the extent of fault. It is founded on fundamental considerations of fairness. As this Court noted, there is nothing fundamentally fair about a defendant who is 10% at fault paying 100% of the loss. Certainly there is nothing fair about compelling a negligent defendant to pay more than his or her fair share of the loss because another individual committed an intentional tort which contributed to causing the loss.

In Fabre, this Court made it clear that Section 768.81, Florida Statutes, requires the jury to consider the fault of all at-fault entities in reaching its apportionment of fault. Under Fabre and its progeny, that is true even if the other at-fault entity is a spouse, a hit-and-run driver who cannot be located, a bankrupt manufacturer, an employer who enjoys immunity from tort liability under Section 440.11, Florida Statutes, or an entity which has not been made a party to the suit for any other reason. It is equally true when the other "at-fault" entity is an intentional tortfeasor.

The fact that one "at-fault" entity is not, for whatever reason, held directly liable to the plaintiff does not magically transform the extent of fault of some other party. Thus, for instance, if Plaintiff A is 30% at fault, Defendant B 20% at fault,

and hit-and-run driver C 50% at fault in causing an injury to plaintiff, Defendant B's percentage of fault is 20% -- not 20% if C is included in the suit and 40% if it is not. Similarly in the instant case, the jury has found the Department to be 50% at fault; if the fault of the inmates is excluded, the Department's fault would be increased to 100%. Exclusion of the fault which the jury attributed to the inmates would thus double the Department's fault percentage for absolutely no valid reason.

Under the provisions of Section 768.81, Florida Statutes, a negligent defendant is entitled to have the fault of all other at-fault entities included in the computation of fault, regardless of whether the other at-fault party is an unidentified hit-and-run driver, a bankrupt corporation, or an employer whose tort liability is precluded by Section 440.11, Florida Statutes. How, then, in all fairness, can it be claimed that a negligent defendant can be deprived of the benefits of Section 768.81, Florida Statutes, simply because the other at-fault entity is an intentional tortfeasor? There can be no principled justification for such a result.

The result sought by McGhee and the Academy in the District Court of Appeal would be inequitable in the extreme. Consider the situation, for instance, where Plaintiff is 30% at fault, Defendant A 20% at fault, and Defendant B 50% at fault in causing plaintiff's injuries. If both defendants are negligent, Defendant A's liability is limited to 20% of plaintiff's damages. If, however, McGhee's position is accepted, and if Defendant B is an intentional

tortfeasor, Defendant A (who was merely negligent) would be held responsible for 40% of the damages[4] -- even though that defendant's negligence caused only 20% of the damages and the intentional tort of Defendant B comprised 50% of the causal fault (and plaintiff's own negligence an additional 30%).[5] There simply can be no principled reason for claiming, in such a situation, that negligent Defendant A can only be held responsible for 20% of plaintiff's damages if Defendant B was also negligent, but that Defendant A is

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[4]Even the 40% figure is a best-case scenario, and assumes that the jury allocates fault between plaintiff and Defendant A in precisely the same ratio whether or not the fault of the intentional tortfeasor is considered. More likely, the jury would, in most cases, simply continue attributing 30% of the causal fault to plaintiff and hold Defendant A responsible for the full remaining 70% of the fault. In that situation, negligent Defendant A is held liable for intentional tortfeasor B's fault even though there is no basis for imposing vicarious liability.

Nonetheless, we will assume for purposes of this brief that the jury would apply a constant ratio of fault between the plaintiff and the negligent defendant.

[5]Moreover, exclusion of the intentional tortfeasor's fault would also increase the comparative negligence of the plaintiff in this hypothetical to 60%. Assuming that damages were $100,000, inclusion of the intentional tortfeasor in the fault allocation would result in plaintiff obtaining a judgment against A for $20,000 and a judgment against B for $70,000 (of which $20,000 would represent B's joint and several liability), for a potential recovery of $70,000. On the other hand, if the intentional tortfeasor is to be excluded from the allocation, plaintiff's recovery would be limited to $40,000 (the $100,000 damage award reduced by plaintiff's 60% comparative negligence). Plaintiff's total recovery would be significantly reduced (subject, of course, to any subsequent suit plaintiff might be able to maintain against intentional tortfeasor B), and negligent defendant A's liability would be doubled, even though their relative degrees of fault were unchanged. The net effect of this approach is to shift part of B's liability (for an intentional tort) to A (who was merely negligent) -- directly contrary to the intent of Section 768.81, Florida Statutes, to equate each party's liability with the extent of its own fault.

liable for 40% of plaintiff's damages if Defendant B was an intentional tortfeasor. That result would double the liability of Defendant A simply and solely because another party acted more egregiously than Defendant A did.

It is wholly inequitable to hold Defendant A responsible for only 20% of the damages where the other tortfeasor was merely negligent but, without in any other way changing the situation, to hold Defendant A liable for 40% of the damages where the other tortfeasor committed an intentional tort. That result is nothing more or less than shifting part of the intentional tortfeasor's liability to the merely negligent defendant -- and doing so <u>because</u> the party whose fault has been ignored <u>is</u> an intentional tortfeasor rather than a negligent tortfeasor. Considerations of equity, fundamental fairness, and simple justice demand that such a result be rejected out of hand.

A defendant is entitled to the benefits of Section 768.81, Florida Statutes, if the other tortfeasor is a negligent co-defendant. A defendant is entitled to those benefits if the other tortfeasor is a negligent entity which was, for some reason, simply not joined as a party. A defendant is entitled to those same benefits if the other tortfeasor is an entity which, for whatever reason, <u>could not</u> be joined as a party. In each case, the rationale is the same: the defendant's percentage of fault in causing the plaintiff's injuries is fixed (albeit inchoate and unknowable) at the time of the causative acts, and does not

subsequently change based on the happenstance of whether other at-fault entities are, or could be, joined in the litigation.

Precisely that same rationale compels the conclusion that the negligent defendant is entitled to the benefits of Section 768.81, Florida Statutes, if the other at-fault entity is an intentional tortfeasor. Once again, the defendant's percentage of fault is fixed (albeit inchoate and unknowable) at the time of the causative events. The mere fact that the other tortfeasor's acts are more egregious than the defendant's (because the other tortfeasor is an intentional tortfeasor, not a negligent tortfeasor) should not -- and must not -- alter that result.

In Kansas, where McGhee's theory has been accepted, the result has been cogently criticized with the following hypothetical:

> Assume that a visibly intoxicated third person in the restaurant negligently stumbles into and knocks down one guest, then intentionally pushes down another guest. In each case the restaurant breached its duty in the same manner -- by failing to remove the intoxicated person from the premises before he harmed a guest. The results, however, vary. The restaurant is liable for only a proportionate fault share of the damages suffered by the first guest, but is jointly and severally liable for all damages suffered by the second guest.

Westerbeke and Robinson, Survey of Kansas Tort Law, 37 Kan. L. Rev. 1005, 1049 (1989).

McGhee and the Academy argued in the District Court of Appeal that permitting allocation in the present situation violates the principle that a negligent defendant cannot reduce his liability by shifting the blame to an actor who may have negligently aggravated plaintiff's injury in a separate transaction, citing

Stuart v. Hertz Corp., 351 So.2d 703 (Fla. 1977). Stuart involved an auto accident in which a physician's subsequent negligent treatment allegedly aggravated plaintiff's injuries.[6] It has no application here, where there are no distinct injuries attributable only to either the Department or the inmates.

The Academy and McGhee also argued that Section 768.81, Florida Statutes, cannot apply because it only abrogates joint and several liability (with certain exceptions) and thus cannot apply where the parties would not be considered joint tortfeasors at common law.[7] Their reasoning is flawed. The statute does more than abrogate, in certain situations, joint and several liability; it affirmatively provides that judgment shall be entered "against each party liable on the basis of such party's percentage of

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[6]Farina v. Zann, 609 So.2d 629 (Fla. 4th DCA 1992), Davidson v. Gaillard, 584 So.2d 71 (Fla. 1st DCA 1991), rev. den., 591 So.2d 181 (Fla. 1991), Gonzalez v. Leon, 511 So.2d 606 (Fla. 3d DCA 1987), rev. den., 523 So.2d 577 (Fla. 1988), and Dade County Medical Association v. Hlis, 372 So.2d 117 (Fla. 3d DCA 1979), also cited by the Academy, all involve the negligent initial tortfeasor's liability for additional injuries caused by negligent medical treatment of the original injuries.

[7]McGhee claimed that the Department and the inmates aren't joint tortfeasors because (1) their acts are separate and occurred at different points in time and (2) negligent and intentional tortfeasors can't be joint tortfeasors because of the difference in types of fault involved. As to the first point, the Department's negligence did not result in damages -- and hence become actionable -- until the inmates attacked McGhee's husband. As we will show, two parties may be joint tortfeasors if their separate acts of negligence (no matter when committed) unite to form a single set of damages. As to the second point, an intentional tortfeasor can be considered a joint tortfeasor with a negligent tortfeasor for purposes of the contribution statute (as will be discussed below) and there is no apparent reason to reach a different result as to the comparative fault statute.

fault." Section 768.81(3), Florida Statutes. Although the statute will, in most cases, involve situations in which the relevant actors would have been joint tortfeasors at common law, there is nothing in the statute's language which restricts its scope to only those situations, and the statutory language clearly demonstrates a legislative intent that it apply in the present situation.

In fact, the statute's effect is not limited to situations in which the at-fault entities would be joint tortfeasors. An employer with immunity from suit under Chapter 440, Florida Statutes, is not a joint tortfeasor (and hence subject to contribution actions) even if the employer's negligence was a cause of plaintiff's injury. Seaboard Coast Line R. Co. v. Smith, 359 So.2d 427 (Fla. 1978); Armor Elevator Co., Inc. v. Elevator Sales & Service, Inc., 360 So.2d 1129 (Fla. 3d DCA 1978); Firestone Tire & Rubber Co. v. Thompson Aircraft Tire Corp., 353 So.2d 137 (Fla. 3d DCA 1977); United Gas Pipeline Co. v. Gulf Power Co., 334 So.2d 310 (Fla. 1st DCA 1976). In Allied-Signal, Inc. v. Fox, supra, this Court nonetheless held that any fault attributable to the immune employer must be included in the allocation called for by Section 768.81, Florida Statutes.

Even if the statute only applied if the at-fault entities would be joint tortfeasors, the case law disproves McGhee's and the Academy's claim that there can be no joint and several liability because the Department's negligence and the inmates' intentional tort are separate transactions. In General Dynamics Corp. v. Wright Airlines, Inc., 470 So.2d 788 (Fla. 3d DCA 1985), the court

held that the doctrine of joint and several liability applied where one defendant had negligently supplied a defective airplane part and the other defendant had thereafter negligently failed to discover the defect, resulting in a single indivisible injury. In Florida Rock & Sand Co. v. Cox, 344 So.2d 1296 (Fla. 3d DCA 1977), the court held that a highway subcontractor, charged with negligence during construction of the road, was entitled to make a contribution claim against the driver of a vehicle which subsequently struck a median strip, injuring the passenger.

In Showell Industries, Inc. v. Holmes County, 409 So.2d 78 (Fla. 1st DCA 1982), the defendant (employer of a driver involved in an intersection collision) was permitted to assert a contribution claim against a county for negligent maintenance of the intersection. In Chinos Villas, Inc. v. Bermudez, 448 So.2d 1179 (Fla. 3d DCA 1984), a defendant charged with negligent failure to provide lifesaving apparatus, in a case involving the drowning of a four-year old, was held entitled to a contribution claim based on the child's parents' negligent failure to supervise and protect the child. In Orlando Sports Stadium, Inc. v. Gerzel, 397 So.2d 370 (Fla. 5th DCA 1981), a defendant charged with negligently providing a spectator area at motorcycle races, permitting minors to wander onto the track, was held entitled to a contribution claim based on the parents' negligent failure to supervise and protect their children.

In each of these cases, the negligence of one party preceded the negligence of the other -- as the Academy phrased it in their

District Court brief, it occurred "in a transaction entirely separate from the transaction involving the [other party's] negligence." In each case, the negligence of several entities combined to form a single indivisible injury. In each case, the court either held that joint and several liability applied or held that a contribution claim was proper. Similarly in the instant case, the Department's negligence caused no damage to McGhee (and hence was not actionable) until the inmates' intentional tort, when McGhee received a single, indivisible injury. The fact that the inmates' tort occurred at a different time and place than the Department's negligence does not prevent them from being joint tortfeasors.

Nor is that result changed by the fact that the duty the Department breached was to protect McGhee from the risk of a tort such as the inmates'. In General Dynamics Corp. v. Wright Airlines, Inc., supra, one defendant's duty was to detect and prevent faulty airplane parts from being used, and the other defendant supplied such a faulty part; joint and several liability was held applicable. In Orlando Sports Stadium, Inc. v. Gerzel, supra, the parents' duty was to supervise and protect the minor child from the dangers of a motorcycle race the child was watching; a contribution claim against the parents was permitted. In Chinos Villas, Inc. v. Bermudez, supra, the parents' duty was to supervise and protect the child from the dangers of drowning; a contribution claim against the parents was permitted. Similarly, the fact that the Department's duty was to protect McGhee from the dangers of

someone like the inmates does not prevent the Department and the inmates from being joint tortfeasors in the present case.

In the District Court, McGhee relied on the language of Section 768.81(4)(b), Florida Statutes, which provides, in pertinent part, that "this section does not apply . . . to any action based upon an intentional tort . . .". That reliance is badly misplaced. McGhee's claim against the Department is not an action based on an intentional tort; the substance of McGhee's action against the Department is based on negligence. Plainly, the statutory prohibition against applying Section 768.81, Florida Statutes, in cases based on intentional tort is aimed at preventing an intentional tortfeasor from decreasing his or her own financial exposure. In short, the prohibition acts to keep intentional tortfeasors from obtaining the benefits of Section 768.81, Florida Statutes. Yet McGhee's theory has precisely the opposite effect; it increases the negligent defendant's liability (and hence the amount of setoff the intentional tortfeasor can claim if subsequently sued),[8] thereby reducing the intentional tortfeasor's financial exposure.

In precluding the intentional tortfeasor from obtaining the statutory benefits, the provision makes eminently good sense. One

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[8]In order to assure that plaintiff recovers judgments for the full amount appropriate, the juries in both the initial suit against the negligent defendant and any subsequent suit against the intentional tortfeasor should allocate fault among all at fault entities, but the intentional tortfeasor should be held jointly and severally liable for the total fault of all at-fault entities, less a setoff calculated as set forth in Wells v. Tallahassee Memorial Regional Medical Center, Inc., supra.

who has, for instance, assaulted another, causing serious bodily injury, should not be permitted to decrease his or her responsibility by shifting some of the liability to others who joined in the assault or who may have been merely negligent in failing to prevent the assault or in failing to more timely intervene to bring it to an end.

The same is not true, however, where the party seeking the benefits of Section 768.81, Florida Statutes, was merely negligent. If A negligently leaves his rifle unsecured and B takes that rifle and thereafter negligently shoots C, it is clear that Section 768.81, Florida Statutes, calls for A and B each to be liable only for their own respective percentages of the total fault. If B, instead of negligently shooting C, does so with malice aforethought, there is ample justification for refusing to let the intentional shooter avoid responsibility for part of the damages by pointing to the rifle owner's negligence. On the other hand, there is no responsible justification for denying the negligent gun-owner (who has breached the same duty in the same way in both instances) the benefits of the proportionate liability provisions of Section 768.81, Florida Statutes, by pointing to the intentional wrongdoing of the shooter as being part of the causal fault. The gun-owner remains responsible for his or her <u>own</u> proportionate share of the fault, of course, but is not, and should not be, also

held responsible for the intentionally wrongful acts of the shooter.[9]

As the Academy noted below, Kansas and Massachusetts have reached the opposite result. Kansas State Bank & Trust Co. v. Specialized Transportation Services, Inc., 249 Kan. 348, 819 P.2d 587 (1991); Gould v. Taco Bell, 239 Kan. 564, 722 P.2d 511 (1986); M. Bruenger & Co. v. Dodge City Truckstop, 234 Kan. 682, 675 P.2d 864 (1984); Flood v. Southland Corp., 416 Mass. 62, 616 N.E.2d 1068 (1993). In both states, however, the pertinent statute speaks solely in terms of "negligence"; Section 768.81, Florida Statutes, in contrast, speaks in terms of "percentage of fault."

Thus, Kansas Statute Annotated Section 60-258a, on which Kansas State Bank, Gould, and M. Bruenger are based, provides:

> 60-258a. Comparative negligence.
>
> (a) The contributory negligence of any party in a civil action shall not bar such party or such party's legal representative from recovering damages for negligence resulting in death, personal injury, property damage or economic loss, if such party's negligence was less than the causal negligence of the party or parties against whom claim for recovery is made, but the award of damages to any party in such action shall be diminished in proportion to the amount of negligence attributed to such party. If any such party is claiming

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[9]Assume, for instance, that in this situation the jury finds that plaintiff was 10% at fault, the negligent gun owner 30% at fault, and the intentional shooter 60% at fault. Under the statute, plaintiff would recover 90% of the damages, the gun owner would be liable for 30% of the damages (for simplicity, we assume that all damages in this hypothetical are non-economic damages), and the shooter would remain jointly and severally liable for the full 90% of the damages. Thus, the negligent party obtains the benefits of the statute, but they are denied to the intentional tortfeasor -- who, as discussed below, is also precluded from obtaining contribution.

damages for a decedent's wrongful death, the negligence of the decedent, if any, shall be imputed to such party.

(b) Where the comparative negligence of the parties in any such action is an issue, the jury shall return special verdicts, or in the absence of a jury, the court shall make special findings, determining the percentage of negligence attributable to each of the parties, and determining the total amount of damages sustained by each of the claimants, and the entry of judgment shall be made by the court. No general verdict shall be returned by the jury.

(c) On motion of any party against whom a claim is asserted for negligence resulting in death, personal injury, property damage or economic loss, any other person whose causal negligence is claimed to have contributed to such death, personal injury, property damage or economic loss, shall be joined as an additional party to the action.

(d) Where the comparative negligence of the parties in any action is an issue and recovery is allowed against more than one party, each such party shall be liable for that portion of the total dollar amount awarded as damages to any claimant in the proportion that the amount of such party's causal negligence bears to the amount of the causal negligence attributed to all parties against whom such recovery is allowed.

(e) The provisions of this section shall be applicable to actions pursuant to this chapter and to actions commenced pursuant to the code of civil procedure for limited actions.

Similarly, Massachusetts General Laws Annotated, Chapter 231, Section 85, on which Flood is based, provides:

s 85. Comparative negligence: limited effect of contributory negligence as defense.

Contributory negligence shall not bar recovery in any action by any person or legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the total amount of negligence attributable to the person or persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made. In determining by what amount the plaintiff's damages shall

> be diminished in such a case, the negligence of each plaintiff shall be compared to the total negligence of all persons against whom recovery is sought. The combined total of the plaintiff's negligence taken together with all of the negligence of all defendants shall equal one hundred per cent.
>
> The violation of a criminal statute, ordinance or regulation by a plaintiff which contributed to said injury, death or damage, shall be considered as evidence of negligence of that plaintiff, but the violation of said statute, ordinance or regulation shall not as a matter of law and for that reason alone, serve to bar a plaintiff from recovery.
>
> The defense of assumption of risk is hereby abolished in all actions hereunder.
>
> The burden of alleging and proving negligence which serves to diminish a plaintiff's damages or bar recovery under this section shall be upon the person who seeks to establish such negligence, and the plaintiff shall be presumed to have been in the exercise of due care.

Each of these statutes is plainly limited, on its face, to allocations among negligent parties. Section 768.81, Florida Statutes, does not have that limitation; rather it is titled "Comparative fault" and speaks to allocation based on "percentage of fault."

Other jurisdictions have concluded that, in this type of situation, the negligent defendant is entitled to the benefits of a proportionate liability system under which its liability is decreased by the percentage of fault attributable to the intentional tortfeasor. In Blazovic v. Andrich, 124 N.J. 90, 590 A.2d 222 (1991), plaintiff was assaulted while leaving a restaurant and sued the restaurant (for negligently failing to provide adequate lighting and security and negligently failing to exercise reasonable care in disbursing alcoholic beverages to the

assailants). Plaintiff also sued the assailants, charging that they had either negligently or intentionally struck him. Plaintiff settled with several of the assailants prior to trial. The trial court, feeling that negligent conduct could not be compared with intentional conduct, instructed the jury to compare only the relative fault of the negligent parties. The jury apportioned 70% of the causal negligence to the restaurant and 30% to plaintiff. The jury further found that the assailants had not been negligent, but instead had committed an intentional assault and battery.

Both the intermediate appellate court and the New Jersey Supreme Court held that the fault of the intentional tortfeasors should be included in the allocation of fault -- even though the relevant New Jersey statute, like the Kansas and Massachusetts statutes but unlike Section 768.81, Florida Statutes, spoke solely in terms of "negligence," rather than in terms of "fault."

The New Jersey Supreme Court was unpersuaded by decisions from other jurisdictions rejecting apportionment in actions involving intentional tortfeasors, observing that they derived from an earlier era when courts attempted to avoid the harsh effects of the contributory negligence defense. Likewise, the Blazovic court rejected the concept that intentional conduct was different in kind from negligence or willful and wanton conduct, finding that intentional wrongdoing was, instead, simply different in degree. The different levels of culpability inherent in each type of conduct, the court said, will be reflected in the jury's apportionment of fault. The court said (590 A.2d at 231):

> By viewing the various types of tortious conduct in that way, we adhere most closely to the guiding principle of comparative fault -- to distribute the loss in proportion to the respective faults of the parties causing that loss. [Citations omitted]. Thus, consistent with the evolution of comparative negligence and joint-tortfeasor liability in this state, we hold that responsibility for a plaintiff's claimed injury is to be apportioned according to each party's relative degree of fault, including the fault attributable to an intentional tortfeasor [citation omitted].

Similarly, the court in Weidenfeller v. Star and Garter, 1 Cal. App. 4th 1, 2 Cal. Rptr. 2d 14 (1991), held that California's proportionate liability statute applied in favor of a negligent defendant so as to require allocation of fault to intentional tortfeasors. In that case, plaintiff was the victim of an unprovoked assault in defendant's parking lot. Plaintiff sued, alleging negligent failure to provide adequate lighting and proper security. The jury found for plaintiff, allocating 20% of the fault to the negligent defendant, 5% to the plaintiff, and 75% of the fault to the assailant. On appeal, the court rejected plaintiff's claim that the statute should not be applied so as to include the fault of the intentional tortfeasor, stating that: "There is no principled basis in which we can interpret the statute in this manner." (2 Cal. Rptr. 2d at 16). The court also stated (2 Cal. Rprt. 2d at 15-16):

> According to Weidenfeller the statute has a limited effect benefitting a negligent tortfeasor only where there are other equally culpable defendants, but eliminating that benefit where the other tortfeasors act intentionally. Stating the proposition reflects its absurdity. It is inconceivable the voters intended that a negligent tortfeasor's obligation to pay only its proportionate share of the non-economic loss, here 20 percent, would become disproportionate increasing to 95% solely because the only other responsible tortfeasor

> acted intentionally. To penalize the negligent tortfeasor in such circumstances not only frustrates the purpose of the statute but violates the common sense notion that a more culpable party should bear the financial burden caused by its intentional act.

The court specifically rejected the argument (made in the District Court by McGhee and the Academy) that permitting allocation in this situation would improperly permit a person to be relieved of liability because of the reasonably foreseeable intervening act of a third party.[10] 2 Cal. Rptr. at 17, n. 11. The court pointed out that the jury had found the negligent defendant should have reasonably foreseen the assailant's conduct, and held it liable, with the statute shifting the negligent defendant's responsibility (under joint and several liability) for a portion of the damages once that liability had been established.

McGhee has claimed that permitting the fault of intentional tortfeasors to be considered by the jury "would effectively abolish negligent security cases" and that businesses would no longer have any incentive to protect their patrons. It is difficult to credit such claims when, as here, the jury found the Department 50% at fault and judgment was entered against the Department in the amount of $1,485,000. In Weidenfeller v. Star and Garter, supra, the defendant in a negligent security case was held liable for $166,375 even though the intentional tortfeasor assailant was found 75% at

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[10]It is precisely this same misapprehension which led the court astray in Bach v. Florida R/S, Inc., 838 F.Supp. 559 (M.D. Fla. 1993).

fault. In another case of which we are aware,[11] the jury found the negligent defendant 10% at fault and the intentional tortfeasor 90% at fault, and the court entered judgment against the 10% negligent defendant for 58% of the damages (due to joint and several liability for economic damages). Such results hardly sound a death knell for this type of case or give businesses an economic reason to ignore their patrons' safety.

McGhee and the Academy have argued that inclusion of the inmates' percentage of fault improperly permits the negligent defendant to escape (at least in part) liability in a situation where the negligence consisted of a failure to prevent the third party's intentional conduct, citing Holley v. Mt. Zion Terrace Apartments, Inc., 382 So.2d 98 (Fla. 3d DCA 1980). Holley does not involve the application of Section 768.81, Florida Statutes (in fact, Holley was decided years before the statute was enacted). In Holley, a defendant sought to completely escape liability, asserting that the third party's criminal act was unforeseeable. That is not the situation presented in the instant case, since the jury found such a criminal attack foreseeable, as reflected in its finding that the Department was 50% at fault. Had the jury found the inmates' acts unforeseeable, it would have completely exonerated the Department.

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[11]Stellas v. Alamo Rent-A-Car, Inc., Case No. 94-2583, Third District Court of Appeal. As of this writing, the District Court has not yet rendered an opinion in this case, which involves the issues addressed in this brief.

Moreover, the verdict and judgment in this case disprove McGhee's and the Academy's claim; the jury found the Department 50% at fault notwithstanding the vicious criminal acts of the inmates, and the Department was held jointly and severally liable for McGhee's economic damages. The effect of including the inmates' intentional tort in the jury's calculation of fault was simply to relieve the negligent defendant (the Department) of liability for that part of McGhee's non-economic damages corresponding to the intentional tortfeasors' percentage of fault. Not only did the Department not escape liability (judgment for $1,485,000 was entered against the Department), but the jury's percentage allocations clearly demonstrate that the jury kept in mind the point that it was the Department's negligence which made the inmates' intentional tort possible.

Additionally, this argument by McGhee and the Academy proves too much. In its District Court brief, the Academy quoted Restatement (Second) Torts, §449: "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby." Thus, under McGhee's and the Academy's logic, the Department would not be entitled to the statutory benefit even if the inmates had merely been negligent. Assume, for instance, that the inmates had stolen a car during their escape and collided with a car being driven by McGhee. Clearly, the benefits of Section 768.81, Florida Statutes,

are available in that situation, even though McGhee and the Academy would apparently reach the opposite result under their theory.

Permitting allocation in favor of a negligent defendant is consistent with Florida law, not only as expressed in Fabre, but also in connection with the contribution statute. Section 768.31(2)(a), Florida Statutes, provides:

> Except as otherwise provided in this act, when two or more persons become jointly or severally liable in tort for the same injury to person or property, or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

Section 768.31(3), Florida Statutes, provides, in pertinent part:

> In determining the pro rata share of tortfeasors in the entire liability: (a) Their relative degrees of fault shall be the basis for allocation of liability.

Section 768.31(2)(c), Florida Statutes, provides:

> There is no right of contribution in favor of any tortfeasor who has intentionally (willfully or wantonly) caused or contributed to the injury or wrongful death.

Thus, the statute provides that there is no right of contribution in favor of intentional tortfeasors, but permits contribution against intentional tortfeasors in favor of negligent tortfeasors. Moreover, the statute (like Section 768.81, Florida Statutes) provides that the pro rata liability of tortfeasors is determined by their relative degrees of "fault," not by their relative degrees of "negligence."

Pursuant to that statute, the courts have held that an intentional tortfeasor is not entitled to contribution. See, for instance, Jewelcor Jewelers & Distributors, Inc. v. Southern

Ornamentals, Inc., 499 So.2d 850 (Fla. 4th DCA 1986), rev. den., 509 So.2d 1118 (Fla. 1987). By the same token, the District Courts permit contribution against an intentional tortfeasor in favor of a negligent tortfeasor. See, Nesbitt v. Auto-Owners Ins. Co., 390 So.2d 1209 (Fla. 5th DCA 1980).[12]

Section 768.31, Florida Statutes, thus evinces a legislative policy determination that an intentional tortfeasor should not be permitted to diminish his financial responsibility simply because another entity has negligently contributed to the plaintiff's injury, but that the negligent tortfeasor should be permitted to diminish the extent of his financial liability by obtaining contribution from an intentional tortfeasor who also contributed to plaintiff's injury.

Where, as here, plaintiff's claim against defendant is for negligence, that legislative policy is furthered by including intentional tortfeasors among those to whom fault is allocated by the jury. In such situations, including the intentional tortfeasor in the jury's allocation of fault achieves precisely the goal sought by Section 768.81, Florida Statutes: to measure the extent

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[12]The Academy cited Insurance Co. of N. America v. Poseidon Maritime Services, Inc., 561 So.2d 1360 (Fla. 3d DCA 1990), as being to the contrary. It is not. In that case, the party seeking contribution (a subrogated insurer) had asserted that the amounts it paid in settlement were for negligence. However, the documents attached to the contribution complaint asserted claims for both negligence and intentional tort -- and even the negligence claim appears to have involved claims of willful or wanton misconduct. The District Court held that those attached documents were a part of the contribution complaint for all purposes and that the trial court had properly relied on them in dismissing the contribution complaint.

of the negligent defendant's liability by the extent of that defendant's fault. Just as it has done with the contribution statute, the Legislature has permitted negligent defendants to obtain the benefits of the statute, but has forbidden intentional tortfeasors from obtaining those benefits: the statutory prohibition of Section 768.31(2)(c), Florida Statutes, against contribution in favor of an intentional tortfeasor is mirrored in Section 768.81(4)(b), Florida Statutes, which prohibits an intentional tortfeasor from obtaining the benefits of proportionate liability.

It has been argued that simple negligence is different in kind from intentional wrongdoing, and that the two types of fault cannot be compared. Florida case law, however, rejects that argument. As noted above, a negligent tortfeasor can obtain contribution, based on relative shares of fault, from an intentional tortfeasor. Moreover, Florida case law permits application of comparative negligence to reduce the plaintiff's recovery even where the defendant's conduct has been egregious. American Cyanamid Co. v. Roy, 466 So.2d 1079 (Fla. 4th DCA 1984), approved in part, quashed on other grounds in part, 498 So.2d 859 (Fla. 1986) (comparative negligence applied notwithstanding willful and wanton misconduct on the part of defendant); Tampa Electric Co. v. Stone & Webster Engineering Corp., 367 F.Supp. 27 (M.D. Fla. 1973) (comparative negligence applicable to compensatory damages notwithstanding gross negligence, although inapplicable to punitive damages).

As McGhee correctly noted in the District Court, there is also significant case law holding that a defendant guilty of intentional conduct is precluded from raising the defense of comparative negligence. However, the case most closely on point is Island City Flying Service v. General Electric Credit Corp., 585 So.2d 274 (Fla. 1991). In that case, defendant was charged with the negligent hiring of an employee who stole plaintiff's airplane and then crashed it. The jury found plaintiff to be 75% comparatively negligent (for leaving the plane unlocked) and defendant 25% negligent. The District Court held that comparative negligence did not apply because the employee's acts were intentional. This Court quashed, ruling that the fact that a third party's acts were intentional did not preclude application of comparative negligence as between parties who were themselves merely negligent. The Court stated (585 So.2d at 277): "We expressly reject the assertions that comparative negligence is not applicable to this situation because this was an intentional tort by [defendant's] employee and that [defendant], as employer, stood in the shoes of its employee in this situation." Continuing, the Court said (585 So.2d at 278):

> As noted, General Electric's suit against Island City was based on a theory of negligent hiring or retention. Unlike a suit based on the doctrine of respondeat superior, this cause of action is grounded upon the negligence of the employer. [citation omitted]. In suits for negligence, the defendant is entitled to raise the defense of comparative negligence. [citations omitted]. Regardless of the dangerous instrumentality theory, it would be incongruous to permit General Electric to sue Island City in negligence and deprive Island City of the ability to assert the comparative negligence of Southern Express Airways, to whom the airplane had been entrusted by General Electric when it was stolen. It is irrelevant that [the employee],

> himself, could not assert the defense of comparative negligence because of having committed an intentional tort.

Thus, at least where the intentional conduct is that of a third party, rather than the defendant, comparative negligence remains applicable.

Similarly, case law in other jurisdictions permits gross negligence, willful and wanton misconduct, or other aggravated conduct on the part of the defendant to be compared to simple negligence of the plaintiff in assessing comparative negligence. See, Comeau v. Lucas, 90 A.D.2d 674, 455 N.Y.S.2d 871 (1982); Lomonte v. A & P Food Stores, 107 Misc. 2d 88, 438 N.Y.S.2d 54 (1981); Plyler v. Wheaton Van Lines, 640 F.2d 1091 (9th Cir. 1981, applying California law); Billingsley v. Westrac Co., 365 F.2d 619 (8th Cir. 1966, applying Arkansas law); Amoco Pipeline Co. v. Montgomery, 487 F.Supp. 1268 (W.D. Okla.1980, applying Oklahoma law).

Patently, if gross negligence or willful and wanton misconduct can be compared with simple negligence for purposes of determining the relative degrees of fault of plaintiff and defendant in a comparative negligence situation, or can form the basis of a comparison of relative degrees of fault for purposes of the contribution act, there is no reason why that same comparison of simple negligence with more aggravated or egregious forms of misconduct cannot similarly be made for purposes of the allocation of fault called for by Section 768.81, Florida Statutes.

Under Florida law, a jury is permitted to determine the relative degrees of fault of all "at-fault" entities, even where one of the at-fault entities is negligent and another is guilty of an intentional tort. Section 768.81, Florida Statutes, requires the determination of the relative degree of fault of all at-fault entities whose conduct causally contributed to the plaintiff's injury. The statute applies where the plaintiff's action against the defendant sounds in negligence, as in this case. The statute grants the benefit of its proportionate liability provisions to defendants, such as the Department here, who are found guilty of nothing more than negligence, although it bars intentional tortfeasors, such as the inmates here, from taking advantage of its provisions. Thus, the trial court properly permitted the jury to allocate fault to the inmates, the intentional tortfeasors in this case. That ruling should be affirmed.

CONCLUSION

For all the reasons set forth above, this Court should hold that Section 768.81, Florida Statutes, permits a defendant found to have been negligent to have the jury also determine the causative fault of intentional tortfeasors, and to have judgment entered in accordance with the statutory plan of proportionate liability. The trial court properly permitted the jury in this cause to allocate percentages of fault among all at-fault entities involved, in accordance with the proportionate liability provisions of Section 768.81, Florida Statutes, and properly entered judgment based on that allocation. That ruling should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to **Laura Rush, Esquire**, Office of the Attorney General, The Capitol, Suite PL01, Tallahassee, FL 32399-1050, to **Joel S. Perwin, Esquire**, 25 West Flagler Street, Suite 800, Miami, FL 33130, to **Dawn Wiggins Hare, Esquire**, P.O. Box 833, Monroeville, AL 36461, to **Loren E. Levy, Esquire**, P.O. Box 10583, Tallahassee, FL 32302 and to **Louis K. Rosenbloum, Esquire**, and **Virginia M. Buchanan, Esquire**, 226 South Palafox, P. O. Box 12308, Pensacola, FL 32581, by mail this 11th day of July, 1995.

ATTORNEY

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