OA 3.4.96

IN THE SUPREME COURT OF FLORIDA

DOCKET NO. 85,990
(DCA NO. 93-3025)

LUCILLE NASH,

Petitioner,

vs.

WELLS FARGO GUARD SERVICES, INC.
OF FLORIDA,

Respondent.

On Review from The District Court of Appeal,
First District, State of Florida

RESPONDENT'S AMENDED ANSWER BRIEF ON THE MERITS

FOWLER, WHITE, BURNETT, HURLEY,
BANICK & STRICKROOT, P.A.
Attorneys for Respondent
International Place - 17th Floor
100 Southeast Second Street
Miami, Florida 33131-1101
(305) 789-9200

By: STEVEN E. STARK
Florida Bar No. 516864

TABLE OF CONTENTS

LAW OFFICES OF FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A.
INTERNATIONAL PLACE, 100 SOUTHEAST SECOND STREET, SEVENTEENTH FLOOR, MIAMI, FLORIDA 33131 • TEL. (305) 789-9200

TABLE OF CONTENTS
(Continued)

Page

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

LAW OFFICES OF FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A.
INTERNATIONAL PLACE, 100 SOUTHEAST SECOND STREET, SEVENTEENTH FLOOR, MIAMI, FLORIDA 33131 • TEL. (305) 789-9200

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

Other Authorities

INTRODUCTION

In this action on discretionary review from the decision of the First District Court of Appeal, the respondent, Wells Fargo Guard Services, Inc. of Florida, will refer to itself as Wells Fargo. Wells Fargo will refer to the petitioner, Lucille Nash as Nash. References to the record on appeal will be by the letter "R" with appropriate page number. References to the transcript of the trial testimony will be by the letter "T" with appropriate page numbers. All emphasis is added unless otherwise stated.

STATEMENT OF CASE AND FACTS

Nash's Statement of Case and Facts discusses certain procedural facts relevant to certain issues that Nash has raised in her brief. What Nash's Statement fails to do is set forth the underlying facts of the case, discuss in any detail the rulings of the trial court, or establish in any fair manner the evidence that was presented. These facts, rulings, and evidence, which the district court relied upon in reaching its decision below, are necessary for this Court's total understanding and complete review of the instant action. The following is a recitation of those facts and a further clarification of the trial court's rulings and the reasons for those rulings.

Methodist Hospital is a medical facility located in Jacksonville, Florida. It consists of two separate complexes, the tower complex and the Professional Office Building or POB. Since 1984, Nash worked in the hospital's Patient Billing

Department (T. 401-02), which was located in the POB. Her normal work hours were 7:30 a.m. to 4:00 p.m. (T.406). On the morning of incident sued upon, Nash went to work early in order to complete unfinished paperwork. Prior to entering the POB parking garage, Nash drove to the Tower Building to pick up the day's work. (T.406-07). She went to the data processing office, picked up her work for the day, signed the work out, and left the data processing office. Prior to leaving, she punched a time clock located right outside the door. On that morning she clocked in at 6:32 a.m. (T.407) Thereafter, she drove across the street to the POB garage. This took approximately four minutes. (T.408).

Over objection, Nash was allowed to testify that the entrance to the POB parking garage contains a sign (admitted into evidence as Plaintiff's Exhibit No. 21) that states that the premises are being patrolled for the safety of the garage users. Nash testified that she believed that it was Wells Fargo that patrolled for her safety, particularly Roy Richter, a Wells Fargo employee that she had known since he began working at the Methodist Hospital Center. Methodist Medical Center installed these signs in the POB parking garage. (T.608). It did not have to consult with and did not consult with Wells Fargo before the installation.(T.608). Notwithstanding this signage, however, Methodist Hospital contracted with Wells Fargo for only one guard to monitor and patrol both the Professional Office Building and

its parking garage and only agreed to pay for the services of one guard. (T.608).

After entering the garage, Nash drove up the ramp and past Richter's security truck, which was parked directly in front of two double glass doors -- the entrance to the Professional Office Building. Richter was in his truck with the door closed, the windows up, and the flashing lights on. Nash acknowledged Richter and she believed he saw her as well. (T.411-12). Nash proceeded downward, past the third entrance gate of the parking garage and parked in the second spot. (T.413). Due to the building structures, she could no longer see Richter's vehicle from that spot. (T.414).

Ms. Nash described the garage lighting as very dim. When she stopped, she shut off her lights and began to pick up her paperwork -- a big bundle of daily bills and a floppy disk -- which had fallen on the floor of the car. Another car driven by a co-employee, Mrs. Munn, parked in an adjacent spot. Mrs Munn then walked by Ms. Nash on her way into the building. (T.415-16).[1]

After organizing her paperwork, Nash stepped out of her car. Her purse was on her left arm, her keys were in her right hand, and her arms were full of paperwork. Thus, she needed to push

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[1] Mrs. Munn testified that approximately five minutes passed from the time she drove past Richter's vehicle to the time that she walked past his vehicle to enter the building. At that time, Richter was still in his vehicle. Other than Mrs. Nash and Mr. Richter, she did not see anybody else in the parking garage. (T.64-66).

her car door closed with her body. She heard a crunching sound behind her, immediately turned, and saw an armed black male, who proceeded to beat her, rob her, and run away. (T.417-18). Nash did not know which direction her assailant ran, but stated that he conceivably could have gotten out of several different gates into the garage. (T.419-20). After she could no longer hear him running, she got up, ran to the entrance of gate 3 and began to scream for Mr. Richter. When he did not respond, she walked toward his truck. At that time, he was walking in front of the vehicle. After realizing what had happened, Mr. Richter began to walk toward her and Nash told him what occurred. Richter then called the telephone operator, who called the police. Thereafter, Mrs. Nash's supervisor arrived and took her to the hospital emergency room for treatment.

As a result of the incident, Nash sued Wells Fargo for its alleged negligence in failing to prevent the attack and her resulting injuries.(R.1-4). The matter was tried in the Fourth Judicial Circuit in and for Duval County, Florida before the Honorable Lawrence D. Faye, commencing on Monday, May 17, 1993.

During a pre-trial conference, an issue arose whether the plaintiff was going to use and whether the court would admit into evidence, the contract between Wells Fargo and Methodist Hospital. Wells Fargo asserted that any of its alleged duties were contained in the contract and that there was no general common law duty to protect the plaintiff. Nash argued that the action was based upon common law duties, not contract duties, and

that there was no reason to admit the contract into evidence. The court initially ruled that it would be up to the litigants, during the course of their presentation, to determine what evidence would be offered. However, the court did specifically recognize that "[i]f the defendant owes no duty to a plaintiff, then, there is no case." (T.11-14).

During trial, Nash sought to admit into evidence certain incident reports that Wells Fargo prepared and submitted to Methodist Hospital. These reports covered the period from 1987 to the date of the incident. Nash asserted that these reports were evidence of Wells Fargo notice regarding criminal activities on the premises. Wells Fargo objected on the basis of relevance. It asserted that the reports had no relation to the 1992 incident and no bearing on the legal duty to the Hospital Wells Fargo undertook in the contract. The court wrestled with the issue and stated:

> Is this a notice of criminal activity and notice to the owner of the property who then must provide the reasonable means of protecting against that criminal activity, or against the contracted service who they're [sic] to perform a certain service?
>
> I know, in any event, where there's criminal activity, be it retail store, be it apartment building, whatnot, prior records of criminal activity in that area, general area, or in those particular stores, no matter if it's in the immediate area or not, is notice to the owner that they should take reasonable steps to protect their customers from that particular type of activity.
>
> I'm just -- my main concern here is Methodist Hospital knows about this, maybe the guard service knows about it, does that mean the

> guard service has to provide six more guards or a guard on each level of the floor or--

(T.130). The court asked Nash's counsel what specific negligence Wells Fargo would be accountable for when carrying out its duties to the hospital. Nash's counsel responded that Wells Fargo, based upon the incident reports, was negligent in not providing additional security. The court observed that under that scenario Methodist would have a cause of action against Wells Fargo (T.132-133), but expressed continuing concern how that supported Wells Fargo's direct "liability" to Nash.

In further support of her duty argument, Nash also relied specifically upon and referred to the "post-orders" establishing the security officer's general responsibilities with respect to maintaining security on the property. Nash argued that once Wells Fargo undertook a contract duty, it had to exercise reasonable care in performing that duty. The trial court suggested that counsel was "stretching the law a little bit" and observed that there were "some duties that are not invoked to third parties by virtue of contracts." (T.136). Nevertheless, Nash asserted that the incident reports were relevant to the issue of what Wells Fargo knew and also relevant to Nash's argument that Wells Fargo did nothing to change, fix or otherwise increase the security services. (T.137-38). The trial court responded:

> If there were an act[ion] against the property owner, then any criminal activity would probably be relevant, even though it's not of the same exact type that occurred. ... all criminal activity to the landowner

> has put them on notice that they must protect their customers against various activities. What concerns me about this whole case here, the duty upon Wells Fargo is imposed by virtue of the fact they were hired by Methodist Hospital to perform security services. The contract . . . specifies the duties that are imposed by virtue of that contract. There is a specific provision in the contract that states that the parties intend -- that this is to be a contract strictly between the parties and that no third-party beneficiary intends to imply this.

(T.138-39). After subsequent argument by Nash with respect to Wells Fargo's alleged failure to assure that there was additional security based upon the notice of similar acts (T.144-47) the court specifically stated:

> Wait just a minute, please. They've argued also that the duty under the contract in providing adequate security, including post orders, would require them to notify Methodist Hospital that the security's inadequate and they breached their duty to provide adequate security. I'm not sure it's a valid argument.

(T.147).

Later, the Court reviewed two New York decisions that Wells Fargo cited. He believed that these were "pretty strong defendant cases" and were "on all fours with this one." (T.155). Nevertheless, after taking the matter under advisement overnight, the court specifically stated:

> We'll pick up where we left off yesterday. After reviewing the memorandum of law that's been submitted, the cases that were submitted, the arguments that were so ably given by both sides, and review of the preceding matters, and rulings of the Court, the ruling on the evidentiary exhibit offered by the plaintiff will be that the objection

> is overruled. In overruling it, the Court is mindful of the fact that early on the defendant's motion for summary judgment was denied. In that particular proceeding, the primary issue was whether or not the plaintiff could sue on a direct negligence, pure negligence theory against a guard service hired by a hospital to provide protective services. By denying the defendant's motion for summary judgment, the Court ruled that the plaintiff could proceed on a pure negligence theory. I do not know if -- I did not handle the case initially. I do not know if there was a motion to dismiss the complaint on the basis that they could not state a cause of action against the guard service where the action was brought by an employee of the hospital, but that's neither here nor there since I do not know what the arguments were at that time. So, in effect, we're proceeding on a pure negligence theory by the plaintiff against the defendant guard service, and ultimately it will be up to the First District Court of Appeal to see if the law of Florida has, in fact, evolved to the point where an employee can sue a guard service which is hired and contracted with, was hired by and contracted for by the Methodist Hospital.

(T.167-68). Wells Fargo's counsel noted that the court's ruling placed it in the same "duty" posture as the landowner, remarked that the evidence regarding the landowner's breach of that duty was being admitted improperly as to Wells Fargo, and attempted to obtain a clarification regarding the nature of the court's ruling. In response, the court stated:

> All I ruled is that the evidence objection as to the evidentiary matter is overruled, it is to the issue of negligence, and by the summary judgment ruling, the Court is -- that became the law of this case, whether right or wrong, and we'll have to leave that up to the First District Court of Appeals as to whether the law has evolved to that point to proceed.

(T.169-70).

Later during trial, Nash presented the testimony of a Wells Fargo operations manager, who had formerly been Wells Fargo's post commander at the Methodist Hospital Center. (T.297). He testified that he discussed with Methodist Hospital personnel the possibility of changing procedures at a particular post and provided them opinions and suggestions regarding security.(T.296-298). He also agreed that it was important to understand the client's knowledge of security situations and to take steps to assure that the client was given relevant information. (T.302-03). In 1990 or 1991, he suggested that Wells Fargo supply supervisors on site instead of having Methodist people supervise Wells Fargo people and this suggestion was implemented. However, he testified that this was ultimately Methodist Hospital's decision, not his. (T.303-04). He had been involved with, but did not initiate, Methodist's decision not to place an armed access control device on the employee parking lot and had evaluated the dollar cost to Methodist of a second-shift guard at the Professional Office Building. He also independently initiated conversations with electronics companies about placing card readers at the Professional Office Building to limit access and presented that suggestion to Methodist on a regular basis. Some of his suggestions were adopted; others were not. (T.304-06). Although Wells Fargo could make revisions in the manner in which the security was undertaken, any specific changes requiring additional personnel or additional money could not be implemented

without the input and approval of Methodist Hospital. (T.306-08). In fact, no changes could be implemented without Methodist Hospital's authorization. (T.309). He agreed that Wells Fargo was hired to provide security to any person on the property including Lucille Nash. (T.309-10). He also agreed that, if requested, part of the guard's job function was to walk patients, visitors and employees into the building. However, it was not feasible to do for everyone at all times. (T.318-19). Methodist paid Wells Fargo to have only one guard in two buildings -- the Professional Office Building and the parking garage -- so a choice had to be made to have one building open and unlocked, while the other one was being checked. (T.324).

Nash also called a security expert at trial. He opined that one guard was not sufficient to perform the functions required by the post orders (T.340); that the Wells Fargo security guard was not properly trained, (T.337-38) or supervised, (T. 339); that by sitting stationary in his truck for five to ten minutes he did not comply with his post order requirement to be on constant patrol, (T.353) that he generally did not conform to his post orders (T.354); and that the procedure established in which no one would be guarding the garage at the time that the guard was required to be in the building was an improper security procedure. He also proposed an alternative procedure in which the garage was not opened until the building was opened and secured and the lights were turned on (T.356-57). Finally, he

opined that "all those factors contributed to [the] assault on Ms. Nash." (T.358).

Nash further sought to elicit an opinion that Wells Fargo had a duty to tell their clients about additional security needs. Wells Fargo objected on the basis that it invaded the Court's province with respect to the existence of a duty. (T.341-42). Nash argued that Wells Fargo breached its duty because it failed to offer more security, failed to independently change the security procedures, and failed to unilaterally adopt the types of procedures that Nash's experts believed should be undertaken.

In response, the Court stated:

> Let's assume they had a duty to report to Methodist, what does that have to do with Wells Fargo's negligence?
>
> * * * *
>
> What does that have to do with the tort to an invitee on the premises?
>
> * * * *
>
> That might be related to Methodist Hospital is they recorded and did something to it.

(T.342). Nash argued that the testimony was directed to the duties Wells Fargo assumed. Wells Fargo argued that the existence of a tort duty was an issue of law to be decided by the Court. In response to the objection and the argument, the Court stated:

> What you're talking about is a duty to the hospital?
>
> * * * *

> You're talking about reporting something to Methodist, if they breached their contract with Methodist, Methodist would have good cause, and it would be a duty to report that, but so far as the tortuous act of the employee there, I don't think that has any relevance whatsoever to your allegation of negligence causing the injuries to Mrs. [Nash]
>
> * * * *
>
> The objection to the question is sustained.

(T.343-44).

On cross-examination, Nash's security expert reiterated his opinion that he would have liked Wells Fargo to tell Methodist Hospital that they needed an extra guard. (T.372). He agreed that the primary reason to put an armed security guard on a post is to function as a deterrent. (T.375). He also agreed that it does not take much training to tell a guard to look for stragglers that don't belong in the garage (T.376) and conceded that there was no place that a guard would be able to see 100% of the bottom garage, regardless of where he was stationed. (T.378).

At the close of plaintiff's case, Wells Fargo moved for a directed verdict on the issue of both duty and causation. (T.584-85). Relying upon the earlier ruling on summary judgment, the court denied the motion. Although he questioned whether the latitude given by the rules of procedure to experts to testify as to an ultimate issue was justified, he denied the Motion for Directed Verdict on the causation issue as well. (T.586-87).

Thereafter, an issue arose whether the entire contract for guard services between Wells Fargo and Methodist Hospital would be admitted into evidence. Nash objected to admission of the contract (rather than the attached post orders that had been previously admitted) because the action was solely a negligence case and, therefore, there was no contract defense available. (T.589). The Court expressed concern and confusion regarding Nash's argument; the testimony that Wells Fargo should have provided more than one guard; the fact that the contract provided for only one guard; and the "mixed relationship" involved in action based on a contract for service brought under a negligence theory, especially where the land owner that hired the guard service was not joined as a defendant. (T.592-93). The Court was concerned about the "strong" case Nash presented that there should have been more than one guard on the premises; the testimony Nash presented on that theory was one thing that "bothered" the Court about the case. (T.594). During the argument on the issue, Nash's counsel and the Court had the following exchange:

> [NASH'S COUNSEL]: Now, the question in this case is did Wells Fargo perform its duties to secure under the post objectives properly, and the answer to that is a negligence question under our theory. As we've said, if Mr. Murray's right and we're what he deems an incidental beneficiary, then the First DCA can tell us that, but I think to allow that contract now would be basically to bring his contract action as a defense for negligence and that's not proper, and I'm sure the Court is well aware of that.

> THE COURT: Well, I'm aware of that, but I'm also aware of the fact there's been so much emphasis put on the fact that Wells Fargo only put one guard out there without the jury knowing that the agreement was for one guard.

(T.595).

Ultimately, the Court decided to exclude the contract because it was irrelevant, inapplicable, and extremely prejudicial. (T.597). Nevertheless, the judge continued to express concern with respect to Nash informing the jury that one of the "big faults" was that Wells Fargo did not have two guards and should have provided more. (T.601). He also questioned why it was any more proper to introduce the post orders that were referred to in the contract than the contract itself (T.602) and continued to assert that if the plaintiffs "hadn't mentioned this second guard so much we wouldn't have this problem." (T.603). Notwithstanding these concerns, the Court ultimately felt it would be in error to admit the whole contract (T.604). However, he allowed the defendants to mark it as defendant's exhibit "A" for identification.

In its case, Wells Fargo presented one witness. That witness established that Methodist Hospital placed the signs on the premises regarding the security services and that Methodist Hospital had only agreed to pay for one guard. (T.605-11). Thereafter, Wells Fargo renewed its Motion for Directed Verdict on the same grounds stated previously, supported by that additional testimony. The court once again denied the Motion for Directed Verdict. (T.612-13).

During charge conference, counsel for Wells Fargo requested a verdict form, based upon the Fifth District's decision in Messmer v. Teacher's Ins. Co., 588 So. 2d 610 (Fla. 5th DCA 1991) that would ask the jury to apportion fault between Wells Fargo and Methodist Hospital based upon the testimony presented at trial. Wells Fargo's counsel informed the Court of the conflict between the Messmer decision and the Third District's Fabre decision and advised the issue was pending in this Court. (T.615-18). At no time did Nash's counsel object to the requested verdict on the basis that the issue was not pled or tried. Indeed, he agreed that the request was valid and properly preserved:

> MR. MURRAY: Judge, I do, and it's not so much with the form, it's on the issue that I raised yesterday, and I feel like I owe it to my client to call it before the Court and that is to include a question on the verdict form, whether there was negligence on the part of Methodist Hospital that contributed to the injury and, if so, to show apportionment between Methodist and my client.
>
> I recognize that there are two cases out here from the district court, the Messmer case out of the Fifth District and the Fabre case out of the Third District that are just dead at odds with each other on that question.
>
> * * * *
>
> MR. COKER: I understand he's trying to protect the record, but I certainly feel that that verdict form is appropriate, and I think he may --
>
> * * * *

. . . . . I mean, I understand him protecting his record. If the court is going to seriously entertain this, I'll be glad to go get all the cases.

THE COURT: There's two cases that I am not familiar with either one of the cases. I think it's my duty to review those --

MR. COKER: Yes, sir.

THE COURT: -- and then make the decision.

MR. COKER: My point is I think that Mr. Murray would be candid with you and tell you that he is just attempting to protect his record. Your Honor, that's up to you.

THE COURT: He presented the point, it's a valid point, and I think it might be good to consider everything he presents.

MR. COKER: I don't disagree with you, sir, but we need to cross that bridge before we --

THE COURT: We'll do that immediately. It won't take me ten minutes at the most to read both of these cases.

MR. COKER: Yes, sir.

THE COURT: I understand what the issues are clearly -- so it's just a matter of seeing which one makes the most sense, and I'll read both of them.

(T.615-18). After reviewing both cases, the Court specifically stated:

> Let's go on the record for a moment. I have carefully read both the Messmer versus Teachers Insurance Company case and the Fabre, F-a-b-r-e, versus Marion case, the Fifth District decided the Messmer case, came to one conclusion, the Third District in Fabre versus Marion case came to an opposite conclusion, and this Court is of the opinion that the Messmer decision is not well taken and that the Marion decision by the Third

> District is the more reasonable interpretation of the statute.
>
> And I agree with that district court's opinion when they say they cannot have jurisdiction over a nonparty and could not reduce damages to plaintiff by virtue of a nonparty action to proceeding, through no fault of the plaintiff, the plaintiff is not at fault.
>
> I'm going to adopt the decision of the Messmer decision over the Fabre decision and adopt the ruling of the Messmer decision, so the verdict form then will not be changed in accordance with the defendant's request per the Messmer decision.

(T.627-28).[2]

After closing arguments, the case was submitted to the jury, which returned a verdict in favor of the plaintiff. The Jury found that Wells Fargo Guard Services was negligent, that the negligence was the legal cause of damage to Lucille Nash, and that the amount of damages sustained were $38,500.00 for past medical expenses and lost earnings or earnings ability; $58,650.00 for future medical expenses; $112,000.00 future damages for lost earnings ability reduced to present value; and non-economic damages in the amounts of $75,000.00 for past damages and $290,000.00 for future damages. The total damage award was $556,150.00. (T.693-95). (R. 330-32). Wells Fargo filed post-trial motions for judgment in accordance with its

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[2] In addition, the Court refused to admit over objection the defendant's requested instruction with respect to the issue being a negligent breach of contract rather than solely negligence, based upon the Court's earlier ruling with respect to the duty and negligence issues. (T.620-21; 626).

prior Motions for Directed Verdict and a Motion for a New Trial. (R. 337-39). In his ruling, dated August 24, 1993, the judge expressed the belief that no matter what he decided, it would be appealed. He also noted that he had struggled with the matter extensively, but decided to deny both of the defendant's motions. (R. 355-56). An appeal of the final judgment and that order was taken. (R. 357-62). The First District affirmed the denial of Wells Fargo's renewed motion for directed verdict but reversed and remanded the action for a new trial based on Fabre and Allied-Signal v. Fox. This court accepted jurisdiction to review that decision.

SUMMARY OF THE ARGUMENT

Nash takes most of her initial brief to address the alleged conflict created by the First District's grant of a new trial based upon the dictates of Fabre and Allied Signal, due to Wells Fargo's failure to assert §768.81 as an affirmative defense in its pleadings. Nevertheless, that argument was never raised in the trial court and, therefore, was waived. Although Nash's brief in the First District raised this matter generally, Wells Fargo raised the waiver issue in its brief. The district court's opinion did not directly address Nash's argument. Thus, there is no conflict to resolve, and no issue to even address. Under the circumstances, this Court should decline to review this issue.

In addition, even assuming that Nash has adequately preserved this issue, prior to this Court's decisions in Fabre and Allied Signal, an employer was absolutely immune from suit by an employee or a third party tortfeasor as a result of any employer negligence causing injury to an employee covered by workers compensation insurance. In this case, Methodist Hospital was immune from suit and as a result no cause of action existed against them that could have formed the basis of an affirmative defense that its negligence was responsible for the plaintiff's injuries.

Further, throughout the course of trial, Nash's counsel was clearly advised of Wells Fargo's position that the alleged duties Nash sought to impose upon Wells Fargo were the same non-delegable duties that the common law placed squarely upon the

premise owner and employer, Methodist Hospital, to provide a safe environment for business invitees and employees. Wells Fargo's counsel consistently argued that when the court determined that Wells Fargo had a duty outside the scope of its contract, which the law simply does not support, then Wells Fargo was essentially held responsible for the same broad obligations of the land owner, which was immune from suit. Accordingly, any and all evidence and testimony that was admitted in the case with respect to Wells Fargo's alleged breach of duty, particularly the alleged failure to supply more than one guard, proved not only Wells Fargo's purported negligence, but indeed more appropriately proved directly the negligence of Methodist Hospital and its fault in relation to the injury. This was continuously reiterated throughout the course of trial, and the court continuously expressed its view that the evidence Nash sought to admit and, indeed was allowed to admit, went to the duty of Methodist Hospital and its breach of that duty, as well as the duty the court improperly imposed upon Wells Fargo. Thus, it came as no surprise to Nash's counsel when Wells Fargo requested, during charge conference, a verdict form pursuant to Messmer, that asked the jury to apportion Methodist Hospital's fault. When that request was made, Nash's counsel did not argue that the issue was not raised in the pleadings or pre-trial stipulation, that the pleadings had not been amended to conform to the evidence, or that the evidence did not support a finding of fault on the part of Methodist Hospital. Rather, counsel merely

suggested that Fabre rather than Messmer was the appropriate decision. He otherwise recognized that Nash's counsel was requesting the verdict in order to "preserve his record" and agreed with the court that the point was a valid one that the court needed to consider by reviewing the two cases. Had Nash preserved its argument the district court could have addressed it. Had the issue been raised, Nash could also have sought to amend its answer and pleadings to conform to the evidence that established clearly the fault of Methodist Hospital. Indeed, given the evidence presented by both sides and the arguments raised, that issue was tried by implied consent and a motion to amend to conform the pleadings to the evidence was unnecessary.

With respect to the district court's decision granting a new trial as to all issues, which Nash asserts is in conflict with other district court decisions that reverse pursuant to Fabre and remand for a new trial on liability only, it is inherently a function of the district courts, which otherwise act as courts of final resort, to determine whether the issues that they address and the errors that they find are so inextricably bound with other issues in the case that a new trial on all issues is required. Although a determination on the Fabre issue does not necessarily affect directly the determination of damages, it is respectfully submitted that the same jury who decides the damages should also decide the liability and apportionment issues and that such issues should be addressed within the confines of the same proceeding. However, if this Court adopts the decisions of

other district courts of appeal and holds that a new trial on liability only is required, then all potential liability and apportionment issues should be tried.

ARGUMENT

I. THE DECISION UNDER REVIEW DOES NOT DIRECTLY OR EXPRESSLY CONFLICT WITH OTHER DECISIONS REGARDING THE GRANTING OF A NEW TRIAL AND CORRECTLY APPLIES THE DICTATES OF THIS COURTS DECISIONS IN FABRE AND ALLIED-SIGNAL

A. The Decision Under Review Does Not Announce any Rule of Law Related to Pleading of Affirmative Defenses

In its opinion, the first district did not reach any conclusion related to the pleading of an affirmative defense or reject any requirement that the negligence of third parties must be pled as an affirmative defense before apportionment of fault is allowed under Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993) or Allied-Signal, Inc. v. Fox, 623 So. 2d 1180 (Fla. 1993). Despite this lack of any direct mention of a contrary rule of law, Nash asserts that this court's jurisdiction and, indeed, the necessity for this court's exercise of its discretionary jurisdiction is the "conflict" created by the first district decision. Nevertheless, there is no direct and express conflict between the first district decision and any other decision and no reason for this court's continuing exercise of jurisdiction over a question that was never directly addressed.[3] In fact, to the extent that

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[3] In order for this Court to have "direct conflict" it must be based upon facts contained "within the four corners of the decisions allegedly in conflict." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Further, although the district court decision does not have to specifically identify a conflict with other appellate decisions in order to be "express", it must at a minimum discuss and apply legal principles that are in conflict with other decisions for there to be a sufficient basis for review. See Ford Motor Co. v. Kikis, 401 So. 2d 1341 (Fla. 1981).

this issue was ever raised, it was raised only in the district court; it was never made an issue in the trial court. In its answer brief and in response to Nash's motion for rehearing, Well's Fargo specifically argued that Nash had waived the argument being made in this court by not bringing it to the attention of the trial court at the time that Wells Fargo sought to include Methodist Hospital on the verdict form. In fact, rather than objecting to Wells Fargo's alleged failure to raise the issue, Nash's counsel recognized that under Messmer, Wells Fargo had the right to include Methodist Hospital on the verdict and that Wells Fargo had properly preserved its objection to the application of the Third District's decision in Fabre.

The basis upon which this court accepted jurisdiction is not stated in its order scheduling oral argument and this court can review any issue once jurisdiction is accepted. However, it should decline to review an alleged error that was never raised in the trial court and, thus, was waived on appeal. Indeed, if the holding of the First District supports any ruling it supports a finding that, despite Nash's argument on appeal that Wells Fargo waived its defense, that alleged error would not preclude a new trial due to Nash's own failure to preserve the issue below. This is black letter law that has been consistently followed and applied by the district courts, including the First District. Thus, as stated in Abrams v. Paul, 453 So. 2d 826 (Fla. 1st DCA 1983):

> it is axiomatic that it is the function of the appellate court to review errors

> allegedly committed by trial courts, not to entertain for the first time on appeal issues which the complaining party could have, and should have, but did not, present to the trial court.

Id. At 827. Based on this principle, the district court was not obligated to consider Nash's belated argument and, therefore, its refusal to accept that argument cannot form a basis for this court's further review. That rule applies even more to Nash's vague constitutional argument, which was never raised in the trial or appellate court and is raised for the first time in this court. Fleischer v. Fleischer, 586 So. 2d 1253, 1254 (Fla. 4th DCA 1991) (citing Sanford v. Rubin, 237 So. 2d 134 (Fla. 1970). Furthermore, the lack of any specific discussion of this issue in the district court opinion under review should preclude its further consideration here.

In Morales v. Sperry Rand Corp., 601 So. 2d 538 (Fla. 1992), this court reviewed a certified question from the Third District Court of Appeal related to the application of Fl. F. R. Civ. Pro. 1.070(j). After answering the certified question, this court addressed the argument that the failure to raise the provisions of the rule in the motion to dismiss waived the grounds for dismissal. In response, this court stated:

> This issue was not raised before the trial judge and was not discussed by the district court in the opinion under review. We therefore decline to address this issue. Trushin v. State, 425 So. 2d 1126 (Fla. 1982).

601 So. 2d at 540. In the instant action, Nash has taken the majority of its brief to raise an argument that Wells Fargo

waived its right to apportionment by not timely requesting it in the trial court. Nevertheless, Nash never raised this objection or made this argument in the trial court and that issue was not discussed in the district court's opinion. Indeed, when the verdict form was requested, Nash's counsel agreed that Wells Fargo had preserved the issue and did not argue that it had been waived or that the evidence was insufficient on the issue (T. 616-618). Thus, Nash never objected to the Fabre verdict form on the basis that she now asserts. Accordingly, this court should, as it did in Morales, decline to consider this issue.

B. Prior to this Court's Decision's in Fabre and Allied Signal the Liability of an Immune Employer Could Not be Raised

Under §440.11, Florida Statutes (1993), a part of the Workers Compensation Act, "the liability of an employer [under workers compensation] shall be exclusive and in place of all other liability of such employer to any third-party tortfeasor and to the employee. . . and anyone otherwise entitled to recover damages from such employer at law." Accordingly, although a specific indemnification action might be available by the tortfeasor against a negligent employer causing injury, a third-party tortfeasor would not be allowed to bring an action for contribution, which requires a pleading that adequately alleges common liability. Such "common liability cannot exist where the employer is immunized under Section 44.11(1), Florida Statutes. D.O.T. v. B.E. Whitehurst & Sons, Inc., 636 So. 2d 101, 105 (Fla.

1st DCA 1994) (citing Seaboard Coastline R. Co. v. Smith, 359 So. 2d 427 (Fla. 1978). Accordingly, the exclusive remedy of workers compensation totally immunized Methodist Hospital from any liability either to the employee or to a third-party tortfeasor absent allegation of egregious conduct sufficient to take the injury outside the scope of the workers compensation immunity protection. As a result, at the time of filing the answer in this case, the assertion of an affirmative defense that Methodist was at fault, as Nash asserts was required, was essentially a defense that could not be asserted and proven because Methodist Hospital was immune from any tort liability and could not be made a "party" to the action. In addition, at the time that the answer in the instant action was filed, there was no requirement that §768.81 be pled as an affirmative defense, which requirement was first stated by the Second District in the Dougherty decision. Indeed, that decision was not released at the time the request for apportioned verdict was made. Having followed the law in existence at the time of the action and having properly preserved the request for apportionment prior to charge conference and closing arguments, Nash was entitled to a reversal by the First District properly applying the then existing law of Fabre and Allied-Signal.

C. Even Assuming That an Affirmative Defense was Required, Nash Opened the Door to This Issue by the Manner in Which They Presented Evidence On Wells Fargo's Alleged Breach of Duty and Were Fully Aware Throughout Trial that Wells Fargo Asserted That Such Evidence Proved Methodist Hospital's Negligence and Fault Rather than Wells Fargo's Negligence.

As can be seen from transcripts of the trial proceedings, throughout the course of trial Wells Fargo specifically objected to any imposition of a duty that more appropriately should have been placed upon Methodist Hospital. As Nash's employer and the owner of the premises, Methodist Hospital had a non-delegable duty, as will be discussed in the sections below, to provide a safe environment to its business invitees and employees. That duty, recognized as a matter of law, exists regardless of whether Methodist Hospital hired a guard service to otherwise assist it in complying with that duty. It was Wells Fargo's position throughout trial that the evidence Nash presented was more appropriately directed to Methodist Hospital's breach rather than Wells Fargo's alleged negligence. Indeed, the court recognized on several occasions that Nash's presentation of testimony that more than one guard was required and that other security measures should have been incorporated created confusion with respect to the duty Wells Fargo undertook pursuant to its contract. Under the circumstances, Nash cannot possibly argue that it was not aware of Wells Fargo's assertions or that it was surprised by the request for a verdict pursuant to Messmer. Indeed, it is clear from the transcript of the charge conference that Nash's counsel

was fully cognizant of the request and made no objection to the request on the basis that they now assert is error.

When an affirmative defense is tried by the consent of the parties, than that defense is deemed appropriately raised and can be presented to the jury despite the lack of a proper pleading. This is especially true where a party objecting to the defense itself "opened the door", see Massey-Ferguson, Inc. v. Santa Rosa Tractor Co., Inc., 366 So. 2d 90, 94-5 (Fla. 1st DCA), cert. denied, 376 So. 2d 75 (Fla. 1979). Where evidence of a defense is admitted without objection or, as in this case, evidence that goes directly to an otherwise valid defense is admitted, over objection, by a party later seeking to preclude the defense, then the issue is deemed tried by implied consent and it can be treated in all respects as if it had been raised in the pleadings. Di Teodoro v. Lazy Dolphin Development Co., 418 So. 2d 428, 429 (Fla. 3d DCA 1982), rev. denied, 427 So. 2d 737 (Fla. 1983). If such issues are tried by implied consent, it is unnecessary for the plaintiff to even move to amend the pleadings to conform to the evidence under Florida Rules of Civil Procedure 1.190(b) in order for the defense to be deemed validly at issue and submit it to the jury. 418 So. 2d at 430; Flebont, Inc. v. Comoza Int'l., Inc., 281 So. 2d 61 (Fla. 3d DCA 1973); Beefy Trail, Inc. v. Beefy King Int'l, Inc., 267 So. 2d 853 (Fla. 4th DCA 1972); Robbins v. Grace, 103 So. 2d 658 (Fla. 2d DCA 1988). Thus, even assuming that an affirmative defense was required, the defense was implied by consent and the court erred in not

submitting that defense and allowing an apportioned verdict to go to the jury.

D. There Was Sufficient Evidence Of Methodist Hospital's Fault to Place Them On The Verdict

With respect to whether or not there was sufficient evidence at trial to show negligence on the part of Methodist Hospital, Nash's position here simply ignores that which Nash must concede -- that Methodist Hospital had a duty to provide a safe premises to its invitees and employees. Thus, when Nash claimed negligent failure to post sufficient guards, negligent assignment of the single guard, and general negligence in otherwise failing to secure the premises, those breaches applied equally to Methodist Hospital. In fact, they applied solely to Methodist Hospital, both as a matter of law and as a matter of fact, on this record.

Furthermore, Wells Fargo obtained testimony that Methodist Hospital had the sole right to control the decisions with respect to guard services; that it alone put up the sign upon which Mrs. Nash allegedly relied in believing that guard services were being provided for her benefit; and that it had to approve any changes in the security procedures before Wells Fargo could undertake them. Fabre, Allied-Signal, and the applicable statute requires juries to apportionment fault and requires the courts to enter judgment based solely on the apportioned fault. Indeed,in Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987), upholding the constitutionality of certain sections of the Tort Reform and Insurance Act of 1986, including the legislative

modification of joint several liability in Section 768.81, Florida Statutes (1986), this Court specifically stated that it found no denial of right of access to the courts "because that right does not include the right to recover for injuries beyond those caused by the particular defendant." Thus, it is inherent in Nash's claims that she is only entitled to recover those amounts which she proved were caused by a particular defendant and she had no vested right in a full joint and several recovery. See also, Clausell v. Hobart Corp., 515 So. 2d 1275, 1275-6 (Fla. 1987) (no person has a property or vested interest in any rule of common law or any vested right in the mere expectation of the anticipation of continuance of an existing law). Accordingly, Nash had no right to recover from Wells Fargo any non-economic damages greater Wells Fargo's conduct caused and in order to assess and apportion that fault pursuant to Fabre, the trial court was required to include Methodist Hospital on the verdict form. The First District Court of Appeal correctly reached this result and there is no basis to overrule that decision in this court. Here there was an undeniable duty on the part of Methodist Hospital and testimony that established its fault in failing to meet that duty. Thus, it should have been included on the verdict form.

This Court reiterated the foregoing principles when on August 26, 1993 it resolved the certified conflict between Messmer and Fabre, approved the opinion in Messmer, quashed the decision in Fabre, and remanded for further proceedings

consistent with its opinion. Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993). In evaluating the issue, this court stated:

> We reject the suggestion that the statute is ambiguous because it fails to define the "whole" at which a party's percentage of fault is to be determined. The "fault" which gives rise to the accident is the "whole" from which the fact-finder determines the party-defendant's percentage of liability. Clearly, the only means of determining a party's percentage of fault is to compare that party's percentage to all other entities who contributed to the accident, regardless of whether they have been or could have been joined as defendants.
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> * * * *
>
> This Court has already noted that the act disfavors joint and several liability to such a degree that it survives only in those limited situations where it is expressly retained. . . . In passing on the constitutionality of the act, we observe that the right of access of courts "does not include the right to recover for injuries beyond those caused by the particular defendant."...

Id. at 1183. (citations omitted).

In reaching its conclusion, this court looked to other jurisdictions that either interpreted similar statutes or the common law to limit joint and several liability. These included rulings that a defendant should not be liable for the fault of other parties even if those parties were not or could not be named as defendant. Several of these dealt with situations in which fault was also attributable to the plaintiff's employers but due to workers compensation immunity, those employers could not be named in the litigation.

On the same day as the decision in Fabre, this court also decided a companion case, Allied-Signal, Inc. v. Fox, 623 So. 2d 1180 (Fla. 1983) which was a certified question from the Eleventh Circuit Court of Appeal. Fox v. Allied-Signal, Inc., 966 F.2d 626 (11th Cir. 1992). The certified question arose out of an action by employee of Eastern Lines, who while performing his functions as a technician maintaining and overhauling an aircraft electrical system lost his fingers when they were caught in the rotating blades of a fan. This court noted that the fan did not have a safety screen at the particular time; that the fan manufacturer's maintenance and service manual did not indicate that a safety screen or guard was needed while the fan was being serviced; and that Eastern Lines and its employee failed to place a guard or screen over the fan. As the Eleventh Circuit noted, Eastern Airlines was immune from suit pursuant to the Workers Compensation Act. The trial court denied the defendant's request to allow the jury to consider and assess Eastern Airlines' percentage of fault, if any, under the Florida Tort Reform Act, §768.81. The court interpreted the statute to allow apportionment of fault only among the parties to the suit and not to include the non-party, immune employer, Eastern Airlines on the verdict form. Id. at 1181. The certified question asked the Court to determine whether the statute at issue required a consideration by the jury of the non-parties comparative fault in order to determine a party's liability. In response, it stated:

> On the authority of our decision in Fabre v. Marin, NOS 79,869 and 79,870 (Fla. August 26,

> 1993). [18 Fla. L. Wkly. S 453], we answer the certified question in the affirmative. In Fabre we adopted the rationale of Messmer, holding that Section 768.81(3), Florida Statute (1989), requires that liability be apportioned to all participants in an accident in order to determine a defendant's percentage of fault. In support of our decision we cited several cases with facts similar to those in the instant case in which it was necessary to consider the percentage of fault of the plaintiff's employer even though the employer was immune from tort liability under Workers' Compensation laws. Nats v. Gulf Oil Corp., 817 F.2d 1176 (5th Cir. 1987); Johnson v. Niagara Mach. & Toolworks, 666 F. 2d 1223 (8th Cir. 1981); DaFonte v. Up-Right, Inc., 828 P.2d 140 (Cal. 1992); Connar v. West Shore Equip., 227 N.W. 2d 660 (Wis. 1975).

Id.

Applying these decisions to the instant action, it is clear that the trial court, although correct in choosing between conflicting decisions in two other districts, chose wrong. Rather than adopting the rationale of Fabre, he should have adopted the rationale of Messmer and granted the request for verdict form apportioning fault between both Wells Fargo and Methodist Hospital, Nash's immune employer. Furthermore, the Allied-Signal decision is directly on point in that it specifically requires the court to include a Workers' Compensation immune employer on a verdict form. Although the trial court did not have the benefit of these two decisions when ruling on the issue prior to submitting the case to the jury, or on ruling on the issue post-trial, pursuant to the axiom that an appellate court should apply the law in effect at the time of its decision, the failure of the trial court to follow the dictates of Messmer was clearly

erroneous. Accordingly, the district court's reversal and remand for a new trial was proper.

In a later decision in W.R. Grace & Conn. v. Dougherty, 636 So. 2d 746 (Fla. 2d DCA), rev. den., 645 So. 2d 454 (Fla. 1994) and 645 So. 2d 457 (Fla. 1994), the court, in an action against an asbestos manufacturer, was asked to determine whether there was error on the part of the trial court in refusing to provide instructions and a verdict form pursuant to the applicable statute and this court's Fabre decision. As the court stated:

> We recognize that the trial court must fully instruct the jury on the issues in the case, and with the theory of the case as supported by competent evidence, a party is entitled to an instruction on that theory when the instruction is properly requested. Simmons v. Roorda, 601 So. 2d 609, 610 (Fla. 2d DCA 1992). However, the evidence in this case was not sufficient to have permitted the jury to have received instructions in a verdict form pursuant to Fabre. Fabre permits a jury to determine each party's and each non-party's percentage of fault and how much that fault contributed to a plaintiff's injury. We conclude that the only way to determine fault in a trial is from the evidence presented to the jury. Therefore, there must be evidence of fault of a non-party before a jury can determine the fault of that non-party.

Id. Although the court noted that there was evidence of multiple companies and up to 25 other asbestos-containing products used on the plaintiff's job site, it held that if the defendants wanted the benefit of a jury instruction and a verdict form which included other entities that manufactured products used on the job site, then they needed to produce evidence establishing the specifics of different products; how often the products were used

on the job sites; and the toxicity of those products that were used. This would permit the jury to more accurately assess each of the asbestos products of both parties and non-parties on a job site and the likelihood of injury from each of the products. This was based primarily upon principles applicable to asbestos litigation adopted by the Supreme Court of Florida in Celotex Corp. v. Copland, 471 So. 2d 533 (Fla. 1985).

Applying the principles of the Dougherty decision to the instant action, however, the verdict still should be overturned and the action remanded for a new trial. Initially, Dougherty is a case specifically tailored to asbestos products and asbestos litigation and the difficulties inherent in identifying exposure levels and toxicity for multiple products and multiple manufacturers. On the other hand, the instant action involves a simple application of the rule of Fabre and Allied-Signal to a single non-party immune employer, rather than a complex action involving asbestos products. Furthermore, in the instant action there was ample evidence to support a jury's apportionment of fault of Methodist Hospital. Nash presented testimony that not enough guards were hired, the security plan chosen was inadequate, and that there were otherwise inadequate steps taken to protect the employees and visitors at the Methodist Hospital complex. There was also evidence that the decision regarding the number of guards to hire and the types of guard services that would be provided was ultimately Methodist Hospital's to make. Finally, both as a matter of fact and as a matter of law,

Methodist Hospital was and is responsible for maintaining the safety of its premises and providing a safe work place for its employees. Thus, even assuming that this duty is not non-delegable, but rather can be jointly shared by Wells Fargo and Methodist Hospital, the issue of each joint obligors separate fault should have been presented to the jury pursuant to both Fabre and Allied-Signal.

E. The Owner of A Business has a Non-delegable Duty to Provide a Safe Environment for its Employees and Guests

The burden of providing reasonable safety for invitees is a non-delegable obligation of the land owner, Methodist Hospital. See Patterson v. Deeb, 472 So. 2d 1210, 1214 (Fla. 1st DCA 1985); Ameijeiras v. Metropolitan Dade County, 534 So. 2d 812, 813 (Fla. 3d DCA 1988). As stated in Ameijeiras:

> A landowner has a duty to protect an invitee on his premises from a criminal attack that is reasonably foreseeable. Admiral's Port Condominium Ass'n, Inc. v. Feldman, 426 So. 2d 1054 (Fla. 3d DCA), review denied, 434 So. 2d 887 (Fla. 1983); Medina v. 187th Street Apts., Ltd., 405 So. 2d 485 (Fla. 3d DCA 1981); Fernandez v. Miami Jai-Alai, Inc., 386 So. 2d 4 (Fla. 3d DCA 1980), appeal after remand, 454 So. 2d 1060 (Fla. 3d DCA 1984); Relyea v. State, 385 So. 2d 1378 (Fla. 4th DCA 1980). The landowner's duty arises only when he has actual or constructive knowledge of similar criminal acts committed on his premises. Peterson v. Deeb, 472 So. 2d 1210 (Fla. 1st DCA 1985), review denied, 484 So. 2d 8 (Fla. 1986), and 484 So. 2d 9 (Fla. 1986); School Bd. of Palm Beach County v. Anderson, 411 So. 2d 940 (Fla. 4th DCA 1982); Medina; Relyea.

Id. at 813. See also, Ashcroft v. Calder Race Course, 492 So. 2d 1309 (Fla. 1986); Holiday Inns, Inc. v. Shelbourne, 576 So. 2d 322 (Fla. 4th DCA 1991); Skipper v. Barnes Supermarket, 573 So. 2d 411 (Fla. 1st DCA 1991).

Furthermore, in Hancock v. Department of Corrections, 585 So. 2d 1068 (Fla. 1st DCA 1991), which involved an appeal from a summary judgment in favor of the Department of Corrections brought by an inmate at a state penitentiary injured while descending a stairway at the prison sewer treatment plant where he worked, the Court stated:

> Hancock was injured while performing work assigned to him by the Department. As such, the duty owed by the Department to Hancock was akin to that owed by an employer to an employee or by a master to a servant. Generally, a master or employer has an affirmative duty to provide his servants or employees with reasonably safe instrumentalities and places to work. Hicks v. Kemp, 79 So. 2d 696, 699 (Fla. 1955); Dearing v. Reese, 519 So. 2d 761 (Fla. 1st DCA 1988). An employer has a duty to use ordinary care and diligence to keep the workplace safe, taking into consideration the exigency of the circumstances and the character of work to be done. Richards Co., Inc. v. Harrison, 262 So. 2d 258, 261 (Fla. 1st DCA), cert. denied, 268 So. 2d 165 (Fla. 1972); Hicks v. Kemp, 79 So. 2d at 700. As the owner and operator of the premises with knowledge of the condition of the broken handrail, the Department also owed a duty to persons such as Hancock to protect them from reasonably foreseeable risks, even though he was aware of the dangerous condition. Hall v. Billy Jack's, Inc., 458 So. 2d 760, 761-762 (Fla. 1984); Kolosky v. Winn Dixie Stores, Inc., 742 So. 2d 891 (Fla. 4th DCA 1985), rev. denied, 482 So. 2d 350 (Fla. 1986).

Hancock, 505 So. 2d at 1070. Thus, in the instant action, Nash's contention, through her expert, that there was evidence of prior criminal acts on the premises that justified the existence of additional guard services created a duty on the part of the landowner to take steps to comply with its duty. Indeed, once Methodist recognized the necessity for such protective services and hired Wells Fargo, that duty existed regardless of its prior notice.

In addition, the testimony regarding the failure to have more than one guard on the premises and the manner in which that guard was requested to perform its services, also created a negligence question as to Methodist Hospital in both its capacity as the owner of the premises and the employer of Nash. This duty was non-delegable. As stated by the Second District Court of Appeal in Mills v. Krauss, 114 So. 2d 817 (Fla. 2d DCA) cert. denied, 119 So. 2d 293 (Fla. 1959):

> Under some circumstances duties may devolve upon an employer which he cannot delegate to another, and in such cases the employer is liable for breach and nonperformance of such duties even though he employs an independent contractor to do the work.

Id. at 819.

In Atchley v. The First Union Bank of Florida, 576 So. 2d 340 (Fla. 5th DCA 1991) the court discussed the general rule that an employer is not liable for of an independent contractor hired by him to do specific work, but determined that there are exceptions when the employer specifically undertakes, in that

case pursuant to a contract, to do something for another. As the court stated:

> This is sometime called the category of "non-delegable" duties. What is actually meant, however, is although the duty to perform may be delegated to an independent contractor, the liability for misfeasance cannot be avoided by the person who obligated himself originally to perform the contract.

Id. at 343-44. In the instant action, although there was no specific contractual agreement between Nash and her employer that specifically creates such a non-delegable duty, as noted above, there is a duty implied in law on the part of Methodist Hospital, both as the premises owner and as the employer to protect its employees and invitees from any foreseeable criminal acts of third parties and to provide a safe environment for them to work.

F. There is no Common Law Duty to Protect Against the Criminal Acts of Third Parties

This court has recognized there is no common law duty to enforce the law or to prevent misconduct of third persons. In Trianon Park Condominium v. City of Hialeah, 468 So. 2d 912 (Fla. 1985), this court considered the liability of a city for failing to enforce various building code standards. This court wrote:

> [T]here is not now, nor has there ever been any common law duty for either a private person or a governmental entity to enforce the law for the benefit of an individual or a specific group of individuals. In addition, there is no common law duty to prevent the misconduct of third parties.

Id. at 918. See also Parrotino v. City of Jacksonville, 612 So. 2d 586, 588 (Fla. 1st DCA 1989). Although Trianon Park and

its progeny arose in the context of public law enforcement officers, this court's analysis of existing common law duties is applicable to both public and private persons. Under that analysis, there is simply no common law duty running from Wells Fargo, a privately contracted guard service, to protect the plaintiff, Nash, from the criminal act sued upon herein.

In analyzing the issue regarding the existence of a duty to protect others from harm caused by criminal acts of third parties, this Court has looked to the Restatement (Second) of Torts, which provides:

> § 315. General Principle
> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.

As stated in Garrison Retirement Home Corp. v. Hancock, 484 So. 2d 1257 (Fla. 4th DCA 1985).

> The special relations referred to in (a) are parent-child, master-servant, land possessor and custodian of a person with dangerous propensities. Restatement (Second) of Torts, § 316-319 (1964). Absent some form of special relationship, the general rule to date in most jurisdictions has been that set forth in section 314 of the Restatement (Second) of Torts (1964), which provides that the fact that a person realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose a duty to take such action.

Id. at 1261. Restatement (Second) of Torts § 315 (1964).

The Third District Court of Appeal analyzed the same concept in Vic Potamkin Chevrolet, Inc. v. Horne, 505 So. 2d 560 (Fla. 3d DCA 1987) (en banc). The court stated:

> The duty to protect strangers against the tortious conduct of another can only arise if, at the time of the injury, the defendant is in actual or constructive control of (1) the instrumentality, e.g., Avis Rent-A-Car Sys. v. Garmas, 440 So. 2d 1311 (Fla. 3d DCA 1983) (owner of dangerous instrumentality liable to third persons for negligent use by anyone to whom it has been entrusted), rev. denied, 451 So. 2d 848 (Fla. 1984), (2) the premises upon which the tort is committed, e.g., Allen v. Babrab, Inc., 438 So. 2d 356 (Fla. 1983) (tavern owner has duty to protect patrons from disorderly conduct of third persons), or (3) the tortfeasor [citation omitted].

Id. at 562. Turning to the instant case, there was no instrumentality belonging to Wells Fargo involved in this incident. Therefore, the first point is inapplicable. Wells Fargo did not own or possess the premises where the assault occurred; Methodist Hospital did. Finally, Wells Fargo did not control the tortfeasor. He was not Wells Fargo's employee or agent. Thus, Wells Fargo fits none of the categories listed and arguably did not owe Nash a legally recognized duty to protect

her.[4] At a minimum, any duty imposed was a part of the landowner's duty in the initial instance.

G. Wells Fargo's Duties Were Limited by the Terms of its Contract

Nash argued that the contract between Wells Fargo and Methodist Hospital created a duty on Wells Fargo to Nash. However, the contract provided as follows:

> The services provided under this Agreement are solely for the benefit of Client and neither this Agreement nor any services rendered hereunder shall be deemed to confer any rights on any other party as a third-party beneficiary or otherwise and Client

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[4] A case directly on point is Haigler v. City of New York, 521 N.Y. Supp. 2d 428 (App. Div. 1987). MAG Guard Service entered into an agreement with the owner of a building to furnish a uniformed security guard. Someone threw a metal object from the building and struck plaintiff Haigler. He contended that had the guard been doing his job properly, the object would not have been thrown and he would not have been injured. The case is factually indistinguishable from the one at bar. The New York court held that "MAG owed no duty to Plaintiff which would support a claim of tort liability, since its alleged dereliction was in the nature of non-feasance, i.e., the failure to prevent the injury pursuant to its agreement, rather than misfeasance or negligent performance." The court went on to note MAG's contractual undertaking was intended to benefit only the "Client," the building's managing agent. "There was no provision specifically creating an obligation to plaintiff as a member of the general public." Id. at 429. The contract between Wells Fargo and Methodist Hospital contained substantially identical language.

This case was followed by Carrini v. Supermarkets General Corp., 550 N.Y. Supp. 2d 710 (App. Div. 1990). Carrini was shopping in a Pathmark Supermarket when an alleged thief escaped from store personnel and ran into her, knocking her down. APEX had a security guard posted inside the store. Carrini brought an action against the guard service contending that, had the guard done his job properly, she would not have been injured. The court held that APEX owed no duty to Carrini. APEX's obligations ran purely to Pathmark which had retained its services.

agrees to indemnify and defend WFGS against third-party claims.

This case was tried on the theory that, because Wells Fargo contracted to provide a security guard to the Professional Office Building, Wells Fargo owed Lucille Nash a duty to protect her from harm. The evidence which came in at trial - prior incident reports, expert opinion that more guards were needed - was no different than had Methodist had been the defendant. Wells Fargo did not step into the shoes of Methodist and undertake to do whatever was necessary to provide security. Wells Fargo undertook to provide to the hospital one guard to perform certain enumerated functions. Wells Fargo's obligations flowed only to the hospital and not to the general public or the hospital's employees absent a special legal relationship. As noted previously, there is simply generally no common law duty to prevent the misconduct of third parties.

Nash attempted to mix and match duties arising under the contract, which run only to Methodist Hospital, with common law negligence principles. This confusion was most evident at trial when Nash objected to the introduction into evidence of the guard service contract, but introduced into evidence the post orders. Without the post orders Nash could not show what the guard was supposed to do. In other words, she needed part of the contract in evidence because without it she had no way of describing Wells Fargo's alleged duty to Nash. Nevertheless, if there truly were a common law duty, as Nash alleged, reference to the post orders would have been unnecessary. Thus, Nash attempted to bootstrap

Wells Fargo's obligations to Methodist Hospital under the contract into a general tort duty running from Wells Fargo to Nash. The court erroneously allowed it. "It is only when the breach of contract is attended by some additional conduct which amounts to an independent tort that such breach can constitute negligence." Electronic Sec. Systems v. Southern Bell, 482 So. 2d 518, 519 (Fla. 3d DCA 1986). See Floyd v. Video Barn, Inc., 538 So. 2d 1322 (Fla. 1st DCA 1989) (breach of contract may be actionable in negligence where breach is attended by additional misconduct which amounts to independent tort).[5] In so doing, the court imposed the landowners non-delegable duty on a contract guard service. At a minimum, the landowner should be included in the verdict.

II. THE DISTRICT COURT'S DECISION REGARDING THE SCOPE OF THE NEW TRIAL SHOULD NOT BE DISTURBED

Although not specifically discussed in the district court's opinion nor ever brought to the court's attention in Nash's briefs or motion for rehearing, Wells Fargo concedes that the

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[5] Admittedly, had the guard fired a pistol at the robber and negligently hit Nash, no reference to the guard service contract or post orders would have been needed to state a negligence claim. Likewise, if the guard had accidently run over Nash in his car, no reference to the contract or post orders would be needed. These common law duties were specifically recognized in Trianon Park and Parrotino. However, the duty alleged here and the negligence asserted were acts of omission, not commission, and Nash's use of the post orders to create a duty which the common law of negligence does not recognize was improper. See also Goldberg v. Casanave, 513 So. 2d 751 (Fla. 3d DCA 1987).

opinion below is impliedly contrary to the decisions of other court's regarding the scope of a new trial pursuant to Fabre. In addition, it concedes that the issues it raised in the district court in support of a new trial were not directly related to the amount of damages awarded by the jury. Nevertheless, the decision whether any errors in a trial are of such a magnitude and are so intertwined with other issues is invariably that of the district courts in their role as primary appellate court's for all but the most narrow issues. Here, the district court, for unexpressed reasons, determined that a new trial on all issues was required. Given the nature of the duty imposed by the trial court and the possibility that most, if not all, of the fault in this matter can be attributed to Methodist Hospital, a new trial on both liability and damages before the same jury is appropriate. If, however, this court is inclined to reverse the decision in order to harmonize existing law (indeed it would appear that this implicit conflict is the only arguably legitimate basis for this court's exercise of jurisdiction), then the new jury should evaluate and apportion all potential fault and not be limited to the piecemeal retrial seemingly required by some of the decisions upon which Nash relies in this court.

CONCLUSION

WHEREFORE, Wells Fargo respectfully requests that this court approve the decision of the First District Court of Appeal.

Respectfully submitted,

STEVEN E. STARK
Florida Bar No. 516864

FOWLER, WHITE, BURNETT, HURLEY,
BANICK & STRICKROOT, P.A.
Attorneys for Respondent
International Place - 17th Floor
100 Southeast Second Street
Miami, Florida 33131-1101
(305) 789-9200

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this _____ day of February, 1996, to: HOWARD C. COKER, ESQ. and CORINNE L. HELLER, ESQ., COKER, MYERS, SCHICKEL, COOPER & SORENSON, P.A., 136 East Bay Street, Jacksonville, Florida 32202.

STEVEN E. STARK

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