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.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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

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INTRODUCTION

In this appeal, Petitioner will refer to itself as Petitioner, Plaintiff or Nash. References to the Respondent will be made as Respondent, Defendant, Wells or Wells Fargo. References to the Record on Appeal will be made by "R." with the appropriate page reference, while reference to the transcripit will be indicated by "T."

STATEMENT OF CASE AND FACTS

On February 20, 1992, Petitioner/Plaintiff, Nash, filed a Complaint in the Duval County Circuit Court alleging negligence against Respondent/Defendant, Wells, Fargo. (R. 1-4) Wells Fargo answered Plaintiff's Complaint on March 18, 1992. (R. 14-15) That Answer asserted the following positions:

> A. It (Wells Fargo) is not guilty.
>
> B. The incident was an unforeseeable event caused by a supervening, intervening, criminal act and is not the responsibility of this Defendant.
>
> C. This Defendant's rights and duties are prescribed by a written contract and, under the terms thereof, this Defendant owes no duty to the Plaintiff herein.
>
> D. Plaintiff herein is at best, an incidental beneficiary and entitled to no contract duties.
>
> E. This Defendant owed no common law duties to the Plaintiff herein to prevent the occurrence and/or apprehend the assailant and, therefore, the complaint fails to state a cause of action against this Defendant upon which relief can be based.

There was no assertion in the Answer of either (a) Plaintiff's contributory negligence or (b) the negligence of any third parties other than the intentional action of the assailant.

Pursuant to the Trial Court's Order of November 19, 1992, setting the cause for trial, the parties were required to file a pre-trial stipulation which contained "...(c) a concise statement of those issues of fact which remain to be litigated;" and "(d) any

proposed amendments to the pleadings..." (R. 133-136) A Pre-Trial Stipulation was filed jointly by the parties in accordance with that Order. This Stipulation and the issues for trial were discussed at the Pre-Trial Conference with the trial judge on May 6, 1993. The Order on that Pre-Trial Conference (R. 271-274) identified the following issues to be tried by jury:

11. a. Did the defendant owe any duty to plaintiff?
    b. Was the defendant negligent in the performance of its duties? If so, did that negligence proximately cause injury and damages to the plaintiff?
    c. Was the plaintiff negligent, and if so, did her negligence proximately contribute to her injury and damages?
    d. What are plaintiff's lawful damages?

Additionally, that Order specified that "1. [t]here are no amendments or corrections to be made to the pleadings." After a discussion with Wells Fargo's counsel, on the first day of trial, both parties informed the judge that the contributory negligence of Plaintiff should not be an issue for submission.

> Mr. Higginbotham: In the pretrial stip, we inadvertently, being the plaintiff, in preparation of the pretrial stip, included as an issue, plaintiff's comparative negligence. That issue was never pled by the defendant, and Mr. Murray agrees, as I believe that it is not an issue so should not be in the case. (Emphasis added)
>
> Mr. Murray: I agree with that, Judge. (T.5)

After that announcement, the case proceeded to trial on the remaining issues. The negligence of any third parties was still not raised by Wells Fargo as an issue in the case. The case was

tried to a jury during the week of May 17, 1993, some year and three months after the filing of the Complaint.

During the course of the trial, Wells Fargo made multiple objections and representations to prevent certain arguments and evidence which, in Wells Fargo's opinion, would solely impact on the responsibility of Methodist Hospital since Wells Fargo maintained that it owed no duty to Plaintiff.[1] Areas in the record which reflect this include the following:

1. Mr. Higginbotham:...This is a blowup of this sign as we enter the parking garage.

> Mr. Murray: If I may, Your Honor, it's a Methodist Hospital's sign. They're not on trial here unless you prove we put that sign up. That's got nothing to do with the price of tea in China, and I think if it comes in, that is a highly prejudicial piece of evidence and there's absolutely no basis for bringing it in. (T. 77) (emphasis added)

From that point forward, Wells Fargo continued to argue that nothing that was done by Methodist should be admissible (T. 77-87).

2. Regarding an evidentiary issue where Wells Fargo wanted to keep their own incident reports out of evidence, Wells Fargo's attorney stated:

> I mean, this -- it doesn't go anywhere, Judge. It's just not -- this is all evidence that's directed against the owner or occupier of property. It has nothing to do with the claim against the contract guard service. (T. 134).

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[1]. The issue of Wells Fargo's duty to Nash was an issue in the underlying appeal. That issue was decided in favor of Nash by the First District. That decision has not been appealed further, and is not an issue for review in the present action.

3. Later, while continuing to argue that Wells Fargo owed no duties to Ms. Nash, Wells Fargo's attorney stated:

> ...they're trying to strap Wells Fargo with a landowner's duty, you know, to try to truck in various incidents that have been reported in the building and say you should have had more security. That's a great argument made to Methodist Hospital if they were sitting here. (T. 146) (emphasis added).

This was followed by:

> Evidence of prior criminal activity is perfectly relevant if you've got a landowner. We don't have a landowner, and that's not our position. (T. 163) (emphasis added)

4. The next day, when an issue regarding documents prepared by Methodist was discussed, Wells Fargo's attorney stated an objection.

> It's a relevance objection...It's their own report of their own problems that they prepare for themselves and generate to their internal committee...I don't know what the relevancy is since you're suing Wells Fargo. (T. 198-199)

The Court prohibited introduction of any document created by Methodist based upon Wells Fargo's objection. (T.203)

5. Later in the trial, Wells Fargo objected to questioning Methodist professionals about what information Wells Fargo had given to them regarding security needs and recommendations. Wells Fargo suggested that the information was irrelevant to the issues. The Court sustained the objection and Plaintiff's attorneys were not allowed to inquire into the level of information supplied by Wells Fargo to Methodist. (T. 341-344).

6. When Plaintiff was on direct and testifying about the incident and events that occurred thereafter, Wells Fargo's attorney, objecting to a line of questioning stated:

> Judge, I don't really care, why do we care in this trial what representations are bad that Methodist Hospital made? (T. 425) (emphasis added)

After Plaintiff rested its case, Wells Fargo presented its case which consisted of one lay witness. This direct testimony encompasses only four pages of trial transcript. (T. 606 - 609).

On May 20, 1993, after four days of trial testimony, the evidence was closed and the parties, including the Defendant, rested their cases. (T. 612). Thereafter, Wells Fargo, for the first time, raised the issue of Methodist being on the verdict form. (T.615). However, Wells Fargo did not (a) timely raise the issue or (b) present any testimony regarding Methodist's negligence. Additionally, Wells Fargo requested no jury instruction on the issue of Methodist's negligence. (R. 314-329).

> Court: ...The defendant's instructions are pretty much the same. Are there any special instructions?
> Mr. Murray: There are no additional instructions to what plaintiffs submitted.
> Court: ...Were there any other instructions of yours that I'm not giving that should have an objection registered for the failure to give?
> Mr. Murray: No, sir. (T. 626)

This exchange occurred before any ruling on whether Methodist

should be included on the verdict form.

Later that morning, approximately 1-2 hours after the defense was first asserted, the Trial Court rejected Wells Fargo's request to have Methodist placed on the verdict form and adopted the holding of Messmer v. Teachers Ins. Co., 588 So. 2d 610 (Fla. 5th DCA 1991). (T. 627-628). The case was submitted to the jury for a determination of the liability of Wells Fargo, if any, and the damages. A verdict was rendered for Plaintiff. (R. 330-332).

In the appeal that followed, Wells Fargo asserted that the failure to include Methodist on the verdict form was reversible error. Nash's attorneys responded in the Answer Brief that the Trial Court's decision was correct, but for the wrong reasons since the issue of Methodist's alleged negligence was (a) an untimely raised affirmative defense and (b) unsupported by any evidence at trial which would have allowed for apportionment.

In the opinion of April 4, 1995, the First District Court reversed the final judgment in favor of Ms. Nash on the basis that the Trial Court made a wrong selection between the Messmer v. Teacher's Ins. Co., 588 So.2d 610 (Fla. 5th DCA 1991) case and the case of Fabre v. Marin, 597 So.2d 883 (Fla. 3rd DCA 1992).

While the decision of the First District correctly pointed out that the Trial Court had sided with the wrong case authority, the Appellee, Nash, had already conceded that issue in the Answer Brief, agreeing that the Florida Supreme Court decision in Fabre v.

Marin, 623 So. 2d 1182 (Fla 1993) had effectively overruled the Third District interpretation of the comparative fault statute as recited in Fabre v. Marin, 597 So.2d 883. However, the Order of the First District, as it stood, conflicted with the Florida Rules of Civil Procedure, various cases from all of the District Courts and the Florida Supreme Court and, additionally, was a misapplication of this Court's opinion in Fabre. These issues were raised in various Motions to the First District seeking clarification and/or certification. Those Motions were denied and a timely Petition for Certification to this Court was made. On November 27, this Court accepted jurisdiction and ordered briefs on the merits raised by Nash to be submitted for review and argument.

SUMMARY OF THE ARGUMENT

The decision of the First District Court of Appeal expressly conflicts with several well reasoned decisions of both the District Courts and of the Florida Supreme Court, as well as with the Florida Rules of Civil Procedure. Additionally, the decision is a misapplication of the law as enunciated by this Court in Fabre. As such, the decision should be reversed and the verdict for Plaintiff should be reinstated.

This case involves the issue of when and how an affirmative defense should be raised. This Court's decision in Fabre did not change pleading and proof requirements. Every District within Florida has recognized that affirmative defenses must be pled and proven at trial. The Florida Rules of Civil Procedure demand it. Notions of constitutional due process demand it. The decision of the First District, in the instant case, conflicts with all of these established principles and should be overturned.

The issue, simply stated, is whether Wells Fargo's failure to (a) raise the affirmative defense in its Answer (b) raise the issue by amendment to the pleadings (c) raise the affirmative defense or alert the Trial Court to its existence at the time of pre-trial (d) request jury instructions on the affirmative defense or (e) reveal the existence of the affirmative defense until both parties had rested their cases, acted as a waiver of the affirmative defense. Nash also asserts that Wells Fargo's continual representation to

the Trial Court that Methodist's negligence or participation were not issues, and indeed requiring that many pieces of evidence be kept out of evidence because of that position, acted as a waiver of the affirmative defense.

Finally, even if it could be said that the First District was correct in requiring a new trial, there are established lines of cases from the Third District which hold that where the issue to be retried solely relates to apportionment of liability, a new trial should only occur as to that division and should not be a retrial of the damages issues. This rule of the Third District results in a furtherance of judicial economy by requiring retrial only on the limited issues where error was found. Additionally, it is more just and protects litigants from having to incur unnecessary expenses. Therefore, the decision of the First District is in clear and express conflict with this expressed line of reasoning from the Third District and should be overturned.

ARGUMENT

I. THE DECISION OF THE FIRST DISTRICT COURT OF APPEALS WAS IN ERROR AND CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL AND THE FLORIDA RULES OF CIVIL PROCEDURE SINCE IT GRANTED A NEW TRIAL TO DEFENDANT/RESPONDENT BASED UPON AN UNPLED, UNRAISED AND UNPROVEN AFFIRMATIVE DEFENSE.

A. THE FIRST DISTRICT ORDER DEFEATS THE RULE THAT NEGLIGENCE OF THIRD-PARTIES IS AN AFFIRMATIVE DEFENSE WHICH MUST BE PLED BY THE DEFENDANT.

According to W.R. Grace Conn. v. Daugherty, 636 So.2d 746 (Fla. 2d DCA 1994); rev. den., 645 So. 2d 454 (Fla. 1994) and 645 So. 2d 457 (Fla. 1994), the negligence of third parties is an affirmative defense which requires affirmative proof. Defendants are required to give proper notice of affirmative defenses in their responsive pleadings. Pursuant to Rule 1.140(h), Fla. R. Civ. P.:

> A party waives all defenses and objections that the party does not present either by motion...or, if the party has made no motion, in a responsive pleading... (emphasis added)

The alleged negligence of Methodist constitutes an affirmative defense. As such, Wells Fargo was required to follow procedural rules of pleading and proof in order to have the issue submitted to the trier of fact. Wells Fargo had several opportunities to accomplish this which included:

a) Assertion of the defense in the original Answer,

b) Amendment of the Answer,

c) Motion to add issue at the pre-trial conference,

d) Motion to amend pleadings to add issue prior to the start of trial, and

e) Motion to amend pleadings to add issue prior to the end of trial.

Wells Fargo did not utilize any of these methods. Therefore, the defense was waived when Wells Fargo failed to mention it until after both parties had rested their cases at trial.

The First District has previously recognized these applicable procedural guidelines in State v. Pepper, 155 So. 2d 383 (Fla. 1st DCA 1963). In that case, the petitioner appealed a decision regarding a writ of mandamus which was issued and then quashed. Prior to trial, the parties met with the court for a pre-trial conference. From that conference, the court drafted a Pre-Trial Order delineating the issues to be tried by both parties. After trial, the petitioner argued that error occurred when he was prevented from presenting evidence on issues outside of the Pre-Trial Order. The First District stated:

> The foregoing points on appeal call for consideration of issues outside the pleadings and foreign to the issues which the parties agreed should form the basis of the trial as reflected by the pre-trial conference order. Having agreed at the pre-trial conference that the only issue to be tried was whether appellant passed the examination taken by him ...appellant precluded himself from injecting into the trial any separate or different issues other than those agreed upon at the pre-trial conference. The trial court was therefore correct in refusing to consider at the trial any new issues sought to be raised

> by appellant, and correctly excluded evidence offered for the purpose of proving issues different from those to which the parties agreed the trial would be confined.

The effect of the First District Order here under review is to nullify the dictates of Pepper. The Order finds, contrary to Pepper, that when the affirmative defense is based upon Fabre, that no pleading requirements apply. The Order finds that it is error to fail to allow the introduction of issues foreign to the proceedings, even if that introduction occurs after the close of all of the evidence.

Additionally, the First District Order nullifies the requirements of Rule 1.200(d), Fla. R.Civ. P., which states that:

> The Court shall make an order reciting the action taken at a conference and any stipulations made. The order shall control the subsequent course of action unless modified to prevent injustice.

The Third District Court of Appeals has also applied the above rules to the waiver of an unpled affirmative defense. In Bradford Builders, Inc. v. Dept. of Water & Sewers, 142 So. 2d 137 (Fla. 3d DCA 1962), the Third District reversed an order granting a new trial which was based upon an unpled affirmative defense. In that case, the plaintiff brought an action for breach of contract. At some point in the trial, the entire contract was placed into evidence. The defendant then moved for a directed verdict, stating that the terms of the contract, in evidence, required performance within a specified time limit and plaintiff had not put on any

evidence of compliance. The trial court granted the directed verdict. The Third District reversed. The contract defense was an affirmative defense sought by the defendant, but one which had not been pled by defendant. The Court stated:

> An available affirmative defense, if not asserted, is considered waived under 1.119(h), F.R.C.P., 30 F.S.A., unless, though not plead, the issue is tried as provided for in rule 1.15, F.R.C.P.. Id. at 138.

In the present case, Wells Fargo neither pled the issue, nor tried the issue of Methodist's negligence. In fact, Wells Fargo sought to, and was successful at blocking any evidence which mentioned Methodist at trial. Defendant's trial tactics did not evidence a true intent to ever assert or prove the affirmative defense. When affirmative defenses are abandoned in the pleadings and not raised during a scheduled pre-trial conference, they are waived and evidence which would support the unpled affirmative defense may be properly excluded. Sonnenblick-Goldman v. Feldman, 266 So.2d 48 (Fla. 3rd DCA 1972); cert. den., 270 So. 2d 15 (Fla. 1972). When affirmative defenses are abandoned in the pleadings, and not raised until the time of trial or thereafter, they are waived and the defendants are estopped from asserting them at trial. Peninsular Life Ins. Co. V. Hanratty, 281 So.2d 609 (Fla. 3rd DCA 1973). Since Wells Fargo's pleading, pre-trial and trial actions evidenced a waiver of the affirmative defense, there should not have been a new trial ordered based upon a waived issue.

The Third District Court has gone even further in this analysis and in Meyers v. Garmire, 324 So. 2d 134 (Fla. 3d DCA 1975), the court found that it was prejudicial and reversible error to allow presentation of evidence on an affirmative defense that was not timely raised. In that case, the Third District acknowledged that a trial court has broad discretion to modify a pre-trial order regarding issues to be presented at trial. However, the court also found it was prejudicial and reversible error to allow presentation of evidence on an affirmative defense that plaintiff had not been apprised of, nor had ample time to prepare for.

In the present matter, not only did Wells Fargo block evidence regarding Methodist and fail to present any affirmative proof of their negligence, it would have been reversible, prejudicial error of the trial court to have allowed the trial of this issue. Therefore, the First District Opinion which reversed the trial court's denial of a new trial was in conflict with other decisions and in error.

All of the decisions above have applied basic civil procedure rules uniformly to find waiver of an affirmative defense that is not pled or raised by the defendant before trial. The decision from the First District Court in the instant case is in clear conflict since it finds error in failing to allow inclusion of an unpled affirmative defense in the context of third parties on the verdict

form. The rulings of the Third District are clearly the better and more rational rules. They also properly comport with the Florida Rules of Civil Procedure which have been adopted by this Honorable Court.

The Fourth District has ruled similarly to the Third District in the case of Kersey v. City of Riviera Beach, 337 So. 2d 995 (Fla. 4th DCA 1976), which also conflicts with the present decision under review by this Court. In that case, the appellant sought reversal of a trial court decision after the trial court had admitted evidence on an affirmative defense which had never been before pled. The Fourth District reversed the trial court and agreed with the appellant. "[I]t has long been held in Florida that affirmative defenses must be plead or they are considered waived." Id. at 997. (Citations omitted). The only exception to that rule, as recognized by the Fourth District, is when the issue is tried by consent of the other party.

In the present case, the issue of Methodist's negligence was never pled. In addition, it was never tried as Wells Fargo blocked most mentions of Methodist and failed to put on any affirmative proof of their alleged negligence.

The previous cases all discussed the pleading and proof requirements of various affirmative defenses in general. The issue of pleading and proof of the specific affirmative defense of third-party negligence, involved in this case, has been addressed in

other cases. In Seminole Gulf Railway v. Fassnacht, 635 So. 2d 142 (Fla 2d DCA 1994), these procedural issues were raised by the dissent in the context of pleading and proving third-party negligence under Fla. Stat. §768.81:

> I do not believe the issue was adequately preserved by the defendant in the trial court. The record does not reflect that the defendant asked for relief under section 768.81 until after the jury returned its verdict. In my opinion, a defendant should raise section 768.81 as an affirmative defense, just as defendants have always raised contributory or comparative negligence. A defendant should request jury instructions on this issue similar to the standard instructions for comparative negligence. Id. at 144.

The case of American Aerial Lift v. Perez, 629 So. 2d 169 (Fla. 3d DCA 1993) had the same reasoning as the dissent in Fassnacht. In that case, the Court refused to allow defendant to include an untimely asserted third party on the verdict form when it stated,

> As to the possible responsibility of Plaintiff's employer, the defendant adduced no evidence on that issue and did not request that the employer be included on the jury form. We see no reason why the defendant should be given another bite at either apple. Id. at 172.

In the instant case, the First District opinion attempts to give the Defendant another bite and conflicts with Perez.

The First District opinion is in even further conflict with the opinion of the Second District Court of Appeals rendered in E.H.P. Corp. v. Cousin, 654 So. 2d 976 (Fla. 2d DCA 1995). In that

case, the trial court allowed a third party's name to be placed on the verdict form after the defendant first raised the issue on the eve before trial was to begin. In the appeal to the Second District, the propriety of the trial court's decision was addressed. The court stated,

> On the second point raised, [the third party's] name was added to the verdict form over Cousins' objection. This was allowed even though Jai-Alai failed to affirmatively plead the negligence of a third party or raise the matter at pretrial. The first notice the Cousins received of the inclusion of [the third party's] name on the verdict form was on the eve of trial. Although [the third party's] name should not have been placed on the verdict form, the jury never reached the issue...as the jury's determination that Jai-Alai was not negligent was dispositive of the case. Therefore, any error in including [the third party's] name on the verdict form was harmless. Id. (emphasis added)

The Second District's opinion states that it is error to include a third party on the verdict form if the defendant does not plead the issue or raise the issue at pre-trial. The First District opinion in the instant matter says that it is reversible error not to place the name of a third party on the verdict form, even if the issue is not raised until all parties have rested their cases at trial. Clearly, the two opinions are in conflict.

From a reading of the Cousin, 654 So. 2d 976 and Perez, 629 So. 2d 169 decisions, it seems that the Second and Third District are applying the more well reasoned approach. It does not matter if the affirmative defense is comparative negligence or apportionment

of fault; all should be pled and proven. The issues should be raised prior to resting at trial. The Second and Third Districts, on review of circumstances similar to the instant matter, found that there was a waiver absent proper assertion of the defense. That same rule should be applied in this case to find a waiver by Wells Fargo. The First District Order should be reversed and brought into conformity with these other decisions.

B. THE FIRST DISTRICT ORDER DEFEATS THE RULE THAT NEGLIGENCE OF THIRD-PARTIES, AS AN AFFIRMATIVE DEFENSE, MUST BE PROVEN BY THE DEFENDANT THROUGH AFFIRMATIVE EVIDENCE AT TRIAL.

As to whether evidence must be presented by the Defendant before a third-party's negligence can be considered by the factfinder, the First District opinion is in conflict with at least three other District Court decisions. In W.R. Grace & Co. v. Dougherty, 636 So. 2d 746 (Fla. 2d DCA 1994), the Second District Court upheld a trial court's refusal to place the names of third parties on the verdict form and stated:

> However, the evidence in this case was not sufficient to have permitted the jury to have received instructions and a verdict form pursuant to Fabre....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 nonparty. Id. at 748 (emphasis in original)

The Daughtry decision has been followed as controlling in at

least two other cases; Owens-Illinois, Inc. v. Baione, 642 So. 2d 3, 4 (Fla. 2d DCA 1994); rev. den., 649 So. 2d 870 (Fla. 1994) and Chesterton v. Fisher, 655 So. 2d 170 (Fla. 3d DCA 1995).

In the instant case, both parties had rested their cases before Methodist's fault had been raised by the Defendant so evidence on the issue was not presented. In fact, it is clear that during the entire trial, Wells Fargo adopted the position that Methodist Hospital was not, and would not, be a party to the legal action. It can hardly be said that any affirmative proof was submitted by Wells Fargo in the four pages of direct testimony which constituted their case in chief since there was not one question presented regarding Methodist's responsibility. Therefore, since Wells Fargo affirmatively blocked testimony regarding any potential negligence of a third party, it is clearly erroneous to allow them to assert that third party negligence should be an issue submitted to the jury after both parties have rested. It is equally erroneous to rule that after such action by the defendant, a new trial should be granted in order to apportion third party fault. The Order amounts to nothing more than another bite at the apple, allowing the defense to use a new trial approach. Therefore, the First District Court opinion conflicts with all three of the opinions discussed above.

The more well reasoned approach, therefore, is found in the rulings of the Second and Third Districts as reflected in

Dougherty, 636 So. 2d 746, Baione, 642 So. 2d 3 and Fisher, 655 So. 2d 170. If the defendant makes a reasoned trial decision to prevent testimony from being presented on a given defense, that defense has been abandoned and it should not be submitted to the trier of fact. The Defendant should not be heard to complain regarding its trial decisions after resting its case at trial. Again, this rule should be applied to the instant matter to bring the First District's decision into conformity with the rulings of the Second and Third District.

C. THE FIRST DISTRICT ORDER MISAPPLIES THIS COURT'S HOLDING IN FABRE, AND BY SUCH MISAPPLICATION, NULLIFIES THE FLORIDA RULES OF CIVIL PROCEDURE AND NEGATIVELY IMPACTS THE CONSTITUTIONAL RIGHTS OF THE PLAINTIFF

When this Honorable Court decided Fabre, it was attempting to give meaning to Florida's comparative fault statute. This Court did not intend, by that decision, to nullify the Florida Rules of Civil Procedure regarding requirements of pleading and proof for affirmative defenses. When the opinion of the First District Court in the instant case is read along with this Court's opinion in Fabre, other opinions of courts cited by this Court in Fabre and with the Florida Rules of Civil Procedure, it becomes clear that the application of the Fabre rule to the instant facts resulted in a misapplication of the law.

The instant application of Fabre may also have adverse constitutional due process implications. Although not controlling authority for this Honorable Court, the Montana Supreme Court's

analysis of comparative fault statutes in Newville v. Dept. of Family Services, 883 P.2d 793 (Mont. 1994) is well reasoned and persuasive. In the context of examining the constitutionality of their comparative fault statute, the Montana Supreme Court made the following analysis.

> [Plaintiffs] contend there is no reasonable basis to require any plaintiff to prepare a defense at the last minute for nonparties whom defendants seek to blame for the injury, but who have not been joined as defendants; and that there is no reasonable basis for requiring plaintiffs to examine jury instructions, marshal evidence, make objections, argue the case, and examine witnesses from the standpoint of unrepresented parties, particularly when they do not know until the latter part of the trial that the defendants will seek to place blame on unrepresented persons. These procedural problems form the basis for our holding that §27-1-703, MCA (1987), in part violates substantive due process.
>
> We conclude that [the statute] unreasonably mandates an allocation of percentages of negligence to nonparties without any kind of procedural safeguard. As a result, plaintiffs may not receive a fair adjudication of the merits of their claims. It imposes a burden upon plaintiffs to anticipate defendants' attempts to apportion blame up to the time of submission of the verdict form to the jury. Such an apportionment is clearly unreasonable as to plaintiffs, and can also unreasonably affect defendants and nonparties. Id. at 802. (emphasis added)

The Newville court went on to discuss that the substantive due process violations may be alleviated by instituting procedural guidelines, such as requiring defendants to plead the negligence of

third parties well before trial and affirmatively prove the negligence of third parties at trial. The court seemed to indicate that sandbagging the plaintiff at trial with a mere assertion of third party negligence, without prior pleading and proof by the defendant, was violative of substantive due process rights held by the plaintiff.

Under the Newville analysis, clearly the First District Opinion is violative of Nash's substantive due process rights. If the First District Opinion were allowed to stand, it would mandate that a new trial must be given to a defendant who neither pled nor proved its affirmative defense. This assertion of the defense after the close of all the evidence would also negate the plaintiff's ability to combat the assertion by their own proofs and evidence. This Honorable Court did not intend such an application of its rule in Fabre.

The real issues in this case are not even controlled by Fabre and, therefore, the overt application of Fabre to the present facts shows the clear misapplication of this Court's ruling. The facts underlying Fabre clearly show that the issues of third party fault were before the parties throughout the pendency of their litigation and that evidence of third party fault was presented at trial. Therefore, the facts in Fabre are sufficiently distinguishable from the instant case such that Fabre should not control the outcome of the instant case. The instant case can be resolved by reliance on

basic civil procedure rules of pleading and proof.

It is clear from the First District Opinion under review that the Fabre decision was misapplied, resulting in virtually overruling all other decisions surrounding pleading and proof requirements for affirmative defenses. Additionally, this application of Fabre results in a violation of substantive due process rights. Since it is clear that this was a misapplication, not intended by this Honorable Court, the decision should be reversed.

In order to give effect to the applicable Rules regarding waiver of affirmative defenses (1.140(h)), Fla.R.Civ.P.) and mandates of pre-trial orders (1.200(d), Fla.R.Civ.P.), as well as the prior case law from the First, Second, Third and Fourth Districts, as well as this Honorable Court, the decision of the First District, now under review by this Court, must be reversed. The present decision under review permits a defendant to intentionally omit an available affirmative defense during the pendency of the litigation, intentionally omit it from the pre-trial order of the trial court and, without amendment of the pleadings nor proof to a jury, assert it after the close of all evidence at trial. This would essentially condone trial by ambush. This practice would be in clear conflict with decisions of every District Court and the goals of the Florida Rules of Civil Procedure to have an orderly trial, not trial by ambush and

surprise. As such, the decision should be overturned.

II. THE FIRST DISTRICT OPINION CONFLICTS WITH THE WELL REASONED LINE OF CASES FROM THE THIRD DISTRICT COURT SINCE IT REQUIRES A NEW TRIAL ON ALL ISSUES WHEN THE BASIS FOR REQUIRING A NEW TRIAL IS BASED ON THE JURY'S FAILURE TO APPORTION DAMAGES, NOT UPON THE AMOUNT AND KIND OF DAMAGES THEMSELVES AND, AS SUCH, SHOULD BE REVERSED.

The opinion of the First District in the instant case mandates a "new trial incorporating a proper verdict form" without restricting the trial to apportionment of fault. To that extent, it directly conflicts with an established line of opinions from the Third District Courts of Appeal. In American Aerial Lift v. Perez, 629 So. 2d 169 (Fla. 3d DCA 1993), the Third District reversed the trial court based on Fabre issues. However, the Court also stated,

> Since a new trial is required on grounds unrelated to the damages issue, the new trial shall be confined to issues of the liability of the defendant and of the other entities allegedly responsible for the condition of the defective equipment. Id. at 172 (citations omitted)

The Third District followed this opinion with two others which come to the same result; if the reason for retrial is based upon the inclusion of non-parties pursuant to Fabre, then the new trial is to be based upon liability and apportionment only. Schindler Corp. v. Ross, 625 So. 2d 94, 96 (Fla. 3d DCA 1993) ("Neither of the errors which require a new trial affected the jury's determination of the plaintiff's damages. Accordingly, we direct that issue shall not be considered at the retrial..."). Schindler Elevator Corp. v. Viera, 644 So. 2d 563, 564 (Fla. 3d DCA 1994)

("On remand, the trial court is instructed not to consider the issue of damages, and to confine the issues on retrial to a determination of the negligence...")

Therefore, the First District opinion in the instant case is directly contrary to the line of cases from the Third District discussed above and a clear conflict exists. Additionally, this Court has previously adopted a similar holding in Purvis v. Inter-County Telephone & Telegraph Co., 173 So. 2d 679 (Fla. 1965), which adopted the rule in Larrabee v. Capeletti Bros., 158 So. 2d 540 (Fla. 3d DCA 1963), holding that where the assignments of error and issues raised by the party bringing the appeal only relate to liability, the new trial should not address issues of damages. Therefore, the First District Court decision also conflicts with these opinions.

The more reasoned approach to this issue is that held by the Third District. New trials should be awarded in order to correct errors which occurred during the trial, not give litigants another "bite at the apple." Where the error is purely about the apportionment of damages, the damage award, itself, is not at issue. Proof of the damage award at trial involves presentation of evidence which is clearly separable from the evidence required for proof of liability apportionment. It would be clearly prejudicial to require plaintiffs to retry their entire case and incur the additional expenses associated with the complete trial when the

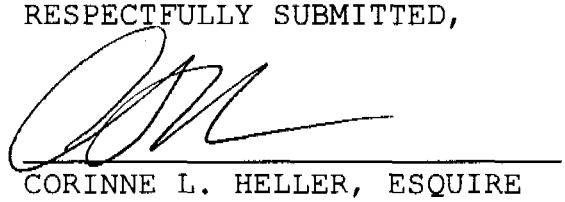
issue claimed to be in error could be addressed through a limited review of the issues. Such is the rule in the Third District. This should also be made the rule for the First District. The First District decision should, therefore, be reversed.

CONCLUSION

Since Fabre was decided by this Honorable Court in August, 1993, there has been a substantial amount of litigation created over its application to particular facts. The case presently under review, however, should not be governed by the holding in Fabre, or the dictates of the comparative fault statute, as it can be properly decided utilizing basic civil procedure rules surrounding pleading and proof. The First District application of Fabre, to award a new trial to a defendant who; a)did not plead nor prove the affirmative defense; b)blocked any possible proof through objections at trial; c)failed to submit any jury instructions on the defense; and d)first raised the issue after the close of all of the evidence in the case; resulted in a decision which conflicts with numerous established precedents, denies substantive due process to the plaintiff and confuses and misapplies this Court's decision in Fabre. For the reasons cited within this brief, the Petitioner respectfully requests that this Honorable Court reverse the decision of the First District and reinstate the jury verdict

for Petitioner, thereby harmonizing the law surrounding application of the Fabre decision with established rules of pleading and proof.

RESPECTFULLY SUBMITTED,



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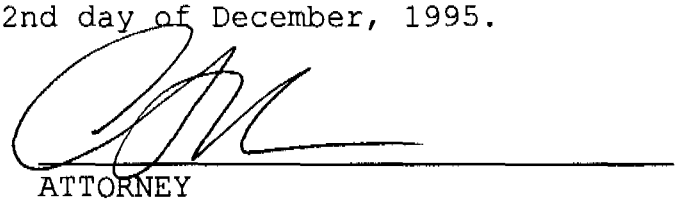
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Steven E. Stark, Esquire, International Place - 17th Floor, 100 Southeast Second Street, Miami, FL 33131-1101, by telefax and U.S. Mail this 22nd day of December, 1995.



ATTORNEY