IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,504

Y.H. INVESTMENTS, INC.,

Petitioner,

vs.

RAQUEL GODALES, Individually and as Guardian of Armando Rodriguez, a minor,

Respondent.

_____/

ON CERTIFICATION FROM THE DISTRICT COURT OF APPEAL
THIRD DISTRICT

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS IN SUPPORT OF THE RESPONDENT'S POSITION

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I
STATEMENT OF THE CASE AND FACTS

Because petitioner Y.H. Investments and its supporting amici have not properly characterized the district court's rationale, we need to revisit briefly the decision below. As Judge Barkdull's opinion makes clear, the district court fully appreciated the interplay between those doctrines which may affect primarily principles of contribution on the one hand, and those doctrines which relate to the allocation of primary fault on the other. As even Y.H. Investments reluctantly acknowledges (brief at 9), "there is some interplay between these concepts," and the district court's decision is based upon that interplay.

The district court recognized, as Y.H. Investments and its supporting amici have stated repeatedly, that the evolution of Florida law toward a "pure fault" system has focused upon the extent of a given defendant's exposure, attempting in various contexts to limit such exposure to some measure of the amount of harm attributable to that defendant's conduct. Nevertheless, and despite complimentary modification of the common-law doctrine of intra-family immunity, "one constant has remained. That is, the child's award has never been reduced due to the negligence of the parent" (opinion at 4-5). That observation of course encompasses far more than the principle of contribution among defendants; and the reason is that the underlying rationale of the immunity doctrine, as the district court recognized, is no less applicable to the central concept of apportioning fault among defendants, than it is to the corollary principle of contribution. In both contexts, "[t]he rationale [is] based on the fact that minors and infants are required to bring suit through a guardian ad litem" (opinion at 5); and the incentive to do so would be significantly undermined if the child's recovery were subject to reduction for the parent's negligence. That would certainly be true if an action for contribution against the parent were permitted; as the district court noted (opinion at 6): "If the parents fear possible liability through contribution then it would be their decision, and not that of the child, to withhold the suit." And it is equally true, wholly apart from the defendant's right of contribution, if the child's recovery as plaintiff

is reduced. As the district court put it (opinion at 6): "The true distinction in this case is that this plaintiff is a child who remains dependent on his guardian for the prosecution of his action, and the guardian might be detoured by the prospect of diminished recovery because of his or her own negligence."

The issue here is the child's dependence on the parent to bring the lawsuit, and in that context the issue of contribution on the one hand, and the issue of the child's primary recovery on the other, are complimentary sides of the same coin. Either way, the child's fortunes remain dependent upon his parent's incentive to bring the case; and that incentive is undermined if the parents' asserted fault is factored into either side of the equation--the plaintiff's side or the defendants' side. Thus the comparative-fault statute, which admittedly was drafted to focus upon each defendant's share of liability, directly implicates the central rationale of the principle of intra-family immunity as it relates to children. And the district court reached its holding because the comparative-fault statute does not expressly abrogate that longstanding common-law doctrine. Now that we have properly stated the district court's reasoning, we can turn to its defense.

II
ISSUES ON APPEAL

A. WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT Y.H. INVESTMENTS' INTERPRETATION OF § 768.81(3), FLA. STAT., DIRECTLY UNDERMINES THE COMMON-LAW PRINCIPLE OF INTRA-FAMILY IMMUNITY AS IT RELATES TO CHILDREN, AND THAT THE STATUTE'S MANIFEST FAILURE EXPLICITLY TO ABROGATE THAT DOCTRINE THUS REQUIRES A CONSTRUCTION WHICH PRESERVES IT.

B. WHETHER THE DISTRICT COURT WAS RIGHT FOR THE WRONG REASON BECAUSE THE GUARD RAILS ON THE APARTMENT COMPLEX IN QUESTION VIOLATED REGULATIONS DESIGNED TO PROTECT A CLASS OF PERSONS FROM ITS INABILITY TO PROTECT ITSELF, AND THUS CREATED LIABILITY FOR THE ENTIRETY OF THE PLAINTIFF'S DAMAGES, AS A MATTER OF LAW.

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C. WHETHER THE *FABRE* DECISION IS WRONG, AND SHOULD BE OVERRULED.

III
SUMMARY OF THE ARGUMENT

First, the district court properly held that § 768.81(3), the comparative-fault statute, did not abrogate the pre-existing common-law rule precluding in any context--not just the context of contribution claims--the reduction of a child's recovery by virtue of his parent's negligence. That rule reflects the recognition that children can bring their actions only through their parents, and that to reduce or to preclude the child's recovery because of the parent's negligence might foreclose the lawsuit altogether--an outcome sufficiently unacceptable that it must be prevented even at the expense of sacrificing to some extent the principle of pure comparative fault. Thus, both in the child's primary recovery, and in any available contribution claim, this Court quite properly has forbidden a reduction for the parent's negligence.

As Petitioner Y.H. Investments and its amici have pointed out repeatedly, the common-law doctrine, as thus framed, focuses upon the plaintiff child's entitlement to recovery, and the extent of that recovery. In contrast, the comparative-fault statute focuses instead upon the defendant's potential exposure, attempting to limit the defendant to his "fair share" of fault. But that rather obvious observation hardly accomplishes the gargantuan leap to the petitioner's and amici's conclusion--that the common-law doctrine therefore has no relevance to interpreting the statute. That is a non-sequitur. Notwithstanding that the statute seeks to hold each defendant accountable in some contexts only for his own share of fault, that principle nevertheless collides headlong with the policy objectives underlying this particular aspect of intra-family immunity--notwithstanding that it focuses upon the plaintiff's recovery and not the defendant's exposure. Either way, the two principles obviously collide, and that requires application of the traditional rules for construing statutes. As the district court recognized, because the comparative-fault

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statute does not by its terms abrogate the common-law doctrine of intra-family immunity in this context, that doctrine survives the statute.

Second, an independent basis for upholding the district court's ruling is that Y.H. Investments' misconduct in this case violated a regulation designed to protect children, and this Court has held that one who violates such a statute cannot reduce his own liability by anyone else's fault. Petitioner Y.H. Investments ignores the point entirely. Some of the amici do talk about it, acknowledging the general principle, but arguing that the regulation in question was not designed to protect children, and thus at most supports a finding of negligence per se. But that contention, supported by no authority, is plainly wrong. The regulation itself says explicitly that it is designed to "provide protection for children"--and of course it must be. A regulation requiring no more than six inches between guard rails can hardly be said to protect anyone but children--the only sub-group of human beings in our society which would require that small a proximity between guard rails. Unquestionably the defendant's violation is not merely negligence per se; it is negligence as a matter of law, and there is no sharing of responsibility in that context.

Third and finally, we respectfully submit that the *Fabre* decision is wrong and should be overruled. In further eroding joint and several liability by amending § 768.81(3), the Florida Legislature never in its wildest dreams intended to require the litigation of non-parties' fault--and it certainly did not intend the disastrous consequences which that interpretation has occasioned in Florida's courts. We will review the original arguments concerning construction of the statute, as well as a number of additional infirmities, including constitutional infirmities, which have emerged in the wake of its interpretation in *Fabre*. The only just outcome is for this Court to overrule *Fabre* without any further delay.

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IV
ARGUMENT

A. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT Y.H. INVESTMENTS' INTERPRETATION OF § 768.81(3), FLA. STAT., DIRECTLY UNDERMINES THE COMMON-LAW PRINCIPLE OF INTRA-FAMILY IMMUNITY AS IT RELATES TO CHILDREN, AND THAT THE STATUTE'S MANIFEST FAILURE EXPLICITLY TO ABROGATE THAT DOCTRINE THUS REQUIRES A CONSTRUCTION WHICH PRESERVES IT.

The rule at common law, clearly applicable before the *Fabre* decision,[1/] indeed focused not upon a given defendant's share of liability but upon a given plaintiff's recovery. It provided that a child's recovery in a negligence action could not be diminished by his parent's alleged negligence in contributing to the child's injury (typically, negligent supervision), even though the parent was a party to the action.[2/] The common-law rule reflected the reality that "[m]inors and infants must bring suit through a representative, next friend, or guardian ad litem," and that the parent would be deterred from prosecuting his child's interests if the parent's contributing negligence could preclude or reduce the child's recovery. *Joseph v. Quest,* 414 So. 2d 1063, 1064 (Fla. 1982). The general rule, therefore, extended far beyond the context of defendants' claims for contribution. It extended to any and all contexts in which a parent might be deterred from asserting his child's interests.

The specific question of contribution was only one aspect of this concern. This Court recognized in *Joseph* that the possibility of a contribution claim against the parent by the

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[1/] *Fabre v. Marin,* 623 So. 2d 1182 (Fla. 1993).

[2/] *See Orefice v. Albert,* 237 So. 2d 142, 146 (Fla. 1970); *Burdine's, Inc. v. McConnell,* 146 Fla. 512, 1 So. 2d 462, 463 (1941); *Meeks v. Johnston,* 85 Fla. 248, 95 So. 670, 672 (1923); *Jacksonville Electric Co. v. Adams,* 50 Fla. 429, 39 So. 183, 185 (1905); *Florida Power & Light Co. v. Macias,* 507 So. 2d 1113, 1117-18 (Fla. 3d DCA), *review dismissed,* 513 So. 2d 1060 (Fla.), *review denied,* 518 So. 2d 1276 (Fla. 1987); *Flick v. Malino,* 356 So. 2d 904 (Fla. 1st DCA 1978); *Dubov v. Ropes,* 124 So. 2d 34, 35 (Fla. 3d DCA 1934).

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defendant/tortfeasor would be no less inhibiting than a direct reduction of the child's recovery, and the Court therefore held that "contribution is available against a parent but only to the extent of existing liability insurance coverage for the parent's tort against the child." *Id.* at 1065.

In light of the policies underlying the rule, the adoption of comparative negligence in Florida--a doctrine which clearly moves toward the "pure fault" concept, thus focusing upon the defendants' exposure--did not change it. *See McDonough Power Equipment, Inc. v. Brown,* 486 So. 2d 609, 612 (Fla. 4th DCA 1986). Notwithstanding that the comparative-fault doctrine, like § 768.81(3) itself, seeks to limit a given defendant's exposure, that doctrine could not undermine the common-law principle of intra-family immunity as it relates to children, because to do so would undermine the safeguard for children built into that policy, wholly independent of any principles of contribution. Therefore, adoption of the comparative-fault concept left undisturbed the fundamental principle of intra-family immunity as it relates to children.

The language of § 768.81(3) does not speak to the common-law rule, or to its rationale. The statute says generally that in proper cases "the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability." The statute says nothing which by its terms abrogates the pre-existing common-law rules applicable in personal-injury actions brought on behalf of minor children. As the Court is aware, a statute passed in derogation of the common law must be narrowly construed in favor of the broadest possible retention of the pre-existing common-law rule.[3/] Clearly the policy underlying the common-law rule in question is no different in the *Fabre* era, in which defendants may apportion responsibility to non-parties, than they were in the pre-*Fabre*

[3/] *See Carlisle v. Game & Freshwater Fish Commission,* 354 So. 2d 362 (Fla. 1977); *Graham v. Edwards,* 472 So. 2d 803 (Fla. 3d DCA 1985), *review denied,* 482 So. 2d 348 (Fla. 1986); *Rudolph v. Unger,* 417 So. 2d 1095 (Fla. 3d DCA 1982); *Phillips v. Hall,* 297 So. 2d 136 (Fla. 1st DCA 1974).

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era, in which defendants could apportion blame to other defendants, and apportion their own liability through actions for contribution. Both before and after *Fabre*, a minor child remains dependent upon his guardian for the prosecution of his action, and the guardian would be deterred by the prospect of diminished recovery because of his own negligence. Because the language of § 768.81(3) does not explicitly abrogate the common-law rules, it must be construed to preserve them.

Our contention here--and the district court's holding--is not that § 768.81(3) should be interpreted to exclude from apportionment all non-parties who enjoy a common-law immunity to suit by the plaintiff. We recognize that in most cases, a defendant may reduce his share of liability on account of the asserted fault of a non-party who is immune from suit by the plaintiff. Indeed, the two leading decisions on the issue were cases in which the non-party in question had such a privilege. *See Fabre v. Marin,* 623 So. 2d 1182 (Fla. 1993) (spousal immunity); *Allied-Signal, Inc. v. Fox,* 623 So. 2d 1180 (Fla. 1993) (employer's immunity).

The difference is that in *Fabre* and *Allied-Signal*, the plaintiffs were both adults, who were not the object of any special protection by the courts and legislature; they could make their own decisions about whether or not to prosecute the action in light of both the immunity in question, and the reduction in damages which would be occasioned by the immune non-party's asserted fault. Indeed, it was precisely that recognition which motivated the Court in *Joseph v. Quest* to distinguish between contribution actions in cases involving inter-spousal immunity and contribution actions in cases brought on behalf of minor children, 414 So. 2d at 1064:

> In *Shor v. Paoli* [, 353 So. 2d 825 (Fla. 1977)] we allowed a third party tortfeasor to obtain contribution from the co-tortfeasor spouse of the plaintiff. The case is limited to situations involving husbands and wives and allows the Uniform Contribution Among Tortfeasors Act control over interspousal immunity. However, we recognize a legal difference between the husband and wife relationship and that of parent-child. In the former both are adults capable of bringing suit independently and with full knowledge of

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> the financial relationship. Prior to the institution of any suit either or both spouse can examine the relative strength of the financial positions, including insurance coverage and other assets. They can also evaluate the likelihood of success in the litigation process. With all this they can decide together or as individuals whether or not to bring suit with the possibility of contribution by the other spouse.
>
> The situation is completely different for minor children, and we do not extend *Shor* to cases involving parental/family immunity.

The same reasoning informs the post-*Fabre* regime. Here too, adult plaintiffs are not the object of special protection by the courts and legislature; and adult plaintiffs are capable of making their own decisions about the costs and benefits of bringing an action, mindful that the named defendants may be able to reduce their responsibility because of the asserted fault of non-parties. But no less after *Fabre* than before it, the minor child is at the mercy of his guardian, whose incentive to bring the action is significantly affected by the prospect of a reduction in recovery because of the asserted fault of the guardian himself.

These considerations necessarily inform the Court's construction of § 768.81(3). *Fabre* and *Allied-Signal* hold that the legislature intended, as a matter of general policy, to reduce a defendant's exposure by the amount of any provable wrongdoing by non-parties who are immune from suit by the plaintiff. That, indeed, was the underlying purpose of the statute, as interpreted by this Court--to make the plaintiff, and not the defendant, bare the onus of a judicially-created privilege, by reducing the plaintiff's recovery on account of that privilege. But that conclusion is not so easily reached in the case of minor plaintiffs, because of competing considerations. The onus of applying § 768.81(3) in this particular context would be far more than merely shifting the burden of non-parties' fault to the plaintiff; in this area it may be to preclude the lawsuit altogether. In this area, the non-party wrongdoer in question may be the minor's guardian, upon whose decisionmaking the minor depends. And this clear threat to the minor's

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interests, if the guardian himself is to be a potential target, is no less significant after *Fabre* than before it. The legislature's judgment in promulgating § 768.81(3) necessarily is informed by these considerations. Because the statute at least is ambiguous, in that it does not expressly abrogate the common-law rule of parental/family immunity, the statute should be interpreted to preserve it.

As against all of this, Y.H. Investments and its supporting amici have devoted a total of sixty-one pages to the endless repetition of a single argument--that because the comparative-fault statute addresses a defendant's potential exposure, while the intra-family doctrine ostensibly addresses a plaintiff's potential recovery, for some inexplicable reason the two principles could not be inconsistent, thus requiring application of traditional judicial rules governing the interpretation of statutes which are ambiguous. As Y.H. Investments puts it: "The Third District's decision in Godales is flawed in its primary assumption that the focus of section 768.81(3) is on the plaintiff and not the defendant" (brief at 17); the district court assertedly was concerned that "parents, who bring suit for minor children as guardians, would fear possible liability through contribution, thereby withholding suit on behalf of the child" (*id.*); "[c]ontribution does not factor into section 768.81, Fabre or Fox [*Allied-Signal, Inc. v. Fox,* 623 So. 2d 1180 (Fla. 1993)]. In both those cases, there was an immunity preventing suit for contribution against the spouse or employer" (brief at 18); "[w]hile a parent's negligence will not be imputed to a child, a parent's negligence will be considered in determining whether that negligence is a proximate cause of the accident" (brief at 19).[4/]

[4/] *See also* USAA Amicus Brief at 5 ("[T]he Third District decision erroneously focuses on the wrong party to the lawsuit"); Nationwide etc.'s amicus brief at 9 ("[T]he proper focus is on the extent of liability of the named defendant, not how much the plaintiff will be able to collect from the nonparty tortfeasors"); 9 (district court "failed to distinguish between the abrogation of joint and several liability and the availability of contribution among joint tortfeasors"); 10 (contribution "applies to determine one joint tortfeasor's liability to another, but does not impact either's liability to the injured plaintiff"); *id.* (the statute "is not the result of a grant of

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These comments, of course, entirely miss the point, which the district court readily appreciated--that there is an obvious inconsistency between a statute designed in most contexts to limit a defendant to his own share of fault on the one hand, and a common-law rule, extending far beyond the narrow principle of contribution, which is designed to remove a deterrent to the parent's assertion of his child's right of action. That deterrent may forestall the child's action if a claim for contribution is available against a parent; and it may also do so if the parent concludes that the child's recovery as plaintiff will be insignificant in light of the parent's contribution to the child's injuries. In either context, a system of "pure" comparative fault will work against the child's interests, by deterring the parent from asserting those interests. Thus, although the statute focuses on defendants and the common-law rule focuses on plaintiffs, those simplistic characterizations can hardly forestall their inconsistency.

It is that fundamental point which the district court recognized, and which Y.H. Investments and its supporting amici have utterly failed to appreciate. Their rebuttal may be a generally-accurate characterization of the two competing principles, but it fails either to recognize or to resolve the inconsistency. It therefore offers no guidance in answering the

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contribution rights to the named defendant against his joint tortfeasors, but a grant of freedom in the first instance from joint and several liability for his joint tortfeasors' shares of fault"); 11 ("[W]hether a named defendant could seek contribution against a nonparty joint tortfeasor is simply not relevant to the Fabre analysis. The limitation on Y.H. Investments' liability to the child was the result of its limited percentage of fault, not the result of contribution from the child's mother"); *id.* ("Apportioning fault to joint tortfeasors is not the equivalent of imputing fault to a plaintiff. Section 768.81 does not impute nonparties' negligence to the plaintiff; it simply provides that the nonparties' negligence will not be imputed to the named defendants"); 12 ("After the adoption of comparative fault, the application of the rule that a parent's negligence is not imputed to the child simply means that the child is not comparatively at fault merely because the parent acted negligently"); 15 ("Since the rule against imputing a parent's negligence to a child is not implicated in a Fabre analysis, there is no basis for concluding that section 768.81 is in derogation of that common law rule and therefore must be strictly construed"); 17 ("the fact that a joint tortfeasor is immune from suit does not alter the fact that the named tortfeasor cannot be required to pay greater than his percentage share of fault").

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question certified to this Court.

The answer to that question is clear. The legislature did not unambiguously abrogate the common-law doctrine. It thus survives the statute.

B. THE DISTRICT COURT WAS RIGHT FOR THE WRONG REASON BECAUSE THE GUARD RAILS ON THE APARTMENT COMPLEX IN QUESTION VIOLATED REGULATIONS DESIGNED TO PROTECT A CLASS OF PERSONS FROM ITS INABILITY TO PROTECT ITSELF, AND THUS CREATED LIABILITY FOR THE ENTIRETY OF THE PLAINTIFF'S DAMAGES, AS A MATTER OF LAW.

Before the adoption of § 768.81(3), Fla. Stat., as interpreted in *Fabre*, the common-law rule in Florida was that a tortfeasor's liability for injuring a child could not be diminished by the comparative fault of the child or anyone else, if the tortfeasor's liability was based on the defendant's violation of a statute or regulation which was designed to protect a class of individuals, like children, who are not able to protect themselves. As the Court put it in *Tamiami Gun Shop v. Klein,* 116 So. 2d 421, 423 (Fla. 1959): "Such statutes have been construed to place the entire responsibility upon the defendant, and to require him to protect not only plaintiffs who are exercising reasonable care but those who are contributorily negligent as well." Thus in *Tamiami Gun Shop,* the "entire responsibility" was placed upon the gun's seller, notwithstanding any contributing fault by the child or anyone else. Similarly, in *Tampa Shipbuilding & Engineering v. Adams,* 132 Fla. 419, 191 So. 403, 406-07 (1938), in which the minor child was killed while working illegally for the defendant, "[t]he employment of the child, ipso facto, in derogation of the statutes [prohibiting employment of minors] is in law considered the proximate cause of the death of the boy . . . ." The rationale of the rule is that the legislature intended to place full responsibility upon the defendant for protecting a minor or other incapacitated person from harm, and the defendant cannot escape such responsibility by pointing the finger of blame, even in part, upon someone else.

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This doctrine constitutes an independent basis for supporting the district court's holding. As the district court pointed out (opinion at 2), the plaintiff's claim is based upon the violation of a South Florida Building Code requirement--unquestionably designed to protect children--that guard rails on stairways not contain openings of more than six inches (*see* opinion at 2).

Petitioner Y.H. Investments has not addressed the point at all. Amici Nationwide Mutual and the Defense Lawyers do so at pages 19-21 of their joint amicus brief. Their discussion concedes the general principle, but argues that the regulation in question at most can fall into the second category outlined by this Court in *de Jesus v. Seaboard Coast Line R.*, 281 So. 2d 198, 201 (Fla. 1973)--the type of statute or regulation establishing at most negligence per se, which still requires the plaintiff to prove causation--but could not reasonably be characterized as a statute designed to protect a class of persons from its inability to protect itself. These amici obviously have not read South Florida Building Code § 3108.2, which prescribes that "guard rails shall provide protection for children by being designed and constructed to reject a six-inch diameter object." A regulation requiring no more than six inches between guard rails can hardly be said to protect anyone but children--the only sub-group of human beings in our society which would require that small a proximity between guard rails. The building code is explicitly designed to protect children, and that puts it squarely within the first *de Jesus* category. Under the authorities cited, therefore, Y.H. Investments cannot assign comparative fault to anyone else.

C. THE *FABRE* DECISION IS WRONG, AND SHOULD BE OVERRULED.

If the Court in *Fabre* had correctly interpreted the language of § 768.81(3), then the Court could rightly insist that litigants take to the legislature their complaints about the utter disaster occasioned by the *Fabre* decision in Florida's courts. To put it simply, it is now the rare minority of tort cases which either settle quickly with some or all defendants, or which are handled expeditiously. Tort cases no longer settle, because the settling party goes on the verdict

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form anyway, with the plaintiff's lawyer facing a malpractice suit if the jury assigns a greater percentage of fault to the settling defendant (which of course all the other defendants strongly urge) than the percentage of a plaintiff's damages absorbed by that settlement. Every plaintiff's lawyer's nightmare is that he settles with a 10% wrongdoer, only to have the jury assign 90% of the fault to that wrongdoer. Therefore, the cases do not settle. And the fight in those cases is no longer only with the named defendants. Now the parties are fighting daily over the asserted fault of non-parties--the phantom vehicle which the defendant driver suddenly remembers; the criminal assailant whose wrongdoing the defendant failed to prevent; and in every medical-malpractice case, every single health-care provider--from the lowliest orderly to every member of every professional association, who even arguably had anything to do with the patient. In Florida, tort cases do not settle, and tort cases never end.

All of this is the present reality because this Court adopted an interpretation of § 768.81(3) in *Fabre* which is not supported by its language, not supported by its legislative history, not supported by its underlying policy, and not supported by common sense. *See Wal-Mart Stores, Inc. v. McDonald,* 21 *Fla. L. Weekly* at D1375 (Webster, J., concurring) ("[P]erhaps the Supreme Court might wish to reconsider its conclusion in *Fabre* . . ."). Section 768.81(3) says that the court "shall enter judgment against each party liable on the basis of such party's percentage of fault . . . ." It does not define the phrase "percentage of fault." It does not tell us whether that phrase refers to the "fault" of only the parties to the lawsuit, which is the common-sense and historical meaning of the phrase, or whether for the first time in history the legislature intended litigation to allocate fault to non-parties without saying so explicitly.

In every other context in which the division of "fault" for causing a plaintiff's injuries has been at issue, it has been the "fault" of the parties to the lawsuit. There has never been a context in which litigants have ever understood an applicable common-law rule, or an applicable statute, to govern anything more than the relative responsibilities of the parties to a lawsuit.

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There has never been a context, other than the context of a defendant's argument that he was not at fault at all, in which the asserted fault of non-parties has been an issue in a lawsuit. Mindful that the legislature is presumed to be aware of pre-existing law when it passes a statute, and that repeals by implication are not favored, *see Palm Harbour Special Fire Control District v. Kelly,* 516 So. 2d 249, 250 (Fla. 1987), it is critical that all previous statutes--all previous common-law rules--have concerned themselves with the allocation of 100% of responsibility for an accident among those individuals who are brought into the lawsuit either by the plaintiff or by other defendants. The injection of such a consideration into comparative-fault principles could only be described as revolutionary, and yet this Court read it whole cloth into the innocent and at least ambiguous language of § 768.81(3).

As the plaintiff argued in *Fabre*, doing so not only violated every applicable rule of statutory construction; it also created enormous conflicts with other Florida Statutes, and with other common-law rules. We could not improve upon the *Fabre* plaintiff's treatment of these issues, and thus we attach and incorporate by reference the brief in *Fabre*.

Moreover, in addition to the arguments earlier made, this Court may revisit a statute which it earlier upheld, in order to consider additional constitutional considerations revealed in the course of its administration. *See Aldana v. Holub,* 381 So. 2d 231, 237 (Fla. 1980). As Justice Wells recognized in his concurring opinion in *Wells v. Tallahassee Memorial Regional Medical Center, Inc.,* 659 So. 2d 249, 255 (Fla. 1955), one persistent question which has arisen in the course of the statute's administration is the due process rights of non-parties who are accused of wrongdoing:

> [I]n addition to the reconciling of the applicable statutes, another troubling question specifically highlighted by this case is whether the jury's determination of the percentage of fault, which includes a determination of the fault of individuals who are no longer parties in the proceedings, has sufficient reliability to meet due-process requirements. Settling parties who are no longer parties

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> in the judicial proceedings present no evidence, cross-examine no witnesses, and make no arguments. Nevertheless, pursuant to *Fabre*, the jury determines in its verdict the settling parties' percentage of fault just as it does with respect to the parties who continue in the proceedings and actively participate in the trial. A procedure which mandates such a verdict is plainly inapposite to my view of due process as it exists in our courts. Due process has as a fundamental premise the adverserial presentation and examination of evidence by the parties whom the jury's verdict addresses.

Virtually identical reasoning informed the declaration of invalidity by the Montana Supreme Court in *Newville v. State Department of Family Services,* 883 P. 2d 793, 802 (Mont. 1994), of Montana's comparative-negligent statute, allowing non-parties to be placed on the verdict form:

> [T]here is no reasonable basis to require any Plaintiff to prepare a defense at the last minute for non-parties whom defendants seek to blame for the injury, but who have not been joined as defendant; and there is no reasonable basis for requiring plaintiffs to examine jury instructions, marshall 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 Defendants will seek to place blame on unrepresented persons.

In addition to this fundamental consideration of due process, endless intractable problems have emerged in the administration of § 768.81(3), as interpreted in *Fabre*, which render the statute virtually unenforceable. As the Court is aware, if a statute omits provisions which are necessary to its effective administration, the reviewing court cannot correct such deficiencies, because to do so would be to impermissibly engage in a lawmaking function.[5/] As Justice Wells noted in his concurrence in *Wells v. Tallahassee Memorial Regional Medical Center, Inc.,* 659 So. 2d at 255, the application of this statute to non-parties has led to a "myriad of

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[5/] *See State v. Barquet,* 262 So. 2d 431 (Fla. 1972); *State v. Furen,* 118 So. 2d 6 (Fla. 1960); *Sarasota Herald-Tribune v. Sarasota County,* 632 So. 2d 606 (Fla. 2d DCA 1993).

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imponderable reconciliations between common law and statutory law that have plagued the proper administration of justice in tort cases . . . ."

Among the administrative problems created by the holding are whether the fault of non-parties must be pleaded as an affirmative defense, now resolved in *Nash v. Wells Fargo Guard Services,* 21 *Fla. L. Weekly* S292 (Fla. July 3, 1996); the extent to which and the point in the litigation at which a defendant must assert the fault of a non-party; the extent to which a defendant must comply with statutory pre-suit notice requirements and other procedural requirements if he alleges that a non-party health-care provider is at fault under the statute; the extent to which such a non-party health-care provider, or any accused non-party, can resist discovery concerning his culpability in light of the possibility of professional sanction; the confidentiality attending this entire process; the extent to which the plaintiff can sue someone accused of wrongdoing by the other defendants, but then support the new defendant's protestation of innocence; the extent to which a non-party can intervene in the lawsuit to protect his reputation; and the extent to which a defendant whose liability is reduced by that of a non-party nevertheless remains liable for costs and fees. These are just a handful of problems which constitute only the tip of the iceberg. If the legislature had truly intended to permit the litigation of non-parties' fault, it would have addressed these considerations and many more in the statute. And at the least, the statute is inherently defective for failing to address them, and thus is unconstitutional.

Respondent Godales has argued in his brief that *Fabre* was wrong, and should be overruled. Under traditional rules of procedure applicable in this Court, the amici are therefore permitted to advance and expand upon that contention.[6/] For the reasons outlined here, and

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[6/] After the Court's recent decision in *Kinney System, Inc. v. Continental Ins. Co.,* 21 *Fla. L. Weekly* S43 (Fla. Jan. 25, 1996), it is not even clear whether such traditional principles apply anymore in this Court. In *Kinney* the petitioner explicitly eschewed any contention in its brief

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more fully developed in the incorporated brief in *Fabre*, the disastrous *Fabre* rule should immediately be overruled.

V
CONCLUSION

The Academy of Florida Trial Lawyers respectfully submits that the Court should overrule *Fabre*, and should properly interpret § 768.81(3) to require apportionment of 100% of the fault to be allocated by the factfinder among those parties to the lawsuit who are found to be at fault. In the alternative, the Academy respectfully submits that the order of the district court should be reversed, upon this Court's finding that a negligent defendant's percentage of fault cannot be reduced by the wrongdoing of an intentional tortfeasor.

VI
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 10th day of July, 1996, to: ROBERT L. PARKS, ESQ. and JOHN M. COONEY, ESQ., Haggard & Parks, P.A., 330 Alhambra Circle, First Floor, Coral Gables, Florida 33134; Miami, Florida 33132; T. GARY GORDAY, ESQ., Vernis & Bowling of Miami, P.A., Attorneys for Defendant, 1680 N.E. 135th St., Second Floor, Miami, Florida 33181; CARLOS LIDSKY, ESQ., 145 E. 49th St., Hialeah, Florida 33012; TRACEY RAFFLES GUNN, ESQ., Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., P.O. Box 1438, Tampa, Florida 33601; JAMES K. CLARK, ESQ., James K. Clark & Associates, One S.E. Third Avenue, Suite 1800, Suntrust International Center, Miami, Florida 33131; BESTY E. GALLAGHER, ESQ., Gallagher & Howard, P.O. Box 21548, Tampa, Florida 33622; and to G. BART

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that the pre-existing rule of *Houston v. Caldwell,* 359 So. 2d 858 (Fla. 1978), should be overruled, limiting its argument to the interpretation of *Houston* which was addressed in the district court. Only the amici argued that the *Houston* rule should be overruled, and this Court did so in its opinion. In any event, the point here is preserved by its assertion in Respondent Godales' answer brief.

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Appendix

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I.
STATEMENT OF THE CASE AND FACTS

Although we have no serious quarrel with the Fabres' statement of the case and facts (which has been adopted by State Farm), it is incomplete in some respects and somewhat lacking in clarity. We therefore intend to restate the case and facts briefly for the reorientation of the Court. We will provide only a general overview here. The factual and procedural backgrounds to the several issues on appeal will be provided at appropriate places in the argument section of the brief.

On January 29, 1989, Ann Marin was a passenger in an automobile being driven by her husband, Ramon Marin (T. 103-13, 142-43). The Marins were proceeding northbound in the left of five travelling lanes of I-95 when, in the vicinity of N.W. 103rd Street, Mr. Marin was forced to take evasive action to avoid an automobile which had cut directly in front of him while changing into his lane (*id.*). Although Mr. Marin successfully avoided a collision with this automobile, he lost control of his own vehicle during the evasive maneuver, and struck the concrete median wall (*id.*). Mrs. Marin was seriously injured, and Mr. Marin suffered minor injuries (T. 113-20).

Mr. and Mrs. Marin thereafter filed suit against Marie Fabre, alleging that she was driving the automobile which cut them off while changing into their lane, and that her negligence was a cause of their injuries (R. 2-5). Mrs. Fabre's husband, Eddy Fabre, was joined as a defendant because he was the owner of the automobile which Mrs. Fabre was driving at the time (R. 2-5; T. 250). The Fabres thereafter filed an answer in which they denied every allegation in the Marins' complaint, and alleged affirmatively (among other things) that Mr. Marin's recovery should be reduced under the doctrine of comparative negligence (R. 6-7). The Fabres' answer did not mention §768.81, Fla. Stat., or otherwise allege that Mrs. Marin's recovery should be reduced by the negligence of Mr. Marin (*id.*).

During the discovery which followed, the Marins learned that the Fabres' liability insurance coverage was limited to only $10,000.00 (R. 18-26; T. 3). They therefore sought

leave to amend their complaint to add a claim against their own insurance carrier, State Farm Mutual Automobile Insurance Co., which provided them with $500,000.00 in uninsured/underinsured motorist coverage (*id.*). Leave was granted, and State Farm was brought into the action by an amended complaint (R. 18-26, 27). State Farm answered, admitted that it provided UM coverage as alleged, and denied the remaining allegations of the amended complaint (R. 46-48). State Farm also alleged affirmatively (among other things) (1) that Mr. Marin's recovery should be reduced by his own comparative negligence, and (2) that, pursuant to §768.81, Fla. Stat., Mr. and Mrs. Marins' recoveries should be further reduced by the percentage of fault attributable to the negligence of a non-party "phantom" tortfeasor (*id.*). State Farm's answer contained no defensive allegation that Mrs. Marin's recovery should be reduced by the negligence of Mr. Marin (*id.*). The Fabres did not file an answer to the amended complaint.

On the first day of the trial, shortly after it commenced, Mr. Marin's claim was voluntarily dismissed; Mr. Marin was dropped as a party; and the trial proceeded on Mrs. Marin's claim alone (T. 94). On the liability issue, the jury was presented with two conflicting versions of the accident. Mr. Marin, a certified public accountant and councilman for the City of North Miami Beach, testified that he was driving in the leftmost travelling lane of I-95 at 55-65 m.p.h.; that Mrs. Fabre's vehicle was in the lane to his right; that Mrs. Fabre pulled into his lane, directly in front of him; that he had to take evasive action to avoid a collision; that he swerved to his right; that he avoided a collision with Mrs. Fabre's automobile; that he noticed as he was swerving around Mrs. Fabre's vehicle that it had a flat tire; that he apparently overcorrected for the swerve when he straightened the steering wheel; and that he hit the concrete median wall as a result (T. 101-23). Mrs. Marin corroborated her husband's description of the accident (T. 142-43). According to Mr. Marin, after Mrs. Fabre had stopped her car in the emergency lane next to the retaining wall, she approached him and said, "I'm sorry," but she denied being the cause of the accident (T. 121).

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Mrs. Fabre told an entirely different story. According to her, she was proceeding northbound on I-95 in the second travelling lane from the left at 45-50 m.p.h., when her car had a flat tire (T. 32-41). She had no difficulty controlling her car, and she pulled over to the left and parked the car in the emergency lane (T. 34-45). Thereafter, she stood beside her car watching the northbound traffic for someone she knew to come along (T. 46-52). After four or five minutes, she observed a red car, followed by the Marins' car, travelling northbound in the third travelling lane from the left (*id.*). According to Mrs. Fabre, both cars attempted to change lanes to the right, but the Marins' car "swayed" to the left, and then hit the median wall (*id.*). There was an adult witness in Mrs. Fabre's car at the time, but the defendants did not call her to corroborate Mrs. Fabre's story (T. 42-44, 163). Mrs. Fabre's version of the accident was impeached in a number of respects by prior inconsistent statements made in her deposition, and by conflicting evidence from the investigating trooper, but there is no need to detail those conflicts here because it is clear from the verdict that the jury rejected her version of the accident in favor of the version to which Mr. and Mrs. Marin testified.

At the charge conference, and notwithstanding that the defendants' pleadings contained no defensive allegation that Mrs. Marin's recovery should be reduced by the negligence of Mr. Marin (who was now no longer a party), the defendants requested that the verdict form allow the jury to apportion blame for the accident between Mr. Marin and Mrs. Fabre (T. 268-79). The plaintiffs objected and the trial court declined the defendants' request, ruling that §768.81 authorized apportionment only between parties to the action (*id.*). To obviate the necessity of a retrial if this ruling later proved to be erroneous, the Marins agreed to have the issue of Mr. Marin's negligence submitted to the jury, subject to a post-trial determination of whether any affirmative finding on that issue should result in a reduction of Mrs. Marin's recovery in the judgment ultimately entered (T. 290-93). The jury thereafter returned a verdict finding both Mrs. Fabre and Mr. Marin 50% at fault;

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assessing $12,750.00 in economic damages for Mrs. Marin's future medical expenses; and awarding Mrs. Marin $350,000.00 in intangible damages (R. 126-28; T. 419-20). Judgment was initially entered in Mrs. Marin's favor, against both the Fabres and State Farm, in the full amount of the verdict (R. 162).

The defendants thereafter moved for new trial, for remittitur, and for reduction of Mrs. Marin's recovery to half the verdict (R. 129, 132, 143).[1] State Farm's motion for new trial was denied, but the trial court granted State Farm's motion for remittitur, and it ordered a remittitur of $5,000.00 in the economic damages awarded to Mrs. Marin (which Mrs. Marin accepted); the initial final judgment was vacated, and an amended final judgment was entered in the reduced amount of $357,750.00 against both the Fabres and State Farm (R. 145, 147, 161, Fabres' appendix).[2] No written orders were entered on the defendants' requests for reduction of the verdict by half -- but because the issue was argued below, and because an adverse ruling on the requests would appear to be implicit in the amount of damages awarded in the amended final judgment, we will assume that the defendants' first issue on appeal was preserved for review.

The Fabres' motions for new trial and for remittitur were served 20 days after the

---

[1] The request for reduction of the verdict by half was technically incorrect, even under the defendants' reading of §768.81. Because Mrs. Marin was not at fault in causing the accident, only her *intangible* damages were subject to apportionment under the defendants' reading of the statute. The error in the request was mooted by the trial court's ultimate denial of the request, however, so we will not dwell upon it here.

[2] With respect to State Farm at least, the amount of this judgment was technically incorrect. Because State Farm was sued in its status as underinsured motorist carrier, it was not responsible for the first $10,000.00 of the verdict because the Fabres had $10,000.00 in liability insurance coverage. State Farm has raised no issue here concerning the amount of the judgment (and it is unlikely that it will ever be a problem, since State Farm will be entitled to a setoff of the $10,000.00 paid by the Fabres' carrier -- or, if the Fabres' carrier should become insolvent, State Farm will owe the entire judgment), so there is no need for the Court to concern itself with the point. We mention it simply in the interest of clarity, since the error might have jumped off the page at first reading, and an explanation therefore appeared to be in order.

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verdict, so they were clearly untimely (R. 126, 143).[y] The trial court also entered no written orders disposing of these motions before the Fabres filed their notice of appeal. Nevertheless, because State Farm obtained an order vacating the initial judgment and obtained the entry of an amended final judgment to which the Fabres directed a timely notice of appeal, it would appear that, notwithstanding these procedural missteps, the Fabres' appeal was timely filed. These missteps did result in a waiver of the Fabres' second issue on appeal, however, as we will explain in the argument section of the brief. The trial court also entered a cost judgment against both the Fabres and State Farm (R. 159). The separate appeals perfected by the Fabres and State Farm brought both the amended final judgment and the cost judgment here (R. 149, 150, 152) -- and the two appeals have been consolidated for all appellate purposes by the Court.

II.
ISSUES ON APPEAL

The defendants have stated four issues on appeal. At least two of the statements contain the wrong standard of appellate review, and some of the issues have not been stated neutrally. We therefore restate the issues on appeal as follows:

> A. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DECLINING TO APPORTION THE PLAINTIFF'S DAMAGES BETWEEN THE DEFENDANTS AND A NON-PARTY TO THE ACTION, AND IN ENTERING JUDGMENT AGAINST THE DEFENDANTS IN THE FULL (REMITTED) AMOUNT OF THE VERDICT AS A RESULT.
>
> B. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN, AFTER RESERVING RULING DURING TRIAL ON THE DEFENDANTS' MOTIONS FOR MISTRIAL, IT DENIED THE DEFENDANTS' MOTIONS FOR NEW TRIAL, WHICH ASSERTED THAT PLAINTIFF'S COUNSEL HAD IMPROPERLY SUGGESTED THAT MRS.

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[y] *See* Rule 1.530, Fla. R. Civ. P. The Fabres' request for reduction of the verdict was arguably a motion to alter or amend the initial final judgment, and because it was filed eight days after entry of that judgment, it was probably timely (R. 143, 162).

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FABRE HAD RECEIVED A TRAFFIC CITATION AS A RESULT OF THE ACCIDENT IN SUIT.

C. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE DEFENDANTS' MOTIONS FOR MISTRIAL, WHICH ASSERTED THAT PLAINTIFF'S COUNSEL HAD IMPROPERLY EXPRESSED HIS PERSONAL BELIEF CONCERNING THE VERACITY OF THE WITNESSES DURING CLOSING ARGUMENT.

D. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DECLINING TO INSTRUCT THE JURY THAT A VIOLATION OF §316.071, FLA. STAT. (DISABLED VEHICLES OBSTRUCTING TRAFFIC), WAS EVIDENCE OF NEGLIGENCE.

III.
SUMMARY OF THE ARGUMENT

In our judgment, the circumstances do not lend themselves to preparation of the type of summary of the argument which would ordinarily belong here. We reach that conclusion because the number of issues raised by the defendants -- coupled with the page limitations imposed upon us, and the need to use many of those pages to supplement the defendants' inadequate statements of the case and facts and to discuss the manner in which some of the issues were waived -- necessarily means that our arguments on the issues must be relatively brief. In effect, our arguments will be little more than summaries themselves, and to summarize those summaries here would amount to mere repetition of an already unfortunately lengthy brief. We therefore respectfully request the Court's indulgence, and we turn directly to the merits.

IV.
ARGUMENT

A. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN DECLINING TO APPORTION THE PLAINTIFF'S DAMAGES BETWEEN THE DEFENDANTS AND A NON-PARTY TO THE ACTION, AND IN ENTERING JUDGMENT AGAINST THE DEFENDANTS IN THE FULL (REMITTED) AMOUNT OF THE VERDICT AS A RESULT.

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1. Resolution of the problem presented here depends upon a definition of "the whole" by which a "party's percentage of fault" is to be determined -- a definition which is missing from §768.81(3).

The defendants' primary contention on appeal is that §768.81(3), Fla. Stat., required the trial court to apportion Mrs. Marin's intangible damages between (1) the Fabres (and State Farm, which stands in the Fabres' shoes), and (2) Mr. Marin, a non-party to the action. We intend to demonstrate that §768.81(3) does not require that result, but before we analyze the statute it is necessary to place the issue presented here in its proper historical perspective. Prior to the enactment of §768.81(3), the facts presented by this case would have implicated the following settled principles of law:

(1) Mr. Marin could not have been found liable to Mrs. Marin, either severally or jointly with the Fabres, because suit against him would have been barred at the threshold by the doctrine of interspousal immunity. *Raisen v. Raisen*, 379 So.2d 352 (Fla. 1979).

(2) In an action by Mrs. Marin against the Fabres, Mr. Marin's negligence could not have been imputed to Mrs. Marin to reduce her recovery. *Bessett v. Hackett*, 66 So.2d 694 (Fla. 1953).

(3) In an action by Mrs. Marin against the Fabres, the Fabres' remedy for apportioning Mrs. Marin's damages between themselves and Mr. Marin would have been an action against Mr. Marin for contribution under §768.31, Fla. Stat. (for which Mr. Marin would have been indemnified by his own liability insurance carrier, State Farm). *Shor v. Paoli*, 353 So.2d 825 (Fla. 1977).

(4) In an action by Mrs. Marin against the Fabres (in which contribution against Mr. Marin had not been sought by joining him as a third-party defendant under §768.31), the issue of Mr. Marin's negligent contribution to his wife's injuries could not have been submitted to or determined by the jury. *See Metropolitan Dade County v. Yearby*, 580 So.2d 186 (Fla. 3rd DCA 1991). *Cf. Dudley v. Carroll*, 467 So.2d 706 (Fla. 5th DCA), *review*

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dismissed, 469 So.2d 749 (Fla. 1985).[4]

In short (and if these settled legal principles continue to apply), because Mr. Marin was not a party below, either as a counterdefendant or as a third-party defendant in a contribution action, (1) the issue of his negligent contribution should not have been submitted to the jury; (2) Mrs. Marin was entitled to recover the full amount of her (remitted) damages from the Fabres (and State Farm, which stands in the Fabres' shoes); and the Fabres' (and State Farm's) remedy for apportionment lay in a subsequent contribution action against Mr. Marin (which would have been unnecessary, since State Farm provided Mr. Marin's liability insurance coverage as well). In other words, Mrs. Marin would have recovered the full amount of her (remitted) damages by recovering $10,000.00 from the Fabres' liability insurance carrier and the balance from State Farm, and that would have been the end of the matter.

The defendants contend that all of the foregoing was changed by enactment of §768.81(3), Fla. Stat. -- and that a defendant may now reduce its liability to a plaintiff, not by an action for contribution against a party to the lawsuit, but simply by deducting the adjudicated contributions of negligent persons who are not even parties to the suit, even if those persons could have incurred no liability to the plaintiff in the first place. The propriety of this contention depends, of course, upon §768.81(3) -- which reads as follows:

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

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[4] If Mrs. Marin had been a child of Mr. Marin, rather than his spouse, the governing legal principles would have been somewhat different. A child can sue a parent, but only to the extent of liability insurance coverage. *Ard v. Ard*, 414 So.2d 1066 (Fla. 1982). And in an action by a child against a non-parent, the non-parent can recover contribution from the parent, but only to the extent of liability insurance coverage. *Joseph v. Quest*, 414 So.2d 1063 (Fla. 1982).

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> that party on the basis of the doctrine of joint and several liability.

The defendants contend that this statute is plain and unambiguous, but it clearly is not. In fact, the statute is lacking an essential piece; it is woefully incomplete; and it is therefore quintessentially ambiguous. Although the statute provides for the assessment of liability "on the basis of such party's percentage of fault," *it nowhere defines the whole by which the percentage is to be determined.* One cannot "determine a percentage of . . . ," of course; one must determine a percentage of *something* -- a total which amounts to a *whole* -- and in the absence of a definition of the whole, the statute is, in our judgment, essentially gibberish. It has therefore fallen to this Court (as it often does) to give the legislature's handiwork a workable meaning by defining the whole by which a "party's percentage of fault" is to be determined -- and that unfortunate task simply cannot be avoided here.

In essence, the defendants have asked the Court to supply the missing piece of the statute by defining the whole to be this: *all persons or entities who contributed to the plaintiff's injuries*, whether parties to the action or not, and even if they could not have been found directly liable to the plaintiff, either severally or jointly with the defendants. If that is to be the definition of the whole by which the Fabres' ultimate liability to Mrs. Marin is to be determined, then the defendants are correct that they should only have been held liable for 50% of Mrs. Marin's intangible damages. For two alternative reasons, however, we believe that the result reached by the trial court in the instant case was correct.

First, for the several reasons which follow, we believe the trial court correctly supplied the missing piece of the statute by defining the whole to be this: *all parties to the lawsuit* who contributed to the plaintiff's injuries -- and the bulk of our argument will be directed to convincing the Court that that is the more sensible construction of the statute, and the construction which the legislature most probably intended. Second, we will argue alternatively that, even if the whole is to be defined to include non-parties to the lawsuit, the result in this case was nevertheless correct -- because the whole can include only those non-

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parties who could have been found jointly and severally liable to Mrs. Marin, which (because of the doctrine of interspousal immunity) *excludes* Mr. Marin.

2. Settled rules of statutory construction require a narrow construction of §768.81(3) limiting "the (missing) whole" to parties to the lawsuit.

The first thing we ask the Court to observe is that §768.81(3) does not mention the word "non-party"; instead, it mentions only the word "party," and it mentions the word four times. Unfortunately, the legislature's repeated use of this word does not compel any particular definition of the "the whole" by which a "party's percentage of fault" should be determined, since either of the competing definitions of "the whole" urged by the parties here can be accommodated by the present language of the statute. We mention the point nevertheless, because the legislature's repeated use of the word "party," coupled with the absence of any reference to non-parties, at least suggests that it probably did not have in mind the more expansive definition of "the whole" urged by the defendants here -- and we think that suggestion ought to be placed up front here, for whatever weight it might bring to bear upon the more important rules of statutory construction by which the Court must ultimately be guided.

The primary rule of statutory construction is, of course, to determine the legislative intent -- and when a statute is ambiguous, it is appropriate to consult its legislative history to determine its meaning. *See* 49 Fla. Jur.2d, *Statutes*, §§114, 157, 160 (and numerous decisions cited therein). To aid the Court in that respect, we have included in our appendix the legislative staff analyses of Ch. 86-160 (and the bills which created it).[5] The final staff analysis of Ch. 86-160 prepared for the House Committee on Health Care and Insurance

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[5] Staff analyses of legislative enactments are considered appropriate sources of legislative history. *See, e. g., Public Health Trust of Dade County v. Menendez*, 584 So.2d 567 (Fla. 1991); *Comnenos v. Family Practice Medical Group, Inc.*, 588 So.2d 629 (Fla. 1st DCA 1991); *Pershing Industries, Inc. v. Vista Memorial Gardens*, 17 FLW D46 (Fla. 1st DCA Dec. 17, 1991).

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contains the following discussion of §768.81(3):

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

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

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

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

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

(A. 4-5; emphasis supplied). An additional Senate staff analysis dated three days later explains that, under the statute, "liability for damages is based on *each party's proportionate fault*" (A. 8; emphasis supplied).

Neither of these analyses makes any mention of "non-parties"; indeed, they explicitly state that, under the statutory provision in issue here, the jury is to apportion percentages of fault only "*among the parties*" to the lawsuit, according to "*each party's proportionate fault.*" Most respectfully, in the absence of any contrary analysis, we think these analyses must be accepted as a valid statement of the legislative intent in enacting §768.81(3); and if we are correct about that, then the *only* definition of "the whole" which is available to this Court is the definition we have urged here -- the parties to the lawsuit -- and the more expansive definition urged by the defendants here should be rejected as contrary to the stated legislative intent.

There is an additional, thoroughly settled rule of statutory construction which is squarely implicated here:

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

Carlile v. Game & Freshwater Fish Commission, 354 So.2d 362, 364 (Fla. 1977). *Accord, State v. Egan*, 287 So.2d 1 (Fla. 1973); *MacIntyre v. Hark*, 528 So.2d 1276 (Fla. 3rd DCA 1988); *Bacon v. Marden*, 518 So.2d 925 (Fla. 3rd DCA 1987); *Graham v. Edwards*, 472 So.2d 803 (Fla. 3rd DCA 1985), *review denied*, 482 So.2d 348 (Fla. 1986); *Goodman v. Kendall Gate-Investco, Inc.*, 395 So.2d 240 (Fla. 3rd DCA 1981). *See generally*, 49 Fla. Jur.2d, *Statutes*, §192 (and decisions cited therein).

Unlike the construction of §768.81(3) which we have urged here, which does only limited damage to the common law between parties to a lawsuit, the construction which the defendants have urged here does *enormous* damage to the common law in *numerous* areas. In the instant case, for example, if the defendants' definition of "the whole" is written into the statute, Mrs. Marin recovers only half the damages which she would have recovered under the common law, notwithstanding that she was not at fault in any way; she loses the benefit of the liability insurance coverage which would have been available to her husband in a contribution action against him, notwithstanding that he was 50% at fault in causing her injuries; and State Farm ends up paying roughly half of her damages, notwithstanding that it insured both tortfeasors for all but $10,000.00 of the entire amount of her damages.

The same unconscionable result would follow in the more typical case of a defendant like Mrs. Fabre who, unlike Mrs. Fabre, was fully insured. In that scenario, under the common law, the defendant's insurer would pay all of Mrs. Marin's damages and recover half of that payment from Mr. Marin's insurer in an action for contribution, thereby equitably apportioning the damages between the two tortfeasors. If the defendants'

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proposed definition of "the whole" is written into §768.81(3), however, the defendant's insurer would pay only half of Mrs. Marin's damages and Mr. Marin's insurer would pay nothing, notwithstanding that Mr. Marin was 50% at fault for causing her injuries, thereby inequitably relieving Mr. Marin's insurer from all liability for the damages he caused and leaving Mrs. Marin with only half a loaf.

Of course, the legislature *could* have mandated these inequitable results if it had wished, but the point is that the statute which it enacted does not explicitly replace the equitable results mandated by the common law with the inequitable results which would flow from the defendants' proposed construction of the statute, and the Court should therefore not be quick to assume that the legislature meant what the defendants say it meant when it enacted §768.81(3). Instead, the Court should be guided by the settled rule that an ambiguous statute will be construed to do as little damage to the common law as possible, and it should define "the (missing) whole" as narrowly as possible to preserve those areas of the common law not explicitly abolished by the statute -- by defining "the whole" as "the parties to the lawsuit." There will be time enough for the legislature to disagree with such a construction if the Court has supplied an unintended definition, and it can change that construction if it wishes to mandate the inequities required by the defendants' proposed construction of the statute; but until such time as the legislature makes the defendants' definition of "the whole" explicit in the statute, settled rules of statutory construction simply require the narrowest definition of "the whole" which the Court can supply.

There is a third rule of statutory construction which is implicated here -- the settled rule that repeals by implication are not favored, and that two (or more) statutes should be construed in such a way as to preserve the force of each, and to render them consistent if at all possible. *See Palm Harbor Special Fire Control District v. Kelly*, 516 So.2d 249 (Fla. 1987); *Garner v. Ward*, 251 So.2d 252 (Fla. 1971). *See generally*, 49 Fla. Jur.2d, *Statutes*, §213 (and numerous decisons cited therein). That rule is squarely implicated here because, when

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it enacted §768.81(3), the legislature did *not* repeal any of several existing statutes which are plainly inconsistent with the defendants' proposed construction of the statute. The most obvious example is §768.31, Fla. Stat., entitled "Contribution among tortfeasors," which codifies the contribution remedy initially recognized in the common law by *Lincenberg v. Issen*, 318 So.2d 386 (Fla. 1975). If the defendants are correct that "the whole" means all persons or entities who contributed to the plaintiff's injuries, whether parties to the action or not (and even if they could not have been found directly liable to the plaintiff), then tort defendants will rarely be in need of the remedy of contribution again, and §768.31 has become largely surplusage (except in the limited areas in which the doctrine of joint and several liability has been retained). *See Walt Disney World Co. v. Wood*, 515 So.2d 198 (Fla. 1987) (observing that the "pure apportionment" doctrine urged by the defendants here is totally inconsistent with the contribution remedy provided by §768.31). On the other hand, §768.31 will continue to have a significant purpose under the narrower definition of "the whole" we have proposed, because it will continue to be available to named defendants to enable them to make unnamed tortfeasors parties to the lawsuit, and because it will be available post-judgment to adjust the equities between defendants and unnamed tortfeasors who were not made parties to the suit.

In this connection, we should note that §768.81(3) is contained in Part II of Chapter 768, Fla. Stat., which begins with three "applicability" provisions, one of which reads as follows: "If a provision of this part is in conflict with any other provision of the Florida Statutes, such other provision shall apply." Section 768.71(3), Fla. Stat. (1991). In other words, because the contribution statute still exists, *it* must be utilized to obtain apportionment of damages among joint tortfeasors, irrespective of what §768.81(3) may say. As a result, although the Court could accept the defendants' proposed definition of "the (missing) whole," it would ultimately be required to ignore that definition in favor of enforcement of the contribution statute, so the definition proposed by the defendants itself amounts to mere

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meaningless surplusage. *See Gurney v. Cain*, 588 So.2d 244 (Fla. 4th DCA 1991) (declining to allow apportionment of damages under §768.81(3) where specific provision of §768.20 prohibited reduction required by §768.81(3); no issue raised as to whether apportionment could be made with reference to non-parties, because defendants brought initially unnamed tortfeasor into the suit in a contribution action). The more sensible thing to do, of course, is to define "the (missing) whole" as narrowly as possible, as we have proposed, and require party-tortfeasors to obtain apportionment of damages with non-party tortfeasors as §768.31 plainly requires. In no event, given the "applicability" provision of §768.71(3), can the Court define "the (missing) whole" in such a way that §768.31 is rendered largely meaningless.

The defendants may respond by pointing out (as we have conceded) that §768.31 is not rendered *entirely* meaningless by their construction of §768.81(3), since joint and several liability remains for *economic* damages in at least some cases, for which the remedy of contribution should remain viable. That observation will be correct, but it will not be dispositive -- because at least one aspect of §768.31 is so plainly inconsistent with the defendants' proposed construction of §768.81(3) as to render that proposed construction perfectly absurd. Assume that a plaintiff is injured in an automobile accident by the negligence of defendants A and B, each of whom is equally to blame, and that the plaintiff suffers damages in the amount of $200,000.00. The plaintiff settles with defendant A for $100,000.00, gives him a release, and dismisses him from the lawsuit. The case proceeds to trial against defendant B, who is found liable for the plaintiff's damages, and the plaintiff's total damages are assessed at $200,000.00.

On these perfectly ordinary facts, the plaintiff's damages are sensibly apportioned between the two defendants by §768.31(5), §768.041(2), and §46.015(2).[9] According to the

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[9] Section 768.31(5) reads as follows:

> (5) RELEASE OR COVENANT NOT TO SUE. -- When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort

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plain language of these three statutes, defendant B would be given a credit for the $100,000.00 paid by defendant A; defendant B would not be entitled to any contribution from defendant A; and defendant B would owe the plaintiff only half her damages, or $100,000.00 -- which is exactly the right result, by any reasonable measure which can be brought to bear on the apportionment problem. *See Weddle v. Voorhis*, 586 So.2d 494 (Fla. 1st DCA 1991).

If the defendants' proposed construction of §768.81(3) is correct, however, defendant B would be entitled to have the jury assess 50% of the blame against defendant A, notwithstanding that he had settled with the plaintiff and was no longer a party to the action; defendant B would obtain automatic contribution by obtaining a reduction of the verdict against him in the amount of defendant A's contribution to the accident; and defendant B's liability to the plaintiff would be limited to $100,000.00. Subsequent to that result, however -- and because §768.31(5), §768.041(2), and §46.015(2) are still on the books -- the trial court would be required to set off the $100,000.00 received from defendant A against the $100,000.00 owed by defendant B, resulting in a recovery against defendant B of zero dollars.

> for the same injury or the same wrongful death:
> (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless it terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,
> (b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

Section 768.041(2) reads as follows:

> (2) At trial, if any defendant shows the court that the plaintiff, or any person lawfully on his behalf, has delivered a release or covenant not to sue to any person, firm, or corporation in partial satisfaction of the damages sued for, the court shall set off this amount from the amount of any judgment to which the plaintiff would be otherwise entitled at the time of rendering judgment and enter judgment accordingly.

Section 46.015(2) is nearly identical to §768.041(2).

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The plaintiff would therefore recover only half her damages, and defendant B would pay nothing, notwithstanding that he was 50% responsible for the plaintiff's $200,000.00 loss.

There are only two ways to avoid the perfectly absurd "double reduction" inherent in this result. One is to accept the defendants' proposed construction of §768.81(3), ignore the "applicability" provision of §768.71(3), and assume that the legislature meant to repeal §768.31(5), §768.041(2), and §46.015(2) in the process. The other is to define "the (missing) whole" in §768.81(3) narrowly, as "parties to the lawsuit," and assume that the legislature meant what it did when it left §768.31(5), §768.041(2), and §46.015(2) on the books.[7] Either approach cures the problem presented by the non-party joint tortfeasor with whom a plaintiff has settled prior to trial, but only one of them is consistent with the well-settled rule of statutory construction that repeals by implication are not favored, and that two (or more) statutes should be construed in such a way as to preserve the force of each, and to render them consistent if at all possible. Most respectfully, the only way that §768.31(5), §768.041(2), and §46.015(2) can be given effect and rendered consistent with §768.81(3) is to define "the (missing) whole" in the latter statute narrowly, as "parties to the lawsuit" -- and

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[7] At first blush, it would appear that there is a third way to avoid the absurdity of the "double reduction" presented by our hypothetical: (1) first determine the amount of the judgment which would have been entered against defendant B before the set off was taken into account; (2) then reduce the plaintiff's total damages by the amount of the payment received from defendant A; (3) then, if the amount computed under step two exceeds the amount computed under step one (because defendant A paid less than his adjudicated share), enter judgment against defendant B in the amount computed under step one; or (4) if the amount computed under step two is less than the amount computed under step one (because defendant A paid more than his adjudicated share), enter judgment against defendant B in the amount computed under step two (although this would result in a judgment against defendant B in *less* than his proportionate share of the fault -- a result which some courts do not permit). *See, e. g., Roland v. Bernstein*, 98 Ariz. Adv. Rep. 69 (Ariz. App. 1991). The language of §768.31(5) might be construed to accommodate this type of jury-rigged adjustment in the interest of equitable results, but the language of §768.041(2) and §46.015(2) would appear to flatly prohibit it (since these statutes require that the settlement proceeds be set off "from the amount of any judgment to which the plaintiff would be otherwise entitled at the time of rendering judgment . . .") -- so, in the final analysis, the statutes requiring a set off simply cannot be harmonized by manipulation with the defendants' proposed construction of §768.81(3).

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because the defendants' proposed construction of "the whole" results in the absurdity of a "double reduction" in every case in which a plaintiff has settled with a joint tortfeasor, the narrow definition which we propose is simply the only definition which makes any sense.[8]

In this connection, we note again that the Fourth District has recently refused to apply §768.81(3) even among parties to a lawsuit, where the result would conflict with the result required by another statute which the legislature left on the statute books. See *Gurney v. Cain*, 588 So.2d 244 (Fla. 4th DCA 1991). While that decision does not address the question presented here -- whether "the whole" contemplated by §768.81(3) should include non-parties to the suit -- the Fourth District's reluctance to read §768.81(3) as an implied repeal of another statute at least reinforces our position here that "the whole" should be defined as narrowly as possible to avoid the implied repeal of other existing statutes, and we commend *Gurney* to the Court for that limited purpose.

In short, there are three settled rules of statutory construction which simply require the narrowest definition of "the (missing) whole" which the Court can supply. And to reinforce the ***clear need*** for application of those rules to produce that narrow construction,

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[8] The problem presented by our hypothetical was presented, but not resolved, in ***Williams v. Arai Hirotake, Ltd.***, 931 F.2d 755 (11th Cir. 1991). Since the trial court in that case had simply dismissed the non-settling defendant because of the plaintiffs settlement with other defendants, the Court of Appeals limited itself to reversing the dismissal, and it did not reach the question of how the plaintiffs damages were to be determined against that reinstated defendant after trial. In the process of reaching its conclusion, however, the Court of Appeals squarely rejected the non-settling defendant's contention that §768.31(5), §768.041(2), and §46.015(2) had been impliedly repealed by enactment of §768.81(3).

The problem was also presented, but not resolved, in ***Dosdourian v. Carsten*, 580** So.2d 869 (Fla. 4th DCA 1991), in which the settling defendant remained in the lawsuit as a defendant and the issue of his liability was submitted to the jury with the issue of the non-settling defendant's liability. Although the issue on appeal was whether the settlement agreement had to be disclosed to the jury, the non-settling defendant took the position that she was entitled to have her liability reduced in two successive steps: first, by the settling defendant's percentage of liability (per §768.81(3)), and second, by the amount paid to the plaintiff by the settling defendant (per §768.31(5)). The district court did not reach this contention because it had not been raised below -- but that disposition was "without prejudice to the appellant to seek a set off in the trial court upon remand." 580 So.2d at 870 n. 1.

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we ask the Court to consider several additional "horribles" which would accompany acceptance of the defendants' proposed definition. Consider, for example, the not infrequent case where a defendant has negligently injured a plaintiff (in, say, an automobile accident) and the plaintiffs injuries have been aggravated (or additional injuries have been caused) thereafter by the negligence of his treating physician. According to well-settled principles of the decisional law, the initial tortfeasor is responsible for *all* of the plaintiffs damages, because the possibility of malpractice in treatment of the injuries is reasonably foreseeable. See *Stuart v. Hertz Corp.,* 351 So.2d 703 (Fla. 1977). Query whether this rule survives the defendants' construction of §768.81(3)? In all likelihood, and notwithstanding that the rule is bottomed upon proximate causation rather than upon the doctrine of joint and several liability, it does not.

More importantly for our purposes here, *Stuart prohibits* the defendant from bringing the negligent physician into the plaintiffs lawsuit if the plaintiff has chosen to exclude him, for perfectly sound public policy reasons:

> An active tortfeasor should not be permitted to confuse and obfuscate the issue of his liability by forcing the plaintiff to concurrently litigate a complex malpractice suit in order to proceed with a simple personal injury suit. To hold otherwise would in effect permit a defendant to determine the time and manner, indeed the appropriateness, of a plaintiffs action for malpractice. This decision eliminates the traditional policy of allowing the plaintiff to choose the time, forum and manner in which to press his claim. [Citation omitted].
>
> The choice of when and whether to sue his treating physician for medical malpractice is a personal one which rightfully belongs to the patient. A complete outsider, and a tortfeasor at that, must not be allowed to undermine the patient-physician relationship, nor make the plaintiffs case against the original tortfeasor longer and more complex through the use of a third-party practice rule which was adopted for the purpose of expediting and simplifying litigation.
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> The complex issues of liability to be resolved in a medical malpractice action are foreign to the resolution of liability in the typical personal injury suit. . . .

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> In summary, to allow a third-party action for indemnity, as in the case ***sub judice***, would . . . expand the applicability of the third-party rule and make it a tool whereby the tortfeasor is allowed to complicate the issues to be resolved in a personal injury suit and prolong the litigation through the filing of a third-party malpractice action.

Stuart, supra at 706.

If the defendants' proposed construction of §768.81(3) is to be accepted here, this salutary policy will be dead letter. The plaintiff may elect not to sue his physician, but the defendant can drag the physician into the lawsuit (in name only, without service of process) and have his "percentage of fault" adjudicated by the jury. The physician will not be there to defend himself, of course, which is bad enough -- but it gets worse: the ***plaintiff*** will be forced to defend what amounts to a medical malpractice suit against his physician, at the enormous cost which such a defense normally entails (and, of course, the trial will be lengthened considerably at enormous cost to judicial resources). In addition, a jury verdict finding that the physician committed malpractice could damage the physician's reputation; it could cause an increase in the physician's malpractice insurance premiums; and it could even result in disciplinary action by the Department of Professional Regulation. See ***generally***, $458.331, Fla. Stat. (1991). All of these things are possible, notwithstanding that the physician was not even a party to the lawsuit, and that his defense was provided at trial by his ***victim*** (who may then find himself in the ironic position of thereafter having to sue the physician he previously defended).

This type of problem will not be limited to cases involving facts like those in ***Stuart*** v. ***Hertz Cop.*** Indeed, in every case in which the plaintiff elects not to sue a particular tortfeasor for one reason or another -- because he does not believe he can prove a ***prima facie*** case, because he does not wish to incur the added expense or complexity, because he does not wish to sue his girlfriend or grandmother, because he has already settled with the tortfeasor, or for any other heretofore perfectly legitimate reason -- the defendant may drag

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that tortfeasor into the litigation without process, litigate its liability, and have its "percentage of fault" determined by the jury. Worse still, the defendant can drag persons and entities into the lawsuit who could not have been sued by the plaintiff at all -- like phantom tortfeasors, immune tortfeasors, dissolved tortfeasors, tortfeasors discharged in bankruptcy, tortfeasors over which jurisdiction cannot be obtained, and the like. The result of this process will be that two-day trials will become two-week trials; two-week trials will become two-month trials; and the judiciary will simply be overwhelmed by the enormous burden involved in adjudicating the liability of nearly everyone on the planet.[9]

Most respectfully, before the Court opens this Pandora's box, it should search long and hard in §768.81(3) for explicit language requiring such a result -- and if no such language can be found (and it is not there), then the statute's (missing) whole should be defined as narrowly as possible, in the manner in which we have proposed here. There will be time enough for the legislature to disagree with that construction if it wishes, and open the Pandora's box which the defendants' proposed construction represents -- but until the legislature declares its explicit intent to open the box in that manner, this Court should keep the lid firmly in place. See *Selchert* v. *State*, 420 N.W.2d 816 (Iowa 1988) (declining to interpret Iowa's comparative fault statute -- which is explicitly limited in the narrow fashion we have urged here -- to require joinder of all potential tortfeasors in one action because of the enormous burden which it would impose upon the state's limited judicial resources).

The defendants' proposed construction of "the (missing) whole" creates other baffling

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[9] The obvious hyperbole in this statement is not entirely unjustified. Because undersigned counsel receives numerous telephone calls from around the state seeking legal advice on the problem at issue here, he is aware of many cases in which defendants have attempted to add more than a few non-parties to verdict forms. In one case presently pending in Tallahassee, for example, the single medical malpractice defendant sued by the plaintiff is attempting to add 18 unnamed health care providers to the verdict form. If this ploy succeeds, the plaintiff will be required to prove one medical malpractice case and defend 18 others. While this is an extreme example, it is nevertheless illustrative of the enormous damage which the defendants' proposed construction of §768.81(3) will inflict on the litigants and judiciary of this state.

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conundrums. Consider, for example, the plaintiff who is injured by the joint negligence of a governmental defendant and a private defendant. Because of the notice provisions of §768.28, the plaintiff may not be able to sue the governmental defendant when he wishes, and the untolled statute of limitations governing his claim against the private defendant may force him to file suit against the private defendant while waiting six months for the governmental defendant to deny his claim. The governmental defendant may also have a venue privilege requiring that it be sued in a venue which would be improper for the private defendant. The plaintiff therefore sues the private defendant in, say, Dade County. Six months later he sues the governmental defendant in, say, Leon County. If the defendants' proposed construction of §768.81(3) is accepted here, the governmental defendant will insist upon litigating the liability of the private defendant in the Leon County suit, and the private defendant will insist upon litigating the liability of the governmental defendant in the Dade County suit.

Because the liability of the two defendants will be tried in each suit, the costs of the suit and the expenditure of judicial resources will be doubled -- and inconsistent results are clearly more probable than not. Assume that the jury in the Leon County suit finds the governmental defendant 10% at fault and the private defendant 90% at fault. Assume that the jury in the Dade County suit finds the private defendant 10% at fault and the governmental defendant 90% at fault. If the defendants' proposed construction of "the (missing) whole" is the law, the plaintiff will ultimately recover 10% of his damages from each defendant, or a total of only 20% of his damages, notwithstanding that the findings of each of the two juries would have required the defendants to pay the plaintiff 100% of his damages if the two defendants could have been named as parties to a single suit. This result is, of course, perfectly ludicrous -- and it simply should not be mandated by this Court in the absence of explicit language in §768.81(3) which would clearly require it. That language simply is not there, and if for no other reason than to avoid this type of ludicrous result in

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cases in which a plaintiff cannot join all potential tortfeasors in one suit, the only construction of the statute which can even arguably be considered sensible here is the one we have proposed.

As ludicrous as the result in our hypothetical is, we do not believe that our hypothetical is at all fanciful. There are several types of cases where pre-suit notice requirements have been imposed upon plaintiffs, and where suit cannot be brought until the potential defendant acts in some way upon the notice. Medical malpractice and governmental tort cases are the most obvious examples. There are also a number of venue privileges which not infrequently require that separate suits be filed against joint tortfeasors. And it is occasionally necessary to file separate suits against joint tortfeasors because of the inability to obtain personal jurisdiction over one of them in the only forum which can assert jurisdiction over the other. The results in some of these "split cases" can also be even more ludicrous than our hypothetical suggests. For example, two juries hearing "split cases" might exonerate the party-defendant altogether and assign 100% of the fault to the non-party. In that event, the plaintiff will recover nothing, notwithstanding that he would have recovered 100% if he had been able to join both defendants in a single lawsuit.

Our "parade of horribles" could go on and on, of course. If we have not made the point by now, however, it cannot be made -- so we will desist.[10] An additional observation

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[10] The Court will find a thoughtful discussion of these and other "horribles" accompanying the defendants' proposed construction of §768.81(3) in a recent article by the late Dean Prosser's successor as the "Dean of Torts," Dean Emeritus John W. Wade. See Wade, ***Should Joint and Several Liability of Multiple Tortfeasors Be Abolished?***, 10 Am. J. Trial Advoc. 193 (1986).

We should note briefly, in addition, that the Rules of Civil Procedure will have to be extensively revised if the defendants' proposed construction of §768.81(3) is accepted here. That will be necessary because, unlike the typical "empty chair" case in which a defendant simply seeks a "not liable" verdict based upon the previously-pleaded denial of the plaintiffs claim in the defendant's answer, the construction of §768.81(3) proposed by the defendants here contemplates an affirmative finding that the "empty chair" was at fault in causing the plaintiffs damages in a certain percentage of the whole. In that circumstance, and at minimum, since notice and an opportunity to defend is required by the due process clause, some method will have to be devised for pleading claims against non-parties, both

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nevertheless deserves mention. Although the Supreme Court has yet to construe §768.81(3) in any binding way, it ***has*** announced at least a tentative construction of the statute which this Court may find persuasive here -- in its adoption of an added sentence to Fla. Std. Jury Instn. (Civ.) 6.1b. That new jury instruction reads as follows:

> [In entering a judgment for damages based on your verdict against [either] [any] defendant, the court will take into account the percentage of that defendant's [negligence] [fault] as compared to the total [negligence] [fault] of ***all*** parties ***to this action.***]

In Re Standard Jury Instructions, 540 So.2d 825, 829 (Fla. 1989) (emphasis supplied). That, of course, is precisely the construction of §768.81(3) which we have urged upon the Court here, and if it was good enough for the Supreme Court when it revised the standard jury instructions to explain the effect of §768.81(3), it ought to be good enough for this Court in disposing of the issue presented here.[11]

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affirmatively and defensively (which did not happen in the instant case). See ***Arky, Freed, Steams, Watson, Greer, Weaver & Harris, PA. v. Bowmar Instrument Corp., 537*** So.2d 561 (Fla. 1988). Some method will also have to be devised for a plaintiff to obtain a directed verdict on a claim against a non-party, where the evidence is insufficient to present a jury question on the claim. The judiciary will also have to determine whether the non-party should be given notice that a claim has been raised against him which may result in an affirmative finding of liability on his part, since that person ought to be given an opportunity to appear and defend his good name if he wishes, even though the result may not be binding upon him in a legal sense. New jury instructions will also have to be devised -- which is a convenient observation upon which to return to the text.

[11] We should also note that the very Act which contained §768.81(3) created the Academic Task Force for Review of the Insurance and Tort Systems, and charged it with the responsibility of evaluating the statute and making recommendations for its change. Ch. 86-160, Laws of Florida. In undertaking that evaluation, the Academic Task Force understood the statute to be, and characterized it as, a modified form of "pure several liability which provides that a defendant is only liable for a proportionate share of the judgment based upon a comparison of its relative degree of fault ***compared with the other defendants."*** Academic Task Force, etc., ***Final Recommendations,*** pp. 52-53 (March 1, 1988; emphasis supplied). (For the convenience of the Court, a copy of the relevant portion of this report is included in the appendix to this brief.) The Academic Task Force thereafter recommended that "this balanced policy should be given a chance to work," and recommended only that the $25,000.00 statutory threshold be raised to $50,000.00. ***Id.*** at p. 54. Although we are speculating to some extent here, we cannot help but think that the recommendations would

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A fmal word is in order concerning the Fifth District's recent decision in ***Messmer v. Teacher's Insurance*** **Co.,** 588 So.2d 610 (Fla. 5th DCA 1991). In that case, which is neither factually nor legally distinguishable from the instant case, the defendants' proposed construction of §768.81(3) was accepted -- lock, stock, and barrel, and without even a mention of the enormous consequences which would follow from that construction of the statute. In our judgment, the reasons given for this holding were ***non sequiturs.*** As its first reason, the district court adopted the trial court's reasoning, which went like this:

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

588 So.2d at 611-12.

With all due respect to both the trial court and the district court in ***Messmer***, this reasoning does not purport to find any definition of "the whole" in the language of the statute itself. It simply ***assumes*** that "the whole" was meant to be "all participants in the accident," and its announcement that the legislature could have explicitly limited the apportionment effected by the statute to "parties to the proceeding" is simply a makeweight.

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have been considerably different if the Task Force had understood the statute to mean what the defendants now claim it means. At minimum, because the Task Force's recommendation to the legislature to retain the statute was based upon its understanding that it contained the considerably narrower definition of the whole which we have urged here, this Court can legitimately insist that the legislature be far more explicit about its intent before it will enforce the present statute in the manner insisted upon by the defendants.

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It can just as easily be *assumed* that "the whole" was meant to be "all parties to the proceeding," and this conclusion can just as easily be justified by noting that, if the legislature had meant the statute to apply to "all participants in the accident," "it would have so stated." In other words, this reasoning is not reasoning at all; it is simply a *non sequitur* which entirely misses the point. The point is that the legislature did *not* define "the whole" at all, so the statute is missing an essential definition and is therefore quintessentially ambiguous. And when the settled rules of statutory construction upon which we have relied here are applied to this ambiguity, the only construction of the statute which is justified in a judicial forum is the narrow construction which we have proposed.

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

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narrow construction which we have proposed.

The *Messmer* Court also purported to find a third support for its reading of §768.81(3) in the Supreme Court's recent decision in *Conley* v. *Boyle Drug Co., 570* So.2d 275 (Fla. 1990). In our judgment, the district court's reliance upon that decision was entirely inapt. In *Conley*, the Supreme Court adopted the "market share" theory of liability in actions against drug companies producing DES, where the plaintiff is unable to identify the particular manufacturer whose product was ingested by her mother. Under that theory, the plaintiff is allowed to recover against party-defendants who may not even have supplied her mother with the product, and all defendants must contribute to the recovery in the percentage of their market share of sales of the product.

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

Most respectfully, this conclusion says little at all of relevance to the different issue presented here -- whether "the (missing) whole" in §768.81(3) should be broadly defined as all persons or entities contributing to the plaintiffs injuries, or narrowly defined as all parties to the lawsuit. In fact, as the *Conley* decision elsewhere makes clear, the market share theory of liability is both anomalous and unique, because it allows a plaintiff to recover from a defendant who has caused the plaintiff no injury at all -- so the common law doctrine of

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joint and several liability does not mesh with the theory in the first place, and applying it to mulct an ***innocent*** defendant of more than his market share percentage of the plaintiffs damages would be illogical in the extreme. Quite a different question is presented, of course, when determining how to apportion a plaintiffs damages between tortfeasors whose liability depends upon proof of actual fault and causation, and the fact that the doctrine of joint and several liability does not mesh with the market share theory of liability is no indication, one way or the other, of how the legislature intended that damages be apportioned in the more ordinary type of tort case presented here.

In any event, when the *Conley* decision is read a little more carefully than the *Messmer* Court read it, the Court will discover that it actually supports our proposed construction of §768.81(3), not the defendants'. According to *Conley*, there is an initial presumption under the market share theory of liability that the defendants sued by the plaintiff comprise 100% of the market, and the named defendants' market shares must therefore total 100%. The named defendants may reduce their market share thereafter by increasing the market to include unnamed manufacturers of the drug -- but ***not*** (as the *Messmer* Court concluded that §768.81(3) authorized) by litigating the liability of those non-party manufacturers and factoring their market shares into the total market. Instead, the party-defendants must ***implead*** the non-party manufacturers and make them ***parties to the lawsuit*** before they can be utilized to increase the market and reduce the party-defendants' market shares. Moreover, any impleaded manufacturer which is "insolvent or defunct" ***cannot*** be utilized to increase the market and reduce a defendant's share of the 100% which will be allocated among the parties to the lawsuit. 570 So.2d at 286. Most respectfully, this is essentially the construction of §768.81(3) which we have proposed to the Court in this case, so we fail to see how *Conley* supports the *Messmer* Court's reading of the statute in any way.[12]

[12] *Conley* does contain at least a tiny wrinkle which would appear to be somewhat

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

3. **Alternatively, "the (missing) whole" should be 'defined to include only those non-parties who**

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inconsistent with our reading of §768.81(3). If a named defendant is unable to implead a non-party manufacturer (who is neither insolvent nor defunct) because it is not amenable to suit in Florida, the named defendant may nevertheless obtain a reduction of his proportionate share of the market by proving the actual market share of that non-party manufacturer. This does not hurt the plaintiff, however, because the plaintiff can presumably recover the missing piece of the pie by suing that manufacturer in a jurisdiction in which it is amenable to suit. In our judgment, because the plaintiffs total recovery under the market share theory of liability thus depends upon simple, statistically provable market shares of existing, solvent manufacturers who are amenable to suit in one jurisdiction or another, this tiny wrinkle does not present any of the enormous number of problems which will flow from the defendants' proposed construction of §768.81(3), so it ought to be considered essentially irrelevant to the issue before the Court.

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could have been found jointly and severally liable to the plaintiff in the first place.

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

It logically follows that a joint tortfeasor should find himself in no better position after enactment of §768.81(3) than he would have been where contribution was available from a ***solvent*** joint tortfeasor after the doctrine of joint and several liability was applied, even if §768.81(3) requires apportionment of damages among both non-party joint tortfeasors and joint tortfeasors named as parties to the suit. Under the ***Messmer*** Court's construction of the statute, however, a joint tortfeasor is, in some circumstances at least, far better off than he would have been under the old regime (where every joint tortfeasor was ***solvent),*** because he may now obtain what amounts to automatic contribution from persons with whom he could not have been held jointly and severally liable to the plaintiff in the first place.

Consider, for example, the not infrequent case in which a plaintiff is injured in the course of his employment by both his employer and a third-party tortfeasor. (Any immune defendant will do for our hypothetical, of course -- and there are a number of them: employers, co-employees, governmental defendants, employees of governmental defendants, spouses, parents, children, ***et cetera.)*** Under settled principles of the law, both decisional and statutory, the employer is immune from suit by the plaintiff, Indeed, the employer is not

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even considered a "joint tortfeasor" under the law because of its immunity, so it also cannot be sued for contribution by the third-party tortfeasor. ***See Seaboard Coast Line Railroad*** Co. ***v. Smith, 359*** So.2d 427 (Fla. 1978). See ***generally,*** 57 Fla. Jur.2d, ***Workers' Compensation,*** §312 (and decisions cited therein). As a result, in such a case, the third-party tortfeasor's liability does not even implicate the doctrine of joint and several liability; the third-party tortfeasor is simply held liable for the damages he caused to the plaintiff, and abrogation of the doctrine of joint and several liability would not change that result in any way.

Under the ***Messmer*** Court's construction of §768.81(3), however, the third-party tbrtfeasor may litigate the employer's contribution to the plaintiffs injuries in the plaintiffs lawsuit, and obtain a reduction of his liability for the percentage contribution of the plaintiffs employer. The third-party tortfeasor therefore obtains automatic contribution from an entity with which he was not even a "joint tortfeasor," as that concept is defined by the doctrine of joint and several liability. Whatever the legislature may actually have intended when it enacted §768.81(3) without defining "the whole" by which a "party's percentage of fault" is to be determined, the very most that the statute reflects is an intent to (partially) abolish the doctrine of joint and several liability. As a result, that should be the very broadest manner in which "the (missing) whole" can legitimately be defined -- as all persons and entities with whom the defendant could have been found jointly and severally liable to the plaintiff under the doctrine of joint and several liability.

Although this construction of the statute still does enormous damage to both the common law and existing statutory law, it is at least a more sensible construction of the statute than the one provided by the ***Messmer*** Court (with far more equitable results, since the remedy of contribution remains for those instances in which contribution is available) -- and we therefore commend it as an alternative construction of the statute here. ***See Luke v. Construction Machinery, Inc.,*** 787 P.2d 1027 (Alaska 1990) (in absence of explicit legislative intent, declining to allow an immune employer's fault to be used to reduce a defendant-

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tortfeasor's liability to a plaintiff under Alaska's proportionate fault statute).

We say again, there will be time enough for the legislature to disagree with that construction if it does not reflect its actual intent, but until the legislature explicitly states its intent to inflict the enormous damage represented by the *Messmer* Court's construction of §768.81(3), the statute's (missing) whole should be defined as narrowly as the Court can be persuaded to define it. And if our alternative construction of the statute is to be adopted by the Court, then the result reached by the trial court in this case remains correct, because Mr. Marin was simply not a "joint tortfeasor" who could have been found liable to his wife under the doctrine of joint and several liability in the first place, whether a party to her lawsuit or not -- and the defendants' remedy was an action under $768.31 for contribution, according to the decisional law, and the statutory law which is still in place. Most respectfully, if either of our alternative constructions of §768.81(3) is to be adopted here, Mrs. Marin's judgment for the full amount of her (remitted) damages must be affirmed.

B. THE TRIAL COURT DID NOT ABUSE ITS **DISCRETION** WHEN, AFTER RESERVING RULING DURING TRIAL ON THE DEFENDANTS' MOTIONS FOR MISTRIAL, IT DE **NIED** THE DEFENDANTS' MOTIONS FOR NEW TRIAL, WHICH ASSERTED THAT **PLAINTIFF'S** COUNSEL HAD IMPROPERLY SUGGESTED THAT MRS. **FABRE** HAD RECEIVED A TRAFFIC CITATION AS A RESULT OF THE ACCIDENT IN SUIT.

The defendants next complain that plaintiffs counsel improperly suggested to the jury that Mrs. Fabre had been given a traffic citation as a result of the accident, and that this impropriety requires the Court to reverse the plaintiffs judgment and order a retrial of the liability issues. Of course, the defendants are correct that evidence of the issuance or non-issuance of a traffic citation is ordinarily inadmissible in a traffic accident case, and that an impropriety in that regard may be grounds for a new trial, The defendants are clearly not entitled to a new trial in the instant case, however, for several perfectly straightfonvard reasons: they, not plaintiff's counsel, were directly responsible for what occurred below; they

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waived any complaint they may have had about plaintiffs counsel's conduct several times over below; and any impropriety which may have been attributable to plaintiff's counsel was clearly harmless in light of the verdict. Unfortunately, these things cannot be demonstrated upon the highly selective, chronologically reversed, and subtly misleading version of the record background which the defendants have provided to the Court. These things will be obvious upon an accurate and complete version of the record background, however, so we have little choice but to walk the Court through the pertinent portions of the transcript.

Following Mrs. Fabre's testimony, the plaintiff called the investigating trooper to the stand (T. 71). The subject of traffic citations was not broached during direct, cross, or redirect examination of the trooper. Thereafter, counsel for the Fabres attempted to "recross" the trooper as follows:

> BY MR. COHEN [counsel for the Fabres]:
>
> Q. Trooper, after this accident happened there in fact was a traffic court hearing; is that correct?
>
> A. That is correct, sir.
>
> Q. And at that traffic court hearing Mrs. Fabre along with an interpreter gave her version of how the accident happened; isn't that correct?
>
> MR. GROSSMAN [plaintiff's counsel]: Your Honor, although I don't mind, for certain reasons I don't think that we can get into the traffic court hearing.

(T. 86). The trial court thereafter prohibited the inquiry, albeit on the ground that it did not allow "recross" examination (T. 86-88). Although there was little in this early exchange to suggest who was the accused at the traffic court hearing, the mere fact that the subject was raised before the jury by defense counsel, and that plaintiffs counsel had thereafter prevented inquiry on the subject, left an uncomfortable suggestion that perhaps Mr. Marin had received the citation.

If the subject had been dropped, this suggestion could probably have been tolerated

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by plaintiffs counsel. The subject was not dropped, however. During the cross-examination of Mr. Mar-in by counsel for the Fabres, the defense first established that Mr. Marin had been exceeding the speed limit on I-95 by as much as 10 m.p.h. at the time of the accident:

> Q. Isn't it true that you have testified that you were going 55 to 60 miles an hour?
>
> A. I testified that I was going about 55-60 miles an hour at the subsequent deposition, because it was alleged by other people that I was doing 65, I then said in the deposition that I was, I will allow the 65, so therefore I said I was doing between 55 and 65 miles an hour in a subsequent deposition, counsel.
>
> Q. And the speed limit on I-95 at the location is what?
>
> A. It is 55 miles an hour.
>
> Q. So, you were exceeding the speed limit on I-95?
>
> A. It would appear that I may have been.

(T. 123).

Having obtained this concession, there was no need for the defense to pursue the matter further. Counsel for State Farm pursued it nevertheless, and the following occurred:

> Q. And you are in the left lane and you are traveling, actually it was you who said that you were traveling 55 to 65 miles an hour, isn't that true?
>
> A. No, but what I said and I will repeat it counsel is that I was doing 55 to 60 and then in a subsequent deposition I believe that I said I added 65.
>
> Q. Well, in the court proceeding earlier in this case --
>
> MR. GROSSMAN: Excuse me, Your Honor, objection to any reference to that, he knows it was not him.
>
> THE COURT: All right, all right, I will sustain the objection.
>
> BY MR. CLARK:
>
> Q. At a prior time when your sworn statement was taken in this case, on page 4, line 20 your testimony was, I was going

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north on 95, I was doing about 55, 65 miles an hour, I was in the inside lane and the young lady was in the lane next to me to my right, do you remember that?

A. No sir. What I remember was that I said that I was doing 55 to 60 and in a subsequent deposition I extended it to 65.

Q. Well, do you remember giving sworn testimony in May of '89?

A. I would have to take a look at the deposition that I have in my file to see if it is the same one.

Q. Have you ever seen that before?

A. Can I have that file right there counsel.

MR. GROSSMAN: Sure. I would like him to have his deposition, if you don't mind.

MR. CLARK: This is not a deposition, this is a proceeding on May 1, 1989 where you gave sworn testimony.

MR. GROSSMAN: I think at this time I would have to ask him not to refer to this for the tenth time.

MR. CLARK: May we go to side bar, Your Honor?

THE COURT: No, I think what he is saying now is all right, that will be fine.

THE WITNESS: This is the subsequent deposition and the answer that I said was that I was doing, I would say between 55 to 60 but since it was alleged that I might have been doing 65 I will extend it to 55 to 65.

BY MR. CLARK:

Mr. Marin, I am not referring to that deposition, I am referring to page 4, line 20 of this proceeding where you were placed under oath, do you remember that sir?

A. I remember that and I remember seeing that deposition.

Q. So, you deny that you said I was doing about 55 to 65 miles an hour.

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A. No, I don't deny it counselor, I said that I have never seen that deposition or that statement,

Q. Is it your testimony or has it been your sworn testimony in this case you were going 55 to 65?

A. It has been my sworn testimony that I was doing 55 to 65 and in a subsequent deposition that I will tell you again I was, that is on page 6, line 10, it says I was doing, I would say between 55 to 60 but since it was alleged that I might have been doing 65 I will extend it to 65, 55 to 65.

Q. Mr. Marin, On May 1, 1989 did you not raise your right hand and swear --

MR. GROSMAN: He has said that, Judge, he said it three times, Your Honor, 55 to 65.

THE COURT: Well, but he keeps saying it at a later deposition.

MR. GROSSMAN: But that is true also.

THE COURT: I understand, I am not saying it isn't, anyhow, let him answer the question.

MR. GROSSMAN: It is all repetitious.

BY MR. CLARK:

Q. Did you not raise your right hand and swear to tell the truth on May 1, 1989?

A. Is that the date of the traffic court?

Q. Did you not raise your hand on May lst?

A Counsel, is that the date of the traffic court?

Q. Yes.

MR. GROSSMAN: Yes and he was not charged.

MR. CLARK: Your Honor, can we come side bar?

THE COURT: No, uh-uh. Let's go on.

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BY MR. CLARK

Q. Did you not swear to that?

A. I don't rememer that whole day to tell you the truth. I remember being in traffic court but that was it.

Q. You don't remember what you swore to on that day?

A. No, I do not.

(T. 127-30).

There are several things which deserve to be noted about this exchange. First, there was neither need nor justification for defense counsel's attempt to "impeach" Mr. Mar-in with any testimony from the traffic court hearing, because Mr. Marin had already candidly admitted that he may have been travelling up to 65 m.p.h. Second, plaintiff's counsel was persistent in his efforts to keep the lid on any further references to the traffic court hearing, so he can hardly be blamed for continuation of the exchange to the point where it became dangerous. Third, Mr. Marin (who was unschooled in the legal niceties surrounding the problem) was obviously confused about which statement defense counsel was attempting to impeach him with, and it should therefore have come as no surprise to defense counsel that he fmally asked the type of question that a layman would reasonably be expected to ask in seeking clarification of what counsel meant by the "testimony" he gave on "May 1, 1989."

In addition, of course, it was defense counsel's persistence in the inquiry which ultimately elicited Mr. Marin's query about "traffic court," despite plaintiffs counsel's efforts to keep the lid on. Moreover, because the subject had again been raised by the defendants, over the plaintiffs repeated objections, the exchange suggested a strong inference that perhaps Mr. Marin was the accused at the traffic court hearing -- so it is perfectly understandable that, in his frustration with these developments and the erroneous inference that may have been created by them, Mr. Marin's counsel set the record straight by noting simply that "he was not charged." Finally, whether plaintiffs counsel's comment was grounds

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for a mistrial or was forgivable because unfairly provoked, we think the defendants had an obligation to complain about the comment -- but they did not.

The only complaint lodged by the defendants did not come until seven pages later -- when, on redirect examination, plaintiff's counsel set out to clarify the ambiguity created by defense counsel, and to ensure that the jury did not infer from his repeated objections to the subject that Mr. Marin had been the recipient of a citation:

> Q. Mr. Mar-in, at that May 4th [sic] statement that Mr. Clark has made reference to, you were testifying merely as a witness not as a party; isn't that correct?
>
> A That is correct.
>
> Q. At that proceeding, correct?
>
> A. It was traffic court, I believe, I didn't even remember until counsel showed it to me.

(T. 137). Note that defense counsel could have prevented answers to these questions by appropriate objections, but no objections were made. It was not until after these questions were asked and answered that counsel for the Fabres objected (but did not move to strike), and the subject was then dropped (T. 137). Neither defense counsel asked the trial court for a curative instruction; instead, after Mr. Marin was excused from the witness stand, both moved for a mistrial (T. 137-39). The motions for mistrial were not directed to the questions and answers quoted above, however; they were addressed to the "he was not charged" comment which came seven pages earlier (id.). The trial court neither granted nor denied the motions for mistrial; instead it reserved ruling on the motions (T. 139).

Although these events give rise to several different types of waiver arguments which could be supported by scores of decisions, we do not believe that the Court needs page after page of argument on this issue -- so we will simply make our points cursorily. First, it should be obvious that it was the defendants who were responsible for what happened below, and that plaintiffs counsel actually tried to prevent it, so the waiver doctrines of "opening the

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door" and "invited error" clearly ought to be applicable here. Also applicable here is the "contemporaneous objection rule," which was breached by the defendants throughout these events. Also applicable is the rule that a mistrial is reserved for only the most egregious of improprieties, and that the failure to request a curative instruction when a curative instruction would have been sufficient waives any claim to a mistrial. ***See*** the decisions cited at page 46, ***infra.*** Also applicable is the settled rule that the admission of inadmissible matter over objection (or a motion for mistrial) is harmless where the same matter is also in evidence without objection. In our judgment, any of these settled rules, or all of them, ought to be sufficient to dispose of this issue here without reaching the merits.

We should also point out that the Fabres waived this issue in even another way. Note that the trial court did not deny the defendants' motions for mistrial when they were made; instead, it reserved ruling on the motions, as it was entitled to do. See Ed ***Ricke & Sons, Inc.*** v. ***Green,*** 468 So.2d 908 (Fla. 1985). And because ruling on the motions had been reserved, it was incumbent upon the defendants to renew their motions after trial in a motion for new trial. See ***id.*** State Farm did so, but the Fabres did not do so in a timely manner. As we noted in our statement of the case and facts, the Fabres' motion for new trial was served 20 days after the verdict; it was therefore untimely; and it was a nullity as a result. See ***Menfi*** v. Exxon Co., ***U.S.A.,*** 433 So.2d 1327 (Fla. 3rd DCA 1983); ***Potetti v. Ben Lil, Inc.,*** 213 So.2d 270 (Fla. 3rd DCA 1968). Moreover, even if the Fabres' motion for new trial had been timely served, it was abandoned when the Fabres filed their notice of appeal before obtaining a written disposition of the motion. ***See In Re Forfeiture of $104,591 in U.S.*** Currency, 16 FLW S730 (Fla. Nov. 14, 1991). In short, the Fabres never obtained a ruling below on their motion for mistrial, so they are simply in no position to complain about any adverse ruling here. ***See Schreidell v. Shoter, 500*** So.2d 228 (Fla. 3rd DCA 1986), ***review denied,*** 511 So.2d 299 (Fla. 1987).

We should also briefly make the point that, even if the defendants had properly

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preserved this issue in every particular, the impropriety of which they complain here was demonstrably harmless. The reason for exclusion of evidence of the issuance or non-issuance of a traffic citation is settled:

> Common sense (and experience as well) tells us that to the average juror, the decision of the investigating police officer, i. e., whether to charge one driver or the other with a traffic violation based upon the result of his investigation, is very material to, if not wholly dispositive of, that juror's determination of fault on the part of the respective drivers.

Albertson v. Stark, 294 So.2d *698, 699* (Fla. 4th DCA), ***dismissed, 299*** So.2d 602 (Fla. 1974). In other words, if the defendants had been unfairly prejudiced in the instant case by the suggestion that Mrs. Fabre had been given a traffic citation and that Mr. Marin had not, one would have expected a verdict exonerating Mr. Max-in and finding Mrs. Fabre 100% at fault, That is not what the jury found, however. It found that both Mrs. Fabre and Mr. Marin were equally to blame for the accident -- Mrs. Fabre for pulling into Mr. Marin's lane without clearing it first, and Mr. Marin for travelling at an excessive speed, which caused him to lose control during his swerve.[13] It is therefore clear from the verdict that the defendants were ***not*** prejudiced in any way by the evidence of which they complain here -- so the impropriety, if not waived, was clearly harmless. See §59.041, Fla. Stat. (1991).

Finally, we return to the bottom line. The bottom line here is that the defendants provoked the impropriety of which they complain by their own initial impropriety -- suggesting to the jury, over plaintiffs counsel's persistent efforts to keep the lid on the subject, that someone, perhaps Mr. Marin, had been given a traffic citation. And once that erroneous suggestion was created, of course, plaintiffs counsel had little choice but to set the record straight by simply eliciting the truth. The defendants were therefore directly responsible for what occurred below -- and it simply cannot be grounds for granting the

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[13] This is the only conceivable explanation for the verdict, because acceptance of Mrs. Fabres' version of the accident would have required a verdict exonerating her entirely and fixing the entire blame on Mr. Marin.

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defendants a new trial that *they* pursued an impermissible area of inquiry to the prejudice of the plaintiff, and that the plaintiff then responded with a simple statement of the truth. Most respectfully, the defendants have only themselves to blame for what happened below, and this issue on appeal is without merit.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANTS' MOTIONS FOR MISTRIAL, WHICH ASSERTED THAT PLAINTIFF'S COUNSEL HAD IMPROPERLY EXPRESSED HIS PERSONAL BELIEF CONCERNING THE VERACITY OF THE WITNESSES DURING CLOSING ARGUMENT.

The defendants next contend that, during closing Argument, plaintiffs counsel improperly stated his "personal belief' concerning the veracity of the witnesses, and that the argument was so highly inflammatory and prejudicial that the trial court abused its discretion in denying their motion for mistrial. Plaintiffs counsel's closing argument covers approximately 25 pages of the transcript (T. 344-64, 385-88). The defendants have bottomed their complaint on a mere eleven words of it, which they identify as follows:

> Now, this is not lawyer talk about lawsuits, this [is] what happens and when the people in the emergency room say what happened, do you think that they got their story straight in the ambulance? I don't think so, I think that she got her story straight over here, when she determined there was another vehicle and then she changed her story again and went into this formation business because she knew she cut them off. So, tell us Mrs. Fabre, after you didn't see anything, one car behind another moving, and the next thing you know is that this fellow makes a figure seven and hits the wall, I mean it is unbelievable.

(Fabres' brief, p. 12; emphasis in original). Most respectfully, the defendants' complaints are hyperbolic in the extreme, and these eleven words simply did not require the trial court to mistry the case during closing argument.

Because Mr. Marin testifed to one version of the accident and Mrs. Fabre testified to another, the only real issue to be decided by the jury was who was telling the truth -- and the believability of the witnesses was therefore the central focus of *all* of the closing

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arguments; The second comment of which the defendants complain here -- that Mrs. Fabre's version of the accident was "unbelievable" -- was therefore a perfectly appropriate argument, and because it was ***not*** prefaced by any expression which could even arguably have suggested that the phrase amounted to a statement of counsel's "personal opinion," the defendants' complaints about it here are thoroughly unjustified, See ***Hartford Accident & Indemnity Co. v. Ocha***, *472* So.2d 1338, 1343 (Fla. 4th DCA), ***review dismissed***, *478* So.2d 54 (F'la. 1985) ("Counsel are, of course, entitled to point out the lack of factual or legal support for an opposing party's contention, or the lack of reasonableness or rationality in an approach.").

The first comment of which the defendants complain requires a more elaborate response, First, it must be read in context. In the argument which preceded it, plaintiffs counsel reminded the jury that Mr. and Mrs. Marin rode together in the ambulance to the hospital, and that Mrs. Marin's description of the accident to the emergency room physicians was consistent with the Marins' version of the accident at trial:

> You know about the ambulance ride and you know about coming into emergency rooms because as Dr. Seley told you what had occurred in the, in the room where they tried to get you stablized first and then their [sic] about to move her to the intensive care unit and you recall that testimony and with all of this, if someone is going to fabricate a story or make a story up before these lawyers and before these jurors and you had just been involved in an accident and you are in that kind of -- well, what do you think Mrs. Marin told the doctors, well, they recorded it in the Parkway Hospital records and you will have this record, it is this exhibit, this is just a blow up of it and I urge you to look for it because it will be one of the first pages, the admission records, this is a blow up of what is in this Plaintiffs Exhibit No[.] 3.

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[14] Plaintiffs counsel made this point to the jury several times (T. 345-49). The only argument which the Fabres made was that Mrs. Fabre was telling the truth, and that Mr. Marin was not (T. 365-71). State Farm's counsel described the case as one "involving two absolutely and completely inconsistent stories of how this accident happened," and also devoted the bulk of his argument on the liability issue to a contention that Mrs. Fabre was telling the truth, and that Mr. Marin was not (T. 372, 372-78).

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> Here she is freshly injured, in pain, Mrs. Max-in was involved in a motor vehicle accident this afternoon, this afternoon, this is her admission, this is her admission note from Parkway Regional Medical Center. They were come [sic] along I-95 when another vehicle in front of them swerved in front of them and apparently the other vehicle had a flat tire swerving in front of them causing them to go off of the road. The driver of the vehicle, the patient's husband tries to prevent impact, and his car swung around and went into the median.

(T. 351).

Plaintiffs counsel then asked the jury a rhetorical question: "Now, this is not lawyer talk about lawsuits, this is what happens and when the people in the emergency room say what happened do you think that they got their story straight in the ambulance?" (T. 352; emphasis supplied). The comment which followed -- "I don't think so" -- was simply an answer to this rhetorical question -- meaning, in effect, "I don't think that you, the jury, think that Mr. and Mrs. Marin got their story straight in the ambulance." In context, therefore, this statement was not an expression of counsel's personal opinion concerning the veracity of the witnesses -- which brings us to the last two of the eleven words of which the defendants complain: counsel's argument that "I think" that Mrs. Fabre got her story straight when she was sitting on the side of I-95, after she realized that she had cut the Matins off.

Although the words "I think" certainly imply that counsel may be expressing a "personal opinion," we respectfully submit that if these two words required a mistrial below, no case in this state will ever be successfully tried to verdict again. Phrases like this are ubiquitous in closing argument, and practically unavoidable. Witness the closing arguments made by defendants' counsel in the instant case. The phrase "I think" appears six times (T. 377, 378, 382, 383, 384, 385). The phrase, "I don't think" appears once (T. 383). And the arguments are laced with similar phrases -- like "I don't know" (T. 374), "I can't tell you" (T. 374), "I suggest to you" (T. 376), "I would suggest to you" (T. 377, 383), "I suggest that" (T. 378), "I tell you what" (T. 378, 378), "I am sure" (T. 379, 379), and "I submit to you" (T. 381).

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Defense counsel even boldly crossed into the prohibited area with phrases like "In my humble opinion that is what happened" (T. 377), "I believe that with my heart" (T. 379), and "I believe that" (T. 379). Most respectfully, the pot is clearly calling the kettle black here,

That is not our primary point, however, The point is that it is next to impossible to make a closing argument without uttering phrases like this -- and that a trial court must therefore be given some latitude in determining when the line has been crossed and whether a violation is so prejudicial as to require a mistrial, or no case can ever be successfully tried to conclusion again. The Second District has recognized the practical impossibility of avoiding use of the word "I" in closing argument, and has therefore adopted a realistic and flexible approach to the problem:

> . . . Although [plaintiffs] counsel did use the words, "I'm telling you," "I say baloney," "I would suggest to you," "We knew," and other such phrases, he used them in the context of commenting upon matters which were in evidence. Although such phrases might have been better avoided, they do not render the closing argument inflammatory.

Wasden v. Seaboard Coast Line Railroad Co., 474 So.2d 825, 832 (Fla. 2nd DCA 1985), ***review denied,*** 484 So.2d 9 (Fla. 1986). We commend this conclusion to the Court, and we respectfully submit that the trial court did not abuse its discretion in declining to mistry the case during closing argument simply because plaintiffs counsel said "I think" on the one occasion of which the defendants complain here.[15/]

We should also note in conclusion that, although the defendants complain here that the trial court should have given a curative instruction, the defendants did not request a curative instruction below; the only relief which they requested was a mistrial (T. 352-53). That is significant, because even if the comments complained of here amounted to

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[15/] ***See generally, Metropolitan Dade County v. Dillon, 305*** So.2d 36 (Fla. 3rd DCA 1974), cert. ***denied,*** 317 So.2d 442 (Fla. 1975); ***Getelman v. Levy, 481*** So.2d 1236 (Fla. 3rd DCA 1985), ***review denied, 494*** So.2d 1150 (Fla. 1986); ***Bew*** v. ***Williams, 373*** So.2d 446 (Fla. 2nd DCA 1979); ***Porta v. Arango, 588*** So.2d ***50*** (Fla. 3rd DCA 1991); ***Dillard v. Choronzy, 584*** So.2d 240 (Fla. 5th DCA 1991).

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improprieties, the fact remains that declaring a mistrial is a matter committed to the sound discretion of a trial court -- and it is an absolute "last resort," reserved for incidents where the impropriety is so egregious that a curative instruction cannot possibly undo the prejudice. *See Compania Dominicana de Aviacion v. Knapp,* 251 So.2d 18 (Fla. 3rd DCA), *cert. denied,* 256 So.2d 6 (Fla. 1971).

As a result, it is settled that the denial of a motion for mistrial will not be reversed if the impropriety to which it was directed could have been cured by a curative instruction, but no curative instruction was sought. See, e. *g., Rodriguez v. State, 493* So.2d 1067 (Fla. 3rd DCA 1986), *review denied, 503* So.2d 327 (Fla. 1987); *Cabrera v. Stare, 490* So.2d 200 (Fla. 3rd DCA 1986). Because the defendants asked only for the drastic relief of a mistrial, and did not ask for a curative instruction, it should follow that the failure to request a curative instruction ought to be fatal to the defendants' contention here -- because any impropriety in the comments complained of here was clearly curable upon proper request. Most respectfully, for all of these reasons, this issue on appeal is without merit.

> D. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN DECLINING TO INSTRUCT THE JURY THAT A VIOLATION OF 9316.071, FLA. STAT. (DISABLED VEHICLES 'OBSTRUCTING TRAFFIC), WAS EVIDENCE OF NEGLIGENCE

The defendants next complain that the trial court committed reversible error when it declined to instruct the jury upon §316.071, Fla. Stat.:

> Whenever a vehicle is disabled on any street or highway within the state or for any reason obstructs the regular flow of traffic, the driver shall move the vehicle so as not to obstruct the regular flow of traffic or, if he cannot move the vehicle alone, solicit help and move the vehicle so as not to obstruct the regular flow of traffic. Any person failing to comply with the provisions of this section shall be punished as provided in s. 3 16,655,

Actually, what the defendants requested below was that the trial court include this statute alongside the two statutes which the parties had agreed could be read in conjunction

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with an "evidence of negligence" instruction patterned upon Fla. Std. Jury Instn. (Civ.) 4.11:

> Violation of a traffic regulation prescribed by Statute is evidence of negligence. It is not, however, conclusive evidence of negligence. If you find that a person or corporation alleged to have been negligent violated such a traffic regulation, you may consider that fact, together with the other facts and circumstances, in determining whether such person or corporation was negligent.

(T. 29597, 338-40, 398-99).[16] In other words, the defendants requested that the jury be instructed that the failure to move a disabled vehicle from a highway is "evidence of negligence" -- and it is the propriety of the denial of ***that*** request, not a mere request that the jury be instructed on the statute, that is the issue to be decided here.

Whether the trial court committed reversible error in declining to instruct the jury that the failure to move a disabled vehicle from a highway is "evidence of negligence" is governed by the following three-part rule:

> The failure to give a requested jury instruction constitutes reversible error where the complaining party establishes that:
>
> (a) the requested instruction contained an accurate statement of law,
>
> (b) the facts in the case supported giving the instruction, and
>
> (c) the instruction was necessary for the jury to properly resolve the issues in the case.
>
> [Citations omitted]. A verdict will not be set aside, however, merely because the court failed to give instructions which might properly have been given [citation omitted]. Rather, the standard of review is "whether . . . there was a reasonable possibility that the jury could have been misled by the failure to give the instruction" [citation omitted]. More importantly, this in turn depends on whether the omitted instructions addressed a material issue in the case that was not covered by the

[16] The two statutes to which the parties agreed this instruction was applicable were §316.085(2), Fla. Stat., which prohibited Mrs. Fabre from changing lanes so as to interfere with traffic in the new lane, and 5316.183, Fla. Stat., which prohibited Mr. Fabre from exceeding a reasonable and prudent speed (T. 398-99).

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remaining instructions. [Citations omitted].

Schreidell v. Shoter, 500 So.2d *228,* 231 (Fla. 3rd DCA 1986), *review denied,* 511 So.2d 299 (Fla. 1987). Although the "evidence of negligence" instruction requested by the **defendants** was an accurate statement of the law (in the abstract at least), the facts in the case did support it and it was entirely unnecessary for resolution of the issues, so the trial court properly refused it.

The facts in the case did not support giving the instruction for two reasons. First, Mrs. Fabre's vehicle was neither "disabled" nor obstructing the regular flow of traffic. According to Mrs. Fabre, although her vehicle had a flat tire, she had full control of it and was able to drive it to the left emergency lane of the expressway without difficulty; this testimony was repeated at least three times, and it was uncontradicted (T. 34, 35, 40). Second, even if her vehicle could have been considered "disabled" because of its flat tire, the fact remains that Mrs. Fabre removed it from the expressway, just as the statute required. For both of these reasons, there was no justification whatsoever for instructing the jury that the failure to remove a disabled vehicle from a highway is "evidence of negligence."

The instruction was also unnecessary for the jury's resolution of the issues, because the plaintiff never contended that Mrs. Fabre violated the statute. Although the defendants insist here (as they did below) that the statute supported their position that it was not negligent for Mrs. Fabre to drive to the left emergency lane rather than the right, that was simply not an issue in the case -- and the jury was told precisely that in closing argument by plaintiffs counsel: "I don't fault her for veering off of the road[;] she should get off of the road but she can't do it with disregarding other peoples[']] safety and that is what she did. . . " (T. 350). In short, the plaintiff did not contend that Mrs. Fabre was negligent for seeking the safety of the left emergency lane rather than the right.[17] The plaintiffs only

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[17] The plaintiffs position was therefore perfectly consistent with *Graham v. Kebel,* 431 So.2d 652 (Fla. 3rd DCA 1983), in which this Court held that a defendant who suffered a flat tire on I-95 was not negligent in stopping his vehicle on the nearest side of the expressway, and

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contention was that Mrs. Fabre was negligent in cutting off Mr. Marin while driving into the appropriate emergency lane, so there was no justification whatsoever for instructing the jury that the failure to remove a disabled vehicle from a highway is "evidence of negligence."

Finally, the ***reason*** why the defendants wanted the statute read to the jury was to demonstrate that Mrs. Fabre had a legal duty to remove her vehicle from the highway, so that they could argue that she had fully complied with the law in driving her car to the side of the expresway: ". . . what we're trying to tell the jury is that she had a duty not to leave it there and that she had to get it off of the road and that is what the statute tells her to [d]o and she is complying with that statute" (T. 338-40, 340). In other words, the defendants wanted to utilize $316.071 to argue that ***compliance*** with a traffic regulation is evidence of non-negligence. The defendants did not propose such an instruction, however. Instead, they asked that the statute be read in conjunction with an instruction which stated that Violation of a traffic regulation . , . is evidence of negligence" (T. 399) -- and ***that*** instruction simply did not support the quite different, converse proposition which the defendants wished to argue to the jury. Since the statute simply did not belong in such an instruction on the facts in this case, the trial court clearly did not commit reversible error in declining to instruct the jury that the failure to remove a disabled vehicle from a highway is "evidence of negligence."[18] Most respectfully, this issue on appeal is without merit.

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that he would have violated 8316.071 if he had driven across several lanes of rush hour traffic to the farthest side of the expressway. Because the plaintiff did not contend anything to the contrary in the instant case, the defendants' reliance upon ***Graham*** here is misplaced. In addition, ***Graham*** does not even discuss the propriety of giving an "evidence of negligence" instruction on facts like those in the instant case, so it is no authority for the defendants' position that the trial court committed reversible error in declining to give such an instruction below.

[18] A considerably different issue would have been presented here if the defendants had requested that §316.071 be read in conjunction with an instruction stating that ***compliance*** with a traffic regulation is evidence of non-negligence. Such an instruction would have presented a dubious proposition at best, for which we can fmd no authority at all. There is no need for us to chase this particular rabbit at the Court's expense, however, because such an instruction was not requested below -- and we will therefore leave the merits of the

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V.
CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the plaintiffs amended final judgment should be affirmed. Since no separate argument has been addressed to the plaintiffs cost judgment, an **affirmance** of any portion of the plaintiffs amended **final** judgment should result in an **affirmance** of the cost judgment as well.

Respectfully submitted,

GROSSMAN & ROTH, **P.A.**
2665 South **Bayshore** Drive, Penthouse One
Grand Bay Plaza
Miami, **Fla.** 33133
-and-
PODHURST, **ORSECK,** JOSEFSBERG,
EATON, MEADOW, OLIN **& PERWIN,** P.A.
25 West Flagler Street, **Suite 800**
Miami, Florida 33130
(305) **358-2800**

Attorneys for Appellee Marin

By: _____
JOEL D. EATON

---

defendants' dubious proposition to another case in which it is appropriately before the court.

APPENDIX

INDEX TO APPENDIX

Page

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

HOUSE OF REPRESENTATIVES
COMMITTEE ON HEALTH CARE AND INSURANCE
STAFF ANALYSIS

BILL #: Ch. 86-160, Laws of Florida, (CS/CS/SB 465, 349, 592, 698, 699, 700, 701, 702, 956, 977, & 1120)

RELATING TO: Tort Reform and Insurance

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

EFFECTIVE RATE: Multiple Effective Dates

COMPANION BILL(S): CS/HB 1344

OTHER COMMITTEES OF REFERENCE: (1) Senate Commerce

(2) Senate Judiciary-Civil

****

I. SUMMARY:

INSURANCE REFORMS

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

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

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

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

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

Section 60. Prior to 1973, Florida adhered to the legal doctrine of "contributory negligence." Contributory negligence provided that a plaintiff who was partially responsible for injuries caused by a negli defendant could be totally barred from recovering from that defendant, 1973, the Florida supreme Court. abolished contributory negligence and adopted the doctrine of "comparative negligence*, See *Hoffman v. Jones* 280 So.2d 431 (1973). Comparative negligence allows a plaintiff who is partially responsible for his injuries to recover from a negligent dcf endant. Under comparative negligence, a plaintiff's total judgment against a negligent defendant is reduced by the percentage of the plaintiff's fault. The act codifies the comparative negligence law.

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

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

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

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

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

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

DATE: June 6, 1986 Page 1

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Grange	Fort	CO	Fav/CS
2.	Plante	Lesner	JC	Fav/CS/CS
3.				

SUBJECT: Liability Insurance/Tort Reform

BILL NO: AND SPONSOR: Analysis of CS/CS/SBs 465, 702, 699, 700, 701, 956, 977 & 1120 by Commerce Committee and Senators Vogt, Grant, and others Barton, Kirkpatrick,

I. SUMMARY:

Present situation and Effect of Proposed Changes:

CS/CS/SB 465, 349, 592, 690, 699, 700, 701, 702, 956, 977, & 1120 (hereinafter CS/CS/SB 4651, cited as the Tort Reform and Insurance Act of 1966, is intended to ameliorate the current commercial liability insurance crisis by making commercial liability insurance more available, by increasing the regulatory authority of the Department of Insurance (department), and by modifying legal doctrines that have aggravated the crisis.

Among other things, the bill;

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

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

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

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

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

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

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

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

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

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

Section 59.

Ocher than under ch. 440, F.S., which exempts employers who maintain workers' compensation insurance for the benefit of their employees Cram all liability for damages arising out of work-related injuries, s. 627.737, F.S., relating to the automobile no-fault law, is the only statute vhieh limits the recovery of noneconomic damages by injured persons. In all other types of personal injury cases, there it no Limit to the amount of noneconomic damages 4 plaintiff may recover.

The bill sets a maximum *amount* of noneconomic damages that may be avarded to any person entitled thereto in any action for personal injury or vrongful death at $450,000. The provisions of this section would apply to any cause of action filed on or after July 1, 1906.

egs on ,

Prior to 1973, Florida adhered to the Legal doctrine of 'contributory negligence." Contributory negligence provided that • plaintiff who veo partially responsible for injuries caused by a negligent defrndent could be totally barred from reoovering from that defendant. fn 1973. the Florida Supreme . Court ● bo&i$hed contributory negligence end adopted thr doctrine of "comparative negligence". See Hoffman v. Jones, 280 So.2d 431 (1973). Comparat i ve negl igence allovs e plaintiff vho is partially responsible for his injuries to recover from a negligent defendant. Under comparative negligenc, a plaintiff's total judgment against a negligent defendant is reduced by the percentage of the plaintiff's fault.

The principles of comparative negligence are also applicable in cases involving multiple defendants, vith fault being apportioned among all nevlivent parties and the plaintiff's total damages being divided wnq those parties ● ecording to their proportionate degree of fault. However, in chase cases, one OF more of the defendants may ultimately be Forced to pay more than their proportionate shares of the damages, pursuant to the doctrine of joint and several liability. Under this doctrine, if tvo or more defendants are found to be responsible for causing the plaintiff's injuries, the plaintiff Can recover the full amount of damager from my one of them.

Under the bill, *joint* and several liability applies to all cases in vhlch the award for damages does not exceed $25,000. In cases in which the avard of damages is greater then $25,000, liability for damages is based an each party's proportionate fault, except that each defendant vho is more at fault than the claimant is jointly and severally liable for all economic damages. The bill's modified version of joint and several liability vould also nor apply to actions vhfch the Legislature has mandated ther the doctrine apply: specifically chapter 403 (rnvironmental pollution), chapter 491 (land salts), chapter 517 (securities), chapctr 542 (antitrust) and chapter 895 (RICO).

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

amounts avarded for economic and noneconomic damages, in addision to apportioning Qcrttntages of fault among the parties. This section vould apply to all cases filed on or after July 1, 1986.

Section 61.

This section amends s. 57.105, F.S., to provide that vhtn tht court assesses attorney's fees against the losing party because that party's claim or defense completely lacked a justifiable issue, that cht losing party's attorney pay one-halt of the attorney' t fees so assessed. Pravidtr an exception for an attorney who has acted in good faith, based upon the representations of his client,

Section 62.

Under present law, in s. 768.13, F.S., immunity is established for. any person vha, in good fait-h, renders emergency cart or treatment at the scent of an emergency where the person acts as an ordinary, reasonably prudent man vould have acted under the same circumstances.

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

Section 63

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

Section 64.

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

Section 65.

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

Section 67.

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

Section 68.

A.5

REVISED: _____

CS/CS/SB 465, 349, 592, 698, 699, 700, 701, 702, 956, 977 & 1120

(11)

DATE: June 9, 1986

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

SUBJECT:

Liability Insurance/Tort Refotm

BILL NO. AND SPONSOR:

Analysis of CS/CS/SBs 465, 349, 592, 698, 699, 700, 701 702, 956, 977 & 1120 by Judiciary-Civil, Commerce Committee and Senators Hair, Barron, Kirkpatrick, Vogt, Crawford and others
Passed by the Legislature June 7, 1986

I. SUMMARY:

Present Situation and Effect of Proposed Changes:

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

Among other things, the bill:

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

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

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

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

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

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

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

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

Section 58.

This section is similar to s. 768,585, F.S., which provides for offers and demands for judgment in medical malpractice actions, except this provision makes such offers and demands applicable to all civil actions based upon injury to person or property or for wrongful death.

The bill provides that if a defendant files an offer of judgment which is not accepted within 30 days by the plaintiff, the defendant is entitled to reasonable *costs* and attorney's fees incurred *from* the date of the offer if the final judgment for the plaintiff is at least 25 percent less than such *offer*. If the costs and attorney's fees are more than the amount of the judgment , then the court must enter judgment for the defendant in the amount that the costs and attorney's fees exceed the plaintiff's judgment. Conversely, if a plaintiff files a demand for judgment which is not accepted by the dcf endant within 30 days, and the plaintiff receives a judgment which exceeds the demand by 25 percent or more, the plaintiff is entitled to recover reasonable costs and attorney's fees incurred from the date of the demand. If rejected, neither the offer nor demand is admissible as evidence in subsequenr litigation.

Any offer or demand for judgment made under the section would not be permitted until 60 days after filing of the suit, and could not be accepted later than 10 days before the date of trial.

Sect ion 59 .

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

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

Section 60.

Prior to 1973, Florida adhered to the legal doctrine of "contributory negligence." Contributory negligence provided that a plaintiff who was partially responsible for injuries caused by a negligent defendant could be totally barred from recovering from that defendant. In 1973, the Florida Suprame Court abolished contributory negligence and adopted the doctrine of "comparative negligence". See Hoffman v. Jones, 280 So.2d 431 (1973). Comparative negligence allows a plaintiff who is partially responsible for his injuries to recover from *a* negligent defendant. Under comparative negligence, a plaintiff's total judgment against a negligent defendant is reduced by the percentage of the plaintiff's fault.

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

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

Section 61.

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

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

Section 63.

This section creates, a five-member Academic Task Force for Review of tht Insuranft and Tort Systems consisting of the pttsidtnt of each state university having a lav school, the president of a private university having both a law school and a medical school, plus two others to be appointed by these three. The task force would be charged with evaluating the

ACADEMIC TASK FORCE FOR REVIEW OF THE INSURANCE AND TORT SYSTEMS

FINAL RECOMMENDATIONS

March 1, 1988

Based upon a consideration Of all these factors, the Task Force recommends that the comparative fault provisions[17] of the 1986 Act should be replaced with modified comparative fault provision8 that incorporate the following features.

1. No plaintiff may recover in an action brought in negligence, product strict liability, and breach of implied warranty, including wrongful death actions brought under those theories, if the plaintiff's percentage Of fault was more than the cumulative percentage *of fault* allocated to all defendants in the action.

2. Thr jury should be informed of the effects of its finding8 *on* tha entitlement *of* the plaintiff to recover.

b. Joint and Several Liability

Both *basic* forms of comparative negligence impose numerous secondary policy choices for decision-makers. *The* most important issue is how multiple tortfeasers share thm financial liability for injuries to the claimant. The traditional common law approach wa8 one of "joint and several" liability in which any one of the defendants was liabile *for* the entire amount of the plaintiff 's judgment. The plaintiff could collect only once for hi8 damages, but hi8 recovery of full damages was facilitated even in the avant that one of the co-defendants *war* judgment-proof or beyond the jurisdiction of thr court. In recent years, some courts[18] and legislatures[19] have taken the opposite approach of pure several liability[20] which provides that a defendant is only liable *for* a proportionate share of the judgment based upon

a comparison of its relative degree of fault compared with the other defendants. Mosts states currently *retain* joint and several liability,[21] but a few statutes impose only several (proportionatr) liability upon a defendant whoa8 negligence was less than the plaintiff's and joint and *several* as to all the rest.[22]

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

Florida's 1986 Act[24] adopts several (proportionatf) liability, except *for* intentional torte, designated statutory torts, negligence judgment8 not exceeding *$25,000,* and for *economic* damager am against a defendant who is not less negligent than plaintiff. Joint end several liability is *retained* for the excepted categories.

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

The basic argument in favor *of* abolishing joint *and* several liability is t&at, oncm the comparative fault principle is

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

Hybrid rtatutu, like Florida's 1986 Act, obviously strive *for* some appropriate balance between these competing policies, as recommended by the American Bar Association's Report on the Action ◊□○○)(♦♦)(□■ to Improve the ❄□□♦ Liability Systems (1987) ● The retention of joint and several liability *for* smaller *cases* attempts to rnhancm collection and avoid complexity in those cases, while still providing protection against ths potential inequity of "deep pocket" liability for the entire judgment in larger cases where that is *more* likely to be a serious problem. The retention *of* joint and several liability *for* economic damages, as applied to a high-fault defendant, recognizes an implicit priority *for* economic losses and applies it so as to avoid the potential inequity of "deep pocket" liability for a defendant who is less *at* fault than thr plaintiff.

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

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 21st day of January, 1992, to: Marc R. Ginsberg, Esq., Mandina & Ginsberg, P.A., Second Level, 2964 Aviation Avenue, Miami, Fla. 33133, Attorneys for Fabre; James Clark, Esq., Barnett, Clark & Barnard, Biscayne Building, Suite 1003, 19 W. Flagler Street, Miami, Fla. 33130, Attorneys for State Farm; and to Arthur A. Cohen, Esq., Arthur A. Cohen, P.A., 44 West Flagler Street, Suite 406, Miami, Fla. 33130, Attorney for Fabre.

By: J. D. Eaton
JOEL D. EATON