ORIGINAL

IN THE SUPREME COURT
OF THE STATE OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. 87,504

Y.H. INVESTMENTS, INC.

Petitioner,

vs.

RAQUEL GODALES, individually and as Guardian of Armando Rodriquez, a minor,

Respondent.
_____/

ON CERTIFIED QUESTION FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

AMICUS CURIAE BRIEF OF UNITED SERVICES AUTOMOBILE ASSOCIATION AND USAA CASUALTY INSURANCE COMPANY IN SUPPORT OF THE PETITIONER'S POSITION

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STATEMENT OF THE CASE AND FACTS[1]

The facts pertinent to the certified question which are contained in the Third District opinion are fully quoted below:

> Armando Rodriquez was sitting next to his mother, Raquel Godales, on the stairs connecting the first and second floors of their apartment building. He fell beneath the lower guardrail of the open staircase and the accident resulted in a skull fracture. Ms. Godales brought a negligence action against the building's owner on her own behalf and on her son's behalf, alleging that the owner was negligent in maintaining the premises. On the day of trial, Ms. Godales withdrew her derivative claim and was no longer a party to the lawsuit.
>
> At trial, Ms. Godales proved that the apartment complex stairway was in violation of the South Florida Building Code which required the guardrails on such stairways to reject an object six-inches in diameter. The opening between the tread of the steps and the lower guardrail that allegedly caused the injuries was seventeen inches wide.
>
> The jury received instructions that the defendant was negligent as a matter of law, and only the issue of whether or not defendant's negligence was a legal cause of injury to the child was submitted for consideration. In addition, the jury was instructed to determine whether or not the child's mother, Ms. Godales, was negligent for failing to provide adequate supervision, and whether such negligence was also a legal cause of injury to the child. Over objection, the verdict form listed both the defendant, Y.H. Investments, and the mother, Ms. Godales, with instructions to state the percent of negligence attributable to each.
>
> The jury returned with a verdict awarding damages to Armando Rodriquez in the amount of $42,500.00 for past pain and suffering, and zero damages for past medical expenses. The jury found Y.H. Investments and Ms. Godales to each be fifty percent negligent. On this basis, the trial court entered a final judgment entitling the minor to recover only one-half, or fifty percent, of the jury's assessed damages, $21,250.00, from Y.H. Investments.

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[1] U.S.A.A. and USAA Casualty respectfully adopt the Statement of the Case and Facts of Y.H. Investments, Inc.

On these facts, the Third District held "that the trial court erred in allowing the minor plaintiff to recover only one-half of the jury's assessed damages." *Godales v. Rodriguez*, 21 Fla.L.Weekly D282 (Fla. 3rd DCA Jan. 31, 1996). The Third District certified to the Supreme Court of Florida that the instant decision

> passes upon a question of great public importance concerning the interpretation and application of § 768.81 Fla. Stat. (1993) in determining whether a minor child plaintiff's award should be reduced by the negligence of the non-party parent or guardian, and to the benefit of the defendant tortfeasor. Art. V, § 3(b)(4), Fla. Const.

U.S.A.A. and USAA Casualty respectfully restate the certified question to more accurately reflect the issue presented to this Court.

SUMMARY OF THE ARGUMENT

The comparative negligence statute, section 768.81(3), Florida Statutes (1993), requires liability to be apportioned among both participants to the accident, including a parent immune from liability under the parental/family doctrine. This Court previously held in *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993) and *Allied-Signal, Inc. v. Fox*, 623 So. 2d 1180 (Fla. 1993) that liability must be apportioned among all participants to the accident even when the person or entity can not be joined as a party to the lawsuit due to tort immunity.

The instant *Godales* decision does not point out any ambiguity in the statute or otherwise explain how section 768.81(3) can possibly be construed to exclude an immune parent from being included on the verdict form for apportionment of liability. Since the statute was enacted in response to the insurance crisis as a "remedial measure," it affects the general welfare of the state and must be liberally construed to effectuate the intent of the legislature. The legislature intended to substantially abrogate joint and several liability in negligence cases.

The statute expressly applies to negligence cases and specifically describes all limitations and exceptions to the apportionment of damages provision. If the legislature had intended to preserve joint and several liability in cases involving

a participant subject to the family/parent immunity, it would have so provided. The Third District decision should be quashed.

ARGUMENT

ON CERTIFIED QUESTION (REPHRASED)[2]: THE COMPARATIVE NEGLIGENCE STATUTE, SECTION 768.81(3), FLORIDA STATUTES (1993), REQUIRES LIABILITY TO BE APPORTIONED AMONG BOTH PARTICIPANTS TO THE ACCIDENT, INCLUDING A PARENT IMMUNE FROM LIABILITY UNDER THE PARENTAL/FAMILY IMMUNITY.

U.S.A.A. and USAA Casualty respectfully suggest that the certified question should be rephrased as follows to more accurately reflect the legal issue presented in the instant case: Whether the comparative negligence statute, section 768.81(3), Florida Statutes (1993), requires liability to be apportioned among both participants to the accident, including a parent immune from liability under the parental/family doctrine. For the following reasons, U.S.A.A. and USAA Casualty urge this Court to answer the rephrased question in the affirmative pursuant to section 768.81(3) and this Court's decisions in *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993) and *Allied-Signal, Inc. v. Fox*, 623 So. 2d 1180 (Fla. 1993).

First, the Third District decision erroneously focuses on the wrong party to the lawsuit. As the phraseology of the certified

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[2] The instant Third District decision certified that its decision "passes upon a question of great public importance concerning the interpretation and application of § 768.81(3), Fla. Stat. in determining whether a minor child plaintiff's award should be reduced by the negligence of the non-party parent or guardian, and to the benefit of the defendant tortfeasor."

question demonstrates, the decision is only concerned with the reduction of the plaintiff's recovery due to the apportionment of negligence to an immune parent. The comparative negligence statute, however, expressly limits the defendant's liability in cases to which the statute applies "on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability." Section 768.81(3), Florida Statutes (1993); *Fabre v. Marin, supra.*

In *Fabre*, this Court expressed its belief that "the legislature intended that damages be apportioned among all participants to the accident." *Fabre*, 623 So. 2d at 1185. *See also Wells v. Tallahassee Memorial Regional Medical Center*, 659 So. 2d 249, 251 (Fla. 1995)(wherein the Court reiterated that in order to limit each defendant's liability for non-economic damages to its pro rata share, "it is necessary to determine the percentage of fault of all entities who contributed to an accident regardless of whether they are joined as defendants."); *Dosdourian v. Carsten*, 624 So. 2d 241 (Fla. 1993)(wherein this Court again reiterated that section 768.81(3) "requires the fault the of *all* persons responsible for an accident to be determined regardless of whether they are parties to the litigation."). The *Fabre* Court further noted that by section 768.81(3)'s elimination of joint and several liability, the legislature decided that "a plaintiff should take each defendant as he or she finds them." *Fabre*, 623 So. 2d at

1186. In interpreting the comparative negligence statute in *Fabre*, the Court's focus was on limiting the defendant's liability to the proportion of his or her fault in causing the accident.[3]

The underlying decision almost completely overlooks the express wording in section 768.81(3) and this Court's interpretation of the statute in *Fabre* and its companion case, *Allied-Signal, Inc., supra*, in holding that the statute can not be applied to reduce the recovery of a minor child by the negligence of a parent who is immune from suit. Both *Fabre* and *Allied-Signal, Inc.* held that section 768.81(3) requires that liability be apportioned among all participants to the accident even when a participant can not be joined as a party to the lawsuit due to a tort immunity.

In *Fabre*, this Court held that an immune spouse's percentage of negligence is apportioned on the verdict form.[4] In the *Allied-Signal, Inc.* decision, this Court held

> that it [is] necessary to consider the percentage of fault of the plaintiff's employer even though the employer was immune from tort liability under workers' compensation law [623 So. 2d at 1182].

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[3] In *Fabre*, the Court also noted that in previously upholding the constitutionality of the act, it stated that the right of access to courts "does not include the right to recover for injuries beyond those caused by the particular defendant." 623 So. 2d at 1185, *quoting, Smith v. Department of Ins.*, 507 So. 2d 1080 (Fla. 1987).

[4] The *Fabre* opinion notes that the doctrine of interspousal immunity "has been abrogated in *Waite v. Waite*, 618 So. 2d 1360 (Fla. 1993). 623 So. 2d at 1186.

See also Schindler Corp. v. Ross, 625 So. 2d 94 (Fla. 3d DCA 1993)(wherein the district court held that the percentage of fault of an immune employer had to be assessed by the jury on the verdict form).

This Court's *Fabre* and *Allied-Signal, Inc.* decisions discuss at length a substantial body of cases from outside jurisdictions which construe similar statutes; the decisions all require a determination of the percentage of fault among all persons and entities contributing to an accident including those immune from suit. *Nance v. Gulf Oil Corp.*, 817 F.2d 1176 (5th Cir. 1987); *Johnson v. Niagara Mach. & Tool Works*, 666 F.2d 1223 (8th Cir. 1981); *DaFonte v. Up-Right, Inc.*, 2 Cal.4th 593, 7 Cal.Rptr.2d 238, 828 P.2d 140 (1992); *Brown v. Keill*, 224 Kan. 195, 580 P.2d 867 (1978); *Connar v. West Shore Equip.*, 68 Wis.2d 42, 277 N.W. 2d 660(1975).

The Third District *Godales* decision reasons that since the language of section 768.81 "does not explicitly abrogate the common law rule that a child's recovery should not be diminished by his parent's negligence" that "it must be construed to preserve this common law rule." The decision recites that the statute is in derogation of the common law and must be narrowly construed in favor of the broadest retention of common law rights. The decision, however, does not point out any ambiguity in the statute or describe any narrow construction which would allow preservation

of a common law right.[5] The statute, however, specifically provides: "This statute applies to negligence cases." Section 768.81(4)(a), Florida Statutes (1993). The statute also expressly lists all limitations and exceptions to the apportionment of damages provision. In fact, over half of the section is devoted to describing under what circumstances the statute is and is not to be applied.[6]

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[5] Indeed, the common law rule on which the court relies--that the negligence of a parent or other custodian can not be imputed to a child--does not apply to this case. The negligence of a parent is not being imputed to a child as a result of the application of section 768.31; rather, a defendant's liability is being limited to its pro rata share of fault.

[6] In this regard, subsections (4), (5) and (6) provide, in their entirety:

(4) Applicability.--

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

(b) This section does not apply to any action brought by any person to recover actual economic damages resulting from pollution, to any action based upon an intentional tort, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by chapter 403, chapter 498, chapter 517, chapter 542, or chapter 895 [footnote omitted].

(5) Applicability of joint and several liability.--Notwithstanding the provisions of this section, the doctrine of joint and several liability applies to all actions in which the total amount of damages does not exceed $25,000.

(6) Notwithstanding anything in law to the contrary, in an action for damages for personal injury or wrongful death arising out of medical malpractice, whether in contract or tort, when an

In *Fabre*, this Court reiterated its previous observation "that the act disfavors joint and several liability to such a degree that it survives only in those limited situations where it is expressly retained." 623 So. 2d at 1185, *citing Conley v. Boyle Drug Co.*, 570 So. 2d 275, 285 (Fla. 1990). If the legislature had intended to preserve joint and several liability in cases involving parties subject to the parental/family immunity it would have included that situation in the limited list of those specifically retained. Hence, the principle of statutory construction--*expressio unius est exclusio alterus*--applies to this case. *See, e.g., University of Florida, Institute of Agricultural Services v. Karch*, 393 So. 2d 621 (Fla. 1st DCA 1981). *See also Martin v. Johnston*, 79 So. 2d 419 (Fla. 1955).

The *Fabre* Court noted that the statute was enacted as a part of the Tort Reform and Insurance Act of 1986 enacted as "a solution to the current crisis in liability insurance" as a "remedial measure." Such a law which affects the general welfare of the state should be liberally construed to favor the legislature's intent. *See, e.g., Ideal Farms Drainage Dist. v. Certain Lands*, 154 Fla. 554, 19 So. 2d 234 (Fla. 1944).

Since the comparative negligence statute expressly abrogated

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apportionment of damages pursuant to this section is attributed to a teaching hospital as defined in s. 408.07, the court shall enter judgment against the teaching hospital on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability.

joint and several liability except in those limited circumstances specifically preserved, and no mention was made of situations involving parental negligence, it is respectfully submitted that the Third District decision misconstrued the statute.

As its rationale for excluding situations involving parental negligence from the act, the Third District decision states that joint and several liability must be preserved in such cases because a parent or guardian "might be deterred [from bringing suit] by the prospect of diminished recovery because of his or her own negligence."[7] However, there is no compelling reason why a parent or guardian should be deterred from bringing suit if a meritorious claim exists against a solvent tortfeasor. The solvent tortfeasor is only entitled to contribution from a negligent parent to the extent of existing liability insurance coverage. *Joseph v. Quest*, 414 So. 2d 1063 (Fla. 1982).[8]

It is respectfully submitted that section 768.81(3) requires liability to be apportioned among both participants to the accident, including a parent immune from liability under the parental/family doctrine.

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[7] In the paragraph preceding this statement the Third District erroneously construed the *Fabre* and *Allied Signal* decisions as "allow[ing] **contribution** even in light of an employer-employee relationship and a spousal relationship." (emphasis added). The two cases, however, allowed apportionment of liability among immune parties. Contribution issues were not involved. This confusion may have led to the court's holding on this point.

[8] The Third District concedes in its opinion that "it would have been proper for the trial court to include Ms. Godales on the verdict form, pursuant to 768.81(3) Fla. Stat. if she maintained liability insurance that could be used for contribution."

CONCLUSION

This Court is respectfully requested to answer the certified question in the affirmative and determine that the comparative negligence statute, section 768.81(3) requires liability to be apportioned among both participants to the accident, including a parent immune from liability under the parental/doctrine. This Court is requested to quash the instant Third District decision and remand the case for further proceedings consistent with this Court's answer to the certified question.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on the 13 day of May, 1996, to:

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