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

Y. H. INVESTMENTS, INC.,

Petitioner,

v.

RAQUEL GODALES, Individually and as Guardian of ARMANDO RODRIGUEZ, a Minor,

Respondent.

CASE NO.: 87,504

BRIEF OF AMICUS CURIAE NATIONWIDE MUTUAL FIRE INSURANCE COMPANY AND FLORIDA DEFENSE LAWYERS' ASSOCIATION

SUPPORTING POSITION OF PETITIONER, Y.H. INVESTMENTS, INC.

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SUMMARY OF ARGUMENT

Florida Statutes section 768.81 makes clear that in negligence cases, the jury should assess the percentage of fault attributable to each person who contributed to the accident, and the named defendants should pay only their percentage of fault as determined by the jury. With certain enumerated exceptions, joint and several liability has been repealed. This is true regardless of whether all persons responsible for the accident are named in the suit or amenable to suit. The fact that a party defendant is no longer subject to joint and several liability does not depend in any way on the status, identity, or collectability of the joint tortfeasors. A defendant is obligated solely to pay for his percentage of fault, regardless of whether the remaining tortfeasors can or will pay for their percentage of fault.

The decision of the Third District Court of Appeal in this case is directly contrary to these established principles of Florida law. The legislature did not create any exception to Florida Statutes section 768.81's abrogation of joint and several liability for cases in which a joint tortfeasor happens to be the claimant's parent. The Third District should not have judicially created such an exception.

The Third District's analysis is incorrect in large part because that court appears to have confused the concept of contribution among joint tortfeasors with the principle of joint and several liability to a plaintiff. The placing of a nonparty joint tortfeasor on the verdict form does not amount to

contribution from the nonparty to the named defendant; it simply enforces the principle that the named defendant does not have joint and several liability to the plaintiff for certain defined damages.

This Court has expressly held that the fact that a nonparty tortfeasor is immune from suit does not alter this analysis. Negligent parents' immunity has no greater effect on section 768.81 than does a negligent spouse's immunity or a negligent employer's immunity.

Finally, the fact that a parent's negligence is not imputed to the child is absolutely irrelevant to this analysis. That doctrine simply means that the parent's fault cannot result in a finding that the child was comparatively negligent. It does not mean that the parent is any less a joint tortfeasor in his or her own right. Like all other joint tortfeasors, the parent should be on the verdict form.

ARGUMENT[1/]

I. FLORIDA STATUTES SECTION 768.81 IS A GENERAL REPEAL OF JOINT AND SEVERAL LIABILITY AND THIS COURT SHOULD NOT JUDICIALLY CREATE AN EXCEPTION TO THAT REPEAL IN CASES WHERE THE CLAIMANT IS A MINOR AND THE CHILD'S PARENT IS AN ALLEGED JOINT TORTFEASOR.

The issue before this Court is whether section 768.81, which requires apportionment of fault among all joint tortfeasors in a negligence case, and which strictly limits a defendant's liability to his proportionate share of fault, applies with any less force when one of the joint tortfeasors happens to be the claimant's parent. Clear Florida law dictates that this question be answered in the negative, and that section 768.81's requirement of apportionment applies equally to all negligence cases regardless of the identity or status of the particular joint tortfeasors who contributed to a given accident.

Florida Statutes section 768.81 (1993)[2/] provides in pertinent part:

> 768.81 Comparative fault --
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> * * *
>
> (2) EFFECT OF CONTRIBUTORY FAULT -- in an action to which this section applies, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and non-economic damages for an

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[1] Nationwide Insurance Company and Florida Defense Lawyers' Association adopt the Statement of Case and Facts presented by Petitioner.

[2] According to the Third District's decision, the 1993 version of the statute is at issue in this case. Godales v. Y.H. Investments, 21 Fla. L. Weekly D282 (Fla. January 31, 1996). There has been no amendment to the statute since 1992. See Laws of Florida, ch 92-33.

> injury attributable to the claimant's contributory fault, but does not bar recovery.
>
> (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 that party on the basis of the doctrine of joint and several liability.

* * *

This Court has had several opportunities to address section 768.81 and has consistently applied the statute according to its plain terms to mandate that a defendant simply cannot be held liable for more than his proportionate share of fault. As this Court explained in Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993), "[w]e are convinced that section 768.81 was enacted to replace joint and several liability with a system that requires each party to pay for noneconomic damages only in proportion to the percentage of fault by which that defendant contributed to the accident." 623 So. 2d at 1185. See also Smith v. Department of Insurance, 507 So. 2d 1080, 1091 (Fla. 1987) (holding that a plaintiff's right to access to courts "does not include the right to recover for injuries beyond those caused by the particular defendant"). See generally Licenberg v. Issen, 318 So. 2d 386 (Fla. 1975) ("the most equitable result that can ever be reached is the equation of liability with fault"); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973) ("[w]hen the negligence of more than person contributes to

the occurrence of an accident, each person should pay the proportion of total damages he has caused the other party").

The legislature has made clear, and this Court has affirmed, that in negligence cases the doctrine of joint and several liability has been generally repealed. With certain enumerated exceptions, tort defendants can no longer be required to pay damages caused by the fault of their joint tortfeasors. In all cases subject to section 768.81, a jury must determine the proportionate share of fault attributable to each person or entity which contributed to the accident. This Court has clearly stated that the jury must apportion the fault of all persons and entities which contributed to the accident, regardless of whether they are or could be made parties to the lawsuit. Fabre, 623 So. 2d at 1185. In other words, a party defendant's freedom from joint and several liability is not dependent upon whether the joint tortfeasors are amenable to suit. Fabre, 623 So. 2d at 1185.

The present case can easily be resolved by simple application of these well-established principles. In fact, this Court has already twice specifically recognized that there is no exception to section 768.81's abrogation of joint and several liability simply because the nonparty joint tortfeasor is not amenable to suit due to tort immunity. In Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993), this Court addressed in detail the specific issue of what total percentage of fault should be considered in determining the party defendant(s)' relative shares of fault. This court considered and rejected the argument that the total percentage of fault to be

considered should be limited to the fault of the plaintiff and of party defendants. This court likewise considered and rejected the argument that the total percentage of fault to be considered should be limited to the fault of the plaintiff and of nonparty tortfeasors who are otherwise amenable to suit. This court explained that section 768.81 makes clear that

> [l]iability is to be determined on the basis of the percentage of fault of each participant to the accident and not on the basis of solvency or amenability to suit of other potential defendants.

623 So. 2d at 1186. This Court concluded that regardless of interspousal immunity, a negligent nonparty spouse's fault must be considered in the whole, and the spouse must appear on the verdict form.

This Court reached the same conclusion in Allied-Signal, Inc. v. Fox, 623 So. 2d 1180 (Fla. 1993), with respect to an employer joint tortfeasor. This Court reaffirmed that the fact that one of the participants in the accident is immune from tort liability is irrelevant to the named defendants' obligation to pay only their share of fault under section 768.81. 623 So. 2d at 1182 (citations omitted).

This Court's decisions in Fabre and Allied-Signal, along with the plain language of section 768.81, should have easily led the Third District in this case to an affirmance of the trial court's decision to place the mother on the verdict form. However, despite the clear language of section 768.81 and this Court's pronouncements in Fabre and Allied-Signal, the Third District Court of Appeal in the decision below concluded that where the plaintiff

in a negligence case is a minor child, and where one of the persons whose fault contributed to the child's damages is his parent, section 768.81 does not apply and the remaining tortfeasors are subject to joint and several liability for the parent's share of fault.

The Third District's decision makes an injured plaintiff better off, and a named defendant worse off, due to the fortuity that the other joint tortfeasor is the plaintiff's parent. This is contrary to the clear terms of section 768.81 as well as its intent as explained by this Court in Fabre.[3] In Fabre, this court specifically stated that the argument that a named defendant's liability depends on the identity of the other tortfeasor:

> . . . defies common sense. It would be incongruous that the legislature would have intended that the [named defendants'] responsibility be 100% in situations where the [plaintiff's] vehicle was operated by her husband and only 50% in situations where by chance she was a passenger in a vehicle operated by a friend.

Fabre, 623 So. 2d at 1185-86. The Third District below erroneously reached the equally "incongruous" conclusion that a named defendant's liability to the plaintiff is greater if a joint tortfeasor is also the plaintiff's parent than if the joint tortfeasor is a friend or another third party.

Specifically, this case is before this Court on certification by the Third District Court of Appeal of a question of great public importance as follows:

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[3] Interestingly, it was the Third District's opinion which this Court quashed in Fabre. See Fabre v. Marin, 597 So. 2d 883 (Fla. 3d DCA 1992), quashed, 623 So. 2d 1182 (Fla. 1993).

> We hereby certify to the Florida Supreme Court that this decision of this Court on this issue passes upon a question of great public importance concerning the application and interpretation 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.

Godales v. Y.H. Investments, Inc., 21 Fla. L. Weekly D282, D283 (Fla. 3d DCA January 31, 1996).

It is respectfully submitted that the form of the Third District's certified question precludes a meaningful analysis of the issue presented in this case. In fact, the question as phrased by the Third District incorporates concepts which Amicus Nationwide Insurance Company and Florida Defense Lawyers' Association[4] believe are at the heart of the Third District's erroneous decision in this case.

A proper reading of Florida Statutes section 768.81 and this Court's decision in Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993), makes clear that a plaintiff's award is not "reduced" by the negligence of nonparties to the "benefit" of the party tortfeasor as stated by the Third District in its certified question. Instead, the party tortfeasor's obligation is simply limited to his own proportionate share of fault. Whether the nonparty tortfeasor is also subject to judgment and collectible is irrelevant to the party defendant's liability; he is neither benefitted nor harmed in

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[4] For ease of reference herein, these amicus will be referred to as "Nationwide" and "FDLA." Plaintiffs/Respondents will be referred to collectively as such and individually as "mother" and "child." Defendant/Petitioner will be referred to by name.

his obligation to the plaintiff by the nonparty tortfeasor's amenability to suit. Thus, the 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. It is accordingly submitted that the certified question should be rephrased as follows:

> Whether an exception to Florida Statutes section 768.81 should be judicially created to maintain joint and several liability for all damages where the claimant is a minor and the child's parent is an alleged joint tortfeasor?

This question should be answered in the negative.

With the analysis properly framed, it is clear from the Third District's opinion in this case that it has failed to distinguish between the abrogation of joint and several liability and the availability of contribution among joint tortfeasors. See Godales, 21 Fla. L. Weekly at D282 [erroneously describing Fabre and Allied-Signal, Inc. v. Fox, 623 So. 2d 1180 (Fla. 1993) as "allowing contribution"]; 21 Fla. L. Weekly at D283 (stating "[h]owever, it would have been proper for the trial court to include [the mother] on the verdict form, pursuant to §768.81(3) Fla. Stat. (1993), if she maintained liability insurance that could have been used for contribution") (emphasis supplied). The Third District's approach, which analyzes the applicability of section 768.81 in terms of the party defendant's right to contribution, is circular because contribution is only at issue if there is joint and several liability, and section 768.81 repeals joint and several liability except in certain enumerated circumstances.

This Court made clear in Fabre that section 768.81 does not address liability between or among joint tortfeasors; it only addresses each party defendant's liability to the plaintiff. Fabre, 623 So. 2d at 1185. Contribution is the converse; it applies to determine one joint tortfeasor's liability to another, but does not impact either's liability to the injured plaintiff. See Shor v. Paoli, 353 So. 2d 825, 826 (Fla. 1978) (in which this Court, approving the Fourth District's opinion in that case, explained that contribution is claim by one joint tortfeasor against another, not a claim by an injured plaintiff against a tortfeasor).

The entire purpose of section 768.81 is to make clear that the salient issue with respect to a party defendant's liability is not whether or how much other at-fault parties will pay; the party defendant's obligation is based solely on his percentage of fault in contributing to the plaintiff's total damages. Fabre, 623 So. 2d at 1185. Section 768.81 provides that a defendant cannot be required to pay more than his proportionate share of damages to the plaintiff. This provision is not the result of a grant of 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. In fact, this distinction is what makes the result in the Third District so anomalous: under the Third District's decision, named defendants are subject to joint and several liability for a parent's fault and at the same time are precluded from seeking

contribution from that parent.

The fact that this case must be analyzed in terms of abrogation of joint and several liability and not in terms of availability of contribution makes clear that the Third District's reliance on Joseph v. Quest, 414 So. 2d 1063 (Fla. 1982), is clearly misplaced. Whether 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.

In addition to relying erroneously on contribution principles, the Third District's opinion also recites the proposition that a parent's negligence cannot be imputed to a minor child. Like contribution concepts, this principle is also irrelevant to this case. 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.

This distinction is made clear in Dubov v. Ropes, 124 So. 2d 34 (Fla. 3d DCA 1960), cited by the Academy of Florida Trial Lawyers in its amicus brief filed in the Third District. In Dubov, a child was injured in a two car accident while a passenger in a vehicle operated by his mother. The child's father sued the operator of the other vehicle on behalf of the child and in his own

right. The court held that the mother's negligence would not be imputed to the child so as to permit the other driver to assert the complete defense of contributory negligence. The court rejected imputed negligence arguments based both on the parent/child relationship and the driver/passenger relationship.

Significantly, however, the court held that it was proper to consider whether the mother's negligence was a proximate cause of the accident. The court simply held that the mother's negligence would not be imputed to the child for purposes of finding the child negligent.

Therefore, 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. As explained in Dubov, it does not mean that the parent is not negligent. See generally Quest v. Joseph, 392 So. 2d 256, 259 (Fla. 3d DCA 1980) (on rehearing en banc), quashed on other grounds, 414 So. 2d 1063 (Fla. 1982) (explaining that while a parent's negligence is not imputed to a child, a parent's negligence is treated as such with respect to the parent's rights and liabilities) (citations omitted).

In this case, the mother was on the verdict form in her own right as a joint tortfeasor, as any other joint tortfeasor would be. The rule that a parent's negligence is not imputed to a child dictates only that a finding of comparative fault on the part of the child due to the mother's negligence would have been erroneous.

See also Joseph v. Quest, 414 So. 2d 1063, 1064 (Fla. 1982) (wherein this Court emphasized that the financial stakes of parent and child in a child's injury action cannot be commingled). See generally Hunnings v. Texaco, Inc., 29 F.3d 1480, 1487 (11th Cir. 1994) (fault of mother in contributing to death of child was issue for the jury). It does not change the fact that the parent is a joint tortfeasor.

This distinction can be easily understood by several examples. First, the analysis may be easier understood by reference to another circumstance in which imputed negligence has been the subject of debate: automobile guests. It is true that the negligence of a driver cannot be imputed to a passenger. However, assume that a passenger in vehicle 1 is injured by the combined negligence of the driver of vehicle 1 and the driver of vehicle 2. Assume further that the passenger sues only the driver of vehicle 2. In such a case, the driver of vehicle 2 is entitled to put the driver of vehicle 1 on the verdict form, and the passenger's recovery against the driver of vehicle 2 is limited to his percentage share of fault as apportioned by the jury.

However, contrary to the Third District's analysis in this case, this limitation on the passenger's recovery is not the result of the negligence of the driver of vehicle 1 being imputed to the passenger; the passenger remains without fault, imputed or otherwise. The limitation on the liability of the driver of vehicle 2 is instead the result of the rule that the passenger is entitled only to recover from the driver of vehicle 2 for the

damages which are attributable to that driver's fault. Whether the passenger can or does sue or collect from the driver of vehicle 1 is not relevant to the amount of damages which the driver of vehicle 2 is required to pay.

The distinction between imputing a parent's negligence to the child and apportioning fault to the parent as a joint tortfeasor is also explained by analyzing the effect of the Third District's analysis on a sample jury apportionment. Assume that case is tried in which the child was found 0% at fault, the mother 80% at fault, and the party defendant 20% at fault. The mother's percentage of fault exceeds that of the named defendant. If the result of including the parent as joint tortfeasor for purposes of apportioning fault were, as the Third District asserts, that the parent's negligence was being imputed to the child, the party defendant would be freed of joint and several liability not only for noneconomic damages but also for economic damages.

This result would occur because section 768.81 abrogates joint and several liability for all noneconomic damages and also for economic damages if the defendant's percentage of fault is less than the claimant's. If the mother's negligence were truly imputed to the child, the child in this example (i.e., the claimant) would be deemed 80% at fault instead of 0% and would not recover even his economic damages on the basis of joint and several liability. This example demonstrates that the Third District has misunderstood the fact that apportioning fault to a joint tortfeasor is not the equivalent of imputing that fault to the plaintiff. In fact, the

Third District's reliance on the rule against imputing a parent's negligence to the child could only make sense only if the sole method by which a plaintiff's recovery against a given defendant could be reduced was by the plaintiff's own fault, not by any fault of any third party. This is obviously not the law in Florida.

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. The common law rule is that a parent's negligence cannot be imputed to a child, not that the child's recovery from a third party tortfeasor should be increased if the joint tortfeasor is his parent instead of a stranger. The Third District's reliance on the fact that a parent's negligence is not imputed to a child is wholly misplaced.

Furthermore, the Third District's decision in this case is the result of a failure to adhere to well-established rules of statutory construction. In order to approve the decision of the Third District in this case, this Court would have to judicially create an exception to the legislature's general abrogation of joint and several liability in section 768.81. This Court can modify principles of common law. See generally Hoffman v. Jones, 280 So. 2d 431, 434-36 (Fla. 1973). For example, this Court is free to reduce or abrogate common law tort immunity. See, e.g., Waite v. Waite, 618 So. 2d 1360 (Fla. 1993) (fully abrogating interspousal immunity); Ard v. Ard, 414 So. 2d 1066 (Fla. 1982)

(waiving parent-child immunity to the extent of available liability insurance, if any). If this Court finds as a matter of public policy that parent-child claims should be limited, it can impose any number of limitations on such direct tort claims by a child against a parent.

However, placing restrictions on the apportionment of fault and limiting the legislature's repeal of joint and several liability is a matter for the legislature. This Court has already recognized that any alteration to the doctrine of joint and several liability must come from the legislature and not this Court. Walt Disney World Co. v. Wood, 515 So. 2d 198 (Fla. 1987). In Wood, this Court relied, among other factors, on the legislature's enactment of section 768.81 to find that the scope of joint and several liability is matter for the legislature rather than the courts. See also Fabre, 623 So. 2d at 1185 (reaffirming this finding). It is respectfully submitted that this Court's authority to modify the law of joint and several liability is no greater today than it was in 1987.

The legislature has specifically defined the applicability and nonapplicability of section 768.81. See Fla. Stat. § 768.81(4). It certainly could have included an exception for parent joint tortfeasors. It did not elect to do so. Additionally, the legislature specifically defines each party defendant's liability to the plaintiff in terms of his percentage of fault, not in terms of whether other joint tortfeasors are collectable. The statute by its plain terms does not permit a joint tortfeasor's identity or

collectability to impact a named defendant's obligation. Respectfully, neither the Third District nor this Court can rewrite the statute to include an exception to the abrogation of joint and several liability which the legislature did not see fit to include.[5/] The Third District's decision improperly increases a named defendant's obligation due solely to the fortuity that his joint tortfeasor is the child's parent rather than any other person or entity. This is the precise result rejected by this Court in Fabre.

In addition to disregarding longstanding rules of statutory construction, the Third District summarily dismissed the fact that this Court has already twice held that 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. The Third District acknowledges this Court's prior holdings that there is no exception to section 768.81's abrogation of joint and several liability where the nonparty is immune from suit. However, the Third District dispenses with this Court's decisions in Fabre and Allied Signal as follows:

> In two cases interpreting [section 768.81], the Florida Supreme Court has allowed

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[5] In this regard, it is noted that the legislature has had at least three opportunities since this Court's decision in Fabre to correct or limit this Court's holding that there is no exception to section 768.81 for immune joint tortfeasors, and has not seen fit to make any changes to section 768.81. Compare Zorzos v. Rosen, 467 So. 2d 305 (Fla. 1985) (declining to judicially create a cause of action for loss of parental consortium); Florida Statutes § 768.0415 (1988) (creating such a cause of action).

> contribution even in light of an employer-employee relationship and a spousal relationship. *Fabre, supra; Allied-Signal, Inc. v. Fox, 623 So. 2d 1180 (Fla. 1993).* However, the doctrine of interspousal immunity had been abrogated by the time of the *Allied-Signal* decision. *See Waite v. Waite, 618 So. 2d 1360 (Fla. 1993).* The parent-child immunity, albeit limited, remains intact.

21 Fla. L. Weekly at D282. This one paragraph illustrates at least two serious misconceptions in the Third District's opinion. Again, the Third District seems to overlook the fact that section 768.81 and Fabre are the result of an abrogation of joint and several liability, not a grant of contribution rights.

Additionally, it is true that the Allied-Signal case was decided after this court abrogated interspousal immunity in Waite v. Waite. However, the significance of this fact is somewhat difficult to comprehend given that Fabre was the case which dealt with a nonparty spouse and Allied-Signal dealt with a nonparty employer. Furthermore, while Waite was decided several months before Fabre, it did not apply retroactively and interspousal immunity was applicable to the parties in Fabre. See Fabre, 623 So. 2d at n.2. Likewise, at the time of this Court's decision in Allied-Signal, employer immunity was, and still is, the law in Florida.

This case, like both Fabre and Allied-Signal, involves a nonparty who is immune (at least in part) from tort liability. This case is controlled by those authorities and there is no justification for the Third District's creation of an exception to both this Court's prior decisions and the statute itself.

In summary, it is clear that the legislature intended to abolish joint and several liability except in certain limited circumstances. This case does not fall within one of those exceptions. Section 768.81 dictates that a defendant cannot be required to pay more than his proportionate share of fault, and this Court has recognized that the collectability of a joint tortfeasor does not impact the named defendant's obligations. The legislature has not created an exception to this rule for cases in which the joint tortfeasor is the plaintiff's parent, and this Court likewise should not create such an exception.

While not addressed in the Third District's opinion in this case, amicus Nationwide and FDLA respectfully take this opportunity to respond to two issues which were raised in detail by Plaintiffs and amicus Academy of Florida Trial Lawyers in their briefing to the Third District, and which may be raised in their responses to this petition. Both issues concern the fact that this case arises out of a child's fall through an allegedly oversized space between a stairway guard rail and the stair.

First, Plaintiffs and the Academy asserted in the Third District that Y.H. Investments' violation of a building code provision relating to the maximum distance between a stair guard rail and the stair precluded Y.H. Investments from placing the child's mother on the verdict form. Plaintiffs and the Academy cited several cases holding that the violation of statutes designed to protect children establish liability per se on the part of the violator.

These decisions are simply not applicable in this case. Plaintiffs and the Academy have confused two separate categories of statutes with respect to negligence per se principles. There are three categories of statutes the violation of which has legal significance in a negligence case: (1) statutes designed to protect a certain class of persons from their own inability to protect themselves; (2) statutes designed to protect a particular class of persons from a specific injury or type of injury; and (3) statutes designed to protect the general public. Tierney v. Black Bros. Co., 852 F.Supp. 994, 1000 (M.D. Fla. 1994); DeJesus v. Seaboard Coast Line R.R., 281 So. 2d 198, 201 (Fla. 1973). The last type creates only a prima facie case of negligence. DeJesus, 281 So. 2d at 201.

The Plaintiffs' confusion stems from an apparent failure to recognize that the first and second type of statutes are in fact in two separate types. A violation of the second type of statute establishes negligence per se, in which the first two elements of negligence, a duty and breach of duty, are deemed established. DeJesus, 281 So. 2d at 201. However, in order to recover, the plaintiff must still prove that the violator's breach was a proximate cause of damage to him. DeJesus, 281 So. 2d at 201.

In contrast, a violation of the first type of statute has been held to constitute negligence as a matter of law, as opposed to negligence per se, in which the plaintiff need not prove proximate cause. Tierney, 852 F.Supp. at 1000; Tamiami Gun Shop v. Klein, 116 So. 2d 421, 423 (Fla. 1959). The violator is held to be the

sole proximate cause of the protected person's injury since the entire purpose of the statute is that the injured party cannot care for himself. Tamiami Gun, 116 So. 2d at 423. See also Tampa Shipbuilding & Engineering v. Adams, 181 So. 403 (Fla. 1938). In such cases, prior to section 768.81 and Fabre, it was held that the finding of proximate cause as a matter of law also barred the violator from asserting as a complete defense the negligence of a third party.

Whether this analysis is viable after Fabre is irrelevant in this case. The building code at issue in the present case was clearly not designed to protect a particular class of persons from their own inability to protect themselves. The building code falls either within the second or third category of statutes, if any. This is clear from a comparison with the types of statutes which have been held to fall within the first, very limited, category. Tierney v. Black Bros. Co., 852 F.Supp. 994, 1000 (M.D. Fla. 1994) (child labor law); Tamiami Gun Shop v. Klein, 116 So. 2d 421 (Fla. 1959) (statute precluding sale of a gun to a minor; also explaining the limited scope of statutes which impute negligence as a matter of law); Tampa Shipbuilding & Engineering v. Adams, 181 So. 403 (Fla. 1938) (child labor law).[6/] These cases' findings that a

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[6] Flick v. Malino, 356 So. 2d 904 (Fla. 1st DCA 1978), also cited by the Academy below, did not hold that the statute before it created negligence as a matter of law. Flick dealt with the dog bite statute, section 767.04, and held that the mother's ability to read the "bad dog" sign would not be imputed to the child victim so as to bar her claim. Flick simply applies above-explained rule that a parent's fault is not imputed to the child, and holds that the statutory defense to dog bite claims will not be applied to a child victim who could not read the sign simply because her mother

plaintiff need not establish proximate cause simply cannot be extended to the present case.

Second, Plaintiffs asserted throughout their briefing in the Third District that Plaintiff's mother and Y.H. Investments were not joint tortfeasors. Instead, they assert that this case involves an initial tort and a subsequent tort. Plaintiffs liken this case to Stuart v. Hertz Corporation, 351 So. 2d 703 (Fla. 1977), claiming that Y.H. Investments' violation of the building code (30 years before the child's fall) was the initial tort and that the plaintiff's mother's failure to adequately supervise him was a subsequent tort. Plaintiffs conclude that under Stuart v. Hertz, Y.H. Investments should not have been permitted to assert the mother's negligence as a defense to its liability to the plaintiff.

This argument is faulty in several respects. First, no tort occurred in this case until the child was injured. It is fundamental that actionable negligence requires not only a duty and the breach thereof, but also that the breach proximately cause damage to the claimant.[7] The continued existence of an allegedly

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could read it. In this case, Y.H. Investments did not seek to impute the mother's fault to the child in the form of the child's comparative negligence; the mother was on the verdict form in her own right for her own liability, as any other joint tortfeasor would be.

[7] Plaintiffs' disregard of the requirements of proximate cause and damage parallels their confusion regarding the effect of Y.H. Investments' violation of the building code. See supra.

dangerous condition cannot be interpreted as a prior tort.[8] Because the mother and Y.H. Investments were joint tortfeasors, this case is clearly subject to section 768.81.

Furthermore, Plaintiff's conclusion that Stuart v. Hertz would preclude Y.H. Investments from presenting evidence of the mother's fault to the jury is incorrect. The complete bar on such evidence applies only where it is established as a matter of law that the initial tortfeasor was the sole proximate cause of the plaintiff's claimed injury. Where there is an injury of disputed causation, in contrast, the initial tortfeasor is entitled to argue the subsequent tortfeasor's fault to the jury. Barrios v. Darrach, 629 So. 2d 211 (Fla. 3d DCA 1993), review denied, 637 So. 2d 234 (Fla. 1994); Haas v. Zaccaria, 659 So. 2d 1130 (Fla. 4th DCA 1995), review denied, 669 So. 2d 253 (Fla. 1996). In such cases of disputed causation, Stuart v. Hertz entitles the plaintiff to a jury instruction on the first tortfeasor's liability for subsequent negligence occasioned by him, but does not preclude the defendant from asserting to the jury his theory that the plaintiff's damages were actually caused by the subsequent tortfeasor.

Thus, Plaintiffs' reliance on Stuart v. Hertz is misplaced. In fact, Plaintiffs conceded in their Initial Brief to the Third District that a parent's negligence could reduce the award to a child plaintiff if the parent's negligence occurred at the same time as, or just before, the named defendant's negligence. See

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[8] Perhaps Plaintiff did not realize the effects of its argument on other important issues, such as when the statute of limitations against Y.H. Investments began to run.

Initial Brief of Appellant, Third District Court of Appeal case number 95-1178, pages 9-10. This concession may well have rendered moot the point under consideration before the Third District.

CONCLUSION

Amicus Nationwide and FDLA respectfully request that this court quash the decision of the Third District Court of Appeal and hold that there is no exception to section 768.81's abrogation of joint and several liability in cases where there is a parent joint tortfeasor.

Respectfully submitted,

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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 _____ day of May, 1996 to:

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