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 Review of a Certified Question from the Third District Court of Appeal

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The petitioner, Y.H. Investments, Inc., seeks review and resolution of a certified question from the Third District Court of Appeal. In this case, the Third District Court of Appeal certified a question of great public importance concerning the interpretation and application of section 768.81, Florida Statutes (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 tort feasor. Y.H. Investments, Inc. v. Godales, 667 So.2d 871 (Fla. 3d DCA 1996).

The petitioner, Y.H. Investments, Inc., was the defendant in the trial court and will be referred to as the petitioner, the defendant, or by name.

The respondent, Raquel Godales, was the plaintiff in the trial court and will be referred to as the respondent, the plaintiff, or by name.

References to the record on appeal will be designated by the letter "R". References to the supplemental record on appeal will be designated by the letters "SR".

STATEMENT OF THE CASE AND THE FACTS

This action commenced as a negligence suit by a minor child, through his mother, and the mother individually, against a property owner. On the day of trial, the mother withdrew her derivative claim. The jury was instructed as a matter of law that the defendant property owner was negligent, and the jury was to decide whether the defendant's negligence was a legal cause of damage to the plaintiff. The jury was also asked to determine the percentage of fault between the defendant and the plaintiff's mother on the verdict form.

The jury's verdict determined that the mother and the property owner were each 50% negligent. The jury did not award the minor child any damages for medical expenses. Judgment was eventually entered for the minor child in the amount of $21,250.00, reflecting the 50% reduction for fault apportionment.

The judgment was appealed to the Third District Court of Appeal, which reversed on two grounds. First, the court held that the minor child's mother should not have been included on the verdict form for fault apportionment. Second, the jury should have awarded past medical expenses to the plaintiff. Godales, 667 So.2d at 873.

The Third District certified to this court, as a question of great public importance, a question "concerning the interpretation and application of section 768.81 Fla. Stat. (1993) in determining whether a minor child plaintiff's award

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should be reduced by the negligence of the non-party parent or guardian, and the benefit of the defendant tortfeasor." Id. Petitioner seeks resolution of the certified question and the quashing of the Third District's opinion.

Factually, Y.H. Investments owned a building where Raquel Godales was a tenant with her minor son, Armando Rodriguez. Armando was sitting next to his mother, Raquel Godales, on the stairs connecting the first and second floors of their apartment building. Rather than being positioned next to a wall, the child was positioned next to an outside stair railing. While Godales tried to put a shoe on the child, he slipped under the lower guardrail of the staircase railing, fell approximately five feet to the ground, and injured his head. (SR. 22, 42, 53-55).

Raquel Godales, as her son's guardian, and on her own behalf in a derivative capacity, sued Y.H. Investments. Godales alleged that Y.H. Investments was negligent in maintaining the condition of the apartment building. (R. 9-11).

The case proceeded to a trial date with both plaintiffs maintaining their claims. On the day of trial, Raquel Godales withdrew her individual claim.[1]

At trial, Godales apparently proved that the staircase and railing violated the South Florida Building Code. Based on that proof, the trial court concluded that Y.H. Investments was

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[1] The entire trial transcript was not made a part of the record by Godales. The terms of Godales withdrawing her claim are not included in the record. (R. 176). However, the final judgment includes only the minor plaintiff through his guardian, and does not include the mother individually. (R. 304).

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negligent as a matter of law, and so instructed the jury. (R. 210).

There were three limited issues for the jury's determination on the minor child's claim. First, whether Y.H. Investment's negligence was a legal cause of injury to the child. Second, was there anyone else who acted negligently toward this child, and if so, was their negligence a legal cause of injury to the child. Third, what were the child's damages, if any.

In the charge conference, the trial court stated, and plaintiff's counsel has conceded, that there was evidence of negligence as to the mother. (R. 187-88). Consistent with Fabre v. Marin, 623 So.2d 1182 (Fla. 1993), and the evidence adduced at trial, the defendant requested a jury instruction and jury determination as to whether the mother's negligence was a contributing legal cause of the injury to the plaintiff. The trial court agreed, the jury was so instructed on the issue, and the verdict from set forth provision for a determination of fault apportionment.

The jury returned a verdict for the minor plaintiff, awarding him damages 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 the mother each 50% negligent. (R. 156-158). A judgment for the minor child was thereafter rendered reflecting a reduction based on the jury's Fabre determination. (R. 304).

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On appeal, the Third District reversed. The Third District concluded that section 768.81, Florida Statutes, the comparative negligence statute, did not apply to this case. According to the Third District, a minor child should not have his damage award reduced by the comparative negligence of his non-party parent. The Third District certified the issue to this court as a question of great public importance.

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ISSUE ON REVIEW

WHETHER SECTION 768.81, FLORIDA STATUTES, ABROGATING JOINT AND SEVERAL LIABILITY, REQUIRES THAT ALL PARTIES, INCLUDING A NEGLIGENT PARENT, BE SUBJECT TO A DETERMINATION OF FAULT APPORTIONMENT?

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SUMMARY OF THE ARGUMENT

The Third District's decision in this case is flawed in its primary assumption that the focus of section 768.81(3) is on the plaintiff and not the defendant. That assumption is directly contradicted by the statute and this court's opinion in Fabre v. Marin, 623 So.2d 1182 (Fla. 1993). The focus of the fault apportionment act is on the negligent tortfeasors and a determination of their relative degrees of fault. The notion of payment, or dollar recovery, is not found in the statute and has been rejected by this court in the insolvency and immunity examples of Fabre.

Neither the statute nor Fabre speak about reduction of a plaintiff's award. The statute does not use terms pertaining to money or benefit, which the Third District's certified question, as phrased, does. The statute focuses on extent of liability of the at fault parties -- with the legislature's purpose of making sure that an at fault party was responsible for only his percentage on negligence.

The Third District's decision to prevent a defendant from having his percentage of fault determined when there is a negligent parent is at odds and inconsistent with the development of fault apportionment in this state. As recognized by this court, the legislature created a clear and unambiguous statute. The Third District's decision creates an improper exception to that statute, and that error must be corrected in this appeal.

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ARGUMENT

SECTION 768.81, FLORIDA STATUTES, ABROGATING JOINT AND SEVERAL LIABILITY, REQUIRES THAT ALL PARTIES, INCLUDING A NEGLIGENT PARENT, BE SUBJECT TO A DETERMINATION OF FAULT APPORTIONMENT.

The decision of the Third District is at odds with a well developed trend of this court, and a statutory mandate of the Legislature. This court's trend of equating liability with fault began in earnest in 1973 with Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). Since then, this court has determined that liability is to be apportioned among all participants of an accident, regardless of their status to the litigation. Fabre v. Marin, 623 So.2d 1182 (Fla. 1993); Allied-Signal, Inc. v. Fox, 623 So.2d 1180 (Fla. 1993). In the interval between Hoffman and Fabre, the legislature set the framework for apportionment of damages by fault sharing among parties, and eliminated joint and several liability. §768.81, Fla. Stat.

The Third District's decision to prevent a defendant from having his percentage of fault determined when there is a negligent parent is at odds and inconsistent with the development of fault apportionment in this state. The Third District's opinion erroneously focuses on the plaintiff, when the case law and the comparative fault statute focus on the at fault parties. Under a correct focus, the Third District's decision cannot stand.

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The Third District's opinion also erroneously intertwines fault apportionment, contribution, and parental immunity. While there is some interplay between these concepts, they are not interchangeable, as the Third District's opinion implies.

Finally, the Third District has applied an incorrect form of statutory analysis and essentially acted as a legislative body. The comparative fault statute does not need to be strictly construed in this case because it does not place any limitations on existing common law principles. As recognized by this court, the legislature created a clear and unambiguous statute. The Third District's decision creates an exception that could only come into existence by legislative act. The statute does not exempt any class of individuals from fault apportionment.

A. The doctrines of contributory negligence, joint and several liability, parent/child immunity, and comparative fault.

The doctrine of fault apportionment did not develop overnight, and a brief review of its origin is appropriate. The doctrine developed from what are now considered harsh rules -- the doctrines of contributory negligence and joint and several liability. See Hoffman, 280 So.2d at 437 ("The rule of contributory negligence is a harsh one. . . .").

Under the doctrine of contributory negligence, even if the plaintiff's negligence was only partially responsible for the accident, there could be no recovery from a defendant who may

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have been guilty of even greater negligence. Louisville & N. R.R. v. Yniestra, 21 Fla. 700 (1886). While the doctrine was in effect, fault apportionment among defendants did not exist because of the doctrine of joint and several liability. Under that doctrine, all negligent defendants were held responsible for the total of the plaintiff's damages, regardless of the extent of each defendant's fault in causing the accident. Louisville & N. R.R. v. Allen, 67 Fla. 257, 65 So. 8 (1914).

One other relevant doctrine coexisted with the doctrines of contributory negligence (complete bar) and joint and several liability (one defendant responsible for all) -- the doctrine of parent/child immunity.[2] Unlike the interspousal immunity, the doctrine of parent/child immunity did not originate in the English common law. Rather, the doctrine originated in Mississippi just over 100 years ago. See Hewellette v. George, 9 So. 885 (Miss. 1891). Florida appears to have first recognized the immunity in Meehan v. Meehan, 133 So.2d 776 (Fla. 2d DCA 1961).[3]

This court first acknowledged the immunity in Orefice v. Albert, 237 So.2d 142 (Fla. 1970), although the case involved the interspousal immunity doctrine. In Orefice, a woman, on her own

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[2] As demonstrated infra, the doctrine of parental immunity is irrelevant to fault apportionment, and only relevant to contribution.

[3] In Meehan, a father sued one his minor children for negligence in inflicting injuries that caused the death of a sibling. The Second District chose to follow the majority of jurisdictions based on public policy grounds in upholding dismissal of the suit.

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behalf and on behalf of her son's estate, brought suit against the co-owner of a plane when her son was killed because her husband, also a co-owner of the plane, was negligent. As stated by this court, "[i]t is the established policy, evidenced by many decisions, that suits will not be allowed in this state among members of a family unit for tort. Spouses may not sue each other, nor children their parents. The purpose of this policy is to protect family harmony and resources." Id. at 145.

Under the parent/child immunity doctrine, a parent is immune from suit by his child for damages caused by the parent's negligence. Thus, a child could not sue his parent for negligence and any single defendant, be it parent or other tortfeasor, was always responsible for the total of the plaintiff's damages. However, as subsequently developed, the doctrine has no bearing on fault apportionment because immunity is not implicated in determining fault comparison among the parties.

In 1973, the rigid doctrines of contributory negligence and joint and several liability began to crumble. In Hoffman, this court adopted comparative negligence and "took the first step toward equating liability with fault. In receding from the doctrine of contributory negligence, this Court said:

> If fault is to remain the test of liability, then the doctrine of comparative negligence which involves apportionment of the loss among those whose fault contributed to the occurrence is more consistent with liability based on a fault premise.

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Fabre, 623 So.2d 1185, citing Hoffman, 280 So.2d at 436. In succession, the Florida Legislature enacted the Uniform Contribution Among Tortfeasors Act; this court abolished the rule of contribution among joint tortfeasors; and then questioned joint and several liability to the point that the legislature enacted section 768.81(3). Ch. 75-108 Laws of Fla. (1975); Lincenberg v. Issen, 318 So.2d 386 (Fla. 1975); Walt Disney World Co. v. Wood, 515 So.2d 198 (Fla. 1987); Ch 86-160 Laws of Fla. (1986).

Along the way, this court also revisited the parent/child immunity issue. The foundation for revising the doctrine came from Shor v. Paoli, 353 So.2d 825 (Fla. 1977), where this court allowed a third party tortfeasor to obtain contribution from the co-tortfeasor spouse of the plaintiff. In Ard v. Ard, 414 So.2d 1066, 1067 (Fla. 1982), this court held that in a "tort action for negligence arising from an accident brought by an unemancipated minor child against a parent, the doctrine of parental immunity is waived to the extent of the parent's available liability insurance coverage." In a companion case, Joseph v. Quest, 414 So.2d 1063 (Fla. 1982), the court held that contribution was available against a parent limited to the extent of existing liability insurance coverage for the parent's tort against the child. As subsequently recognized by the legislature, and by this court, contribution, however, is not the same as fault apportionment.

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B. Comparative Fault Statute, Fabre and Fox

In 1986, as part of the Tort Reform Act of 1986, the Florida Legislature enacted section 768.81(3), which stated:

> (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 joint and several liability.

The statute is applicable in negligence cases. §768.81(4), Fla.Stat. It eliminates joint and several liability in favor of fault apportionment. The statute also contains a dollar threshold of $25,000.00 before fault apportionment replaces joint and several liability. §768.81(5), Fla. Stat.

In Fabre, this court was called upon to reconcile a conflict in the districts concerning section 768.81. In Fabre, the court was asked to decide whether the term "party" had any limitations in meaning and application. Contrary to the Third District's opinion in this case, Fabre did not involve an action for contribution, but rather the application of fault apportionment in the face of spousal immunity.

The court conducted an historical analysis of the doctrines of contributory negligence, joint and several liability, and comparative negligence and fault. The court concluded that

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section 768.81(3) was unambiguous, and by its clear terms stated that judgment should be entered against each party liable on the basis of that party's percentage of fault. "Party" was not limited to those named in litigation, but rather all entities who contributed to the accident, "regardless of whether they [had] been or could have been joined as defendants." Fabre, 623 So.2d at 1185. That statement alone -- "regardless of whether they . . . could have been joined as defendants" -- completely contradicts the Third District's decision in this case.

There is still another clue in Fabre that focus is placed on the at fault parties and not the plaintiff, demonstrating the Third District's erroneous conclusion in this case. A little further on in the Fabre opinion, this court addressed two situations where the plaintiff may not get 100% of her judgment:

> The court below erroneously interpreted section 768.81 by concluding that the legislature would not have intended to preclude a fault-free plaintiff from recovering the total of her damages. Ever since this Court permitted contribution among joint tortfeasors, the main argument for retaining joint and several liability was that in the event one of the defendants is insolvent the plaintiff should be able to collect damages from a solvent defendant. By eliminating joint and several liability through the enactment of section 768.81(3), the legislature decided that for purposes of noneconomic damages a plaintiff should take each defendant as he or she finds them. If a defendant is insolvent, the judgment of liability is not increased. The statute requires the same result where a potential defendant is not or cannot be joined as a party to the lawsuit. Liability 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

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> amenability to suit of other potential defendants. The fact that Mrs. Marin could not sue her husband does not mean that he was not partially at fault in causing the accident.

Id. at 1186 (emphasis supplied, footnote omitted).

On the heels of Fabre, this court addressed a certified question from the Eleventh Circuit Court of Appeals in Fox. Like Fabre, Fox did not involve a claim for contribution, but rather the application of fault apportionment in the face of workers' compensation immunity. Fox held that it was necessary to consider the percentage of fault of the plaintiff's employer, even though the employer was immune from tort liability under workers' compensation immunity. See also Wells v. Tallahassee Memorial Regional Medical Center, Inc., 659 So.2d 249, 251 (Fla. 1995) ("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"); Dousdourian v. Carsten, 624 So.2d 241 (Fla. 1993) (same).

Fabre and Fox implicitly recognize what is explicitly contained in the comparative fault statute. The effect of the enactment of the comparative fault statute was to significantly shift the focus from traditional doctrines, i.e. contributory negligence and joint and several liability, to the singular and inclusive concept of fault. The comparative fault statute clearly replaced the concept of joint and several liability with several allocation of damages among tortfeasors in proportion to

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the fault of those who contributed to an injury. Fabre, 623 So.2d at 1185.

In Conley v. Boyle Drug Co., 570 So.2d 275 (Fla. 1990), this court recognized that the fault apportionment act disfavored joint and several liability, retaining it only in expressly limited situations. §768.81(5), Fla. Stat. As stated even more explicitly in Fabre: "We 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 the defendant contributed to the accident." Fabre, 623 So.2d at 1185. By rejecting joint and several liability, the Legislature rejected "[a] policy principle implicit in the reasoning behind joint and several liability [that] . . . [i]t is fairer that one wrongdoer be burdened with a fellow-wrongdoer's liability than the innocent victim be saddled with the loss." McDonough Power Equip. Inc. v. Brown, 486 So.2d 609 (Fla. 4th DCA 1986).

The legislature and this court have rejected that fairness argument with the advent of fault apportionment in favor of a stronger fairness argument. The victim is no longer saddled with the loss -- abandonment of contributory negligence -- and the at fault party defendant is no longer required to carry the full burden of all negligent parties.

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C. The Godales opinion

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. That assumption is directly contradicted by the statute and this court's opinion in Fabre. The focus of the fault apportionment act is on the negligent tortfeasors and a determination of their relative degrees of fault. The notion of payment, or dollar recovery, is not found in the statute and has been rejected by this court in the insolvency and immunity examples of Fabre.

Neither the statute nor Fabre speak about reduction of a plaintiff's award. The statute does not use terms pertaining to money or benefit, which the Third District's certified question, as phrased, does. The statute focuses on extent of liability of the at fault parties -- with the legislature's purpose of making sure that an at fault party was responsible for only his percentage on negligence.

The Third District's decision is also flawed because it analyzes section 768.81 on a contribution theory. Specifically, the Third District 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. Godales, 667 So.2d at 873. The Third District incorrectly stated that Fabre and Fox were contribution cases: "In two cases interpreting this statute, the Florida Supreme Court has allowed

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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)." Godales, 667 So.2d at 872.

Contribution does not factor into section 768.81, Fabre, or Fox. In both those cases, there was an immunity preventing suit for contribution against the spouse or employer. Notwithstanding the immunity, this court held that fault apportionment still applied. Immunity from suit does not play into factoring percentage of fault. See Schindler Corp. v. Ross, 625 So.2d 94 (Fla. 3d DCA 1993) (immune employer's percentage of fault to be determined by jury). Put simply, Y.H. Investments could not sue Ms. Godales for contribution because she is immune from suit.

Liability among or between tortfeasors, or contribution, is distinct from a particular defendant's liability to the plaintiff. Section 768.81 is not a contribution statute. In Shor v. Paoli, supra, this court made clear that contribution is a claim by one joint tortfeasor against another, not a claim by an injured plaintiff against a tortfeasor. Y.H. Investments and Ms. Godales are not joint tortfeasors due to Ms. Godales' immunity from suit. Fault apportionment is distinct and different from contribution. See Joseph v. Quest, 414 So.2d at 1065 (Boyd, J. dissenting) ("I do not agree with the majority that application of Shor v. Paoli to cases of contributory negligence of parents would have dire results. The recovery from the non-family tort-feasor can simply be reduced in proportion to

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the immune parent's percentage of causal responsibility.") (emphasis supplied).

The Third District's decision suggests that the comparative fault statute should be narrowly construed because the statute is in derogation of a common law rule that a child's recovery should not be diminished by a parent's negligence. The Third District was referring to the doctrine of imputed negligence -- that a parent's negligence may not be imputed to child. That doctrine is not impacted by the comparative fault statute or Fabre.[4]

As stated above, the statute focuses not on the plaintiff, but on the tortfeasors. The parent's negligence is not being imputed to the child, but rather the percentages of fault among the tortfeasors is being determined so that the liable tortfeasor in court is being charged only with what he is responsible for. While 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. See Dubov v. Ropes, 124 So.2d 34 (Fla. 3d DCA 1960); see Hunnings v. Texaco, Inc., 29 F.3d 1480 (11th Cir. 1994) (mother's fault in contributing to death of child jury issue). The comparative fault statute is entirely consistent with the irrelevant doctrine of imputed parental negligence. The Third District's attempt to invoke a narrow statutory construction theory is simply not

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[4] In the unfortunate situation where the minor child has died, the non-parental tortfeasor defendant can sue the negligent parent for contribution. See Hudson v. Moss, 653 So.2d 1071 (Fla. 3d DCA 1995); Johnson v. School Board of Palm Beach County, 537 So.2d 685 (Fla. 1989).

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supported by either the common law or the statute's plain language.

Since this court has already determined that the statute is unambiguous, Fabre, supra, and modification of the doctrine of joint and several liability must come from the legislature, Wood, 515 So.2d at 198, there is no further need for statutory construction. On the facts of this case, there are no pertinent exceptions to the statute, and more specifically, the statute does not exempt a negligent parent from inclusion on the verdict form when the plaintiff is a minor. Normal rules of statutory construction apply, and they do not support the Third District's conclusion.

Finally, the Third District's decision makes Y.H. Investments jointly and severally liable for the plaintiff's damages, notwithstanding the legislative abrogation of joint and several liability. Nothing in the comparative fault statute can support that conclusion. Joint and several liability has been abolished in favor of fault apportionment, regardless of whether a defendant is immune from suit. The Third District's decision reinstates joint and several liability and creates an exception for a particular defendant not found in the statute, or this court's case law.

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CONCLUSION

Based on the foregoing rationale and authorities, the petitioner, Y.H. Investments, Inc., respectfully requests that this court quash the Third District's opinion and apply §768.81, Florida Statutes, to allow a defendant tort feasor's percentage of negligence to be reduced by the negligence of a non-party parent or guardian.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of May, 1996, to: ROBERT L. PARKS, ESQ. and JOHN M. COONEY, ESQ., Haggard & Parks, Counsel for Respondent, 330 Alhambra Circle, First Floor, Coral Gables, Florida 33134; CARLOS LIDSKY, ESQ., Counsel for Respondent, 145 E. 49th Street, Hialeah, Florida 33013 and JOEL S. PERWIN, ESQ., Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., Counsel for The Academy of Florida Trial Lawyers, 25 West Flagler Street, Suite 800, Miami, Florida 33130; TRACY RAFFLES GUNN, ESQ., Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Counsel for Florida Defense Lawyers Association and Nationwide Mutual Fire Insurance Company, Post Office Box 1438, Tampa, Florida 33601; JAMES K. CLARK, ESQ., James K. Clark & Associates, counsel for State Farm, Suite 1800, Suntrust International Center, One S.E. Third Avenue, Miami, Florida 33131; and BETSY E. GALLAGHER, ESQ., Gallagher & Howard, Counsel for USAA and USAA Casualty Insurance Company, Post Office Box 21548, Tampa, Florida 33622

By: _____
G. BART BILLBROUGH

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