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 REPLY BRIEF ON THE MERITS

WALTON LANTAFF SCHROEDER & CARSON
By: G. BART BILLBROUGH
GEOFFREY B. MARKS
Attorneys for Petitioner
One Biscayne Tower, 25th Floor
2 South Biscayne Boulevard
Miami, Florida 33131
(305) 379-6411

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WALTON LANTAFF SCHROEDER & CARSON
TWENTY-FIFTH FLOOR, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131
TELEPHONE (305) 379-6411 • FACSIMILE (305) 577-3875

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WALTON LANTAFF SCHROEDER & CARSON
TWENTY-FIFTH FLOOR, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131
TELEPHONE (305) 379-6411 • FACSIMILE (305) 577-3875

ISSUE ON REVIEW

I. 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?

ARGUMENT

I. 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 respondent and her amicus have fallen into the same legal crevasse that dooms the Third District's decision. The respondent has not accurately stated either the "common law" pertaining to child recovery cases, or the exact working operation of the fault apportionment statute. The respondent and the Third District have not separated the distinct doctrines and workings of fault apportionment and contribution. A correct view of the "common law" and the statute demonstrate that fault apportionment for all responsible parties is mandated by the statute and has been approved several times by this Court.

The respondent argues that a parent's negligence has never been applied to reduce a child's recovery or to limit a third party's liability. The statement is both inaccurate in its phrasing of the common law, and inaccurate in its application.

Prior to the enactment of section 768.81's fault apportionment provision, i.e. prior to 1986, this court had already established that a tortfeasor could seek contribution from an at fault defendant. 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

WALTON LANTAFF SCHROEDER & CARSON
TWENTY-FIFTH FLOOR, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131
TELEPHONE (305) 379-6411 • FACSIMILE (305) 577-3875

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.

Thus, the simplistic statement by the respondent, and the Third District, that pre-fault apportionment did not allow for a named defendant to reduce its exposure in claims involving a negligent parent is inaccurate. By operation of a separate action, contribution, the tortfeasor could seek to limit its exposure by pursing the at fault non-party parent. The exposure of the named tortfeasor was reduced. The competing interests of recovery for the child and fault apportionment (in the form of contribution) co-existed -- and did so prior to fault apportionment.

The next logical step taken in the evolution of fault apportionment is set forth in section 768.81. The Legislature determined that fault apportionment, i.e. direct determination of a tortfeasor's level of responsibility, should be conducted in the main action regardless of whether the non-party tortfeasor could be sued for contribution. The statue is a logical extension of the evolving tort law.

This court has already determined that the statute is unambiguous, Fabre v. Marin, 623 So.2d 1182 (Fla. 1993), and this Court has unequivocally stated that "the statute requires [fault

WALTON LANTAFF SCHROEDER & CARSON
TWENTY-FIFTH FLOOR, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131
TELEPHONE (305) 379-6411 • FACSIMILE (305) 577-3875

apportionment] where a potential defendant is not or cannot be jointed as a party to the lawsuit." Fabre. The statue focuses on liability, not damages. Fabre. The fact that the minor child's parent could not be sued by Y.H. Investments does not mean that she was not partially at fault in causing the minor child's injuries. Fabre.

The Third District's decision represents a modification of the statute, by creating joint and several liability where no such liability exists. Joint and several liability has been abolished in favor of fault apportionment, regardless of whether a defendant is immune from suit. In light of this Court's unambiguous holding in Fabre, and subsequent decisions, any reinstitution of the doctrine of joint and several liability must come from the legislature. Walt Disney World Co. v. Wood, 515 So.2d 198 (Fla. 1987). There is no authority supporting the Third District's decision to create joint and severally liability in cases involving a minor plaintiff and negligent parent.

Most notably, the respondent ignores altogether the statutory damage thresholds. First and foremost, the apportionment of fault applies only to non-economic damages. The statute explicitly retains joint and several liability for economic damages. Thus, recovery of money which provides the most direct benefit to an injured person, i.e. medical (and inappropriate situations income), is not subject to any fault reduction analysis. An injured minor child is assured, by statute, that he will receive an economic damage judgment not

WALTON LANTAFF SCHROEDER & CARSON
TWENTY-FIFTH FLOOR, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131
TELEPHONE (305) 379-6411 • FACSIMILE (305) 577-3875

reduced by the application of fault apportionment. The Legislature has seen fit to protect a plaintiff's recovery of "real" damages, or the damages which put the most realistic dent or crimp on the pocketbook.

The respondent also refuses to acknowledge that fault apportionment only applies in cases where damages exceed $25,000.00. The Legislature retained joint and several liability for all cases in which damages do not exceed that dollar threshold. The legislature created a dollar threshold, evincing an intent if not implicit understanding, that pure comparative fault should give way to assuring a plaintiff of a threshold recovery figure.

The respondent and its amicus argue that application of fault apportionment will reduce the amount of a recovery of a minor child. Under the respondent's view, joint and several liability should be retained when the "real" plaintiff is a minor child. The respondent attempts to write exceptions into an unambiguous statute: "the act disfavors joint and several liability to such a degree that it survives only in those limited situations where it is expressly retained." Fabre, 623 So.2d at 1185. There is absolutely no retention of joint and several liability, or the abdication of fault apportionment, where the "real" plaintiff is a minor child.

Furthermore, the argument by respondent's amicus that a named party defendant should bear the full brunt of a damage award without fault apportionment is somewhat suspect. The

WALTON LANTAFF SCHROEDER & CARSON
TWENTY-FIFTH FLOOR, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131
TELEPHONE (305) 379-6411 • FACSIMILE (305) 577-3875

amicus forgets that the Legislature enacted fault apportionment as part of a comprehensive reform of the tort system. Had the Legislature intended to exempt any particular group from this crisis, surely the statute would have been so drafted.

The respondent's amicus is a well respected plaintiff's oriented lawyer organization. Yet nothing is said regarding the plaintiff's counsel reducing his share of fees to ensure that a minor plaintiff should recover as much as possible. We do not suggest that this particular counsel has or has not taken such steps. Rather, the "plaintiffs' bar", as represented by amicus for the respondent, lobbies for the abrogation of fault apportionment meaning that a defendant should not pay his fair share of non-economic damages. Curiously, or perhaps not surprisingly, the "plaintiffs' bar" does not have a public position that lawyer's fees should also be reduced to ensure that a minor plaintiff recovers as much as possible. It takes little imagination to hear the howls of lawyers in response to the suggestion that a fee be reduced in exchange for greater financial responsibility by a defendant. The amicus argument is nothing more than a retread of the deep pocket argument, which the Legislature rejected and even responded to in enacting fault apportionment through the Tort Reform Act.

Contrary to the respondent's argument, the fault apportionment involving a negligent parent is not equivalent to imputed negligence. If anything, fault apportionment ensures that a non-party negligence is not imputed to the named

WALTON LANTAFF SCHROEDER & CARSON
TWENTY-FIFTH FLOOR, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131
TELEPHONE (305) 379-6411 • FACSIMILE (305) 577-3875

defendant. 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 his percentage of responsibility.[1] Imputed negligence is completely irrelevant to this analysis in light of the statutory dollar threshold and limitation of application to non-economic damages. The negligence of the parent has no impact on the recovery of economic damages as the named defendants are still jointly and severally liable for those damages.

Finally, in Dubov v. Ropes, 124 So.2d 34 (Fla. 3d DCA 1960), the court correctly rejected imputed negligence arguments in a injured parent and negligent parent situation. The court held that it was proper to consider whether the mother's negligence was a proximate cause of the accident. The parent's negligence would not be imputed to the child for purposes of finding the child negligent. Under comparative fault analysis, the parent is considered a joint tortfeasor whose degree of fault is measured against other tortfeasors, not the minor plaintiff.

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[1] As this Court held in Smith v. Department of Ins., 507 So.2d 1080, 91 (Fla. 1987), the right to access to the courts of the Florida "does not include the right to recover injuries beyond those caused by the particular defendant." This Court's statement is entirely supported by the statue, which contains no immunity provisions, and the Court's subsequent holdings in Fabre and Allied-Signal, Inc. v. Fox, 623 So.2d 1180 (Fla. 1993). Put simply, the current state of the law in Florida, with limited statutory exceptions, is that a plaintiff can only recover from a named defendant the amount of pain and suffering damages that the defendant is at fault for. There are no immunity or protected class exceptions.

WALTON LANTAFF SCHROEDER & CARSON
TWENTY-FIFTH FLOOR, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131
TELEPHONE (305) 379-6411 • FACSIMILE (305) 577-3875

Nothing in the comparative fault statute can support the conclusion of the Third District. 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. 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).

"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 non-economic 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). In light of the unambiguous statute and this Court's holdings in Fabre and Fox, the decision from the Third District must be reversed.

II. THE THIRD DISTRICT'S OPINION CANNOT BE AFFIRMED BECAUSE OF AN ALLEGED ORDINANCE VIOLATION WHERE THE PLAINTIFF WAS REQUIRED TO PROVE THAT THE TORTFEASORS' NEGLIGENCE WAS A PROXIMATE OF THE PLAINTIFF'S INJURIES.

The respondent and her supporting amicus have raised an issue that the Third District did not address in its opinion,

WALTON LANTAFF SCHROEDER & CARSON
TWENTY-FIFTH FLOOR, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131
TELEPHONE (305) 379-6411 • FACSIMILE (305) 577-3875

although the respondent and her amicus presented argument on the issue. The respondent argues that there should be no fault apportionment because the defendant was negligent by violation of a local ordinance. The argument demonstrates a basic misunderstanding of the fault apportionment statute. It is also a misinterpretation of the actual negligence determination by the lower court in the trial proceedings.

The trial court determined that the defendant was negligent. However, the trial court did not identify that the defendant was negligent as a matter of law for the first statutory violation category, i.e. statutes designed to protect a certain class of persons from their own inability to protect themselves. DeJesus v. Seaboard Coast Line R.R., 281 So.2d 198, 201 (Fla. 1973). As stated in the jury instructions:

> The Court has determined and now instructs you as a matter of law that Y.H. Investments, Inc., was negligent. The issue for your determination on the claim of Armando Rodriguez is whether such negligence was a legal cause of injury sustained by Armando Rodriguez.
>
> If the greater weight of the evidence does support the claim of plaintiff Raquel Godales as a parent and natural guardian of Armando Rodriguez, then you shall consider the defenses raised by the defendant Y.H. Investments, Inc. The first defense is whether the mother, Raquel Godales, was negligent and if so, whether such negligence was a contributing legal cause of the injury of Armando Rodriguez.
>
> (T. 210).

The record makes it abundantly clear that the trial court merely determined that Y.H. Investments violated a statute

WALTON LANTAFF SCHROEDER & CARSON
TWENTY-FIFTH FLOOR, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131
TELEPHONE (305) 379-6411 • FACSIMILE (305) 577-3875

designed to protect a particular class of persons from a specific injury or type of injury, which still required proof of proximate cause. DeJesus, 281 So.2d at 201; Tamiami Gun Shop v. Klein, 116 So.2d 421, 423 (Fla. 1959). The plaintiff did not get an instruction as a matter of law that the defendant was negligent. The issue of proximate cause, that is whether the tortfeasors' acts were a legal cause of the injury to the plaintiff, was put before the jury. The respondent's argument that it is entitled to affirmance of the Third District Court's opinion for any reason, is refuted by the record in this case.

The argument raised by the respondent was raised in the Third District but not addressed in the opinion. The Third District did not consider the ordinance violation a first category negligence as a matter of law issue, otherwise such discussion would have appeared in the opinion. Therefore, the Third District's opinion cannot be affirmed on this argument because the Third District did not address the issue and the record refutes the argument.

Finally, petitioner is constrained to point out that the ordinance relied upon by the respondent no longer contains child protection language that it contained in the 1950's. The language exclusion in subsequent versions of the ordinance indicates an intent inconsistent with respondent's analysis of the ordinance.

WALTON LANTAFF SCHROEDER & CARSON
TWENTY-FIFTH FLOOR, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131
TELEPHONE (305) 379-6411 • FACSIMILE (305) 577-3875

III. THIS COURT'S RECENT DECISION IN FABRE WAS EMINENTLY CORRECT AND IN STEP WITH THIS STATE'S TREND TOWARDS PURE FAULT APPORTIONMENT.

The respondent and her supporting amicus urge this Court to reconsider and reverse its recent decision in Fabre. The recommendation is nothing more than a rehash of the arguments already made to this Court in Fabre, and amount to nothing more than a motion for rehearing which argues no new legal principles or issues.[2]

Contrary to respondent's amicus, Fabre is not a "disaster." As pointed out in Fabre, and in petitioner's initial brief, Fabre and the fault apportionment statute are steps in the evolution of fault apportionment from its onerous and harsh beginning, to its more reasonable and fair current state.[3] There is nothing disastrous about placing fault on the proper "parties."

The respondent argues that a defendant would always try to apportion fault to a parent because "a case could almost always be made that a parent was not attentive enough in the care of a young child." That argument is not supported by any legal analysis, and in fact is contrary this Court's recent decision in

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[2] The proof is in the pudding, i.e. the appendix to the amicus brief of the Academy of Florida Trial Lawyers, which attaches the Third District Brief for the plaintiff in Fabre.

[3] See Wal-Mart Stores, Inc. v. McDonald, 676 So.2d 12 (Fla. 1st DCA 1996) ("[F]abre illustrates the evolution of Florida tort law toward a system that requires each party to pay for non-economic damages only in proportion to its percentage of fault. . . .").

WALTON LANTAFF SCHROEDER & CARSON
TWENTY-FIFTH FLOOR, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131
TELEPHONE (305) 379-6411 • FACSIMILE (305) 577-3875

Nash v. Wells Fargo, ___ So.2d ___ (Fla. 1996) [21 F.L.W. S292].

In Nash, this Court determined that a defendant has the burden of pleading, proof and persuasion for fault apportionment. In the absence of meeting the burden, the jury does not apportion fault. Therefor, a case would not always be made that a parent was not attentive enough in the care of a young child -- at least not one to meet the requirements of proof.

The respondent's amicus tries an additional angle, relying on a concurring opinion from the First District, Wal-Mart Stores, Inc. v. McDonald, 676 So.2d 12 (Fla. 1st DCA 1996), and Justice Wells' concurrence in Wells v. Tallahassee Memorial Regional Medical Center, Inc., 659 So.2d 249 (Fla. 1995). In McDonald, Judge Webster of the First District merely suggested that this Court analyze the term "party" in cases involving a non-party intentional actor. Clearly, Judge Webster did not advocate an overthrow of Fabre.

In Wells, Justice Wells, joined by Chief Justice Kogan, expressed concern that a non-party defendant's due process rights were being trampled by conducting fault apportionment without the non-party's participation at trial. If Justice Wells was concerned with the potential for precluding a non-part defendant from having a fair determination of its percentage of fault, the courts of this state have addressed the issue.

Assuming that the non-party defendant is not immune from suit, such as Fabre or Fox, and the named defendant can proceed against the non-party defendant on a contribution theory, the

WALTON LANTAFF SCHROEDER & CARSON
TWENTY-FIFTH FLOOR, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131
TELEPHONE (305) 379-6411 • FACSIMILE (305) 577-3875

non-party defendant is entitled to a full trial establishing its percentage of fault. The subsequent proceeding, either based on contribution or indemnification, is not bound by the determinations in the first proceeding where the non-party did not participate. See Sol Walker & Co. v. Seaboard Coast Line R.R. Co., 362 So.2d 45 (Fla. 2d DCA 1978) (Grimes, Chief Judge). There is no res judicata effect to the non-party, and hence no due process problem, because the non-party defendant is accorded his full and fair day in court.

There is no reason for this Court to erase a fair, just and very recent step in the evolution of tort law in this state. The arguments made by the respondent and amicus were presented in Fabre to no avail. The respondent has failed to demonstrate that Fabre was anything less then a step forward in reaching a true determination of fault apportionment. There is absolutely no legal or logical basis for this Court to overrule Fabre.

WALTON LANTAFF SCHROEDER & CARSON
TWENTY-FIFTH FLOOR, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131
TELEPHONE (305) 379-6411 • FACSIMILE (305) 577-3875

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.

WALTON LANTAFF SCHROEDER & CARSON
Attorneys for Petitioner
One Biscayne Tower, 25th Floor
2 South Biscayne Boulevard
Miami, Florida 33131
Telephone (305) 379-6411
Telecopier (305) 577-3875

By _____
G. BART BILLBROUGH
Fla. Bar No.: 334261

_____
GEOFFREY B. MARKS
Fla. Bar No.: 714860

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 16th day of August, 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

GBB:bb
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WALTON LANTAFF SCHROEDER & CARSON
TWENTY-FIFTH FLOOR, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131
TELEPHONE (305) 379-6411 • FACSIMILE (305) 577-3875