ORIGINAL

SUPREME COURT OF FLORIDA

CASE NO.: 88,250

RACHELLE M. STELLAS and **FRANK STELLAS,** her husband,

Petitioners,

vs.

ALAMO RENT-A-CAR, INC.,

Respondent.
_____/

AMICUS CURIAE BRIEF OF **AUTO-OWNERS AND HANOVER INSURANCE COMPANIES IN SUPPORT** OF **RESPONDENT**

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PRELIMINARY STATEMENT

The Petitioners/Plaintiffs, RACHELLE M. STELLAS and FRANK STELLAS, shall be referred to herein as "Petitioners" or "STELLAS." The Respondent/Defendant, ALAMO RENT-A-CAR, INC., shall be referred to herein as "Respondent" or "ALAMO." Bernard Aaron, the individual who attacked STELLAS and is the subject of dispute in this appeal as to whether he should be included on the verdict form, shall be referred to as the "intentional tortfeasor" or "Aaron." Finally, Auto-Owners Insurance Company and Hanover Insurance Company, on whose behalf this Amicus Curiae Brief is filed in support of Respondent, will be referred to as "Auto-Owners" and "Hanover."

References to documents contained in the Appendix filed contemporaneously with this brief by Auto-Owners and Hanover shall be referred to as (A-) followed by the page number.

STATEMENT OF FACTS AND OF THE CASE

In accordance with the recent decision of Ciba-Geigy Ltd., Basf A.G. v. The Fish Peddler, Inc., 21 Fla. L. Weekly D1562 (Fla 4th DCA, July 3, 1996), Auto-Owners and Hanover will not restate the factual and procedural history of this case. Further, the undersigned will attempt when possible to cite to argument presented in other amicus curiae briefs filed in this case so as to avoid repetitious arguments. Auto-Owners and Hanover adopt the statement of the case and facts as contained in Petitioner's Initial Brief as corrected. Auto-Owners and Hanover generally support the position of Respondent in this case.

SUMMARY OF ARGUMENT

A negligent defendant, such as Alamo in this case, is entitled to apportion fault pursuant to Section 768.81(3), Florida Statutes. Alamo should not be deprived of this right simply because another person, who is not a party to this suit, acted intentionally and contributed to the plaintiff's injuries. Petitioners' reliance on what it sees as lopsided verdicts that will place most of the liability on the intentional actor is mere speculation. As demonstrated in this Brief, this is not true in all cases involving intentional conduct, and the purpose of apportioning fault is to tailor liability based on the unique facts of each case. Further, Petitioners' reliance on "negligent security" case law is misplaced. This does not justify imposing 100% liability on negligent defendants. Finally, judicial interpretation of the case law in Florida and other jurisdictions supports Alamo's right to apportionment of fault. The intentional tort exclusion in Section 768.81, upon which Petitioners rely, is aimed at preventing intentional tortfeasors themselves from utilizing the benefits of the statute. Alamo was adjudged to be 10% at fault for the non-economic damages, and its liability as a negligent defendant should be based on that finding.

ARGUMENT

I. A **NEGLIGENT DEFENDANT SUCH AS ALAMO IS ENTITLED TO THE BENEFIT OF FLORIDA'S APPORTIONMENT** OF FAULT STATUTE, **DESPITE THE FACT THAT AN INTENTIONAL ACTOR ALSO CONTRIBUTED TO THE PLAINTIFF'S ALLEGED INJURIES**

The Florida Apportionment of Fault Statute mandates that the court shall enter judgment against each party liable on the basis of that party's percentage of fault.[1] As to the scope of the statute, Sub-Section (4) (a) provides that the statute "applies to negligence cases", and lists examples of cases that are included within that term, such as theories of negligence, strict liability, products liability, professional malpractice (in terms of contract or tort), or breach of warranty and like theories. The statute also provides that the court should look to the substance of the action and not the conclusory terms used by the parties to determine if a case is one of negligence.[2] Finally, the statute contains certain exceptions and lists a class of cases to which it does not apply, including the so-called "intentional tortfeasor" exception at issue in this appeal. In particular, sub-section (4) (b) of the statute provides that "This section does not apply . . . to any action based upon an intentional tort . . ."

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[1]In particular, Section 768.81(3), Florida Statutes, provides as follows: 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 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.

[2]Section 768.81(4) (a), Florida Statutes.

Petitioners seek to have this Court view the exception in isolation, and mechanically apply the phrase "based upon an intentional tort" to the facts of this case simply because an intentional actor contributed to the plaintiff's injuries, On the contrary, when this Court views the evolution of tort law in Florida to a system that equates liability with fault, it is clear that ALAMO should be able to avail itself of the benefits of the statute. Such a discussion necessarily begins with consideration of this court's decision in Fabre v. Marin, 623 So.2d 1182 (Fla. 1993). In that case, the Court noted that section 768.81 was enacted as part of the Tort Reform and Insurance Act of 1986, Chapter 86-160, Laws of Florida. Id at 1185. The Court also held 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. Id. This' court also detailed the policy considerations leading up to the adoption of a fault based system and the enactment of the statute:

> We conclude that the statute is unambiguous. By its clear terms, judgment should be entered against each party liable on the basis of that party's percentage of fault . . . The "fault" which gives rise to the accident is the "whole" from which the fact-finder determines the party-defendant's percentage of liability . . .
>
> 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 . . . 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 of another defendant is not increased. The statute requires the same result when 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 amenability to suit of other potential defendants . . .**
>
> There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them . . . [quoting Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978).] Id at 1185 - 87 (Emphasis added).

The single thread running through Fabre is the recognition that, except for pure economic **damages** or the narrow exceptions delineated in the statute, a party is now only responsible for that degree of fault which he or she commits that results in injuries to the plaintiff. **As** a result of passage of the Act, joint **and** several liability is only favored in those limited situations expressly set forth in the statute. Conlev v. Boyle Drug Co., 570 So.2d 275 (Fla. 1990).

In reaching its decision that a non-party to the action should be included on the verdict form, Fabre also discusses the evolution of general negligence principals, as well **as** joint and **several** liability, **as** a basis for its decision. The court begins its analysis with **a** discussion of Hoffman v. Jones, **280 So.2d 431 (Fla. 1973). That case** resulted in the **adoption of comparative** negligence in place of contributory negligence, based on the **same**

policy considerations and principals of equity that ultimately resulted in passage of the Apportionment of Fault Statute. The Hoffman Court begins its substantive analysis with a recognition that the traditional reasons behind contributory negligence, which completely bars recovery if the plaintiff bears any degree of responsibility for his or her injuries, is no longer valid. Id at 436 - 37. In this regard, the Court recognized that the historical protection for the growth of industry and transportation has given rise to a tort system based on protection in favor of the individual. Id. The court also held as follows:

> Therefore, we now hold that a plaintiff in an action based on negligence will no longer be denied any recovery because of his contributory negligence.
>
> In other words, the jury should apportion the negligence of the plaintiff and the negligence of the defendant; then, in reaching the amount due to plaintiff, the jury should give the plaintiff only such an amount proportioned with his negligence and the negligence of the defendant. Id at 438.

Although the Hoffman court does not speak in terms of fault in general and focuses instead on negligence, it nevertheless reflects the movement toward a **system based on fault, and not other social** considerations, such as the protection of certain segments of society (as referenced by the opinion). The arguments advanced by Petitioners in this case, namely that the more innocent plaintiff in this case should be guaranteed a recovery against ALAMO, regardless of Alamo's degree of fault, represent the same type of social considerations that were rejected in 1986 with the enactment of the modern statute.

The next major step in the path toward reaching a liability system based on fault was achieved in Lincenberg v. Issen, 318 So.2d 386 (Fla. 1975). In that case, this Court discussed its earlier decisions, and noted that "in the field of **tort** law, the most equitable result that can ever be reached by a court is the **equation of liability with fault."** (Emphasis added). Id at 389. The specific issue before the Court in Lincenberg was whether it is proper to allow the jury to apportion fault as it saw fit between the negligent defendants. Id at 388. The Court held that such an apportionment was proper; that the plaintiff was entitled to a measurement of its full damages; and the liability for those damages should be apportioned in accordance with negligence on a pro-rata basis. Id at 390 - 94. Although the court held that the new statute creating a right of contribution among joint tortfeasors was not yet applicable, and limited the apportionment on a pro-rata basis, the overall impact of the decision reflects the continued judicial movement toward a liability system based on fault.

ALAMO is alleged to have been negligent in this case. Nonetheless, since the actor who perpetrated the "smash and grab" crime acted in intentionally, Petitioners seek to have this Court misapply an exception in the statute to make ALAMO liable for non-economic damages beyond its degree of fault. This flies in the face of the policies first enunciated in Hoffman and Lincenberg, and later codified in the Apportionment of Fault and Contribution statutes. If the most equitable result is the equation of

liability with fault as recognized in Lincenberg, then ALAMO is entitled to the benefits of Section 768.81(3). The complaint in this case brings a cause of action for common law negligence against ALAMO for failure to warn of the danger of the criminal acts and for taking certain actions that foreseeably exposed STELLAS to the possibility of such a criminal act. Simply because the intentional actor himself, who was not a party to the underlying suit, contributed to STELLAS' injury, does not afford a basis to deprive ALAMO of its right to be held responsible only to its degree of fault as mandated by the statute.

Petitioners' attempt to justify 100% liability against ALAMO on the grounds the juries will invariably render lopsided verdicts and place most of the fault on the intentional tortfeasor, thereby depriving the plaintiff of a judgment against a deep pocket such as ALAMO, represents a conception of tort law that was rejected by the 1986 Reform Act. In this regard, Petitioners' brief states that "If negligent businesses are permitted to compare their fault with the intentional wrongdoer who they knew, or should have known, was being given the opportunity their evil due to the business' negligence, then what possible result could a reasonable jury arrive at other than 10 to 20% fault against the negligent parties as occurred in the case at bar and in Slawson [v. Fast Food Enterprises, 671 So.2d 255 (Fla. 4th DCA 1996)] ." (Emphasis added). (Initial Brief, page 31). Petitioners also opine that if the jury assessed any greater percentage of fault against the negligent tortfeasor, such a verdict would undoubtedly be against

the manifest weight of the evidence. (Initial Brief, page 31). For this reason, Petitioner concludes that ALAMO should not be able to avail itself of the statute.

The real issue before this court is whether the intentional tort exception contained in Section 768.81(4) applies to a negligent defendant. As demonstrated more fully below, the more plausible conclusion is that the exception in the statute **was** included solely to prevent an **intentional tortfeasor** from reducing his or her **own liability** by the alleged negligence of another party, but not vice-versa. Petitioners' argument that the statute is somehow unfair because a jury could only reasonably place 10 to 20% of the fault on the negligent party, while placing the remainder of fault on the intentional actor, represents a viewpoint that more properly belongs to joint and several liability. However, that principle has been soundly rejected as to the damages at issue in this case as a result of passage of the Apportionment of Fault Statute.

Furthermore, the Petitioners' contention that (1) juries will virtually always place only 10%-20% liability on the negligent business and (2) that if a jury does assess any greater percentage of fault on the negligent business, it would necessarily **be** against the manifest weight of the evidence, are both without merit. Significantly, Petitioners offer no support for these conclusions, other than comparing the outcome in this **case** to the jury's findings in Slawson, supra, which involved. similar issues. However, review of additional cases where the intentional

tortfeasor was placed on the verdict form is instructive. In Publix Super Markets, Inc. v. Jeffrey, Case No. 93-2354, in the District Court of Appeal for the Third District, an 87 year old women was the victim of a purse snatching in front of a Publix. The plaintiff was a bystander and attempted, to pursue her assailant, but was shot in the chest in the process. Publix was sued for negligent security based on the contention that the criminal actions of the assailant were foreseeable. In addition to Publix and the plaintiff himself, the trial court also allowed the property owner and the assailants to be included on the verdict form. As demonstrated by a copy of the verdict form contained in the Appendix submitted hereto, the jury in that case found Publix 65% at fault, the plaintiff 10% at fault, the property owner 25% at fault, and the assailants 0% at fault.[3] (A-1) While this result seems quite surprising and might possibly raise separate issues on appeal in that case, it nevertheless demonstrates that it is not a foregone conclusion that juries will place most or all of the liability on the intentional actor as Petitioners contend.

Similarly, in Dept. of Corrections v. McGhee, 653 So.2d 1091 (Fla. 1st DCA 1995), cited in Petitioners' Initial Brief, the jury found the Dept. of Corrections 50% at fault for the escape of the prisoners, and only assigned 25% fault to each of the two prisoners

[3]The record on appeal in the Jeffrey v. Publix case contains a detailed recitation of the facts underlying that action. Also, Auto-Owners' and Hanovers' Appendix in this case contains a copy of the verdict form demonstrating the percentage of fault assigned by the jury to Publix, the plaintiff, the landlord (Kasler Realty and Investment Corp., Plaza Realty, and Taire Corp.), and the shooters (Rudolph Muller and Dwight Gilford). (A-3).

who assaulted the plaintiff (A-4). The mere fact that the jury in the instant case, as well as the jury in the Slawson case, assigned a high degree of fault to the intentional actors does not demonstrate such a pattern of unjust results so as to justify depriving Alamo of benefit of the statute as Petitioners suggest. These cases demonstrate that, just as in other types of civil action, juries weigh evidence uniquely in each case and assign fault accordingly.

Similarly, the standard for determining that a jury verdict is against the manifest weight of the evidence does not support Petitioners' position. In this regard, Petitioners suggest that any assignment of fault above 20% to the merely negligent defendants in these types of cases "by any reasonable standard" would be against the manifest weight of the evidence (Initial Brief, p. 31). As such, the implication is that the jury thus should not be able to apportion because of this possible outcome. The standard for determining if a verdict is against the manifest weight of the evidence is addressed in Fitserald v. Molle-Teeters, **520** So.2d 645 (Fla. 2d DCA 1988) (Holding that the record must affirmatively show the impropriety of the verdict and there must be an independent determination **by** the judge that the jury was influenced by considerations outside of the record); See also, Lassiter v. Intl. Union of Op. Engin., 349 So.2d 622 (Fla. 1976). Mere speculation that a verdict which assesses fault above 10%-20% against the negligent party (as was done in this case) does not meet this standard. The percentage of fault assigned to the

business owner, just as in any negligence case, could vary greatly, depending a numerous factors. This is the reason Florida allows the trier of fact to weigh the evidence and equate liability with fault. The possibility of varying outcomes does not support depriving a party altogether of the right to apportionment under the statute.

Petitioners' contention that to allow such apportionment will also "undermine the entire law of negligent security" (Initial Brief, page 29) also ignores the fact that the equation of liability with fault in Florida is not simply a device to protect deep-pocket defendants. In fact, the case law demonstrates that this doctrine is a two way street. In Koloskv v. Winn-Dixie Stores, Inc., 472 So.2d 891 (Fla. 4th DCA 1985), the plaintiff was injured in a grocery store after being knocked down by three small children who were running. Id at 892. The Plaintiff brought suit against the grocery store, and then moved for summary judgment on the grounds that an independent, intervening cause was the proximate cause of the plaintiff's injuries. Id at 892-93. The court first noted that the proprietor of a business owes a duty to invites to protect them from reasonably foreseeable risks. Id at a93. In rejecting the grocery store's contention that it was insulated from liability because the dangerous condition was obvious or actually known to the plaintiff, the court held as follows:

> To extend the obvious danger doctrine to bar a plaintiff from recovery by mandating a landowner's or occupier's duty to invites to maintain his premises in a reasonably safe

> condition would be inconsistent with the philosophy of Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), that liability should be apportioned according to fault.
>
> Rather than acting as a complete bar to recovery, [the plaintiff's] knowledge [of the children running in the store] presents an issue of comparative negligence.
> Id at 895 - 96.

For this reason, the trial court's determination that the grocery store was insulated by an intervening cause was reversed, and the appellate court remanded for entry of judgment consistent with a verdict that placed 50% of the negligence on the plaintiff 50% on the grocery store. Id at 895 - 96.

See also, Walt Disnev World Companv v. Wood, 515 So.2d 198 (Fla. 1987) (Declining to entirely abandon the doctrine of joint and several liability through judicial fiat, but also recognizing that the 1986 Tort Reform Act substantially modified that doctrine as part of its comprehensive framework.); Standard Havens Products, Inc. v. Benitez, 648 So.2d 1192 (Fla. 1994) (Holding that since Hoffman, supra, this court has consistently rejected the use of various legal "doctrines" as per se defenses to negligence claims, and rejecting the appellant's contention that the "patent danger doctrine" would afford a basis to put the entire accidental loss on the injured plaintiff); General Dynamics Corp. v. Wright Airlines, Inc., 470 So.2d 788 (Fla. 3rd DCA 1985) (Refusing to allow apportionment of damages between two defendants and applying the doctrine of joint and several liability since no contribution claim was ever filed in the action (before the passage of the apportionment of fault statute).

The above referenced cases exhibit several themes which show that ALAMO should be allowed to apportion fault in this case. First, it is apparent that the public policy reasons espoused in the judicial opinions over a number of years, as well as the enactment of tort reform statutes by the legislature, has been to equate fault with liability for all parties, and not just defendants. Petitioners ask this court to depart from these principals simply because it feels juries are likely to place the lion's share of liability on the intentional actor, and not what is typically the deep-pocket property owner. The fallacy in this argument lies in the fact that this doctrine is not simply intended to protect a certain class of defendants. On the contrary, the public policy considerations which have led the statute to allow a negligent defendant such as ALAMO to be held only responsible for its percentage of fault are the same policies which reduce a plaintiff's recovery only by an amount equal to the percentage of its own fault. A plaintiff is no longer totally barred from recovery by the contributory negligence doctrine. Second, the above referenced case law also demonstrates that the court have consistently applied the "liability equals fault" principle within the parameters of the statutes in effect at the time the decision is made. In this regard, at the time Lincenberg was decided, the court allowed contribution among tortfeasors, but only on a pro-rata basis. Id at 393. Once the statute was amended to provide that contribution among tortfeasors should be based on their relative degrees of fault, the court gave effect to that method.

Similarly, in Walt Disney, susra, the court declined to totally abolish joint and several liability (such as for economic damages or a limited classes of torts), but also recognized that the 1986 Act substantially modified the doctrine of joint and several liability. It is therefore submitted to this court that when determining whether the jury should be allowed to apportion fault to the assailant in this case, the court should be guided by the specific language in the apportionment of fault statute, together with the case law that reflects the evolution of tort law on this issue. As demonstrated below, the exception in the statute does not apply to a party alleged to be only negligent. Petitioners' claim that juries will likely find defendants such as ALAMO to be minimally at fault does not justify making ALAMO 100% liable. It should only be responsible for its degree of fault.

II. THE NEGLIGENT SECURITY CASE LAW DOES NOT FORM A VALID BASIS TO RESURRECT JOINT & SEVERAL LIABILITY FOR NON-ECONOMIC DAMAGES AGAINST NEGLIGENT DEFENDANTS SUCH AS ALAMO

Petitioners' next attempt to justify depriving a negligent party such as Alamo of the benefits of the Apportionment of Fault Statute focus on the duties imposed by the so-called "negligent security" cases. First, Petitioners argue that trying to get juries to weigh the fault of negligent and intentional tortfeasors is not possible. In support of the position, Petitioners cite to various cases and treatises holding that these two types of actions are so different in kind that they simply can not be compared. (Initial Brief, p. 16-18). In effect, Petitioners contend that it is like comparing apples to oranges. As such, the conclusion is

that intentional and negligent actors can not be joint-tortfeasors. Rather, they can only be distinct and independent tortfeasors, each fully liable to the plaintiff. (Initial Brief, p. 17-18).

As is aptly demonstrated in the Brief filed by the Florida Defense Lawyer's Association,[4] Stellas is mistaken. The courts of Florida have not held that there can be no finding of joint-tortfeasors when the torts are separate actions, such as Alamo's negligence and Aaron's intentional conduct. The FDLA Brief notes that joint-tortfeasors have been found to exist in cases involving a supplier and subsequent user of a defective airline part, a highway subcontractor and automobile driver, an employer and government entity at a dangerous street intersection, as well as numerous other settings. Auto-Owners and Hanover will not repeat the specific holdings of those cases here[5]. These cases demonstrate that the proposition advanced by Petitioner to the effect that Alamo and Aaron can not be considered joint-tortfeasors for liability purposes is not correct. In fact, the traditional rationale against comparing these types of fault to one another has resulted from an effort by the courts to deprive intentional tortfeasors themselves of the benefits ushered in by modification of joint and several laws. Thus, this argument can not justify

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[4]Brief of Florida Defense Lawyers Association, Amicus Curiae In Support of Respondent, filed with this Court on August 1, 1996.

[5]See, General Dynamics Corp. v. Wright Airlines, Inc., 470 So.2d 788 (Fla. 3d DCA 1985); Florida Rock & Sand Co. v. Cox, 344 So.2d 1296 (Fla. 3d DCA 1977); Showell Ind., Inc. v. Holmes, 409 So.2d 78 (Fla. 1st DCA 1982); Chinos Villas, Inc. v. Bermudez, 448 So.2d 1179 (Fla. 3d DCA 1984); and Orlando Sports Stadium, Inc. v. Gerzel, 397 So.2d 370 (Fla. 5th DCA 1981).

holding Alamo 100% liable for the non-economic damages, when the trier of fact found it was only 10% at fault.

Aside from the alleged impossibility of comparing negligent and intentional conduct, Petitioners also posit that the common law duties imposed for negligent security prevent apportionment of fault in this case. In this vein, Petitioner cites Holly v. Mt Zion Terrace Apts., 382 So.2d 98 (Fla. 3d DCA 1980), for the proposition that a negligent party can not reduce its liability by shifting the blame to another party if its own negligence failed to prevent the other party's conduct. (Initial Brief, p. 18). In the Holly case, supra, the plaintiff's wife **was** raped and murdered at the defendant apartment complex. Id at 99. The plaintiff sued the landlord for negligent security. Id. The court held that since the assailant's actions were foreseeable, the landlord was liable. Id at 101. Finally, the court rejected the landlord's contention that the assailant's actions were an "independent intervening cause" which served to **insulate the landlord from liability** (emphasis added). Id.

The holding of Holly and its progeny leads Petitioner to conclude that Alamo is wholly liable for Stellas' injuries, since the crux of the negligence claim against Alamo is for its alleged negligent failure to warn of the danger and negligence in providing directions.[6] This argument ignores the principle that **a negligent**

[6]Aside from fact that Holly and similar cases should not be read to impose absolute liability on allegedly negligent defendants such as Alamo (as addressed more fully below), it is dubious **as** to whether the negligent security cases relied on by Petitioner can even be applied to this type of case. Most of the cases which hold

defendant such as Alamo is only liable for its own percentage of fault. Furthermore, Petitioners improperly extend the holding of Holly so as to conclude that it imposes joint and several liability on a negligent defendant for the duty to prevent the criminal acts of a third party. While the negligent security body of case law does not permit the landowner to totally avoid liability by pointing to the assailant as the proximate cause, it does not go as far as Petitioners contend. It is equally well established that the landowner or operator is not the insurer of the patron's safety. See, Babrab, Inc. v. Allen, 408 So.2d 610 (Fla. 4th DCA **1981)** ; Highlands Ins. Co. v. Gilday, 398 So.2d 834 (Fla. 4th DCA **1981).** The holdings of all of these **cases** must be considered in conjunction with the Apportionment of Fault Statute. These cases do not establish that a party such as Alamo, which allegedly is under a duty to prevent the criminal actions of a third-party, becomes 100% liable when it **was** only partially at fault. Rather, these cases simply establish that Alamo will not be entitled to argue that it bears absolutely zero liability, because the criminal actions of Aaron constituted an independent, intervening cause. To

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that a negligent property owner or operator can not reduce its liability by shifting the blame to another party involve on-site incidents at apartments, hotels or taverns. On the other hand, Alamo is alleged to have failed to warn tourists of the danger of certain areas of Miami, and to have failed to provide adequate driving directions. This is in substance different from the failure of a property owner or operator to warn of foreseeable criminal acts by third parties on the property. As such, it is highly questionable whether the unique common law-duties enunciated in the negligent security cases relied on by Petitioner can afford a basis to impose 100% liability on partially at-fault defendants such as Alamo.

the extend the common law duty principles set forth in the negligent security cases so **as** to prevent **a** negligent defendant from apportioning fault conflicts with the clear mandate of Section 768.81(3). As such, the statute controls and should be enforced by this Court.

III. THE ACTION AGAINST ALAMO IN THIS CASE IS ONE BASED UPON NEGLIGENCE AND THE JUDGMENT SHOULD BE ENTERED AGAINST ALAMO ON ITS PERCENTAGE OF FAULT

Petitioners also contend that Section 768.81(4)(b) supports their contention that Alamo should not be able to apportion fault to Aaron in the case against Alamo. However, as a matter of law, the cause of action against Alamo is not "an action based upon an intentional tort." Aaron, the assailant who committed the "smash and grab" against Stellas, is not a party to this action. Further, there is no allegation that Alamo somehow acted intentionally in causing Petitioners' injuries. Both the terms used by the parties in this case **as** well **as** the substance of the claims against Alamo allege nothing more than negligence on its part: **a** negligent failure to warn and negligent providing of directions. A common sense reading of the statute leads to the conclusion that the exception for an "action based upon and intentional tort" is intended to prevent a person sued for an intentional tort from **reducing his or her liability based upon the negligence** of someone else. Further, as discussed more fully below, this interpretation is consistent with the public policy in Florida of punishing and deterring criminals and people who intentionally hurt others.

Aside from this Court's decision in Fabre, supra, the apportionment of fault mandated by Section 768.81 has been applied to a variety of factual settings in many types of cases. See, American Aerial Lift v. Perez, 629 So.2d 169 (Fla. 3d DCA 1993) (Holding in products liability case that it was proper to place other entities in chain of distribution who were allegedly negligent or strictly liable on verdict form, even if not parties); Dewitt Excavating, Inc. v. Walters, 642 So.2d 833 (Fla. 5th DCA 1994) (Holding that apportionment of fault was proper between negligent driver and construction company at intersection where plaintiff was injured); Schindler Corp. v. Ross, 625 So.2d 94 (Fla. 3d DCA 1993) (Holding that non-party, immune employer can be placed on verdict form and be considered to determine the relative percentages of fault); and East West Karate Assoc. v. Riquelme, 638 So.2d 604 (Fla. 4th DCA 1994) (Holding that both student who administered kick (but was not party) and karate association should be placed on verdict form).

Only when there is no evidence presented of the non-party's fault, W.R. Grace & Co. v. Doughtertv, 636 So.2d 746 (Fla. 4th DCA 1994), St. Mary's Hosp., Inc. v. Brinson, 21 Fla. L. Weekly D1187 (Fla. 4th DCA, May 22, 1996); or it is determined as a matter of law that the non-party was not at fault, Southern Bell Tel. Co. v. Dept. of Trans, 668 So.2d 1039 (Fla 3d DCA 1996); or one of the specific exceptions in the statute for which joint and several liability is retained is implicated, Conley v. Boyle Drug Co., 570 So.2d 275 (Fla 1990), should the negligent defendant be prevented

from placing the non-party on the verdict form to **allow** the jury to apportion fault. In this **case,** there is no dispute about the evidence of Aaron's actions; there was no finding by the trial court he was not at fault **as** a matter of law; and the negligence of Alamo **itself** does not fall into any of the exceptions in the statute. As such, Alamo was properly afforded the benefits of the statute and should not be held 100% liable for the non-economic damages when it **was** only found to be 10% at fault, simply because Aaron acted intentionally himself.

IV. THE CASE LAW FROM FLORIDA AND OTHER JURISDICTIONS ON THE ISSUE OF INTENTIONAL TORTS MORE STRONGLY SUPPORTS ALAMO'S POSITION WHEN READ TOGETHER WITH THE FLORIDA STATUTE

Petitioners cite case law from states such as Kansas' and Massachusetts' for the proposition that other jurisdictions considering whether to allow apportionment of fault in this setting have answered the question in the negative. This Brief will not repeat the extensive discussion of the reasons why this court should reject the rationale of the Kansas and Massachusetts decisions. The Brief filed by the Florida Defense Lawyers Association contains a detailed analysis of the Kansas and Massachusetts statutes. In this regard, those statutes speak strictly in terms of "negligence," and not "fault," as that term is used in Section 768.81. Furthermore, as noted by Judge Ervin in

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'Kansas State Bank & Trust Co. v. Specialized Transportation Servs., Inc., 819 P.2d 587 (Kan. 1991); Gould v. Taco Bell, 722 P.2d 511 (Kan. 1986).

'Flood v. Southland Corp., 616 N.E.2d 1068 (Mass. 1993).

his dissent in Dept. of Corrections v. McGhee, 653 So.2d 1091 (Fla. 1st DCA 1995):

> It is clear that plaintiff's action against the [Defendant] was based on negligence, and the comparative fault statute specifically applies to actions for negligence. [Section] 768.81(4) Fla.Stat. (1989). No action was brought by 'appellee on the theory of intentional tort. **In reaching** my conclusion, **I am greatly persuaded by the cogent analysis of the Supreme Court, of New Jersey in Blazivic v. Andrich, 124 N.J. 90, 590 A.2d 222 (1991), which appears to be in harmony with the spirit of Florida's comparative negligence law.** In Blazovic, the court explained that early cases had distinguished between negligent and intentional conduct in order to circumvent the harsh effect of the contributory negligence bar, under the view that intentional tortfeasors would be required to pay damages as a means of deterring them from future wrongdoing, regardless of whether a plaintiff had been partially negligent. . .
>
> The reasoning of the court's opinion in Blazovic appears to me to be consistent with Florida courts' general interpretations of section 768.81 in that the statute 'clearly requires a jury's consideration of each individual's fault contributing to an injured person's damages, even if such person is not or cannot be **a** party to the lawsuit.
> Id at 1101.

For this reason, Judge Ervin concludes that the negligent defendant should be allowed to apportion fault in this scenario. Id.

Furthermore, Petitioners also rely on Bach v. Florida R/S, Inc., 838 F.Supp. 559 (M.D. Fla. 1993), as persuasive in authority in support of their position. The Bach court held that the defendant would not be allowed to include a third party intentional tortfeasor on the verdict form. Id at 561. Its decision is cited by the First District Court of Appeal in support of its holding in

Wal-Mart Stores, Inc. v. McDonald, 676 So.2d 12, 21 (Fla 1st DCA 1996). However, the Bach decision contains little discussion of the rationale in support of its holding, and does not even mention any of the Florida case law interpreting the apportionment of fault statute. Bach at 561.

Furthermore, it is also submitted that the District Court of Appeal in this case properly declined to follow Slawson v. Fast Food Enters., 671 So.2d 255 (Fla. 4th DCA 1996). As addressed by the District Court of Appeal in this case, the Slawson court improperly considered its conception of the common law in isolation, failing to give effect to this Court's pronouncement in Fabre that Section 768.81 "disfavors joint and several liability to such a degree that it survives only in those limited situations where it is expressly retained." Stellas at 21 Fla. L. Weekly D1203. As a negligent defendant in this case, Alamo should not be subject to joint and several liability for non-economic damages.

Similarly, the decision of the court in Wal-Mart Stores, Inc. v. McDonald, 676 So.2d 12 (Fla. 1st DCA 1996) also fails to give full effect to Section 768.81's mandate and this Court's decision in Fabre. First, the Wal-Mart court distinguishes Fabre on the grounds that it involved an automobile accident involving purely negligent acts. Wal-Mart at 20. The principles set forth in Fabre are equally applicable to a negligent defendant such as Alamo, regardless of whether some other person who is not a party to the suit acted intentionally. Second, the Wal-Mart court also argues that public policy considerations mandate' that negligent

tortfeasors in these types of cases should not be able to reduce their fault by shifting blame to another tortfeasor whose intentional, criminal conduct was a foreseeable result of their negligence. Id at 21. That court also notes that allowing such apportionment would serve **as a** disincentive for negligent tortfeasors to meet their duties. Id at 22. The policy arguments advanced by the Wal-Mart court are in truth criticisms of the entire concept of apportionment of fault. They advance theories of tort law embodied in the doctrine of joint and several liability, but rejected as to non-economic damages with the enactment of Section 768.81, Florida Statutes. The District Court of Appeal in this case properly followed the dictates of Fabre' in allowing Alamo to apportion fault.

V. THE PUBLIC POLICY GOALS BEHIND THE STATUTE SUPPORT ALAMO'S RIGHT TO APPORTIONMENT OF FAULT

As recognized by this Court in Fabre, supra, "There is nothing inherently fair about the defendant who is 10% at'fault paying 100% of the loss, and there is no social policy that should compel the defendants to pay more than their fair share of the loss...." Fabre at 1187. Similarly, there is no justification in this case why Alamo should be compelled to pay 100% of the plaintiff's non-economic damages, when it was only 10% at fault, simply because Aaron acted intentionally. The more plausible explanation behind the exception for actions "based upon an intentional tort" is that it was intended to prevent **intentional actors themselves,** and not merely negligent actors who also contributed to the plaintiff's injuries, from availing themselves of the benefits of the statute.

It strains credibility to believe that in enacting the statute, the Florida legislature intended that a negligent party could reduce his or her proportion of fault by the degree of negligence of another participant to the accident, but that the same defendant could not do so simply because the other party acted intentionally. This in effect punishes a party like Alamo, because the other party acted more egregiously.

That the purpose of the exception is to punish and deter intentional tortfeasors themselves is consistent with the rules that govern Contribution actions under Section 768.31, Florida Statutes. As the Florida Defense Lawyers Association points out in its Brief, while a negligent tortfeasor can obtain contribution from an intentional one, the reverse is not, allowed, citing Jewelcor Jewelers & Distributors, Inc. v. Southern Ornamentals, Inc., 499 So.2d 850 (Fla. 4th DCA 1986); and Nesbitt v. Auto-Owners Ins. Co., 390 So.@d 1209 (Fla. 5th DCA 1980). See also, Diaz v. Sears, Roebuck & co., 475 So.2d 932 (Fla. 3d DCA 1985). Petitioners offer no explanation why the public policy rules governing contribution actions between negligent and intentional tortfeasors would differ for cases involving apportionment of fault. Both contribution and apportionment of fault, as adopted in the 1986 Tort Reform Act, are but different mechanisms designed to achieve the same result: to equate liability with fault. Surely holding a negligent defendant like Alamo 100% liable when it was determined to be 10% at fault does not achieve this result.

VI. CONCLUSION

The trial court in this case properly allowed Alamo, charged with negligence in the complaint, to apportion fault. Section 768.81(3), Florida Statutes, allows a negligent defendant to apportion fault and be held liable only to the extent of its percentage of fault as to non-economic damages. For these reasons, the decision of the Third District Court of Appeal should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel on the attached service list by U.S. Mail this 13th day of SEPTEMBER, 1996.

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