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IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,250

RACHELLE M. STELLAS,
et al.,

Petitioners,

v.

ALAMO RENT-A-CAR,
et al.,

Respondents.
_____/

BRIEF OF AMICUS CURIAE THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF RESPONDENTS

On Certified Question From
The Third District Court of Appeal

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pase

CASES:

TABLE OF AUTHORITIES (cont'd)

Page

TABLE OF AUTHORITIES (cont'd)

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES (cont'd)

Page

STATEMENT OF INTEREST

The Product Liability Advisory Council, Inc. ("PLAC") is an organization established to express the views of its members, as friends of the court, in cases involving significant products liability issues.

STATEMENT OF THE CASE AND FACTS

PLAC adopts the Statement of the Case and Facts submitted by Respondent.

SUMMARY OF THE ARGUMENT

The district court properly interpreted section 768.81(3), Florida Statutes (1986 Supp.) so as to permit a jury to apportion fault to an intentional tortfeasor in a negligence case. The development of Florida law over the past twenty years, culminating with this Court's decision in Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993), clearly demonstrates that the policy in this state is to apportion fault amongst all entities that contribute to an accident.

It is axiomatic that courts must give effect to the plain language of a statute. In the present case, this requires only that the court adhere to its definition of fault as set forth in Fabre. That definition is consistent with the interpretation by other courts whose legislatures have included similar language in their comparative fault statutes. Accordingly, Plaintiffs' and their amici's efforts to redefine the term must be rejected.

Going beyond the plain language of the statute, the district court's interpretation of section 768.81 is in accord with the traditional public policy of the statute, which equates liability with fault. Any other interpretation would, in effect, constitute a reversal of the clearly established trend in Florida law. Plaintiffs' arguments that the statute cannot apply because the entities are not joint tortfeasor, that the district court's ruling

will eliminate negligent security claims or that the acts of a negligent and intentional tortfeasor are different in kind so that they cannot be compared, all ignore the underlying policy behind section 768.81, and therefore must be rejected.

Finally, there is no basis to revisit this Court's logical decision in Fabre, which in any event, was not raised as an issue below. As such, the district court's decision should be affirmed in all respects.

ARGUMENT

I.

DEVELOPMENT OF COMPARATIVE FAULT AND JOINT AND SEVERAL LIABILITY LAW IN FLORIDA.

Historically, Florida courts precluded a plaintiff from recovering if that plaintiff were even partially responsible for causing his own injury. See Louisiana N.R.R. v. Yniestra, 21 Fla. 700 (1886). Additionally, Florida courts adhered to the concept of joint and several liability and prohibited contribution among tortfeasors. As such, one tortfeasor could be held responsible for all of plaintiff's damages regardless of the extent of his fault.

In 1973, Florida took its first step toward equating liability with fault in Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973). In Hoffman, this Court noted that the best argument in favor of moving from contributory to comparative fault:

> [I]s that the latter is simply a more equitable system of determining liability and a more socially desirable method of loss distribution.

Id. at 437. Accordingly, this Court observed:

> 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.

Id. at 436.

The second step in the evolution toward equating liability with fault occurred when this Court permitted contribution among tortfeasors in Lincenberg v. Issen, 318 So. 2d 386 (Fla. 1975).

Therein, this Court recognized that as a result of Hoffman, the rule barring contribution among tortfeasors must be eliminated:

> [I]n view of a re-examination of the principles of law and equity and in light of Hoffman and public policy, as a matter of judicial policy, **it would be undesirable for this Court to retain a rule that under a system based on fault, casts the entire burden of a loss for which several may be responsible upon only one of those at fault . . .**

Id. at 391 (emphasis added).

Consistent with the foregoing, the Uniform Contribution Among Tortfeasors Act, codified at section 768.31(3), Florida Statutes (1995) provides that "[i]n determining the pro rata shares of tortfeasors in their entire liability: (a) Their relative degrees of fault shall be the basis for allocation of liability."

The next development occurred in 1986 when the legislature adopted section 768.81, Florida Statutes (1986 Supp.) entitled "Comparative Fault." Section 768.81(3) of that statute provides:

> In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability,

This statute was entirely consistent with the developing case law because it again focused on allocating liability in accordance

with fault.[1] Thus, it was not surprising that when called upon to determine whether, pursuant to section 768.81, the jury should be permitted to allocate fault to nonparties, this Court again concluded that liability must be based on fault even if the nonparty was otherwise immune from suit. Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993).

In Fabre, this Court first reviewed the history of comparative fault and joint and several liability, The Court then turned to the language of section 768.81(3) and concluded:

> By its clear terms, judgment should be entered against each party liable on the basis of that party's percentage of fault.

Id. at **1185.**

In reaching its decision, this Court noted that the legislature's failure to define the term "whole," by which a party's share of the fault is determined, did not create an ambiguity in the statute:

> The "fault" which gives rise to the accident is the "whole" from which the fact-finder determines the party - defendant's percentage of liability, Clearly, the only means of

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[1]In fact, in a case decided after the statute became effective, but in which the accident occurred prior to the effective date of the legislation, Chief Justice McDonald echoed the need to equate liability with fault:

> If we are ever to achieve a just and equitable tort system, we must predicate a party's liability upon his or her blameworthiness, not upon his or her solvency or a codefendant's susceptibility to suit.

Walt Disney World v. Wood, 515 So. 2d 198, 205-206 (Fla. **1987)** (McDonald, C.J., dissenting).

> determining a party's percentage of fault is to compare that party's percentage to all other entities who contributed to the accident, regardless of whether they have been or could have been joined as defendants.

Id.

Going beyond the plain language of the statute, this Court confirmed that the legislature intended damages to be apportioned among all participants to the accident reasoning that:

> The abolition of joint and several liability has been advocated for many years because the doctrine has been perceived as unfairly requiring a defendant to pay more than his or her percentage of fault . . . .
>
> 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 that defendant contributed to the accident.**

Id. at 1185 (emphasis added). Thus, this Court has rejected the notion that "depending on who was being sued, a defendant could be required to pay **a greater** proportion of the damage than his or proportion of fault in causing the accident." Id. at 1186.

As expected, the Fabre decision has raised further questions as to its application in particular circumstances. In the instant case, the Third District Court of Appeal held that the trial court correctly permitted the jury to apportion fault between a negligent defendant and a nonparty intentional tortfeasor. Stellas v. Alamo Rent-A-Car, 673 So. 2d 940 (Fla. 3d DCA 1996). In reaching its decision, the court relied upon Judge Ervin's dissenting opinion in Department of Corrections v. McGhee, 653 So. 2d 1091 (Fla. 1st DCA

1995), approved, 666 So. 2d 140 (Fla. 1996),[2] in which he concluded that "the fault of both negligent and intentional tortfeasors may appropriately be apportioned as a means of fairly distributing the loss according to the percentage of fault of each party contributing to the loss." Id. at 1101. Judge Ervin had relied upon the New Jersey Supreme Court's decision of Blazovic v. Andrich, 590 A.2d 222 (1991), to support his conclusion. Other cases are also in accord. See Weidenfeller v. Star & Garter, 2 Cal. Rptr. 2d 14 (Cal. Ct. App. 1991); Comeau v. Lucas, 455 N.Y.S.2d 871 (N.Y. App. Div. 1982).

On the other hand, the Fourth District Court of Appeal in Slawson v. Fast Food Enterprises, 671 So. 2d 255 (Fla. 4th DCA), rev. dismissed, (Case No. 88,043) (Fla. Aug. 15, 1996), and the First District in WalMart Stores, Inc. v. McDonald, 676 So. 2d 12 (Fla. 1st DCA 1996),[3] both concluded that the legislature did not intend the statute to apply to intentional tortfeasors.

Against this backdrop, Plaintiffs and Amicus Curiae, Academy of Florida Trial Lawyers ("Academy") ask this Court to ignore the historical development of the law concerning comparative fault and create an exception to section 768.81(3) where the nonparty is an intentional tortfeasor. As will be demonstrated below, the plain

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[2]As the Third District in this case noted, Judge Ervin's dissent from the majority allowed him to reach the issue presented here. The majority did not address the issue because it was rendered moot by the remainder of their opinion. Thus, this Court's approval of the majority opinion from the First District did not express an opinion on this issue. 673 So. 2d at 942 n.4.

[3]Walmart is also pending before this Court.

language of the statute compels the conclusion that a negligent defendant's fault must be compared to an intentional tortfeasor's share of responsibility. Indeed, this interpretation is not only consistent with the development of Florida law, it is also in accord with sound public policy. Finally, there is no basis upon which this Court should revisit its decision in Fabre as requested by Plaintiffs and the Academy.

II.

THE DISTRICT COURT'S INTERPRETATION OF SECTION 768.81(3) SO AS TO REQUIRE APPORTIONMENT OF FAULT TO ALL RESPONSIBLE ENTITIES IS THE ONLY ONE CONSISTENT WITH THE LANGUAGE OF THE STATUTE.

A. The Court Must Give Effect to the Plain Lansuase of the Statute.

The first guide to statutory construction is the plain language of the statute. Thus, the law is well established that:

> When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.

A.R. Douglas, Inc. v. McRainey, 102 Fla. 1141, 1144, 137 So. 157, 159 (1931). See also Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984).

The district court in this case correctly relied upon this rule of statutory construction in finding that the language of section 768.81(3) compelled the conclusion that the fault of all culpable individuals must be measured. Stellas v. Alamo Rent-A-Car, Inc., 673 So. 2d 940, 942 (Fla. 3d DCA 1996).

The language of section 768.81(3) provides for the entry of a judgment on the basis of "each **party's percentage of fault,**" not on the basis of their percentage of negligence. Moreover, while the legislature used the term "negligence" in other parts of the statute, its use of the word "fault" in connection with the percentages of liability plainly demonstrates it must apply to all parties at fault, not just those who are negligent.

Indeed, this was precisely what this Court found in Fabre:

> **By its clear terms,** judgment should be entered against each party liable on the basis of that party's percentage of fault . . . **To accept** [plaintiff's] position would require the entry of **a** judgment against [defendants] in excess of their percentage of fault and **directly contrary to the wording of the statute.**

623 So. 2d at 1185 (emphasis added).

In reaching its conclusion, this Court specifically rejected any notion that the statute was ambiguous for failing to define the "whole" from which percentages would be determined.[4] As such, section 768.81(3) must be read as written--that is to apportion a party's liability in proportion to his **share** of the total

[4]Since this Court has determined that there is no ambiguity in the word "fault," Plaintiff's reference to appellate court confusion as to the meaning of "fault" (Plfs' Br. at n.8 and accompanying text) is to no avail.

responsibility of all those who contributed to plaintiff's damages.

B. "Fault" Means "Fault".

Despite the plain language of section 768.81(3), and this Court's holding in Fabre, Plaintiffs and the Academy seek to convince this Court that "fault" does not mean "fault"; and instead, that "fault" means "negligence." (See, e.g., Academy's Br. at 21) There is simply no basis for this argument.

First, the legislature is presumed to mean what it **says.** Leisure Resorts, Inc. v. Frank J. Roonev, Inc., 654 So. 2d 911, 914 (Fla. 1995); Holmes Countv School Bd. v. Duffell, 651 So. 2d 1176, 1179 (Fla. 1995); King v. Ellison, 648 So. 2d 667 (Fla. 1994). The legislature said that liability would be based on fault; it did not say liability would be based on negligence.[5] It even titled section 768.81 "comparative fault" not "comparative negligence." Thus, Plaintiffs' attempt to redraft the statute cannot be permitted.

Second, Plaintiffs quoted from the Black's Law Dictionary to argue that the term "fault" is limited to "negligence." (Plfs' Br. at 21) While Plaintiffs fail to identify the particular edition they have used, the sixth edition of Black's includes the following definition of "fault":

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[5]Plaintiffs' argument that Hoffman demonstrates an intent that the term "fault" be equated with "negligence" because that **case** appeared to use the words interchangeably, is **a** reflection of the fact that in Hoffman, the only fault being considered was negligence. Thus, there was no reason for this Court to further explain or define fault in that case.

> The term connotes an act to which blame, censure, impropriety, shortcoming or culpability attaches.

Black's Law Dictionary 608 (6th ed. 1991). Such a definition of fault clearly includes intentional conduct.

Moreover, had the legislature intended to limit the statute's application to **negligent** parties rather than all parties at fault, it certainly could have said so **as** have other legislatures. For example, Kansas' statute, which unlike Florida's, is titled "Comparative Negligence," clearly limits its terms to negligent actors:

> (a) The contributory negligence of **any** party in a civil action shall not bar such party . . . from recovering damages for negligence . . . if such party's negligence **was** less than the causal negligence of the party or parties against whom claim for recovery is made, but **the award of damages . . . shall be diminished in proportion to the amount of negligence attributed to such party, , . ,**
>
> (b) Where the comparative negligence of the parties in any such action is an issue, **the jury shall return special verdicts, . . . determining the percentage of negligence attributable to each of the parties, ...**
>
> (c) On motion of any party against whom a **claim** is asserted for negligence resulting in death, personal injury, property damage or economic loss, **any other person whose causal negligence is claimed to have contributed . . . shall be joined as an additional party to the action.**
>
> (d) Where the comparative negligence of the parties in any action is an issue and recovery is allowed against more than one party, **each such party shall be liable for that portion of the total dollar amount awarded as damages to any claimant in the**

> **proportion that the amount of such party's causal negligence bears to the amount of the causal negligence attributed to all parties against whom such recovery is allowed.**

Kan. Stat. Ann. § 60-258(a) (emphasis added).

Not surprisingly in light of the language limiting its terms to negligence, the courts in Kansas have concluded that the statute will not apply to intentional tortfeasors. See Gould v. Taco Bell, **722** P.2d 511 (Kan. 1986); Kansas State Bank & Trust Co. v. Specialized Transp. Servs. Inc., 819 P.2d 587 (Kan. 1991); M. Bruenser & Co., Inc. v. Dodge City Truck Stop, Inc., **675** P.2d **864** (Kan. 1984).[6] In contrast, Florida's use of the term "fault" rather than "negligence" evidences the legislature's intent that the term be interpreted as written.

As reflected in the title, "Comparative negligence; limited effect of contributory negligence as defense," Massachusetts also uses the term "negligence" rather than broader language in its statute.

> Contributory negligence shall not bar recovery in any action by any person or legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the total amount of negligence attributable to the person or persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made. **In determining by what amount the plaintiff's damages shall be diminished in such a case, the negligence of**

[6]The Kansas decisions have been criticized, in spite of the language in the statute. See Tort Reform, 16 U. Puget Sound L. Rev. 1, 29-30 (1992).

> **each plaintiff shall be compared to the total negligence of all persons against whom recovery is sought.** The combined total of the plaintiff's negligence taken together with **all** of the negligence of all defendants shall equal one hundred per cent.

Mass. Gen. L. ch. 231, § 85. (emphasis added).

Again, relying on this restrictive "negligence" language, the court in Flood v. Southland Corp., 616 N.E.2d 1068, 1071-72 (Mass. 1993), refused to apply the statute to an intentional tort:

> **Section 85 of G.L. c. 231 speaks only of contributory negligence and of negligence attributable to plaintiffs and defendants.** Intentional tortious conduct cannot be negligent conduct. If a defendant's misconduct **was** intentional, that misconduct is not involved in the application of § 85. It is not surprising that **a** court which has held that § 85 does not apply even to a breach of warranty action should hold that § 85 does not apply to intentional tortious conduct. A contrary conclusion would result in § 85 reducing plaintiffs' recoveries in cases to which the concept of contributory fault had no common law application, an unlikely legislative intention. The strong majority view across the country is that comparative fault statutes do not apply to intentional tort claims, **with exceptions arising especially where the statute uses terms broader than negligence, such as "culpable conduct" or "fault."**

Id. at 1070-71 (citations omitted) (emphasis added).

In contrast to the foregoing, and as suggested in Flood, where a statute is characterized in terms of "fault" rather than "negligence," it should **apply** to intentional tortfeasors. For example, California's comparative fault statute provides:

> In any action for personal injury, property damage, or wrongful death, based upon principles of **comparative fault,** the liability of each defendant for noneconomic damages

> shall be several only and shall not be joint. **Each defendant shall be liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of fault,** and a separate judgment shall be rendered against that defendant for that amount.

Cal. Civ. Code § 1431.2(a) (emphasis added).

This statute was interpreted in Weidenfeller v. Star & Garter, 2 Cal. Rptr. 2d 14 (Cal. Ct. App. 1991), wherein the victim of an assault in the parking lot of a bar sued the owners of the bar for negligent lighting and security. The jury returned a verdict attributing 75% of the fault to an intentional tortfeasor, 20% to the defendant-owners, and 5% to plaintiff. As to the negligent tortfeasors, the court entered a judgment for non-economic damages based on the defendant's 20% share of the total damages. Consistent with the statutory language, the California court concluded that the statute must be applied to intentional tortfeasors. See **also** DaFonte v. Up-Right, Inc., 828 P.2d 140 (Cal. 1992) (plain language of section 1431.2 providing that each defendant shall be liable "only" for those noneconomic damages directly attributable to his or her own "percentage of fault" did not provide for exception where a tortfeasor was immune from suit).

Similarly, New York's statute provides:

> In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but **the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant**

or decedent bears to the culpable conduct which caused the damages.

N.Y. Civ. Prac. L. & R. § 1411 (McKinney 1976) (emphasis added).

In Comeau v. Lucas, 455 N.Y.S.2d 871 (N.Y. App. Div. 1979), plaintiff was injured by an intoxicated member of a rock band. He sued the band member for an intentional tort and the host of the party for negligence. The court interpreted the language in the New York statute to allow for apportionment between a negligent party and a party who committed an intentional tort.

An analysis of the foregoing statutes and their interpretation by the courts readily leads to the conclusion that, while a statute couched in terms of "negligence" might not be broadly interpreted, a statute using language of "comparative fault" or "culpable conduct" will be interpreted as written.[7] The Florida statute, like California's, is broadly written to include the fault of all parties, not simply those who are negligent. In fact, the Academy recognizes the California cases and acknowledges that "the California statute is sufficiently broad to cover intentional

[7]Plaintiffs and the dissenter in the Third District rely on Veazev v. Elmwood Plantation Associates, Ltd., 650 So. 2d 712 (La. 1994), to support the position that liability should not be apportioned. In fact, Veazev is entirely consistent with the foregoing analysis. Because Louisiana's statute uses language concerning fault rather than negligence, Veazey acknowledged that the statute could allow for a comparison of negligent and intentional torts. However, the statute also **gave** the court discretion as to when the issue will be submitted to the jury. La. Code Civ. Pro. art. 1812(C) (2) ("the court may submit to the jury special written questions inquiring **as** to: **(2) if appropriate,** whether another person, whether party or not, other than the person suffering injury, death, or loss, was at fault . . .") Thus, unlike Florida, the court in Louisiana could exercise its discretion on a case-by-case basis to refuse to apply this statute. Here, the court has no such discretion.

wrongs," (Academy Br. at 12), yet the Academy fails to recognize that the Florida statute is similar to California. This Court acknowledged the similarity in Fabre. 623 So. 2d at 1186. Because like California, the Florida legislature made the determination that its comparative fault statute will be broadly applied, this Court must follow that directive. See also William McNichols, Should Comparative Responsibility Ever Apply to Intentional Torts, 37 Okla. L. Rev. 641, 667 (1984) ("Since the concept of fault includes any legal duty, it would seem clearly to apply to intentional torts.").

C. Section 768.81(4) Does Not Impact the District Court's Conclusion in This Case.

Plaintiffs and the Academy also seek to sidestep the plain language of section 768.81(3) and its interpretation in Fabre by arguing that this is not a "negligence" case as required by section 768.81(4)(a), and that the statute cannot be applied to "action based upon an intentional tort." See § 768.81(4)(b) (Plfs' Br. at 9)[8] Plaintiffs' analysis is again misplaced.

Quite simply, the claim between Plaintiffs and Alamo is not one which is "based on an intentional tort." Rather, it is a claim by Plaintiffs against Alamo based on negligence principles. The fact that the allegedly negligent defendant may seek to allocate

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'This was also the primary basis for the Fourth District's decision in Slawson v. Fast Food Enterprises, 671 So. 2d 255 (Fla. 4th DCA), rev. dismissed, (No. 88,043) (Fla. Aug. 15, 1996); and the First District's decision in Walmart Stores Inc. v. McDonald, 676 So. 2d 12 (Fla. 1st DCA 1996).

fault to one who committed an intentional tort does not change the substance of the claim between Plaintiffs and Alamo.

In arguing that section 768.81(4) precludes a comparison of fault between negligent and intentional tortfeasors, Plaintiffs contend that section 768.81(4) is intended to preserve the common law concept that an intentional tortfeasor cannot reduce his liability by the fault of others. In Plaintiffs' view, the district court's interpretation would abrogate this well-embedded doctrine. (Plfs' Br. at 24) Plaintiffs' analysis, however, misconstrues the very real difference between prohibiting an intentional tortfeasor from being relieved of liability and limiting the negligent tortfeasor's liability to his share of fault.

PLAC agrees that public policy as expressed in the common law of Florida has always dictated that an intentional tortfeasor be held fully accountable for his actions. See, e.g., Mazilli v. Doud, 485 So. 2d 477 (Fla. 3d DCA), rev. dismissed, 492 So. 2d 1333 (Fla. 1986) (refusing to reduce judgment against intentional tortfeasor based on plaintiff's comparative negligence). See also Island City Flying Serv. v. General Elec., 585 So. 2d 274 (Fla. 1991) (while intentional tortfeasor could not assert defense of comparative negligence, this did not preclude negligent tortfeasor from relying on comparative negligence).

Consistent with the common law, the Uniform Contribution Among Tortfeasors Act expressly precludes an intentional tortfeasor from maintaining a contribution claim against any other tortfeasor. See § 768.31(2)(c), Fla. Stat. (1995); Jewelcor Jewelers &

Distributors, Inc. v. Southern Ornamentals, Inc., 499 So. 2d 850 (Fla. 4th DCA 1986), rev. denied, 509 So. 2d 1118 (Fla. 1987) (if defendant's actions were intentional rather than negligent, then he would be precluded from seeking contribution from other tortfeasors); Nesbitt v. Auto Owners Ins. Co., 390 So. 2d 1209, 1211 (Fla. 5th DCA 1980) (statute is intended "to prevent an intentional tortfeasor from having others share the payment for injuries suffered as a result of his tortious conduct"); Insurance Co. of North America v. Poseidon Maritime Servs., Inc., 561 So. 2d 1360 (Fla. 3d DCA 1990) (contribution claim based on settlement of suit involving allegations of negligent as well as intentional conduct was barred by contribution statute).

On the other hand, the contribution statute does not prohibit a negligent tortfeasor from maintaining a contribution claim against an intentional tortfeasor. Thus, a negligent tortfeasor has been permitted to attempt to reduce his liability by turning to the more culpable party. See Jewelcor, 499 So. 2d at 853 (if defendant was found to have committed an intentional tort, his contribution claim will be barred; on the other hand, if defendant's actions were merely negligent, it can pursue a contribution claim against the intentional tortfeasor).[9]

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[9]The Academy's citation to Insurance Co. of North America v. Poseidon Maritime Servs., Inc., for the proposition that a negligent tortfeasor cannot seek contribution from an intentional tortfeasor is incorrect. In Poseidon, the court found a prior settlement to have included intentional conduct and thus, a contribution claim arising from the intentional tort was prohibited.

The district court's interpretation of section 768.81 **so** as to apply to a claim in which a negligent tortfeasor seeks a determination that an intentional tortfeasor shares the fault, but not to a claim between plaintiff and an intentional tortfeasor is in harmony with the foregoing principles. It ensures that an intentional tortfeasor will remain jointly and severally liable for **all** damages and cannot rely the provision of the statute allowing for the allocation of liability in accordance with fault. At the same time, it allows for apportionment of liability in accordance with a negligent tortfeasor's share of fault. See DeArmas and White, Apportioning Fault Between the Negligent and Intentional Tortfeasor, Fla. Bar J. (Oct. 1995).

The foregoing analysis was relied upon by Judge Ervin in his dissent in Department of Corrections v. McGhee, 653 So. 2d 1091 (Fla. 1st DCA 1995), wherein he concluded that section 768.81(4) did not preclude the jury from allocating fault to an intentional tortfeasor:

> I consider **that the comparative fault statute, in precluding the comparing of fault in any action based upon intentional fault, expressed an intent to retain the common law** rule **forbidding an intentional tortfeasor from reducing his or her liability by the partial negligence of the plaintiff in an action based on intentional tort.** However, such exclusion has no applicability to an action, such as that at bar, based solely on negligence, and, consequently, the fault of both negligent and intentional tortfeasors may appropriately be apportioned as a means of fairly distributing the loss according to the percentage of fault of each party contributing to the loss.

Id. at 1101 (emphasis added).

A similar conclusion was reached by the California court in Weidenfeller v. Star & Garter, 2 Cal. Rptr. 2d 14 (Cal. Ct. App. 1991), wherein the court found that the common law principle that an intentional actor cannot rely on someone else's negligence to diminish his or her liability for his or her own conduct does not mean that the comparative fault statute never applies to apportion fault among intentional and negligent tortfeasors:

> [T]his is not a case where the intentional actor is attempting to shift its financial burden to a negligent party. We have the converse situation where the injured party is attempted to transfer the intentional actor's responsibility to the negligent tortfeasor. There is no principled basis on which we can interpret the statute in this manner.

2 Cal. Rptr. at 16.

Judge Ervin's dissent in McGhee, which was wholly adopted by the district court in this case, and the analysis in Weidenfeller, represent the only proper interpretation of section 768.81(4); namely, that an intentional tortfeasor will not be permitted to benefit by an allocation of fault to other less culpable parties, but a negligent tortfeasor's liability will be defined by his share of responsibility. See also William E. Westerbeke & Reginald L. Robinson, Survey of Tort Law, 37 Kan. L. Rev. 1005, 1049 (1989) ("the better approach would be a hybrid system in which the intentional tortfeasor is jointly and severally liable for all damage, but the negligent tortfeasor is limited to a proportionate fault share of the total damages. This approach would retain the policy of denying the benefits of the comparative negligence statute to intentional tortfeasors, and still honor the intent of

the statute to require negligent actors to pay only in proportion to fault.") .

Based on the foregoing, PLAC submits that this Court should look no further than the language of the statute to conclude that Defendant's fault must be allocated with that of the intentional tortfeasor.

III.

THE DISTRICT COURT' S INTERPRETATION IS CONSISTENT WITH LEGISLATIVE INTENT AND PUBLIC POLICY.

As this Court held in Fabre, and as discussed above, the plain language of the statute requires that the fault of intentional tortfeasors be allocated along with all other parties. As such, this Court should not go behind the language to interpret the statute. However, even if this Court looks beyond the unambiguous wording of the statute, it is apparent that legislative intent and **public** policy can only be satisfied by including all responsible parties on a verdict form. Plaintiffs' analysis, on the other hand, would undermine the very policies to which the Court and the legislature have adhered.

A. Application of Comparative Fault Principles to Intentional Tortfeasora is Consistent With the Principle That Liabilitv Equates With Fault That has Become the Backbone of Florida Jurisprudence.

As demonstrated above, Florida's shift toward comparative fault, contribution among tortfeasors, and modified joint and several liability is reflective of the state's goal of equating liability with fault. In order to preserve this intent, this Court must affirm the district court's ruling in this case.

Fabre unequivocally pronounced the state's intent to require a party's liability to be limited to his share of the responsibility:

> 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 that defendant contributed to the accident.

Id. at 1185. For all of their arguments, Plaintiffs and the Academy cannot explain away this language. Instead, Plaintiffs narrowly read the developing law in Florida to suggest that this state is only concerned with a comparison between the tortfeasors' fault and the victim's fault. (Plfs' Br. at 15) As Fabre demonstrates, Florida's concern is much broader -- it looks to a comparison of defendant's fault in relation to the total fault in causing the injury.

In fact, the transition toward a system based on fault rather than the "all or nothing" approach of prior law was a primary consideration of the New Jersey Supreme Court in Blazovic v. Andrich, 590 A.2d 222 (1991). In Blazovic, **a** bar patron who was injured by other customers sued the bar owner contending that he failed to provide adequate security and failed to exercise care in disbursing alcoholic beverages. The plaintiff also sued the customers who had assaulted him, who settled during trial. The jury found that the bar owner was negligent, that the individual patrons had committed an intentional tort, and that plaintiff was also negligent. The court instructed the jury to only compare the negligence of plaintiff and the bar owner.

On appeal, the New Jersey Supreme Court observed that "early cases distinguished between negligent and intentional conduct in order to circumvent the harsh effect of the contributory-negligence bar, reflecting the view that intentional tortfeasors should be deterred **and** required to pay irrespective of plaintiff's negligence." 590 A.2d at 228.

With contributory negligence abrogated, the New Jersey **court** found decisions which refused to apportion fault to intentional tortfeasors to be unpersuasive:

> Those decisions derive from an earlier era when courts attempted to avoid the harsh effect of the contributory-negligence defense and sought to punish and deter intentional tortfeasors. . . , Refusal to compare the negligence of a plaintiff whose percentage of fault is no more than fifty percent with the fault of intentional tortfeasors is difficult to justify under a comparative-fault system in which that plaintiff's recovery can only be diminished, not barred.

590 A.2d at 231.

In light of the foregoing, the court in Blazovic concluded:

> [C]onsistent with the evolution of comparative negligence and joint tortfeasor liability in this state we hold that responsibility for a plaintiff's claimed injury is to be apportioned according to each party's relative degree of fault, including the fault attributable to an intentional tortfeasor.

Id. at 231. See also Dear & Zipperstein, supra at 11. ("With the advent of comparative fault and the rejection of contributory negligence . . . one major policy reason for ignoring the plaintiff's negligent conduct when an intentional tort is alleged--that of avoiding a bar to recovery is gone.")

Judge Ervin relied upon Blazovic in his dissent in Department of Corrections v. McGhee, 653 So. 2d 1091 (Fla. 1st DCA 1995), awwroved, 666 so. 2d 140 (Fla. 1996). After reciting the analysis set forth in Blazovic, Judge Ervin observed that the New Jersey court's cogent analysis "appears to be in harmony with the spirit of Florida's comparative negligence law . . ." Moreover, Judge Ervin found Blazovic's reasoning:

> [T]o be consistent with the Florida court's 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 have been a party to the lawsuit.

Id. at 1101 (emphasis in the original). As the district court in this case ruled, "Judge Ervin's reasoned and well-supported opinion not only analyzes but deals with the necessary aspects of the problem." Stellas, 673 So. 2d at 942.

In light of the public policy favoring liability in accordance with fault, it is both illogical and untenable to selectively apply this policy only when a negligent tortfeasor is fortunate enough to share liability with the "right" other tortfeasor. Stated another way, there is no basis to find section 768.81 effective to benefit a negligent tortfeasor where there are other negligent tortfeasors, but to eliminate that benefit where the other tortfeasors acted intentionally.

The Court in Fabre addressed the precise issue and rejected an analysis which would be dependent upon the status of the nonparty:

> 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 the entire amount of 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 of another defendant 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 amenability to suit of other potential defendants. The fact that [plaintiff] could not sue her husband does not mean that he was not partially at fault in causing the accident.**

623 So. 2d at 1186 (footnotes omitted) (emphasis added).

Thus, this Court concluded that "it would be incongruous that the legislature would have intended that the [negligent defendant's] responsibility would be 100% in situations where the vehicle were operated by [plaintiff's] husband and only 50% in situations where by chance [plaintiff] was a passenger in a vehicle operated by a friend." Id. at 1186.

The court in Weidenfeller v. Star & Garter, 2 Cal. Rptr. 2d 14 (Cal. Ct. App. 1991) agreed that focusing on the other tortfeasor was inappropriate:

> Respectfully we think [plaintiff's] myopic view of the statute focusing on its words rather than its purpose distorts the meaning of section 1431.2. According to [plaintiff] the statute has a limited effect benefitting a negligent tortfeasor only where there are other equally culpable defendants, but eliminating that benefit where the other tortfeasors act intentionally. Stating the

> proposition reflects is absurdity, It is inconceivable the voters intended that a negligent tortfeasor's obligation to pay only its proportionate share of the non-economic loss, here 20 percent, would become disproportionate increasing to 95 percent solely because the only other responsible tortfeasor acted intentionally. To penalize the negligent tortfeasor in such circumstances not only frustrates the purpose of the statute but violates the common sense notion that a more culpable party should bear the financial burden caused by its intentional act.

2 Cal. Rptr. at 15-16.

Similarly, a commentator used the following example to demonstrate the illogic of looking at the status of the nonparty:

> For example, a restaurant owes a duty of reasonable care to protect its guests from unreasonable risks of harm while they are on the premises. Assume that a visibly intoxicated third person in the restaurant negligently stumbles into and knocks down one guest, then intentionally pushes down another guest. In each case the restaurant breached its duty in the same manner -- by failing to remove the intoxicated person from the premises before he harmed a guest. The results, however, vary. The restaurant is liable for only a proportionate fault share of the damages suffered by the first guest, but is jointly and severally liable for all damages suffered by the second guest.

William E. Westerbeke & Reginald L. Robinson, Survey of Tort Law, 37 Kan. L. Rev. 1005, 1049 (1989) . See also Tort Reform, 16 U. Puget Sound L. Rev. 1, 27 (1992) ("why should the defendant who unintentionally, albeit negligently, contributes only in part to an accident suddenly lose the protections of the modification of -joint and several liability through the mere happenstance that some other defendant acting independently may have committed an intentional

wrong? ") . Such a result is directly contrary to the intent behind section 768.81 and the express language in Fabre.

Because Plaintiffs' analysis ignores the focus of the statute and creates the anomalous rule that negligent actors are subjected either to individual culpable or joint and several liability, depending on the nature or culpability of a third party's act, rather than the nature or culpability of their own acts, Plaintiffs' analysis is illogical and must **be** rejected.

In sum, the interest of fairness underlying section 768.81 and Fabre mandate that a negligent defendant's liability be limited to his share of fault regardless of the nature of the other party's conduct.

B. Plaintiffs' Analysis Ignores the Fundamental Policy Underpinnings of Section 768.81.

In contrast to Defendant's analysis which serves to preserve Florida's policy of equating liability with fault, Plaintiffs' arguments reflect a sharp divergence from Florida jurisprudence. Acceptance of Plaintiffs' arguments would create a split from existing policy and law as defined by Florida jurisprudence. As the discussion below confirms, the only result which is consistent with Florida's policy is that which was reached by the Third District.

1. Application of section 768.81 is not determined by defendants' status as joint tortfeasors.

Plaintiffs and the Academy first argue that negligent and intentional tortfeasors are not jointfeasors, that section 768.81 was only intended to abrogate joint and several liability and thus

the statute can only be applied to entities who were joint tortfeasors at common law. (Plfs' Br. at 9-10, 24-25) There are several significant reasons why Plaintiffs' argument must fail.

First, from a policy perspective, it is clear that the operation of section 768.81 is not dependent on the parties' status as joint tortfeasors. As discussed above, the historical concern in Florida has been to limit the negligent actor's responsibility in accordance with his share of fault. Given this purpose, the status of the other responsible entity is irrelevant. The focus must remain on the tortfeasor being held accountable and on the legislature's desire to limit that accountability. Nothing Plaintiffs or the Academy have argued alters this fundamental proposition.

Additionally, as a practical matter, it is clear that Florida has not limited the application of section 768.81 to joint tortfeasors. Thus, in Fabre, the statute was applied to require apportionment between a negligent party and a husband who was otherwise immune from suit by his wife. Similarly, even though an employer is not a joint tortfeasor with a negligent defendant,[10] this Court has held that a judgment-proof employer could be included in allocating fault. Allied Sisnal, Inc. v. Fox, 623 So. 2d 1180 (Fla. 1993). Again, the key is limiting liability in accordance with fault, not determining the relationship between tortfeasors.

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[10] See State, DOT v. V.E. Whitehurst & Sons, Inc., 636 So. 2d 101 (Fla. 1st DCA), rev. denied, 645 So. 2d 456 (Fla. 1994)

Going beyond the issue of whether it is necessary that the defendants be joint tortfeasors, it is also clear that Plaintiffs' conclusion that the entities are not joint tortfeasors is in error. The basis for Plaintiff's and the Academy's argument in this regard is that contribution is not available between intentional and negligent tortfeasors and therefore these entities must not be joint tortfeasors. (Plfs' Br. at 16, 23-25; Academy Br. at 4-5, 8) In fact, it is only intentional tortfeasors who are precluded from seeking contribution. See n.8 and accompanying text. If the prohibition on contribution were based on the lack of joint liability, negligent tortfeasors would also be precluded from seeking contribution. The reason why intentional tortfeasors are denied contribution is the public policy favoring an intentional tortfeasor being held fully accountable for his actions. See infra at Section II(C). Accordingly, Plaintiffs cannot **avoid** application of section 768.81 by hiding behind artificial labels.

2. Application of section 768.81 to the instant case would not eliminate the law concernins negligent security.

Plaintiffs and the Academy next suggest that application of section 768.81 to a **case** like the present one would be inconsistent with Florida law which has traditionally allowed suits against a premises owner for failing to protect against foreseeable intentional conduct. (Plfs' Br. at 29-30; Academy Br. at 5) They also argue that if the decision in this **case** is affirmed, businesses will no longer feel compelled to protect their patrons. On this issue, Plaintiffs rely on Holley v. Mt. Zion Terrace

Apartments, Inc., 382 So. 2d 98 (Fla. 3d DCA 1980), wherein the court held that the deliberate act of a rapist did not constitute an independent intervening cause which served to insulate the landlord from liability.

Hollev is completely different than this case. In Hollev, defendant did not ask the court to compare the responsibility of each entity, rather defendant attempted to totally avoid liability for its own negligent security by shifting all of the fault to the intentional tortfeasor. In that circumstance, public policy required that the negligent tortfeasor be held accountable.

The instant case does not disturb that policy. It simply asks that the jury determine the appropriate comparison of fault between the two entities. Such a comparison will not eliminate the law requiring a landlord to secure his property; it will only serve to properly measure that defendant's share of responsibility.

When faced with this same argument in California, the court in Weidenfeller noted that application of comparative fault in the context of negligent security case is not contrary to public policy because it would fail to deter negligent tortfeasors.

> Negligent actors remain liable for all economic damages and for non-economic damages in proportion to their fault. Moreover, a legitimate purpose of the code section is to deter the more culpable defendant.

2 Cal. Rptr. 2d at 17.

The present case bears out California's analysis. The negligent tortfeasor is responsible for his share of the non-economic damages as well as jointly and severally liable for the

economic damages. As such, the incentive remains for him to secure his property. Thus, this situation is entirely different from Holley, and does not clash with any of the policies set forth therein.

3. There is no impediment to comparing different degrees of fault.

Despite Florida's clearly announced policy of equating liability with fault, Plaintiffs next argue that the acts of negligent and intentional tortfeasors are different in kind so that a comparison of the two acts is not proper. (Plfs' Br. at 27-28) In fact, the term "fault" encompasses negligence as well as other degrees of fault. Thus, contrary to Plaintiffs' assessment, an intentional tort simply represents a different point along the fault spectrum. Moreover, Florida courts have previously permitted comparisons between negligence and other types of conduct. The instant situation is but a continuation of that development.

Turning first to the theoretical question as to whether negligent and intentional conduct are different in kind, we begin with the proposition that, traditionally, there have been three classifications of fault -- negligence, recklessness, and intent. Wigmore, Responsibility for Tortious Acts: Its History, 7 Harv. L. Rev. 315, 383, 441, 455-56 (1894). These three classifications of fault simply differ in degree in terms of their violation of the norm. As one law review commentator has pointed out, the norm is defined **as** "persons should not knowingly engage in conduct that poses unjustifiable harm to others." Jake Dear & Steven Zipperstein Comparative Fault and Intentional Torts: Doctrinal

Barriers and Policy Considerations, 24 Santa Clara L. Rev. 1, 12 **(1984).**

> "Negligent fault" least violates the norm. With regard to this classification we do not require of the actor a high degree of knowledge; in fact, courts do not at all subjectively examine the actor's mind. Instead **we attribute** to the actor a relatively **low** degree of **objective** knowledge. We say that he either **knew,** or **should have known,** that his conduct was socially unjustified. Courts also require for negligence a relatively low standard of social justifiability. We measure the social justification of the conduct by balancing the magnitude of the risk created by the conduct against the social utility of the conduct. When risk outweighs social utility, we say that the conduct is not socially justified because it poses **an unreasonable risk of harm.**
>
> What the courts classify as "recklessness" contemplates yet a greater violation of the norm. We recognize two ways to satisfy the knowledge element of the norm violation. We **may** attribute to the actor a relatively high degree of objective knowledge by saying that he **"really" should have known** that his conduct was socially unjustified. Alternatively we **may** probe the actor's subjective mind to discover whether he **intentionally encountered** a **known risk.** By using either method we require a high degree of knowledge regarding the norm violation. Similarly, we require for recklessness a high degree of social unjustifiability. We typically express this by saying that the actor's conduct poses a **highly unreasonable risk of harm.**
>
> "Intentional fault" most forcefully violates both the moral and social components of the norm. Under this classification we again recognize two ways to satisfy the norm violation. To meet the first branch of intentional fault, we ask whether the actor **knew** that his conduct was **substantially certain** to cause harm. Thus we require a somewhat more dramatic violation of the knowledge component of the norm, and a very

> high degree of violation of the social justifiability component.
>
> * * *
>
> The second branch of the intentional fault classification contemplates the ultimate degree of violation of both components of the norm. As in the first branch, we analyze the actor's subjective mind. We inquire whether he acted with the highest degree of knowledge by asking if he **purposefully** acted to produce the socially unjustifiable result. We also undertake the most exacting scrutiny of social justifiability by asking if his purposeful act was done to **produce the resulting harm.**

Id. at 13-15 (footnotes omitted) (emphasis in the original). Viewed in this light, one cannot distinguish between acts based on "intent" or "no intent" because each classification has a knowledge component that must be met:

> The difference in classification, **as** far as the knowledge component is concerned is accounted for by the **degree** of knowledge we require -- from a low level of objective knowledge (negligence) to a very high level of subjective knowledge (intent).

Id. at 15.

In short, the three classifications "reflect not different norms, but simply shades of violation of the **same** norm." Id. at 15. Thus, Dear and Zipperstein conclude that "because the different in kind theory is without foundation, there is no **theoretical** obstacle to extending comparative fault principles to intentional torts, Id. at 16. Other commentators are in accord. See Sobelsohn, Comparing Fault, 60 Ind. L. J. 413, 442-43 (1985) (rejecting notion that intentional conduct is different in kind and finding that "rather than bar comparative fault in all cases of

intentional tort, a comparative fault system should at least permit the court, in individual cases, to instruct the jury to compare the parties' fault."); Note, Comparative Fault and Intentional Torts, 12 Loy. L.A. L. Rev. 179, 185-86 (1978) (given application of comparative fault in context of strict liability, there is no basis to argue that negligence and intentional torts cannot be compared).

The analysis set forth by these commentators was adopted by the New Jersey Supreme Court as part of its rationale for allowing liability to be allocated between negligent and intentional tortfeasors in Blazovic v. Andrich, 590 A.2d 222 (1990). In Blazovic, the court specifically rejected the concept that intentional conduct was "different in kind" from negligent or even wanton conduct, instead concluding that the conduct was different only in degree:

> To act intentionally involves knowingly or purposefully engaging in conduct "substantially certain" to result in injury to another. In contrast, wanton and willful conduct poses a highly unreasonable risk of harm likely to result in injury. Neither that difference nor the divergence between intentional conduct and negligence precludes comparison by a jury. The different levels of culpability inherent in each type of conduct will merely be reflected in the jury's apportionment of fault.

590 A.2d at 231 (citations omitted).

According to the New Jersey Supreme Court, this analysis "adhere[s] most closely to the guiding principle of comparative fault -- to distribute the loss in proportion to the respective faults of the parties causing that loss." Id.

Plaintiffs contend that Blazovic's analysis cannot be followed because unlike New Jersey, Florida adhere to the position that negligence and intentional conduct are different in kind. (Plfs' Br. at 27) There is no basis for this assertion. Florida, like New Jersey, permits apportionment between strictly liable and negligent parties. See, e.g., American Aerial Lift, Inc. v. Perez, 629 So. 2d 169 (Fla. 3d DCA 1993), rev. denied, 659 So. 2d 1085 (Fla. 1995). Also, like New Jersey, Florida allows for a comparison between negligent and willful and wanton conduct. American Cyanamid Co. v. Roy, 466 So. 2d 1079, 1085 (Fla. 4th DCA 1984), approved in part, quashed in part on other grounds, 498 so. 2d 859 (Fla. 1986) ("comparatively negligent plaintiff should bear his fair share of the loss even where the defendant tortfeasor's conduct has been egregious"). Thus, it is apparent that, in practice, courts in Florida have been allowing juries to draw distinctions between negligent conduct and other types of conduct. The rationale of Blazovic is therefore appropriately applied in Florida.

IV.

THIS COURT SHOULD NOT REVISIT FABRE.

In a last ditch effort to obtain a reversal, Plaintiffs and the Academy argue that Fabre is wrong and should be overturned. No basis exists for the Court to accept such an invitation.

In the first place, this issue was not properly preserved for review because it was not raised in the district court. While the Academy clings to the Stellas' two-paragraph discussion of the

issue in its brief to this Court, to assert amici's right to expand on this issue, the Academy ignores the fact that the issue was not briefed by anyone below. It is axiomatic that an issue cannot be raised for the first time before this Court. Penn v. Florida Defense Fin. & Accounting Serv. Ctr., 623 So. 2d 459, 462 (Fla. 1993) ; Morales v. Sperry Rand Corp., 601 So. 2d 538, 540 (Fla. 1992).

In any event, there is no reason for this Court to reevaluate a decision rendered just three years ago. As described throughout this brief, the law in Florida has developed into a system whereby liability is equated with fault. Fabre carries this policy to its logical conclusion. Nothing has changed since Fabre was decided. In fact, amici's adoption of its brief in Fabre suggests that this is nothing more than a motion for rehearing filed in the wrong case.

Fabre is good law. It must be applied to this case to allow for an apportionment of fault between the negligent and intentional tortfeasors.

CONCLUSION

Based on the foregoing argument and recitation of authorities, PLAC submits that the district court decision should be affirmed.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this **13th** day of September, 1996, to **SCOTT FEDER, ESQ. and SCOTT L. POISSON, ESQ.,** Counsel for Petitioner, Feder & Fine, 200 S. Biscayne Blvd., Suite 3100, Miami, FL 33131-2327; **G. BART BILLBROUGH, ESQ. and GEOFFREY MARKS ESQ.,** Counsel for Respondent, Walton, Lantaff et al., 2 S. Biscayne Blvd., Suite 2500, Miami, FL 33131-1802; **ASA GROVES, III, ESQ.,** Stephens, Lynn, Klein, & McNicholas, P.A., Attorneys for Respondent, Two Datran Center, PH II, 9130 South Dadeland Blvd., Miami, FL 33156; JOEL S. **PERWIN, ESQ.,** Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, Counsel for Academy of Florida Trial Lawyers in support of Petitioner, 25 W. Flagler St., Suite 800, Miami, FL 33130-1720; JACK **SHAW, ESQ.,** Osborne, McNatt, Shaw, O'Hara, Brown & Obringer, Counsel for the Florida Defense Lawyers in support of Respondent, One Enterprise Center, 225 Water St., Suite 1400, Jacksonville, FL 32202-5147; **KERRY C. McGUINN, JR., ESQ. and MICHAEL** S. **RYWANT, ESQ.,** Rywant, Alvarez, Jones & Russo, P.A., Attorneys for Auto-Owners Insurance Company and Hanover Insurance Company, Perry Paint & Glass Building, Suite 500, 109 N. Brush St., P.O. Box 3283, Tampa, FL 33601; and NEIL H. **BUTLER, ESQ.,** Butler & Long, Attorneys for The Association of Voluntary Hospitals of Florida, Inc., The Florida Hospital Association, Inc., The Florida League of Hospitals, Inc. and The

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