IN THE SUPREME COURT OF FLORIDA

RACHELLE M. STELLAS and
FRANK STELLAS,

Petitioners,

v. CASE NO. 88,250

ALAMO RENT-A-CAR, INC.

Respondent.

BRIEF OF FLORIDA DEFENSE LAWYERS ASSOCIATION, AMICUS CURIAE IN SUPPORT OF RESPONDENT

BROWN, OBRINGER, SHAW, BEARDSLEY
& DeCANDIO
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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. THIS COURT SHOULD EXERCISE ITS DISCRETION IN FAVOR OF ACCEPTING JURISDICTION 3

II. WHERE THE CLAIM AGAINST DEFENDANT SOUNDS IN NEGLIGENCE, SECTION 768.81, FLORIDA STATUTES, REQUIRES THAT THE ALLOCATION OF FAULT INCLUDE ALL ENTITIES WHOSE FAULT CONTRIBUTED TO PLAINTIFF'S INJURY 4

III. NO REASON EXISTS FOR THIS COURT TO REVISIT ITS RECENT DECISION IN FABRE V. MARIN, 623 So.2d 1182 (Fla. 1993) 33

CONCLUSION 36

CERTIFICATE OF SERVICE 37

TABLE OF AUTHORITIES

CASES: **Pages**

Allied-Signal, Inc. v. Fox, 623 So.2d 1180 (Fla. 1993) 6.17

American Aerial Lift, Inc. v. Perez, 629 So.2d 169 (Fla. 3d DCA 1993) 7

American Cyanamid Co. v. Roy, 466 So.2d 1079 (Fla. 4th DCA 1984), approved in part, quashed on other grounds in part, 498 So.2d 859 (Fla. 1986) 31

Amoco Pipeline Co, v. Montgomery, 487 F.Supp. 1268 (W.D. Okla.1980) 32

Armor Elevator Co., Inc. v. Elevator Sales & Service, Inc., 360 So.2d 1129 (Fla. 3d DCA 1978) 16

Bach v. Florida R/S, Inc., 838 F.Supp. 559 (M.D. Fla. 1993) 26

Billingsley v. Westrac Co., 365 F.2d 619 (8th Cir. 1966) 32

Blazovic v. Andrich, 124 N.J. 90, 590 A.2d 222 (1991) . . 23, 24

Brooks v. Anastasia Mosquito Control District, 148 So.2d 64 (Fla. 1st DCA 1963) 14

Brown v. Keill, 580 P.2d 867 (Kan. 1978) 8

Chinos Villas, Inc. v. Bermudez, 448 So.2d 1179 (Fla. 3d DCA 1984) 17, 19

Comeau v. Lucas, 90 A.D.2d 674, 455 N.Y.S.2d 871 (1982) . . . 32

Dade County Medical Association v. Hlis, 372 So.2d 117 (Fla. 3d DCA 1979) 15

Davidson v. Gaillard, 584 So.2d 71 (Fla. 1st DCA 1991), rev. den., 591 So.2d 181 (Fla. 1991) 15

Department of Corrections v. McGhee, 653 So.2d 1091 (Fla. 1st DCA 1995), approved, 666 So.2d 140 (Fla. 1996) 26

Fabre v. Marin, 623 So.2d 1182 (Fla. 1993) . . 3, 6-9, 29, 33-35

Farina v. Zann, 609 So.2d 629
(Fla. 4th DCA 1992) 15

Firestone Tire & Rubber Co. v.
Thompson Aircraft Tire Corp.,
353 So.2d 137 (Fla. 3d DCA 1977) 16

Flood v. Southland Corp., 416 Mass. 62,
616 N.E.2d 1068 (1993) 21, 22

Florida Rock & Sand Co. v. Cox,
344 So.2d 1296 (Fla. 3d DCA 1977) 17

General Dynamics Corp. v. Wright
Airlines, Inc., 470 So.2d 788
(Fla. 3d DCA 1985) 17, 18

Gonzalez v. Leon, 511 So.2d 606
(Fla. 3d DCA 1987), rev. den.,
523 So.2d 577 (Fla. 1988) 15

Gould v. Taco Bell, 239 Kan. 564,
722 P.2d 511 (1986) 21

Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) 4, 5, 14

Holley v. Mt. Zion Terrace
Apartments, Inc., 382 So.2d 98
(Fla. 3d DCA 1980) 27

Insurance Co. of N. America v. Poseidon Maritime
Services, Inc., 561 So.2d 1360 (Fla. 3d DCA 1990) 30

Jewelcor Jewelers & Distributors, Inc. v. Southern
Ornamentals, Inc., 499 So.2d 850 (Fla. 4th DCA 1986),
rev. den., 509 So.2d 1118 (Fla. 1987) 30

Kansas State Bank & Trust Co. v. Specialized
Transportation Services, Inc., 249 Kan. 348,
819 P.2d 587 (1991) , ... 21

Lincenberg v. Issen, 318 So.2d 386 (Fla. 1975) 5

Lomonte v. A & P Food Stores, 107 Misc. 2d 88,
438 N.Y.S.2d 54 (1981) 32

M. Bruenger & Co. v. Dodge City
Truckstop, 234 Kan. 682,
675 P.2d 864 (1984) 21

Messmer v. Teacher's Insurance Co., 588 So.2d 610

(Fla. 5th DCA 1991), rev. den., 598 So.2d 77 (Fla. 1992) 6

Nash v. Wells Farqo Guard Services, Inc., 21 FLW S292 (Fla. 1996) 34

Nesbitt v. Auto-Owners Ins. Co., 390 So.2d 1209 (Fla. 5th DCA 1980) 30

Orlando Sports Stadium, Inc. v. Gerzel, 397 So.2d 370 (Fla. 5th DCA 1981) 18, 19

Plyler v. Wheaton Van Lines, 640 F.2d 1091 (9th Cir. 1981) 32

Publix Supermarkets, Inc. v. Austin, 658 So.2d 1064 (Fla. 5th DCA 1995), rev. den., 666 So.2d 146 (Fla. 1995) 4

Seaboard Coast Line R. Co. v. Smith, 359 So.2d 427 (Fla. 1978) 16

Showell Industries, Inc. v. Holmes County, 409 So.2d 78 (Fla. 1st DCA 1982) 17

Slawson v. Fast Food Enterprises, 671 So.2d 255 (Fla. 4th DCA 1996) 4

State ex rel Florida Jai Alai, Inc. v. State Racinq Commission, 112 So.2d 825 (Fla. 1959) 13

Stuart v. Hertz Corp., 351 So.2d 703 (Fla. 1977) 15

Tampa Electric Co. v. Stone & Webster Ensineerinq Corp., 367 F.Supp. 27 (M.D. Fla. 1973) 31

United Gas Pipeline Co. v. Gulf Power Co., 334 So.2d 310 (Fla. 1st DCA 1976) 17

Wal-Mart Stores, Inc. v. McDonald, 21 FLW D1369 (Fla. lstDCA1996) 4

Walt Disney World Co. v. Wood, 515 So.2d 198 (Fla. 1987) . . . 5

Weidenfeller v. Star and Garter, 1 Cal. App. 4th 1, 2 Cal. Rptr. 2d 14 (1991) 25, 26

CONSTITUTIONAL PROVISIONS:

Article V, Section 3(b), Florida Constitution . . . ., . . 3

STATUTES:

Chapter 86-160, Sections 49, 50, 60, Laws of Florida 6

Chapter 440, Florida Statutes . . , ... 16

Kansas Statute Annotated Section 60-258a 21

Massachusetts General Laws Annotated, Chapter 231,
Section 85 22

Section 440.11, Florida Statutes 9, 10

Section 766.112, Florida Statutes 6

Section 768.31, Florida Statutes 5, 30

Section 768.31(2)(a), Florida Statutes 29

Section 768.31(2)(c), Florida Statutes 29, 31

Section 768.31(3), Florida Statutes 5, 29

Section 768.81, Florida Statutes 1-4, 6, 7, 9-13, 15, 17, 19-21, 23, 24, 27, 29, 31-34, 36

Section 768.81(3), Florida Statutes 6, 8, 14, 16

Section 768.81(4), Florida Statutes 6

Section 768.81(4)(a), Florida Statutes 7, 14

Section 768.81(4)(b), Florida Statutes 8, 19, 31

Section 768.81(5), Florida Statutes 6

MISCELLANEOUS:

Black's Law Dictionary, Abridged Fifth Edition, p. 313 . . . 14

Restatement (Second) Torts, §449 28

Survey of Kansas Tort Law,
37 Kan. L. Rev. 1005 (1989) 13

PRELIMINARY STATEMENT

In this brief, Petitioners Rachelle M. Stellas and Frank Stellas, plaintiffs in the trial court, will be collectively referred to as "Stellas." Respondent Alamo Rent-A-Car, Inc., defendant in the trial court, will be referred to as "Alamo." Bernard Aaron, the intentional tortfeasor whose fault was included in the verdict form, will be referred to as "Aaron." The Academy of Florida Trial Lawyers, amicus curiae supporting Stellas' position, will be referred to as "the Academy."

All emphasis herein is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

For purposes of this Amicus Curiae Brief, the pertinent facts are simple and straightforward. Stellas sued Alamo for negligently failing to warn of the danger of "smash and grab" crimes in certain parts of Dade County, and for negligently failing to take other steps (such as removing decals identifying the vehicle as a rental car) which might have reduced the likelihood that Stellas would fall victim to such a crime. Stellas got lost while in Miami, inadvertently drove into a high-risk area, and fell victim to a "smash and grab" attack committed by Aaron. Aaron was not a party to Stellas' suit. At Alamo's request, the fault attributable to Aaron was included in the verdict form. The jury found Stellas without fault, Alamo 10% at fault, and Aaron 90% at fault and assessed damages at $39,900. Pursuant to the verdict and Section 768.81, Florida Statutes, judgment was entered against Alamo in the amount of $23,282.08. On appeal, the Third District affirmed, and certified its decision.

SUMMARY OF THE ARGUMENT

This Court should accept jurisdiction to resolve a direct conflict of decisions among the District Courts of Appeal.

For several decades, Florida's jurisprudence has been moving towards a system in which a negligent party's liability is measured by the extent of fault, rather than the extent of wealth. Under Section 768.81, Florida Statutes, the jury must now consider the relative fault of all entities involved, even if the entity is not a party to the litigation. Stellas' claim against Alamo in the instant case sounds in negligence, and thus the fault of all entities -- including intentional tortfeasors -- must be considered in determining the extent of Alamo's fault and resulting liability.

A negligent defendant is entitled to have the fault of other entities considered by the jury, so as to reduce that defendant's liability, even if that other entity is immune from suit. A negligent defendant is entitled to the benefits of this statute if the other at-fault entity is negligent. There can be no principled justification for depriving that same defendant of the benefits of the statute when the other entity is instead an intentional tortfeasor. A defendant's liability should not be arbitrarily increased because some other party behaved more egregiously than the defendant.

The language of Section 768.81, Florida Statutes, does not compel such an absurd result. The statutory benefits are not available in favor of an intentional tortfeasor, but they remain

fully available to a negligent defendant who, along with the intentional tortfeasor, was at fault in causing plaintiff's injury.

That result is fully consistent with analogous case law interpreting the contribution statute. Like Section 768.81, Florida **Statutes,** the contribution statute allocates liability based on extent of fault, but its benefits are not available to intentional tortfeasors. Contribution actions can nonetheless be maintained by a negligent defendant against an intentional tortfeasor. The same result should follow under the instant statute. The benefits of the proportionate liability statute are not available to an intentional tortfeasor, but a negligent defendant is entitled to those benefits even if an intentional tortfeasor is also involved in causing plaintiff's injury. The Third District's decision should be approved, and the conflicting decisions disapproved.

No reason exists for this Court to revisit and recede from Fabre v. Marin, 623 So.2d 1182 (Fla. 1993). This Court correctly interpreted the legislative intent in that decision. Subsequent attempts to legislatively overrule Fabre by revising the statutory language have failed, evidencing the legislature's approval of **Fabre.** This Court should continue to abide by that legislative intent.

ARGUMENT

I. THIS COURT SHOULD EXERCISE ITS DISCRETION IN FAVOR OF ACCEPTING JURISDICTION

This Court has discretionary jurisdiction in this case under **Article V,** Section **3(b),** Florida Constitution. It should exercise

that discretion in favor of accepting jurisdiction to resolve the conflict among the various District Courts of Appeal.

In the instant case, the Third District has held that when plaintiff's claim against a defendant sounds in negligence, the fault attributable to an intentional tortfeasor should be included in the jury's allocation of fault under Section 768.81, Florida Statutes. Other District Courts have held directly to the contrary in Wal-Mart Stores, Inc. v. McDonald, 21 FLW D1369 (Fla. 1st DCA 1996); Slawson v. Fast Food Enterprises, 671 So.2d 255 (Fla. 4th DCA 1996); and Publix Supermarkets, Inc. v. Austin, 658 So.2d 1064 (Fla. 5th DCA 1995), rev. den., 666 So.2d 146 (Fla. 1995).

This Court should accept jurisdiction to resolve this conflict of decisions and ensure uniformity in the law of Florida on this issue.

II. WHERE THE CLAIM AGAINST DEFENDANT SOUNDS IN NEGLIGENCE, SECTION 768.81, FLORIDA STATUTES, REQUIRES THAT TBE ALLOCATION OF FAULT INCLUDE ALL ENTITIES WHOSE FAULT CONTRIBUTED TO PLAINTIFF'S INJURY.

For a number of years, the jurisprudence of Florida has been moving towards a system in which the extent of a party's liability is measured by the extent of that party's fault, not by the extent of that party's wealth. In Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), this Court discarded the rule of contributory negligence and replaced it with comparative negligence, reasoning that the most equitable result that could ever be reached is the equation of liability with fault. If fault is to remain the test of liability, the Court reasoned, a doctrine which apportions the loss among

those whose fault contributed to the occurrence is more consistent with liability based on a fault premise.

The purposes of adopting comparative negligence were: (1) to allow a jury to apportion fault as it sees fit between those whose fault was part of the legal and proximate cause of any loss or injury; and (2) to apportion the total damages resulting from the loss or injury according to the proportionate fault of each party. Walt Disney World Co. v. Wood, 515 So.2d 198 (Fla. 1987); Hoffman v. Jones, supra. As Stellas recognizes (Initial Brief at 15): "The 'all or nothing' approach imposed by contributory negligence gave way to what is now considered a far more equitable system of responsibility based on the tortfeasor's fault compared with the victim's fault."

Two years later, in Lincenbers v. Issen, 318 So.2d 386 (Fla. 1975), this Court abolished the rule precluding contribution among joint tortfeasors, recognizing that the doctrine was inconsistent with the purposes of comparative negligence. In its place, the Court adopted the principle of pro rata contribution, consistent with the Legislature's then-recent enactment of Section 768.31, Florida Statutes. It would be undesirable, the Court reasoned, to retain a rule that, under a system based on fault, casts the entire burden of a loss for which several may be responsible on only one of those at fault. Lincenberq v. Issen, supra.

Thereafter, the Legislature amended the Contribution Among Joint Tortfeasors Act. In its present form, Section 768.31(3), Florida Statutes , provides that in determining the pro rata contri-

bution shares of tortfeasors, their relative degrees of fault shall be the basis for the allocation of liability.

Subsequently, the Legislature enacted Section 768.81, Florida Statutes, which substantially modified the doctrine of joint and several liability. Where this statute applies,[1] joint and several liability is replaced by a system under which each defendant's liability for non-economic damages is governed solely by, and is equal to, its percentage of causal fault. Likewise, each defendant's liability for economic damages is governed by and equal to its percentage of causal fault unless that defendant is at least as much at fault as the plaintiff -- in which case, that defendant's liability for economic damages is governed by the doctrine of joint and several liability.

It is now settled that this statutory provision requires jury consideration of the extent of fault of every entity involved in causing the plaintiff's injuries, even if that entity is not (or cannot be) a party to the lawsuit. Fabre v. Marin, supra; Allied-Sisnal, Inc. v. Fox, 623 So.2d 1180 (Fla. 1993); Messmer v.

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[1] Essentially, the statute applies to negligence cases. Section 768.81(4), Florida Statutes. It does not apply to causes of action which arose before July 1, 1986. Chapter 86-160, Sections 49, 50, 60, Laws of Florida. It does not apply where the total damages do not exceed $25,000. Section 768.81(5), Florida Statutes. Certain medical malpractice actions are apparently governed by the provisions of Section 766.112, Florida Statutes, rather than by the provisions of Section 768.81, Florida Statutes. Finally, it provides 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 the claimant's economic damages against that party on the basis of the doctrine of joint and several liability. Section 768.81(3), Florida Statutes.

Teacher's Insurance Co., 588 So.2d 610 (Fla. 5th DCA 1991), rev. den., 598 So.2d 77 (Fla. 1992).

The scope of the Court's decision in Fabre is not limited solely to negligence actions, but includes, for instance, actions sounding in strict liability. see, American Aerial Lift, Inc.v. Perez, 629 So.2d 169 (Fla. 3d DCA 1993). This is in accord with the statutory language of Section 768.81(4)(a), Florida Statutes, which provides, in pertinent part:

> For purposes of this section, 'negligence cases' includes, but is not limited to, civil actions for damages based upon theories of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories. In determining whether a case falls within the term 'negligence cases,' the court shall look to the substance of the action and not the conclusory terms used by the parties.

In the instant case, it is clear that the substance of Stellas' claim against Alamo is a negligence case within the meaning of Section 768.81, Florida Statutes. Alamo is in no way charged with any intentional wrongdoing, but rather is charged with negligence in not warning of certain dangers and taking other protective measures. It is Aaron -- not Alamo -- who is charged with intentional wrongdoing in this case. It is the negligent party -- not the intentional tortfeasor -- which seeks to invoke the provisions of Section 768.81, Florida Statutes.

In arguing that the present case is one "based upon an intentional tort" because Aaron's acts were intentional torts, Stellas and the Academy wholly overlook the fundamental fact that Stellas' own claim against Alamo is based on negligence by Alamo. If

Stellas is to recover against Alamo, it is because Alamo was negligent, not because Alamo committed any intentional tort.

In claiming that, because Aaron's acts were intentional, it is irrelevant that Alamo's liability is based on negligence, Stellas and the Academy overlook clear indications in the statute that such was not the legislative intent. Section 768.81(3), Florida Statutes, repeatedly speaks in terms of "percentage of **fault**," not in terms of "percentage of negligence" -- a clear sign that the legislature intended the statute to be applicable where some form of fault other than negligence was involved. To ensure that intentional tortfeasors did not obtain the benefits of the statute, Section 768.81(4)(b), Florida Statutes, expressly makes apportionment inapplicable to actions based on intentional torts; as discussed below, that language serves to prohibit apportionment in favor of an intentional tortfeasor, but does **not** preclude application of the statute in favor of a negligent defendant in the same action.

In the course of its decision in Fabre, this Court quoted with approval from Brown v. Keill, 580 P.2d 867, 874 (Kan. 1978), as follows:

> There is nothing inherently fair about a defendant who was 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. If one of the parties at fault happens to be a spouse or a governmental agency, and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the codefendant to pay more than his fair share of the loss.

Application of Section 768.81, Florida Statutes, in the present case continues the long-standing Florida trend of equating the extent of liability with the extent of fault. It is founded on fundamental considerations of fairness. As the Court noted, there is nothing fundamentally fair about a defendant who is 10% at fault paying 100% of the loss. Certainly there is nothing fair about compelling a negligent defendant to pay more than his or her fair share of the loss because another individual committed an intentional tort which contributed to causing the loss.

In Fabre, the Court made it clear that Section 768.81, Florida Statutes, requires the jury to consider the fault of all at-fault entities in reaching its apportionment of fault. Under Fabre and its progeny, that is true even if the other at-fault entity is a spouse, a governmental agency, a hit-and-run driver who cannot be located, a bankrupt manufacturer, an employer who enjoys immunity from tort liability under Section 440.11, Florida Statutes, or an entity which has not been made a party to the suit for any other reason. It is equally true when the other "at-fault" entity is an intentional tortfeasor.

The fact that one "at-fault" entity is not, for whatever reason, directly liable to the plaintiff does not magically transform the extent of fault of some other party. Thus, for instance, if Plaintiff A is 30% at fault, Defendant B 20% at fault, and hit-and-run driver C 50% at fault in causing an injury to plaintiff, Defendant B's percentage of fault is 20% -- not 20% if C is included in the suit and 40% if it is not. Similarly in the

instant case, the jury has found Alamo to be **10%** at fault: if the fault of Aaron is excluded, Alamo's fault would be increased to 100%. Exclusion of the fault which the jury attributed to Aaron would thus multiply Alamo's fault percentage tenfold for absolutely no valid reason.

Under the provisions of Section 768.81, Florida Statutes, a negligent defendant is entitled to have the fault of all other at-fault entities included in the computation of fault, regardless of whether the other at-fault party is a governmental agency with total or limited immunity, an unidentified hit-and-run driver, a bankrupt corporation, or an employer whose tort liability is precluded by Section 440.11, Florida Statutes. How, then, in all fairness, can it be claimed that a negligent defendant can be deprived of the benefits of Section 768.81, Florida Statutes, simply because the other at-fault entity is an intentional tortfeasor? There can be no principled justification for such a result.

The result sought by Stellas and the Academy would be inequitable in the extreme. Consider the situation, for instance, where Plaintiff is 30% at fault, Defendant A 20% at fault, and Defendant B 50% at fault in causing plaintiff's injuries. If both defendants are negligent, Defendant **A's** liability is limited to 20% of plaintiff's damages. If, however, **Stellas'** position is accepted, and if Defendant B is an intentional tortfeasor, Defendant A (who was

merely negligent) would be held responsible for 40% of the damages[2] -- even though that defendant's negligence caused only 20% of the damages and the intentional tort of Defendant B comprised 50% of the causal fault (and plaintiff's own negligence an additional 30%).[3] There simply can be no principled reason for claiming, in such a situation, that negligent Defendant A can only be held responsible for 20% of plaintiff's damages if Defendant B was also negligent, but that Defendant A is liable for 40% of plaintiff's damages if Defendant B was an intentional tortfeasor. That result

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[2] Even the 40% figure is a best-case scenario, and assumes that the jury allocates fault between plaintiff and Defendant A in precisely the same ratio whether or not the fault of the intentional tortfeasor is considered. More likely, the jury would, in most cases, simply continue attributing 30% of the causal fault to plaintiff and hold Defendant A responsible for the full remaining 70% of the fault. In that situation, negligent Defendant A is held liable for intentional tortfeasor B's fault even though there is no basis for imposing vicarious liability.

Nonetheless, we will assume for purposes of this brief that the jury would apply a constant ratio of fault between the plaintiff and the negligent defendant.

[3] Moreover, exclusion of the intentional tortfeasor's fault would also increase the comparative negligence of the plaintiff in this hypothetical to 60%. Assuming that damages were $100,000, inclusion of the intentional tortfeasor as a party would result in plaintiff obtaining a judgment against A for $20,000 and a judgment against B for $70,000 (of which $20,000 would represent B's joint and several liability), for a potential recovery of $70,000. On the other hand, if the intentional tortfeasor is to be excluded from the allocation, plaintiff's recovery would be limited to $40,000 (the $100,000 damage award reduced by plaintiff's 60% comparative negligence). Plaintiff's total recovery would be significantly reduced (subject, of course, to any subsequent suit plaintiff might be able to maintain against intentional tortfeasor B), and negligent defendant A's liability would be doubled, even though their relative degrees of fault were unchanged. The net effect of this approach is to shift part of B's liability (for an intentional tort) to A (who was merely negligent) -- directly contrary to the intent of Section 768.81, Florida Statutes, to equate each party's liability with the extent of its own fault.

would double the liability of Defendant A simply and solely because another party acted more egregiously than Defendant A did.

It is wholly inequitable to hold Defendant A responsible for only 20% of the damages where the other tortfeasor was merely negligent but, without in any other way changing the situation, to hold Defendant A liable for 40% of the damages where the other tortfeasor committed an intentional tort. That result is nothing more or less than shifting part of the intentional tortfeasor's liability to the merely negligent defendant -- and doing so because the party whose fault has been ignored is an intentional tortfeasor rather than a negligent tortfeasor. Considerations of equity, fundamental fairness, and simple justice demand that such a result be rejected out of hand.

A defendant is entitled to the benefits of Section 768.81, Florida Statutes, if the other tortfeasor is a negligent co-defendant. A defendant is entitled to those benefits if the other tortfeasor is a negligent entity which was, for some reason, simply not joined as a party. A defendant is entitled to those same benefits if the other tortfeasor is an entity which, for whatever reason, could not be joined as a party. In each case, the rationale is the same: the defendant's percentage of fault in causing the plaintiff's injuries is fixed (albeit inchoate and unknowable) at the time of the causative acts, and does not subsequently change based on the happenstance of whether other at-fault entities are, or could be, joined in the litigation.

Precisely that same rationale compels the conclusion that the defendant is entitled to the benefits of Section 768.81, Florida Statutes, if the other at-fault entity is an intentional tortfeasor. Once again, the defendant's percentage of fault is fixed (albeit inchoate and unknowable) at the time of the causative events. The mere fact that the other tortfeasor's acts are more egregious than the defendant's (because the other tortfeasor is an intentional tortfeasor, not a negligent tortfeasor) should not -- and must not -- alter that result.

In Kansas, where Stellas' theory has been accepted, this result has been cogently criticized with the following hypothetical:

> 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.

Westerbeke and Robinson, Survey of Kansas Tort Law, 37 Kan. L. Rev. 1005, 1049 (1989).

In a display of semantic gymnastics worthy of the Olympics, Stellas argues that "fault" means "negligence," and does not include intentional wrongdoing. The legislature is familiar with the word "negligence," and knows how to use it in a statute when it so desires. The legislature is presumed to mean what it says in a statute. State ex rel. Florida Jai Alai, Inc. v. State Racing

Commission, 112 So.2d 825 (Fla. 1959); Brooks v. Anastasia Mosca-uito Control District, 148 So.2d 64 (Fla 1st DCA 1963). Indeed, the legislature, after stating that "fault" was to be the basis for apportioning damages in Section 768.81(3), Florida Statutes, used the word "negligence" no less than four times in the very next subsection. Moreover, a holding that only negligence would be a basis for apportioning liability would make apportionment unavailable in strict liability cases, breach of warranty cases, and professional malpractice cases couched in terms of contract. Yet, the legislature expressly made apportionment applicable in each of those situations. Section 768.81(4)(a), Florida Statutes.

Stellas' claim that Black's Law Dictionary equates fault with negligence may depend on which edition is consulted. The Abridged Fifth Edition, at page 313, contains the following in the definition of "Fault": "The word connotes an act to which blame, censure, impropriety, shortcoming or culpability attaches." Intentional torts certainly come within that language.

Stellas claims that Hoffman v. Jones, supra, shows that fault is synonymous with negligence, quoting this Court's statement that "[i]f 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 promise." The fault involved in Hoffman, of course, was negligence, so it certainly made sense for the Hoffman Court to use the two terms interchangeably. The essence of the Court's statement, however, remains true

in other contexts (such as strict liability or breach of implied warranty cases), and makes eminently good sense in the context of this case; Alamo should have the extent of its liability measured by the extent of its own fault -- there should be an "apportionment of the loss among [all] those whose fault contributed to the occurrence," including the intentional tortfeasor.

Stellas and the Academy argue that permitting allocation in the present situation violates the principle that a negligent defendant cannot reduce his liability by shifting the blame to an actor who may have negligently aggravated plaintiff's injury in a separate transaction, citing Stuart v. Hertz Corn., 351 So.2d 703 (Fla. 1977). Stuart involved an auto accident in which a physician's subsequent negligent treatment allegedly aggravated plaintiff's injuries.[4] It has no application here, where there are no distinct injuries attributable only to either Alamo or Aaron.

The Academy and Stellas also argue that Section 768.81, Florida Statutes, cannot apply because it only abrogates joint and several liability (with certain exceptions) and thus cannot apply where the parties would not be considered joint tortfeasors at

[4] Farina v. Zann, 609 So.2d 629 (Fla. 4th DCA 1992), Davidson v. Gaillard, 584 So.2d 71 (Fla. 1st DCA 1991), rev. den., 591 So.2d 181 (Fla. 1991), Gonzalez v. Leon, 511 So.2d 606 (Fla. 3d DCA 1987), rev. den., 523 So.2d 577 (Fla. 1988), and Dade County Medical Association v. Hlis, 372 So.2d 117 (Fla. 3d DCA 1979), also cited by the Academy, all involve the negligent initial tortfeasor's liability for additional injuries caused by negligent medical treatment of the original injuries.

common law.[5] Their reasoning is flawed. The statute does more than abrogate, in certain situations, joint and several liability; it affirmatively provides that judgment shall be entered "against each party liable on the basis of such party's percentage of fault." Section 768.81(3), Florida Statutes. Although the statute will, in most cases, involve situations in which the relevant actors would have been joint tortfeasors at common law, there is nothing in the statute's language which restricts its scope to only those situations, and the statutory language clearly demonstrates a legislative intent that it apply in the present situation.

In fact, the statute's effect is not limited to situations in which the at-fault entities would be joint tortfeasors. An employer with immunity from suit under Chapter 440, Florida Statutes, is not a joint tortfeasor (and hence subject to contribution actions) even if the employer's negligence was a cause of plaintiff's injury. Seaboard Coast Line R. Co. v. Smith, 359 So.2d 427 (Fla. 1978); Armor Elevator Co., Inc. v. Elevator Sales & Service, Inc., 360 So.2d 1129 (Fla. 3d DCA 1978); Firestone Tire

[5] Stellas claims that Alamo and Aaron aren't joint tortfeasors because (1) their acts are separate and occurred at different points in time and (2) negligent and intentional tortfeasors can't be joint tortfeasors because of the difference in types of fault involved. As to the first point, Alamo's negligence did not result in damages -- and hence become actionable -- until Aaron committed his violent robbery of Stellas. As we will show, two parties may be joint tortfeasors if their separate acts of negligence (no matter when committed) unite to form a single set of damages. As to the second point, an intentional tortfeasor can be considered a joint tortfeasor with a negligent tortfeasor for purposes of the contribution statute (as will be discussed below) and there is no apparent reason to reach a different result as to the comparative fault statute.

& Rubber Co. v. Thompson Aircraft Tire Corp., 353 So.2d 137 (Fla. 3d DCA 1977); United Gas Pipeline Co. v. Gulf Power Co., 334 So.2d 310 (Fla. 1st DCA 1976). In Allied-Signal, Inc. v. Fox, supra, this Court nonetheless held that any fault attributable to the immune employer must be included in the allocation called for by Section 768.81, Florida Statutes.

Even if the statute only applied if the at-fault entities would be joint tortfeasors, the case law disproves Stellas' and the Academy's claim that there can be no joint and several liability because Alamo's negligence and Aaron's intentional tort are separate transactions. In General Dynamics Corp. v. Wright Airlines, Inc., 470 So.2d 788 (Fla. 3d DCA 1985), the court held that the doctrine of joint and several liability applied where one defendant had negligently supplied a defective airplane part and the other defendant had thereafter negligently failed to discover the defect, resulting in a single indivisible injury. In Florida Rock & Sand Co. v. Cox, 344 So.2d 1296 (Fla. 3d DCA 1977), the court held that a highway subcontractor, charged with negligence during construction of the road, was entitled to make a contribution claim against the driver of a vehicle which struck a median strip, injuring the passenger.

In Showell Industries, Inc. v. Holmes County, 409 So.2d 78 (Fla. 1st DCA 1982), the defendant (employer of a driver involved in an intersection collision) was permitted to assert a contribution claim against a county for negligent maintenance of the intersection. In Chinos Villas, Inc. v. Bermudez, 448 So.2d 1179

(Fla. 3d DCA 1984), a defendant charged with negligent failure to provide lifesaving apparatus, in a case involving the drowning of a four-year old, was held entitled to a contribution claim based on the child's parents' negligent failure to supervise and protect the child. In Orlando Sports stadium, Inc. v. Gerzel, 397 So.2d 370 (Fla. 5th DCA 1981), a defendant charged with negligently providing a spectator area at motorcycle races, permitting minors to wander onto the track, was held entitled to a contribution claim based on the parents' negligent failure to supervise and protect their children.

In each of these cases, the negligence of one party preceded the negligence of the other -- in the Academy's phrase, it occurred "in a transaction entirely separate from the transaction involving the [other party's] negligence." In each case, the negligence of several entities combined to form a single indivisible injury. In each case, the court either held joint and several liability applied or held that a contribution claim was proper. Similarly in the instant case, Alamo's negligence caused no damage to Stellas (and hence was not actionable) until Aaron's intentional tort, when Stellas received a single, indivisible injury. The fact that Aaron's tort occurred at a different time and place than Alamo's negligence does not prevent them from being joint tortfeasors.

Nor is that result changed by the fact that the duty Alamo breached was to protect Stellas from the risk of a tort such as Aaron's. In General Dynamics Corp. v. Wright Airlines, Inc., supra, one defendant's duty was to detect and prevent faulty

airplane parts from being used, and the other defendant supplied such a faulty part: joint and several liability was held applicable. In Orlando Sports Stadium, Inc. v. Gerzel, supra, the parents' duty was to supervise and protect the minor child from the dangers of the motorcycle race; a contribution claim against the parent was permitted. In Chinos Villas, Inc. v. Bermudez, supra, the parents' duty was to supervise and protect the child from the dangers of drowning; a contribution claim against the parent was permitted. Similarly, the fact that Alamo's duty was to protect Stellas from the dangers of someone like Aaron does not prevent Alamo and Aaron from being joint tortfeasors in the present case.

Stellas relies on the language of Section 768.81(4)(b), Florida Statutes, which provides, in pertinent part, that "this section does not apply . . . to any action based upon an intentional tort . . .". That reliance is badly misplaced. Stellas' claim against Alamo is not an action based on an intentional tort; the substance of Stellas' action against Alamo is based on negligence. Plainly, the statutory prohibition against applying Section 768.81, Florida Statutes, in cases based on intentional tort is aimed at preventing an intentional tortfeasor from decreasing his or her own financial exposure (under the doctrine of joint and several liability) by shifting some of the financial responsibility for his or her own intentional torts to other intentional tortfeasors -- or even to merely negligent tortfeasors. In short, the prohibition acts to keep intentional tortfeasors from obtaining the

benefits of Section 768.81, Florida Statutes. Yet, **Stellas'** theory has precisely the opposite effect.

In precluding the intentional tortfeasor from obtaining the statutory benefits, the provision makes eminently good sense. One who has, for instance, assaulted another, causing serious bodily injury, should not be permitted to decrease his or her responsibility by shifting some of the liability to others who joined in the assault or who may have been merely negligent in failing to prevent the assault or in failing to more timely intervene to bring it to an end.

The same is not true, however, where the party seeking the benefits of Section 768.81, Florida Statutes, was merely negligent. If A negligently leaves his rifle unsecured and B takes that rifle and thereafter negligently shoots C, it is clear that Section 768.81, Florida Statutes, calls for A and B each to be liable only for their own respective percentages of the total fault. If B, instead of negligently shooting C, does so with malice aforethought, there is ample justification for refusing to let the intentional shooter avoid responsibility for part of the damages by pointing to the rifle owner's negligence. On the other hand, there is no responsible justification for denying the negligent gun-owner (who has breached the same duty in the same way in both instances) the benefits of the proportionate liability provisions of Section 768.81, Florida Statutes, by pointing to the intentional wrongdoing of the shooter as being part of the causal fault. The gun-owner remains responsible for his or her **own** proportionate

share of the fault, of course, but is not, and should not be, also held responsible for the intentionally wrongful acts of the shooter.[6]

As the Academy notes, Kansas and Massachusetts have reached the opposite result. Kansas State Bank & Trust Co. v. Specialized Transportation Services, Inc., 249 Kan. 348, 819 P.2d 587 (1991); Gould v. Taco Bell, 239 Kan. 564, 722 P.2d 511 (1986); M. Bruenger & Co. v. Dodge City Truckstop, 234 Kan. 682, 675 P.2d 864 (1984); Flood v. Southland Corp., 416 Mass. 62, 616 N.E.2d 1068 (1993). In both states, however, the pertinent statute speaks solely in terms of "negligence"; Section 768.81, Florida Statutes, in contrast, speaks in terms of "percentage of fault."

Thus, Kansas Statute Annotated Section 60-258a, on which Kansas State Bank, Gould, and M. Bruenger are based, provides:

> 60-258a. Comparative negligence.
>
> (a) The contributory negligence of any party in a civil action shall not bar such party or such party's legal representative from recovering damages for negligence resulting in death, personal injury, property damage or economic loss, 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 to any party in such action shall be diminished in proportion to the amount of negligence

[6] Assume, for instance, that in this situation the jury finds that plaintiff was 10% at fault, the negligent gun owner 30% at fault, and the intentional shooter 60% at fault. Under the statute, plaintiff would recover 90% of the damages, the gun owner would be liable for 30% of the damages (for simplicity, we assume that all damages in this hypothetical are non-economic damages), and the shooter would remain jointly and severally liable for the full 90% of the damages. Thus, the negligent party obtains the benefits of the statute, but they are denied to the intentional tortfeasor -- who, as discussed below, is also precluded from obtaining contribution.

attributed to such party. If any such party is claiming damages for a decedent's wrongful death, the <u>negligence</u> of the decedent, if any, shall be imputed to such party.

(b) Where the comparative <u>negligence</u> of the parties in any such action is an issue, the jury shall return special verdicts, or in the absence of a jury, the court shall make special findings, determining the percentage of <u>negligence</u> attributable to each of the parties, and determining the total amount of damages sustained by each of the claimants, and the entry of judgment shall be made by the court. No general verdict shall be returned by the jury.

(c) On motion of any party against whom a claim is asserted for <u>negligence</u> resulting in death, personal injury, property damage or economic loss, any other person whose causal <u>negligence</u> is claimed to have contributed to such death, personal injury, property damage or economic loss, shall be joined as an additional party to the action.

(d) Where the comparative <u>negligence</u> 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 <u>negligence</u> bears to the amount of the causal <u>negligence</u> attributed to all parties against whom such recovery is allowed.

(e) The provisions of this section shall be applicable to actions pursuant to this chapter and to actions commenced pursuant to the code of civil procedure for limited actions.

Similarly, Massachusetts General Laws Annotated, Chapter 231, Section 85, on which <u>Flood</u> is based, provides:

s 85. Comparative <u>negligence</u>: limited effect of contributory <u>negligence</u> as defense.

Contributory <u>negligence</u> shall not bar recovery in any action by any person or legal representative to recover damages for <u>negligence</u> resulting in death or in injury to person or property, if such <u>negligence</u> was not greater than the total amount of <u>negligence</u> attributable to the person or persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of <u>negligence</u> 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 neqlisence of each plaintiff shall be compared to the total neslisence of all persons against whom recovery is sought. The combined total of the plaintiff's neslisence taken together with all of the negligence of all defendants shall equal one hundred per cent.
>
> The violation of a criminal statute, ordinance or regulation by a plaintiff which contributed to said injury, death or damage, shall be considered as evidence of neslisence of that plaintiff, but the violation of said statute, ordinance or regulation shall not as a matter of law and for that reason alone, serve to bar a plaintiff from recovery.
>
> The defense of assumption of risk is hereby abolished in all actions hereunder.
>
> The burden of alleging and proving neqlisence which serves to diminish a plaintiff 's damages or bar recovery under this section shall be upon the person who seeks to establish such neslisence, and the plaintiff shall be presumed to have been in the exercise of due care.

Both of these statutes are plainly limited, on their face, to allocations among negligent parties. Section 768.81, Florida Statutes, does not have that limitation: rather it is titled "Comparative fault" and speaks to allocation based on "percentage of fault."

Other jurisdictions have concluded that, in this type of situation, the negligent defendant is entitled to the benefits of a proportionate liability system under which its liability is decreased by the percentage of fault attributable to the intentional tortfeasor. In Blazovic v. Andrich, 124 N.J. 90, 590 A.2d 222 (1991), plaintiff was assaulted while leaving a restaurant and sued the restaurant (for negligently failing to provide adequate lighting and security and negligently failing to exercise reason-

able care in disbursing alcoholic beverages to the assailants). Plaintiff also sued the assailants, charging that they had either negligently or intentionally struck him. Plaintiff settled with several of the assailants prior to trial. The trial court, feeling that negligent conduct could not be compared with intentional conduct, instructed the jury to compare only the relative fault of the negligent parties. The jury apportioned 70% of the causal negligence to the restaurant and 30% to plaintiff. The jury further found that the assailants had not been negligent, but instead had committed an intentional assault and battery.

Both the intermediate appellate court and the New Jersey Supreme Court held that the fault of the intentional tortfeasors should be included in the allocation of fault -- even though the relevant New Jersey statute, like the Kansas and Massachusetts statutes but unlike Section 768.81, Florida Statutes, spoke solely in terms of "negligence," rather than in terms of "fault."

The New Jersey Supreme Court was unpersuaded by decisions from other jurisdictions rejecting apportionment in actions involving intentional tortfeasors, observing that they derived from an earlier era when courts attempted to avoid the harsh effects of the contributory negligence defense. Likewise, the Blazovic court rejected the concept that intentional conduct was different in kind from negligence or willful and wanton conduct, finding that intentional wrongdoing was, instead, simply different in degree. The different levels of culpability inherent in each type of conduct,

the court said, will be reflected in the jury's apportionment of fault. The court said (590 **A.2d** at 231):

> By viewing the various types of tortious conduct in that **way,** we adhere 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. [Citations omitted]. Thus, consistent 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, <u>including the fault attributable to an intentional tortfeasor</u> [citation omitted].

Similarly, the court in <u>Weidenfeller v. Star and Garter,</u> 1 Cal. App. 4th 1, 2 Cal. Rptr. 2d 14 **(1991),** held that California's proportionate liability statute applied in favor of a negligent defendant so as to require allocation of fault to intentional tortfeasors. In that case, plaintiff was the victim of an unprovoked assault in defendant's parking lot. Plaintiff sued, alleging negligent failure to provide adequate lighting and proper security. The jury found for plaintiff, allocating 20% of the fault to the negligent defendant, 5% to the plaintiff, and 75% of the fault to the assailant. On appeal, the court rejected plaintiff's claim that the statute should not be applied so as to include the fault of the intentional tortfeasor, stating that: "There is no principled basis in which we can interpret the statute in this manner." (2 Cal. Rptr. 2d at 16). The court stated (2 Cal. Rprt. 2d at 15-16):

> According to Weidenfeller 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. <u>Stating the proposition reflects its absurdity. It is inconceivable the voters intended that</u>

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% **solely** because the **only** other **responsible** tortfeasor acted intentionally To **penalize** the **negligent tort-feasor** 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.

The court specifically rejected the argument (made here by Stellas and the Academy) that permitting allocation in this situation would improperly permit a person to be relieved of liability because of the reasonably foreseeable intervening act of a third **party.**[7] 2 Cal. Rptr. at 17, n. 11. The court pointed out that the jury had found the negligent defendant should have reasonably foreseen the assailant's conduct, and held it liable.

Stellas claims that permitting the fault of intentional **tort-**feasors to be considered by the jury would effectively abolish negligent security cases and that businesses would no longer have any incentive to protect **their patrons. It is difficult to credit** such claims when, as here, the 10% at fault negligent defendant has been held liable for 58% of the plaintiffs' total damages as found by the jury. In Weidenfeller v. Star and Garter, **supra,** the defendant in a negligent security case was held liable for $166,375 even though the intentional tortfeasor assailant was found 75% at fault. In another case of which we are aware, **Department** of Corrections v. **McGhee,** 653 **So.2d** 1091 (Fla. 1st DCA **1995),**

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[7] It is precisely this same misapprehension which led the court astray in Bach v. Florida R/S, Inc., 838 **F.Supp.** 559 (M.D. Fla. 1993).

approved, 666 So.2d 140 (Fla. 1996), the jury found the negligent defendant 50% at fault and the two intentional tortfeasors each 25% at fault, and the trial court entered judgment against the negligent defendant for $1,485,000 based on that allocation.[8] Such results hardly sound a death knell for this type of case or give businesses an economic reason to ignore their patrons' safety.

Stellas and the Academy argue that inclusion of Aaron's percentage of fault improperly permits the negligent defendant to escape (at least in part) liability in a situation where the negligence consisted of a failure to prevent the third party's intentional conduct, citing Holley v. Mt. Zion Terrace Apartments, Inc., 382 So.2d 98 (Fla. 3d DCA 1980). Holley does not involve the application of Section 768.81, Florida Statutes (in fact, Holley was decided years before the statute was enacted). In Holley, a defendant sought to completely escape liability, asserting that the third party's criminal act was unforeseeable. That is not the situation presented in the instant case, since the jury found such a criminal attack foreseeable, as reflected in its finding that Alamo was 10% at fault. Had the jury found Aaron's acts unforeseeable, it would have completely exonerated Alamo.

Moreover, the verdict and judgment in this case disprove Stellas' and the Academy's claim; the jury found Alamo 10% at fault notwithstanding the vicious criminal acts of Aaron, and Alamo was

[8] The allocation is specified in Judge Ervin's concurring and dissenting opinion, at p. 1099 N.9. The amount does not appear in the decision, but is reflected in the Record in that case.

held jointly and severally liable for Stellas' economic damages. The effect of including Aaron's intentional tort in the jury's calculation of fault was simply to relieve the negligent defendant (Alamo) of liability for that part of Stellas' non-economic damages corresponding to the intentional tortfeasor's percentage of fault -- in this case, $18,450.00. Not only did Alamo not escape liability (judgment for $23,282.08 was entered against Alamo), but the jury's percentage allocations clearly demonstrate that the jury kept in mind the point that it was Alamo's negligence which made Aaron's intentional tort possible, and the judgment against the 10% at fault Alamo is for 58% of Stellas' total damages.

Moreover, this argument by Stellas and the Academy proves too much. The Academy quotes Restatement (Second) Torts, §449: "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby." Thus, under Stellas' and the Academy's logic, Alamo would not be entitled to the statutory benefit even if Aaron had merely been negligent.

Assume, for instance, that certain areas of Dade County were dangerous not because of a high incidence of auto robberies, but because of a high incidence of auto collisions, and that Aaron, instead of having committed a robbery, had negligently collided with Stellas' car in such an area. Clearly, the benefits of Section 768.81, Florida Statutes, **are** available in that situation,

even though **Stellas** and the Academy would apparently reach the opposite result under their theory.

Permitting allocation in favor of a negligent defendant is consistent with Florida law, not only as expressed in Fabre, but also in connection with the contribution statute. Section **768.31(2)(a),** Florida Statutes, provides:

> Except as otherwise provided in this act, when two or more persons become jointly or severally liable in tort for the same injury to person or property, or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

Section **768.31(3),** Florida Statutes, provides, in pertinent part:

> In determining the pro rata share of tortfeasors in the entire liability: (a) Their relative degrees of fault shall be the basis for allocation of liability.

Section **768.31(2)(c),** Florida Statutes, provides:

> There is no right of contribution in favor of any tortfeasor who has intentionally (willfully or wantonly) caused or contributed to the injury or wrongful death.

Thus, the statute provides that there is no right of contribution in favor of intentional tortfeasors, but permits contribution **against** intentional tortfeasors in favor of negligent tortfeasors. Moreover, the statute (like Section 768.81, Florida Statutes) provides that the pro rata liability of tortfeasors is determined by their relative degrees of **"fault,"** not by their relative degrees of **"negligence."**

Pursuant to that statute, the courts have held that an intentional tortfeasor is not entitled to contribution. see, for instance, Jewelcor Jewelers & Distributors, Inc. v. Southern Ornamentals, Inc., 499 So.2d 850 (Fla. 4th DCA 1986), rev. den., 509 So.2d 1118 (Fla. 1987). By the same token, the District Courts permit contribution against an intentional tortfeasor in favor of a negligent tortfeasor. See, Nesbitt v. Auto-Owners Ins. Co., 390 So.2d 1209 (Fla. 5th DCA 1980).[9]

Section 768.31, Florida Statutes, thus evinces a legislative policy determination that an intentional tortfeasor should **not** be permitted to diminish his financial responsibility simply because another entity has negligently contributed to the plaintiff's injury, but that the **negligent** tortfeasor should be permitted to diminish the extent of his financial liability by obtaining contribution from an intentional tortfeasor who also contributed to plaintiff's injury.

Where, as here, plaintiff's claim against defendant is for negligence, that legislative policy is furthered by including intentional tortfeasors among those to whom fault is allocated by

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[9] The Academy cites Insurance Co. of N. America v. Poseidon Maritime Services, Inc., 561 So.2d 1360 (Fla. 3d DCA 1990), as being to the contrary. It is not. In that case, the party seeking contribution (a subrogated insurer) had asserted that the amounts it paid in settlement were for negligence. However, the documents attached to the contribution complaint asserted claims for both negligence and intentional tort -- and even the negligence claim appears to have involved claims of willful or wanton misconduct. The District Court held that those attached documents were a part of the contribution complaint for all purposes and that the trial court had properly relied on them in dismissing the contribution complaint.

the jury. In such situations, including the intentional tortfeasor in the jury's allocation of fault achieves precisely the goal sought by Section 768.81, Florida Statutes: to measure the extent of the negligent defendant's liability by the extent of that defendant's fault. Just as it has done with the contribution statute, the Legislature has permitted negligent defendants to obtain the benefits of the statute, but has forbidden intentional tortfeasors from obtaining those benefits: the statutory prohibition of Section 768.31(2)(c), Florida Statutes, against contribution in favor of an intentional tortfeasor is mirrored in Section 768.81(4)(b), Florida Statutes, which prohibits an intentional tortfeasor from obtaining the benefits of proportionate liability.

It has been argued that simple negligence is different in kind from intentional wrongdoing, and that the two types of fault cannot be compared. Florida case law, however, rejects that argument. As noted above, a negligent tortfeasor can obtain contribution, based on relative shares of fault, from an intentional tortfeasor. Moreover, Florida case law permits application of comparative negligence to reduce the plaintiff's recovery even where the defendant's conduct has been egregious. American Cyanamid Co. v. Roy, 466 So.2d 1079 (Fla. 4th DCA 1984), approved in part, quashed on other grounds in part, 498 So.2d 859 (Fla. 1986) (comparative negligence applied notwithstanding willful and wanton misconduct on the part of defendant); Tampa Electric Co. v. Stone & Webster Engineering Corp., 367 F.Supp. 27 (M.D. Fla. 1973) (comparative

negligence applicable to compensatory damages notwithstanding gross negligence, although inapplicable to punitive damages).

Similarly, case law in other jurisdictions permits gross negligence, willful and wanton misconduct, or other aggravated conduct on the part of the defendant to be compared to simple negligence of the plaintiff in assessing comparative negligence. See, Comeau v. Lucas, 90 A.D.2d 674, 455 N.Y.S.2d 871 (1982); Lomonte v. A & P Food Stores, 107 Misc. 2d 88, 438 N.Y.S.2d 54 (1981); Plyler v. Wheaton Van Lines, 640 F.2d 1091 (9th Cir. 1981, applying California law); Billingsley v. Westrac Co., 365 F.2d 619 (8th Cir. 1966, applying Arkansas law); Amoco Pipeline Co. v. Montgomery, 487 F.Supp. 1268 (W.D. Okla.1980, applying Oklahoma law).

Patently, if gross negligence or willful and wanton misconduct can be compared with simple negligence for purposes of determining the relative degrees of fault of plaintiff and defendant in a comparative negligence situation, or can form the basis of a comparison of relative degrees of fault for purposes of the contribution act, there is no reason why that same comparison of simple negligence with more aggravated or egregious forms of misconduct cannot similarly be made for purposes of the allocation of fault called for by Section 768.81, Florida Statutes.

Under Florida law, a jury is permitted to determine the relative degrees of fault of all "at-fault" entities, even where one of the at-fault entities is negligent and another is guilty of an intentional tort. Section 768.81, Florida Statutes, requires

the determination of the relative degree of fault of <u>all</u> at-fault entities whose conduct causally contributed to the plaintiff's injury. The statute applies where the plaintiff's action <u>asainst the defendant</u> sounds in negligence, as in this case. The statute grants the benefit of its proportionate liability provisions to defendants, such as Alamo here, who are found guilty of nothing more than negligence, although it bars intentional tortfeasors, such as Aaron here, from taking advantage of its provisions. Thus, the trial court properly permitted the jury to allocate fault to Aaron, the intentional tortfeasor in this case. The Third District properly affirmed. That decision should be approved, and the contrary decisions of other District Courts of Appeal should be disapproved.

III. NO REASON EXISTS FOR THIS COURT TO REVISIT ITS RECENT DECISION IN <u>FABRE V. MARIN</u>, 623 So.2d 1182 (Fla. 1993).

The Academy of Florida Trial Lawyers asks this Court to revisit and recede from its recent decision in <u>Fabre v. Marin</u>, 623 So.2d 1182 (Fla. 1993). No reason exists to do so.

We will assume, for purposes of this brief, that this issue has been properly preserved for review (and that the parties will correct any mistake in that assumption).

<u>Fabre</u> was decided a scant three years ago. This Court resolved a conflict between the Third and Fifth District Courts of Appeal as to whether the jury's allocation of fault under Section 768.81, Florida Statutes, should include fault attributable to entities who were not, or could not be, parties to the suit. This

Court held, pursuant to the plain language of the statute, that fault attributable to non-parties should be included. To paraphrase Stellas (Initial Brief at 15), under Fabre the "all or nothing" approach imposed by holding defendants liable for damages caused by non-parties gave way to a far more equitable system of responsibility based on comparison of the fault of all at-fault entities. That decision is fully consistent with Florida's long-standing jurisprudential trend towards equating the extent of a party's liability with the extent of that party's fault.

That policy has not changed since Fabre was decided, nor has the statute's language. Indeed, bills have been introduced in subsequent legislative sessions to revise Section 768.81, Florida Statutes, to exclude consideration of non-party fault. Those bills have uniformly failed. Thus, the legislature has demonstrated that this Court correctly understood the legislative intent when it decided Fabre. This Court should continue to abide by that legislative intent.

The Academy raises a series of pleading and procedural issues as grounds for receding from Fabre. Such issues can be resolved as they arise. Indeed, this Court recently resolved a number of them in Nash v. Wells Fargo Guard Services, Inc., 21 FLW S292 (Fla. 1996). The remaining issues likewise can, and should, be resolved on a case-by-case basis.

We do not propose to re-argue Fabre here, nor to follow the Academy's example of wholesale inclusion of the briefs filed in

that case, which are included in the Court's own records. Suffice to say, Fabre was correctly decided, and it remains correct today.

If a result of Fabre is that tort cases involve additional entitles and do not settle as quickly and easily as before, that is simply a result of the legislature's decision to move to a more fundamentally fair system of not imposing liability on a defendant based on the fault of another party for whom the defendant is not responsible. No longer can plaintiffs simply sue a defendant whose fault is small but whose pockets are deep, secure in the knowledge of full recovery, and leave that defendant with the risk of trying to collect from another whose fault is great but whose finances are slight. Instead, the fault of all entities is appraised by the jury, and each defendant is held liable in damages in accordance with its share of fault, not its share of wealth. Any "remedy" for the fairness of that result is to be found in the legislature.

The Academy's argument that non-parties (or former parties who settled) are somehow harmed by having their fault included in the jury's apportionment rings hollow. Plaintiffs and defendants in such cases have ample economic reasons to fully develop the facts of such non-party fault before and during trial. The non-party is not held liable in money damages, and is not in any way bound by the jury's allocation of fault.

No reason exists to revisit and recede from Fabre. If the Academy does not like inclusion of non-party fault in the jury's allocation, it is free to seek a change in the legislature. Until

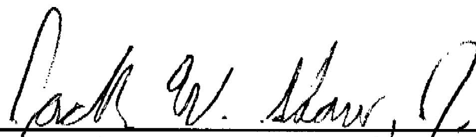
the legislature changes the statute, this Court should continue to abide by the legislature's intent.

CONCLUSION

For all the reasons set forth above, this Court should approve the Third District's decision and hold that Section 768.81, Florida Statutes, permits a defendant found to have been negligent to have the jury also determine the causative fault of intentional tort-feasors, and to have judgment entered in accordance with the statutory plan of proportionate liability. The trial court properly permitted the jury in this cause to allocate percentages of fault among all at-fault entities involved, in accordance with the proportionate liability provisions of Section 768.81, Florida Statutes, and properly entered judgment based on that allocation. The Third District properly affirmed. That ruling should be approved.

Respectfully submitted,

BROWN, OBRINGER, SHAW, BEARDSLEY & DeCANDIO
Professional Association



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Florida Defense Lawyers Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Scott Jay **Feder,** Esquire, 3100 First Union Financial Center, 200 South Biscayne Boulevard, Miami, FL 33131; Renee Braeunig, Esquire, 110 S.E. Sixth Street, 28th Floor, P.O. Box 14245, Ft. Lauderdale, FL 33302; Joel S. **Perwin,** Esquire, 25 W. Flagler Street, Suite 800, Miami, FL 33130; **Asa** Groves! III, Esquire, Two Datran Center, PH II, 9130 South **Dadeland** Boulevard, Miami, FL 33156; Kerry C. **McGuinn,** Jr., Esquire, Perry Paint **&** Glass Building, Suite 500, 109 North Brush Street, P.O. Box 3283, Tampa, FL 33601; and G. **Bart** Billbrough, Esquire, One Biscayne Tower, 25th Floor, 2 South Biscayne Boulevard, Miami, FL 33131, by U.S. Mail, this 1st day of August, 1996.

Jack W. Shaw, Jr.

Attorney

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