SUPREME COURT OF FLORIDA

CASE NO. 88,250

RACHELLE M. STELLAS and
FRANK STELLAS, her husband,

Petitioners,

vs.

ALAMO RENT-A-CAR, INC.,

Respondent.
_____/

On Review of a Certified Question From The Third District Court Of Appeal.

RESPONDENT'S BRIEF ON THE MERITS

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

TABLE OF CONTENTS

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

TABLE OF AUTHORITIES

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

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Miscellaneous

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

INTRODUCTION

The petitioners, Rachelle M. Stellas and Frank Stellas, her husband, seek review and resolution of a certified question from the Third District Court of Appeal. The Third District has asked this court to determine whether in a negligence action, an intentional actor is to be placed on the verdict form for fault apportionment purposes.

The petitioners, Rachelle M. Stellas and Frank Stellas, her husband, were the plaintiffs in the trial court, appellants before the Third District Court of Appeal, and will be referred to on review as the plaintiffs, the petitioners, or by specific name.

The respondent, Alamo Rent-A-Car, Inc., was the defendant in the trial court and will be referred to on review as the defendant, the respondent, or as "Alamo."

References to the record on appeal will be designated by the letter "R". References to the trial transcript will be designated by the letter "T". All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND THE FACTS

In their complaint, the Stellas sued Alamo Rent-A-Car for negligent failure to warn of Miami tourist dangers and in failing to provide adequate directions. As cogently stated by the Third District:

> The Stellases rented a car from Alamo in Orlando and made arrangements to return it in Miami. During that portion of the trip returning to Miami, the Stellases' daughter, who was driving, took a wrong turn off the expressway into a high-crime area. While stopped at a traffic signal, Bernard Aaron approached the vehicle and smashed the passenger side window grappling with Mrs. Stellas before taking her purse and fleeing. The assailant was subsequently apprehended.
>
> Stellas v. Alamo Rent-A-Car, Inc., 673 So.2d 940, 941 (Fla. 3d DCA 1996).

In its answer, Alamo denied all material allegations to the complaint. (R. 11-14). Additionally, Alamo asserted as an affirmative defense that:

> At the approximate time and place alleged, the Plaintiffs' injuries and/or damages were caused by a superseding intervening criminal act caused by third persons, for which the Plaintiff is barred or limited in his recovery against this Defendant. (R. 12).

On August 29, 1994, a jury trial in this case was had before the Honorable Philip Bloom, Circuit Court Judge of the Eleventh Judicial Circuit in and for Dade County, Florida. (T. 1-570). In presenting their claim, the Stellas offered evidence from a security expert (T. 78-117), the officer who investigated the smash and grab (T. 119-133), the Stellas' daughter (T. 139-162),

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

as well as the testimony of Mr. Stellas (T. 237-275) and Mrs. Stellas (T. 337-361).

In substance, the testimony from the Plaintiffs' witnesses recounted the rental of the Alamo vehicle, the smash and grab incident in Miami, and the subsequent apprehension of the criminal perpetrator, Bernard Aaron. The Plaintiffs' security expert described what he thought Alamo could have done differently. The Stellas and their family members described the nature of Mrs. Stellas' damages.

While preparing the verdict form, the parties had a dispute on who should be listed as potential "at-fault" candidates for purposes of apportionment. An issue arose concerning whether the non-party intentional tortfeasor -- the smash and grab artist Aaron -- should be included on the verdict form for apportionment with Alamo's responsibility, if any. After hearing argument on the matter, the trial court determined that section 768.81, Florida Statutes, required that the non-party intentional tortfeasor be included on the verdict form. (T. 440).

At the conclusion of the trial, the jury returned its verdict. The jury found that Alamo was negligent; that the Stellas were not negligent; and that fault between Alamo and the non-party intentional tortfeasor should be apportioned 10% and 90%, respectively. On the issue of damages, the jury found Mrs. Stellas' past medical expenses to have been $1,000.00; her future medical expenses to be $4,000.00; her property loss to have been $14,400.00; and her psychic damage claim to be worth $20,000.00.

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

Finally, Mr. Stellas was awarded $500.00 on the loss of consortium claim. (R. 549-551).

After judgment was entered in this cause, the Stellas sought review in the Third District Court of Appeal. In that forum, the court affirmed the lower court's fault apportionment ruling. The Third District relied primarily on Judge Ervin's dissent in Department of Corrections v. McGhee, 653 So.2d 1091, 1093 (Fla. 1st DCA 1995), approved, 666 So.2d 140 (Fla. 1996). As succinctly summarized by Judge Ervin and adopted by the Third District:

> [T]he 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 the 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.
>
> McGhee, 653 So.2d at 1101.

To this analysis, the Third District added that "[t]he unmistakable intent of 768.81(3) is to limit a negligent defendant's liability to his percentage of fault. The whole fault, of which a negligent defendant's acts are but a part, is broad enough to encompass an intentional tortfeasor's acts." Stellas, 673 So.2d at 942-43.

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

The Third District noted that the Fourth District Court of Appeal had reached a different result, and certified the question of great public importance to this Court. See Slawson v. Fast Food Enters., 671 So.2d 255 (Fla. 4th DCA 1996).

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

ISSUES ON REVIEW

I.

WHETHER THE THIRD DISTRICT COURT ERRED IN CONCLUDING THAT A NON-PARTY INTENTIONAL TORTFEASOR MUST BE PLACED ON A VERDICT FORM PURSUANT TO SECTION 768.81, FLORIDA STATUTES FOR FAULT APPORTIONMENT PURPOSES?

II.

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

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

SUMMARY OF THE ARGUMENT

Under Florida Law, a jury is permitted to determine the relative degrees of fault of all "at-fault" parties, even where one of the at-fault entities not present before the court contributed to the injuries through intentional conduct. Section 768.81, Florida Statutes, grants Alamo the benefit of a proportionate determination of liability on the instant facts. Accordingly, the Third District was eminently correct in including the non-party intentional tortfeasor on the verdict form.

This Court's recent decision in Fabre v. Marin, 623 So.2d 1182 (Fla. 1993), is well-reasoned and consistent with the developing trend in fault analysis in this state. No reason exists to revisit and recede from Fabre. Neither petitioners nor their supporting amicus have raised any new issues not addressed in Fabre or its progeny. The argument is without merit.

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

ARGUMENT

I.

A NON-PARTY INTENTIONAL TORTFEASOR MUST BE PLACED ON A VERDICT FORM PURSUANT TO SECTION 768.81, FLORIDA STATUTES FOR FAULT APPORTIONMENT.

The Stellas contend that the Third District erred in concluding that the non-party tortfeasor belonged on the verdict form for fault apportionment purposes. In Section 768.81(3), Florida Statutes, the Florida Legislature has provided for assessment of a tortfeasor's liability based upon his **percentage** at fault, and not upon the doctrine of joint **and several** liability:

> In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such parties' 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 Court in Fabre v. Marin, 623 So.2d 1182 (Fla. 1993), made clear that this statutory provision requires jury consideration of the extent of fault of any party involved in causing a plaintiff's injuries, even if that party is not present in the lawsuit.

The Stellas contend that the above-cited statute and the Fabre holding should not apply to situations where the non-party

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

tortfeasor has intentionally, rather than negligently, caused a plaintiff's injuries. In making this argument, the Stellas place too much emphasis on the non-parties' state of mind. Regardless of whether the non-parties' conduct was negligent or intentional, the focus of any analysis must be on an apportionment of Alamo's responsibility. This interpretation is consistent with the statutory language and cases construing this subject.

The Stellas' allegations against Alamo in this case were unequivocally predicated on a theory of negligence. The comparative fault statute specifically applies to actions for negligence. §768.81(4), Florida Statutes. On its face, the statute requiring an apportionment of fault applies to the claims brought by the Stellas. Indeed, as to this simple but important point, there is no dispute.

The Third District Court of Appeal was entirely correct in determining that a negligent defendant is entitled to have the fault of other entities, including intentional tortfeasors, considered by the jury, so as to reduce that defendant's liability. A review of the development of fault apportionment, along with the plain language of the statute, and this Court's recent decisions, as well as decisions from other jurisdictions, plainly supports the Third District's correct conclusion.[1]

[1] Alamo adopts and incorporates here by reference the arguments presented by the defense amici in this cause.

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

a. The Development of Fault Apportionment

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

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

Under the doctrine of contributory negligence, even if the plaintiff's negligence was only partially responsible for the accident, there could be no recovery from a defendant who may have been guilty of even greater negligence. Louisville & N.R.R. v. Yniestra, 21 Fla. 700 (1886). While the doctrine was in effect, fault apportionment among defendants did not exist because of the doctrine of joint and several liability. Under that doctrine, all negligent defendants were held responsible for the total of the plaintiff's damages, regardless of the extent of

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

each defendant's fault in causing the accident. Louisville & N.R.R. v. Allen, 67 Fla. 257, 65 So. 8 (1914).

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

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

Fabre, 623 So.2d 1185, citing Hoffman, 280 So.2d at 436. In succession, the Florida Legislature enacted the Uniform Contribution Among Tortfeasors Act; this Court abolished the rule of contribution among joint **tortfeasors;** and then questioned joint and several liability to the point that the legislature enacted section 768.81(3). Ch. 75-108 Laws of Fla. (1975); Lincenberg v. Issen, 318 So.2d 386 (Fla. 1975); Walt Disney World Co. v. Wood, 515 So.2d 198 (Fla. 1987); Ch 86-160 Laws of Fla. **(1986)** ; see e.g. Agencv for Health Care Admin. v. Associated Industries of Fla., Inc., ____ So.2d ____ (Fla. June 27, 1996) [21 FLW S296].

In 1986, as part of the Tort Reform Act of 1986, the Florida Legislature **enacted section 768.81,** which stated in relevant parts:

> (3) APPORTIONMENT OF DAMAGES. - In cases to which this section applies, the court shall enter judgment against each party liable on

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

> the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of joint and several liability.
>
> (4) APPLICABILITY. -
>
> (a) This section applies to negligence **cases.** 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.
>
> (b) This section does not apply to any action brought by any person to recover actual economic damages resulting from pollution, to any action based upon an intentional tort, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by chapter 403, chapter 498, chapter 517, chapter 542, or chapter 895.

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

In Fabre, this Court was called upon to reconcile a conflict in the districts concerning section 768.81. In Fabre, the court

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

was asked to decide whether the term "party" had any limitations in meaning and application.

The court conducted an historical analysis of the doctrines of contributory negligence, joint and several liability, and comparative negligence and fault. The court concluded that section 768.81(3) was unambiguous, and by its clear terms stated that judgment should be entered against each party liable on the basis of that party's percentage of fault. "Party" was not limited to those named in litigation, but rather all entities who contributed to the accident, "regardless of whether they [had] been or could have been joined as defendants." Fabre, 623 So.2d at 1185.

A little further on in the Fabre opinion, this court addressed two situations where the plaintiff may not get 100% of its judgment:

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

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

> 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 Mrs. Marin could not sue her husband does not mean that he was not partially at fault in causing the accident.

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

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

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

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

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

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

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

In this case, the Stellas' claim against Alamo is one predicated solely on negligence and falls within the parameters of section 768.81. Alamo is not charged with any intentional

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

wrongdoing nor has any claim been made to remove the application of the fault apportionment statute from this case. Alamo, the purportedly negligent party, and not Aaron, the intentional tortfeasor, seeks to invoke the provisions of section 768.81. The Stellas' are confused when they refer to the intentional tortfeasor receiving a benefit from application of the comparative fault statute. This is not a situation where a party receives a benefit. Rather, the purportedly negligent defendant, consistent with the development of fault apportionment in this state, is now only required to pay his percentage of non-economic damages. There is no benefit to the intentional tortfeasor.

b. Section 768.81 Applies to Non-Party Intentional Tortfeasors

To avoid the plain application of the statute to the allegations in this case, the Stellas argue that Section 768.81(4)(b), Fla. Stat., prohibits an intentional tortfeasor's inclusion on the verdict form. Section 768.81(4)(b) provides in pertinent part:

> This section does not apply to any action brought by any person to recover actual economic damages resulting from pollution, to any action based upon an intentional tort, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by [various provisions of the Florida Statutes]. (emphasis supplied).

The purpose of the statutory prohibition against applying Section 768.81, Florida Statutes, to cases involving intentional torts is

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

to prevent an intentional tortfeasor from minimizing his financial responsibility by shifting some fault for injuries to other tortfeasors. In enacting this requirement, the Legislature merely recognized that it would not permit intentional tortfeasors to obtain the statute's benefit. Nothing about the statute's inapplicability to an intentional tortfeasor's liability runs contrary to the rationale of applying this statute to a negligent tortfeasor's financial responsibility. Simply stated, Section 768.81(4)(b) merely represents the Legislature's "drawing of the line" between intentional tortfeasors and negligent tortfeasors. The former do not get the benefit of the statute, but the latter do. The public policy considerations justifying the distinction in treatment of these two kinds of tortfeasors is plain on its face.

According to the Stellas, the comparative fault statute has the limited effect of 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 its absurdity." Weidenfeller v. Star & Garter, 1 Cal.App.4th 1, 2 Cal.Rptr.2d 14, 15-16 (1991). Fault apportionment for a negligent defendant should occur among all parties.

The Stellas also argue that a negligent defendant should not be permitted to reduce its liability in a situation where it has failed to prevent the actions of a non-party's intentional tort. To support this argument, the Stellas cite Holley v. Mount Zion

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

Terrace Apartments, Inc., 382 So.2d 98 (Fla. 3d DCA 1980). Aside from the fact that the Holley decision did not involve the application or construction of Section 768.81, Florida Statutes, the defendant in that case sought to completely escape liability on foreseeability grounds. As such, the Holley decision is both factually and legally inapposite. See Reichert v. Atler, 117 N.M. 623, 875 P.2d 379 (1994) (business owner's negligent failure to protect patrons from foreseeable harm may be compared to conduct of third party who caused harm, and owner is responsible only for its percentage of fault); Natseway v. City of Tempe, 184 Ariz. 374, 909 P.2d 441 (Ariz. App. 1995) (defendant city entitled to compare fault with that of fleeing suspect in automobile collision).

There is simply no rational basis for any court to conclude that Florida's statute and cases demand that a negligent defendant not be entitled to compare his fault to an intentional tortfeasor. The petitioners' argument amounts to a penalty against the negligent tortfeasor. Such a penalty would frustrate the purpose of the comparative fault statute and also violate the common sense notion that a more culpable party should bear the financial burden caused by its intentional act.

Finally, the petitioners argue that a jury will always apportion fault in excessive percentages against the intentional actor. That argument is not based on any statistical, or even legal, analysis. It is pure hype. A jury should be given more credit. A jury will be able to understand the duties involved in

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

situations involving a negligent defendant and an intentional tortfeasor. A jury will be able to equitably apportion fault according to those duties and the facts presented in a particular case.

c. The Third District's Analysis and Judge Ervin's Analysis in McGhee

This Court should follow the analysis of this precise question by Judge Ervin in Department of Corrections v. McGhee, 653 So.2d 1091 (Fla. 1st DCA 1995), on this issue. Judge Ervin, in his concurrence and dissent, discussed the issue of whether a trial court should permit juries to apportion non-economic damages between negligent and intentional tortfeasors. After surveying the arguments on both sides of this issue, Judge Ervin ultimately concluded that non-party intentional tortfeasors should be included on verdict forms under Section 768.81, Florida Statutes:

> After considering the arguments by counsel and the authorities cited, I would affirm [the trial court's inclusion of the intentional tortfeasor on the verdict form] as to this issue. It is clear that plaintiff's action against the DOC was based on negligence, and the comparative fault statute specifically applies to actions for negligence. Section 768.81(4), Fla. Stat. (1989). No action was brought by appellee on the theory of intentional tort. In reaching my conclusion, I am greatly persuaded by the cogent analysis of the Supreme Court of New Jersey in Blazovic v. Andrich, 590 A.2d 222 (N.J. 1991), which appears to be in harmony with the spirit of Florida's comparative negligence law. In Blazovic, the court explained that early cases had distinguished between negligent and intentional conduct in order to

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

> circumvent the harsh effect of the contributory-negligence bar, under the view that intentional tortfeasors should be required to pay damages as a means of deterring them from future wrongdoing, regardless of whether a plaintiff had been partially negligent. Additionally, under common law, joint tortfeasors could not seek contribution from each other. With the passage of contribution law, joint tortfeasors could recover their pro rata share of the judgment from the other joint tortfeasors, thereby limiting their liability. Intentional tortfeasors could not seek contribution, however, and such prohibition was intended to deter future wrongdoing; the same theory advanced vis-a-vis a plaintiff and an intentional tortfeasor. Id. at 228-29.
>
> With the advent of comparative negligence, the all-or-nothing result of contributory negligence was eliminated and recovery was allowed based on a percentage of the parties' negligence. Moreover, under the comparative fault statute, joint tortfeasors were no longer liable for a pro rata share, but were liable in proportion to their percentage of fault. In the court's view, the application of the law in such manner results in greater fairness to both moderately negligent plaintiffs, as well as joint tortfeasors. Id. at 230.
>
> The court further observed that some courts had refused to apportion negligence to intentional tortfeasors, but it was unpersuaded by those cases. It found the more just result was to allow comparative negligence as to both negligent and intentional tortfeasors, because it distributes the loss according to the respective faults of the parties causing the loss. Id. at 231
>
> Department of Corrections v. McGhee, supra, 653 So.2d at 1101.

Judge Ervin continued his discussion of the issue by discussing how the New Jersey court's analysis was consistent

WALTON LANTAFF SCHROEDER & CARSON
TWENTY-FIFTH FLOOR, ONE BISCAYNE TOWER. 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131
TELEPHONE (305) 379-641 I • FACSIMILE (305)577-3875

with Florida law's treatment of comparative fault issues in recent years:

> The **reasoning** of the court's opinion in Blazovic appears to me to be consistent with the Florida courts' general interpretations of section 768.81 in that the statute clearly requires a jury's consideration of each individual's fault contributing to an injured person's damages, even if such person is not or cannot be a party to the lawsuit. See Fabre v. Marin, 623 So.2d 1182 (Fla. 1993); Allied-Signal, Inc. v. Fox, 623 So.2d 1180 (Fla. 1993) . As observed in Marin: "Clearly, the only means of determining a party's percentage of fault is to compare that party's percentage to all of the other entities who contributed to the accident, regardless of whether they have been or could have been joined **as** defendants." 623 So.2d at 1185.
>
> 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 an 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 of the loss according to the percentage of fault of each party contributing to the loss.
>
> Department of Corrections v. McGhee, supra.

The analysis of Judge Ervin is both cogent and compelling. Under Florida Law, a jury is permitted to determine the relative degrees of fault of all "at-fault" parties, even where one of the

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

at-fault entities not present before the court contributed to the injuries through intentional conduct.

The Third District adopted Judge Ervin's analysis, and also added that the intent is clear from the language used in the statute and that the unmistakable intent of the statute is to limit a negligent defendant's liability to his percentage of fault. The court correctly stated that "[t]he whole fault, of which a negligent defendant's acts are but a part, is broad enough to encompass an intentional tortfeasor's acts." Stellas, 673 So.2d at 942-43. Where a plaintiff brings a negligence action, there is no basis in the statute for piecemealing or dividing fault based upon the conduct of the other tortfeasors. A negligent defendant has a right to apportion fault with the other tortfeasors. The statute is clear.

Neither Judge Jorgenson's dissent, the Fourth District's decision in Slawson (which we understand has settled), nor the First District's decision in Wal-Mart (which is essentially a rehash of Judge Jorgenson's dissenting opinion in Stellas), command any authority requiring a different result. Each issue raised in those decisions was considered and rejected by Judge Irvin or the Third District. No one of these contrary decisions can point to any indication that public policy, as expressed through legislative action, i.e. the fault apportionment statute, would command that a negligent defendant not have his fault shared with an intentional actor. These decisions engage in

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

contortionistic analysis on straightforward statutory language and case law development of fault apportionment.

Section 768.81, Florida Statutes, grants Alamo the right of a proportionate determination of liability on these facts. Accordingly, the Third District and the trial court were eminently correct in including the non-party intentional tortfeasor on the verdict form.

To place the entire responsibility for the incident on Alamo would be inconsistent with the principles of comparative fault that are embodied in the Tort Reform Act. In adopting Florida's comparative fault scheme, the Legislature intended that the trier of fact consider the fault of all persons who contributed to the harm and intended that each tortfeasor be responsible for only his or her percentage of fault and no more.

The petitioners' arguments refute common sense and the purpose of the statute. There is a common sense notion that a more culpable party should bear the financial burden caused by its intentional act. See Weidenfeller v. Star & Garter, 1 Cal.App. 4th 1, 2 Cal.Rptr.2d 14 (1991). By arguing against comparative fault, the injured party is attempting to transfer the intentional actor's responsibility to the negligent tortfeasor, in contravention of the statute. Common sense mandates an opposite result.

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

II.

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

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

As pointed out in Fabre, and in this brief, Fabre and the fault apportionment statute are steps in the evolution of fault apportionment from its onerous and harsh beginning, to its more reasonable and fair current state.[3] The Fabre decision is one more step in the logical progression of placing fault on the proper "parties."

In this Court's recent decision in Nash v. Wells Fargo, So.2d (Fla. 1996) [21 FLW S292], this Court determined that a defendant has the burden of pleading, proof and persuasion for fault apportionment. In the absence of meeting the burden, the

---

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

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

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

jury does not apportion fault. Furthermore, Nash held that a defendant must identify the at fault parties in the answer. So much for the myriad of problems complained about by the petitioners and supporting amicus.

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

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

Assuming that the non-party defendant is not immune from suit, such as Fabre or Fox, and the named defendant can proceed against the non-party defendant on a contribution theory, the non-party defendant is entitled to a full trial establishing its percentage of fault. The subsequent proceeding, either based on contribution or indemnification, is not bound by the

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

determinations in the first proceeding where the non-party did not participate. See Sol Walker & Co. v. Seaboard Coast Line R.R. Co., 362 So.2d 45 (Fla. 2d DCA 1978) (Grimes, Chief Judge). There is no res judicata effect to the non-party, and hence no due process problem, because the non-party defendant is accorded his full and fair day in court.

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

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

CONCLUSION

Based upon the foregoing rationale and authority, the Appellee, Alamo Rent-A-Car, Inc., respectfully requests this Honorable Court to approve the decision of the Third District Court of Appeal.

Respectfully submitted,

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

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

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

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 27th day of September, 1996 to: Scott Jay Feder, Esquire, Feder & Fine, P.A., Attorneys for Petitioners, 3100 First Union Financial Center, 200 South Biscayne Blvd., Miami, Florida 33131; Asa Groves, III, Esquire, Stephens, Lynn, Klein, & McNicholas, P.A., Attorneys for Respondent, Two Datran Center, PH II, 9130 South Dadeland Boulevard, Miami, Florida 33156; Jack W. Shaw, Jr., Esquire, Brown, Obringer, Shaw, Beardsley & DeCandio, Attorneys for The Florida Defense Lawyers Association, 12 East Bay Street, Jacksonville, Florida 32202; Joel S. Perwin, Esquire, Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., Attorneys for The Florida Academy of Trial Lawyers, Suite 800, 25 West Flagler Street, Miami, Florida 33230; Kerry C. McGuinn, Jr., Esquire and Michael S. Rywant, Esquire, Rywant, Alvarez, Jones & Russo, P.A., Attorneys for Auto-Owners Insurance Company and Hanover Insurance Company, Perry Paint & Glass Building, Suite 500, 109 North Brush Street, Post Office Box 3283, Tampa, Florida 33601; Wendy F. Lumish, Esquire, Popham, Haik, Schnobrich & Kaufman, Ltd., Attorneys for The Product Liability Advisory Council, Inc., 4000 International Place, 100 S.E. Second Street, Miami, Florida 33131; Neil H. Butler, Esquire, 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 Florida Statutory Teaching Hospital

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

Council, Post Office Box 839, Tallahassee, Florida 32302-0839; and John Beranek, Esquire, Ausley & McMullen, Attorneys for CSX Transporation, Inc., 227 South Calhoun Street, Post Office Box 391, Tallahassee, Florida 32302.

By: _____
G. BART BILLBROUGH

GBB\bj
H:\LIBRARY\33710001.50\B\RESP.SCT

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