IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,250

DISTRICT CASE NO.94-2583

LOWER TRIBUNAL NO. 93-24471 CA25

RACHELLE M. STELLAS and
FRANK STELLAS, her husband,

Petitioners,

vs.

ALAMO RENT-A-CAR, INC.,

Respondent.

PETITIONERS' INITIAL BRIEF
(As Corrected)

On Discretionary Review from the Third District Court of Appeal

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STATEMENT OF THE CASE AND OF THE FACTS

In December, 1993, Petitioners, Rachelle and Frank Stellas, sued Respondent, Alamo Rent A Car, for its negligence in failing to warn them of known, foreseeable criminal dangers to people like themselves who were in rental cars in Dade County, Florida. Rachelle Stellas was brutally attacked in her rental car by a criminal whose modus operandi was to target tourists in rental cars. The jury returned a verdict in favor of the Stellas' but apportioned liability between Alamo, a negligent tortfeasor, and the criminal mugger, an intentional tortfeasor (who was not a litigant to the lawsuit). The jury found that Alamo was 10% at fault and that the criminal was 90% at fault.[1] The district court of appeal reversed and remanded for a new trial on damages due to error which is not at issue in this appeal.[2] However, the district court affirmed the trial court's ruling permitting the jury to apportion fault between the intentional tortfeasor and the negligent tortfeasor. The issue presented in this appeal is whether §768.81, Fla. Stat. (1986), generally known as the Comparative Fault Act, applies to circumstances where a victim has been injured as a result of both negligent and intentional wrongdoing.

On July 1, 1992, Rachelle and Frank Stellas flew from Los Angeles, California along with their daughter, Lisa, and grand daughter, Nicole. The family planned to

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[1] The jury found that Rachelle Stellas was not comparatively negligent to any degree.

[2] The trial court had agreed with Alamo that this was a case under the Florida No-Fault Motor Vehicle Act ($627.727 et seq., Fla. Stat. (1992)) and, therefore, the jury had to find that there was a significant permanent injury. The district court correctly noted that the trial judge was in error pursuant to the principles stated by this Court in Race v. *Nationwide Mut.* Fire Ins. Co., 542 So.2d 347 (Fla. 1989).

attend Nicole's "Tae Kwon Do" tournament in Orlando, Florida and then tour other parts of Florida. R-141. Upon arriving in Orlando, the Stellas' rented a car from Alamo Rent A Car. They specifically advised the Alamo agent that they would be driving the car to Dade County, Florida and would be dropping the vehicle off there.[3] R-239.

During the summer of 1992, tourist crimes, and in particular, smash and grab crimes against tourists in rental cars, were a frequent problem in certain parts of Dade County. R-l 19 and 120. Alamo was well aware of the specific problem. The company took steps to protect its customers such as providing "Traveler's Safety Alert" warnings specifically designed to increase their customers' awareness of the special dangers to tourists in rental cars in Dade County. R-226, 227, 290, and 291. Additionally, Alamo removed any markers, tags and bumper stickers from its vehicles in Dade County which identified its cars as rental cars.[4] R-224. However, Alamo failed to issue any such warnings to the Stellas' despite these known, specific dangers R-360 and the car Alamo provided to the Stellas had a brightly colored "Alamo" bumper sticker on the rear bumper. R-83.

After attending Nicole's tournament, the Stellas' drove from Orlando to Key West. The family enjoyed a few days in the Keys, and then they drove to Miami International Airport on July 9, 1992 to drop Frank Stellas off. He needed to return to

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[3] Alamo could not dispute that it knew that the Stellas' were planning on traveling to Miami and would be dropping the car off there. It was on the rental agreement.

[4] These precautions were required by law in Dade County, but only as to vehicles rented in Dade County. Similar requirements would later become the law of the entire state, but the law was not enacted at the time the Stellas' rented their vehicle in Orlando.

California for a scheduled business engagement. R-142. The rest of the family planned on spending a few days at Sanibel Island on the west coast of Florida before returning the car to Miami and flying back to California. R-142. After dropping Mr. Stellas off, the three ladies started their trip to Sanibel. Rachelle Stellas was in the passenger seat, her daughter, Lisa, was the driver, and her young granddaughter, Nicole, was in the back. R-142. They never reached their destination. Shortly after leaving the airport, Lisa missed an exit, got off the expressway,, and ended up lost in the heart of the "Miami Triangle", an area known to Alamo and to Dade County law enforcement as a high crime area where tourists in rental cars were specifically targeted for smash and grab robberies. R-120 and 291. In the Alamo warnings normally given out to rental customers in Dade County, this specific area was identified as being one to avoid.

While at a stop light at the intersection of 50th Street and 27th Avenue, a criminal noticed the ladies in the Alamo car. Unbeknowst to the Stellas', he had a history of targeting tourists in rental cars for smash and grab robberies. He walked around to the back of the car and then pointed at the bumper. R-144. Suddenly, without warning, he ran to the passenger side and smashed the passenger side window. He leaped into the vehicle landing on Rachelle Stellas. R-l 15 and 145. While he lunged for the keys in the ignition, Lisa and Nicole frantically kicked and punched him. R-299. He was not able to get the keys but he did see Rachelle's handbag. He finally backed out of the Alamo car. He stood up with his trophy, Rachelle's handbag, held up high for the crowd to see. The crowd actually cheered. R-145 and 251.

A few minutes later Lisa saw a police car and was able to get the officer's

attention. Paramedics were immediately called and soon arrived. R-146. Rachelle was in shock from the horrifying episode. At the time of the incident, Rachelle, age 58, was already suffering from a pre-existing heart condition. Her chest cavity felt tight. She was bleeding all over from the broken glass. R-124 and 344. She was taken to North Shore Hospital by an ambulance where a battery of tests were run. R-124. The doctor prescribed bedrest for the time being. Ultimately, she was well enough to return home to California, but she continued to experience nightmares, irrational fears, chest pressure, and difficulty breathing. R-241. Eight days after the attack her cardiologist determined that she needed an immediate angioplasty which was performed at UCLA Medical Center. R-243.

The surgery was successful but the emotional difficulties persisted, especially the nightmares and the irrational fears. Rachelle sought professional help and began treating with a psychologist, Dr. Malinek. He diagnosed her as suffering from post traumatic stress disorder. R-166 and 174.

The criminal was eventually apprehended. When the local state attorney's office contacted her, Rachelle was willing to cooperate and checked with Dr. Malinek to see what he thought. Dr. Malinek thought she was up to testifying and that it might even be therapeutic for her to face her attacker. She agreed to return to Miami to testify, but despite the passage of time, while flying back to Miami to testify, Rachelle suffered a serious anxiety attack on the airplane. R-146. She was taken off the plane in Atlanta and rushed to the hospital. The anxiety of coming to Miami had exacerbated her heart

condition. R-147. She stayed there for three days before returning to California.[5]

The effects of the attack linger today. She is afraid of driving long distances and traveling alone. R-183. She suffers from recurring nightmares that she is being attacked. R-347. Dr. Malinek testified that even after a year of analysis and professional treatment these problems persist. His diagnosis was confirmed by objective findings such as the Minnesota Multi-phasic Personality Inventory II Test. R-180. He felt she would need at least another year of treatment.

The case was tried on August 29-31, 1994. At the conclusion of the trial, the jury returned its verdict finding that Alamo was negligent, but was only 10% at fault when compared with the 90% fault of the mugger. Rachelle Stellas was found to be free from any comparative negligence. The jury awarded the Stellas' only some of their past medical expenses ($1,000) only some of their future medical expenses ($4,000), the total value of their lost jewelry and property ($14,400) and past non-economic losses of $20,000. The jury awarded no non-economic losses for the future. Frank Stellas was originally awarded no damages, but after being re-instructed by the Court, the jury returned a verdict for Frank Stellas for past non-economic losses of $500 and no future non-economic losses.

On September 2, 1994, the Stellas' moved for a new trial or for judgment notwithstanding the verdict. This motion was denied.

On October 18, 1994, the Circuit Court entered a Final Judgment awarding

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[5] At the last moment, the criminal pled guilty. He is now serving time in a Florida correctional facility in Tallahassee.

$19,400[6] to the Stellas plus prejudgment interest of $3,882.08 for a total sum of $23,282.08.

On November 1, 1994, the Stellas' timely appealed to the Third District Court of Appeal. Oral argument occurred on September 19, 1995.

On May 22, 1996 the district court of appeal rendered its opinion. It held that the trial court erred in applying Q627.727 Fla. Stat. (1992) to the facts of this case. The matter was remanded for a new trial on damages. However, by a two to one vote, the court affirmed the trial courts' application of §768.81, Fla. Stat. (1986) permitting the jury to apportion fault between the negligent defendant and the intentional wrongdoer (who had not been sued).

Noting express conflict with the Fourth District Court of Appeals' opinion in *Slawson v.* Fast Food *Enterprises,* 671 So.2d 255 (Fla. 4th DCA 1996), the district court certified the question to the Supreme Court as being one of great public importance.

On June II, 1996, the Stellas timely filed their Notice of Discretionary Review to the Supreme Court.

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[6] The trial court erroneously determined that the case was under the No Fault Automobile Reparations Act, §627.727, Fla. Stat. (1992). Since the jury found no permanent injury, the court entered judgment for the Plaintiff but for economic losses only. The district court reversed the trial court on this point. The Plaintiff is entitled to non economic damages, past and future and thus a new trial on damages is necessary.

ISSUES ON APPEAL

I. WHETHER THE DISTRICT COURT ERRED IN ALLOWING APPORTIONMENT OF FAULT BETWEEN AN INTENTIONAL TORTFEASOR AND THE NEGLIGENT DEFENDANT?

II. WHETHER THE DISTRICT COURT ERRED IN ALLOWING APPORTIONMENT OF FAULT BETWEEN A NON-LITIGANT AND A LITIGANT?

SUMMARY OF ARGUMENT

The Stellas' were denied a fair trial because the trial court incorrectly misconstrued §768.81, Fla. Stat. (1986) as permitting the jury to apportion fault between an intentional tortfeasor and the negligent defendant. The district court affirmed, essentially opining that "liability equates fault", and "fault" means any type of wrongful conduct, negligent or intentional. This simplified, broad and misguided approach ignores:

(a) the proper interpretation of the term "fault", as used by the legislature in the statute, is as a synonym for "negligence";

(b) the legislative intent behind the statute to only change the law of joint and several liability (but intentional and negligent tortfeasors are not joint tortfeasors);

(c) the statute's express language that. it does not apply to any action based upon an intentional tort;

(d) the common law principle that negligent and intentional misconduct can never be compared because they are inherently different types of wrongdoing; and,

(e) the common law principle that a negligent actor can not be relieved of some, or all, responsibility to an injured victim by an apportionment of fault to the intentional wrongdoer which is the very hazard which the negligent actor failed to protect against.

Additionally, the interpretation of the statute which permits the jury to assess the "fault" of persons not before the *court, Fabre v. Marin,*[7] unconstitutionally violates the injured victim's right to due process. *Fabre* is wrong and should be revisited.

The district court's opinion that the statute's use of the term "fault" is unambiguous is wrong. The term is not defined in the statute. That so many of the best and brightest jurists across our state are unsure of the legislature's intent in the use of that term is proof that its meaning is ambiguous.[8] Examining the legislative history of the statute reveals that the drafters apparently took the term directly from the two key cases that created comparative negligence in Florida, *Hoffman* v. *Jones*[9] and *Lincenberg v. Issen.*[10] In those cases the courts used the term "fault" in a sense which makes it clear that it is being used as a synonym for the word "negligence". *Wal-Mart Stores, Inc. v. McDonald,* 21 Fla. L. Weekly D1369 (Fla. 1st DCA June II, 1996) (Webster, J. concurring) (pending in this Court).

The broad meaning read into the term "fault" by the district court in the case at bar is without support in the legislative history of the statute or in the common law. This interpretation is erroneous.

Indeed, the legislature showed its intent in the statute to only modify the law of joint and several liability. The legislature desired to rectify certain perceived problems

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[7] 623 So.2d 1182 (Fla. 1993).

[8] Thirteen appellate judges of this state have examined this issue. Ten find that the term "fault" is ambiguous. Similarly, in the only two reported decisions at the federal level, the two federal district judges also find that the term "fault" does not mean what the district court in the instant case holds. *Bach v. Florida R/S, Inc., 838* F. Supp. 559 (M.D. Fla. 1993); Doe v. Pizza Hut of *America, Inc.,* Case No. 93-709 (M.D. Fla. 1994).

[9] 280 So.2d 431 (Fla. 1973).

in Florida concerning availability and cost of insurance." Accordingly, if the doctrine did not apply to the circumstances of a case before the statute's enactment, then the case would not be affected by the enactment of the statute. Since negligent tortfeasors and intentional tortfeasors have never been joint tortfeasors, the statute has no application to the case at bar.

The statute also expressly states that it "does not apply to any action based upon an intentional tort". The statute further states that "the court shall look to the substance of the action and not the conclusory terms used by the parties". At its core, this case is in substance an action based upon an intentional tort. Under facts similar to the case at bar, both the First'* and the Fourth District Courts of Appeal[13] have concluded that the statute does not apply because "the substance of the action" arises from an intentional tort. As both courts held, for statutory purposes, the subsequent action against the negligent actor that created the opportunity for the intentional wrongdoer to do evil constitutes an "action based on an intentional tort." Following the statute's plain meaning, it does not apply to circumstances where the action is based on an underlying intentional tort.

The district court also ignored common law principles of Florida tort law. It is well established in Florida that negligent misconduct can not be compared with intentional wrongdoing. Both the common law and the statutory law recognized this

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[10] 318 So.2d 386 (Fla. 1975).

[11] Smith v. *Dept. of* Insurance, 507 So.2d 1080, 1084 (Fla. 1987).

[12] *Wal-Mart* Stores, *Inc.* v. *McDonald,* 21 Fla. L. Weekly D1369 (Fla. 1st DCA June 11, 1996) (pending in this Court).

[13] *Slawson* v. Fast Food *Enterprises,* 671 So.2d 255 (Fla. 4th DCA 1996) (pending in this Court).

principle. Thus in interpreting this statute in a manner in derogation of the common law, the district court violated well established principles of statutory construction. Statutes in derogation of the common law are to be strictly construed in favor of the common law. Any intent to abolish or limit the common law must be indicated in a clear manner. No such clear intent to apportion fault among intentional and negligent tortfeasors exists in the Comparative Fault statute. Therefore the common law rules should stand.

Like the First and the Fourth, the Fifth District Court of Appeal also considered the interpretation of this statute under circumstances virtually identical to the case at bar.[14] The court noted that a intentional tot-tfeasor and a negligent tortfeasor are not joint tortfeasors. The statute, therefore, did not apply. The court further noted that there was no way to compare the fault of these two different types of misconduct.

Additionally, even assuming arguendo that the statute was intended to apply to negligent and intentional tortfeasors generally, the district court failed to consider that such application should never occur in the specific context of this type of case because the negligent business owner was supposed to protect against the very intentional wrongdoing that the business owner now wants to use as its excuse for being relieved from some, if not all, of its responsibility to the injured plaintiff.

Finally, this Court was in error in its decision in *Fabre* in permitting the jury to assess fault against persons not before the court. The legislature's use of the term, "party", in one portion of the statute to mean those who had used "conclusory terms" in

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[14] *Publix* Supermarkets, Inc. v. Austin, 658 So.2d 1064 (Fla. 5th DCA 1995), review *denied,* 666 So.2d 146 (Fla. 1995).

the case evidences its intent that the term means only persons before the court.[15] The term should be interpreted consistently throughout the statute. Alternatively, the term is ambiguous and thus the legislative intent controls. The history of the drafting of the statute again proves that the legislature took the term from the *Hoffman* and *Lincenberg* cases where the courts used the term as it is commonly used in the law, meaning litigant or one who is before the court.'

For each of the above reasons, the trial court and the district court are in error in interpreting the statute as meaning that a jury may apportion the fault of a negligent tortfeasor and an intentional tortfeasor thus reducing the negligent tortfeasors responsibility to the injured victim by the amount of responsibility ascribed to an intentional wrongdoer. This is especially wrong when the intentional wrongdoer is not a litigant in the action.

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[15] The legislature wrote, "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".** $768.81 (4)(a), Fla. Stat. (1986) (emphasis supplied).

ARGUMENT

IT WAS ERROR TO PERMIT A JURY TO APPORTION FAULT BETWEEN A NEGLIGENT DEFENDANT AND AN INTENTIONAL WRONGDOER BECAUSE:

(a) THE STATUTORY TERM, "FAULT", MEANS NEGLIGENCE, NOT INTENTIONAL MISCONDUCT;

(b) THE LEGISLATURE INTENDED ONLY TO ABROGATE THE DOCTRINE OF JOINT AND SEVERAL LIABILITY - INTENTIONAL AND NEGLIGENT TORTFEASORS ARE NOT JOINT TORTFEASORS;

(c) THE STATUTE, BY ITS VERY TERMS, DOES NOT APPLY TO AN ACTION BASED UPON AN INTENTIONAL TORT

(d) INTENTIONAL AND NEGLIGENT MISCONDUCT ARE INHERENTLY DIFFERENT TYPES OF WRONGDOING AND CAN NOT BE COMPARED; AND,

(e)A NEGLIGENT ACTOR SHOULD NOT BE RELIEVED OF RESPONSIBILITY TO THE INJURED PARTY BY AN APPORTIONMENT OF FAULT TO THE INTENTIONAL ACTOR WHICH IS THE VERY HAZARD WHICH THE NEGLIGENT ACTOR FAILED TO PROTECT AGAINST.

In 1986, the legislature enacted Q768.81 in response to the perception that a tort crisis existed, that insurance was not readily available and that the insurance that was obtainable was prohibitively expensive." The statute modified the tort law of this state to the extent that it abrogated joint and several liability regarding the amount of responsibility to an injured person that a negligent person would have. Before this new statute, Florida followed the common law doctrine of joint and several liability whereby each negligent tortfeasor that caused injury to a person was responsible for the full amount of the damages regardless of the amount or percentage of fault attributable to that specific tortfeasor.

To properly analyze the statute requires a detailed understanding of the history of tort law in Florida prior to the statute's enactment. Similarly, an understanding of the fundamental principles of tort law are critical. The pre-statutory framework of Florida's tort law reveals how to apply the statute to circumstances such as the case at bar. Accordingly, one must start with certain basics.

Pre-Comparative Fault Law

More than one hundred years ago, in Louisville and Nashville Railroad Co. v. *Yniestra,* 21 Fla. 700 (Fla. 1886), Florida adopted the contributory negligence doctrine that had been developed in England. The doctrine precluded a victim from recovering at all if the victim had any fault in causing the accident.

The doctrine of joint and several liability developed and evolved with the system of contributory negligence. See *genera//y, Smith v. Dept. of Insurance,* id. at 1090;

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[16] *See Smith v. Dept. of Insurance, 507* So.2d 1080, 1084 (Fla. 1987).

Louisville and Nashville Railroad Co. v. Allen, 65 So. 8 (Fla. 1914). In essence, the doctrine held that the "act of one was the act of all". In other words, each responsible party was liable for the entire damage amount. The justification for the doctrine was that contributory negligence embodied legal principles of causation that made injuries "indivisible" and there was no ability under the tort system at that time to apportion negligence between each tortfeasor.[17]

Thirty-three years ago, in *Hoffman v. Jones,* 280 So.2d 431 (Fla. 1973), Florida became the first state in the country to judicially abandon contributory negligence in favor of comparative negligence. 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.

The doctrine of joint and several liability survived after *Hoffman*. Florida courts continued to apply the doctrine and the legislature expressly approved it when it enacted the law of contribution in the Uniform Contribution Among Tortfeasors Act.[18]

Prior to 1975, the common law had denied joint tortfeasors the right to receive reimbursement for any payments in excess of their pro rata share of responsibility to an injured victim.[19] In 1975 this court changed the common law rule in *Lincenberg v. Issen,* 318 So.2d 386 (Fla. 1975) and the legislature enacted The Uniform Contribution Among Tortfeasors Act which codified the change.

The contribution statute rectified the problem that arose when one negligent

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[17] See Fort, Florida's *Tort Reform:' Response to a Persistent Problem, 14* Fla. St. U. L. Rev. 505, 509 (Fall 1986).

[18] 9768.31, Fla. Stat. (1975).

tortfeasor paid more than its pro rata share of the damages, by providing that a defendant could obtain reimbursement for any excess payments it had made. However, the legislature clearly limited contribution to tortfeasors who were "jointly and severally liable in tort for the same injury".[20] Joint tortfeasors are parties whose negligence combined to produce a plaintiffs injury in the same transaction and occurrence. *Albertson's, Inc. v. Adams, 473* So.2d 231 (Fla. 2nd DCA 1985). The doctrine was not imposed on tortfeasors that were not joint, but instead were distinct and independent. See *Stuart* v. Hertz Corp., 351 So.2d 703 (Fla. 1977). In numerous cases over the years, the principle that only joint tortfeasors, and only those who caused the same injury, had a right of contribution was consistently followed.[21]

Intentional tortfeasors are not joint tortfeasors; intentional tortfeasors and negligent tortfeasors are not joint tortfeasors.[22] *Holley v. Mt. Zion Terrace Apartments, Inc.,* 382 So.2d 98 (Fla. 3d DCA 1980). In full accord with these established principles, the Uniform Contribution Among Tortfeasors Act specifically prohibited contribution for

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19 Seaboard *Air Line R. Co. v. American Dist. Elec. Protective Co., 143 So.* 316 (Fla. (1932).

20 Q768.31 (2), Fla. Stat. (1975).

21 *See Gulf Refining Co. v. Wilkinson,* 114 So. 503 (Fla. 1927) ("A joint tort is essential to a joint action for damages therefor against several parties, and where the evidence fails to show a joint liability, a joint judgment is erroneous, and will be reversed); *Touche Ross & Co. v. Sun Bank of Riverside,* 366 So.2d 465 (Fla. 3rd DCA 1979) (no action for contribution by negligent accountant against banks which honored embezzler's checks - not joint tortfeasors); *Weaver v. Worley,* 134 So.2d 272 (Fla. 2nd DCA 1 961) (joint judgment only against joint tortfeasors).

22 *Davidoff* v. *Seyforth,* 58 So.2d 865 (Fla. 1952) (joint tortfeasors defined as parties whose "negligence" combined to cause a plaintiff's injury); *Pub/ix Supermarkets, Inc. v. Austin, supra* at 1068 ("Austin and Publix were not alleged to be joint tortfeasors *in pari delicto.* Austin was charged with a negligent tort; Publix was charged with a willful tort").

intentional wrongdoing.[23] It has always been axiomatic under Florida common and statutory law that an intentional tortfeasor could not obtain contribution from anyone. One court even determined that a negligent tortfeasor could not seek contribution from an intentional tortfeasor since the types of misconduct were so different in kind. *Insurance Co. of North America v. Poseidon Maritime Services, Inc., 561* So.2d 1360 (Fla. 3rd DCA 1990).

Under both prior systems, contributory and comparative negligence, intentional tortfeasors could never assert the fault of any other party to reduce their full liability to the victim. See *Genera/ Electric Credit Corp. v. Diezel, 551* So.2d 520 (Fla. 3rd DCA *1989); Mazzili* v. *Doud,* 485 So.2d 477 (Fla. 3rd DCA 1986); *Honeywell, Inc. v. Trend Coin Company,* 449 So.2d 876 (Fla. 3rd DCA 1984). As Dean Prosser explained long ago, intentional wrongdoing "differs from negligence not only in degree but in kind, and the social condemnation attached to it". *Prosser and* Keaton *on the Law of Torts, 65,* T P. 462 (5th Ed. 1984).

Extending the purpose of tort law (to compensate the injured by the tortfeasor and to deter misconduct) a step further, in *Holley v. Mt. Zion Terrace Apartments, Inc.*,[24] the court held that a negligent party cannot reduce its liability by shifting the blame to another party if its negligence failed to prevent the other party's conduct.

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[23] "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." §768.31 (c), Fla. Stat. (1975).

[24] *382* So.2d 98 (Fla. 3d DCA 1980).

> "We first reject, as entirely fallacious, the defendant's claim that the brutal and deliberate act of the rapist-murderer constituted an 'independent intervening cause' which served to insulate it from liability. It is well-established that if the reasonable possibility of the intervention, criminal or otherwise, of a third party is the avoidable risk of harm which itself causes one to be deemed negligent, the occurrence of that very conduct cannot be a superseding cause of subsequent misadventure." Id. at 101.

The independent intentional tort does not extinguish the negligent tortfeasor's liability if, and only if, the intentional misconduct was foreseeable. *Holley* v. *Mt.* Zion Terrace *Apartments,* Inc., supra.

Similarly, even absent intentional misconduct, a defendant cannot reduce its liability due to subsequent negligence which takes place in a separate transaction and occurrence because the tortfeasors are not joint tortfeasors but rather distinct and independent tortfeasors. Stuart *v.* Hertz Corp., 351 So.2d 703 (Fla. 1977). For example, a negligent driver who harms another in an automobile collision has always been held responsible for any subsequent medical negligence since the original tortfeasor set in motion the necessity of obtaining health care and it is a foreseeable consequence that the injured party might be further hurt during treatment. Since the two tortfeasors in this example are not joint tortfeasors, the Uniform Contribution Among Tortfeasors Act would have no application under these circumstances, and the negligent driver would not be able to reduce his or her liability by the negligence of the physician.

The Comparative Fault Act - $768.81, Fla. Stat. (1986)

Perceiving a crisis in the insurance industry in Florida, the legislature ostensibly enacted the Comparative Fault Act to reduce insurance premiums and to inspire the insurance industry to make coverage available.[25]

The Act contains six sections, to wit: (1) Definitions; (2) Effect of contributory fault; (3) Apportionment of damages; (4) Applicability; (5) Applicability of joint and several liability; and, (6) untitled.[26]

The relevant portions of the Act to the instant case are the sections on Apportionment and Applicability which state:

768.81 Comparative Fault

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> **(3) Apportionment of damages.-** In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of 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.
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> **(4) Applicability.-**
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> (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

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[25] See the preamble to §768.81, Fla. Stat. (1986); *See* a/so *Smith v. Dept. of Insurance*, supra at 1084-85.

[26] 9768.81, Fla. Stat. (1986).

recover actual economic damages resulting from pollution, to any action based on 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.

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Against this historical background, the facts of the instant case and the applicable principles of law require that the statute does not permit apportionment of liability between intentional and negligent tortfeasors

IT WAS ERROR TO PERMIT A JURY TO APPORTION FAULT BETWEEN A NEGLIGENT DEFENDANT AND AN INTENTIONAL WRONGDOER BECAUSE:

(a) THE STATUTORY TERM, "FAULT", MEANS NEGLIGENCE, NOT INTENTIONAL MISCONDUCT.

In one giant leap of reasoning, the district court determined that the legislature in enacting 9768.81 evidenced "[T]he unmistakable intent . . . to limit a negligent defendant's liability to his percentage of fault" which the court went on to define as being "broad enough to encompass an intentional tortfeasor's acts." Rather than acknowledging that the term as used in the statute was ambiguous, thus requiring an examination into the intent of the legislature, the district court relied solely on a definition of the word from one non-legal dictionary to impose its own interpretation of the term.[27] Query: why did the district court ignore the legal definition of "fault" provided by Blacks Law Dictionary? Black's defines the term in many different ways but all

[27] "[W]ith reference to persons: Culpability; the blame or responsibility of causing or permitting some untoward occurrence; the wrongdoing or negligence to which a specified evil is attributable". 4 *The* Oxford *English* Dictionary 104 (1933).

definitions state that "fault" means negligence.[28] Black's definition does not mention intentional misconduct. Black's definition does not mention any kind of misconduct other than negligence. Following the district courts' own methodology, which is simplistic at best, but simply substituting Blacks Law Dictionary definition for the Oxford English Dictionary, yields the opposite result. Fault means negligence.

In reality, resorting to a dictionary for such an important change in the entire law of this state begs the question of what the legislature truly intended. The different definitions, however, prove at least that the term is ambiguous. Highlighting this point is that every other judge in this state to examine the issue,[29] save one,[30] has determined that the term is ambiguous. Ambiguity, of course, compels an examination of the legislative history to determine the intent.

In the statute the legislature expressed its intent that actions "based on an intentional tort" are specifically excluded from the statute's application.[31] The legislature also expressly stated that even in cases to which the statute applied, judgment would be entered on the basis of the party's percentage of fault and not on

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[28] **Fault.**

American Law. Negligence; an error or defect of judgment or of conduct; any deviation from prudence, duty, or rectitude; any shortcoming or neglect of care or performance resulting from inattention, incapacity, or perversity; a wrong tendency, course, or act; bad faith or mismanagement; neglect of duty. (citations omitted)

Civil Law. Negligence; want of care. An improper act or omission, injurious to another, and transpiring through negligence, rashness, or ignorance.

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[29] See note 8, supra.

[30] Judge Ervin in his dissent in Dept. *of Corrections v. McGhee*, *653* So.2d 1091 (Fla. App. 1 Dist. 1995).

the basis of the doctrine of joint and several liability.[32] These two sections of the statute evidence the legislative intent to not change the common law with regard to an intentional tortfeasor

The rules of statutory construction require that any statute in derogation of the common law must be read strictly in favor of the common law. *Carlile v. Game & Fresh* Water *Fish Commission,* 354 So.2d 362 (Fla. 1977). This Court stated this principle in no uncertain terms:

> Statutes in derogation of the common law are to be construed strictly, however. They will not be interpreted to displace the common law further than is clearly necessary. Rather, the courts will infer that such a statute was not intended to make any alteration other than was specified and plainly pronounced. A statute, therefore, designed to change the common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard. 30 Fla. Jur. Statute, Sec 130.

In the event the language of a statute does not clearly abrogate or change the common law, or the extent to which the common law is to be abrogated or changed is not clear, then the common law rule stands. Id at 364. Additionally, a statute passed in derogation of the common law, if at all ambiguous, must be narrowly construed in favor of the broadest possible retention of the pre-existing common law rule. *Carlile v.* **Game** *& Fresh Water Fish Commission,* id.; *Graham v. Edwards, 472* So.2d 803 (Fla. 3d DCA 1985), *review denied, 482* So.2d 348 (Fla. 1986); *Rudolph v. Unger*, 417 So.2d 1095 (Fla. 3d DCA *1982); Phillips* v. *Hall*, 297 So.2d 136 (Fla. 1 st DCA 1974).

To determine the legislative history of a statute, the staff analyses of legislation

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[31] $768.81 (4) (b), Fla. Stat. (1986).

[32] H768.81 (3), Fla. Stat. (1986).

are to be given significant respect.[33] As Judge Webster cogently points out in his concurrence in *Wal-Mart Stores, Inc. v. McDonald,*[34]

> [From] a reading of the relevant portions of these two documents,[35] it seems to me relatively clear that section p768.81 was intended to do two things, and nothing more: (1) to codify the law regarding comparative negligence as it then existed in the state; and (2) to abolish, subject to limited exceptions, the common law doctrine of joint and several liability in negligence cases.
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> * * * * * * * * * * * *
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> As both the Senate and House Staff Analyses recognize, the supreme court adopted the doctrine of comparative negligence in *Hoffman v. Jones.* Subsequently, in *Lincenberg v. Issen,* the court was called upon to decide how the doctrine of comparative negligence should be applied in cases involving more than one allegedly negligent defendant.
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> Reading the court's decisions in *Hoffman v. Jones* and *Lincenberg* v. *Issen* together with the Senate and House Staff Analyses of what became section §768.81, the source of the word "fault" becomes clear (at least to me) -- the word "fault" is used repeatedly by the court in both opinions, in a sense obviously intended to be synonymous with the word "negligence".

In *Hoffman,* after discussing the rule of contributory negligence, this Court stated 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 premise."

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[33] *See Dept. of Environmental Regulation v. SCM Glidco Organics Corp.,* 606 So.2d 722 (Fla. 1 st DCA 1992).

[34] 21 Fla. L. Weekly D1369 (Fla. 1st DCA June 11, 1996).

[35] Senate Staff Analysis and Economic Impact Statement relating to chapter 86-160 , revised on July 23, 1986 and House of Representatives Committee on Health Care and Insurance Staff Analysis, dated July 16, 1986 (which are stored in the Florida State Archives).

This Court continued to use the term fault throughout the opinion as a synonym for negligence.[36]

Similarly, in *Lincenberg,* this court stated that, "There is no equitable justification for recognizing the right of the plaintiff to seek recovery on the basis of apportionment of fault while denying the right of fault allocation as between negligent defendants".[37]

Accordingly, Judge Webster concludes that,

> Clearly, the word "fault" used in section 8768.81 was merely lifted by the drafters from the language used by the court in *Hoffman* and *Lincenberg*. For this reason, it would seem to me logical that the meaning intended for that word in these opinions should be ascribed to it when used by the legislature in the same context. *Wal-Mart* Stores, *Inc. v McDonald,* Id. at 42.

The district courts' claim that the legislative intent was "clear" and "unmistakable" was wrong. If anything, the statute and the legislative history reveal a use of the term "fault" as a synonym for "negligence". But assuming the term is considered ambiguous, then the common law rule should stand. The common law rule that an intentional tortfeasor could not reduce its liability by any fault of any other person was not intended to be abrogated. The district courts opinion is in error

> IT WAS ERROR TO PERMIT A JURY TO APPORTION FAULT BETWEEN A NEGLIGENT DEFENDANT AND AN INTENTIONAL WRONGDOER BECAUSE:
>
> (b) THE LEGISLATURE INTENDED ONLY TO ABROGATE THE DOCTRINE OF JOINT AND SEVERAL LIABILITY - INTENTIONAL AND NEGLIGENT TORTFEASORS ARE NOT JOINT TORTFEASORS.

The district court, having determined that the legislative intent was so clear and

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36 280 So.2d 431, at 436.
37 318 So.2d 386, at 390.

unmistakable, then totally ignored the legislature's unquestionably clear intent that the statute was only to abrogate the law of joint and several liability except for the significant exceptions which the statute specifically preserved.

The legislature stated that, "In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability". (emphasis added)[38] The Senate and House Staff Analyses confirm this intent. This Court has recognized this legislative intent in Smith *v. Dept.* of *Insurance,*[39] (the Florida Legislature "did not abrogate joint and several liability in the areas of intentional torts) and again in *Fabre v. Mat-in,*[40] ("We are convinced that section §768.81 was enacted to replace joint and several liability").

Accordingly, as fully explained above, because an intentional wrongdoer is not a joint tortfeasor[41], the statute should never have been applied to compare the misconduct of a willful wrongdoer with that of negligent tortfeasor.

> IT WAS ERROR TO PERMIT A JURY TO APPORTION FAULT BETWEEN A NEGLIGENT DEFENDANT AND AN INTENTIONAL WRONGDOER BECAUSE:
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> (c) THE STATUTE, BY ITS VERY TERMS, DOES NOT APPLY TO AN ACTION BASED UPON AN INTENTIONAL TORT;

The legislature specified that the statute did not apply to any action "based upon

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38 §768.81 (3), Fla. Stat. (1986).

39 *507* So.2d 1080, at 1091.

40 623 So.2d 1182 (Fla. 1993).

41 See note 22 supra.

an intentional tort".[42] To give the effect to the statute which the district court has approved would permit a backdoor method of undermining exactly that which the legislature specified should not occur.

Recognizing this, both the Fourth and First District Courts determined that an action against a business or premises owner for failing to protect against foreseeable, intentional wrongdoing is in substance, "an intentional tort, not merely negligence."[43] The court in Slawson noted that the legislature used the terms, "based upon" and not "including", "alleging", or even "against parties charged with". The court concluded that the legislature chose the words, "based upon", to require judges to analyze the circumstances and substance of the case to determine whether the action was "'founded or constructed on an intentional tort". Both the Fourth and First District Courts concluded that negligent security cases have at their very core an intentional tort by someone. Therefore the statute does not apply. Slawson v. Burger *King,* id. Wal-Mart Stores, *Inc.* v. McDonald, ("the substance of the action' arose from his being intentionally shot, the ensuing litigation (against the premises owner) constituted an 'action based on an intentional tort' for statutory purposes".)

Both courts noted that although the claims against the defendants were for the negligent failure to protect against the foreseeable intentional wrongdoing, the "basic character of the claim" was not altered. Moreover, as both courts also noted, to construe the statute in the opposite manner (as did the district court in the case at bar) would result in a perverse and irreconcilable anomaly whereby the negligent tortfeasor

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42 $768.81 (4) (b), Fla. Stat. (1986).

43 *Slawson,* id. at 258; Wal-Mart, id.

owed a duty to protect against the foreseeable intentional evil acts, but would then be relieved from some, or all, of its liability for breaching "that duty by transferring it to the very intentional actor it was charged with protecting (her) against." *Wal-Mart Stores, Inc. v. McDonald,* id. at 17., *Slawson v. Burger King,* id. at 258.

> IT WAS ERROR TO PERMIT A JURY TO APPORTION FAULT BETWEEN A NEGLIGENT DEFENDANT AND AN INTENTIONAL WRONGDOER BECAUSE:
>
> (d) INTENTIONAL AND NEGLIGENT MISCONDUCT ARE INHERENTLY DIFFERENT TYPES OF WRONGDOING AND CAN NOT BE COMPARED.

The district court in the instant case adopted Judge Ervin's dissent in McGhee in opining that the statute applied to permit a jury to compare the fault of a negligent wrongdoer with that of an intentional wrongdoer. Judge Ervin's dissent, in addition to being based on the erroneous belief that the legislative intent was clear, was also based on the logic of the *New* Jersey *court* in *Blazovic v. Andrich, 590* A.2d 222 (1991). In the context of this issue, however, key differences in the basic principles of each state's tort system render case law from outside the jurisdiction inapplicable. Judge Ervin's reliance on *Blazovic* is misplaced because of one critical difference in New Jersey's law on torts: New Jersey follows the minority view that negligence and intentional wrongdoing are not different in kind; Florida has long ago established that it adheres to the majority, and better, view that negligence and intentional misconduct are different in kind.[44]

In the instant case, Judge Jorgenson in dissent, explains the majority view:

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[44] *See genera//y, Publix Supermarkets, Inc. v. Austin,* 658 So.2d 1064 (Fla. 5th DCA *1995); Prosser and Keaton on the Law of Torts.* (5th Ed. 1984).

> Intentional wrongdoing 'differs not only in degree but in kind, and in the social condemnation attached to it'.[45] The difference between a negligent act and an intentional act such as the crime of rape or assault lies in the mental state of the actor. 'This different-in-kind argument is rooted in the moral culpability involved in intentional acts, which is objectively absent from the mind of a negligent actor'.[46] . . .
>
> The variance in moral culpability is recognized by the criminal justice system, by which the State prosecutes and punishes those accused of crimes that carry elements of intent. . . . Tort law, however, was designed around the principles that 'injuries are to be compensated, and anti-social behavior is to be discouraged.'[47] 'The duty underlying an action in negligence or strict products liability is to avoid causing, be it by conduct or by product, an unreasonable risk of harm to others within the range of proximate cause foreseeability. These distinct worlds of culpability cannot be reconciled.'[48]

Blazovic is distinguishable. States like Florida that follow the majority view hold that the fault of these two different types of tortious misconduct can not be compared.[49] In Florida, intentional wrongdoing is not comparable in any fashion to negligent misconduct. The other district courts of Florida have recognized this fundamental principle. The district court in the instant case failed to even acknowledge it.[50]

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45 Quoting *Prosser and Keaton,* id. at 65.

46 Quoting B. Scott Andrews, Comment, *Premises Liability - The Comparison of Fault Between Negligent and Intentional Actors, 55* La. L. Rev. 1149, 1152 (1995).

47 Quoting *Prosser and Keaton,* supra at 1.

48 Quoting Michael B. Gallub, *Assessing Culpability in the Law of Torts; A* Call *for Judicial Scrutiny in Comparing 'Culpable Conduct' Under New York's CPLR 141* 7, 37 Syracuse L. Rev. 1079, 1112 (1987).

49 *Flood v. South/and Corp., 616* N.E. 2d 1068 (Mass. 1993); *Kansas State Bank & Trust Co. v. Specialized Transp. Servs., Inc.,* 819 P.2d 587 (Kan. 1991); *Gould* v. *Taco Bell,* 722 P.2d 511 (Kan. *1986); Veazey v. Elmwood Plantation Assocs., Ltd., 650* So.2d *712* (La. 1994).

50 See note 8, supra.

IT WAS ERROR TO PERMIT A JURY TO APPORTION FAULT BETWEEN A NEGLIGENT DEFENDANT AND AN INTENTIONAL WRONGDOER BECAUSE:

(e) A NEGLIGENT ACTOR SHOULD NOT BE RELIEVED OF RESPONSIBILITY TO THE INJURED PARTY BY AN APPORTIONMENT OF FAULT TO THE INTENTIONAL ACTOR WHICH IS THE VERY HAZARD WHICH THE NEGLIGENT ACTOR FAILED TO PROTECT AGAINST.

Since the seminal case of *Holley v. Mt. Zion Terrace Apartments, Inc., 382* So.2d 98 (Fla. 3d DCA 1980), Florida has permitted the premises owner to be sued for negligently failing to protect against intentional misconduct provided that it was foreseeable. As the Restatement (2d) of The Law of *Torts* explains, if the likelihood that a third person may act in a specific manner is a hazard, or one of the hazards, that makes the actor negligent, such an act, whether innocent, negligent, intentionally tortious or criminal, does not prevent the negligent actor from being liable for the injury or harm caused thereby. The happening of the very event which makes the actor negligent can not be used to relieve the negligent actor from liability. The duty is imposed to require the actor to take steps to protect against the occurrence. To deny or limit the exposure of the negligent actor' would be to deprive the victim of all protection and make the duty a nullity. [51]

Each of the other district courts which have considered this issue have recognized that to apply the statute as in the instant case would be to undermine the entire law of negligent security. The other courts have noted that it would be against the public policy of this state to permit the negligent business or premises owner to

avoid its responsibility, in whole or in part, by blaming the intentional wrongdoer. As the *court* in *Wal-Mart* stated, public policy should not permit the negligent party to

> reduce their fault by shifting it to another tortfeasor whose intentional, criminal conduct was a foreseeable result of their negligence. . . Reducing the responsibility of a negligent tortfeasor by allowing that tortfeasor to place the blame entirely or largely on the intentional wrongdoer would serve as a disincentive for the negligent tortfeasor to meet its duty to provide reasonable care to prevent intentional harm from occurring. It is neither unfair nor irrational for an innocent plaintiff to collect full damages from negligent defendants who knew, or should have known, that an injury would be intentionally inflicted and failed in their duty to prevent it. *Wal-Mart Stores, Inc. v. McDonald,* supra at 28; *Slawson* v. *Burger King,* supra at 259; *Accord* Bach *v. Florida R/S Inc.,* 838 F. Supp. 559, 561.

Highlighting the importance of this public policy is the changes that have occurred in the way businesses in our state now operate with respect to protecting against foreseeable crime. Without dispute these steps have made our state's businesses safer, both for their patrons and for their employees. It is common knowledge that the criminals who prey on society avoid locations that have adequate precautions like security guards, bright lights, and limited ingress and egress. Many of these precautions are now taken for granted, but it is only in the last twenty years, since *Holley,* that business has spent the extra money to protect its patrons and employees.

On this point the tort system has again proven its viability. Business responds mainly to profit issues. Nothing seems to motivate business quicker than the threat of a lawsuit. Lest one conclude, however, that the problems that the legislature found existed in the mid-1980's (even assuming that the insurance crisis was related in any

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[51] Restatement (2d) of *The* Law of *Torts,* Comment (b), section 449 (1965).

fashion to the tort system - an assumption many question today) may still be around today, the National Center for State Courts has determined that the claim of a "tort explosion" today is a myth, that tort cases have dropped, and that tort costs have leveled off .[52] Indeed, one insurance company recently declared that the battle over tort costs in this country has been won, but the "war" goes on.[53]

If negligent businesses are permitted to compare their fault with the intentional wrongdoer who they knew, or should have known, was being given the opportunity to commit their evil due to the business' negligence, then what possible result could a reasonable jury arrive at other than 10 to 20% fault against the negligent party as occurred in the case at bar and in *Slawson*. Indeed, if a jury assessed any greater percentage of fault than that against the negligent tortfeasor, by any reasonable standard, such a verdict would be against the manifest weight of the evidence. In reality, the better reasoned principle is that these two types of conduct can not be compared.

In *Fabre*, this Court construed Florida's comparative fault statute, §768.81(3), Fla. Stat. (1986) to permit a negligent defendant to reduce its share of liability according to the percentage of fault apportioned by the factfinder to nonparty joint tortfeasors. Although the impact of the *Fabre* decision is broad, it is still limited to abrogating the doctrine of joint and several liability among joint tortfeasors. Since they are not joint tortfeasors, a negligent tortfeasor cannot shift the blame to an intentional

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[52] T.Gentilozzi, 'Tort Explosion' is a Myth, says National Center for State Courts", Michigan Lawyers Weekly, May 22, 1995.

tortfeasor. In the instant action, the trial court erroneously applied Florida's comparative fault statute when it permitted the jury to apportion fault among Alamo, a negligent tortfeasor, and Bernard Aaron, a nonparty intentional tortfeasor.

FABRE v. MARIN IS WRONG: THE LEGISLATURE DID NOT INTEND THE TERM "PARTY" TO MEAN ANYTHING OTHER THAN "LITIGANT"

The decision in Fabre, that the legislature intended the term "party" as used in the statute to mean all persons, whether before the court or not, is erroneous. The legislature used the term in the statute in one context that proves that it meant those before the court. The statute specifies that the court is to determine the nature of the action based on the substance of the action and "not the conclusory terms used by the parties"" [54](emphasis added) The only possible definition for the word "parties" in that context is those before the court. It is axiomatic that those not before the court would not have given the court any "conclusory terms". Under statutory rules of construction, this use of the term "party" should be applied consistently throughout the remainder of the statute.

The amicus brief filed by the Academy of Florida Trial Lawyer's fully explains the other reasons why this court erred in *Fabre* including the unconstitutionality of the application of the statute and the true legislative intent. The amicus brief also explains the practical havoc which the decision has created in the state. The Stellas rely on, and adopt fully, the arguments advanced therein.

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[53] "Tort Cost Battle Won, But War Goes On" The National Underwriter Company, Property & Casualty/Risk & Benefits Management Edition, November 20, 1995.

[54] $768.81 (4) (a), Fla.Stat. (1986).

CONCLUSION

Appellants, Rachelle Stellas and Frank Stellas, respectfully submit that the Final Judgment in this case should be entered against Alamo without any apportionment of fault against the intentional criminal and this cause remanded for a new trial on damages only.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 16th day of July, 1996, to G. Bart Billbrough, Esquire, Walton Lantaff Schroeder & Carson, One Biscayne Tower, 25th Floor; 2 South Biscayne Boulevard, Miami, Florida 33131; Asa Groves, Esquire, Darton II PH II, 9130 S. Dadeland Blvd., Miami, FL 33156; Joel S. Perwin, Esquire, Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, 25 West Flagler Street, Miami, Florida 33130; Jack W. Shaw, Esquire, Brown, Obringer, Shaw, Beardsley & DeCandio, P.A., 225 Water St., Jacksonville, Florida 32202; and Kerry C. McGuinn, Jr., Esquire, Rywant, Alvarez, Jones & Russo, 109 N. Brush St., Tampa, Florida 33601.

Respectfully submitted,

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