ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,250

DISTRICT COURT CASE NO. 94-2583

LOWER TRIBUNAL NO. 93-24471 CA 25

RACHELLE M. STELLAS and
FRANK STELLAS, her husband,

Petitioners,

vs.

ALAMO RENT-A-CAR, INC.,

Respondent.

PETITIONERS' REPLY BRIEF

On Discretionary Review from the Third District Court of Appeal

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ARGUMENT

The issue is straightforward - does Florida Statute 768.81 clearly abrogate the common law of Florida and require that the fault of an intentional wrongdoer is to be compared with the fault of a negligent wrongdoer? The answer is no, but to arrive at the proper answer requires an in depth analysis of the common law, the principles underlying this state's tort law, the statute itself and its legislative history.

Rather than performing a proper legal analysis, the respondent and the amici (hereinafter referred to as "the proponents" for ease of reading) instead rely mainly on a superficial appeal that it is unfair that a negligent wrongdoer might bear all of the financial responsibility for an injury caused by its negligence if there is also an insolvent intentional wrongdoer. After making this emotional appeal, the proponents do argue using legal analyses, but their reasoning and interpretation is flawed.

The proponents interpret the statute in a manner supportive of their position, but they ignore the plain meaning of the words selected by the legislature and the basic rules of statutory construction. The proponents also erroneously argue that in Florida, intentional and negligent tortfeasors are joint tortfeasors and misstate case law in an effort to support this wrong statement. Additionally, the proponents rely on cases from different tort systems to support their arguments, but these systems embrace policies different from Florida making such reliance misplaced. One key case on which they rely, Blasovic v. Andrich, 590 A.2d 222 (N.J. 1991), actually undermines the proponents' entire position and supports the Stellas's argument. The proponents violate well established principles of legal analysis is their effort to convince this Court

that the fault of the negligent wrongdoer should be apportioned with the fault of the intentional wrongdoer.

Specifically, the proponents claim that the statute applies to all negligence cases, not just those negligence cases where the parties were previously jointly and severally liable. As a fallback position, assuming that their interpretation is incorrect and the proper application of the statute is only to cases that previously involved joint and several tortfeasors, the proponents claim that in Florida, intentional and negligent wrongdoers are joint tortfeasors. The proponents also claim that the interpretation of the statute in Fabre/Messmer[1] is correct because the legislature has not made any changes to the statute since the decision. Finally, the proponents argue that the statute's use of the term "party" was correctly interpreted in Fabre/Messmer as applying to everyone who was involved in the accident and not just those litigants before the court.

To arrive at these positions the proponents: avoid the plain meaning of the English language as used in the statute; construe the statute based on selectively chosen parts, but not the whole; claim legislative inaction is proof of legislative intent despite this never being an accepted principle of determining legislative intent; ignore the legislative intent revealed by the history of the enactment of the statute; and, claim that law supports their position when in fact the cases stand for the opposite conclusion.

[1] Fabre v. Marin, 623 So.2d 1182 (Fla. 1993); Messmer v. Teacher's Insurance Co., 588 So.2d 610 (Fla. 5th DCA 1991) rev. den., 598 So.2d 77 (Fla. 1992).

The Concept of Fairness and Justice

The proponents' central theme and focus is that by apportioning a negligent wrongdoer's fault with the intentional wrongdoer's fault, the system is "more fundamentally fair." This "fairness" argument is enticing, but its visceral appeal is deceptive. Fairness in this context depends solely on one's personal assumptions and beliefs. Since the system of tort law is but a series of value judgments by a society, the proponents' argument is inappropriate.

One system is not "more fair" than another. Each system merely reflects certain policy choices based on circumstances at a given time. Many people, for example, strongly believe that any type of legal system that compensates the injured for their pain and suffering from those whose mistakes caused the loss is fundamentally unjust. Of course, many others wholeheartedly disagree and believe that compensating the wrongly injured is the essence of civil justice.

The proponents' claim that it is more fair to allow the negligent wrongdoer, whose fault lies in breaching its duty to protect the victim from the foreseeable criminal who injured the victim, to shed some or all of its responsibility to that foreseeable criminal is, as one court has said, **a** "perverse anomaly." The proponents' view is from the wrongdoers' perspective. Under their view, the injured person bears the loss to the extent that the negligent wrongdoer avoids its responsibility. Many others believe the opposite conclusion is far more fair and just because the true travesty of justice would be to permit the wrongdoer, whose negligence created the opportunity for the foreseeable criminal to injure someone, to escape responsibility to the injured by an

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apportionment of fault with the criminal. Admittedly, this counter argument to the proponents' position is emotionally based, but it is the policy choice to which anyone with a conscience and a heart subscribes. This policy choice is the one that a compassionate society must choose. As one prominent humanitarian said just last month in a speech to the leaders of the various state bars, "law without compassion would be cruelty. . . it is important to listen to the victims, not the victimizers."[2]

These perspectives are not based on legal analysis, but rather the mindset of the person advancing the argument: one being pro-business and anti-humanitarian, and the other being humanitarian (but not necessarily anti-business).[3]

The crux of the issue is not whether apportionment is more fair or less fair. The key to answering the question is which tort principles our legal system follows and whether there has been any clear legislative statutory change of those principles. Since Florida law has always provided that negligent and intentional wrongdoers are not joint tortfeasors, and because the statute expressly limited its application to situations where the tortfeasors were previously jointly and severally liable, the proponents' position is legally and analytically without support. It is just that simple.

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[2] Nobel laureate Elie Wiesel speaking at the annual prayer breakfast at the ABA Annual convention in Orlando in August, 1996.

[3] One key reason for the statute was the claim that a tort crisis existed. One claim was that the tort system, and especially joint and several liability, was making insurance rates unaffordable and businesses unprofitable. Though absolutely no empirical evidence ever has existed to support these claims, the arguments were made before the statute. They are still made today. The empirical evidence, however, including internal studies by insurance companies and a study by the U.S. government's General Accounting Office, conclusively proves that there never was a tort crisis. Dean Prosser's system of spreading the risk for the benefit of the victim works. Liability insurance costs in America are highly affordable and have not changed materially over decades other than to reflect the profitability of insurance company investments. Indeed, tort reform (or deform as it is more accurately described) has not resulted in lower insurance rates but it has created enormously higher profits for insurance companies. See generally, National Association of Insurance Commissioner's Report on Profitability by Line and By State 1993 (1994); General Accounting Office, GAO/AIMD 95-169, Medical

The Plain Meaninq of the Statute

The proponents claim the statue applies in all negligence cases. This construction completely ignores the simple and plain language used by the legislature. The statute expressly states that courts are now to

> 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; . . . Fla. Stat. 768.81 (3).

The legislature stated its intent. The statute applies only where joint and several liability previously existed. This Court has already recognized that the comparative fault portion of the statute was intended to modify the doctrine of joint and several liability. Smith v. Dept. of Insurance, 507 So.2d 1080, 1090 (Fla. 1987). The proponents' attempt to judicially expand the statute's application lacks validity. The conjunctive "and" inescapably ties the statutory scheme of comparing fault of each party to circumstances where the wrongdoers were once jointly and severally at fault. The proponents construction of the statute necessarily ignores the language linked together. If the proponents' interpretation is to be followed, the legislature's statement "and not on the basis of the doctrine of joint and several liability" is meaningless and needless verbiage. Since the rules of statutory construction demand that the plain meaning of the English language be given effect whenever possible,[4] the proponents' interpretation fails.

By enacting this statute, the legislature was changing the situation where an injured plaintiff had total control over which jointly and severally liable defendant would

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Liability: Impact on Hospital and Physician Costs Extends Beyond Insurance (1995); Citizens Action, Health Care Statistics and The Effect of Caps on Non-Economic Damages (1996).

pay the judgment. Prior to the statute's enactment, each jointly and severally liable defendant was fully responsible to the plaintiff for the whole judgment despite being only partially at fault. Although the contribution statute and the common law on contribution protected the integrity of the system under many circumstances, situations did exist where a jointly and severally liable defendant would bear the entire loss with no recourse.' The legislature acted to correct this perceived inequity when it passed this statute. Smith v. Dept. of Insurance, 507 So.2d 1080 (Fla. 1987).

Defendants that were not jointly and severally liable, however, were never responsible for paying more than their proportionate obligation. Since no problem existed in the case of non-joint tortfeasors, the statute did not deal with those types of cases. It has no application in situations where the wrongdoers are not jointly and severally liable.

Following the plain meaning of the statute and using proper rules of statutory construction, negligent and intentional fault are not to be compared because these types of fault have never been considered to be comparable in Florida. In Florida, by definition, only negligent wrongdoers are joint tortfeasors, to wit:

> . . . two or more wrongdoers [who] nealisentlv contribute to the injury of another by their several acts, which operate concurrently, so that in effect the damages suffered are rendered inseparable. (Emphasis added).

Albertson's. Inc. v. Adams, 473 So.2d 231, 233 (Fla. 2d DCA 1985); Davidow v. Seyfarth, 58 So.2d 865 (Fla. 1952). Intentional tortfeasors could never use the doctrine of contributory negligence or comparative negligence to reduce their

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[4] A.R. Douglas, Inc. v. McRainey, 137 So. 157, 159 (Fla. 1931); Dudley v. Harrison, 173 So. 820 (Fla. 1937); Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984).
[5] Walt Disney World v. Wood, 515 So.2d 198 (Fla. 1987).

responsibility. Deane v. Johnston, 104 So.2d 3 (Fla. 1958); Island Citv Flvinq Service v. General Electric Credit Corp., 585 So.2d 274 (Fla. 1991).

Not one of the proponents addressed this fundamental premise of Florida law. Instead, the proponents cited to cases holding that the fault of negligent parties could be compared with the fault of grossly or egregiously negligent parties. None of the cases they cited permitted the fault of a negligent wrongdoer to be compared with the fault of an intentional wrongdoer. The proponents simply claimed that these cases stand for the proposition that the courts in Florida have held that negligent and intentional tortfeasors are joint and several tortfeasors. But the cases do not support this leap of logic. In Florida, intentional tortfeasors are never jointly liable with others. This principle applies whether the other tortfeasors are merely negligent or are intentionally at fault. Florida does not follow the belief that negligence and intentional misconduct are different in degree.[6] Florida follows the view that these types of misconduct are different in kind.

Moreover, taking the proponents' logic to its natural conclusion highlights their error. If, as the proponents argue, the two types of wrongdoing are simply different in degree, then there is no basis for not having a "pure" comparative fault system. In such a system intentional tortfeasors can reduce their responsibility by comparing their fault with other intentional tortfeasors and with negligent tortfeasors. In the "pure" system of comparative fault, the concept of "liability equates fault" is not a one way street where

[6] The proponents cite to a law review article from California that concludes that negligent and intentional torts are not different in kind but are merely different in degree. But the proponents fail to disclose that even under that analysis, the commentators concluded that "some types of intentional torts are by their nature so offensive to our customs and values that we should as a matter of social policy decline to apply comparative fault principles." See, e.g., Jake Dear and Steven Zipperstein, Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations, 24 Santa Clara L. Rev. 1 (1984), at 19.

only the negligent can avoid part of their responsibility to the injured victim. If the proponents are correct in their arguments, everyone should be responsible for their own respective fault. But even the proponents agree that an intentional tortfeasor should never be permitted to reduce or avoid responsibility by comparing their fault with anyone else's fault. The proponents thus tacitly admit that negligent conduct and intentional conduct are more than just different in degree, they are different in kind.

Tort law reflects policy decisions by a society.' As Prosser explained, the law of torts deals with "the allocation of losses arising out of human activities" not governed by contracts. The fallacy of the proponents' arguments is that it ignores many well reasoned policy choices the Florida courts have made which would all be overturned by their reasoning. If the proponents' position is the correct one, vicarious liability would be completely eradicated. The well established concepts of responsibility for one's employees, or for a dangerous instrumentality, are concepts that are not based on fault. Instead these concepts are based on policy choices and the fundamental belief that it is better to hold one accountable to the injured under the circumstances even though there is no direct "fault" involved.

The proponents' logic is flawed; their arguments are not supported by the law.

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[7] The evolving nature of tort law reflects these policy choices. Few today would argue that a contributory system that barred an injured from any recovery because of the injured's own fault is a reasonable and just system. Contributory fault principles were designed to prevent recovery in the belief that our society could not afford to allow the social cost of tort law to inhibit industrial growth. It is now recognized that this is not an acceptable system.

Legislative Intent

The proponents argue that because the legislature has failed to change the statute, it has approved of this Court's interpretation of the statute in Fabre/Messmer. This method of using negative implication to interpret legislative intent has never been followed by any court. Legislatures fail to pass legislation or change statutes for many different reasons.

The proper way to determine legislative intent is to analyze the history behind the legislation and the stated purposes of the legislation. Notably, the proponents fail to discuss the legislative history of this statute. They ignore both the Senate and House reports and the several scholarly analyses of the legislative intent behind this particular statute. Their failure is telling since every analysis of this statute concludes that there never was an intent to compare negligent misconduct with intentional misconduct nor was there ever any intent to create a completely "pure" system of liability based solely on fault. This Court has recognized this exact point in Smith v. Dept. of Insurance, 507 So.2d 1080, 1090 (Fla. 1987), stating that the statute modified the doctrine of joint and several liability by establishing key exceptions where joint and several liability still applies, to wit: to economic damages; to any action resulting from pollution, an intentional tort, or certain statutory causes of action; and, to all actions where the total amount of damages does not exceed $25,000. The legislature thus enacted a statute that was to apply only in limited circumstances. Unfortunately, the result is that the more seriously injured bear the risk of not being fully compensated for

their loss when compared with the less seriously injured, but this is the legislature's choice.

The legislature evidenced a clear intent to modify the prior system only in certain specific instances. Accordingly, the broad application that the proponents desire is an improper judicial extension of the statute.

Blazovic v. Andrich: The Proponents Missed the Point

The proponents rely heavily on the case of Blasovic v. Andrich, 590 A.2d 222 (N.J. 1991). Their reliance is misplaced because the New Jersey Supreme Court explained that under circumstances like those in the instant case, there would be no apportionment of fault between a negligent wrongdoer who permitted a foreseeable intentional wrongdoer to injure someone and the intentional wrongdoer. Id. at 233. Both the proponents and Judge Ervin in his dissenting opinion in Department of Corrections v. McGhee, 653 So.2d 1091 (Fla. 1st DCA 1995) missed this essential point in Blasovic.[8]

In that case, a business owner was negligent for having inadequate lighting and security, but the court determined that this negligence did not have any causal connection to the intentional beatings that occurred. Moreover, the New Jersey Supreme Court held that the intentional wrongdoing was not foreseeable. Nevertheless, under New Jersey law, the business owner was still accountable to the

[8] Blasovic highlights the problem with relying on foreign law in this type of analysis. One difference in one fundamental premise of the particular state system results in a dramatically different analysis of the issues.

injured and the court held that the negligent fault could be apportioned with the intentional fault.'

The court specifically noted, however, that if the intentional wrongdoing that had injured the victim had been legally caused by the negligent misconduct, then there would not be an apportionment of fault because "when the duty of one encompassed the obligation to prevent the specific misconduct of the other," the common law of New Jersey would appropriately preclude apportionment of fault. Id. at 233. The court in Blasovic reaffirmed this principle and the line of cases following it (holding one responsible for breaching one's duty even though an intentional wrongdoer acted to directly cause the injury). See Butler v. Acme Markets, Inc., 445 A.2d 1141 (1982) (proprietor with knowledge of repeated criminal attacks on patrons was negligent in failing to take action to prevent similar attack on plaintiff). The court distinguished the facts of Butler (the same type of case as the one at bar) from Blasovic. s e on which the proponents rely actually supports the Stellas's position and undermines the proponents' view. Blasovic stands for the proposition that one whose negligence has permitted a foreseeable intentional wrongdoer to do harm will not be allowed to defray any fault to the intentional wrongdoer.

The law of negligent security as established in Florida by Holley v. Mt. Zion Terrace Apartments, 382 So.2d 98 (Fla. 3rd DCA 1980) (where the courts refused to permit a negligent landlord to hide behind the brutal acts of an intentional rapist/murderer to avoid liability) has worked well to make businesses and property owners take notice that they will be responsible for unreasonably failing to take steps to

[9] New Jersey has different concepts of foreseeability, causation and liability than Florida.

protect against foreseeable criminals. The concept of negligent security law is just as vital today, if not more so, in serving our society's desire to hold those with the power to prevent injury responsible when they fail to do so. As the Restatement (Second) of Torts provides:

> [I]f the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby. Section 449 (1965).

The Restatement further explained that,

> to deny recovery because the other's exposure to the very risk from which it was the purpose of the duty to protect him resulted in harm to him, would be to deprive the other of all protection and to make the duty a nullity. Id. at comment (b).

The proponents fail to even consider these fundamental principles and instead myopically envision a system of responsibility that protects the wrongdoer from bearing any more of the loss than in their view is fair. But the negligent wrongdoer is wholly at fault in permitting circumstances to exist whereby the criminal can hurt the victim. That the criminal is also completely at fault is not the issue. There can be no logical comparison of these separate acts of wrongdoing because they are different in kind. Indeed, how can anyone claim that a system that forces a jury to compare the fault of a negligent wrongdoer with the fault of an intentional wrongdoer is a just and fair system. In other words, how can anyone argue that justice is served by a jury finding that two murderers who intentionally killed someone are each 25% at fault and the prison that negligently permitted the wrongdoers to escape from prison so that they could commit their crime is 50% at fault? Yet this is exactly the proponents' position since they argue

that the jury's verdict in Department of Corrections v. McGhee, 653 so.2d 1091 (Fla. 1st DCA 1995), is the correct result. In truth, this result can not be reconciled under any principled system of justice. This verdict highlights the problem when the jury is forced to compare the incomparable. Negligence and intentional wrongdoing can not be apportioned.

The Slawson and McDonald Analysis

The proponents also ignore the reasoning of the courts in Slawson v. Fast Food Enterprises, 671 So.2d 255 (Fla. 4th DCA 1996), and Wal-Mart Stores, Inc. v. McDonald, 676 So.2d 12 (Fla. 1st DCA 1996). Both courts recognized that the premises owner had the duty to prevent foreseeable intentional wrongdoing and that duty was at the core of the cases at issue. Therefore, the substance of the actions against the businesses was based on an intentional tort "for statutory purposes" even though the cause of action against the business was one of negligent security. Even the proponents admit that without the intentional tort, there is no cause of action against the businesses because there is no damage. The proponents just will not admit that because the business had a duty to protect against foreseeable intentional attacks, that the substance of the action against the business is the intentional misconduct which they unreasonably failed to protect against.

The proponents argue in favor of the "perverse anomaly" criticized and rejected by the courts in Slawson and Wal-Mart that the business:

> owed a duty to protect [the victim, a patron] from foreseeable intentional assaults by other patrons; . . . but . . . is entitled under

> section 768.81 to diminish or defeat its liability for the breach of that duty by transferring it to the very intentional actor it was charged with protecting against. Wal-Mart, id. at 14.

The proponents never discuss this unjust result. Instead they persist in their unwavering claim that "liability equates fault" and these decisions are just wrong. As already shown, the statute does not create the "pure" comparative system; the proponents are in error.

Fabre/Messmer - Does "Party" Really Mean Non-Litigant?

The proponents strenuously argue against any reconsideration of Fabre/Messmer where it was judicially determined that the legislature meant non-litigant when it used the term "party." Their arguments are not analytical. They merely pat this Court on the back for its decision in those cases and pray that no change is made. One proponent went so far as to state that stare *decisis* should be applied even if the decision is legally and fundamentally wrong.

Interestingly, though the proponents consistently claim that the plain meaning of the statute should be given effect, not one proponent addressed the definition that the legislature put into the statute. The statute expressly states:

> 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.** (Emphasis added). Fla. Stat. 768.81(4)(a).

Only litigants could use the "conclusory terms" to which the legislature was referring. A non-litigant would not be before the court and would not be using any

terms. Thus the legislature defined the term "party" within the statute itself. Fabre/Messmer is wrong in its interpretation of the word "party."

CONCLUSION

The tort reform act of 1986 was an attempt to reconcile certain competing interests. Fla. Stat. 768.81 is a compromise in allocating the loss suffered by a tort victim when some negligent wrongdoers are insolvent. Nothing in the statute or its legislative history show a clear legislative intent to abrogate the common law of Florida regarding the non-joint liability of an intentional wrongdoer. Since this is the well established legal test, the proponents' claim that negligent tortfeasors and intentional wrongdoers are to have their fault apportioned among them lacks legal validity.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 2nd day of October, 1996, to G. Bart Billbrough, Esquire, Walton Lantaff et al, One Biscayne Tower, 25th Floor, 2 South Biscayne Boulevard, Miami, Florida 33131; Asa Groves, Esquire, Darton II PH II, 9120 South Dadeland Boulevard, Miami, Florida 33156; Joel S. Perwin, Esquire, Podhurst, Josefsberg, et al, 25 West Flagler Street, 33130; Jack W. Shaw, Esquire, Brown, Obringer, Shaw, et al, P.A. 225 Water Street, Jacksonville, Florida 32202; Kerry C. McGuinn, Jr., Esquire, Rywant, Alvarez, et al, 109 South Brush Street, Tampa, Florida 33601; Hugh F. Young, Jr., Esquire, Product Liability Advisory Counsel, Inc., 1850 Centennial Park Drive, Suite 510, Reston, VA 22091; Wendy F. Lumish, Esquire, Popham, Haik, et al, Ltd., 4000 International Place, 100 S.E. Second Street, Miami, Florida 33131; John Beranek, Esquire, Dubose Ausley & McMullen, 227 S. Calhoun Street, Tallahassee, Florida 32302 and George N. Meros, Jr., Esquire, Rumberger, Kirk & Caldwell, P.A., 106 East College Avenue, Suite 700, Tallahassee, Florida 32302.

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