IN THE SUPREME COURT OF FLORIDA

RACHELLE M. STELLAS and
FRANK STELLAS,

Petitioners,

vs.

CASE NO. 88,250

ALAMO RENT-A-CAR, INC.,

Respondent.

BRIEF OF CSX TRANSPORTATION, INC. AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTRODUCTION

This is an amicus brief by CSX Transportation, Inc. CSX is a major business and employer in this state and appears as amicus in support of the position of the respondent Alamo Rent-A-Car, Inc. Alamo and CSX urge that the decision of the Third District Court of Appeal is correct and should be upheld. The parties will generally be referred to by name. Mr. and Mrs. Stellas were the plaintiffs and Alamo Rent-A-Car was the defendant. The jury ruled in favor of the plaintiffs, but the plaintiff's dissatisfaction with the amount of the judgment resulted in an appeal to the Third District Court of Appeal and a reversal in part. Not wishing to proceed pursuant to the District Court's remand, Stellas now seeks discretionary review before this Court urging this Court to overrule its own prior decision in Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993).

There are other cases presently or recently before this Court presenting different rulings on this same overall issue. These related cases are Wal-mart Stores, Inc. v. McDonald, 21 Fla. L. Weekly D1369 (Fla. 1st DCA 1996); Slawson v. Fast Food Enterprises, 671 So. 2d 255 (Fla. 4th DCA 1996) and Publix Supermarkets, Inc. v. Austin, 658 So. 2d 1064 (Fla. 5th DCA 1995), rev. denied, 666 So. 2d 146 (Fla. 1995). Of course, these cases do not attempt to overrule Fabre.

The Stellas court certified questions based on both conflict and great public importance. The Third District suggested that this Stellas case be paired for decision with Slawson v. Fast Food Enterprises, from the Fourth District Court of Appeal.

Before this Court now are two petitioners' briefs which make reference to and incorporate the arguments of each other. The Stellas plaintiffs have filed a 33 page brief and the Petitioner/Amicus, Academy of Florida Trial Lawyers, has filed a 17 page brief and included the January 21, 1992 brief by the appellee Ann Marin from the original Fabre v. Marin case. The respondents side of the case is presented by the brief by Alamo Rent-A-Car, and several amicus briefs by various interested parties and the present amicus brief by CSX Transportation, Inc.

The arguments by petitioner and petitioner's amicus are two-fold: (1) whether fault should be allocated under Section 768.81, Florida Statutes, when the claim against the defendant is in negligence for failing to warn of foreseeable intentional misconduct by another, and (2) whether this Court should totally recede from Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993) and order that non-parties not be included on jury verdict forms in the state of Florida.

The issues as put forth by the petitioner and the Trial Lawyer amicus may be summarized as follows:

I. WHETHER THE DISTRICT COURT ERRED IN ALLOWING APPORTIONMENT OF FAULT BETWEEN AN INTENTIONAL TORTFEASOR (NON-PARTY) AND THE NEGLIGENT DEFENDANT.

II. WHETHER FABRE V. **MARIN** IS WRONG AND SHOULD BE ABANDONED IN FAVOR OF SOME OTHER INTERPRETATION OF THE WORD "FAULT".

CSX suggests that both issues should be answered in the negative.

STATEMENT OF THE CASE AND FACTS

The Stellas[1] family rented an Alamo car in Orlando making arrangements to return it to Miami. The Stellas daughter, who had not rented the car, was driving and took a wrong turn off of an expressway into a Miami high crime area. Initially, it is important to note that this is not a premises liability case. Unlike the business invitee cases where a customer is injured by another business invitee on the premises of the defendant, this case involves the public roadways of the state of Florida and the federal government. Alamo simply had no duty to provide a safe road nor a crime free environment for the Stellas family to travel in. There has never been any such assertion by the plaintiff in this case, but we suggest it is important to recognize the difference between the present case and a premises liability case where the owner of the premise might have a direct duty to provide a safe place for all occupants. No such duty existed here and absolutely nothing done by Alamo related to the wrong turn which resulted in Stellas becoming lost in an area where crime was apparently commonplace.

Mrs. Stellas was a passenger who sustained psychological and physical pain and suffering along with property loss when an individual named Aaron smashed the window of the car and stole her purse. Although Aaron was identified and arrested, the Stellas suit named solely Alamo as a defendant. The jury was instructed

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'Henceforth, the Stellas plaintiffs will be referred to in the singular.

that they should apportion fault based upon Alamo's asserted negligent failure to warn of the high crime area in Miami and the intentional conduct of Aaron in stealing the Stellas purse and property. There was no causal relationship between the absence of warnings from Alamo and the presence of the Stellas vehicle in this particular high crime area. The Stellas vehicle simply made a wrong turn and inadvertently drove into the high risk area falling victim to the "smash and grab" robbery.

At Alamo's request, the fault attributable to Aaron was included on the verdict form and the jury made three findings as to fault. The jury found that Stellas was without fault, that Alamo was 10% at fault and that Aaron was 90% at fault. Total damages were assessed at $39,900. Based on the verdict and the application of the Comparative Fault statute, Section 768.81, Florida Statutes, a judgment was entered against Alamo in the amount of $23,282.08. This amount computes as 58% of the total damages which the jury awarded. Thus, under Florida's brand of comparative fault as enacted in Section 768.81, Florida Statutes, and as interpreted by this Court's Fabre decision, Alamo's 10% negligence has resulted in Alamo being responsible for 58% of the damages. Plaintiff Stellas now demands that Alamo be responsible for 100% of the damages.

The Stellas appeal to the Third District Court of Appeal resulted in a partial affirmance in which the majority relied upon the dissent in Department of Corrections v. McGhee, 653 So. 2d 1091 (Fla. 1st DCA 1995), approved 666 So. 2d 140 (Fla. 1996). The court ruled that the fault of the robber Aaron should be included

on the verdict for assessment by the jury. The Third District also certified both conflict and great public importance to this Court. The limited reversal by the Third District concerned a trial court error whereby the trial court had erroneously applied the threshold permanent injury requirements of Section 627.727, Florida Statutes (1992). This threshold issue is not involved in the instant certified questions.

SUMMARY OF THE ARGUMENT

The Florida Legislature substantially changed joint and several liability in its passage of Section 768.81, Florida Statutes. Classic common law tort liability, contributory negligence and joint and several liability simply no longer exists in Florida. The overriding rule is now that any defendant is responsible for non-economic damages based on his or her own fault. This is the fair and progressive approach and all at-fault entities should be included on the verdict form whether or not they have been sued.

This Court's decision in Fabre v. Marin correctly applied Section 768.81 and correctly followed the stated an unambiguous legislative intent. Fabre is correct and should not be reversed or receded from.

The question of whether negligent conduct by a defendant and intentional conduct by an at-fault entity may be compared was correctly answered by the Third District Court of Appeal in the affirmative. Such conduct can and should be compared by the fact-finder and this comparison is essentially a jury question under appropriate instructions from the Court.

Any further changes in Florida's substantive law must come from the Florida Legislature and the Florida Legislature has been well-aware of this Court's Fabre decision for the past three years and chosen not to disturb it. The Third District's construction of Section 768.81 should be affirmed. Negligence and intentional conduct can be compared and appropriate percentages of fault assigned.

ARGUMENT

I. WHETHER THE DISTRICT COURT ERRED IN ALLOWING APPORTIONMENT OF FAULT BETWEEN AN INTENTIONAL TORTFEASOR (NON-PARTY) AND THE NEGLIGENT DEFENDANT.

Plaintiff and plaintiff's amicus suggest that Alamo should be responsible for 100% of plaintiff's damages despite the finding of the jury that Alamo was only 10% at fault. Indeed, we suggest that even if the intentional tortfeasor's name had not been on the verdict form the jury could still have chosen to attribute only 10% of the fault to Alamo unless the trial judge has specifically instructed the jury that they could not consider the fault (intentional or negligent) of any other person. If Mr. Aaron had been a wealthy individual the case would have proceeded against him on an intentional tort theory. Had Mr. Aaron been driving an insured car and rear-ended the Stellas car at the red light just before taking the purse, then the lawsuit would almost certainly have been based on negligence and intentional theories.

It is, quite obviously, simply a search for a wealthy defendant which is at issue here. However, ever since Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973), the Florida court system has been steadily moving toward a system in which a party's actual liability is measured by the degree of that party's fault rather than the financial resources of that party. The Hoffman decision was the first case in the nation to discard the common law rule of contributory negligence and to adopt in its place comparative negligence. This Court concluded that pure contributory negligence was outdated and that a more equitable result could be reached by

equating liability with actual causal fault rather than by continuing to employ the arbitrary "all or nothing" bar of pure contributory negligence. Indeed, if fault is to remain the basis for liability as this Court reasoned, the doctrine which apportions the loss among those whose fault contributed to the injury is certainly the more consistent approach and will produce the most equitable result to all sides of all litigation.

Florida's tort law has continued to develop to the present modern and progressive state by virtue of decisions from this Court and enactments by the Florida Legislature. The briefs already before this Court adequately trace the legislative and judicial development of the law and will not be again repeated here. Florida now has a comparative fault statute (Section 768.81) and a contribution among joint tortfeasors statute (Section 768.31). Obviously, Fabre v. Marin is one of the most important decisions by this Court in the development of tort law and specifically in regard to the previously universal doctrine of joint and several liability as altered by Section 768.81.

Plaintiff Stellas now argues that Fabre has been a catastrophe and that tort cases in Florida now never settle and never end. Indeed, these are the same kind of arguments which were probably made against Hoffman v. Jones when pure contributory negligence was abolished. Under the antique contributory doctrine, juries did not have to compare anything and the whole system was much simpler. The plaintiff now wishes to return to the simpler approach of imposing 100% liability on a defendant when the obvious lion's

share of the fault is directly attributable to someone else who may or may not be a defendant in the lawsuit.

Enacted in 1986, Section 768.81, Florida Statutes, substantially modified joint and several liability. Total joint and several liability was replaced by a system where each defendant's liability for non-economic damages is governed solely by that defendant's percentage of fault. Likewise, each defendant's liability for economic damages is governed by its percentage of fault unless that defendant is at least as much at fault as the plaintiff. Such a defendant's liability for economic damages is still governed by the doctrine of joint and several liability. Obviously, the legislative decision to treat the economic and non-economic classes of damages differently depending on these various factors was a major departure from the common law concepts of joint and several liability. Section 768.81 was a major modification.

It is now clear that this statutory provision entitled Comparative Fault requires jury consideration of the extent of fault of every entity involved in causing the plaintiff's injuries, even when that entity is not a party to the lawsuit. Fabre v. Marin; Allied-Signal, Inc. v. Fox, 623 So. 2d 1180 (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 Fabre opinion is absolutely correct and is both progressive and the more modern view of the law of torts.

The scope of Fabre is not limited solely to negligence actions, and includes actions in strict liability. American Aerial

Lift, Inc. v. Perez, 629 So. 2d 169 (Fla. 3d DCA 1993). This is in accord with the language of Section 768.81(4)(a) providing:

> 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.

Obviously, the Legislature was not attempting to maintain the classic common law definition of a "negligence case". The previous common law definitions of such cases were changed.

The substance of the Stellas claim against Alamo is a negligence case within the meaning of Section 768.81, Florida Statutes. Alamo is in no way charged with intentional wrongdoing. Instead, it is charged with negligence in not warning of certain dangers. Mr. Aaron **was** obviously charged with intentional wrongdoing in this case and this was shown by the proof from the Stellas witnesses themselves. Here, the neslisent party Alamo -- not the intentional tortfeasor Aaron -- seeks to invoke Section 768.81.

Taking a page from the Fourth District's Slawson v. Fast Food Enterprises opinion, Stellas argues this case is "based upon an intentional tort" because Aaron's acts were intentional torts. Stellas and the Amicus disregard the fundamental fact that the only claim against Alamo was based solely on negligence by Alamo. To the extent Slawson holds to the contrary it is simply wrong.

The precise nature of the state of mind of the person Alamo did not warn Stellas about is simply not the test for whether the claim against Alamo was a negligence case. Stellas and the Academy conveniently overlook that such was not the legislative intent. Section 768.81(3), is in terms of "percentage of fault," not in terms of "percentage of neslisence" indicating that the Legislature intended the statute to be applicable where some form of fault other than negligence was involved. An intentional tortfeasor was not to obtain the benefits of the statute and Section 768.81(4)(b) expressly makes apportionment inapplicable to actions based on intentional torts and the language prohibits apportionment in favor of an intentional tortfeasor. The contrary is simply not required and the statute does not preclude its application in favor of a negligent defendant.

In Fabre, this Court quoted Brown v. Keill, 580 P.2d 867, 874 (Kan. 1978), as follows:

> There is nothing inherently fair about a defendant who was 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental agency, and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the codefendant to pay more than his fair share of the loss.

Fabre makes it clear that Section 768.81 requires consideration of the fault of all at-fault entities in reaching a fair apportionment of the overall fault. Even if the other at-fault entity is a spouse, a governmental agency, a hit-and-run

driver, an employer with immunity under Section 440.11, Florida Statutes, or simply an entity not joined as a party to the suit. All of this remains true when the other "at-fault" entity is an intentional tortfeasor rather than a negligent tortfeasor. The precise nature of the state of mind of the other person who really hurts the plaintiff should be deemed an irrelevant fact in this overall analysis. It certainly can not be deemed the key to the overall analysis.

There are, of course, numerous and conflicting different views from legal scholars and judges on this issue. In the other pending premises liability cases, the First and Fourth Districts have found an inherent and absolutely crucial difference between an intentional tort and a negligent tort from the point of view of Fabre and Section 768.81. We suggest that this view is overly legalistic and highly impracticable. Who knows whether the average hit and run driver has acted negligently or intentionally. Indeed, who knows what the true state of mind of Aaron might have been. Mr. Aaron may have intended a robbery, but acted in a negligent fashion while committing it. We have already noted the issue of how the whole problem would be changed if Aaron had first rear-ended the Stellas car at the redlight (either negligently or intentionally) before taking advantage of the disabled car to rob one of the occupants.

It is wholly unfair to hold a defendant responsible for only his or her true percentage of fault where the other tortfeasor was merely negligent but, without changing any other fact, to hold a

defendant liable for 100% of the damages where the other tortfeasor committed an intentional tort. That result is nothing more than shifting part of the intentional tortfeasor's liability to the merely negligent defendant. The party whose fault would be ignored would be the intentional actor rather than the negligent actor. Fundamental fairness and simple justice demand this result be rejected.

A defendant should be entitled to the benefits of Section 768.81, if the other tortfeasor is a negligent co-defendant. A defendant is entitled to the same benefits if the other tortfeasor is a negligent entity which for some reason was not joined. A defendant is entitled to those same benefits if the other tortfeasor could not be joined as a defendant. The reason is the same: the defendant's percentage of fault in causing the plaintiff's injuries is fixed by his own acts of negligence and does not change in the slightest based on the happenstance of whether other at-fault entities are joined or not joined in the litigation.

Precisely that same rationale compels the conclusion that the defendant is entitled to the benefits of Section 768.81, if the other at-fault entity is an intentional tortfeasor. The defendant's percentage of fault is again fixed at the moment of the causative events. The mere fact that the other tortfeasor's acts turn out to be more egregious than the negligent defendant's acts truly should not alter this result.

As previously indicated, many states take different views

based on their own particular statutes. Kansas has accepted the plaintiff's view and this result has been criticized as follows in a telling example:

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

Westerbeke and Robinson, Survey of Kansas Tort Law, 37 Kan. L. Rev. 1005, 1049 (1989). Indeed, a further even more telling example would be where the drunk customer negligently knocks down another couple on the dance floor and then proceeds to intentionally kick only the man while on the floor. All kinds of different rules would then apply to different aspects of the same injuries. Frankly, there is not reason to even venture into this morass of hyper-legality. The Third District's relatively simply and straight-forward application of the statute and Fabre was right.

The New Mexico Supreme Court has directly addressed whether comparative fault should include apportionment between a negligent bar owner and an intentional drunk patron who kills another patron in the bar. The court held apportionment of fault should apply in Reichert v. Atler d/b/a A-Mi-Gusto Lounge, 875 P.2d 379 (N.M. 1994). The decision reviews most of the applicable authorities and even fashions the following standard jury instruction:

> If you find that the [owner] [operator] of the [place of business] breached [his] [her] [its] duty to use ordinary care to keep the premises safe for use by the visitor,

> you may compare this breach of duty with the conduct of the third person(s) who actually caused the injury to the plaintiff(s) and apportion fault accordingly. In apportioning this fault, you should consider that the [owner] [operator's] duty to protect visitors arises from the likelihood that a third party will injure a visitor and, as the risk of danger increases, the amount of care to be exercised by the [owner] [operator] also increases. Therefore, the proportionate fault of the [owner] [operator] is not necessarily reducedby the increasingly wrongful conduct of the third party.

In short, this issue is a jury question.

Stellas argues that "fault" means "negligence," and that it could not possibly include intentional wrongdoing. The Legislature well knows the word "negligence," and how to use it. Of course, the Legislature is presumed to mean what it says. State ex rel. Florida Jai Alai, Inc. v. State Racing Commission, 112 So. 2d 825 (Fla. 1959). Indeed, the Legislature, after stating that "fault" was to be the basis for apportioning damages in Section 768.81(3), Florida Statutes, used the word "negligence" four times in the very next subsection. A holding that only negligence would be a basis for apportioning liability would make apportionment unavailable in strict liability cases, breach of warranty case, and professional malpractice case couched in terms of contract. The Legislature clearly intended no such result.

The Abridged Fifth Edition of Black's Law Dictionary, page 313, contains a definition of "Fault" at odds with the Stellas suggestion. Black's states: "The word [fault] connotes an act to which blame, censure, impropriety, shortcoming or culpability attaches."

Stellas also argues that Section 768.81, only abrogates joint

and several liability with certain exceptions and thus it cannot apply where the parties would not be true joint tortfeasors under common law. That statute does much more than Stellas and the Academy suggest. It affirmatively provides that judgment shall be entered "against each party liable on the basis of such party's percentage of fault." Section 768.81(3). Although the statute will often concern classic joint tortfeasors at common law, there is nothing which restricts the statute's scope to onlv those situations, and the language demonstrates an intent that it apply in the present situation.

In fact, the statute's effect is not limited to situations in which the at-fault entities would be joint tortfeasors. An employer with immunity from suit under Chapter 440, Florida Statutes, is not a joint tortfeasor (and hence subject to contribution actions) even if the employer's negligence was a cause of plaintiff's injury. Seaboard Coast Line R. Co. v. Smith, 359 So.2d 427 (Fla. 1978); Armor Elevator Co., Inc. v. Elevator Sales & Service, Inc., 360 So.2d 1129 (Fla. 3d DCA 1978); Firestone Tire & Rubber Co. v. Thompson Aircraft Tire Corp., 353 So.2d 137 (Fla. 3d DA 1977); United Gas Pipeline Co. v. Gulf Power Co., 334 So.2d 310 (Fla. 1st DCA 1976). In Allied-Signal, Inc. v. Fox, supra, this Court nonetheless held that any fault attributable to the immune employer must be included in the allocation called for by section 768.81, Florida Statutes.

Even if the statue only applied if the at-fault entities would be joint tortfeasors, the case law disproves Stellas' and the

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

In Showell Industries, Inc. v. Holmes County, 409 So.2d 78 (Fla. 1st DCA 1982), the defendant (employer of a driver involved in an intersection collision) was permitted to assert a contribution claim against a county for negligent maintenance of the intersection. In Chinos Villas, Inc. v. Bermudez, 448 So.2d 1179 (Fla. 3d DCA 1984), a defendant charged with negligent failure to provide lifesaving apparatus, in a case involving the drowning of a four-year old, was held entitled to a contribution claim based on the child's parents' negligent failure to supervise and protect the child. In Orlando Sports Stadium, Inc. v. Gerzel, 397 So.2d 370 (Fla. 5th DCA 1981), a defendant charged with negligently providing a spectator area at motorcycle races, permitting minors to wander onto the track, was held entitled to a contribution claim based on

the parents' negligent failure to supervise and protect their children.

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

Stellas relies on the language of Section 768.81(4)(b), that "this section does not apply . . , to any action based upon an intentional tort . . . .". The Stellas claim against Alamo is not an action based on an intentional tort; the substance of Stellas' action against Alamo is based on negligence. Plainly, the statutory prohibition against applying Section 768.81, Florida Statutes, in cases based on intentional tort is aimed at preventing an intentional tortfeasor from decreasing his or her own financial exposure by shifting responsibility to other intentional tort-feasors or negligent tortfeasors. In short, the prohibition acts to keep intentional tortfeasors from obtaining the benefits of Section 768.81, and Alamo is not an intentional actor.

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

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

In Kansas Statute Annotated Section 60-258a, states:

60-258a. Comparative negligence.

> (a) The contributory negligence of any party in a civil action shall not bar such party or such party's legal representative from recovering damages for negligence resulting in death, personal injury, property damage or economic loss, if such party's negligence was less than the causal negligence of the party or parties against whom claim for recovery is made, bu the award of damages to any party in such action shall be diminished in proportion to the amount of negligence attributed to such party. If any such party is claiming damages for a decedent's wrongful death, the negligence of the decedent, if any, shall be imputed to such party.

* * *

Similarly, Massachusetts General Laws Annotated, Chapter 231,

Section 85, states:

> s 85. Comparative neslisence: limited effect of contributory neslisence as defense.
>
> Contributory negligence shall not bar recovery in any action by any person or legal representative to recover damages for neglisence resulting in death or in injury to person or property, if such neslisence was not greater than the total amount of neslisence attributable to the person or persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of neslisence attributable to the person for whose injury, damage or death recovery is made. In determining what amount the plaintiff's damages shall be diminished in such a case, the negligence of each plaintiff shall be compared to the total neslisence of all persons against whom recovery is sought. The combined total of the plaintiff's negligence taken together with all of the neslisence of all defendants shall equal one hundred per cent.
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> * * *

Both of these states plainly limit allocations of fault to neslisent parties. Section 768.81 is titled "Comparative fault" and always maintains the consistent language "percentage of fault."

The Third District relied upon and adopted the dissent from Department of Corrections v. McGhee which was in turn based on Blazovic v. Andrich, 124 N.J. 90, 590 A.2d 222 (1991). The New Mexico Reichert case also relies upon Blazovic and in this New Jersey case, plaintiff was assaulted while leaving a restaurant and sued the restaurant (for negligently failing to provide adequate lighting and security and negligently failing to exercise reasonable care in disbursing alcoholic beverages to the assailants). Plaintiff also sued the assailants, charging that they had either negligently or intentionally stuck him. Plaintiff settled with several of the assailants prior to trial. The trial

court, feeling that negligent conduct could not be compared with intentional conduct, instructed the jury to compare only the relative fault of the negligent parties. The jury apportioned 70% of the causal negligence to the restaurant and 30% to plaintiff. The jury further found that the assailants had not been negligent, but instead had committed an intentional assault and battery.

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

The New Jersey Supreme Court was unpersuaded by decisions from other jurisdictions rejecting apportionment in actions involving intentional tortfeasors, observing that they derived from an earlier era when courts attempted to avoid the harsh effects of the contributory negligence defense. Likewise, the Blazovic court rejected the concept that intentional conduct was different in kind from negligence or willful and wanton conduct, finding that intentional wrongdoing was simply different in degree. The different levels of culpability inherent in each type of conduct, the court said, will be reflected in the jury's apportionment of fault. The court said (590 A.2d at 231):

> By viewing the various types of tortuous conduct in that way, we adhere most closely to the guiding principle of comparative fault -- to distribute the loss in proportion to the respective faults of the parties causing that loss. [Citations omitted]. Thus, consistent with the evolution of comparative negligence and joint-tortfeasor

> liability in this state, we hold that responsibility for a plaintiff's claimed injury is to be apportioned according to each party's relative degree of fault, including the fault attributable to an intentional tortfeasor [citation omitted].

Similarly, Weidenfeller v. Star and Garter, 1 Cal. App. 4th 1, 2 Cal. Rptr. 2d 14 (1991), held that California's proportionate liability statute applied in favor of a negligent defendant so as to require allocation of fault to intentional tortfeasors. In that case, plaintiff was the victim of an unprovoked assault in defendant's parking lot. Plaintiff sued, alleging negligent failure to provide adequate lighting and proper security. The jury found for plaintiff, allocating 20% of the fault to the negligent defendant, 5% to the plaintiff, and 75% of the fault to the assailant. On appeal, the court rejected plaintiff's claim that the statute should not be applied so as to include the fault of the intentional tortfeasor, stating that: "There is no principled basis in which we can interpret the statute in this manner." 92 Cal. Rptr. 2d at 16). The court stated at p. 15-16:

> According to Weidenfeller the statute has a limited effect benefitting a negligent tortfeasor only where there are other equally culpable defendants, but eliminating that benefit where the other tortfeasors act intentionally. Stating the proposition reflects its absurdity. It is inconceivable the voters intended that a neslisent tortfeasor's oblisation to pay only its proportionate share of the non-economic loss, here 20 percent, would become disproportionate increasing to 95% solely because the only other responsible tortfeasor acted intentionally. To penalize the neslisent tortfeasor in such circumstances not only frustrates the purpose of the statue but violates the common sense notion that a more culpable party should bear the financial burden caused by its intentional act.

Stellas and the Academy argue that a jury cannot factually or

legally compare intentional conduct and negligent conduct. This same theory that intentional conduct is somehow inherently different from negligent conduct has been espoused by at least the Fourth and Fifth Districts here in Florida. We suggest that the argument is again overly legalistic and totally unrealistic. Indeed, the argument simply fails to recognize how the current jury system works in Florida in average tort cases. The idea that intentional conduct cannot be compared to negligent conduct is an off-shoot of the typical apples versus oranges argument. In fact, Florida juries routinely compare all kinds of negligent and intentional conduct -- in short juries routinely compare apples and oranges and there is no reason why they cannot continue to do so.

In today's multi-party litigation, jurors may be asked to compare the negligence of drivers of multiple different vehicles plus the negligence of an adjoining landowner with various statutory negligence standards thrown in. All issues are decided in one trial. See CSX Transportation, Inc. v. Whittler, 584 So. 2d 579 (Fla. 4th DCA 1991) rev. denied 595 So. 2d 556 (1992) and CSX Transportation, Inc. v. Whittler, 645 So. 2d 2 (Fla. 4th DCA 1994). Comparative negligence diminishing the plaintiff's recovery even where the defendant's conduct has been egregious is definitely allowed. American Cyanamid Co. v. Rov, 466 So. 2d 1079 (Fla. 4th DCA 1984), approved in part, quashed on other grounds in Dart, 498 so. 2d 859 (Fla. 1986) applied comparative negligence in the presence of willful and wanton misconduct by the defendant. Tampa Electric Co. v. Stone & Webster Engineering Corp., 367 F.Supp. 27

(M.D. Fla. 1973), involved comparative negligence applicable to compensatory damages notwithstanding gross negligence, although inapplicable to punitive damages.

In addition to comparing intentional conduct as previously pointed out, other jurisdictions permit gross negligence, willful and wanton misconduct, or other aggravated conduct by the defendant to be compared with plaintiff's simple negligence in assessing comparative negligence. Comeau v. Lucas, 90 A.D.2d 674, 455 N.Y.S.2d 871 (1982); Lomonte v. A & P Food Stores, 107 Misc. 2d 88, 438 N.Y.S.2d 54 (1981); Plyler v. Wheaton Van Lines, 640 F.2d 1091 (9th Cir. 1981); Billingsley v. Westrac Co., 365 F.2d 619 (8th Cir. 1966) and Amoco Pipeline Co. v. Montgomery, 487 F.Supp. 1268 (W.D. Okla. 1980) all so hold.

If gross negligence, willful and wanton misconduct and simple negligence under common law definitions and Federal Employer Liability Act definitions can be compared for purposes of determining the relative degrees of fault of plaintiff and defendant in a comparative negligence situation then there is absolutely no good reason why intentional conduct cannot be similarly compared. The District Court's opinions to the contrary simply have disregarded what happens in the real world of jury decisions. See CSX Transportation, Inc. v. Whittler, supra.

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

Stellas argues that including Aaron on the verdict form permits Alamo to escape liability for the very conduct which Alamo should have warned Stellas about. Alamo is accused of taking advantage of the criminal conduct to reduce its own liability. Alamo again points out that it had no duty whatsoever to provide a safe roadway for Stellas to drive upon. Such arguments have perhaps a more reasonable relationship to cases of a business invitee on a defendant's premises, but they have no application whatsoever when we are talking about a public road. Obviously, it was the duty of the local police to protect Stellas. Further, Stellas took a wrong turn and this had nothing whatsoever to do with Alamo's warnings, absence of warnings as to generalized dangers on the roadway. Florida has not yet recognized a cause of action against a rental car company for failure to warn all renters that they may well be hurt in an automobile accident with another negligent motorist. We have not yet carried tort law this far, but it will unquestionably be one of the next arguments to be made.

Stellas relied upon Hollev v. Mt. Zion Terrace Apartments, Inc., 382 So. 2d 98 (Fla. 3d DCA 1980) for the argument that Alamo should not be allowed to take advantage of the criminal conduct of Aaron. The Hollev case was also argued for precisely the same point in the briefs before this court in Fabre. Obviously, Hollev did not involve application of Florida's Comparative Fault statute in Section 768.81 and in Hollev the apartment house sought to completely escape all liability arguing that the third party's act was an independent intervening cause. Hollev has absolutely no

application here because here the jury found Alamo to be 10% at fault and found that Aaron's acts were indeed foreseeable to Alamo.

Obviously, this argument has no particular application to an intentional tortfeasor rather than a negligent tortfeasor. Fabre recognized that the Legislature changed the law. Hollev predated this decision.

The argument is made that putting intentional tortfeasors on verdicts will do away with any incentive for a business to warn a customer of the dangerous conduct of others. The actual verdict and judgment in this particular case totally dispel this argument. Here, the jury found Alamo 10% at fault despite the terribly anti-social acts of Aaron. Under Florida's brand of comparative fault, Alamo was held jointly and severally liable for the economic damages. The inclusion of Aaron on the verdict form simply relieved the negligent Alamo of liability for Stellas' non-economic damages as corresponding to the percentage of fault found for Aaron.

It is ludicrous to say that Alamo escaped all liability in this case or took advantage of the criminal conduct of another. In this case, a judgment of $23,282.08 was entered against Alamo. This amount represented 58% of the total damages found by the jury. Thus, Alamo's 10% negligence equated to 58% of the damages. This amount is quite clearly sufficient penalty and incentive to encourage Alamo and indeed all businesses to warn customers of any and all foreseeable dangers.

When all is said and done, the percentages of fault between

the multiple entities responsible for a plaintiff's injuries boil down to a jury auestion. Although we cannot actually describe what the mental processes of the jury might be, as a society we simply have no other way of deciding these issues. In fact, jurors can, and do, compare negligent conduct with intentional conduct, in their verdicts in many cases. People simply do not act 100% negligently or 100% intentionally. Frankly, all of this is why this Court's Fabre decision and use of the word "fault" rather than "negligence" is such a sound and correct judicial policy.

11. WHETHER FABRE V. MARIN IS WRONG AND SHOULD BE ABANDONED IN FAVOR OF SOME OTHER INTERPRETATION OF THE WORD "FAULT".

There is absolutely no reason to recede from or dramatically change Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993). The inclusion of other at fault entities on the verdict form was the proper implementation of the legislative intent expressed in § 768.81. Stellas argues again that the statute is ambiguous. This Court has already directly rejected such arguments and we note that in the Fourth District's current opinion in Slawson v. Fast Food Enterprises, the court stated as follows:

> The parties have stipulated that the legislative history of section 768.81, both written and audio, offers no assistance in understanding the text. In any case, we find the meaning of this statute from its text.

The ambiguity argument is no longer an issue before this Court.

As expressed in Fabre it is Alamo's responsibility being determined here. The basic fairness of being held responsible only for the injury one actually causes simply cannot be doubted or disputed. Fabre is the more progressive view and it has worked well in Florida tort litigation for the past several years.

Fabre was issued August 26, 1993 and has thus been in existence for three years as of the filing of this brief. Fabre has been cited over 52 times by the courts of Florida as of this writing. The Legislature has had ample opportunity to revise § 768.81. Indeed, bills have been introduced in subsequent legislative sessions which would have excluded consideration of non-party fault. Those bills have failed before the Legislature. It is patently obvious that the Legislature is well aware of this

Court's Fabre decision and that the Legislature has chosen not to change it. This Court should continue to abide by the legislative intent. Indeed, to go back now and conclude that a mistake had been made as to the Legislature's intent over three years ago would be both wrong and totally unwarranted. Certainly, procedural issues will continue to arise and the courts of Florida can deal with them as they are presented. See Nash v. Wells Fargo Guard Services, Inc., 21 F.L.W. s. 292 (Fla. 1996).

Stellas argues that tort cases do not settle as quickly anymore since this Court issued Fabre. As we have already pointed out, cases do not settle as quickly since this Court's decision in Hoffman v. Jones, supra. That is certainly no reason to overrule Hoffman v. Jones and to return to the pure common law approach. A similar result is what Stellas now asks this Court to do. Stellas wants a dramatic change in the law and it is the Florida Legislature rather than this Court that has the right to make such a change.

CONCLUSION

This Court should uphold the Third District's construction of § 768.81.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been mailed to SCOTT JAY FEDER, 3100 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131; **RENEE** BRAEUNIG, 110 S.E. Sixth Street, 28th Floor, P.O. Box 14245, Ft. Lauderdale, Florida 33302; JOEL S. **PERWIN**, 25 W. Flagler Street, Suite 800, Miami, Florida 33130; **ASA** GROVES, III, Two Datran Center, PH II, 9130 south Dadeland Boulevard, Miami, Florida 33156; KERRY C. **MCGUINN,** JR., Perry Paint & Glass Building, Suite 500, 109 North Brush Street, P.O. Box 3283, Tampa, Florida 33601; G. **BART** BILLBROUGH, One Biscayne Tower, 25th Floor, 2 South Biscayne Boulevard, Miami, Florida 33131; and JACK W. **SHAW,** JR., 12 E. Bay Street, Jacksonville, Florida 32202; dated this 13th day of September, 1996.

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