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SUPREME COURT OF FLORIDA

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MERRILL CROSSINGS ASSOCIATES,
a Florida general partnership,
Appellant/Petitioner,

vs.

WAL-MART STORES, INC.,
a corporation,
Appellant/Respondent,

and

LAWRENCE HOWARD McDONALD,
individually, etc., et al.,

Appellees/Respondents.

Case Nos. 88,324 & 88,776
(consolidated)

WAL-MART STORES, INC.,
a corporation,
Appellant/Petitioner,

vs.

LAWRENCE HOWARD McDONALD,
individually, etc., et al.,

Appellees/Respondents.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

RESPONDENTS' BRIEF ON THE MERITS

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POINTS ON APPEAL

I. AN ACTION ALLEGING THE NEGLIGENCE OF THE DEFENDANTS IN FAILING TO EMPLOY REASONABLE SECURITY MEASURES, WITH SAID OMISSION RESULTING IN AN INTENTIONAL, CRIMINAL ACT BEING PERPETRATED UPON THE PLAINTIFF BY A NON-PARTY ON PROPERTY CONTROLLED BY THE DEFENDANTS, IS AN "ACTION BASED UPON AN INTENTIONAL TORT" PURSUANT TO SECTION 768.81(4)(b), FLA. STAT. (1993) AND, MOREOVER, IN SECTION 768.81(3), FLA. STAT. (1993), THE LEGISLATURE DID NOT INTEND THAT THE TERM "FAULT" SHOULD ENCOMPASS AN INTENTIONAL AND CRIMINAL TORT. THEREFORE, THAT INTENTIONAL AND CRIMINAL ACTOR WAS NOT REQUIRED ON THE VERDICT.

II. IN THE INSTANT CASE, IF EXCLUDING AN INTENTIONAL, CRIMINAL NON-PARTY TORTFEASOR FROM THE VERDICT WAS ERROR, THE JURY'S FINDINGS AS TO NEGLIGENT LIABILITY, COMPARATIVE NEGLIGENT LIABILITY, AND DAMAGES SHOULD NOT BE DISTURBED.

III. THE TRIAL COURT DID NOT COMMIT ERROR IN REFUSING TO ADMIT INTO EVIDENCE DOCUMENTATION OF CRIMES COMMITTED AT REGENCY SQUARE MALL.

IV. THE TRIAL COURT DID NOT COMMIT ERROR IN RULING THAT MERRILL CROSSINGS HAD A DUTY TO KEEP THE PARKING LOT IN FRONT OF WAL-MART REASONABLY SAFE FOR INVITEES OF THE SHOPPING CENTER.

INTRODUCTION

The Appellant/Petitioner, WAL-MART STORES, INC., shall be referred to as the defendant, Wal-Mart. The Appellant/Petitioner, MERRILL CROSSINGS ASSOCIATES, shall be referred to as the defendant, Merrill Crossings. The Appellee/Respondent, LAWRENCE HOWARD McDONALD, shall be referred to as the plaintiff, McDonald. Although the pleadings indicate additional Appellees/Respondents, the claims of these parties were dismissed prior to trial. The record on appeal shall be referred to by the letter "R". The trial transcript shall be designated by the letter "T". References to depositions that were read at trial will be indicated by reference to the page in the transcript where the deposition was read, the name of the witness deposed, and the deposition page.

STATEMENT OF THE CASE

The plaintiff, McDonald, filed a complaint against the defendants, Wal-Mart and Merrill Crossings, alleging that the defendants failed to employ reasonable security measures which resulted in the shooting of McDonald by an assailant on July 30, 1993 (R.1-9). Wal-Mart answered the complaint by asserting that "[p]laintiff's alleged injuries were caused by a third person not party to the lawsuit" (R.18-19). Merrill Crossings' answer asserted that "[t]he plaintiff's alleged injuries were caused in whole or in part by the negligence of a third party . . ." (R.34-36).

At the close of all the evidence, McDonald moved for a directed verdict that the assailant should not appear on the verdict (T.706). Merrill Crossings agreed with McDonald that the

motion should be granted (T.706-711). Counsel for Merrill Crossings stated:

> "It is my prediction that if the assailant goes on the verdict form, you will be back here trying this thing again, and I don't want to try it again. I don't think this assailant has any reason to be on the verdict form. I'm with Mr. Morris, there's no indication of any negligence here." (T.709) .

The trial court granted the motion and excluded the shooter from the verdict (T.711). The trial court also denied Merrill Crossings' motion for directed verdict that there was no competent substantial evidence to show that Merrill Crossings controlled the parking lot (T.522, 714, 715). Neither defendant objected to the jury instructions. Wal-Mart objected to not having the assailant on the verdict (T.745) but still argued to the jury that a "maniac" came up and shot McDonald and that "the only person responsible for this crime is not in the courtroom" (T.771).

The jury returned a verdict for McDonald finding that both defendants were negligently liable and that McDonald was not comparatively negligent. The jury found Wal-Mart 75 percent (75%) negligent and Merrill Crossings 25 percent (25%) negligent. McDonald was awarded total economic damages of $797,028.14 and total non-economic damages of $702,971.86. The trial court entered a final judgment and a cost judgment in favor of McDonald (T.1032-1033, 1106-1107). Both defendants filed notices of appeal (T.1108-1109, 1138-1139). On June 11, 1996, the First District Court of Appeal filed its opinion and affirmed the judgments entered in favor of McDonald. Wal-Mart Stores, Inc. v. McDonald, 676 So. 2d

12 (Fla. 1st DCA 1996) (hereafter cited as McDonald). The First District also certified to the Supreme Court two questions of great public importance:

> (1) Is an action alleging the negligence of the Defendants in failing to employ reasonable security measures, with said omission resulting in an intentional, criminal act being perpetrated upon the Plaintiff by a non-party on property controlled by the Defendants, an "action based upon an intentional tort" pursuant to Section 768.81(4)(b), Florida Statutes (1993), so that the doctrine of joint and several liability applies?
>
> (2) In such an action, is it reversible error for the trial court to exclude an intentional, criminal non-party tortfeasor from the verdict form?

Both the Defendants have filed Notices to Invoke the Discretionary Jurisdiction of this court.

STATEMENT OF THE FACTS

On July 30, 1993, Lawrence Howard McDonald was shot in the parking lot in front of a Wal-Mart store located in a shopping center owned by the defendant, **Merrill Crossings.** At 9:33 p.m., McDonald and his girlfriend exited the Wal-Mart and walked to the girlfriend's car parked in the lot (T.120-122). As McDonald started to get into the driver's side of the vehicle, and as the girlfriend started to get into the passenger side, an assailant approached the girlfriend from the rear of her car, attempted to rob her, and pointed a gun at her (T.124). McDonald yelled at the girlfriend to run (T.125). She ran from the assailant who then pointed the gun towards McDonald's head and pulled the trigger (T.154-155), leaving McDonald with a bullet in his head and severe permanent and disabling injuries (T.316, W. Faillace, p.4-25).

McDonald introduced into evidence police incident reports

reflecting 47 criminal incidents in or about the parking lot in the two years and eight months prior to the McDonald shooting (Exhibit 13; T.382). The reports reflect criminal incidents in the Wal-Mart parking lot on January 22, 1991 when a victim had her purse grabbed and she was knocked to the ground (T.381); on February 3, 1993 when a strong armed robbery occurred and the victim had her purse snatched away (T.378); and on May 11, 1993 when a victim had her purse grabbed and stolen (T.378). Additionally, on March 28, 1992 and on August 19, 1992, there were armed robberies at an ATM machine 20 to 30 yards from the Wal-Mart parking lot (T.231-233, Exhibit 13) and there was an armed robbery in September, 1992 in a Hardees about 50 feet from the parking lot (T.237). There were also numerous auto burglaries, thefts, and store burglaries at the Merrill Crossings Shopping Center prior to the McDonald shooting (Exhibit 13).

There was no security in the lot at the time McDonald was shot (T.30, Cannon, p.19). A few months before the shooting, however, the Wal-Mart store manager and the district manager had discussed hiring a uniformed security guard to be stationed within the store at the front door (T.388, Gross, pp. 8, 9, 13, 16). The head of safety and loss prevention at Wal-Mart knew, before July 30, 1993, about two or three auto burglaries in the parking lot, and one purse snatching (T.453, 465). The Wal-Mart manager, prior to the McDonald shooting, also knew about a purse snatching and auto burglaries that occurred in the parking lot (T.435, D. Jackson, p. 8, 38). Wal-Mart employees were afraid both that their cars might

get burglarized and to walk across the parking lot alone at night (T.452). At the request of its employees, Wal-Mart made the decision, a few weeks before McDonald was shot, to allow the employees to park close to the building (T.451, 452, 460-462, 476). McDonald's security expert testified that the security was inadequate on July 30, 1993 at Merrill Crossings (T.324) and a uniformed security guard should have been employed there (T.325). He further testified that, had there been a uniformed security guard at Merrill Crossings, McDonald would not have been shot (T.332).

The parking lot where McDonald was shot was owned by Merrill Crossings (T.230). In the lease agreement between Merrill Crossings and Wal-Mart, Merrill Crossings reserved the right for agents, customers, and employees of other stores in the center to use the parking lot, its entrances, and exits "for the purpose of ingress and egress on foot and by motor vehicles, for parking motor vehicles, for loading and unloading merchandise and for the display of merchandise". (Exhibit 30, p.1). Merrill Crossings also retained the power to regulate the parking of Wal-Mart's employees' cars and to maintain the "orderly flow of vehicular and pedestrian traffic in and about the Shopping Center". (Exhibit 30, p.1). Wal-Mart, on the other hand, was responsible for maintaining the lot (Exhibit 30, p.20) and paying taxes on it (Exhibit 30, p.16). There was no language in the lease as to which party was responsible for security (Cannon, p.26).

In practice, the lot was used by customers of other stores as

Wal-Mart was an anchor and drew customers to the center who shopped at other stores (T.306, Beverstein, pp. 8, 29). Furthermore, Merrill Crossings paid for electrical repairs in the lot which were performed on July 15, 1991, August 16, 1991, September 3, 1991, August 18, 1992, and July 27, 1993, including repairs to an irrigation "Wal-Mart pump" used to water shrubs in the parking lot (T.283-284, Exhibits 24-29). These invoices specifically refer to repairs performed at "Wal-Mart". Merrill Crossings also paid for security which patrolled the lot from April 30, 1990 through August 9, 1990, when there had been a rash of break-ins at the Bugle Boy store located immediately adjacent to Wal-Mart (T.242, 244, 256, 263). One of the security contracts specifically stated that Merrill Crossings was providing security services for Wal-Mart (Exhibit 14). Wal-Mart, on the other hand, paid for regular cleaning of the lot; it paid the monthly fee for the electrical charges; it controlled the timing on the lights from Bentonville, Arkansas; and paid the real estate taxes (T.665, 667). The dual responsibility for the lot is best exemplified in a letter to Wal-Mart sent by Merrill Crossings when it thought the lawn care service for the lot was incompetent: "Although I do not want to be heavy handed or dictatorial, I think it is apparent that King's Lawn Care must be replaced by a competent contractor immediately." (Exhibit 39).

At about 9:20 p.m. on the evening of McDonald's shooting, an attempted robbery occurred about five miles away at an ATM machine located at a branch of the Barnett Bank (T.522, 187). The victim

of that crime was attempting to make a deposit into the ATM machine when an individual came up to her car and pointed a gun inside her front window (T.553). There was no security at that ATM machine (T.289). The machine was across a service road from the Regency Square Shopping Mall and there was security about 200 to 400 yards away at the mall (T.189). Barnett Bank, where the ATM machine was located, was not on the property of Resency Square Mall (T.558). The victim did not see the security officer while she was at the Barnett Bank (T.557), and she did not see a security person or a police officer until she pulled out of her position at the bank (T.558).

The Merrill Crossings Shopping Center is an open shopping center of less than 150,000 square feet (T.608). In comparison, the Regency Square Mall is an enclosed regional mall, and is at least five times as large as Merrill Crossings (T.607). The Regency Square Mall is five miles from Merrill Crossings (T.608). The trial court refused to admit into evidence the "calls to service" records of the Jacksonville Sheriff's Office concerning the Regency Square Mall, but the court ruled that Wal-Mart's expert could use them as a basis for his opinions and Wal-Mart's counsel could say that the expert referred to these records (T.611-613).

SUMMARY OF ARGUMENT

Section 768.81(4)(b), Fla. Stat. (1993) provides that the comparative fault statute is not applicable to "any action based upon an intentional tort". Strictly construing the plain language of that subsection, the instant case is an action based upon an

intentional tort and the comparative fault statute does not apply. Although the form of the pleading was negligence, the substance of the action was intentional wrongdoing. It was foreseeable intentional conduct from which the defendants had a duty to protect McDonald. Therefore, the action in the instant case was "based upon an intentional tort." Furthermore, the phrase "any action" in that subsection, construed in favor of the broadest possible retention of the common law, includes both an action against an intentional tortfeasor and an action against a negligent tortfeasor that is based upon an intentional tort.

The public policy reasons for not applying the comparative fault statute to the instant case are compelling. A negligent defendant should not be allowed to reduce its fault because of the intentional tort of another that the negligent tortfeasor had a duty to prevent. That would make a nullity out of a negligent defendant's duty of reasonable care. 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 take reasonable steps to prevent it.

Moreover, § 768.81(3), Fla. Stat. (1993) provides that judgment is entered against each party liable on the basis of such party's percentage of "fault". The legislature never intended, however, that "fault" should encompass a criminal and intentional tort and that such a tort should be compared to negligent conduct. The term "fault", when used in § 768.81(2), Fla. Stat. (1993),

clearly does not encompass forcible felonious conduct and it should have that same meaning throughout the statute. Standard definitions of the word "fault" equate it with negligence, and a fact-finder cannot logically balance the distinctions in culpability between negligent conduct and a violent criminal intentional tort. Comparing negligent conduct with intentional torts runs against the grain of case law in Florida and other jurisdictions which recognize that these are two distinct and different kinds of torts. Thus, a negligent defendant's liability is not comparable to the wrongdoing of an intentional tortfeasor and such a tortfeasor is not required on the verdict.

The jury's findings as to negligent liability, comparative negligent liability, and damages, should not be disturbed, regardless of any Fabre error, as the assailant's absence from the verdict form did not affect the jury's determination of these issues. Consequently, the judgment, jointly and severally, for economic damages against the defendants should stand, even if the assailant was required on the verdict. The trial, final arguments, and jury instructions allowed the defendants a fair trial on these issues. The defendant, Merrill Crossings, who argued to the trial court that the assailant should not appear on the verdict, is estopped from now arguing otherwise. Therefore, the instant case is reversible, if at all, only as to the apportionment of the defendants' liability for non-economic damages.

The trial court ruled correctly that the "calls to service" records from the Regency Square Mall were hearsay because there was

no proper predicate laid for contending they fell within an exception to that rule. They were also irrelevant as there was no predicate laid showing a substantial similarity between the Regency Square Mall and Merrill Crossings Shopping Center. The defendant, Merrill Crossings, had sufficient control, both under the lease and in fact, to impose on it a duty to provide a reasonably safe parking lot as it controlled the access and use of the parking lot and, in numerous ways, actually was in possession of the lot.

ARGUMENT I

AN ACTION ALLEGING THE NEGLIGENCE OF THE DEFENDANTS IN FAILING TO EMPLOY REASONABLE SECURITYMEASURES, WITH SAID OMISSION RESULTING IN AN INTENTIONAL, CRIMINAL ACT BEING PERPETRATED UPON THE PLAINTIFF BY A NON-PARTY ON PROPERTY CONTROLLED BY THE DEFENDANTS, 18 AN "ACTION BASED UPON AN INTENTIONAL TORT" PURSUANT TO SECTION 768.81(4)(b), FLA. STAT. (1993) AND, MOREOVER, IN SECTION **768.81(3),** FLA. STAT. **(1993), THE LEGISLATURE DID NOT INTEND THAT THE TERM "FAULT" SHOULD ENCOMPASS AN INTENTIONAL AND CRIMINAL TORT. THEREFORE, THAT INTENTIONAL AND CRIMINAL ACTOR** WAS **NOT REQUIRED ON THE VERDICT.**

BACKGROUND

In 1986, the legislature enacted § 768.81, Fla. Stat. in which it modified the doctrine of joint and several liability which had been part of the common law in Florida for many years. See Fabre v. Marin, 623 So. 2d 1182, 1184 (Fla. 1993). Pertinent portions of that statute are as follows:

> 768.81 Comparative fault. --
>
> (1) DEFINITION. -- As used in this section, "economic damages" means past lost income and future lost income reduced to present value; medical and funeral expenses; lost support and services; . . . and any other economic loss which would not have occurred but for the injury giving rise to the cause of action.

(2) EFFECT OF CONTRIBUTORY FAULT. -- In an action to which this section applies, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for any injury attributable to the claimant's contributory fault, but does not bar recovery.

(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.

(4) APPLICABILITY. --

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

(b) This section does not apply to any action brought by any person to recover actual economic damages resulting from pollution, to any action based upon an intentional tort, or to any cause or 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.

Prior to the enactment of § 768.81, if there were several negligent defendants, each would be held fully responsible, under the doctrine of joint and several liability, for all damages

recoverable by the plaintiff. Moore v. St. Cloud Utilities, 337 so. 2d 982 (Fla. 4th DCA 1976), cert. denied, 337 So. 2d 809 (Fla. 1976). If one of the several negligent defendants was required to pay more than its pro rata share of the common liability, its remedy was in the form of contribution. Id.

Moreover, if both a defendant and a non-party negligently caused damage to a plaintiff, the rule of comparative negligence did not apply between those two tortfeasors and the negligence of the defendant could not be reduced by the percentage of negligence attributable to a non-party. Model v. Rabinowitz, 313 So. 2d 59 (Fla. 3d DCA 1975), cert. denied, 327 So. 2d 34 (Fla. 1976); Travelers Insurance Company v. Ballinger, 312 So. 2d 249 (Fla. 1st DCA 1975). A negligent defendant, whose negligence was based on its failure to protect its tenant from a criminal attack, could not escape responsibility by pointing to the intentional tort of a non-party attacker. Holley v. Mt. Zion Terrace Apartments, Inc., 382 So. 2d 98 (Fla. 3d DCA 1980).

With the passage, however, of § 768.81, a Judgment is now entered against a negligent defendant for non-economic damages on the basis of the percentage of "fault" of each "participant" to the accident. In order to determine the amount of a negligent defendant's liability for non-economic damages, it is now necessary, if the statute applies, to determine the percentage of "fault" of each "participant" to the accident, regardless of whether that participant is a party in the case. Fabre v. Marin, supra.

The issue here is whether, in order to determine the amount of Wal-Mart and Merrill Crossings' liability for non-economic damages, the non-party assailant, who acted intentionally and criminally, was required on the verdict.' Addressing that issue requires answers to the following two questions: (1) Does this case fall under § 768.81(4)(b) so that the comparative fault statute does not apply? If so, the common law would control and a negligent defendant would be fully liable even if a non-party was at fault. Therefore, that non-party would not be required on the verdict; (2) Did the legislature intend that the word "fault", as used in § 768.81(3), should encompass an intentional and criminal tort and that such conduct by a non-party should be compared to the negligence of a party when determining each party's percentage of liability? If that was not intended, then there is no basis for comparing the conduct of an intentional and criminal tortfeasor with the conduct of a negligent party and, thus, no basis for the intentional tortfeasor to appear on the verdict.

THE INSTANT CASE IS AN "ACTION BASED UPON AN INTENTIONAL TORT" AND, THEREFORE, FALLS UNDER SECTION 768.81(4)(B) AND THE COMPARATIVE FAULT STATUTE DOES NOT APPLY.

Section 768.81(4)(b) provides that the comparative fault statute does not apply to "any action based upon an intentional tort". Section 768.81(3) states that, if the comparative fault statute applies, the court shall enter judgment for non-economic

'McDonald also obtained a judgment, jointly and severally, against the defendants for economic damages. That judgment, however, as argued infra at 39, would not be disturbed regardless of whether the assailant was required on the verdict.

damages against each party liable on the basis of such party's percentage of "fault". The statute itself does not define these terms and it is not obvious from the plain language of § 768.81 that it calls for a comparison of negligent conduct with intentional and criminal torts. The rules of statutory construction, therefore, must be utilized to ascertain what the legislature intended when it inserted that language in the statute in 1986. See Streeter v. Sullivan, 509 So. 2d 268, 271 (Fla. 1987) ("were these [statutory] provisions even slightly ambiguous, an examination of legislative history and statutory construction principles would be necessary").[2]

The comparative fault statute is plainly in derogation of the common law rule of joint and several liability. A basic rule of statutory construction is that a statute in derogation of the common law must be strictly construed. Adv v. American Honda

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[2]Three District Courts of Appeal which have considered the issue, including the court below, and 10 of the 13 appellate judges who have considered the matter, have interpreted § 768.81 in line with McDonald's position that a non-defendant intentional tortfeasor is not required on the verdict. McDonald; Slawson v. Fast Food Enterprises, 671 So. 2d 255 (Fla. 4th DCA 1996) (question certified); Publix Supermarkets, Inc. v. Austin, 658 So. 2d 1064 (Fla. 5th DCA 1995), rev. denied, 666 So. 2d 146 (Fla. 1995); contra Stellas v. Alamo Rent-A-Car, 673 So. 2d 940 (Fla. 3d DCA 1992) (question certified); see also Department of Corrections v. McGhee, 653 So. 2d 1091, 1093 (Fla. 1st DCA 1995), approved, 666 So. 2d 140 (Fla. 1996) (Ervin, J., dissenting). The plain language of that statute, if not unambiguously favoring McDonald's position, is, at least, subject to interpretation. Additionally, numerous trial courts have ruled, based on their own interpretation of § 768.81, that an intentional tortfeasor is not required on the verdict. Dav v. Capitol City, et al., Case No. 94-4195 (Fla. 2d Cir. Ct. October 16, 1995); Doe v. Pizza Hut of America, Inc., Case No. 93-709 (M.D. Fla. June 21, 1994); Bach v. Florida R/S, Inc., 838 F. Supp. 559 (M.D. Fla. 1993).

Finance Corporation, 675 So. 2d 577, 581 (Fla. 1996). Such a statute must be narrowly construed in favor of the broadest possible retention of the pre-existing common law rule. Godales v. Y. H. Investments, Inc., 667 So. 2d 871, 872 (Fla. 3d DCA 1996). The presumption is that no change in the common law is intended unless the statute is explicit and clear with regard to that change. Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Assn., 581 So. 2d 1301, 1303 (Fla. 1991); Thornber v. City of Fort Walton Beach, 568 So. 2d 914, 918 (Fla. 1990). The legislature is also presumed to know the meaning of the words chosen and to have expressed its intent by use of those words. S.R.G. Corn. v. Desartment of Revenue, 365 So. 2d 687 (Fla. 1978).

In Slawson v. Fast Food Enterprises, 671 So. 2d 255 (Fla. 4th DCA 1996), which involved a claim against a Burger King restaurant for failing to protect a customer from a foreseeable attack by a third party, the court addressed the meaning of the phrase "based upon an intentional tort" and stated:

> " . . . In limiting apportionment to negligence cases, the legislature expressly excluded actions 'based upon an intentional tort' [e.s.] The drafters did not say including an intentional tort; or allesing an intentional tort; or asainst parties charqed with an intentional tort. The words chosen, 'based upon an intentional tort,' imply to us the necessity to inquire whether the entire action against or involving multiple parties is founded or constructed on an intentional tort. In other words, the issue is whether an action comprehending one or more negligent torts actually has at its core an intentional tort by someone."

Slawson, 671 So. 2d at 258. In Slawson, the court found that the cause of action was technically negligence, but the kind of harm sought to be avoided was an intentional assault. Slawson at 258. Therefore, that court determined that the action against Burger King was based upon an intentional tort. Id. Similarly, the core of McDonald's action was also founded and constructed on an intentional tort. The court below stated that:

> " ... it was foreseeable, intentional conduct (and not simply negligent conduct) from which the appellants had a duty to protect McDonald. The fact that the nature of the appellants' fault is merely negligence regarding the shooter's intentional wrongdoing does not alter the basic character of the claim brought by McDonald. As in Slawson, the form of the pleading here may have been negligence, but 'the substance of the action' was intentional wrongdoing . ..".

McDonald at 18. Thus, McDonald's negligence action was also based upon an intentional tort.

A claim against a negligent tortfeasor whose actions facilitate an intentional tort is similar to a claim against a negligent employer for punitive damages who is vicariously liable under respondeat superior for the conduct of an employee. As stated in Slawson:

> " ... In that circumstance, punitive damages are available against the employer where there is some fault on the part of the employer, even though the employer's own conduct was not malicious and willful . . .
>
> The fact that the character of the employer's fault is merely negligence as regards the intentional wrongdoing of the servant does not erase the essential nature of the claim for punitive damages against the employer. So it is here, too, with regard to Burger King's

> negligent failure to protect Mrs. Slawson from the reasonably foreseeable intentional assault of another patron. The form of the pleading against Burger King may have been negligence, but the substance of the action is intentional wrongdoing."

Slawson, 671 So. 2d at 258; see Mercury Motors Express, Inc. v. Smith, 393 so. 2d 545 (Fla. 1981). In the instant case, the essential nature of McDonald's claim against the defendants was the intentional conduct of the assailant, and that cannot be erased by the fact that the pleading against the defendants sounded in negligence.

The type of negligence action brought by McDonald is considered as arisins out of an assault and battery, a term substantially identical in meaning to the term based upon an intentional tort. In Britamco Underwriter's, Inc. v. Zuma Corporation, 576 So. 2d 965 (Fla. 5th DCA 1991), a patron in a bar was beaten by another patron and obtained a judgment against the bar on the theory that it was negligent in failing to provide adequate security. The court, however, held, "consistent with the overwhelming weight of authority", that the claim clearly arises out of an assault and battery, and not out of the negligence of the bar, and would not be covered under the bar's insurance policy which excluded coverage for claims "arising out of assault and battery." Id. Since McDonald's claim is the same as that of the bar patron in Britamco, it, too, arises out of an assault and battery. And since an assault and battery is an intentional tort, it is difficult to see why McDonald's claim would not also be considered a claim "based upon an intentional tort". See McDonald

v. Ford, 223 So. 2d 553 (Fla. 2d DCA 1969) (an assault and battery is an intentional and unlawful act).

Section 768.81(4)(b) removes intentional torts altogether from comparative fault. The plain meaning of the phrase "any action based upon an intentional tort" is that it includes both (1) an action against an intentional tortfeasor and (2) an action against a negligent tortfeasor when it is based upon an intentional tort. The legislature could have limited that exclusion solely to actions against an intentional tortfeasor by simply stating that the section does not apply to any person who acts with the intent of inflicting injury. But, instead, the legislature chose a wider exclusion by using the all inclusive term "any action" and then following it with "based upon an intentional tort". Subsection 4(b) should be construed in favor of the broadest possible retention of the common law -- and the common law is most broadly retained if that subsection is interpreted as including both an action against an intentional tortfeasor and an action against a negligent tortfeasor that is based upon an intentional tort. Stellas v. Alamo, 673 So. 2d at 945 (Jorgenson, J. dissenting); see Smith v. Department of Ins., 507 So. 2d 1080, 1091 (Fla. 1987) (Florida legislature did not abrogate joint and several liability "in the areas of intentional torts"). A narrower interpretation requires a change in the language of the statute and is properly left to the Florida legislature, not to the courts. McDonald at 22; see Walt Disney World Co. v. Wood, 515 So. 2d 198, 202 (Fla. 1987) ("In view of the public policy considerations bearing on the

issue [joint and several liability], this court believes that the viability of the doctrine is a matter which should best be decided by the legislature.")[3]

Compelling public policy reasons support this position. If the defendants in the instant case, for example, were allowed to compare their negligence with the violent intentional criminal conduct of the assailant, those defendants would be able to diminish or defeat their liability by shifting it to the very intentional actor whose conduct they had a duty to prevent. McDonald at 21; Slawson v. Fast Food Entersrises, 671 So. 2d at 258 (it is a perverse and irreconcilable anomaly for the property owner to owe a duty to protect a patron from foreseeable intentional harm and, at the same time, contend it can diminish its liability by transferring it to the intentional wrongdoer); Kansas State Bank & Trust Co. v. Specialized Transs. Services, Inc., 819 P.2d 587, 606 (Kan. 1991) (negligent tortfeasor should not be allowed to reduce

[3]Comparative fault also does not apply to other negligent defendants in actions: for economic damages where the fault of the defendant equals or exceeds that of the claimant (§ 768.81(3)); for economic damages resulting from pollution (§ 768.81(4)(b)); based on a statute where joint and several liability is required (§ 768.81(4)(b)); and where total damages do not exceed $25,000.00 (§ 768.81(5)). Nonetheless, the defendants argue that McDonald wants comparative fault to apply to all negligent defendants except those involved in a negligence action that is based on a failure to prevent a crime, and that that is a violation of equal protection. The issue of equal protection was not raised by the defendants at trial and cannot be raised for the first time on appeal. Trushin v. State, 425 So. 2d 1126, 1129 (Fla. 1982). Nevertheless, the issue of equal protection was addressed in Smith v. Dent. of Ins., 507 So. 2d at 1091. This court found a rational basis for each of the exceptions to § 768.81, including the exception for cases "in the areas of intentional torts". Furthermore, the compelling public policy reasons set forth above provide a rational basis for McDonald's position.

its fault by the intentional fault of another that the negligent tortfeasor had a duty to prevent); Gould v. Taco Bell, 722 P.2d 511, 517 (Kan. 1986) (business had a duty to protect its invitees from known danger of criminal assault and could not reduce its fault by intentional act of assailant); Veazev v. Elmwood Plantation Assoc. Ltd., 650 So. 2d 712, 719 (La. 1995) (in an attack victim's negligence case, a comparison of fault between defendant/apartmentmanager and non-party rapist was not allowed -- manager's duty to victim encompassed the exact risk of occurrence which caused damage to plaintiff.); Bach v. Florida R/S, Inc., 838 F. Supp. 559, 560-61 (M.D. Fla. 1993) (allocation of fault between intentional and negligent tortfeasors would defeat cause of action for landlord's failure to provide adequate security). If a property owner is negligently liable for failing to protect its customer and invitee from a criminal attack, it should not be allowed to reduce its responsibility because the attack has actually taken place.[4]

The defendants miss the point when they say their liability is increased just because some other party behaved more egregiously than the defendants. That egregious behavior was foreseeable to

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[4]The above-cited cases, Kansas State Bank & Trust and Gould v. Taco Bell, were both decided by the Kansas Supreme Court after that court decided Brown v. Keill, 580 P.2d 867 (Kan. 1978). The Brown case is cited in Walt Disney World Co. v. Wood, Fabre v. Marin, and in the defendants' brief for the proposition that, "There is nothing inherently fair about a defendant who is 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." In Kansas, therefore, a non-defendant's fault may be considered in apportioning the defendant's liability, but that fault does not include an intentional tort to which the victim was exposed by the negligent conduct of the defendant.

the defendants and they had a legal duty to take reasonable steps to prevent it. Hall v. Billy Jack's, Inc., 450 so. 2d 760 (Fla. 1984 (lounge proprietor owes its patrons the duty to protect them from reasonably foreseeable harm). It was the defendants' negligent conduct itself which exposed McDonald to the intentional tort, and a jury determined that, but for that conduct, McDonald would not have been harmed. 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 take reasonable steps to prevent it. McDonald at 22; Restatement (Second) of the Law of Torts § 433A, Comment i (1965) (certain kinds of harm are incapable of logical division -- when a defendant creates a situation upon which another may later act to cause harm, if the defendant is liable at all, the defendant is liable for the entire indivisible harm).

Moreover, if apportionment of liability were allowed in these circumstances, any rational fact-finder would apportion the bulk of liability to the criminal intentional tortfeasor, and the negligent tortfeasor who failed to take reasonable steps to prevent that criminal and intentional tort would be insulated from liability. As stated by one court concerning a case where a plaintiff was raped in the garage of her apartment building and she sued her landlord contending inadequate security caused her rape: "... in such a comparison, how can a rapist (or virtually any intentional tortfeasor) not be 100% liable for his actions." Veazev, 650 So.

2d at 719, n.11. Insulating that negligent defendant from liability would serve as a disincentive for that tortfeasor to meet its duty to provide reasonable care to prevent intentional harm from occurring. McDonald at 22; Restatement (Second) of the Law of Torts § 449, Comment b (1965) (" . . . 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.")

As the legislature clearly had the authority to create § 768.81, it may also make the act as restrictive or inclusive as it sees fit. Leatherman v. State ex rel Somerset Co., 133 Fla. 630, 182 So. 831 (Fla. 1938). It is certainly reasonable to interpret § 768.81(4)(b) as a legislative preference not to transfer a negligent tortfeasor's duty of care over to a criminal tortfeasor, especially where a defendant's acts or omissions are the proximate cause of the intentional tort. McDonald at 22. That interpretation is based on a strict construction of the plain language of the statute, the obvious intent of the legislature to except certain cases from the applicability of § 768.81, and compelling public policy reasons. Therefore, McDonald's claim, which was based on the violent, intentional criminal conduct of the assailant, was not subject to § 768.81 and the assailant was not required on the verdict.

THE LEGISLATURE DID NOT INTEND THAT THE WORD "FAULT" IN SECTION 768.81(3) SHOULD ENCOMPASS AN INTENTIONAL AND CRIMINAL TORT.

Although the Florida tort system has evolved toward a system that requires each party to pay for non-economic damages only in proportion to its percentage of fault, a comparison of negligent acts with intentional, criminal conduct was neither envisioned nor intended by the legislature as a part of that change. The initial move away from joint and several liability and towards a system equating liability with fault was made in Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973). In that case, this court stated:

> "The rule of contributory negligence as a complete bar to recovery was imported into the law by judges. Whatever may have been the historical justification for it, today it is almost universally regarded as unjust and inequitable to vest an entire accidental loss on one of the parties whose negligent conduct combined with the negligence of the other party to produce the loss. If fault is to remain the test of liability, then the doctrine of comparative neslisence which involves apportionment of the loss among those whose fault contributed to the occurrence is more consistent with the liability based on a fault premise."

Id. at 438 (emphasis added). The purpose of adopting comparative negligence for Florida was:

> "(1) to allow a jury to apportion fault as it sees fit between negligent parties whose negligence was part of the legal and proximate cause of any loss or injury; and
>
> (2) to apportion the total damages resulting from the loss or injury according to the proportion of fault of each party."

Id. at 439 (emphasis added). The word "fault" in Hoffman was simply used as a synonym for the word "negligence". There is not

even a hint in Hoffman that the transition to comparative fault would eventually include a leap into comparing intentional torts and negligent acts.

In Lincenbers v. Issen, 318 So. 2d 386 (Fla. 1975), this court was asked to decide how the doctrine of comparative negligence should be applied in cases involving more than one allegedly negligent defendant. This court stated:

> "There is no equitable justification for recosnizins 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 . . . Therefore, although this court has in the past recognized as viable the principal of no contribution [among joint tortfeasors], in view of a re-examination of the principles of law and equity and in light of Hoffman and public policy, as a matter of judicial policy, it would be undesirable of this court to retain a rule that under a system based on fault, cast the entire burden of a loss for which several may be responsible upon only one of those at fault, and for these reasons this Court recedes from its earlier decisions to the contrary."

Id. at 391 (emphasis added). The Lincenberg opinion, as does Hoffman, refers to fault as allocated between negligent parties, thus again equating "fault" with "negligence". Also, when using the word "fault", this court does not distinguish between the "fault" used to determine a plaintiff's recovery and the "fault" that might be used to allocate responsibility between negligent defendants.[5]

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[5]The defendants argue that the contribution statute allows for comparisons between negligent and intentional tortfeasors because tortfeasors' "relative degrees of fault shall be the basis for allocation of liability." § 768.31(3)(a), Fla. Stat. (1993). But,

In 1986, the legislature enacted Section 768.81. The Senate Staff Analysis and Economic Impact Statement relating to Chapter 86-160, revised on July 23, 1986, addresses the history of that statute and the purposes for which it was enacted. See State Department of Environmental Regulation v. SCM Glidco Organics Corporation, 606 So. 2d 722, 725 (Fla. 1st DCA 1992) ("Staff analysis of legislation should be accorded significant respect in determining legislative intent"). The Senate Analysis states:

> "Prior to 1973, Florida adhered to the legal doctrine of 'contributory negligence.' Contributory negligence provided that a plaintiff who was partially responsible for injuries caused by a negligent defendant could be totally barred from recovering from that defendant. In 1973, the Florida Supreme Court abolished contributory negligence and adopted the doctrine of 'comparative negligence.' See Hoffman v. Jones, 280 So. 2d 431 (1973). Comparative neslisence allows a plaintiff who

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this court, interpreting the original contribution statute, stated:

> "The plaintiff is entitled to a measurement of his full damages and the liability for these damages should be apportioned in accordance with the percentage of negligence as it relates to the total of all defendants. The negligence attributable to the defendants will then be apportioned on a pro rata basis without considering relative degrees of fault . ..".

Lincenberg, 318 So. 2d at 393-94, interpreting § 768.31, Fla. Stat. (1975) (emphasis added), Apportionment of liability was intended to involve negligent defendants, The term "relative degrees of fault" (although not a consideration in the apportionment of liability in the original statute) was obviously intended to mean the comparison of negligence. See Senate Judiciary - Civil Committee Staff Analysis Relating to Chapter 75-108 (the statute "recognizes and registers the lack of need for a comparative negligence rule in contribution cases"). Section 768.31(2)(c), Fla. Stat. (1993), which specifically excludes an intentional tortfeasor from seeking contribution, simply endorses the common law rule that one should not be allowed to found a cause of action by committing a deliberate wrong. It is not an endorsement of the comparability of an intentional tort with the negligence which facilitates and is responsible for that tort.

is partially responsible for his injuries to recover from a negligent defendant. Under comparative nesligence, a wlaintiff's total judgment aqainst a neslisent defendant is reduced by the percentage of the wlaintiff's fault.

The principles of comparative neslisence are also applicable in cases involving multiwle defendants, with fault being apportioned among all neslisent parties and the plaintiff's total damages beinq divided among those parties accordins to their prowortionate deqree of fault. However, in these cases, one or more of the defendants may ultimately be forced to pay more than their proportionate shares of the damages, pursuant to the doctrine of joint and several liability. Under this doctrine, if two or more defendants are found to be responsible for causing the plaintiff's injuries, the plaintiff can recover the full amount of damages from any one of them.

The bill's modified version of joint and several liability applies to all negligence cases which are defined to include, but not be limited to, civil action based upon theories of negligence, strict liability, products liability, professional malpractice, breach of warranty, and other like theories. In such cases in which the award of damages does not exceed $25,000, joint and several liability applies to all of the damages. In cases in which the award of damages is greater than $25,000, liability for damages is based on each party's proportionate fault, except that each defendant who is equal to or more at fault than the claimant is jointly and severally liable for all economic damages. The bill's modified version of joint and several liability would not apply to actions based upon intentional torts or in which the Legislature has mandated that the doctrine apply . . ."

Senate Staff Analysis at 24-25 (emphasis added); accord House of Rewresentatives Committee on Health Care and Insurance Staff Analysis Relating to Chapter 86-160, July 16, 1986. This analysis

recognizes that § 768.81 was drafted with the legislature using as its guideposts the law of Hoffman and its progeny, and that law, as reiterated in the analysis, treats "fault" and "negligence" as synonyms. See also House Committee Analysis at 26 ("The act [§ 768.811 codifies the comparative negligence law"). Furthermore, the Senate Analysis uses the same word, "fault", with regard to both comparative negligence and to cases involving multiple defendants. It is clear that the legislature intended that that word have the same meaning in both contexts.

In his concurring opinion below, Judge Webster explained why an intentional tort has no role to play in the application of the comparative fault statute:

> "the word 'fault' used in § 768.81 was merely lifted by the drafters from the language used by the court in Hoffman and Lincenberg. For this reason, it seems to me logical that the meaning intended for that word in those opinions should be ascribed to it when used by the legislature in the same context. Accordingly, I agree that the statute should be read as intended to limit apportionment of damages to those individuals or entities found to have been negligent -- those whose conduct was more than negligent were not intended to figure into the equation."

McDonald at 25 (Webster, J., concurring). There is no indication in the case law which was codified in § 768.81, or in the legislative analyses of that statute, that the term "fault" means anything more than "negligence". See Nash v. Wells Fargo Guard Services, Inc., 21 Fla. L. Weekly S292 (Fla. July 3, 1996) (to include a nonparty on the verdict, the defendant must plead as an affirmative defense "the negligence of the nonparty"); Fabre, 623

So. 2d at 1187 (joint and several liability continues to apply "when a defendant's negligence equals or exceeds that of the plaintiff"); Smith v. Dent. of Ins., 507 So. 2d at 1091 (under contributory negligence, there was no way to determine each tortfeasor's degree of "negligence or fault").

When used with regard to a claimant's recovery, "fault" does not include a violent criminal intentional tort. In § 768.81(2), any "fault" contributed by a claimant "diminishes proportionately the amount awarded . . . but does not bar recovery." But, "fault" cannot mean a "forcible felony". That type of conduct, if proven and charged to the claimant, totally bars the claimant's recovery. § 776.085, Fla. Stat. (1993) (a participant's forcible or attempted forcible felonious conduct shall be a defense to the participant's action for damages). Thus, "fault" in § 768.81(2), if it is to be consistent with § 776.085, does not include a violent intentional criminal tort like that inflicted upon the plaintiff in this case.[6]

The word "fault" was intended to have the same meaning throughout § 768.81. See Woodgate Development Corporation v. Hamilton Investment Trust, 351 So. 2d 14, 16 (Fla. 1977) (it is the duty of the court, where possible, to adopt that construction of a statutory provision which harmonizes and reconciles it with other provisions of the same act). In the absence of any explicit and

[6]The crime committed by the assailant in the instant case was a forcible felony. Section 776.08 defines a forcible felony as: "... robbery ... aggravated assault; aggravated battery; . . . and any other felony which involves the use or threat of physical force or violence against an individual."

clear differentiation in the statute, it is illogical to say that "fault", as used in § 768.81(2), does not encompass violent, intentional, and criminal acts but that that same word, as used in § 768.81(3), encompasses those very same acts. Thus, the only interpretation of "fault" in § 768.81(3) that can be harmonized with the meaning of that term as it is used elsewhere in the statute, and which is also reasonable from a public policy standpoint, is that the term "fault" does not include a violent criminal, intentional tort.

It makes sense that the legislature did not intend that negligent acts and intentional torts should be compared because it is simply illogical to do so. Judge Jorgenson, in his dissenting opinion in Stellas v. Alamo Rent-A-Car, Inc., 673 So. 2d 940 (Fla. 3d DCA 1996), explains why these two different types of conduct are incomparable:

> " . . . A negligent actor is assessed blame partially upon the degree to which it is foreseeable that his breach of duty will result in harm to the plaintiff. 'Where a reasonable man would believe that a particular result was substantially certain to follow, he will be held in the eyes of the law as though he had intended it.' Spivey v. Battaslia, 258 So. 2d 815, 817 (Fla. 1972). It is not always 100 percent foreseeable that a victim of a breach of some duty will be injured by that breach. On the other hand, a criminal wrongdoer, by the very nature of his criminal act, intends to harm his victim. It is always 100 percent foreseeable that the victim will be harmed by a completed crime.
>
> ... 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.' B. Scott Andrews, Comment, Premises Liability -- The Comparison of Fault Between Negligent and Intentional Actors, 55 La. L. Rev. 1149, 1152 (1995). A criminal assailant 'must either desire to bring about the physical results of his act or believe they are substantially certain to follow from his act. Acting with actual desire or with substantial certainty that harm will occur is much different than failing to act as a reasonably prudent person under the circumstances.' Id. at 1159.
>
> 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, or in some cases reckless disregard for the rights of others. Tort law, however, was designed around the principles that 'injuries are to be compensated, and anti-social behavior is to be discouraged.' W. Page Keeton, Prosser and Keeton on the Law of Torts § 1 at 3 (5th ed. 1984). '[T]he 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.' Andrews, supra at 1159, (citing Michael B. Gallub, Assessing Culpability in the Law of Torts: A Call for Judicial Scrutiny in Comparing Culpable Conduct Under New York's CPLR 1411, 37 Syracuse L. Rev. 1079, 1112 (1987).

Id. at 944-945 (Jorgenson, J., dissenting). A jury simply cannot logically compare negligent conduct with a criminal and intentional tort, Veazey, 650 So. 2d at 720 (Watson, J., concurring) (the fault of a rapist cannot be compared logically with the negligence of a party that facilitates that crime as appealing as the theoretical concept may be) (Watson, J., concurring).

The inability of a fact-finder to balance negligent and

intentional torts was also expressed in Publix Supermarkets, Inc. v. Austin, 658 So. 2d 1064 (Fla. 5th DCA 1995), rev. denied, 666 so. 2d 146 (Fla. 1995). In that case, a truck driver, Austin, collided with a motorcyclist, Wurtz, who claimed that Austin was negligent in the operation of his truck, and that another tortfeasor, Publix, willfully sold Austin alcohol. After the jury allocated fault 80% to Austin and 20% to Publix, Publix claimed on appeal that the trial judge should have granted its Motion for Summary Judgment, and Wurtz claimed that the comparative fault statute did not apply. The Fifth District Court agreed with both Publix and Wurtz on these issues and stated:

> ". . . [W]e agree with Wurtz that this was not a case where a jury could assess the comparative fault of two defendants, Austin and Publix.
>
> Austin and Publix were not alleged to be joint tortfeasors in sari delicto. Austin was charged with a negligent tort; Publix was charged with a willful tort. Section 768.125 indicates that the culpable vendor becomes vicariously liable for the damages caused by the intoxicated tortfeasor. There is no logical way for a jury to balance the wrongdoing of the willful vendor and the intoxicated tortfeasor (citations omitted).
>
> In the instant case, if Publix were liable, it would be liable for the entire judgment entered against Austin. Since there was no contributory negligence on the part of Wurtz, and no unjoined "phantom tortfeasors" in this case, the judgment entered against Austin should reflect the entire jury verdict."

Id, at 1068 (emphasis added). In the instant case, as in Publix, there is no logical way to balance the wrongdoing of the intentional, criminal assailant with the negligence of the

defendants and the judgment entered against the defendants should reflect a verdict which is not reduced by any wrongdoing of the assailant.[7]

Chief Justice Rehnquist has written persuasively of the significant distinction between negligent and intentional conduct. Addressing that issue, Justice Rehnquist stated:

> "... This distinction between acts that are intentionally harmful and those that are very negligent, or unreasonable, involves a basic difference of kind, not just a variation of degree. W. Prosser, Law of Torts § 34, p. 185 (4th ed. 1971); Restatement (Second) of Torts § 500, Comment f (1965). The former typically demands inquiry into the actor's subjective motive and purpose, while the latter ordinarily requires only an objective determination of the relative risks and advantages accruing to society from particular behavior. See . . , § 282 . .."

Smith v. Wade, 461 U.S. 30, 61, 103 S.Ct. 1625, 1644 (1983) (Rehnquist, J., dissenting). He went on to quote from Oliver Wendell Holmes, who explained the distinction between intentionally injurious conduct and careless conduct as follows:

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[7]This is also consistent with the position that the defendants and the assailant are independent, and not joint, tortfeasors. It takes distinct acts of neslisence that concur in producing an injury to create joint tortfeasors. Davidow v. Sevfarth, 58 So. 2d 865 (Fla. 1952). An independent tortfeasor cannot shift blame to another independent tortfeasor. See Stuart v. Hertz Corporation, 351 so. 2d 703 (Fla. 1977) (independent tortfeasors could not seek indemnity from one another); Albertson's, Inc. v. Adams, 473 So. 2d 231, 233 (Fla. 2d DCA 1985), rev. denied, 482 So. 2d 347 (Fla. 1986) (no contribution among independent tortfeasors). Therefore, because § 768.81 was enacted to replace joint and several liability among ioint tortfeasors with a fault based system, and was not intended to address liability among independent tortfeasors, a judgment against these negligent defendants would not be reduced by any wrongdoing of the assailant because the assailant's intentional tort made them distinct and independent tortfeasors.

> "Vengeance imports a feeling of blame, and an opinion, however distorted by passion, that a wrong has been done. [E]ven a dog distinguishes between being stumbled over and being kicked." 0. Holmes, The Common Law 3 (1881).

Id. It is impossible for a neutral fact-finder to rationally weigh the conduct of an intentional tortfeasor with the negligent conduct of another. And there is nothing unfair or irrational about holding that negligent actor fully liable when that actor's negligence creates the conditions which directly lead to the occurrence of that intentional tort.

It has long been the tradition in this state that intentional and negligent torts are treated differently. Island City Flving Service v. General Electric Credit Corn., 585 So. 2d 274, 278 (Fla. 1991) (comparative negligence is not available as a defense to an intentional tortfeasor); Fisher v. Shenandoah General Construction co., 498 So. 2d 882 (Fla. 1986) (intentional tort is the conduct required to remove an employer's worker's compensation immunity); White Construction Co., Inc. v. DuPont, 455 So. 2d 1026 (Fla. 1984) (gross negligence will not sustain an award of punitive damages but reckless indifference equivalent to intentional conduct will); Etcher v. Blitch, 381 So. 2d 1119 (Fla. 1st DCA 1979) (a plea of self-defense is an absolute bar to an action based on an intentional shooting but is not an absolute bar to a claim based on negligence); McDonald v. Ford, 223 So, 2d 555 (Fla. 2d DCA 1969) (negligent conduct connotes an unintentional act); Deane v. Johnston, 104 So. 2d 3 (Fla. 1958) (at common law, the defense of contributory negligence was not available to an intentional

tortfeasor). And the express distinction made by the legislature in § 768.81(4) between "intentional" and "negligence" actions follows this tradition. To allow these two fundamentally different kinds of torts to be compared for the purpose of apportioning fault would run counter to the grain of Florida tort law which has long resisted efforts to meld these two distinct kinds of conduct.[8]

Other jurisdictions have also determined that there are fundamental differences between intentional and negligent torts which would make it impossible to compare the two. Veazev, 650 So. 2d at 719-720 (intentional torts are fundamentally different than negligent torts and comparisons between the two, in many circumstances, are not possible); Flood v. Southland Corp., 616 N.E.2d 1068, 1071 (Mass. 1993) (intentional tortious conduct cannot be negligent conduct under Massachusett's comparative negligence statute); Burke v. 12 Rothschild's Liauor Mart, Inc., 593 N.E.2d 522, 532 (Ill. 1992) (willful and wanton conduct carries a degree of opprobrium not found in merely negligent behavior, and a plaintiff's negligence cannot be compared with a defendant's willful and wanton conduct.); Jenkins v. North Carolina Dept. of Motor Vehicles, 94 S.E.2d 577, 580 (N.C. 1956) (negligence is an

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'Contrary to the assertion of the defendants, Florida courts have not consistently (or ever, for that matter) rejected the argument that simple negligence is different in kind from intentional wrongdoing. The defendants cite American Cvanamid Company v. Roy, 466 So. 2d 1079 (Fla. 4th DCA 1984) and Tampa Electric Company, et al v. Stone & Webster Enaineerina Corporation, 367 F. Supp. 27 (M.D. Fla. 1973) in support of that assertion. But neither of these cases involved intentional torts. In Island City Flying Services v. General Electric Credit Corp., supra, this court confirmed the longstanding rule that comparative negligence is not available as a defense to an intentional tort,

outgrowth of the action of trespass on the case and does not include intentional acts of violence).

The defendants contend that § 768.81 speaks in terms of fault, not negligence, and that that implies that the legislature intended the statute to be applicable to some form of fault, other than negligence. If, by using the word "fault", the legislature intended to encompass more than just negligence, its intention was not to encompass intentional torts but to include only those other actions to which the statute explicitly applies, i.e., strict liability, products liability, professional malpractice, and breach of warranty. See § 768.81(4)(a), Fla. Stat. (1993). "Because some statutes and court decisions that affect the doctrine of contributory negligence also deal with such issues as assumption of risk, or misuse of a product, the term 'comparative fault' is often used . . .". 57B Am. Jur. 2d Neslisence § 1138, p.73. This approach was also taken in the Uniform Comparative Fault Act which defines "fault" as follows:

> "'Fault' includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault."

See Henry Woods, Comparative Fault, p.486 (The Lawyer's Cooperative Publishing Company, 2d ed. 1987) and Comment on p.487 ("The Act

does not include intentional torts.").' The term "fault" encompasses these additional theories which are specifically mentioned in the statute. The term does not imply that the statute is applicable to intentional torts.[10]

Therefore, the case law codified in § 768.81 and the legislative history point to a definition of "fault" that equates with "negligence", as does the meaning of "fault" as used in § 768.81(2). Differences in culpability make comparisons between negligent conduct and intentional torts impractical and illogical. Florida tort law has avoided melding these two distinct kinds of conduct. Cases in other jurisdictions have also determined that negligent conduct and intentional torts are fundamentally different and standard legal definitions also equate "fault" with

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'Another definition of "fault" which explicitly states that "fault" equates to "negligence" but does not include any mention of an "intentional tort" is found in Black's Law Dictionary p.608 (6th ed. 1990).

[10]The Florida statute is somewhat unusual in that it specifically provides the type of actions to which comparative fault applies. In contrast, the comparative fault statute in California does not expressly state to what different types of actions it applies, and it also does not specifically exclude from its application actions based upon an intentional tort. That statute provides:

> "In any action for personal injury, property damages, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint . . ."

Section 1432.2(a), California Civil Code (emphasis added). Since that statute does not specifically identify the different types of actions to which comparative fault applies, it has been liberally interpreted to include intentional torts. Martin v. U.S., 984 F.2d 1033 (9th Cir. 1993); Weidenfeller v. Star and Garter, 2 Cal. Rptr.2d 14 (Cal. App. 4th Dist. 1991).

"negligence". Thus, the legislature did not intend that "fault" in § 768.81 should encompass an intentional and criminal tort or that such conduct should be compared to negligence in determining a party's liability.

The defendants (as well as the court in Stellas and Judge Ervin in his dissenting opinion in McGhee) rely on Blazovic v. Andrich, 590 A.2d 222 (N.J. 1991), which involves a patron's action against a lounge for its failure to provide adequate security and against the individuals who assaulted the patron. That case, of course, does not address the non-applicability language of § 768.81(4)(b), the Florida case law codified in § 768.81, or the meaning of "fault" in subsection 2 of that statute. The Blazovic court also disagrees with the contention that intentional torts are different in kind from negligence. Id. at 231. And yet, even with those distinctions, the Blazovic court recognizes the legal principle that apportionment of fault could "lead to the dilution or diminution of a duty of care" and that, under appropriate circumstances, it should not apply between two tortfeasors "when the duty of one encompassed the obligation to prevent the specific misconduct of the other." Id. at 233. In Blazovic, there was no evidence in the record of prior crimes committed on the premises. The assault was deemed as not "sufficiently foreseeable" by the lounge and a "causal connection" was not created between the conduct of the lounge and the resultant injuries. Id. Thus, the court stated, "On this record . . . we are unable to agree that that legal principle should be applied to this case." Id. (emphasis

added).[11]

In the instant case, unlike the facts in Blazovic, there was both substantial evidence of prior serious crime and evidence that Wal-Mart had actual knowledge of crime on its premises. Moreover, Wal-Mart allowed its employees to park close to the store entrance for fear of crime. It was clearly foreseeable to the defendants that their failure to have adequate security would result in a harmful event. The causal connection was solid, and has not been questioned on appeal by either defendant. Thus, the duty of the defendants below, unlike that charged to the lounge in Blazovic, encompassed the obligation to take reasonable steps to prevent the intentional shooting of its invited customer.

Allowing a negligent defendant to reduce its liability by placing blame on a non-party who has intentionally and criminally shot the plaintiff is like placing a two-ton elephant on one side of the scale of justice and a completely innocent crime victim on the other, and all without any explicit and clear legislative authority. Practically speaking, it would unjustly and inequitably result in vesting most, if not all, of the non-economic loss onto the shoulders of a claimant completely free of negligence.[12] And, at the same time, it would relieve from liability the very

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[11]In Florida, a similar claim with a similar set of facts would result in a summary judgment for the defendant. Ameiieiras v. Metropolitan Dade County 534 So. 2d 812 (Fla. 3d DCA 1988), rev. denied, 542 So. 2d 1332' (Fla. 1989).

[12]This burden would fall disproportionately on those claimants more likely to have non-economic losses constitute the substantial proportion of their damages, i.e., victims of sexual assault, children, and the non-working elderly.

tortfeasor whose negligence exposed the plaintiff to the criminal tortfeasor. This is not what the legislature intended when it enacted the comparative fault statute.

ARGUMENT II

IN THE INSTANT CASE, IF EXCLUDING AN INTENTIONAL, CRIMINAL NON-PARTY TORTFEASOR FROM THE VERDICT WAS ERROR, THE JURY'S FINDINGS AS TO NEGLIGENT LIABILITY, COMPARATIVE NEGLIGENT LIABILITY, AND DAMAGES SHOULD NOT BE DISTURBED.

The trial court's decision to leave the shooter off the verdict was made after the defendants concluded their cases and all the evidence was presented, so it obviously had no affect on how the defendants presented their cases or on the evidence they presented. Additionally, the defendants, in closing argument, had every opportunity to argue that the assailant was the sole legal cause of McDonald's injuries and that its conduct should fully displace any negligence attributable to the defendants. In fact, Wal-Mart made this contention by arguing to the jury that a "maniac" came up and shot McDonald and that "the only person responsible for this crime is not in the courtroom" (T.771). That "empty chair" argument, however, was rejected by the jury which found both defendants negligent. Moreover, the trial court clearly and adequately instructed the jury, without objection, on the issues involving the defendants' negligence, the plaintiff's comparative negligence, and damages, and the jury's decisions on these issues were grounded on a proper view of the law.

Therefore, the trial, argument, and jury instructions allowed for a fair trial on the issues of negligent liability, comparative

negligent liability, and damages and the jury would not have reached a different verdict on these issues even if the assailant had been on the verdict. The jury's findings on these issues, therefore, should not be disturbed. Shufflebarser v. Galloway, 668 so. 2d 996 (Fla. 3d DCA 1995); Rule 1.530, Fla. R. Civ. P., (new trial may be granted to all or any of the parties and on all or a part of the issues); see Model Form of Verdict with Apportionment of Fault 8.6, 658 So. 2d 97, 105 (Fla. 1996) (the liability of negligent defendants, the liability of non-party participants, the apportionment of fault, and damages, are each decided separately). Furthermore, Merrill Crossings argued to the trial court that the assailant should not appear on the verdict, and it never objected to McDonald's Motion for Directed Verdict on that issue. Therefore, that defendant is estopped from complaining now of any error concerning the assailant on the verdict. Bould v. Touchette, 349 so. 2d 1181 (Fla. 1977); Rosario v. Melvin, 446 So. 2d 1158 (Fla. 2d DCA 1984);

Since both defendants were found negligently liable and the plaintiff was found not negligently liable, each defendant's negligence exceeded that of the non-negligent plaintiff. Consequently, the judgment against Wal-Mart and Merrill Crossings, jointly and severally, for economic damages of $797,028.14 was properly entered, regardless of whether the assailant should have appeared on the verdict. § 768.81(3), Fla. Stat.; Fabre, supra at 1187 (joint and several applies with respect to economic damages when a defendant's negligence equals or exceeds the plaintiff's).

A case closely on point is Shufflebarser v. Galloway, supra. In that malpractice case, the original district court appellate panel determined that a new trial should be granted the defendant (Dr. Shufflebarger) on the question of the negligence of an attending physician (Dr. Kahn) who was not included on the verdict. The original panel affirmed the trial court's denial of Dr. Shufflebarger's motion for a new trial on the amount of economic damages awarded and on his fault for the medical malpractice. On rehearing en banc, the court unanimously affirmed the panel's opinion and stated:

> "The question of Dr. Kahn's negligence was in fact raised and litigated at the first trial. Dr. Shufflebarger was able to present expert testimony and to argue to the jury that even though Dr. Kahn was not present at trial, his negligence was the sole legal cause of the death of Mr. Bodden. This 'empty chair//intervening cause defense was rejected by the jury. Allowing Dr. Shufflebarger to relitigate the question of his own negligence would unfairly give him that proverbial second bite at a decided issue."

Id. at 997. The court further stated that, on remand,

> "testimony and evidence shall be received solely on the issue of the negligence, if any, of Dr. Kahn. The jury shall be instructed that, as a matter of law, Dr. Shufflebarger was negligent. The jury shall also be instructed to determine whether Dr. Kahn was also at fault and, if so, whether his negligence was a legal cause of damage to the plaintiffs. If the jury determines that Dr. Kahn was also at fault, it shall then apportion the amount of damages established at the first trial between the two defendants ...".

Id. at 998.

In Nash v. Wells Fargo, 21 Fla. L. Weekly at S293, this court

held that, since a Fabre error does not affect the determination of damages, the amount of damages should be upheld.[13] And also, in Nash, this court cited with favor American Aerial Lift, Inc. v. Perez, 629 So. 2d 169 (Fla. 3d DCA 1993). In that case, the court, after a Fabre error, upheld the jury's finding of no contributory negligence by the plaintiff. Id. at 172. The issue of the defendant's negligent liability, however, was to be submitted to the jury at the new trial because the jury charge was "confusing and defective." Id..

When there is a Fabre error, the test as to whether an issue must be retried is whether that error affected the jury's determination of that issue. See Nash, 21 Fla. L. Weekly at S293. In the instant case, if there was a Fabre error, it did not affect the jury's determination of damages and it also did not affect its determination of the liability issues. Wal-Mart asserted at trial that the plaintiff's injuries were solely caused by the assailant. And the jury, after receiving, without objection, clear and proper jury instructions on the liability issues, reached a verdict which rejected that argument. Under these circumstances, and with one of the defendants, during the trial, agreeing with the plaintiff on the form of the verdict, allowing the defendants to relitigate their liability and the liability of the plaintiff would be highly

[13]This court, in Nash, also required that, in order to include a non-party on the verdict form, defendants must specifically identify the non-party in their pleadings. Nash, 21 Fla. L. Weekly at S293. Neither of the defendants herein met that requirement. See Harvey v. Maistroskv, 114 So. 2d 810 (Fla. 2d DCA 1959) (the granting of a motion for directed verdict will not be reversed on appeal if there was any basis for such verdict).

unfair to the plaintiff and would give the defendants a second bite at issues fairly decided by the jury.

Accepting the jury's findings on negligent liability, comparative negligent liability, and damages would not cause confusion, inconvenience, or prejudice to the parties. See Purvis v. Inter-County Telephone & Telegraph Co., 173 So. 2d 679 (Fla. 1965). On retrial, the fact-finder would determine whether the assailant was intentionally liable to the plaintiff. If found liable, the fact-finder would then determine the percentage of fault of each of the three liable participants -- the assailant, Wal-Mart, and Merrill Crossings. The latter two parties would then be held liable for their percentage of fault as applied to the total of non-economic damages of $702,771.86.

ARGUMENT III[14]

THE TRIAL COURT DID NOT COMMIT ERROR IN REFUSING TO ADMIT INTO EVIDENCE DOCUMENTATION OF CRIMES COMMITTED AT REGENCY SQUARE MALL.

The "calls to service" records concerning the Regency Square Mall were hearsay as they were statements, other than made by the declarant while testifying at trial, offered in evidence to prove the truth of the matters asserted. § 90.801, Fla. Stat. (1993). The defendants' purpose in attempting to admit the records was to show that, prior to July 30, 1993, there was crime at the Regency Square Mall, even though that shopping center had security. The

[14]The defendants' Arguments II and III in their brief (argued herein as Arguments III and IV) do not concern the certified questions, nor do they involve any issues which would invoke this court's jurisdiction.

records, as conceded by Wal-Mart's counsel, were not intended to show foreseeability (T.600-601).

The defendants did not lay a proper predicate to show that these records fall under an exception to the hearsay rule. In order for records to fall under the business records exception, which is the exception claimed by the defendants, there must be strict compliance with the requirements of the statute. Johnson v. Department of Health and Rehabilitative Services, 546 So. 2d 741 (Fla. 1st DCA 1989). It must be shown not only that the records were kept in the course of regularly conducted business activity, but, also, that they were (1) made at or near the time of the event recorded (2) from information transmitted by a person with knowledge and (3) that it was the regular practice of that business to make such records. § 90.803(6)(a), Fla. Stat. (1993); Lowe's of Tallahassee v. Giaimo, 552 So. 2d 304 (Fla. 1st DCA 1989); Saul v. John D. and Catherine T. MacArthur Foundation, 499 So. 2d 917 (Fla. 4th DCA 1986). Such a showing was not made in the instant case (T.219-220) and the trial court did not abuse its discretion in denying the admission into evidence of those records. Forester v. Norman Roger Jewel1 & Brooks International, Inc., 610 So. 2d 1369 (Fla. 1st DCA 1992).

Moreover, the records were totally irrelevant. There was absolutely no proper predicate laid to show that those records tend to prove or disprove a material fact. § 90.401, Fla. Stat. (1993). Whatever the effectiveness of security at the Regency Square Mall prior to July 30, 1993, the records were not relevant to the issue

of whether security would have been effective at Merrill Crossings on July 30, 1993. Aside from the obvious differences in the two centers (one is a large regional mall five miles away, while the other is a strip center), the defendants laid no predicate as to how the centers were substantially similar, i.e., there was no testimony as to specifically how many security officers were employed at Regency, the number of customers, the number of exits, the number of parking spaces, or the management philosophy of that mall (a crucial indicator in order to compare security among shopping centers (T.609-610)); McDonald at 14; Frazier v. Otis Elevator Company, 645 So. 2d 100 (Fla. 3d DCA 1994). The court's ruling on this point also is consistent with the court's prior refusal to admit, at the request of the plaintiff, evidence of crime on the issue of foreseeability that occurred five miles away (T.291-293).

Furthermore, the court allowed the defendant's expert to utilize the records in stating his opinions and even permitted the defendant's counsel to say that the expert was using those records in reaching his conclusions. The defendants have not been prejudiced at all by the trial court's ruling. In summary, the records concerning criminal incidents at the Regency Square Mall were hearsay and irrelevant, and the court ruled correctly when it denied their admission into evidence.

ARGUMENT IV

THE **TRIAL COURT DID NOT COMMIT ERROR IN RULING THAT MERRILL** CROSSINGS HAD A DUTY TO **KEEP** THE PARKING LOT IN FRONT **OF WAL-MART REASONABLY SAFE FOR INVITEES OF THE SHOPPING CENTER.**

This issue involves the question of which party involved with a shopping center has the duty to keep the center's common area parking lot reasonably safe when that parking lot poses a general and foreseeable risk of harm to those that use it.[15] This issue was addressed in Publix Super Markets, Inc. v. Jeffery, 650 So. 2d 122 (Fla. 3d DCA 1995). In that case, the court, relying on its earlier holding in Federated Department Stores, Inc. v. Doe, 454 So. 2d 10 (Fla. 3d DCA 1984), held that an owner of real estate who leases part of it to serve tenants and who, under the lease, retains control of the common area to be used by the invitees of its other tenants, has the exclusive duty to keep the area safe for such invitees. Jefferv at 124. The court in Jeffery also found that a tenant might have a duty, notwithstanding the terms of the lease, if the tenant possessed the land. Id. "It is well-settled that a possessor of land which is held open to the public for business purposes has a duty to use reasonable care to prevent harm to its invitees resulting from the intentional attacks of third parties". Id. "Possession", as defined in the Jefferv case, is occupying the land with intent to control it. Id.

Although the question in Jefferv was whether the tenant in that case had a duty, the same criteria can be applied to determine

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[15]The defendants have not questioned whether the parking lot was a foreseeable zone of risk which required the exercise of prudent foresight, but only whether Merrill Crossings, through its conduct, created that risk and is required to exercise that foresight. McCain v. Florida Power Corporation, 593 So. 2d 500, 503 (Fla. 1992) (each defendant who creates a foreseeable zone of risk is required to exercise prudent foresight whenever others may be injured as a result).

whether the landlord in the instant case had a duty to provide a reasonably secure lot. Merrill Crossings, under the lease, had control of the parking lot and, furthermore, it had possession of the parking lot. It had more than sufficient control, under the lease and in actuality, to impose a duty on it to provide a secure lot. McDonald at 15. Neither defendant had the kind of exclusive control found in Jefferv thatwould place the responsibility solely on that one party.

Under the lease, Merrill Crossings reserved for its customers the right to use the lot, its entrances, and its exits (Exhibit 30, p.1). It also had the power to regulate parking and the flow of vehicular and pedestrian traffic in and about the center (Exhibit 30, p.1). Clearly, it did not just own the lot -- it had the predominant say in controlling how pedestrians and vehicles accessed that lot and how that lot was or would be used. See Bovis v. 7-Eleven, Inc., 505 So. 2d 661, 664 (Fla. 5th DCA 1987) (duty to protect others from dangerous condition on premises rests on right to control access by third parties).[16]

As to actual possession of the lot, Merrill Crossings had

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[16] In Jefferv, the clauses in the lease obligating one party to pay the other to maintain the lot and giving one party authority to exclude anyone from the premises were critical factors in its determination that the lot was controlled by just one party (the landlord). Jefferv, 650 So. 2d at 124-125. In the instant case, however, neither Wal-Mart nor Merrill Crossings was obligated to pay the other party for maintaining the lot. There was also no specific clause giving either party the right to exclude persons from the premises, although Merrill Crossings has the right to propound regulations concerning pedestrian and vehicular traffic. Neither Wal-Mart nor Merrill Crossings had the same exclusive control exercisable by the landlords in Jefferv and Federated.

previously hired security guards that patrolled in front of Wal-Mart for over three months (T.242, 244, 256, 263); it paid for electrical repairs in the lot (T.283-284, Exhibits 24-29); it obviously benefitted when customers of its other tenants used the lot (Beverstein, pp.2, 8-29); and it was concerned enough about the landscaping in the lot that it demanded that Wal-Mart replace the landscaper (Exhibit 39). Merrill Crossings had sufficient control of the lot, both contractually and through actual possession, to impose on it a duty to maintain a safe and secure parking lot.[17]

There is ample precedent for finding that both a tenant and landlord may have a concurrent duty to provide a reasonably safe premises. See Craig v. Gate Maritime Properties, Inc., 631 So. 2d 375 (Fla. 1st DCA 1994); Levy v. Home Depot, Inc., 518 So. 2d 941 (Fla. 3d DCA 1987); Bovis v. 7-Eleven, Inc., 505 So. 2d 661 (Fla. 5th DCA 1987); City of Pensacola v. Stamm, 448 So. 2d 39 (Fla. 1st DCA 1984); and Arias v. State Farm Fire & Casualty Company, 426 So. 2d 1136 (Fla. 1st DCA 1983). As stated in Craig v. Gate Maritime Properties, Inc.,

> " ... the fact that there may be joint responsibility or control over premises does not relieve a party from responsibility. A

[17]This contrasts sharply to the facts in Jefferv where that court found that using the lot to transport groceries and providing guards on the lot for just two days did not measure up to "possession" by the tenant. Also, the defendants, in their brief, inaccurately state that, at the end of the plaintiff's case, the trial court observed that it was onlv the letter as to landscaping that persuaded it not to direct a verdict in favor of Merrill Crossings. In fact, the trial court stated that the letter showed that Merrill Crossings asserted control but the court certainly did not state that the letter was the only indication of Merrill Crossings' control (T.715-716).

duty, and therefore liability for breach of that duty may rest upon more than one party:

> Anyone who assumes control over the premises in question, no matter under what guise, assumes also the duty to keep them in repair and the fact that others are under a duty which they fail to perform is no defense to one who has assumed control, thereby bringing others within the sphere of danger."

Craig, supra, at 378, citing Arias v. State Farm Fire and Casualty Company, supra, at 1138.

Both defendants, based on the lease and their actual possession of the premises, had a duty to provide a reasonably safe parking lot. A directed verdict should not be entered unless, as a matter of law, no proper view of the evidence could possibly sustain a verdict for the non-moving party. Sun Life Insurance Company of America v. Evans, 340 So. 2d 957 (Fla. 3d DCA 1976). In the instant case, viewing the evidence in a light most favorable to the plaintiff, the motion for directed verdict made by Merrill Crossings was properly denied, Sears, Roebuck & Co. v. McKenzie, 502 so. 2d 940 (Fla. 3d DCA 1987).

CONCLUSION

The Opinion below should be affirmed in its entirety.

MORRIS AND BERNARD

BY: Jeffery B. Morris

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Jeffrey P. Gill, Esquire, Attorney for Appellant, Wal-Mart, 316 South Baylen Street, Suite 110, Pensacola, Florida 32501; Richard A. Sherman, Esquire and Rosemary B. Wilder, Esq., 1777 South Andrews Avenue, Suite 302, Ft. Lauderdale, Florida 33301; and Noah H. Jenerette, Jr., Esquire, 231 East Adams Street, Jacksonville, Florida 32202, Attorneys for Appellant, Merrill Crossings, by United States Mail, this 16th day of October, 1996.

Jeffery B. Morris
Attorney

Appendix

INDEX TO BRIEF OF RESPONDENT ON **THE MERITB**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JANE DOE, etc.,

Plaintiff,

-vs- CASE NO. 93-709 Civ-J-10

PIZZA HUT OF AMERICA, INC., etc.,

Defendant.
_____/

O R D E R

This is a negligence action brought pursuant to the Court's diversity jurisdiction, The case is before the Court on Plaintiff's motion (Doc. 53) for partial summary judgment. Defendant has responded (Doc. 63).

The following factual summary is derived from Plaintiff's complaint: During business hours on June 29, 1992, Plaintiff entered the Pizza Hut restaurant located at 5421 Roosevelt Boulevard, Jacksonville, Florida to purchase a pizza. Upon entry she encountered three assailants who were in the act of committing armed robbery. Plaintiff alleges that she was forced into a walk-in cooler, robbed, and raped multiple times at gunpoint. Plaintiff's claim against Pizza Hut is based on allegations of negligent security and failure of the business to exercise reasonable care to protect patrons in the face of an allegedly foreseeable criminal attack. Defendant answered the complaint and filed certain affirmative defenses. Plaintiff seeks partial summary judgment as to these defenses.

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In paragraph two of its answer (Doc. 5), Defendant states as an affirmative defense that:

> Plaintiff's own negligence was either the sole proximate cause or a contributing proximate cause of the injuries complained of thus barring or reducing the damages by reason of her own comparative negligence.

Plaintiff moves for partial summary judgment and argues that Defendant has failed to allege any facts that would support a finding of comparative negligence. In response, Defendant concedes that discovery has failed to reveal any comparative negligence on Plaintiff's part. Accordingly, Plaintiff's motion for partial summary judgment as to this affirmative defense is due to be granted.

In paragraph three of its answer, Defendant states as its second affirmative defense that:

> [a]ny damages suffered by the Plaintiff are the result of the negligence of others and Defendant is entitled to an apportionment of damages in accordance with Florida Statutes Section 768.81, Comparative Fault. Any judgment entered against the Defendant must be based on the fault of others and not on the basis of the doctrine of joint and several liability.

Plaintiff moves for partial summary judgment and argues that there is no evidence that the Plaintiff suffered damages as the result of the "negligence of others" and that section 768.81 therefore does not apply. Defendant argues in response that section 768.81, by its terms, applies to nesliaence actions and Plaintiff's noneconomic damages should therefore be apportioned among those found to be at fault for her injuries. Defendant misses the point, however, in that it invokes section 768.81 in an attempt to allocate fault between itself -- the alleged negligent party -- and the armed assailants.

Defendant does not argue, nor could it, that the acts of the assailants were negligent, and it does not cite this Court to any case law in support of its proposition that section 768.81 contemplates an allocation of fault among intentional and negligent tortfeasors. Pursuant to the statute, Plaintiff's damages must be apportioned to those nesliaent parties found to be at fault. Accordingly, to the extent that Defendant can prove at trial that the negligence of others caused Plaintiff's damages, it is entitled to an apportionment of damages with respect to those parties. In all other respects, however, Plaintiff's motion for partial summary judgment is due to be granted.

In paragraph five of its answer, Defendant states that:

> [t]he injuries, if any, of the Plaintiff were not proximately caused by any actions of the Defendant but were caused by the intervening actions of the Plaintiff and others for whom the Defendant is not legally liable.

Defendant is essentially arguing in this affirmative defense that the intervening intentional act(s) of the assailants operate to insulate it from liability. This argument is without merit. Since Defendant is liable, if at all, for failing to protect its patrons from a criminal attack, it cannot escape responsibility because the criminal attack has actually taken place. The issue here is not whether the criminal acts *were* the proximate cause of Plaintiff's injuries, but whether the criminal acts were reasonably foreseeable. See. e.g., Holidav Inns, Inc. v. Shelburne, 576 So.2d 322, 327 (Fla. 4th DCA 1991).

Accordingly, upon due consideration, Plaintiff's motion (Doc. 53) for partial summary judgment is GRANTED and Defendant shall not rely on these affirmative defenses during the course of the trial.

plaintiff's motion (**Doc.** 64) for leave to file reply to Defendant's opposition to Plaintiff's motion for partial summary judgment should be TERMINATED as MOOT.

IT IS SO ORDERED.

DONE and ORDERED at Jacksonville, Florida, this 21st **day** of June, 1994,

United States District Judge

c: counsel of record
Honorable Howard T. Snyder

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

SANDRA DAY,

CASE NO. 94-4 195

Plaintiff,

vs.

CAPITOL CITY HOUSEHOLDING CORPORATION
OF SIGMA PHI EPSILON, a Florida Corporation;
SIGMA PHI EPSILON FRATERNITY, a Virginia corporation;
GEOFFRY E. COTTER; TROY QUEEN; JOSEPH PETER CATANZARATI;
JASON S. PRESS; and CHRISTOPHER M. PETERSON,

Defendants.

ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE FIRST AND THIRD AFFIRMATIVE DEFENSES

THIS CAUSE came on to be heard on the plaintiffs Motion to Strike the Defendants' First and Third Affirmative Defenses. Having considered the plaintiffs Motion, the defendants' responses, the memoranda submitted by the parties, and the argument of counsel, and being otherwise advised in the premises, the court finds that the defendants' affirmative defenses should be stricken.

1. The plaintiffs claim against the defendants is based on allegations of negligent security and failure of the defendants to exercise reasonable care to protect the plaintiff from foreseeable criminal actions on the part of third persons. In their first affirmative defense, the defendants assert that damages should be apportioned among themselves and the assailant or assailants that attacked and sexually battered the plaintiff. The defendants

claim that the intervening intentional acts of the assailant or assailants should reduce their liability proportionately. The defendants contend that Fla. Stat. Section 768.81 allows liability to be so apportioned. The defendants do not cite any Florida cases or other persuasive authority in support of their position that Section 768.8 1 allows an allocation of fault among the intentional tortfeasor and the negligent tortfeasors.

2. Section 768.8 1 provides for a division of fault between tortfeasors in a negligence action. By its terms, that section applies only to negligence cases. By its terms, that section specifically does not apply to "any action based upon an intentional tort." Clearly, sexual battery is an intentional, rather than a negligent, tort. The statute does not contemplate apportionment of fault among or between an intentional tortfeasor and a negligent tortfeasor. Such apportionment would be appropriate only among two (or more) negligent tortfeasors.

3. The intentional acts of a third party cannot be compared with the negligent acts of a defendant whose duty is to protect the plaintiff from the intentional act committed by the third party.

4. The first affirmative defense asserted is not allowed by Section 768.8 1 and should not be relied upon during the trial of this case.

5. The Motion to Strike the First Affirmative Defense is granted to the extent that the defense attempts to apportion liability among the defendants and the assailant or assailants who sexually battered the plaintiff.

6. The defendants concede that their third affirmative defense is unavailing as a

matter of law with respect to the inadequate security claims raised by the plaintiff. The defendants shall not assert at trial that the criminal conduct of the plaintiffs assailant or assailants is an intervening cause to claims that the defendants failed to provide adequate security to prevent foreseeable criminal conduct by third parties.

For the reasons stated, the plaintiffs Motion to Strike the Defendants' First and Third Affirmative Defenses is granted, and the defendants shall not rely upon those affirmative defenses during the trial of this case.

DONE AND ORDERED October 16, 1995 in Tallahassee, Leon County, Florida.

NIKKI ANN CLARK
Circuit Judge

copies furnished to:

C. Gary Williams
R. William Roland

A Certified Copy
Attest-
Dave Lang
Clerk Circuit Court
Leon County, Florida
By _____ D.C.

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Granger	Fort	1. COM	Fav/CS
2.	Plante	Lester	2. JCI	Fav/CS/CS
3.			3.	

SUBJECT: Liability Insurance/tort Reform

BILL NO. AND SPONSOR: Analysis of CS/CS/SBs 465, 349, 592, 698, 699, 700, 701 702, 956, 977 & 1120 by Judiciary-Civil, Commerce Committee and Senators Hair, Barron, Kirkpatrick, Vogt, Crawford and others
Passed by the Legislature June 7, 1986 (Chapter 86-160, Laws of Florida)

I. SUMMARY:

Present Situation and Effect of Proposed Changes:

CS/CS/SB 465, 349, 592, 698, 699, 700, 701, 702, 956, 977, & 1120 (hereinafter CS/CS/SB 465), cited as the Tort Reform and Insurance Act of 1986, is intended to ameliorate the current commercial liability insurance crisis by making commercial liability insurance more available, by increasing the regulatory authority of the Department of Insurance (department), and by modifying legal doctrines that have aggravated the crisis.

Among other things, the bill:

1) authorizes financial institutions to participate in reinsurance and Florida insurance exchanges (sec. 3);

2) authorizes commercial liability risks to be group insured (sec. 6);

3) requires the appellate court to set aside a final order of the department in certain rate-related proceedings (sec. 7);

4) signif icantly increases the department's rate review and enforcement authority (sec. 9);

5) creates a property/casualty insurance excess profits law (sec. 10);

6) authorizes creation of a commercial property/casualty joint underwriting association (sec. 13);

7) expands the types of health care providers that can self-insure and authorizes CPAs, architects, engineers, veterinarians, land surveyors, and insurance agents to self-insure (secs. 14 & 15);

8) establishes notice requirements for cancellation, nonrenewal, and renewal of premium of commercial liability policies (sec. 16);

9) authorizes the creation of commercial self-insurance funds (secs. 25-40);

10) modifies the application of the doctrine of joint and several liability (sec. 60);

11) limits when punitive damages may be pled, specifies to whom they are to be distributed, and caps the maximum amount of awards of such damages in certain cases (secs. 51 & 52);

12) provides for offers and demands for judgments in all civil cases (sec. 58);

13) caps noneconomic damages in civil actions at $450,000 (sec. 59);

14) requires, under certain circumstances, periodic payment of future damages exceeding $250,000 (sec. 57);

15) creates a five member Academic Task Force for Review of the Insurance and Tort Systems (sec. 63); and

16) mandates a limited freeze and reduction, and a filing, of insurance rates for certain commercial line5 of insurance.

For ease of understanding, a section-by-section analysis of CS/CS/SB 465 follows:

Section 1.

This section specifies that this act may be cited as the Tort Reform and Insurance Act of 1986.

Section 2.

This section expresses legislative recognition of the liability insurance crisis, and documents the legislative finding that in order to definitively address the crisis and to deflate it and prevent its recurrence, comprehensive reforms to both the tort system and the insurance regulatory system must be made.

Section 3.

The bill authorizes financial institutions to own or control any insurer that transacts only reinsurance in this state and which actively engages in reinsuring risks located in this state. Financial institutions are also authorized to participate as underwriting members or as investors in an underwritinq member of any insurance exchange which is authorized under s. 629.401, F.S., and which transacts only aggregate or excess insurance for self-insurers, multiple employer welfare arrangements, or workers' compensation self-insured trusts, in addition to any reinsurance the underwriting member may transact.

The bill clarifies chat the investment in reinsurance authorized by the bill is not violative of state law restrictions on financial institutions engaging in insurance agency activities. This clarification primarily affects independent state chartered banks and savings and Loans which are not members of the Federal Reserve system.

Various federal Laws restrict the authority of bank holding companies, national banks, federal savings and loans, and state

Section 58.

This section is similar to s. 768.585, F.S., which provides for offers and demands for judgment in medical malpractice actions, except this provision makes such offers and demands applicable to all civil actions based upon injury to person or property or for wrongful death.

The bill provides that if a defendant files an offer of judgment which is not accepted within 30 days by the plaintiff, the defendant is entitled to reasonable costs and attorney's fees incurred from the date of the offer if the final judgment for the plaintiff is at least 25 percent less than such offer. If the costs and attorney's fees are more than the amount of the judgment, then the court must enter judgment for the defendant in the amount that the costs and attorney's fees exceed the plaintiff's judgment. Conversely, if a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days, and the plaintiff receives a judgment which exceeds the demand by 25 percent or more, the plaintiff is entitled to recover reasonable costs and attorney's fees incurred from the date of the demand. If rejected, neither the offer nor demand is admissible as evidence in subsequent litigation.

Any offer or demand for judgment made under the section would not be permitted until 60 days after filing of the suit, and could not be accepted later than 10 days before the date of trial.

Section 59.

Other than under ch. 440, F.S., which exempts employers who maintain workers' compensation insurance for the benefit of their employees from all liability for damages arising out of work-related injuries, s. 627.737, F.S., relating to the automobile no-fault law, is the only statute which limits the recovery of noneconomic damages by injured persons. In all other types of personal injury cases, there is no limit to the amount of noneconomic damages a plaintiff may recover.

The bill sets a maximum amount of noneconomic damages that may be awarded to any person entitled thereto in any action for personal injury or wrongful death at $450,000. The provisions of this section would apply to any cause of action arising on or after July 1, 1986.

Section 60.

Prior to 1973, Florida adhered to the legal doctrine of "contributory negligence." Contributory negligence provided that a plaintiff who was partially responsible for injuries caused by a negligent defendant could be totally barred from recovering from that defendant. In 1973, the Florida Supreme Court abolished contributory neqliqence and adopted the doctrine of "comparative negligence". See Hoffman v. Jones, 280 So.2d 431 (1973). Comparative neqliqence allows a plaintiff who is partially-responsible for his injuries to recover from a negligent defendant. Under comparative negligence, a plaintiff's total judgment against a negligent defendant is reduced by the percentage of the plaintiff's fault.

The principles of **comparative** negligence are also applicable in cases involving **multiple** defendants, vith fault being apportioned **among all** negligent parties and the plaintiff's total **damages** being divided **among** those parties according to their proportionate degree of fault. However, in these cases one or more of the defendants may ultimately be forced **to** pay more than their proportionate shares of the damages, pursuant to the doctrine of joint and several liability. Under this doctrine, if two or more defendants are found to **be** responsible for **causing** the plaintiff's injuries, the plaintiff can recover the full amount of damages from any one of them.

The bill's modified version of joint and several liability applies to all negligence cases which **are defined** to include, but not be limited to, civil actions **based** upon theories of negligence, strict liability, products liability, professional malpractice, breach of warranty, and other like theories. In such cases in which the award for damages does not exceed $25,000, joint and several liability applies to all of the damages. In cases in which the award of damages is greater than 525,000, liability for damages is based on each party's proportionate fault, except that each defendant who is equal to or more at fault than the claimant is jointly and severally liable **for** all economic damages,. The bill's modified version of joint and several liability would not apply to actions based upon intentional torts or in which the Legislature has mandated that the doctrine apply, specifically chapter 403 (environmental pollution), chapter 498 (land sales), chapter 517 (securities), chapter 542 (antitrust) and chapter 895 (RICO).

Section 61.

This section amends s. 57.105, F.S., to provide that when the court assesses attorney's fees against the losing party because that party's claim or defense completely lacked a justiciable issue, that the losing party's attorney pay one-half of the attorney's fees so assessed. It provides an exception for an attorney who has acted in good faith, based upon the representations of his client.

Section 62.

Under present law, in s. 768.13, **F.S.,** immunity is established for any person who, in good faith, renders emergency care or treatment at the scene of an emergency where the person acts as an ordinary, reasonably prudent man would have acted under the same circumstances.

The bill provides additional immunity for any person licensed to practice medicine who renders emergency care in response to a **"code** blue" emergency within a hospital or trauma center, if he acts as a reasonably prudent person licensed to practice medicine who would have acted under the same or similar circumstances.

Section 63.

This section creates, a five-member Academic **Task** Force for Review of the Insurance and Tort Systems consisting of the president of each state university having a law school, the president of a private university having both a law school and a medical school, plus two others to be appointed by these three. The task force would be charged with evaluating the

STORAGE NAME: CS/CS/SB465/BS

Date: July 16, 1986
Revised:
Final: July 16,1986

HOUSE OF REPRESENTATIVES
COMMITTEE ON HEALTH **CARE AND INSURANCE**
STAFF **ANALYSIS**

BILL #: Ch. 86-160, Laws of Florida, (CS/CS/SB 465, 349, 592, 698, 6.99, 700, 701, 702, 956, 977, & 1120)

RELATING TO: Tort Reform and Insurance

SPONSOR(S): Senate Committees on Judiciary-Civil and Commerce and Senator Hair and others

EFFECTIVE DATE: Multiple Effective Dates

COMPANION BILL(S): CS/HB 1344

OTHER COMMITTEES OF REFERENCE: (1) Senate Commerce

(2) Senate Judiciary-Civil

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I. SUMMARY:

INSURANCE **REFORMS**

In **summary,** CS/CS/SB 465 makes the following changes to the insurance laws:

(1) Additional authority **is** provided to the Department of Insurance as to the review and approval of property and casualty insurance rates. Significant changes include the elimination of "a lack of a reasonable degree of competition" **as a** necessary element in finding a rate to be excessive: greater authority to consider investment income in approving underwriting margins: ***and*** the requirement that insurers either file their rates 60 days before they are to become effective, subject to disapproval by the Department, ***or*** to file their rates 30 days after they are used, subject to disapproval and an order by the Department to rebate excessive rates.

(2) Creation of an excess profits law for commercial property and casualty insurance that returns excess profits to eligible policyholders vho comply vith risk management guidelines.

(3) Establishment ***of*** a joint underwriting association that guarantees the availability of property and **casualty** insurance to:

(a) any person who is required by Florida law to have such insurance and who has been rejected by the voluntary market, or

Section 60. Prior to 1973, Florida adhered to the legal doctrine of "contributory negligence." Contributory negligence provided that a plaintiff who was partially responsible for injuries caused by a negligent defendant could be totally barred from recovering from that defendant. In 1973, the Florida Supreme Court abolished contributory negligence and adopted the doctrine of "comparative negligence". See Hoffman v. Jones, 280 So.2d 431 (1973). Comparative negligence allows a plaintiff who is partially responsible for his injuries to recover from a negligent defendant. Under comparative negligence, a plaintiff's total judgment against a negligent defendant is reduced by the percentage of the plaintiff's fault. The act codifies the comparative negligence law.

Pursuant to the doctrine of joint and several liability. if two or more defendants are found to be jointly responsible for causing the plaintiff's injuries, the plaintiff can recover the full amount of damages from any one of the defendants who, in turn, can attempt to seek recovery in a contribution action against the co-defendants for their equitable share of the damages.

The act's modified version of joint and several liability applies to all. negligence cases which are defined to include, but not be limited to, civil actions based upon theories of negligence, strict liability, products liability, professional malpractice, breach of warranty, and other like theories. In such cases in which the award for damages does not exceed $25,000, joint and several liability applies to all of the damages. In cases in which the award of damages is greater than $25,000, liability for damages is based on each party's proportionate fault, except that each defendant vho is equal to or more at fault than the claimant is jointly and severally liable for all economic damages. The act's modified version of joint and several liability would not apply to actions based upon intentional torts or in which the Legislature has mandated that the doctrine apply, specifically chapter 403 (environmental pollution), chapter 498 (land sales), chapter 517 (securities), chapter 542 (antitrust) and chapter 895 (RICO).

Section 61. This section amends s. 57.105, F.S., to provide that when the court assesses attorney's fees against the losing party because that party's claim or defense completely lacked a justiciable issue, that the losing party's attorney pay one-half of the attorney's fees so assessed. It provides an exception for an attorney vho has acted in good faith, based upon the representations of his client.

Section 62. Under present law, in s. 768.13, F.S., immunity is established for any person who, in good faith, renders emergency care or treatment at the scene of an emergency where the person acts as an ordinary, reasonably prudent man would have acted under the same circumstances.

The act provides additional immunity for any person licensed to practice medicine vho renders emergency care in response to a "code blue" emergency within a hospital or trauma center, if he acts as a reasonably prudent person licensed to practice medicine who would have acted under the same or similar circumstances.

Section 63. This section creates a five-member Academic Task force for Review of the Insurance and Tort Systems consisting of the president of

(date) (approved)

Sponsor Furnished Copy

ACTION : :Com. CS 5-27-75

:Final App'd by Gov. 6-12-75

Ch. No. 75-108

CS UPDATE

SENATE JUDICIARY-CIVIL COMMITTEE

Staff Analysis (by **Steve Kubik**)

1975

BILL NO. & INTRODUCER:

CS/SB 98

Senator McClain

RELATING TO:

Negligence Actions

I. BILL SUMMARY:

This bill creates s. 768.31, Florida Statutes, entitled the Uniform Contribution Among Tortfeasors Act.

Section 2 of the act defines who has a right to contribution. Specifically included in the provisions are insurers; tortfeasors responsible for wilful and wanton acts causing or contributing to the injury are specifically excluded: also excluded are liabilities arising out of fiduciary relationships.

Determination of prorata shares of tortfeasors in the entire liability is addressed in the third section.

Section 4 of the act provides for *enforcement.* Particularly noteworthy are subsections (c) and (f). Subsection (c) provides a 1-year statute of limitations running from the time the judgment becomes final; subsection (f) relates to the res judicata effect of the judgment, binding the defendants among themselves by the adjudication of. their liability to the claimant.

A release or covenant not to sue or not to enforce a judgment in favor of one of the liable persons discharges tie tortfeasor to whom it goes from all liability for contribution but does not discharge the other tortfeasors.

The provisions of the act arm declared severable and all acts or parts of acts inconsistent with this bill are repealed.

II. ANALYSIS :

In Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973), the Florida Supreme Court, while adopting pure comparative negligence as the law in Florida, refused to solve the problem of contribution among tortfeasors. As a result, this whole area has been left in a great state of confusion. This bill would adopt the Uniform Contribution Among Tortfeasors Act, developed first in 1939 by the American Law Institute and the Conference of Commissioners on Uniform State Law and subsequently revised in 1955.

The inclusion of insurers in the right to contribution recognizes the fact that the contribution experiences will inevitably be reflected in insurance rates.

Section 3 attempts *to resolve several difficult* questions of policy. It first recognizes and registers the lack of need for a comparative negligence rule in contribution cases. Second, it invokes the rule of equity which requires class liability, including the common liability arising *from* vicarious relationships, to be treated as a single share:- *Third,* it makes clear that except as limited by this section, principles of equity shall control.

Subsection (b) of Section 4 relating to post-judgment procedure is based on a New York Statute. The requirement of notice to all of the parties makes it necessary to give notice to the plaintiff as well as to joint tortfeasor defendants. This gives a plaintiff who may have been only partially paid, some protection against the exhausting of the assets to satisfy a contribution claim before the plaintiff has collected the balance on his judgment.

Subsections (c) and (d) are so worded as to prevent a long delay in the assertion of a contribution claim. Under both clauses the party seeking contribution must discharge the obligation by actual payment within the prescribed time or lose his right to contribution.

III. TECHNICAL ERRORS:

None noted.

IV. STAFF COMMENTS:

The traditional policy of Anglo-American common law has been to deny assistance to tortfeasors on the understanding that they are wrongdoers and hence not deserving of the aid of courts in achieving equal or proportionate distribution of the common burden. This bill, however, expresses a desire for equal or proportionate distribution of a common burden among those upon whom it rests. The bill recognizes that an injury resulting from the joint tort of two or more persons involves each of them, jointly and severably, in liability for the entire damage.

Thurfar, at least 8 states have passed the Uniform Contribution Among Tortfeasors Act.

REFERENCE: Judiciary-Civil

Comparative Negligence Established...

Examples of apportionment under this bill

EXAMPLE I

P's negligence	= 40%
D's negligence	= 60%
Damages	= $10,000
Award to Plt.	$ 6,000

EXAMPLE 2

P's negligence	= 51% or greater
D's negligence	= 49% or less
Damages	= $10,000
Award to Plt.	No recovery

EXAMPLE 3

P's negligence	= 40%
D-2's negligence-	10.9
D-1's negligence-	50%
Damages	$10,000
Award to Plt.	$ 6,000
D-l owes	$ 6,000
D-2 owes	-0- (Because his negligence was less than plaintiffs)

EXAMPLE 4

P's negligence	= 34%
D-1's negligence-	33%
D-2's negligence-	33%
Damages	$10,000
Award to Plt.	No Recovery (even though the combined negligence of the defendants was greater than plaintiff's)

EXAMPLE 5

P's negligence	= 10%
D-l's negligence-	50%
D-2's negligence-	40%
Damages	$10,000
Award to Plt	9,000
D-l owes	5,000
D-2	4,000

Whore there are multiple Defendants (except in the case of Example 3), Plaintiff may recover against either Defendant. Then the Defendant who pays may seek contribution against the other Defendant, who must pay his proportionate share.