IN THE SUPREME COURT OF FLORIDA
CASE NOS. 08,324 & 88,776
(Consolidated)
Florida Ear No. 184170

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.

WAL-MART STORES, INC., a corporation,
Appellant/Petitioner,
WY.
LAWRENCE HOWARD McDONALD, individually, etc., et al.
Appellees/Respondents.

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

JOINT BRIEF OF PETITIONERS ON THE MERITS WAL-MART STORES, INC., and MERRILL CROSSINGS ASSOCIATES

(With Appendix)

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Esquire
Rosemary B. wilder, Esquire
Suite 302
1777 South Andrews Avenue
Fort Lauderdale, FL 33316
(954) 525-5885 - Bxoward
(305) 940-7557 - Dade
and
Noah H. Jenerette, Jr., Esquire
BOYD & JENERETTE, P.A.
Jacksonville, FL
(904) 353-6241
Attorneys for Merrill Crossings
and
Jeffrey P. Gill, Esquire
BRIDGERS, GILL & HOLMAN
Pensacola, FL
(904) 432-6484
Attorney for Wal-Mart

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LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1776 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525 - 5885
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 - 7557

TABLE OF CITATIONS

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREW5 AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 • 5685
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 . TEL. (305) 940-7557

TABLE OF CITATIONS (Continued)

REFERENCES:

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 -TEL. (954) 525 - 5885
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 - TEL. (305) 940-7557

POINTS ON APPEAL

I. THE TRIAL COURT ERRED IN EXCLUDING THE INTENTIONAL TORTFEASOR FROM THE VERDICT FORM AND THE DECISION BELOW MUST BE QUASHED UNDER § 768.81, ~~FABRE,~~ AND STELLAS.

II. THE TRIAL COURT ERRED IN FAILING TO ADMIT INTO EVIDENCE DOCUMENTATION OF CRIMES COMMITTED AT REGENCY SQUARE MALL

III. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO DIRECT A VERDICT FOR MERRILL CROSSINGS, WHICH OWED NO DUTY OF CARE TO THE PLAINTIFF.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 • 5885
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 • 7557

INTRODUCTION

The Defendant/Appellant, Wal-Mart Stores, Inc., shall be referred to as Wal-Mart.

The Defendant/Appellant, Merrill Crossings Associates, shall be referred to as Merrill Crossings.

The Appellee, Lawrence Howard McDonald, shall be referred to as Plaintiff or McDonald.

The Record on Appeal shall be designated by the letter "R."

The trial transcript appearing at the end of the Record shall be designated by the letter "T."

All emphasis in the Brief is that of the writer unless otherwise indicated.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 -TEL. (954) 525 • 5665
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 • 7557

STATEMENT OF THE FACTS AND CASE

This is an appeal from two certified questions on whether the intentional tortfeasor's liability must be assessed by the jury, under § 768.81, in a negligent security case. The Wal-Mart, infra, Decision is in direct and express conflict with the Third District's decision in Stellas, infra; which correctly interpreted and applied the comparative fault statute to require the assessment of fault of the intentional tortfeasor. The Decision below must be quashed and a new trial granted.

On July 30, 1993, Lawrence McDonald was shot by an unknown assailant in a shopping center parking lot outside a Wal-Mart Store (R 1-9). The Plaintiff filed suit against Wal-Mart and Merrill Crossings Associates, the landowner of the shopping center and Wal-Mart's lessor (R 1-9). The Defendants answered, denying liability for the criminal act perpetrated on the Plaintiff (R 18-19; 34-36).

Wal-Mart leased a store within a strip shopping center owned by Merrill Crossings. In addition to leasing the store and garden department attached thereto, Wal-Mart maintained certain responsibilities for the parking lot adjacent to its store (Exhibit 30). This parking lot area is referred to in the lease as the Wal-Mart Tax Plat Area (Exhibit 30). It is within this area that the Plaintiff was shot (R 211-212).

The perpetrator who shot McDonald was never caught. However, the same perpetrator committed an attempted armed robbery at the Regency Square Mall approximately 15 minutes prior

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525-5885
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

to the incident in question (T 193). The Regency Square Mall is about 5 to 10 minutes away from the Merrill Crossings Shopping Center in which this incident occurred (T 188).

Between the opening of the Wal-Mart store in 1990 and the date of the crime in question, approximately eight million customers were served (T 564). None of those eight million customers had been injured by a criminal prior to McDonald being shot (T 564). Additionally, the patrolman assigned to the Merrill Crossings shopping center for 4 1/2 years did not consider the shopping center to be in a particularly high crime area (T 178). In fact, during that period, the patrolman's calls to the Merrill Crossings shopping center were related primarily to shoplifting (T 178). Nevertheless, McDonald brought this claim against Wal-Mart and Merrill Crossings, the owner of the shopping center, alleging that both Defendants were negligent in failing to provide a security guard in the parking lot at the time of the incident and that such negligence was the legal cause of McDonald's injuries (R 1-9).

Prior to trial, Wal-Mart, while opposing the Plaintiff's Motion for Summary Judgment on his comparative negligence, asserted that the fault of the assailant had to be assessed on the verdict form, even if he was an intentional tortfeasor, under this Court's decision in Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993) and § 768.81, Fla. Stat. (1991) (R 768-884). The Judge reserved ruling, announcing that the procedure in North Florida was to exclude the intentional tortfeasor (R 911-914).

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREW5 AVE., FORT LAUDERDALE, FLA. 33316 'TEL. (954) 525 5685
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 *TEL. (305) 940- 7557

At trial, Wal-Mart presented testimony on the issue of whether the presence of a security guard would have prevented the incident in question. Homicide Detective McCallum testified that the attempted robbery at Regency Square Mall was committed by the same person who shot McDonald (T 193). In addition, Clarisa Rebahan, the victim of that attempted robbery, testified the crime was committed in plain view of 2 police officers who were standing next to their police car (T 554-555). Testimony was also presented that the crime was committed notwithstanding the presence of a security vehicle which patrolled the parking lot on a 24-hour basis (T 555).

However, when Wal-Mart attempted to introduce evidence of criminal incidents occurring at the Regency Square Mall during the exact same time period for which McDonald introduced evidence of occurrences at Merrill Crossings Shopping Center, the trial court ruled that such documentation was hearsay and therefore inadmissible (R Exhibit A for I.D.; T 612). This ruling was made in spite of the trial court's previous ruling that Wal-Mart had established a foundation for the records, as business records and thus, they were exceptions to the hearsay rule (T 219-220).

Wal-Mart admitted that it entered into a lease agreement with Merrill Crossings to rent not only the store, but to use the parking lot area (where the shooting took place) and that Wal-Mart cleaned and maintained this area, paid a monthly fee for the parking lights, paid taxes on the area, etc. (T 300-301). Further, the property manager for Merrill Crossings testified

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREW6 AVE., FORT LAUDERDALE, FLA. 33316 'TEL. (954) 525 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 . TEL. (305) 940- 7557

that Merrill Crossings had no knowledge of any crimes committed at the shopping center (T 317).

Wal-Mart agreed that there was no legal basis to keep Merrill Crossings in the case, as it owed no duty to the Plaintiff and under Florida law, Merrill Crossings was entitled to a directed verdict (T 534). At the end of trial, Merrill Crossings renewed its Motion for Directed Verdict, that it owed no duty to this Plaintiff, as it had turned control of the shopping center over to Wal-Mart, which was again denied (T 715-716). The Judge ruled consistent with his prior announcement that the intentional tortfeasor was not going to be put on the verdict form (T 711). The jury found Wal-Mart 75% negligent, Merrill Crossings 25% negligent, and the Plaintiff, who had confronted the perpetrator, zero percent negligent (T 816). All post trial Motions for New Trial and J.N.O.V. were denied (R 1104-1105).

Wal-Mart and Merrill Crossings appealed the Final Judgment in which they were found jointly and severally liable for damages to the Plaintiff. The Defendants relied on the same reasoning employed by the Third District in Stellas v. Alamo Rent-A-Car, Inc., 673 So. 2d 940 (Fla. 3d DCA 1996), where the inclusion of the non-party intentional tortfeasor in the jury's apportionment of fault was affirmed. However, in the case under review, the Judgment below, without fault assessed to the assailant, was affirmed; in accord with the Fourth District's decision in Slawson v. Fast Food Enterprises, 671 So. 2d 255 (Fla. 4th DCA

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 • 5665
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

1996). Wal-Mart Stores, Inc. v. McDonald, 21 Fla. L. Weekly D1369 (Fla. 1st DCA June 11, 1996). Slawson was settled on appeal to this Court, and Stellas is pending review on direct and express conflict with Slawson. Stellas, supra (Fla. Sup. Ct. Case No. 88-250).

In line with Slawson, the First District in Wal-Mart held that the trial court did not err in failing to put the unknown perpetrator, who shot the Plaintiff, on the verdict form. The First District found that since the perpetrator had committed an intentional criminal act, the Plaintiff's negligent security claim constituted an "action based on an intentional tort," which barred the application of § 768.81. Wal-Mart, D1374.

In addition, the First District affirmed the trial court's denial of Merrill Crossings' Motion for Directed Verdict on the duty issue, and found no error in the trial court's failure to admit into evidence documentation of crimes committed at Regency Square Mall. Wal-Mart, D1370.

Finally, the First District recognized that its decision conflicted with the holding in cases such as Blazovic, infra, which supported the Third District's opinion in Stellas, supra. The First District recognized that "[c]ourts have noted that the 'determination whether certain conduct is amenable to apportionment... affects not only the plaintiff's potential recovery, but also the liability among joint tortfeasors.'" Wal-Mart, D1374. Acknowledging that such a determination may cause substantial consequences, the First District certified to this

LAW OFFICES RICHARD A. SWERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE.. FORT LAUDERDALE, FLA. 33316 'TEL. (954) 525 5665
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 . TEL. (305) 940 . 7557

Court the following questions of great public importance:

> 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?
>
> In such an action, is it reversible error for the trial court to exclude an intentional, criminal non-party tortfeasor from the verdict form?

Wal-Mart, D1374.

The Defendants invoked this Court's jurisdiction, so the Court can resolve the inter-district conflict and answer the certified questions to require the fault of all tortfeasors causing the Plaintiff's injury to be assessed by the jury.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 • 5865
SUITE 207. ❑ ISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

SUMMARY OF ARGUMENT

On July 30, 1993, the Plaintiff was shot by an unknown assailant in a parking lot outside a Wal-Mart Store. In the Plaintiff's suit against Wal-Mart and the landowner, the trial court held that the perpetrator who shot Mcdonald would not be listed on the verdict form. The trial court erred in failing to list the unknown perpetrator for the apportionment of his fault by the jury. This Court's decision in Fabre and the Third District's holding in Stellas properly require the assessment of fault of all those causing the Plaintiff's injury. Wal-Mart must be quashed and a new trial ordered, with the assailant listed on the verdict form.

Wal-Mart affirmed the trial court's holding that, because the unidentified perpetrator's act was intentional, § 768.81, required that liability be joint and several, as the suit was based on an intentional tort. However, the statute clearly requires the intentional tortfeasor's fault to be assessed and bars the application of joint and several liability; especially, where the Plaintiff's cause of action is one for negligent security on the part of the Defendants.

Further, the statute repeatedly speaks in terms of percentage of fault, not in terms of percentage of negligence and the legislative intent is clear and must be given effect. § 768.81 provides that, in entering a judgment for damages, the relative degrees of fault of those injuring the Plaintiff shall be the basis for allocation of liability. Clearly, the unknown

LAW OFFICES RICHARD A. SHERMAN. P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 -TEL. (954) 525 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 • 7557

perpetrator had some fault in this incident. Therefore, the jury should have been required to determine his percentage of fault on the verdict form, in accord with Fabre, Stellas and § 768.81.

Additionally, such allocation of fault is in line with Florida's contribution statute; which provides that there is no right of contribution in favor of intentional tortfeasors, but permits contribution against them, in favor of negligent tortfeasors.

The appellate court should have followed the well reasoned opinion of Judge Ervin, in McGhee, infra, which was adopted in Stellas; where § 768.81 was properly applied and the intentional tortfeasor was included on the verdict form. Both Stellas and the present case are based on claims of negligent security. Thus, § 768.81 requires the fault of all entities, including intentional tortfeasors, to be considered in determining the extent of the Defendants' fault and resulting liability to the Plaintiff.

If Wal-Mart and Slawson are affirmed, defendants would be paying more than their fair share of liability, when a plaintiff is intentionally hurt by a third party, than they would when the plaintiff is accidentally injured. There is no public policy or case law basis for the imposition of this higher standard of care and financial responsibility. In fact it undermines and conflicts with the exact purpose behind Florida's Tort Reform Act, which led to § 768.81, enacted on the principle that liability must be equated to fault. Additionally, the doctrine

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANWREWS AVE., FORT LAUDERDALE, FLA. 33316 'TEL. (954) 525 5665
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940- 7557

of joint and several liability had no such heightened standard, as it was designed to protect plaintiffs from insolvent tortfeasors; not give them a financial advantage if one tortfeasor acted intentionally. Finally, such a disperate treatment of negligent security defendants, from all other negligence defendants, is justified no where in § 768.81 and would violate established principles of equal protection. Wal-Mart must be quashed, Stellas adopted and a new trial granted.

The trial court erred in failing to allow Wal-Mart to introduce evidence of crimes committed at the Regency Square Mall located nearby, which had twenty-four hour security during the time period in question. The First District affirmed this holding, notwithstanding the fact that the main issue in this case was whether the presence of a security guard would have prevented the crime in question. Such evidence showed that more crimes actually occurred at a mall which had twenty-four hour security than occurred at the Merrill Crossings shopping center, which did not have security. This evidence was obviously relevant to the question of whether a security guard would have prevented the incident in question.

This evidence was critical since this same perpetrator committed an attempted armed robbery at Regency Square Mall, in the presence of police officers and a twenty-four hour security vehicle, just fifteen minutes prior to the incident in question. The trial court erred in failing to admit this relevant, critical evidence and this Opinion below must be reversed on this ground

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 'TEL. (954) 525 5885
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 *TEL. (305) 940 7557

as well.

Finally, the evidence, as well as the specific provisions of the lease, established that Merrill Crossings did not maintain control of the Wal-Mart Tax Plat Area. Wal-Mart was responsible for paying the taxes, paying for the lights, paying for the landscaping, paying for the nightly cleaning, paying for the insurance, and otherwise maintaining and controlling the entire Wal-Mart Tax Plat Area, which included the parking lot where the incident occurred. Therefore, based on totally established Florida law, Merrill Crossings owed no duty to keep the parking lot secure. Therefore, the trial court erred in denying Merrill Crossings' Motion for Directed Verdict. Consequently, the Decision below must be reversed and a new trial granted.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 'TEL. (954) 525 - 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 7557

ARGUMENT

I. THE TRIAL COURT ERRED IN EXCLUDING THE INTENTIONAL TORTFEASOR FROM THE VERDICT FORM AND THE DECISION BELOW MUST BE QUASHED UNDER § 768.81, FABRE, AND STELLAS.

On July 30, 1993, the Plaintiff was shot by an unknown assailant in a shopping center parking lot outside a Wal-Mart Store. The Plaintiff filed suit against Wal-Mart and against Merrill Crossings Associates, the landowner. The trial court held that the intentional tortfeasor, who shot McDonald, would not be listed on the verdict form, and the First District affirmed this exclusion. Wal-Mart, supra. Florida law requires that Wal-Mart be quashed, to conform with § 768.81, Fabre and Stellas; which all require the apportionment of fault of all entities contributing to the Plaintiff's injury.

This Court has spoken clearly on this issue in Fabre, supra. In that case, the holding was that "[c]learly, the only means of determining a party's percentage of fault is to compare that party's percentage to all of the other entities who contributed to the accident, regardless of whether they have been or could have been joined as defendants." Fabre, 1185.

Permitting allocation of all at-fault entities, including those acting intentionally, is consistent with Florida law, not only as expressed in Fabre, but also in connection with Florida's contribution statute. § 768.31(3), Fla. Stat. provides that:

> (3) Pro rata shares.--In determining the pro rata shares of tortfeasors in the entire

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 'TEL. (954) 525 5685
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 • 7557

liability:

> (a) Their relative degrees of fault shall be the basis for allocation of liability.

Thus, the statute provides that there is no right of contribution in favor of intentional tortfeasors, but permits contribution against them, in favor of negligent tortfeasors. Finally, § 768.81, expressly provides that "for cases to which this section applies, the court shall enter judgment against such party on the basis of such party's percentage of fault."

In the present case, the First District affirmed the trial court's holding that, because the unidentified perpetrator's act was intentional, § 768.81, did not apply, rather joint and several liability was used instead, because the Plaintiff's negligent security action was based on an intentional tort. Wal-Mart, D1370-1371. The statute reads:

> 768.81 Comparative fault.--
>
> . . .
>
> (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 purposes of this section, "negligence cases" includes, but is not limited to, civil actions for damages based upon theories of negligence, strict liability, products liability, professional malpractice whether couched in terms of

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 . TEL. (305) 940 • 7557

> 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 based upon an intentional tort, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by chapter 403, chapter 498, chapter 517, chapter 542, or chapter 895.

However, § 768.81(4)(b) just confirms that an intentional tortfeasor cannot reduce his or her damages by the fault of negligent tortfeasors; just as they could not under the contribution statute.

The statute repeatedly speaks in terms of percentages of fault, not in terms of percentages of negligence. This clearly signifies that the Legislature intended the statute to be applicable where some form of fault, other than negligence, is involved. As this Court stated in Fabre:

> 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. Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental agency and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the codefendant to pay more than his fair share of the loss.
>
> Fabre, 1187, quoting, Brown v. Keill, 224 Kan. 195, 580 P.2d 867, 874 (1978).

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 'TEL. (954) 525 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 • 7557

The application of § 768.81, in the present case, continues Florida's long-standing trend of equating the extent of liability with the extent of fault; which the Third District agreed was the "backbone" of § 768.81. Stellas, 942. This principle is founded on fundamental considerations of fairness. As this Court noted, there is nothing fundamentally fair about a defendant who is 10% at fault paying 100% of the loss. Fabre, 1187. Certainly there is nothing fair about compelling a "negligent" defendant to pay more that his or her share of the loss, because another entity committed an intentional tort, which contributed to causing the loss.

In Fabre, this Court made it clear that § 768.81 requires the jury to consider the fault of **all** at-fault entities in reaching its apportionment of liability. Under Fabre, that is true even if the other at-fault entity is a spouse, a governmental agency, a hit-and-run driver who cannot be located, a bankrupt manufacturer, an employer who enjoys immunity from tort liability under § 440.11, Fla. Stat., or an entity who has not been made a party to the suit for any other reason. Fabre, 1186-1187. This is equally true when the other "at-fault" entity is an intentional tortfeasor.

In the instant case, it is clear that the substance of the Plaintiff's claim against Wal-Mart and Merrill Crossings was a negligence case within the meaning of § 768.81, Fla. Stat. The Defendants are in no way charged with any intentional wrongdoing, but rather are charged with negligence in failing to provide

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 • 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 7557

security. It is the perpetrator who is the intentional wrongdoer in this case. The negligent party, and not the intentional tortfeasor, is the party seeking to invoke the provisions of § 768.81, limiting their liability to their percentage of fault. That was the express intent of the 1986 Tort Reform Act. The First District has abrogated this in favor of an interpretation that imposes a higher standard of care and financial responsibility on defendants in negligent security cases. There is no legislative or judicial basis for the imposition of such a heightened standard and increased financial responsibility. Plaintiffs in Florida just want joint and several liability back and since the legislature has repeatedly refused to accommodate them, they are relying on the courts to step in and change the statute. That is not the function of the judicial system.

The Plaintiff's recovery against the Defendants, was because they were found negligent, not because they committed any intentional tort. It was the assailant who could not rely on § 768.81(3), not the Defendants; just as the Plaintiff had no entitlement to increase the liability of the Defendants under § 768.81(4)(b).

Other jurisdictions have concluded that the intentional tortfeasor should be included on the verdict form. Blazovic v. Andrich, 124 N.J. 90, 590 A.2d 222 (1991); Martin v. U.S., 984 F.2d 1033 (9th Cir. 1993); Weidenfeller v. Star and Garter, 2 Cal. Rptr.2d 14 (Cal.App 4 Dist, 1991). It is interesting to note that in Blazovic, the court dealt with exactly the same type

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE.. FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 • 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 7557

of case. That is, the plaintiff was assaulted while leaving a restaurant and sued the restaurant for negligently failing to provide security. In Martin and Weidenfeller, the California courts held that California's Fair Responsibility Act, which like § 768.81, speaks of liability of tortfeasors in relation to their percentage of fault, applied to cases in which one tortfeasor acted intentionally and the other negligently.

In addition, Florida trial courts, even in the First District, have permitted intentional tortfeasors to be placed on the verdict form. Department of Corrections v. McGhee, 653 So. 2d 1091 (Fla. 1st DCA 1995) approved, 666 So. 2d 140 (Fla. 1996). McGhee involved the murder of the plaintiff by two escaped prisoners. The plaintiff sued the Department of Corrections for having inadequate security to prevent the escape of prisoners. The trial court permitted the two intentional tortfeasors to be placed on the verdict form. On appeal, while the First District's opinion was not based on this issue, Judge Ervin wrote a dissenting opinion which contained a well reasoned and supported analysis of all the aspects of why the intentional tortfeasor should be included on the verdict form.

> After considering the arguments by counsel and the authorities cited, I would affirm as to this issue. It is clear that plaintiff's *action* against the DOC was based on negligence, and the comparative fault statute specifically applies to actions for negligence. § 768.81(4), Fla.Stat. (1989). No action was brought by appellee on the theory of intentional tort. In reaching my conclusion, I am greatly persuaded by the cogent analysis of the Supreme Court of New Jersey in *Blazovic v. Andrich*, 124 N.J. 90,

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 'TEL. (954) 525 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 • 7557

590 A.2d 222 (1991), which appears to be in harmony with the spirit of Florida's comparative negligence law. In *Blazovic*, the court explained that early cases had distinguished between negligent and intentional conduct in order to circumvent the harsh effect of the contributory-negligence bar, under the view that intentional tortfeasors should be required to pay damages as a means of deterring them from future wrongdoing, regardless of whether a plaintiff had been partially negligent. Additionally, under common law, joint tortfeasors could not seek contribution from each other. With the passage of contribution law, joint tortfeasors could recover their pro rata share of the judgment from the other joint tortfeasors, thereby limiting their liability. Intentional tortfeasors could not seek contribution, however, and such prohibition was intended to deter future wrongdoing; the same theory advanced vis-a-vis a plaintiff and an intentional tortfeasor, *Id.* at 228-29.

With the advent of comparative negligence, the all-or-nothing result of contributory negligence was eliminated and recovery was allowed based on a percentage of the parties' negligence. Moreover, under the comparative fault statute, joint tortfeasors were no longer liable for a pro rata share, but were liable in proportion to their percentage of fault. In the court's view, the application of the law in such manner results in greater fairness to both moderately negligent plaintiffs, as well as joint tortfeasors. *Id.* at 230.

The court further observed that some courts had refused to apportion negligence to intentional tortfeasors, but it was unpersuaded by those cases, It found the more just result was to allow comparative negligence as to both negligent and intentional tortfeasors, because it distributes the loss according to the respective faults of the parties causing the loss. *Id.* at 231.

The reasoning of the court's opinion in *Blazovic* appears to me to be consistent with

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302.1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525 5885
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 • 7557

> the Florida courts' general interpretations of section 768.81 in that the statute clearly requires a jury's consideration of each individual's ***fault*** contributing to an injured person's damages, even if such person is not or cannot be a party to a lawsuit. ***See Fabre v. Marin, 623*** So.2d 1182 (Fla.1993); ***Allied-Signal, Inc. v. Fox, 623*** So.2d 1180 (Fla. 1993). As observed in ***Marin:*** "Clearly, the only means of determining a party's percentage of fault is to compare that party's percentage to all of the other entities who contributed to the accident, regardless of whether they have been or could have been joined as defendants." ***623*** So.2d at 1185.
>
> I consider that the comparative fault statute, in precluding the comparing of fault in any action based upon intentional fault, expressed an intent to retain the common law rule forbidding an intentional tortfeasor from reducing his or her liability by the partial negligence of the plaintiff in an action based on intentional tort. However, such exclusion has no applicability to an action, such as that at bar, based solely on negligence, and, consequently, the fault of both negligent and intentional tortfeasors may appropriately be apportioned as a means of fairly distributing the loss according to the percentage of fault of each party contributing to the loss. I would therefore affirm as to this issue.
>
> McGhee, 1101 (Footnote omitted).

The First District in Wal-Mart completely ignored the opinion of one of its own judges and McGhee is mentioned no where in the 7 page Wal-Mart Decision.

On the other hand, the Third District adopted Judge Ervin's analysis of this issue in Stellas, "as though it were [their] own opinion". Stellas, 942. The court in Stellas added several observations to Judge Ervin's reasoning:

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 TEL. (954) 525 5885
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

> The unmistakable intent of 768.81(3) is to limit a negligent defendant's liability to his percentage of fault. The whole fault, of which a negligent defendant's acts are but a part, is broad enough to encompass an intentional tortfeasor's acts. One dictionary defines fault as follows: "With reference to persons: Culpability; the blame or responsibility of causing or permitting some untoward occurrence; the wrongdoing or negligence to which a specified evil is attributable." 4 *The Oxford English* Dictionary 104 (1933)....Alamo, as a negligent defendant, is entitled to have its liability limited to its percentage of fault.
>
> Stellas, 942.

Based on this analysis, the court held that the trial court did not err in allowing the jury to apportion fault between the negligent and intentional tortfeasors.

The present case is analogous to Stellas in that the underlying causes of action in both cases sound in negligence. Just as McDonald sued Wal-Mart and Merrill Crossings for negligently failing to provide adequate security, the Stellas' sued Alamo for negligently failing to provide adequate protection from the crime committed against them. The only difference was that the Stellas were still in the car and McDonald was already out of the car, when the crimes were committed. In essence, both cases are actions for negligent security. Thus, § 768.81 applies and the fault of all entities, including intentional tortfeasors, must be considered in determining the extent of the Defendants' fault and resulting liability.

In Stellas, the Third District expressly disagreed with the Fourth District's opinion in Slawson, creating direct conflict;

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREW6 AVE., FORT LAUDERDALE, FLA. 33316 'TEL. (954) 525 56.35
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 - 7557

as Slawson held that fault cannot be apportioned between a negligent tortfeasor and a criminal actor. Specifically, the Stellas court noted, "[Slawson] simply fails to give effect to the previously discussed clear legislative intent to limit a ***negligent*** defendant's liability to its percentage of fault." Stellas, 943. In effect, the Fourth District attempted to judicially amend § 768.81, through its decision in Slawson. Stellas, 943. That is exactly what this First District has done in Wal-Mart as well.

In the instant case, the First District relied on Slawson in affirming the trial court's exclusion of the perpetrator from the verdict form. The court agreed with McDonald's argument that simple negligence is different in kind from intentional wrongdoing and therefore, the two types of fault can not be compared. Florida courts, however, have consistently rejected that argument, permitting the application of the doctrine of comparative negligence to reduce a claim for recovery, even where the defendant's conduct has been willful and wanton. American Cyanamid Company v. Rov, 466 So. 2d 1079 (Fla. 4th DCA 1984); Tampa Electric Company v. Stone and Webster Engineering Corporation, 367 F.Supp 27 (M.D. Fla. 1973).

Obviously, if willful and wanton misconduct can be compared with simple negligence for the purpose of determining the relative degree of fault between plaintiff and defendant in a comparative negligence situation, there is no reason why that same comparison of simple negligence with more aggravated forms

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 'TEL. (954) 525 5665
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 7557

of misconduct cannot similarly be made for purposes of the allocation of fault called for by § 768.81. There can be no principled justification for increasing a negligent defendant's liability, because some other party behaved even more egregiously than the defendant. Furthermore, the application of § 768.81 in the manner suggested by Slawson and McDonald results in a disperate treatment of negligent security defendants, from all other negligence defendants in Florida and undisputed is violation of equal protection under the law.

All persons, including defendants, are presumed equal and are entitled to equal protection of the laws. Art. I, § 2, Fla. Const.; Art. I, § 2, Amendment XIV 81, U.S. Const. In order to comply with the requirements of the equal protection clause, a statutory classification must be reasonable and non-arbitrary and all persons in the same class must be treated alike. Laskv v. State Farm Insurance Company, 296 So. 2d 9 (Fla. 1974); Silver Blue Lake Apartments, Inc. v. Silver Blue Lake Home Owners Association, Inc., 225 So. 2d 557 (Fla. 3d DCA 1969). When a statute includes certain parties and excludes others, it violates equal protection, unless the classifications bear a substantial relationship to a legitimate legislative purpose. Laskv, 18; Daniels v. O'Connor, 243 So. 2d 144 (Fla. 1971).

According to the First and Fourth Districts, § 768.81(3) on its face applies to all negligence defendants, except those whose negligence is based on a failure to prevent a crime. § 768.81 would clearly violate equal protection, if it did create such a

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525.5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 *TEL. (305) 940 7557

discriminatory classification. In addition, such a distinction in defendants would be totally arbitrary and unreasonable, where the express purpose of the Tort Reform Act was to limit the liability of all negligence defendants to their percentage of fault; not just certain negligence defendants.

Consequently, this Court should uphold the statute, the legislative intent, follow Fabre and Stellas and quash the First District's Decision and require the inclusion of the perpetrator on the verdict form. This Court should hold that § 768.81 entitles a defendant to have the jury determine the fault of all tortfeasors, and to have judgment entered in accordance with the statutory plan of proportionate liability. Wal-Mart must be reversed and a new trial ordered.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE. FLA. 33316 'TEL. (954) 525 - 5685
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

11. THE TRIAL COURT ERRED IN FAILING TO ADMIT INTO EVIDENCE DOCUMENTATION OF CRIMES COMMITTED AT REGENCY SQUARE MALL.

One of the main issues in the case at hand was causation. That is, in order to prevail, McDonald was required to prove that the presence of a security guard would have prevented the incident in question. In regard to this issue, Wal-Mart presented the testimony of Clarisa Rebahan, a victim of an attempted armed robbery at Regency Square Mall just a few minutes prior to the incident in question. It also presented the testimony of homicide detective McCallum, who testified that the attempted robbery on Ms. Rebahan was committed by the same person who shot McDonald (T 193). The significance of this evidence was that the attempted robbery on Ms. Rebahan was committed in plain view of two police officers who were standing outside their vehicles, and in spite of the presence of security vehicles which patrolled the parking lot at Regency Square Mall. This evidence strongly supported Wal-Mart's position that the presence of a security guard at the Merrill Crossings Shopping Center on the night in question would not have prevented McDonald from being shot.

In further support of this argument, Wal-Mart attempted to introduce evidence of criminal incidents occurring at the Regency Square Mall during the exact time period for which McDonald introduced evidence of occurrences at Merrill Crossings Shopping Center. Florida courts have long held that such evidence of previous criminal incidents is relevant to the issue of

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302.1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525-5885
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET. MIAMI. FLA. 33130 • TEL. (305) 940 - 7557

foreseeability. Harrison v. Housing Resources Management. Inc., 588 So. 2d 64 (Fla. 1st DCA 1991); Paterson v. Deeb, 472 So. 2d 1210 (Fla. 1st DCA 1985); and Holiday Inns, Inc. v. Shelburne, 576 So. 2d 322 (Fla. 4th DCA 1991). This documentation showed that there were more crimes committed at a mall that had twenty-four-hour security, than were committed at the shopping center in question during the same exact time period. This information supported Wal-Mart's theory at trial that a security guard would not have prevented McDonald from being shot.

The trial court's ruling that this documentation was inadmissible constitutes reversible error as the documents in question were absolutely critical to the central issue in this case--causation. The Jury's Verdict may well have been different had it been permitted to examine the amount of similar crimes which were committed in the presence of security officers, and to find that McDonald's injury could not have been prevented by the presence of security guards.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANWREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 5885
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

111. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO DIRECT A VERDICT FOR MERRILL CROSSINGS, WHICH OWED NO DUTY OF CARE TO THE PLAINTIFF.

Merrill Crossings, the owner of the strip shopping center, leased a store to Wal-Mart in 1990. The store and the garden department attached thereto comprised the "demised premises" as defined in the lease. In addition to leasing the store and the attached garden department, Wal-Mart maintained certain responsibilities for the parking lot adjacent to its store. That area is referred to in the lease as the Wal-Mart Tax Plat Area. The Plaintiff parked in the Wal-Mart Tax Plat Area parking lot, shopped at Wal-Mart, came out, and was shot near his vehicle, which was still parked in the Wal-Mart Tax Plat Area.

Wal-Mart paid the taxes, paid for the landscaping, paid for the nightly cleaning, paid for and controlled the lights, was obligated under the lease to pay for any repairs for the electrical system, and totally controlled that area. Consequently, Wal-Mart agreed at trial that there was no basis to hold Merrill Crossings liable to the Plaintiff and that it was entitled to a directed verdict.

The trial court found that there was no substantial evidence of control by Merrill Crossings over the Wal-Mart parking lot where the Plaintiff was shot. However, the judge also found that a letter written by Merrill Crossings to Wal-Mart suggesting that it fire an incompetent landscaping contractor was sufficient to take the issue of negligent security against Merrill Crossings to

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525 • 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 7557

the jury. This was clear legal error. The suggestion to fire an incompetent landscape contractor is not the type of control over leased property that is necessary to impose liability on the landowner under Florida law.

The law is well settled in Florida that when a lessor surrenders possession and control of the premises to the lessee, the lessor will not be liable for injuries to third persons occurring on the premises. Federated Department Stores, Inc. v. Doe, 454 So. 2d 10 (Fla. 3d DCA 1984); Arias v. State Farm Fire & Casualty Company, 426 So. 2d 1136 (Fla. 1st DCA 1983); Colon v. Lara, 389 So. 2d 1070 (Fla. 3d DCA 1980); Gross v. Hatmaker, 173 So. 2d 158 (Fla. 2d DCA 1965); Bovis v. 7-Eleven, Inc., 505 so. 2d 661 (Fla. 5th DCA 1987). The duty to protect third persons from injuries on the premises does not rest on legal ownership of the premises, but rather on the right to control the premises. Id.

Florida law has consistently held that the duty to protect others from injury resulting from a dangerous condition on the premises does not rest on legal ownership of the dangerous condition. Rather, the duty rests on the right to control the access by third parties, which right usually exists in the one with possession and control of the premises. Bovis, 664. In Bovis, the Fifth District pointed out that the possessor has the right and duty to exclude licensees and invitees from an area that is dangerous because of dangerous operations, activities, or conditions, and has the duty to warn third persons of such

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525 5665
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 . TEL. (305) 940 • 7557

danger. Bovis, 664.

Similarly, Wal-Mart had full custody and control over its parking lot and was the only party which had the duty and ability to correct any dangerous condition. Wal-Mart agreed that it alone had the duty to protect and provide security for the shoppers at the time of the incident involving the Plaintiff.

In Publix Super Markets, Inc. v. Jefferv, 650 So. 2d 122 (Fla. 3d DCA 1995), the Third District held that it was the shopping center owner, not the tenant, which maintained and controlled the subject parking lot in accordance with the provisions of the lease. Accordingly, the court held that the owner was liable for the lack of proper security on the lot. Publix, 125. It is noteworthy that the court stated a different case would have been presented if Publix had, in fact, operated and maintained the parking lot, like Wal-Mart did in the present case. The court stated that there was no evidence adduced at trial that Publix exercised control over the parking lot. Publix, 125-126.

On the contrary, the evidence in the subject case, as well as the specific provisions of the lease, established that Merrill Crossings did not maintain control of the Wal-Mart Tax Plat Area. As previously stated, Wal-Mart was responsible for paying the taxes, paying for the lights, paying for the landscaping, paying for the nightly cleaning, paying for the insurance, and otherwise maintaining and controlling the entire Wal-Mart Tax Plat Area. Therefore, the trial court erred as a matter of law in failing to

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 'TEL. (954) 525 • 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 • 7557

direct a verdict for Merrill Crossings, which owed no duty to keep the subject parking lot secure.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREW6 AVE., FORT LAUDERDALE, FLA. 33316 'TEL. (954) 525 5865
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 'TEL. (305) 940 • 7557

CONCLUSION

The Opinion below must be quashed; as it was reversible error to exclude the intentional tortfeasor from the verdict form in an action for negligent security and a new trial must be granted, with the documentary evidence included. A judgment should be entered for Merrill Crossings, as a matter of law.

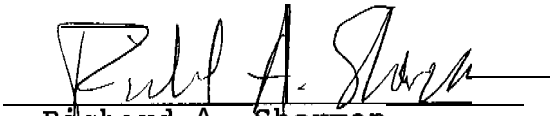
Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Esquire
Rosemary B. Wilder, Esquire
Suite 302
1777 South Andrews Avenue
Fort Lauderdale, FL 33316
(954) 525-5885 - Broward
(305) 940-7557 - Dade

and

Noah Ii. Jenerette, Jr., Esquire
BOYD & JENERETTE, P.A.
Jacksonville, FL
(904) 353-6241
Attorneys for Merrill Crossings

and

Jeffrey P. Gill, Esquire
BRIDGERS, GILL & HOLMAN
Pensacola, FL
(904) 432-6484
Attorney for Wal-Mart

By: 
Richard A. Sherman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 25th day of September, 1996 to:

Jeffrey P. Gill, Esquire
BRIDGERS, GILL & HOLMAN
316 South Baylen Street
Suite 110
Pensacola, FL 32501
(904) 432-6484
Counsel for Defendant/Appellee, WAL-MART STORES, INC.

Jeffrey B. Morris, Esquire
Daniel H. Smith, Esquire
MORRIS and BARNARD
2064 Park Street
Jacksonville, FL 32204
Counsel for Plaintiffs, McDONALD

Noah H. Jenerette, Jr., Esquire
BOYD & JENERETTE, P.A.
231 East Adam Street
Jacksonville, FL 32202-3372
Counsel for Defendant, MERRILL CROSSING ASSOCIATES, a Florida general partnership

Law Offices of
RICHARD A, SHERMAN, P.A.
Richard A. Sherman, Esquire
Rosemary B. Wilder, Esquire
Suite 302
1777 South Andrews Avenue
Fort Lauderdale, FL 33316
(305) 525-5885 - Broward
(305) 940-7557 - Dade
and
Noah H. Jenerette, Jr., Esquire
BOYD & JENERETTE, P.A.
Jacksonville, FL
and
Jeffrey P. Gill, Esquire
BRIDGERS, GILL & HOLMAN
Pensacola, FL
(904) 432-6484
Attorney+ for **Wal-Mart**

By: Richard A. Sherman
Richard A. Sherman

/mn/caos

Appendix

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 95-1612

WAL-MART STORES, INC., a corporation, and MERRILL CROSSINGS ASSOCIATES, a Florida general partnership,

Appellant,

v.

LAWRENCE HOWARD MCDONALD, individually, RENEE HELEN MCDONALD, individually, LAWRENCE HOWARD MCDONALD, III, individually, and MATHEW ADAM MCDONALD and ASHLEE ELIZABETH MCDONALD; by and through their natural guardian and next best friend LAWRENCE HOWARD MCDONALD,

Appellee.

Opinion. filed June 11, 1996.

An appeal from the Circuit Court for Duval County. Bernard Nachman, Judge.

Jeffrey P. Gill, of Bridgers, Gill & Holman, Pensacola, for Appellant/Cross-Appellee Wal-Mart Stores, Inc.; Richard A. Sherman & Rosemary B. Wilder, of Law Office of Richard A. Sherman, P.A., Fort Lauderdale, and Noah H. Jenerette, of Boyd & Jenerette, P.A., Jacksonville, for Appellant/Cross-Appellant Merrill Crossings Associates.

Jeffery B. Morris, of Morris & Bernard, Jacksonville; Daniel A. Smith, Jacksonville, for Appellee.

MICKLE, J.

Wal-Mart Stores, Inc. ("Wal-Mart"), appeals both 1) a final judgment in which Wal-Mart and the other defendant below, Merrill Crossings Associates ("Merrill Crossings**), were found jointly and severally liable for total economic damages to appellee Lawrence Howard McDonald and other members of his family ("McDonald"); and in which Wal-Mart was found liable for an additional sum for total non-economic damages; and 2) a final judgment on Count I in Merrill Crossings' cross-claim against Wal-Mart. Merrill Crossings cross-appeals the final judgment and cost judgment entered in favor of McDonald as well as the order denying its post-trial motions. We affirm the judgments, and we certify two questions of great public importance.

Lawrence Howard McDonald was shot and injured by an unknown assailant on the night of July 30, 1993, in a shopping center parking lot outside a Wal-Mart Store in Jacksonville. Mr. McDonald and other members of his family, the appellees, brought a personal injury lawsuit against Wal-Mart and against the owner and developer of the shopping center, Merrill Crossings, Wal-Mart's lessor. McDonald's complaint against Wal-Mart and Merrill Crossings alleged that the appellants had failed to employ reasonable security measures and that this omission resulted in the shooting of McDonald. The appellants answered by denying their liability and asserting that McDonald's injuries had been caused by a non-party to the lawsuit. The jury found Wal-Mart 75 percent negligent,

Merrill Crossings 25 percent negligent, and McDonald not negligent at all. As a result of a summary judgment entered before trial, Merrill Crossings moved for and was granted final judgment on Count I of its cross-claim for indemnity against Wal-Mart in the amount of its liability to McDonald plus attorney's fees and costs. The appellants filed motions for new trial and judgment notwithstanding the verdict, all of which were denied. The appellants allege several errors on appeal.

Failure to Admit Into Evidence Crime Data From a Different Mall

The appellants contend that the trial court erred by not admitting certain reports of crimes committed in the vicinity of a much larger regional retail center. in Jacksonville, Regency Square Mall. The records in question relate to the appellants' efforts to show that prior to McDonald's shooting at Merrill Crossings' shopping center, the same perpetrator attempted an armed robbery of a bank patron at an automated teller machine on the same evening five miles away across a service road from Regency Square Mall. The bank site had no security, but there was security about 200-400 yards away at the mall. The parking lot in which McDonald was shot, did not have security on the date of the incident. We conclude that the appellants did not lay an adequate predicate showing how the two locations and circumstances are "substantially similar." Frazier v. Otis Elevator Co., 645 So. 2d 100 (Fla. 3d DCA 1994). We note that the appellants have not demonstrated prejudice, as the lower court permitted Wal-Mart's expert to use the "calls to

service" records as a basis for his opinions, and Wal-Mart's counsel was allowed to mention that the expert had referred to these records. Accordingly, the trial court did not abuse its discretion in excluding the records. Forester v. Norman Roger Jewell & Brooks Intern., Inc., 610 so. 2d 1369 (Fla. 1st DCA 1992).

Denial of Merrill Crossings' Motion for Directed Verdict

Merrill Crossings contends that the trial court erred as a matter of law in failing to direct a verdict in its favor. We disagree. 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 Ins. Co. of America v. Evans, 340 So. 2d 957 (Fla. 3d DCA 1976). The law in Florida is settled that if a lessor (such as Merrill Crossings) surrenders possession and control of the premises to a lessee (such as Wal-Mart), the lessor will not be liable for injuries to third parties occurring on the premises. Federated Dep't Stores Inc. v. Doe, 454 So. 2d 10 (Fla. 3d DCA 1984); Arias v. State Farm Fire & Cas. Co., 426 So. 2d 1136 (Fla. 1st DCA 1983). This is because, generally, the duty to protect third persons from injuries on the premises rests not on legal ownership of the premises, but on the rights of possession, custody, and control of the premises. Kline v. 1500 Massachusetts Ave. Ant. Corp., 439 F. 2d 477 (D.C. Cir. 1970); Bovis v. 7-Eleven, Inc., 505 So. 2d 661, 663-64 (Fla. 5th DCA 1987).

The premises in question here are the shopping center parking lot outside the Wal-Mart, where the assailant shot McDonald soon after McDonald and his girlfriend exited the store and got to their vehicle. The specific site is designated in the record as within the Wal-Mart Tax Plat Area. Both a landlord and a tenant can have concurrent duties to provide reasonably safe premises. Citv of Pensacola, 448 So. 2d 39 (Fla. 1st DCA), rev. den., 456 so. 2d 1181 (Fla. 1984); Bovis, 505 So. 2d at 661. The lease between Merrill Crossings and Wal-Mart did not specifically address security. Even if we assume that the lease placed the greater share of general duties and responsibilities upon Wal-Mart, we conclude there is competent substantial evidence showing that Merrill Crossings exercised *some* control over the shopping center parking lot and public access thereto. Bovis, 505 So. 2d at 664 (duty to protect others from dangerous condition on premises rests on right to control access to third parties). Thus, neither of the appellants exercised the type of exclusive control over the parking lot that existed in Publix Super Markets, Inc. v. Jeffery 650 So. 2d 122 (Fla. 3d DCA 1995) (tenant/grocery store was not liable to invitee who was shot as he attempted to stop purse-snatcher in shopping center parking lot adjacent to tenant's store, where responsibility to provide security guards, to patrol common areas, and to warn of prior criminal attacks in lot had been assumed entirely by landlord/shopping center pursuant to lease), and in Federated Dep't Stores, 454 So. 2d at 10. Viewed in a light most

favorable to the appellees as non-movants, the evidence supports the ruling. Sears, Roebuck & Co. v. McKenzie, 502 So. 2d 940 (Fla. 3d DCA), rev. den., 511 So. 2d 299 (Fla. 1987).

Merrill Crossings' Cross-Claim Issue

Merrill Crossings brought a cross-claim against Wal-Mart for breach of contract in Count I, alleging 1) that the lease agreement required lessee Wal-Mart to obtain liability insurance to cover Merrill Crossings in the tax plat area where the shooting occurred and 2) that Wal-Mart failed to meet this obligation. Merrill Crossings claimed entitlement to indemnity against Wal-Mart. Wal-Mart denied having breached an agreement, and it claimed that the lease obligated Wal-Mart only to provide coverage for itself and Merrill Crossings on "the demised premises," an area comprising the store and its garden center but not the parking lot, pursuant to sections (1) (A) and (12) (A) of the lease. On the other hand, Merrill Crossings relied on section (12) (B) of the lease, which provided that the lessor shall maintain insurance "on the Common Areas (except the Wal-Mart Tax Plat Area)." The trial court determined that the appellants "foresaw the risk from premises, liability and clearly bargained for a contractual provision with the intent to shift the risk of loss onto a liability insurer." The court granted Merrill Crossings' motion for summary judgment and denied Wal-Mart's motion for summary judgment on this issue. The effect of the ruling is that, to the extent Merrill Crossings sustained damages in McDonald's lawsuit by Wal-Mart's failure to

procure such insurance for the tax plat area, Wal-Mart would be liable to Merrill Crossings for breach of contract and for reimbursement to the lessor for damages. Final judgment was entered in 'favor of Merrill Crossings on its cross-claim against Wal-Mart. The movants agreed that the issue before the trial court was solely a question of law, namely, whether the lease required Wal-Mart to require liability insurance to protect Merrill Crossings from premises liability at the site of the shooting. National Luggage Services, Inc. v. Reedy Forwarding Co., Inc., 339 so. 2d 305 (Fla. 3d DCA 1976) (where liability rests on construction of written instruments and their legal effect, issue is one of law and is properly determined by summary judgment). We affirm the rulings on the appellants' motions for summary judgment, as these determinations come to us clothed in a presumption of correctness, and Wal-Mart has not shown the rulings to be clearly erroneous, Randy Intern., Ltd. v. American Excess Corn., 501 So. 2d 667 (Fla. 3d DCA 1987); Gars v. Woodard, 214 So. 2d 385, 386 (Fla. 3d DCA 1968).

Exclusion of Intentional Criminal Attacker From Verdict Form

The trial court held that because the perpetrator who shot McDonald had committed an intentional, criminal act, the attacker would not be included on the verdict form. Citing section 768.81, Florida Statutes, which the trial court found inapplicable, and Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993), the appellants claim that the omission of the assailant from the verdict form

constitutes reversible error. We disagree, finding especially instructive, on this same issue, our sister court's recent opinion in Slawson v. Fast Food Enterp., 21 Fla. L. weekly D846 (Fla. 4th DCA Apr. 10, 1996) (reversing trial court's ruling that had allowed jury in negligence suit to apportion fault and liability between the negligent fast-food restaurant and the intentional, Criminal tortfeasor who attacked the plaintiff on the restaurant's premises).

The statute reads in pertinent part:

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 purposes of this section, "negligence cases" includes, but is not limited to, civil actions for damages based upon theories of negligence, strict liability, products liability, professional malpractice whether couched in

> terms of contract *or* tort, or breach of warranty and like theories. In determining whether a case falls within the term "negligence cases," the court shall look to the substance of the action and not the conclusory terms used by the parties.
> (b) This section does not apply...to any action based upon an intentional tort, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by chapter 403, chapter 498, chapter 517, chapter 542, or chapter 895 [footnotes deleted].

s 768.81, Fla. Stat. (1993). The resolution of this issue requires us to determine what the Florida Legislature intended to include and exclude in this statute. The appellate court in Slawson offered a concise survey of the legal foundation on which our answer must rest:

> At common law the defense of contributory negligence was traditionally not available to an intentional wrongdoer. *Deane* v. *Johnston, 104 So.* 2d 3 (Fla. 1958). After the supreme court replaced contributory negligence with comparative negligence, the court held that intentional wrongdoing could not be used for purposes of comparative fault to reduce a plaintiff's recovery. *Island City Flying* Service v. General *Electric* Credit Corp., 585 So. 2d 274 (Fla. 1991). The common law imposed joint and several liability only against joint tortfeasors, who were defined as parties whose *negligence* had combined to produce plaintiff's injury. *Davidow v. Seyforth,* 58 So. 2d 865 (Fla. 1952) [footnote omitted]. Finally, under the common law, an owner of land could not escape liability for failing to prevent the foreseeable risk of harm from the intentional conduct of another on his land by simply pointing to the intentional conduct of the attacker. *Holley v. Mt. Zion* Terrace *Apartments, Inc.,* 382 So. 2d 98 (Fla. 3d DCA 1980).

21 Fla. L. Weekly at D847 (emphasis in original).

Being in derogation of the common law, section 768.81, Florida Statutes, must be strictly construed in favor of the common law. Adv v. American Honda Finance Corp., 21 Fla. L. Weekly S130

(Fla. Mar. 21, 1996); Carlile v. Game & Fresh Water Comm., 354 So. 2d 362 (Fla. 1977). As the supreme court stated in Carlile, any legislative intent either to abolish or to limit the common law must indicate such change clearly, or else the rule of common law stands. Id. at 364. A court will not infer that a statute was intended to enact any change in the common law other than what is specified and plainly pronounced. Therefore, a statute such as section 768.81 should not be interpreted to displace the common law any more than is necessary. Godales v. Y.H. Investments, Inc., 667 So. 2d 871 (Fla. 3d DCA 1996) (as § 768.81 does not explicitly abrogate common-law rule that child's recovery should not be diminished by parent's negligence, statute must be construed to preserve common-law rule); Robinson & St. John Advertising and Public Relations, Inc. v. Lane, 557 So. 2d 908, 909 (Fla. 1st DCA 1990).

Subsection (3) of the statute provides that only "[i]n cases to which this section applies," judgment is to be entered against each liable party "on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability;..." We must look to subsection (4) to determine applicability. Subsection (4)(a) states that the statute applies only "to negligence cases." In determining whether a case falls within the designation "negligence cases," Florida courts must look "to the substance of the action and not the conclusory terms used by the parties." Subsection (4)(b) specifies that the Section is

inapplicable "to any action based upon an intentional tort." See Bel-Bel Intern. Corp. v. Barnett Bank Of South Florida N.A., 158 B.R. 252, 256 (S.D. Fla. 1993); 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").

At the outset, we decline to accept the appellants' position that McDonald is estopped from arguing that the case involved an intentional tort merely because the suit against Wal-Mart and Merrill Crossings was based on a theory of negligence. We believe the appellants received adequate notice that their alleged negligent supervision of the parking lot was believed to have contributed to or caused the intentional, criminal shooting attack of McDonald by a third party. McDonald argues convincingly that because "the substance of the action" arose from his being intentionally shot, the ensuing litigation constituted an "action based on an intentional tort" for statutory purposes.

Having considered "the substance" of the appellees' action, we conclude that it is based on an intentional tort rather than mere negligence. The evidence showed that McDonald had exited Wal-Mart and was getting into the driver's seat of his car when the unknown assailant attempted to rob him and then pointed the gun at McDonald's head and shot him. . The perpetrator's actions were intentional, and not merely negligent, such as by an accidental discharge of the gun. See Stepp v. State Farm Fire & Cas. Co., 656

So. 2d 494 (Fla. 1st DCA) (the insured's shooting of his gun from the back seat of a police car was neither an "accident" nor "occurrence" within the meaning of a homeowner's policy, where any inference that the insured did not intend to fire the gun directly at a police officer would be merely speculative and conjectural), rev. den., 663 So. 2d 632 (Fla. 1995); McDonald v. Ford, 223 so. 2d 553 (Fla. 2d DCA 1969) (because negligence connotes an unintentional act, where a defendant male embraced and kissed the resisting female plaintiff, thereby committing assault and battery, and she struck her face on an unknown object, the plaintiff could not maintain an action for injuries sustained on a theory of negligence).

The appellants stress that the appellees' cause of action was for the negligent failure to protect McDonald from the foreseeable intentional attack in the parking lot. We note, as did the Fourth District Court in Slawson, 21 Fla. L. Weekly at D847, 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. Id. In contrast, to construe the statute as suggested by the appellants would produce the same anomalous result described in Slawson:

> Reading the statute as contended by Burger King produces a perverse and irreconcilable anomaly. On the one hand Burger King owed a duty to protect [the victim, a patron] from foreseeable intentional assaults by other patrons; but on the other hand, Burger King contends, it is entitled under section 768.81 to diminish or defeat its liability for the breach of that duty by transferring it to the very intentional actor it was charged with protecting her against.

Id.

We are convinced that the express distinction made by the legislature in subsection (4) between "intentional" and "negligence" actions prevents us from finding a statutory intent to eliminate the common-law rules barring the appellants from reducing their own liability because of the intentional, criminal act of a non-party from whom the appellants were charged with protecting McDonald. The appellants contend that Fabre controls the case at bar, whereas the appellees assert that the instant question was neither presented nor decided by the supreme court. The facts in that case bear further scrutiny.

In Fabre, Mrs. Marin was injured while riding as a passenger in an automobile driven by Mr. Marin, her husband. Mrs. Marin sued Mr. and Mrs. Fabre, claiming that while driving Mr. Fabre's car, Mrs. Fabre had negligently changed lanes in front of the Marin vehicle, causing it to swerve into a guardrail. The jury returned a verdict finding both drivers 50 percent at fault. The jury awarded Mrs. Marin $12,750 in economic damages and $350,000 in noneconomic damages. The trial court granted a $5,000 remittitur

on Mrs. Marin's economic damages but did not disturb her noneconomic damages. Id. at 1183.

On appeal, the issue was whether the liability for noneconomic damages should be apportioned to the Fabres on the basis of the percentage of fault attributed to them. This required the appellate court to interpret subsection (3) of the comparative fault statute, supra. The Third District Court acknowledged that Mrs. Marin could not recover damages from her husband because of the then doctrine of interspousal tort immunity. The court concluded that in discarding joint and several liability, the Florida Legislature did not intend to curtail a fault-free plaintiff's ability to recover her total damages. Instead, the legislature intended only to apportion liability among those tortfeasors who were defendants in the lawsuit. Therefore, subsection (3) was interpreted so as not to bar Mrs. Marin's recovery. The full amount of the judgment was affirmed, and a conflict was certified with Messmer v. Teacher's Ins. Co., 588 So. 2d 610 (Fla. 5th DCA 1991) (carrier liable for damage caused by uninsured motorist who was 23 percent at fault in causing accident with insured vehicle was not liable for the entire amount of the injured passenger's damages merely because the injured passenger's husband, who drove the insured vehicle at the time of accident, could not have been held liable due to spousal immunity Provision in policy), rev. den., 598 So. 2d 77 (Fla. 1992). See Fabre v. Marin, 597 so. 2d 883, 886 (Fla. 3d DCA 1992).

The Fabres' appeal required the Supreme Court of Florida to determine the legislative intent of section 768.81, Florida Statutes. The court stated:

> We conclude that the statute is unambiguous. By its clear terms, judgment should be entered against each party liable on the basis of that party's percentage of fault. The Fabres' percentage of fault was 50%. To accept Mrs. Marin's position would require the entry of a judgment against the Fabres in excess of their percentage of fault and directly contrary to the wording of the statute. . . .The "fault" which gives rise to the accident is the "whole" from which the fact-finder determines the party-defendant's percentage of liability. Clearly, the only means of determining a party's percentage of fault is to compare that party's percentage to all of the other entities who contributed to the accident, regardless of whether they have been or could have been joined as defendants.
>
> Even if it could be said that the statute is ambiguous, we believe that the legislature intended that damages be apportioned among all participants to the accident.
>
> * • ☒
>
> We are convinced that section 768.81 was enacted to replace joint and several liability with a system that requires each party to pay for noneconomic damages only in proportion to the percentage of fault by which that, defendant contributed to the accident.

Fabre, 623 So. 2d at 1185. Additionally, the supreme court held:

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

> increased. The fault statute requires the same result where a potential defendant is not or cannot be joined as a party to the lawsuit. Liability is to be determined on the basis of the percentage of fault of each participant to the accident and not on the basis of solvency or amenability to suit of other potential defendants. The fact that Mrs. Marin could not sue her husband does not mean that he was not partially at fault in causing the accident.

Id. at 1186. The supreme court determined that Mrs. Marin's judgment should be reduced by 50 percent of her non-economic damages. No reduction was made in economic damages because under subsection (3), joint and several liability continues to apply when a defendant's negligence equals or exceeds a plaintiff's, Messmer was approved, the appealed decision in Fabre was quashed, and the cause was remanded. Id. at 1187.

The parties in the case at bar disagree over whether Fabre disposes of the issue of the criminal assailant's exclusion from the verdict form. In Fabre, the supreme court stated: "Clearly, the only means of determining a party's percentage of fault is to compare that party's percentage to all of the other entities who contributed to the accident, regardless of whether they...could have been joined as defendants." 623 So. 2d at 1185. The, contribution provision in the Uniform Contribution Among Tortfeasors Act states in pertinent part:

> 768.31 Contribution among tortfeasors.---
>
> * * *
>
> (3) PRO RATA SHARES.---In determining the pro rata shares of tortfeasors in the entire liability:
> (a) Their relative degrees of fault shall be the basis for allocation of liability.

§ 768.31(3), Fla. Stat. (1993). The "apportionment of damages" provision in the comparative fault statute states:

> 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,

§ 768.81(3), Fla. Stat. (1993). Because the statutes speak in terms of percentages of fault rather than percentages of *negligence,* the appellants argue that the legislature intended the law to apply even where some sort of fault other than negligence, *e.g.,* an intentional, criminal act, is involved. Assuming that the jury could have found the unknown perpetrator of the shooting wholly or partly at fault, the appellants rely on the supreme court's recitation of public policy in Fabre:

> 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.

Fabre, 623 So. 2d at 1187, quoting Brown v. Keill, 580 P. 2d 867, 874 (Kan. 1978).

On the other hand, the appellees equate "fault" and "negligence" and, instead, note the striking distinction between the merely negligent non-party tortfeasor in Fabre and the intentional, criminal non-party actor in the case sub judice. Likewise, the Slawson court distinguished Fabre in this manner: Which arguably negligent parties should be considered for purposes of apportionment of fault on the jury form in a pure negligence action is quite different from whether the statute is even

applicable to the action in which it was raised." Slawson, 21 Fla. L. Weekly at D848.

Although Fabre illustrates the evolution of Florida tort law toward a system that requires each party to pay for non-economic damages only in proportion to its percentage of *fault*, McDonald argues convincingly that the comparison of negligent acts to criminal, intentional acts was never envisioned as part of that change; See Flood v. Southland Corp., 616 N.E. 2d 1068 (Mass. 1993) (as intentional tortious conduct cannot be negligent conduct under Massachusetts comparative negligence statute, remanding for determination of whether. defendant's stabbing of plaintiff in parking lot of co-defendant/convenience store was intentional). For instance, in its seminal decision in Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973) (holding that a plaintiff in a negligence-based action would no longer be denied any recovery because of his contributory negligence), the supreme court spoke of the shift in the law in Florida from contributory negligence to comparative *negligence:*

> A plaintiff is barred from recovering damages for loss or injury caused by the negligence of another only when the plaintiff's negligence is the sole legal cause of the damage, or the negligence of the plaintiff and some person or persons other than the defendant or defendants was the sole legal cause of the damage.

Id. at 438. The purpose of adopting comparative negligence in 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 proportionate fault of each party.

Id. at 439. In Fabre, the supreme court spoke in terms of fault arising from the context of an "accident":

> The "fault" which gives rise to the accident is the "whole" from which the fact-finder determines the party-defendant's percentage, of liability. Clearly, the only means of determining a party's percentage of fault is to compare that party's percentage to all of the other entities who contributed to the accident, regardless of whether they have been or could have been joined as defendants.

Fabre, 623 So. 2d at 1185. The court equated a defendant's "fault" with the amount of its "negligence." We think that the factual context from which the holding in Fabre arose---an automobile accident involving purely negligent acts---is materially different from a criminal design such as was carried out by McDonald's assailant, The shooting of McDonald was an intended result, not a mere accident. Therefore, we conclude that Fabre and its progeny neither addressed nor disposed of the issue presented in this appeal. Furthermore, McDonald's interpretation of the statute is consistent with the proposition that negligent acts are fundamentally different from intentional acts. See, e.g., White Const. 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 intentional

shooting but is not an absolute bar to a claim based on negligence), cert. den., 386 So. 2d 636 (Fla. 1980); Cruise v. Graham, 622 So. 2d 37, 40 (Fla. 4th DCA 1993) (comparative negligence is not available as defense to intentional tort of fraudulent misrepresentation); McDonald, 223 So. 2d at 555 (negligence connotes an unintentional tort).

This distinction was addressed in Publix Supermarkets, Inc. v. Austin, 658 So. 2d 1064 (Fla. 5th DCA), rev. dep., 666 So. 2d 146 (Fla. 1995), which required the district court to resolve how section 768.81, Florida Statutes, affects a case with two joint tortfeasors---one alleged to be negligent and the other charged with a willful tort. Mr. Austin, a pickup truck driver who collided with a motorcyclist, was alleged to be negligent in the operation of his vehicle, whereas Publix was alleged to have willfully sold alcohol to Austin, an underage driver. The jury found there had been a willful and unlawful sale of alcohol by Publix to Austin. The jury allocated fault between Austin and Publix at 80 percent and 20 percent, respectively. Publix appealed; Mr. Wurtz, the injured motorcyclist, cross-appealed asserting, inter alia, that given the particular facts, the trial court had erred in applying the comparative negligence statute. The Fifth District Court stated:

> [W]e agree with Wurtz that this was not a case where a jury could assess the comparative fault of the two defendants, Austin and Publix.
>
> Austin' and Publix were not alleged to be joint tortfeasors *in pari delicto.* Austin was charged with a

> negligent tort; Publix was charged with a willful tort. 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. The Fifth District Court's observations in Austin are consistent with the following statement by the Louisiana Supreme Court:

> Because we believe that intentional torts are of a fundamentally different nature than negligent torts, we find that a true comparison of fault based on an intentional act and fault based on negligence is, in many circumstances, not possible.

Veazey v. Elmwood Plantation Assoc., Ltd., 650 So. 2d 712, 719-20 (La. 1994) (in attack victim's negligence case, trial court did not err in refusing to allow comparison of fault between defendant/apartment manager and non-party rapist, but Louisiana law is broad enough to allow trial courts to determine, on case-by-case basis, whether to permit comparison of fault between intentional wrongdoers and negligent tortfeasors); Burke v. 17 Rothschild's Liquor Mart, Inc., 593 N.E. 2d 522, 532 (Ill. 1992) ("Because of the qualitative difference between simple negligence and willful and wanton conduct, and because willful and wanton conduct carries a degree of opprobrium not found in merely negligent behavior, we hold that a plaintiff's negligence cannot be compared with a

defendant's willful and wanton conduct."). Dean Prosser echoed these conclusions, stating that intentional wrongdoing differs from simple negligence "not merely in degree but in the kind of fault . . .and in the social condemnation attached to it." Prosser and Keeton on the Law of Torts, § 65, at 462 (5th ed. 1984).

The public policy underlying our construction of section 768.81, Florida Statutes, is that negligent tortfeasors such as Wal-Mart and Merrill Crossings should not be permitted to reduce their fault by shifting it to another tortfeasor whose intentional, criminal conduct was a foreseeable result of their negligence. See Bach v. Florida R/S, Inc., 838 F. Supp. 559 (M.D. Fla. 1993) (order entering summary judgment in favor of plaintiff, a rape victim, in suit alleging defendant/property interests' negligent failure to warn or to provide adequate protection, upon finding that the jury may not apportion fault under the "contribution among tortfeasors" law, § 768.31, among the negligent tortfeasors and the alleged rapist, an intentional tortfeasor); Kansas State Bank & Trust Co. v. Specialized Transp. Services, Inc., 819 P. 2d 587, 606 (Kan. 1991) (negligent tortfeasor should not be allowed to reduce 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 (Kan. 1986) (in patron's action against restaurant for injuries resulting from third party's intentional assault, fault of third-party patron cannot be compared with negligence of restaurant); Veazey, 650 So. 2d at 712; Restatement (Second) of Torts, § 344

(1963) (land possessor entreating members of public to do business is subject to liability to public for physical harm caused by intentionally harmful acts of third persons on property and by land possessor's failure to exercise reasonable care to provide adequate warning or protection). Reducing the responsibility of a negligent tortfeasor by allowing that tortfeasor to place the blame entirely or largely on the intentional wrongdoer would serve as a disincentive for the negligent tortfeasor to meet its duty to provide reasonable care to prevent intentional harm from occurring. It is neither unfair nor irrational for an innocent plaintiff to collect full damages from negligent defendants who knew, or should have known, that an injury would be intentionally inflicted and failed in their duty to prevent it.

McDonald notes that it makes sense that section 768.81, Florida Statutes, protects a plaintiff by allowing the choice between collecting full damages from either the intentional actor or the negligent party whose negligence caused the intentional act. At the same time, the contribution statute prevents an intentional actor who pays the plaintiff from collecting against a negligent. co-tortfeasor, § 768.31(2)(c), Fla. Stat. (1993).

In summary, we conclude that by its express language in section 768.81, Florida Statutes, the legislature did not intend to treat negligent acts and criminal, intentional acts the same. We believe, likewise, that the legislature did not intend for a criminal act such as the shooting of McDonald to be included within

the concept of "fault" when determining a negligent party's percentage of liability under the comparative negligence statute. The inherent distinction between negligent and criminal, intentional torts is considerable, and we find it illogical and impractical for a fact-finder to have to compare or balance the two types of conduct. We believe it is reasonable to interpret section 768.81, Florida Statutes, 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 intended tort. See Hall v. Billy Jack's, Inc., 458 So. 2d 760 (Fla. 1984) (lounge proprietor owes its patrons the duty to protect them from reasonably foreseeable harm). Therefore, we conclude that section 768.81 is inapplicable to the instant action. Changes, if any, in this approach are properly left to the Florida Legislature, not to the courts. Walt Disney World Co. v. Wood, 515 So. 2d 198, 202 (Fla. 1987). Accordingly, we hold that the trial court did not err in excluding the criminal assailant from the verdict form.

courts have noted that the "determination whether certain conduct is amenable to apportionment...affects not only the plaintiff's potential recovery, but also the liability among joint tortfeasors." See, e.g., Blazovic v. Andrich, 590 A. 2d 222, 229 (N.J. 1991) (where a restaurant/bar patron was assaulted and battered by other patrons in the establishment's parking lot, the cause was remanded for new trial on the issue of liability, and the

jury was directed to determine relative percentages of fault of the restaurant/bar, the intentional tortfeasors, and the plaintiff). As the consequences of such a determination can be substantial, we certify to the supreme court the following questions of great public importance:

> 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?
>
> In such an action, is it reversible error for the trial court to exclude an intentional, criminal non-party tortfeasor from the verdict form?

AFFIRMED,

LAWRENCE, J., CONCURS; WEBSTER, J., CONCURRING WITH WRITTEN OPINION.

WEBSTER, J., concurring.

I concur fully in the result reached by the majority on all issues. I concur, also, in the analysis employed to arrive at the result as to all issues except that concerned with exclusion from the verdict form of the individual who committed the criminal attack on McDonald. As to that issue, while I reach the same destination, I do so by following a rather different path. Accordingly, I believe that it might be helpful if I put my steps in writing.

The causes of action asserted against appellants in the complaint are based on negligent failure to provide adequate security to prevent criminal attacks and negligent failure to warn of the danger of such attacks. As an initial matter, it seems to me relatively clear that section 768.81, Florida Statutes (1993), is intended to apply to claims of this type. I can arrive at no other conclusion from the language of section 768.81(4)(a), which states that "[t]h[e] section applies to negligence cases," and then defines "'negligence cases'" to include "civil actions for damages based upon theories of negligence." Respectfully, I am unable to follow the reasoning which leads the court in Slawson v. Fast Food Enterprises, 21 Fla. L. Weekly D846 (Fla. 4th DCA Apr. 10, 1996)--and the majority here--to conclude that claims such as those asserted by appellees are actually "based upon an intentional tort." Id. at 847.

Having concluded that section 768.81 was intended by the legislature to apply to actions such as this, my examination of that section, and particularly of subsection (3), leads- me to conclude that an ambiguity exists because of the use of the word "fault." In particular, it is not clear to me from the context of the statute whether "fault" is intended to have a meaning synonymous with "negligence," or whether it is intended to be read as having a more general meaning. From a reading of the statute, alone, it seems to me that the two meanings are, more-or-less, equally plausible. Searching for assistance in discerning the meaning intended by the legislature, I have turned to the legislative history of the statute.

Section 768.81 was originally enacted as section 60 of the Tort Reform and Insurance Act of 1986. Ch. 86-160, § 60, at 755, Laws of Fla. In attempting to ascertain the intent of the language used in the statute,.1 have found informative both the Senate Staff Analysis and Economic Impact Statement relating to chapter 86-160, revised on July 23, 1986, and the House of Representatives Committee on Health Care and Insurance Staff Analysis, dated July 16, 1986 (both of which are stored in the Florida State Archives). See Department of Environmental Regulation v. SCM Glidco Organics Corp., 606 So. 2d 722, 725 (Fla. 1st DCA 1992) ("Staff analyses of legislation should be accorded significant respect in determining legislative intent"). From a reading of the relevant portions of these two documents, it seems to me relatively clear that section

768.81 was intended to do two things,, and nothing more: (1) to codify the law regarding comparative negligence as it then existed in the state; and (2) to abolish, subject to limited exceptions, the common law doctrine of joint and several liability in negligence cases. Thus, the Senate Staff Analysis reads:

> 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 principles of comparative negligence are also applicable in cases involving multiple defendants, with 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 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. The House Health Care and Insurance Committee Staff Analysis is to the same effect. House Staff Analysis at 26. Moreover, it expressly states that "[t]he act codifies the comparative negligence law." Id.

As both the Senate and the House staff Analyses recognize, the supreme court adopted the doctrine of comparative negligence in Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973). Subsequently, in Lincenberg v. Issen, 318 So. 2d 386 (Fla. 1975), the court was called upon to decide how the doctrine of comparative negligence should be applied in cases involving more than one allegedly negligent defendant. In such cases, it was apparent that a conflict existed between the doctrine of comparative negligence and the doctrine of joint and several liability. It is evident frbm the tenor of the court's opinion that it believed that the doctrine of joint and several liability should be abrogated in favor of the doctrine of comparative negligence, pursuant to which liability would be apportioned among all parties to an action according to

their relative degrees of negligence. However, the court concluded that it was precluded from doing so because of the recently enacted uniform Contribution among Tortfeasors Act. Ch. 75-108, Laws of Fla. (creating section 768.31, Florida Statutes). Instead, it held that a "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 the defendants"; however, because of section 768.31, "[t]he negligence attributed to the defendants [is] then [to] be apportioned on a pro rata basis," and the "defendants will remain jointly and severally liable for the entire amount." 318 so. 2d at 393-94.

Reading the court's decisions in Hoffman v. Jones and Lincenberg v. Issen together with the Senate and House Staff Analyses of what became section 768.81, the source of the word "fault" becomes clear (at least to me)--the word "fault" is used repeatedly by the court in both opinions, in a sense obviously intended to be synonymous with the word "negligence." Thus, in Hoffman, the court says:

> 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 negligence which

> involves apportionment of the loss among those whose fault contributed to the occurrence is more consistent with liability based on a fault premise.

280 So. 2d at 436 (emphasis added). The court then identifies "the purposes" for which it has concluded to adopt the doctrine of comparative negligence as:

> (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 proportionate fault of each party.

Id. at 439 (emphasis added). Similarly, in Lincenberg, after reaffirming "the purposes" behind the adoption in Hoffman of the doctrine of comparative negligence (318 So. 2d at 390), the court says:

> There is no equitable justification for recognizing the right of the plaintiff to seek recovery on the basis of apportionment of fault while denying the right of fault allocation as between negligent defendants. . . . Therefore, although this Court has in the past recognized as viable the principle of no contribution [among joint tortfeasorsl, 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 for this Court to retain a rule that under a system based on fault, casts 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.

Clearly, the word "fault" used in section 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.

I note, in passing, that, if my analysis regarding the source of the word "fault" used in section 768.81 is correct, then it seems reasonable to conclude that the word "party" used in section 768.81(3) was, likewise, lifted from Hoffman and Lincenberg, and was, therefore, intended to have the same meaning as was ascribed to it in those cases. Clearly, in those cases, the court was using the word to refer only to those who were named participants in a lawsuit. If this analysis is correct, then perhaps the supreme court might wish to reconsider its conclusion in Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993), that the legislature intended the word "party" used in section 768.81(3) to mean any individual or entity whose conduct "contributed to the accident, regardless of whether they have been or could have been joined as defendants." Id. at 1185.