THE SUPREME COURT OF FLORIDA

CASE NO. 95,881

KAREN D'AMARIO, individually, and
on behalf of CLIFFORD HARRIS, a minor,
and CLIFFORD HARRIS, individually,

Petitioners,

v.

FORD MOTOR COMPANY,

Respondent.

______________________________________/

On Discretionary Review from a Decision of the
District Court of Appeal, Second District

BRIEF OF AMICUS CURIAE
PRODUCT LIABILITY ADVISORY COUNCIL, INC.

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief uses 14 point proportionally spaced Times New Roman font.

STATEMENT OF INTEREST

The Product Liability Advisory Council, Inc. ("PLAC") is a nonprofit corporation with 127 corporate members representing a broad cross-section of American industry. PLAC's corporate members are listed in Appendix A. These corporate members include manufacturers and sellers in a wide range of industries, from electronics to automobiles to pharmaceutical products. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (i.e., non-voting) members of PLAC.

PLAC's primary purpose is to file *amicus curiae* briefs on behalf of its members on issues that affect the development of the law of product liability. PLAC has submitted numerous *amicus curiae* briefs in state and federal courts, including this Court.

PLAC and its members have a strong interest in the issues in this case. The applicability of section 768.81 to enhanced injury cases is an issue of substantial importance to many of its members. More generally, the membership of PLAC is vitally interested in seeing that the system of comparative fault embraced by section 768.81 is not eviscerated. The plaintiffs' arguments that enhanced injury cases such as this one fall outside the scope of section 768.81 and that their action is based upon an intentional tort simply because a drunk driver caused the accident threaten to undermine the Florida Legislature's decision to replace joint and several liability with a system in which a defendant's liability is commensurate with its degree of fault.

SUMMARY OF ARGUMENT

The court of appeal correctly held that Ford was entitled to have the jury apportion fault between the drunk driver who caused the accident and Ford. This is exactly the result that the Legislature intended when it eliminated joint and several liability. Nothing in the language of section 768.81 supports plaintiffs' claim that comparative fault should be abandoned in an enhanced injury case against a manufacturer.

Kidron v. Carmona, 665 So.2d 289 (Fla. 3d DCA 1995), confirms that section 768.81 applies to enhanced injury cases, and that decision is supported by both the Restatement (Third) of Torts: Products Liability and the Restatement (Third) of Torts: Apportionment of Liability. Plaintiffs' claim that the drunk driver did not proximately cause all the injuries suffered by the plaintiff passenger is, to say the least, astonishing. Their reliance on *Whitehead v. Linkous*, 404 So.2d 377 (Fla. 1st DCA 1977), which belongs to a special category of cases that the Restatement (Third) of Torts: Apportionment of Liability terms "pre-presentment" cases, is utterly misplaced.

The plaintiffs' half-hearted embrace of the Third District Court of Appeal's decision in *Nash v. General Motors Corp.*, 734 So.2d 437 (Fla. 3d DCA 1999), review granted (case no. 96,139), is equally misguided. The ultimate holding there—that plaintiffs' suit against General Motors, brought on negligence, products liability, and breach of warranty theories, was really an action "based upon an intentional tort" is fundamentally at odds with the Legislature's decision to eliminate joint and several liability. The two conclusions upon which that holding is premised are inconsistent with the express language of section 768.81 and overwhelming body

of case law, and are rejected by the Restatements of Torts.

This Court's decisions in *Merrill Crossings Assoc. v. McDonald*, 705 So.2d 560 (Fla. 1997), and *Stellas v. Alamo Rent-A-Car*, 702 So.2d 232 (Fla. 1997), do not stand for the general proposition that a products liability crashworthiness case is transformed into an action "brought upon an intentional tort" simply because a drunk driver happened to cause the accident. Instead, these cases exempt from section 768.81 a small and clearly defined set of cases: when the defendant's negligence is based upon its failure to protect against the specific risk of the intentional tort suffered by the plaintiff. The Restatement (Third) of Torts: Apportionment of Liability confirms this analysis.

The court of appeal's conclusion that an injury caused by an intoxicated driver constitutes an intentional tort is contrary to Florida law and a vast body of authority. Since an intentional tortfeasor must intend the consequences of his act (rather than merely intending to do the act), the intentional tortfeasor must either desire to cause the injury or believe that his conduct is substantially certain to cause the injury. Drunk driving cases do not meet that standard.

ARGUMENT

Plaintiffs attack the decision of the Second District Court of Appeal that the trial court acted correctly when it asked the jury to apportion fault between Ford and the driver who undisputedly caused the accident that caused Plaintiff's injuries. This is not just an attack on the court of appeal's decision. It is a serious assault on the reforms instituted by Section 768.81, Florida Statutes, which "replace[d] joint and several liability with a system that requires each party to pay for noneconomic damages only in proportion to the [party's] percentage of fault." *Fabre v. Marin*, 623 So.2d 1182, 1185 (Fla. 1993). The impetus for this legislative reform was the fundamental idea that it is unfair to require "a defendant to pay more than his or her percentage of fault." *Id.* Plaintiffs seek a result that is not only unfair, but that is at odds with the express language of Section 768.81, an overwhelming body of case law, and the view of the most respected scholars in the field.

I. THE DISTRICT COURT PROPERLY HELD THAT FAULT SHOULD BE APPORTIONED BETWEEN THE DRIVER AND FORD

A. This Case Falls Within the Express Language of Section 768.81

Section 768.81 provides that "the court shall enter judgment against each party liable on the basis of such party's percentage of fault." In *Fabre v. Marin*, this Court held that this language required juries to apportion fault among all participants in the accident, parties and non-parties alike. "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.

Fabre thus sought to ensure that a defendant's liability would be proportionate to its degree of fault.

Nothing in either the language of section 768.81 or the fairness policy it seeks to implement points to abandoning the principle of comparative fault in an enhanced injury case against a manufacturer. To the contrary: Section 768.81(4)(a) explicitly states that its comparative fault regime applies in actions based on theories of negligence, strict liability, and products liability. Plaintiffs cannot point to any language in section 768.81 that exempts enhanced injury cases from its purview.

B. *Kidron* Confirms That Apportionment is Required

Kidron v. Carmona, 665 So.2d 289 (Fla. 3d DCA 1995), confirms that section 768.81 applies to enhanced injury cases. The facts in *Kidron* are remarkably similar to those in the case at bar. The plaintiff's decedent negligently rear-ended a delivery truck. The plaintiff brought a strict liability claim against the manufacturer of the truck, alleging that the truck's defective design enhanced the decedent's injury. The Third District Court of Appeal held that the jury should have apportioned fault between the deceased driver and the defendant. *Id.* at 292. "Fairness and good reason" mandate that the driver's and defendant's fault be compared "with respect to all damages and injuries for which the conduct of each party is a cause in fact and a proximate cause." *Id.*

Kidron correctly noted that "the widely accepted view" is that principles of comparative responsibility should be applied in enhanced injury cases like this one,

id. and cited an impressive array of cases that so hold.[1] The court's list, however, was not exhaustive. Still other courts have reached the same conclusion.[2]

C. The Restatement Calls for Apportionment in Enhanced Injury Cases

The Restatement (Third) of Torts: Products Liability, adopted by the American Law Institute in 1997, embraces this conclusion as well. Section 17 of the Restatement sets forth the general rule that a plaintiff's fault must be compared to the defendant's in a products liability action. Addressing enhanced-injury cases specifically, the Restatement provides "the contributory fault of the plaintiff in causing an accident that results in defect-related increased harm is relevant in apportioning responsibility between or among the parties." *Id.*, § 16, Comment f.

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1 *Whitehead v. Toyota Motor Corp.*, 897 S.W.2d 684 (Tenn.1995) (citing *Doupnick v. General Motors Corp.*, 225 Cal.App.3d 849, 275 Cal.Rptr. 715 (3rd Dist.1990)); *Dahl v. BMW*, 304 Or. 558, 748 P.2d 77 (1987); *Austin v. Ford Motor Co.*, 86 Wis.2d 628, 273 N.W.2d 233 (1979); *Keltner v. Ford Motor Co.,* 748 F.2d 1265 (8th Cir.1984) (based on Arkansas law); *Huffman v. Caterpillar Tractor Co.*, 645 F.Supp. 909 (D.Colo.1986) (based on Colorado law), affirmed, 908 F.2d 1470 (10th Cir.1990); *Trust Corp. of Montana v. Piper Aircraft Corp.*, 506 F.Supp. 1093 (D.Mont.1981) (based on Montana law); *Hinkamp v. American Motors Corp.*, 735 F.Supp. 176 (E.D.N.C.1989) (based on North Carolina law), affirmed, 900 F.2d 252 (4th Cir.1990).

2 E.g., *Zuern v. Ford Motor Co.*, 937 P.2d 676 (Ariz. Ct.App. 1996); *Meekins v. Ford Motor Co.*, 699 A.2d 339 (Del. Super. Ct. 1997); *Moore v. Chrysler Corp.*, 596 So.2d 225 (La. Ct.App.), writ denied, 599 So.2d 316 (La. 1992); *Zalut v. Anderson & Assoc. Inc.*, 463 N.W.2d 236 (Mich. Ct.App. 1990); *Harvey v. General Motors Corp.*, 873 F.2d 1343 (10th Cir. 1989) (New Mexico law); *Day v. General Motors Corp.*, 345 N.W.2d 349 (N.D. 1984); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984); *Fietzer v. Ford Motor Co.*, 590 F.2d 215 (7th Cir. 1984) (Wisconsin law); *Stueve v. American Honda Motors Co.*, 457 F.Supp. 740 (D. Kan. 1978); *Craigie v. General Motors Corp.*, 740 F.Supp. 353 (E.D. Pa. 1990).

The newly-adopted Restatement (Third) of Torts: Apportionment of Liability (Proposed Final Draft (Revised) 3/22/99)[3] also makes clear that the comparative fault of the plaintiff, the defendant manufacturer, and any other tortfeasor must be assessed in enhanced-injury cases. See *id.* § 17, Comment e, Ill. 1 (where injury is indivisible, negligence of plaintiff must be considered); § 50, Comment c, Ill. 1; Reporters' Note to Comment c (where injury is divisible, jury must apportion responsibility among all persons legally responsible for each indivisible part).

D. Plaintiffs' Efforts to Distinguish *Kidron* Fail

Kidron's holding is so compelling that Plaintiffs do not contest it. They concede, "[w]e have no quarrel with this decision [*Kidron*]." Petitioners' Brief on the Merits at 42. Instead, Plaintiffs resort to two stratagems in an attempt to distinguish *Kidron*. Their first argument—which they deem their stronger one[4]—is based on the astonishing assertion that the drunk driver did not proximately cause Plaintiff's injuries. Their second argument is based on a *non sequitur*.

1. Contrary to plaintiffs' claim, the drunk driver proximately caused all plaintiff passenger's injuries

Plaintiffs' primary means of distinguishing *Kidron* runs as follows. Because the fire that burned Plaintiff did not occur until several minutes after the drunk

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[3] The Restatement was adopted at the May 1999 Annual Meeting of the American Law Institute. In this brief, all citations and quotations from this Restatement come from the Proposed Final Draft (Revised). The final version will be published this spring. It has some stylistic changes to the material we have cited in this brief, but none of these changes are substantive in nature.

[4] See Petitioners' Brief on the Merits at 41.

driver, Livernois, negligently crashed his car into the tree, this case involves two separately-caused, successive injuries. Livernois's intoxicated driving, Plaintiffs argue, did not proximately cause Plaintiff's burns. Therefore, although both Livernois and Ford were tortfeasors, they were not "joint tortfeasors," and so the comparative fault scheme of section 768.81 is inapplicable.

Perhaps the simplest way to respond to this argument is to pose a question. If Plaintiffs had sued Livernois, would they assert that Livernois was liable only for the injuries that Plaintiff suffered immediately when the car smashed into the tree and not for the burns he suffered in the resulting fire? Of course not.[5] Whatever can be said of the difficulties that sometimes arise in determining whether proximate cause is present, this case presents no such problems. Livernois's negligent driving proximately caused Plaintiff's burns.

This has long been the law in Florida. For example, in *J. Ray Arnold Lumber Corp. of Olustee v. Richardson,* 141 So.2d 133, 135 (Fla. 1932), where the plaintiff's initial injury was aggravated by the subsequent negligence of his physician, the Court held that the original wrongdoer proximately caused the injuries suffered as a result of the physician's subsequent negligence.[6]

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5 Plaintiffs' explanation as to why the driver did not proximately cause Plaintiff's burns betrays their desperation. The fire was not readily foreseeable because Ford intended by design that no gasoline-fed fire would follow impact with a tree. Petitioners' Brief on the Merits at 41. By this logic, however, Ford did not proximately cause Plaintiff's burns either. Indeed, a manufacturer could never be said to proximately cause an injury caused by a product defect so long as the manufacturer's intent was to design the product to avoid that type of injury.

6 "[T]he law regards the negligence of the wrongdoer in causing the original injury as the proximate cause of the damages flowing from the subsequent negligent or

2. Plaintiffs Reliance on *Whitehead v. Linkous* is Misplaced

Plaintiffs stake their entire argument on *Whitehead v. Linkous*, 404 So.2d 377 (Fla. 1st DCA 1977). In *Whitehead*, the district court held that a physician who negligently treated a patient could not raise the comparative negligence of the patient in causing the condition that the physician was called upon to treat. But *Whitehead* does not override generally accepted notions of proximate causation or comparative fault. Rather, it belongs to a special class of cases in which plaintiffs' negligence has never been considered, either under a contributory negligence or a comparative fault regime.

The Restatement (Third) of Torts: Apportionment of Liability, *supra*,—which refers to this class of cases as "pre-presentment" cases—also exempts them from its general rule of comparative responsibility. Comment m to § 7 provides that in a suit for negligent rendition of a service, a factfinder may not consider any plaintiff's conduct that created the condition the service was employed to remedy. The Reporters' Note to this Comment explains that this rule is "the background against which medical malpractice litigation takes place," and cites *Whitehead* as one of the cases that has actually held this. *Id.* at 111. The Note further explains the basis for the unique treatment accorded to pre-presentment cases like *Whitehead*: "The best explanation of pre-presentment negligence is that the consequences of the plaintiff's negligence—the medical condition requiring medical treatment—caused the very condition the defendant

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unskillful treatment thereof, and holds him liable therefor." Id. (Quoting *Texas & Pacific Ry Co. v. Hill*, 237 U.S. 208 (1915)).

doctor undertook to treat, so it would be unfair to allow the doctor to complain about that negligence." *Id.* at 112.

The pre-presentment cases thus represent a special exception to the general rule of comparative fault. Any attempt to expand this exception beyond its natural confines would cause the exception to swallow the rule. To be sure, every defective design or failure to warn case is based on a claim that the manufacturer failed to protect adequately against the incident that occurred. But that can't be enough to exempt such cases from the reach of section 768.81. Indeed, it would be utterly inconsistent with the express language of 768.81, which clearly states that it applies to products liability actions. In the pre-presentment cases, the physician is asked to treat a specific condition or injury that has already occurred, and agrees to do so. The condition is specific, and the patients' fault in causing the condition is already a given. Neither of these elements is present in a products liability case. The product is designed and manufactured long before the incident giving rise to the case occurred, and the manufacturer's design has to account for a myriad of potential hazards that can arise in a myriad of ways.

Not surprisingly then, the Restatements draw this exact distinction. The Restatement (Third) of Torts: Products Liability provides for apportionment of liability in crashworthiness cases. *Id.*, § 16, Comment f; see Section I.C. *supra*. And the Restatement (Third) of Torts: Apportionment of Liability stipulates that the special exception it recognizes for pre-presentment cases like *Whitehead* is a narrow one. It applies only to claims against physicians (and other service providers), *id.* § 7, Comment m at 113, and only where the plaintiff's negligence caused the condition that

the doctor undertook to treat. Thus, the exemption does not apply where a plaintiff negligently fails to cooperate in the treatment regime prescribed by the doctor. In such cases, the plaintiff's negligence may be taken into account.

The Florida cases offer parallel justifications for and limitations on the exemption for pre-presentment cases. *Whitehead* was based on the idea that it was unfair for a physician to raise as a defense the conduct of a patient "which may have contributed to his illness or medical condition, which furnishes the occasion for medical treatment." 404 So.2d at 379. And in numerous cases, Florida courts have held that a patient's negligence in failing to follow medical advice may be taken into account. See, e.g., *Healthsouth Sports Medicine and Rehabilitation Center v. Roark*, 723 So.2d 314 (Fla. 4th DCA 1998); *Nordt v. Wenck*, 653 So.2d 450 (Fla. 3d DCA 1995).

Whitehead, therefore, simply does not support plaintiffs' position. It represents a special exception to the general rule that a plaintiff's negligence should be considered in a comparative responsibility regime. It does not even come close to establishing that Livernois and Ford were separate and independent tortfeasors and that Livernois did not proximately cause plaintiff's injuries.

3. Even if there were two separate injuries, fault should be apportioned between the driver and Ford

Plaintiffs' fallback argument is even less persuasive. It is based on the premise that this case involves two distinct, divisible injuries. As the analysis above demonstrates, that is a false premise. But even if it were true, it would not matter; their reliance on *Stuart* is a non-sequitur. As shown by the careful analysis of the

Restatement (Third) of Torts: Apportionment of Liability, apportionment would still be required. Indeed, plaintiffs' argument is contradicted by the text of section 768.81. Moreover, the case on which they base their argument is inconsistent with the abrogation of joint and several liability and with subsequent decisions of this Court.

a. The Restatement would require apportionment even if there were two separate injuries

Even if the injuries suffered by Plaintiff were divisible, fault for Plaintiff's burn injuries should still be apportioned between the negligent driver and Ford. This is precisely the conclusion reached by the Restatement (Third) of Torts: Apportionment of Liability, *supra*, § 50. That section provides that when damages for an injury can be divided by causation, the factfinder should divide them into their indivisible component parts. The factfinder should then apportion liability for each indivisible injury according to ordinary apportionment rules. *Id.* § 50(a). Under section 50(b), damages can be divided when a person who bears a share of responsibility was a legal cause of less than the entire damages.

As one of the hypotheticals included in this section demonstrates, however, even if the injuries suffered by Plaintiff could be divided, section 50 would work to relieve Ford of some of its liability, but it would not reduce the negligent driver's liability one iota. The hypothetical posits an enhanced injury case. A negligent driver caused an accident. Either the plaintiff passenger's injuries were enhanced because a defective door latch caused the door to open and the passenger to be ejected, or all the passenger's injuries were a result of the defective door latch. The Restatement

explains that if all the injuries were the result of the defective door latch, the result is that both the driver and the manufacturer caused the entire injury, and the jury must assign percentages of responsibility to them. If, however, the defective door latch merely enhanced the plaintiff's injuries, the result is that the driver's negligence caused the entire damages, but the defect caused only the enhanced injury. Fault must be apportioned between the driver and manufacturer only for the enhanced injury; the driver is solely responsible for the original injury. See *id.* Reporters' Note to Comment c at 468.

Thus, even if there were two separate injuries in this case—the first resulting from the immediate impact and the second resulting from the later fire—the driver is still responsible for causing the second injury. The jury must apportion fault between the driver and Ford for the second injury. The only effect of a finding that two separate injuries occurred would be to relieve Ford of any liability for the first injury.

b. The clear language of section 768.81 contradicts plaintiffs' argument

Section 768.81(3) commands that "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." Despite this clear language, plaintiffs argue that judgment should be entered against Ford on the basis of joint and several liability and not on the basis of its percentage of fault. The plaintiffs do not cite to anything in the text of section 768.81—and there is nothing in the text—to support their remarkable assertion that the fault of the drunk driver should be ignored and that Ford should be held responsible for one hundred percent of the damages. Nor do the plaintiffs

attempt to explain how such a result is compatible with what this Court identified as the purpose of section 768.81: "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 v. Marin*, 623 So.2d at 1185.

c. Stuart v. Hertz Corp, the case on which plaintiffs rely, is inconsistent with Florida's comparative fault regime

Plaintiffs rely on *Stuart v. Hertz Corp*., 351 So.2d 703 (Fla. 1977), a case decided nine years before section 768.81 was enacted. *Stuart* held that a negligent tortfeasor in an auto accident could not bring a third party action for indemnity against a physician whose post-accident negligence aggravated plaintiff's injuries. As Amicus has demonstrated, plaintiffs' reliance on *Stuart* is a *non sequitur*. Even if there were two separate injuries, apportionment would still be necessary. Amicus urges this Court to recognize another fatal flaw in plaintiffs' argument: *Stuart* has been rendered obsolete by the enactment of section 768.81 and subsequent decisions of this Court.

The *Stuart* decision was based on two grounds, both of which this Court has since repudiated. First, Florida's continued adherence to a rule disallowing an active tortfeasor from seeking indemnification from another tortfeasor was rooted in the traditional notion "that, since no one should be permitted to found a cause of action on his own wrong, the courts will not aid one tortfeasor against another." *Id.* at 705. Less than three years later, however, this Court repudiated that ancient notion. In *Underwriters at Lloyds v. City of Lauderdale Lakes*, 382 So.2d 702 (Fla. 1980), this Court held that a negligent tortfeasor in an auto accident could bring a separate subrogation action against a physician whose post-accident negligence aggravated plaintiff's injuries. *Underwriters at Lloyds* reasoned that it was neither fair nor equitable to saddle the defendant tortfeasor with liability for damages that were enhanced by the nondefendant tortfeasor without allowing the former some recourse against the latter. *Id.* at 704. Thus, it abandoned the idea that "courts will not aid one

tortfeasor against another," and allowed the defendant tortfeasor to pursue a subrogation action. *Underwriters at Lloyd* thus achieved substantive justice, but did so by requiring the defendant tortfeasor to resort to a two-step process (judgment in the original suit and pursuit of an independent subrogation action).

The second justification offered in *Stuart* was that the plaintiff, and not the defendant tortfeasor, should be permitted to control the tenor of the litigation. "An active tortfeasor should not be permitted to confuse and obfuscate the issue of his liability by forcing the plaintiff to concurrently litigate a complex malpractice suit in order to proceed with a simple personal injury suit." 351 So.2d at 706. As *Fabre v. Marin* demonstrates, however, section 768.81 necessarily deprives plaintiffs of their ability to control the tenor of the litigation. Since the only means of determining a party's percentage of fault involves comparing that party's fault to that of "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, it is no longer possible for a plaintiff to try to keep a complex case simple by pursuing only one tortfeasor. Section 768.81 takes that control from the plaintiff's hands and thus topples the second pillar upon which *Stuart* stood.

d. The plaintiffs' position is inconsistent with the abolition of joint and several liability

Equally important, while the two-step process imposed by *Underwriters at Lloyds* was not irrational under a regime of joint and several liability, it is simply inconsistent with the Legislature's decision to eliminate joint and several liability. Joint and several liability makes the defendant tortfeasor liable for one hundred percent of

the damages, even when the defendant is less than one hundred percent at fault. An equitable subrogation action merely affords that defendant the opportunity to seek recourse from other tortfeasors for their share of the wrongdoing. Under section 768.81, however, a defendant tortfeasor may be held liable for one hundred percent of the damages only if he or she was one hundred percent at fault. Since a defendant tortfeasor is responsible only for his or her share of the wrongdoing, an equitable subrogation remedy is superfluous.

II. PLAINTIFFS' ACTION WAS NOT "BASED UPON AN INTENTIONAL TORT"

Section 768.81(4)(b) exempts from its purview "any action based upon an intentional tort." Citing the Third District Court of Appeal's recent decision in *Nash v. General Motors Corp.*, 734 So.2d 437 (Fla. 3d DCA 1999), review granted (case no. 96,139), Plaintiffs now argue that, since the driver of the car in which Plaintiff was a passenger was intoxicated, this case is based upon an intentional tort. To arrive at this holding, however, the court in *Nash* was first required to reach two rather startling conclusions: first, that an accident caused by a drunk driver is an intentional tort; and second, that a products liability action brought against a manufacturer is an action "based upon an intentional tort." Neither conclusion withstands the slightest scrutiny.

A. The Fact that a Drunk Driver Caused the Accident Does Not Transform This Products Liability Action Into an Action Based Upon An Intentional Tort Under *Merrill Crossings* and *Stellas*

1. The policy behind the exemption for intentional torts

A drunk driver caused the accident in this case. But that fact does not transform the products liability crashworthiness case brought by plaintiffs into an

action based upon an intentional tort. Strong policy reasons support the Legislature's decision to exempt intentional torts from section 768.81. In *Merrill Crossings Assoc. v. McDonald*, 705 So.2d 560 (Fla. 1997), and *Stellas v. Alamo Rent-A-Car*, 702 So.2d 232 (Fla. 1997), this Court brought within that exemption a small and clearly defined set of cases: when the defendant's negligence is based upon its failure to protect against the specific risk of the intentional tort suffered by the plaintiff. In fact, both the statutory exemption for actions based upon an intentional tort and this Court's decisions in *Merrill Crossings* and *Stellas* are consistent with the scholarly analysis of the Restatement (Third) of Torts: Apportionment of Liability. But the Restatement does not exempt crashworthiness cases such as this one from apportionment, and neither should this Court.

The Restatement recognizes that intentional torts present special problems regarding apportionment. It questions[7] (without ultimately deciding)[8] whether an intentional tortfeasor should be able to raise the plaintiff's comparative fault in an effort to reduce the plaintiff's recovery. (It expressly supports apportionment of liability between intentional and negligent defendants. *Id.* § 1, Reporters' Note, Comment c at 17.) To afford "appropriate redress to victims of intentional torts," *id.* § 1, Comment c. at 7, the Restatement adopts a special rule imposing joint and several

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[7] "There is an intuitive sense that a plaintiff's own failure to use reasonable care should not affect a plaintiff's recovery against an intentional tortfeasor." Restatement (Third) of Torts: Apportionment of Liability § 1, Reporters' Note, Comment c at 13.

[8] *Id.* at 17.

liability on intentional tortfeasors. *Id.* § 22.[9] This special rule parallels section 768.81.

2. *Merrill Crossings* and *Stellas* apply only when the defendant's alleged negligence is its failure to protect the plaintiff from the specific risk of an intentional tort

In *Merrill Crossings*, this Court held that an action by the victim of an intentional assault against the owner and a tenant of a shopping center for failure to maintain reasonable security measures qualified as an action "based upon an intentional tort," and was thus exempt from the comparative fault scheme of section 768.81. *Stellas*, decided the same day, reached a similar conclusion in a suit by an assault victim against a car rental company for its negligent failure to warn that touring in certain areas of Miami with a bumper sticker saying "Alamo" posed the risk of just such an assault.

This Court made clear, however, that its decision to term what was in each case ostensibly a negligence suit an action "based upon an intentional tort" was actually quite a modest step. The Court emphasized that it was dealing with a sharply-defined kind of negligence action: "in the instant case we deal with a negligent tortfeasor whose acts or omissions give rise to or permit an intentional tortfeasor's actions." *Merrill Crossings*, 705 So.2d at 562. The Court underscored this point by quoting from the Restatement (Second) of Torts § 449[10] and by explaining that "it would be irrational

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[9] "Each person who commits a tort that requires intent is jointly and severally liable for any indivisible injury legally caused by the tortious conduct." *Id.* § 22. The Restatement does not take a position on whether joint and several liability should apply generally. See *id.* § 20 Comment a.

[10] "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable

to allow a party who negligently fails to provide reasonable security measures to reduce its liability because there is an intervening intentional tort, where the intervening intentional tort is exactly what the security measures are supposed to protect against." *Id.* at 562-63.

Merrill Crossings and *Stellas* are consistent with another special rule of liability adopted by the Restatement (Third) of Torts: Apportionment of Liability.[11] Section 24 imposes joint and several liability on "a person who is liable to another based on a failure to protect the other from the specific risk of an intentional tort." The Restatement thus takes the view that it is not unfair to hold a party liable for the entirety of the damages caused by an intentional tort when the party's liability lies specifically in its failure to protect against that particular type of risk. *Id.* § 24, Comment b. at 164.

The Restatement cautions, however, that this special rule is limited to the negligent failure to protect against the specific risk of an intentional tort. Warning of the danger of expanding this special rule beyond its narrow confines, it offers a crashworthiness case as an example of the type of case to which the special rule should *not* apply. See *id.* § 24, Comment a, Ill. 3; Reporters' Note, Comment a at 166. ("If the rule provided in this section were applied to [crashworthiness and other similar cases] it could substantially eviscerate the policy reflected in a jurisdiction that has

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for harm caused thereby." Restatement (Second) of Torts § 449, quoted in *Merrill Crossings*, 705 So.2d at 562.

[11] In fact, the Restatement cites with approval both the district court of appeal's opinion in *Merrill Crossings* and *Slawson v. Fast Food Enter.*, 671 So.2d 255 (Fla. 4th DCA 1996), review dismissed, 679 So.2d 773 (Fla. 1996), which this Court relied upon in *Merrill Crossings*, 705 So.2d at 563.

legislatively determined that joint and several liability for independent tortfeasors should be modified or abolished.")

The consequences of adopting the reasoning of the district court of appeals in *Nash* would be truly perverse. Compare the results under *Nash* of two product liability suits brought against a manufacturer by the driver of a car whose injuries were enhanced by the car's defective design. In one suit, the plaintiff was injured when another driver negligent collided with the plaintiff's car. In the second suit, the other driver intentionally rammed the plaintiff's car. Under *Nash*, the manufacturer will be significantly worse off in the case where the other driver intentionally rammed the plaintiff's car. If the other driver is merely negligent, section 768.81 applies, comparative fault is assigned, and joint and several liability is unavailable. But according to *Nash*, if the other driver intentionally rammed plaintiff's car, plaintiff's products liability claim against the manufacturer is transformed into a suit based upon an intentional tort, section 768.81 does not apply, and the manufacturer will be left jointly and severally liable and without the ability to seek an apportionment of fault.

It was just such an anomalous result that prompted *Fabre v. Marin* to reject the plaintiff's claim that a defendant's fault should be compared only to fault of other defendants, and not to that of non-parties. As this Court noted, "it defies common sense" to allow a defendant's liability to hinge on factors immaterial to the defendant's degree of fault. That is precisely what *Nash* would do. The manufacturer's liability would fluctuate wildly, depending on whether the other tortfeasor acted negligently or intentionally. Perversely, the more egregious (and the more worthy of punishment) the other tortfeasor's conduct, the worse off the manufacturer would be.

Accepting the *Nash* court's conclusions would also create serious line-drawing problems. Suppose a drunk driver is involved in an accident with two other cars. The drunk driver sues the other two drivers, claiming their negligence caused the accident. The defendants claim that the plaintiff's intoxication was at least partially to blame. *Nash* says drunk driving is an intentional tort. Assuming for a moment that is true, does that mean section 768.81 is inapplicable? Would the defendants be precluded from asking the jury to compare their fault with the plaintiff's and be held jointly and severally liable? *Nash* implies that the answers to these questions would be yes. Not only does that defy common sense, it is contrary to Florida law. Section 768.36, Fla. Stat., provides that a plaintiff who was intoxicated may not recover any damages if the trier of fact finds that the plaintiff was more than fifty percent at fault. This obviously requires juries to compare the defendant's fault to the drunk driver plaintiff's fault. See also *Demoya v. Lorenzo*, 468 So.2d 358 (Fla. 3rd DCA 1985).

The *Nash* court's conclusions would also create, however unintentionally, bad public policy. Surely, in the hypothetical above, it is against the public interest to allow the plaintiff drunk driver to escape responsibility for his own reprehensible conduct. Similarly, in this case, public policy demands that responsibility be apportioned to the drunk driver who caused the accident. *Nash*, however, holds out the potential that he will never be held accountable for his actions.

The simple fact that an intentional tortfeasor is somehow involved in the chain of events that culminates in a lawsuit cannot mean that the suit qualifies as an action "based upon an intentional tort." To do so would thwart the Legislature's purpose. By enacting section 768.81, the Legislature sought to eliminate joint and several liability

in most cases. *Nash*, however, would reinstate joint and several liability in a great number of cases. And it would do so on almost a random basis, depending on whether an intentional tortfeasor fortuitously happened to have some connection to the accident. Section 768.81 must instead be read in an manner faithful to the Legislature's intent that, except for intentional tortfeasors, liability should be assigned on the basis of a tortfeasor's fault.

B. One Who Causes an Injury While Driving While Intoxicated Has Not Committed an Intentional Tort

The holding in *Nash* that one who causes an injury while driving intoxicated has committed an intentional tort is clearly erroneous. It goes against the vast weight of precedent and scholarly opinion. Florida law holds that a person commits an intentional tort only when that person either "exhibit[s] a deliberate intent to injure or engage[s] in conduct which is substantially certain to result in injury or death." *Fisher v. Shenandoah General Construction Co.*, 498 So.2d 882, 883 (Fla. 1986). See also *Spivey v. Battaglia*, 258 So.2d 815, 817 (Fla. 1972) ("where a reasonable man would believe that a particular result was *substantially certain* to follow, he will be held in the eyes of the law as though he had intended it . . . However, the knowledge and appreciation of a *risk*, short of substantial certainty, is not the equivalent of intent.") (emphasis in original); *General Motors Acceptance Corp. v. David*, 632 So.2d 123, 125 (Fla. 1st DCA 1994).

While drunk drivers may intend to engage in the *act* of drunk driving, that is not the same as intending the *result* of causing injury. See Restatement (Second) of Torts § 8A, Comment a at 15 (intent refers "to the *consequences* of an act rather than the act

itself") (emphasis added); *Kawaauhau v. Geiger*, 523 U.S. 57, 61-62 (1998). Nor does drunk driving, deplorable as it is, create that substantial certainty of injury required of an intentional tort.

In *Fisher v. Shenandoah General Construction Co.* this Court equated substantial certainty with "virtual certainty." 498 So.2d 882, 884. A "strong probability" of injury is not enough; nor is a "great" risk. A defendant acting with the awareness of such risk may be reckless or wanton, but is still not engaged in an intentional tort. *Id.* at 883-84. Quoting Prosser & Keeton, the Court stated:

> the mere knowledge and appreciation of a risk—something short of substantial certainty—is not intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but is not an intentional tort.

Id. at 884 (quoting Prosser & Keeton on Torts 36 (W. Keeton 5th ed. 1984)). See also *General Motors Acceptance Corp. v. David*, 632 So.2d 123, 125 (Fla. 1st DCA 1994) (Substantial certainty "requires more than a strong probability of injury. It requires virtual certainty.").

That intentional torts are limited to those situations where the tortfeasor intended the result or knew the risk of injury was virtually certain is hornbook law. It is the position of the Restatement (Second) of Torts § 8A (which this Court relied on in *Spivey v. Battaglia*, 258 So.2d at 817 n.2), the Restatement (Second) of Torts § 500, Comment f (which this Court relied on in *Fisher v. Shenandoah General Construction Co.*, 498 So.2d at 884), and the proposed Restatement (Third) of Torts: General Principles § 1 (Discussion Draft 4/5/99) (intent is found when actor acts with desire of bringing about the harm or with belief that the harm is substantially certain to

result). See also *Garratt v. Dailey*, 46 Wash.2d 197, 279 P.2d 1091, 1093-94 (1955) (substantial certainty requires more than very grave risk).[12]

The court of appeal in *Nash* brushed aside this overwhelming body of authority with no discussion and with citation to just three cases, none of which is apposite. It cited only one Florida case, *Ingram v. Pettit*, 340 So.2d 922 (Fla. 1976). *Ingram*, however, holds only that a jury may consider awarding punitive damages when a tortfeasor acts negligently and is intoxicated. That is a far cry from holding that causing injury while driving while intoxicated is an intentional tort. Indeed, as this Court explained in *Ingram*, punitive damages will lie when a tortfeasor is reckless. *Id.* at 924. Moreover, answering the question of whether causing an injury while driving intoxicated is sufficiently egregious conduct to justify an award of punitive damages is different from answering whether such conduct is an intentional tort and thus outside the ambit of section 768.81. An affirmative answer to the first question does not resolve the second.

The two other cases cited in *Nash* are likewise inapposite. Both are bankruptcy cases holding that debts arising from injuries caused by the debtor's intoxication were not dischargeable pursuant to 11 U.S.C.A. § 523(a)(6), which disallows the discharge of debts for "willful and malicious injury by the debtor." *In re Ray*, 51 B.R. 236 (B.A.P. 9th Cir. 1985); *In re Fielder*, 799 F.2d 656 (11th Cir. 1986). Once again, these

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12 "It is not enough that the act itself is intentionally done and this, even though the actor realizes or should realize that it contains a very grave risk of bringing about the contact . . . . Such realization may make the actor's conduct negligent or even reckless but unless he realizes that to a substantial certainty, the contact . . . will result, the actor has not that intention which is necessary to make him liable . . ." 279 P.2d at 1093-94.

cases involve an issue very different from the one addressed in *Nash.* Whether a debt arising from an injury caused by the debtor's intoxication should be included in the class of debts for which a discharge in bankruptcy is disallowed is a completely different question from whether such tortfeasors should be subjected to joint and several liability. Furthermore, in *Kawaauhau v. Geiger*, 523 U.S. 75 (1998), the Supreme Court repudiated the logic of these cases, stripping them of any precedential value they might otherwise have had.[13]

The Third District Court of Appeal's holding that one who causes an injury while driving intoxicated has committed an intentional tort is utterly lacking in support. It goes against long-standing and established authority, and should, therefore, be rejected.

CONCLUSION

For these reasons, Amicus Product Liability Advisory Council, Inc. respectfully requests that this Court affirm the judgment of the Second District Court of Appeal.

Respectfully submitted,

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13 The Court noted that a 1990 amendment to the Bankruptcy Code that disallows the discharge of debts "for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated," 11 U.S.C.A. § 523(a)(9), would be superfluous if debts arising from injuries caused by the debtor's intoxication were already nondischargeable under § 523(a)(6). In other words, the bankruptcy cases cited in *Nash* got it wrong.

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