99-501.327

SUPREME COURT OF FLORIDA

CASE NO. SC01-374

JOSEPH CEPHAS,

Petitioner,

v.

MARK J. LETZTER, M.D., et al.,

Respondents.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA FOURTH DISTRICT
CASE NOS. 99-02182 & 99-02925

AMENDED ANSWER BRIEF OF RESPONDENTS MARK J. LETZTER, M.D., ET AL.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF THE CASE

This brief is filed on behalf of the Respondents, Mark J. Letzter, M.D., Mark J. Letzter, M.D., P.A., United Surgeons, P.A., and ProNational Insurance Company, the defendants-appellants-indemnitor below ("Dr. Letzter"). The Petitioner, Joseph Cephas ("Cephas"), brought this action against Dr. Letzter, Mark J. Letzter, M.D., P.A., United Surgeons, P.A., Dr. Lucien Armand ("Dr. Armand"), and Lucien Armand, M.D., P.A., to recover damages arising from an injury that Cephas allegedly sustained as a result of medical care and treatment rendered by Dr. Letzter and Dr. Armand. Cephas contended that as a result of the physicians' treatment of his diabetic condition, he suffered a below-knee amputation that would not have been necessary had he been properly treated. *Letzter v. Cephas*, 26 Fla. L. Weekly D293, D294 (Fla. 4th DCA Jan. 24, 2001). Although Dr. Armand was a named defendant, before trial Dr. Armand's insurance carrier, which had been providing his defense, prevailed in a separately filed declaratory judgment action against Dr. Armand and subsequently withdrew from the action. (R3. 347-48; 362). Dr. Armand did not hire new counsel or continue to tender a defense, and he failed to appear or defend himself at trial. *Id.* at D296 n.1. (T1. 5-7; T8. 970-71).

A jury found in favor of Cephas and awarded $1,805,175.00. Although the jury, as instructed, apportioned fault among the defendants with forty-five percent attributed to Dr. Letzter and fifty-five percent attributed to Dr. Armand, the trial court entered the judgment jointly and severally against the defendants pursuant to the doctrine of *Stuart v. Hertz*, which allows a plaintiff injured in an accident to hold the "initial" tortfeasor responsible for his or her entire damages if the plaintiff suffered additional damages as a result of medical negligence.[1]

Dr. Letzter appealed from the judgment and the Fourth District unanimously reversed, ordering the trial court to apportion the non-economic damages between Drs. Letzter and Armand consistent with the jury's allocation of fault, and pursuant to section 768.81, Fla. Stat., the apportionment statute. *Id.* at D295. The panel majority held that the jury's apportionment of fault showed that the jury rejected the *Stuart v. Hertz* instruction that had been given, and thus found that the defendants were joint tortfeasors, in which case the apportionment statute applied. *Id*. The majority additionally held that Cephas was not in a position to complain about a lack of a clearer or more definitive jury finding in regard to whether the defendants were joint tortfeasors, because Cephas objected to the issue going to the jury. *Id.*

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[1]Judgment was also entered against Dr. Letzter's professional liability insurer, ProNational Insurance Company, in the amount of doctor Letzter's coverage. This is not pertinent to the issues on review.

In a special concurrence, Judge Klein agreed with the majority's result but questioned the continuing validity of *Stuart v. Hertz* in light of the apportionment statute. In response to Judge Klein's special concurrence, the panel majority certified two questions of great public importance to this Court: Whether the doctrine of *Stuart v. Hertz* has been abrogated by the Tort Reform and Insurance Act of 1986, Chapter 86-160, Laws of Florida and (2) whether *Stuart v. Hertz* applies when the initial cause of action is one in medical malpractice and both the initial and subsequent tortfeasors are sued in the same action. *Letzter v. Cephas*, 26 Fla. L. Weekly D293, D295-96 (Fla. 4th DCA Jan. 24, 2001). Cephas' petition followed.

STATEMENT OF THE FACTS

A. Background Facts

Instead of responding to Cephas' statement of facts piecemeal, Dr. Letzter will present the facts as provided in the Fourth District's opinion:

> In 1990, Cephas was diagnosed with diabetes. Expert testimony on the disease established that diabetes causes a narrowing of the blood vessels; as a result, diabetics are at an increased risk for peripheral vascular disease, a condition that restricts blood flow to one's extremities, thus making it difficult for wounds on those extremities to heal properly. In January of 1996, Cephas went to the emergency room at St. Mary's seeking treatment for an ulcer or wound on his toe on his right foot. Cephas was referred to a vascular specialist, Dr. Letzter, and returned to the hospital on January 22nd.
>
> Letzter diagnosed Cephas with dry gangrene of the right, little toe.

Tests revealed that Cephas had arterial blockage, and Letzter advised Cephas that he had two options: one, surgically amputate the toe; or, two, wait and see if the toe would autoamputate, or put in layman's terms, fall off on its own. Dr. Letzter believed the better approach was to wait and see if the toe would autoamputate, as he had reservations about whether a surgical wound would heal given the reduced blood flow to Cephas' foot. The evidence established that, at this juncture, Letzter considered that a distal bypass procedure might be required to restore blood flow to the foot. Letzter testified, however, that he did not immediately perform the procedure because there is a 20 to 30% failure rate and, in the event of failure, Letzter would then be required to amputate the lower portion of Cephas' leg. One medical expert testified that Letzter had acted appropriately and another testified that his wait-and-see plan fell below the standard of care.

Cephas saw Letzter again on February 6th. By this time, a small amount of fluid was draining from the toe and Cephas was complaining of pain in his thigh. Letzter ran some tests regarding the source of the thigh pain. As for the drainage from the toe, Letzter testified that he did not believe the fluid was an indication of wet gangrene; rather, he believed that the small amount of fluid simply indicated that the toe was in the process of autoamputating. One medical expert concurred. Another testified that the fluid was an indication of wet gangrene and that Letzter should have performed the distal bypass immediately.

Cephas was scheduled to see Letzter again on February 13th, but canceled the appointment. Cephas did see Letzter, however, a week later on February 20th. At this time, Letzter told Cephas that surgical intervention was required. Letzter did not view Cephas' condition as an emergency and instructed his staff to schedule the procedure during the next week. One expert concurred that the condition was not an emergency; another testified that the procedure should have been performed within a day or so.

On February 25, 1996, Cephas called Letzter complaining of pain and reporting that the toe had started to fall off. Letzter advised Cephas to "stay the course" and told him that he expected the surgery to be

> scheduled within the next couple of days. This was Dr. Letzter's last consultation with Cephas.
>
> On March 1, 1996, due to the pain in his foot, Cephas went to the emergency room at Glades Hospital, which was nearer to his home than St. Mary's. Dr. Letzter was not contacted. Cephas was treated by Dr. Armand, a general surgeon who had received his training in Haiti and Canada. On March 4, 1996, Armand amputated Cephas' forefoot. None of the experts criticized the performance of this procedure. In addition to the forefoot amputation, however, Armand performed a femoral-to-popliteal artery bypass on Cephas' right leg. This procedure addressed only blood supply from the femoral artery in the thigh to the popliteal artery above the knee. The medical experts at trial testified that this procedure simply did not address the problem – reduced blood flow to Cephas' foot. Letzter learned of the forefoot amputation on March 7, 1996, when his office called Cephas to discuss scheduling surgery. At least one expert testified that it was below the standard of care to Letzter not to call Armand once he learned of the procedure performed, opining that had Letzter learned the facts, he still could have intervened and performed the appropriate procedure – a distal bypass.
>
> On April 5, 1996, Cephas was once again admitted to the hospital. The bypass performed by Armand had failed and the infection had spread. On April 9, 1996, Dr. Armand performed a below the knee amputation of Cephas' right leg. Medical experts agreed that, by this time, the amputation was required.

Letzter, 26 Fla. L. Weekly at D294. Cephas thereafter brought this action against Dr. Letzter and Dr. Armand. *Id.*

It is important to note that the Fourth District's opinion does <u>not</u> state, as Cephas provides, that by March 1, 1996, Dr. Letzter's inaction had allowed Cephas'

infection to get out of control. (I.B. p. 3).[2] Cephas is attempting to incorrectly insinuate that Dr. Letzter was the "initial tortfeasor" to injure him, rather than a joint tortfeasor with Dr. Armand. It was undisputed at trial that at the time Dr. Armand performed the incorrect procedure on Cephas, Cephas had not suffered any irreparable injuries as a result of medical negligence, as his condition still could have been treated with the proper procedure. *Id.* ("At least one expert testified that it was below the standard of care for Letzter not to call Armand once he learned of the procedure performed, opining that had Letzter learned the facts, he still could have intervened and performed the appropriate procedure – a distal bypass."); (T3. 221-23; 305-06; T4. 450-52; 456).

B. Circuit Court Proceedings

At the close of the evidence at trial, Cephas' counsel moved for a directed verdict holding that the comparative fault statute, Florida Statute section 768.81(3), did not apply to the action. (T7. 845-46). Cephas' counsel contended that section 768.81 only applies to joint tortfeasors, and that as a matter of law Drs. Letzter and Armand were not joint tortfeasors. (T7. 846). Cephas' counsel also moved the court to instruct

[2]"I.B." refers to the Petitioner's Initial Brief to this Court. "Amic." refers to the brief submitted by *amicus curiae* ATLA on behalf of the Petitioner. "R." is the record on appeal, "T." refers to the trial transcripts, and "App." is the Appendix to this brief.

the jury and hold as a matter of law that, "based on Stuart v. Hertz," if the jury found that Dr. Letzter was negligent in regard to Cephas' treatment, and further found that Dr. Armand was negligent and caused injury to Cephas, that Dr. Letzter would be responsible for Dr. Armand's negligence as well as his own. (T7. 850). According to Cephas' argument, *Stuart v. Hertz*, 351 So. 2d 703 (Fla. 1977), applied to the action and had the effect of allowing all liability to be attributed to Dr. Letzter regardless of the degree of Dr. Armand's fault. (T7. 846-49). However, Cephas' counsel agreed to allow the jury to apportion fault among the doctors on the verdict form. (T7. 850).

Contrary to Cephas' representation on page 4 of his brief, Dr. Letzter did <u>not</u> agree with Cephas' legal position at trial in regard to the allocation of liability, and in fact vigorously opposed the application of *Stuart v. Hertz* and any finding as a matter of law that the doctors were not joint tortfeasors. (T7. 848-52; T8. 863). In fact, although Cephas later incorrectly contends on page 6 that Dr. Letzter argued for the first time on appeal that he and Dr. Armand were joint tortfeasors as a matter of law, he admits that Dr. Letzter's counsel asserted at trial that section 768.81 applied to the action and that the jury should apportion damages among the tortfeasors, since both Dr. Letzter and Dr. Armand were involved in treating "one bottom-line injury." (T7. 849-51).

Dr. Letzter also did not waive his legal assertions by not calling his arguments

"motions for directed verdicts," as Cephas suggests. (I.B. pp. 4-5). Regardless of what the motions were denoted before or after trial, it cannot be disputed that in response to Cephas' motions for directed verdict, Dr. Letzter's counsel vigorously asserted at trial that *Stuart v. Hertz* should not apply because the case did not involve a situation where a defendant was attempting to try a medical malpractice case alongside a car crash case (the situation in *Stuart v. Hertz*), and additionally contended at trial that *Stuart v. Hertz* should not apply in any event because the injury that ultimately arose as a result of both physicians' alleged negligence, which overlapped in time, was the identical injury -- the below-knee amputation. (T7. 851-52). These arguments were all reraised post-trial. (R4. 542-50).

Dr. Letzter's counsel alternatively asserted at trial that if the jury were to receive a *Stuart v. Hertz* instruction, it be given an additional instruction that would allow the jury to decide whether or not the defendants were joint tortfeasors and to apportion fault pursuant to section 768.81, Fla. Stat. (T7. 851; T8. 863-64). In this regard Dr. Letzter's counsel submitted an instruction to the trial court on joint negligence (T8. 863-64; R3. 514-15), contending that the law allowed for an instruction on all available theories of causation, and that the jury could well find that Dr. Armand and Dr. Letzter were joint tortfeasors. (T8. 864; 869-70). In response to the request for an alternative instruction on joint negligence, Cephas' counsel responded that whether parties are

joint tortfeasors is a legal question to be decided by the court, and that under "no stretch of the imagination" were Drs. Letzter and Armand joint tortfeasors. (T8. 872-73). He further contended that whether or not they were joint tortfeasors was irrelevant because *Stuart v. Hertz* applied to subsequent medical malpractice regardless of whether or not the physicians were joint tortfeasors. (T8. 872-73).

Over Dr. Letzter's objections, the trial court held that a *Stuart v. Hertz* instruction would be read to the jury (T8. 871), and denied the defense's requested alternative instruction despite Dr. Letzter's counsel's assertions that the *Stuart v. Hertz* instruction, combined with an allowance for apportionment on the verdict form, would confuse the jury. (T8. 875-77). The court additionally denied Dr. Letzter's request to include a line item on the verdict form reflecting the jury's decision in the issues regarding whether the defendants were joint tortfeasors. (T. 875-76). The court thereafter instructed the jury as follows:

> [If] the greater weight of the evidence does support the claim of Joseph Cephas against one or more of the defendants, then you should determine and write on the verdict form what percentage of the total negligence of both defendants is chargeable to each.

(T9. 1009).

The trial court also instructed the jury:

> If Dr. Mark Letzter made a negligent diagnosis or

> rendered negligent medical treatment to Joseph Cephas and because of that negligence Joseph Cephas ultimately suffered injury as a result of the negligence, mistake, or lack of skill of Dr. Armand, the law regards the negligence of Dr. Letzter as the proximate cause of the damages flowing from the subsequent negligence or unskillful treatment by Dr. Armand and holds Dr. Letzter liable for all the damages.

(T9. 1009-10).

The jury found in favor of Cephas and awarded him $1,805,175.00, with forty-five percent of the fault attributed to Dr. Letzter and fifty-five percent attributed to Dr. Armand. Over Dr. Letzter's objections, the trial court entered the judgment jointly and severally against the defendants. Dr. Letzter's appeal to the Fourth District followed.

C. The Fourth District's Reversal

On appeal, Dr. Letzter asserted that the trial court erred in holding that *Stuart v. Hertz* applied to the facts of the case because (a) both having been found negligent, Dr. Letzter and Dr. Armand were joint tortfeasors as a matter of law; (b) *Stuart v. Hertz* should not apply where both the alleged initial and subsequent tortfeasors are physicians whom the plaintiff chose to sue; and (c) because *Stuart v. Hertz* did not apply to the facts of this case and Dr. Letzter and Dr. Armand were joint tortfeasors as a matter of law, the trial court erred in refusing to apportion the final judgment pursuant to the jury's verdict and section 768.81, Fla. Stat. As an alternate argument, Dr. Letzter asserted that even if the defendants were not joint tortfeasors as a matter

of law, the trial court erred in failing to instruct the jury to determine whether the defendants were joint tortfeasors.

The Fourth District unanimously agreed with Dr. Letzter's argument that the trial court erred in holding the defendants jointly and severally liable, and remanded the case with instructions that the non-economic damages award be apportioned between Drs. Letzter and Armand consistent with the jury's allocation of fault. The majority held that "given the evidence, it was up to the jury to decide if the negligent actions of Drs. Letzter and Armand combined to create the initial injury, i.e., whether the two physicians were joint tortfeasors." *Letzter*, 26 Fla. L. Weekly at D295. The majority additionally noted that the jury had been given a *Stuart v. Hertz* instruction yet still allocated fault to Dr. Armand, thus holding: "[W]e must presume that the jury followed the court's instructions and applied the law to the facts as it found them." *Id.* The majority therefore concluded: "By finding Dr. Armand the legal cause of damage to Cephas, and allocating fault among Drs. Letzter and Armand, the jury must have rejected the application of *Stuart v. Hertz* and found the physicians joint tortfeasors." *Id.* Accordingly, the panel majority held that the trial court erred in failing to apply the apportionment statute to the non-economic damages awarded.

The majority additionally pointed out that "Cephas is in no position to complain about the lack of a clearer or more definitive jury finding on this issue as it was he who

objected to specifically asking the jury whether the physicians were joint tortfeasors. This is nothing more than the natural corollary to the rule that a litigant may not cry 'foul' when a jury instruction which the litigant has requested is actually given by the court." *Id*. On this point the majority further noted that "even on appeal, Cephas contends that any error in failing to submit this question to the jury on the verdict form is harmless because the jury was permitted to allocate fault." *Id*.

Although the majority found in favor of Dr. Letzter primarily based on the facts, in a special concurrence Judge Klein questioned the continuing validity of *Stuart v. Hertz* in light of the Tort Reform Act of 1986, which compels courts to "enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability." § 768.81(1), (3), Fla. Stat. Thus, Judge Klein opined that "[u]nder the Act, the first negligent physician cannot, in my opinion, be held liable for more than his percentage of fault as found by the jury." 26 Fla. L. Weekly at D296. Judge Klein further held:

> I believe that *Stuart v. Hertz Corp.*, 351 So. 2d 793 (Fla. 1977), in which the Florida Supreme Court held that the defendant in an auto accident case would be liable for 100% of plaintiff's damages, even though some of those damages were caused by medical malpractice, is contrary to the Act, and no longer good law.
>
> Although some courts have held that the Act applies only where the defendants are joint tortfeasors, and adhere to *Stuart*, there is no language in the legislation which limits its applicability to joint tortfeasors.

> The Title of the Act, sections 768.71-81, is "Damages," and the provision specifically applicable in this case, section 768.81(3) is entitled "Apportionment of Damages."

Id. (footnote omitted). Judge Klein went on to explain that this Court's recent opinion in *Gross v. Lyons*, 763 So. 2d 276 (Fla. 2000), shows that *Stuart* has been abrogated, since it is apparent from the *Gross* opinion that if damages from two separate car accidents can be apportioned, the party causing the first accident will only be liable for her portion. *Id.*

The panel majority agreed with Judge Klein that "a *Stuart v. Hertz* instruction is awkward when the plaintiff chooses to sue both tortfeasors in the same lawsuit and is particularly problematic when both tortfeasors are physicians." *Id.* at D295. The majority further noted that "the underlying premise of holding the initial tortfeasor liable for the subsequent medical malpractice of another party may be at odds with the legislative purposes of chapter 768 which show a preference for making each tortfeasor liable only for his own negligence." *Id.* Thus, "for the reasons articulated in Judge Klein's special concurrence," the majority certified the two questions presented as ones of great public importance. *Id.* at D295-96. This petition followed.

SUMMARY OF THE ARGUMENT

This case is a perfect example of why the doctrine of *Stuart v. Hertz* no longer has a place in Florida's tort law system, which mandates that judgment shall be entered on the basis of each party's percentage of fault. Even the Petitioner and *amicus curiae* concede that the application of *Stuart v. Hertz* to these facts did not serve any of the policy concerns that were at issue in the original *Stuart v. Hertz* opinion. The plaintiff in this case sued both doctors who treated him, yet wielded the *Stuart v. Hertz* doctrine for the sole purpose of executing against the more solvent defendant, despite the absence of a jury determination that Dr. Letzter was the "initial tortfeasor" who caused the first injury to Cephas, and despite the fact that the jury assigned only forty-five percent of the fault to Dr. Letzter. To compound the problem, the trial court's misapplication of *Stuart v. Hertz* resulted in a judgment against the defendants jointly and severally -- a result clearly prohibited by the apportionment statute.

This Court should answer the Fourth District's first certified question -- whether the doctrine of *Stuart v. Hertz* has been abrogated by the Tort Reform and Insurance Act -- in the affirmative. The Legislature has imposed a comprehensive, fault-based system of liability, and in doing so has abolished common law remedies which exposed defendants to liability for damages that they did not cause. There would simply be no reason for the Legislature to abolish joint and several liability where the

torts resulted in a single, indivisible injury, let retain the old standard where the torts are separate and distinct, which is what the Petitioner advances. This Court should hold that under the apportionment statute, where liability can be apportioned it should be, regardless of whether the torts were joint or separate.

Even if this Court declines to hold that the *Stuart v. Hertz* doctrine is no longer valid, in any event it should answer the Fourth District's second certified question in the negative and hold that *Stuart v. Hertz* is not applicable when all of the defendants are doctors, particularly where, like here, the plaintiff chooses to sue all of the doctors. As stated, the petitioner and *amicus curie* concede, as they must, that the concerns from *Stuart v. Hertz* simply do not exist under the facts of this case. *Stuart v. Hertz* was based on the premise that a defendant tortfeasor should not be entitled to complicate a plaintiff's lawsuit by introducing the issue of subsequent medical malpractice with a third-party complaint. This has absolutely no application where, as here, the active tortfeasors are both physicians whom the plaintiff chose to bring into the litigation. Holding Dr. Letzter fully responsible for the damages caused by Dr. Armand serves no purpose other than as a vehicle for imposing all financial responsibility onto the physician who happens to be insured. This result was never contemplated by *Stuart v. Hertz*, and additionally frustrates the purpose of the apportionment statute, section 768.81, Fla. Stat., which represents a legislative intent

to apply fault-based liability.

Regardless of whether or not this Court addresses the Fourth District's certified questions, it should approve the Fourth District's decision based on the facts. The Fourth District properly ordered the trial court to enter judgment based on the apportionment statute instead of jointly and severally, which is plainly not permitted under the statute. Over Dr. Letzter's objections, the jury was given a *Stuart v. Hertz* instruction that ordered all fault to be assigned to Dr. Letzter if the jury found that he was the initial tortfeasor. The jury rejected that instruction and assigned more than half of the fault to Dr. Armand, thus holding that Dr. Letzter was not an "initial tortfeasor" as contemplated under *Stuart v. Hertz*, but was a joint tortfeasor with Dr. Armand.

Cephas tries to argue his way around the mandatory apportionment statute by contending that as a matter of law, the negligence committed by Drs. Letzter and Armand was separate and distinct, and not joint. This is contrary to the facts, as well as to all theories of liability asserted by Cephas throughout the litigation, which was that both doctors' negligence combined to cause a single, bottom-line injury to Cephas – the amputation of his lower leg. There was no evidence at trial that Dr. Letzter caused an "initial injury" to Cephas which in and of itself required medical attention. Rather, the theory of liability asserted against Dr. Letzter was that his failure to timely treat Cephas caused Cephas to seek substandard care from Dr. Armand, who

ultimately performed the incorrect procedure.

Although the Fourth District disagreed with Dr. Letzter's argument that the doctors' liability was joint as a matter of law, it properly held that the evidence permitted the jury to find that the doctors were joint tortfeasors. It further held that Cephas was in no position to complain about the lack of a clearer instruction to the jury regarding a finding of joint liability, because it was Cephas who objected to a jury instruction on this issue. Thus, having prevented the jury from deciding the issue, Cephas cannot legitimately argue that the Fourth District was wrong in holding that the jury's apportionment of fault showed that the doctors' negligence was joint.

The last two issues raised by the petitioner and *amicus curiae* are easily disposed of. Although Cephas asks this Court to hold that the apportionment statute is unconstitutional, this Court has already held that the statute does not violate any provisions of the Florida Constitution. Additionally, it would be improper for this Court to revisit the constitutionality issue in this action, because the version of the statute that is at issue in this appeal is no longer in effect. Subsection (3) of section 768.81, Fla. Stat., was extensively amended in 1999; thus, any finding in regard to the constitutionality of the old version of the statute would have little to no application to the current version of the statute. Nor can this Court address the constitutionality of the amended version of the statute, as Cephas suggests, because it would have no

bearing on the outcome of this action.

Similarly, this Court should decline to revisit its decision in *Fabre v. Marin*, because that opinion has no application to the instant action. *Fabre* holds that the apportionment statute requires the jury to consider the negligence of tortfeasors who were not brought into the litigation for the purposes of fault apportionment. *Fabre* does not apply to this action because this case did not involve the potential fault of any non-parties. The only potential tortfeasors whose fault the jury was asked to consider were Dr. Letzter and Dr. Armand, both of whom were voluntarily sued by Cephas. Thus, even a reversal of *Fabre* would not change the outcome of the instant case, and no review by this Court is necessary.

As shown, regardless of whether this Court reaches the certified questions, and even if it answers them in Cephas' favor, this Court should not disturb the Fourth District's proper holding that the final judgment must be remanded and entered pursuant to the apportionment statute.

ARGUMENT

I. THE DOCTRINE OF *STUART V. HERTZ* CONFLICTS WITH THE APPORTIONMENT STATUTE, SECTION 768.81(3), AND IS NO LONGER GOOD LAW.

As Judge Klein asserted in his special concurrence, the doctrine of *Stuart v. Hertz* has been abrogated by the apportionment statute, which requires liability based on fault. This doctrine was formerly a companion to the doctrine of joint and several liability, and allowed an injured plaintiff to collect all of her damages from the initial tortfeasor, even if those damages were a result of subsequent medical malpractice. In 1986, however, the Legislature abolished the doctrine of joint and several liability and enacted section 768.81, Fla. Stat., which provides 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." Like joint and several liability, imposing total responsibility on the initial tortfeasor without considering his percentage of fault, as *Stuart v. Hertz* permitted, is in direct conflict with the apportionment statute. This Court should therefore hold that, like joint and several liability, the doctrine of *Stuart v. Hertz* is no longer valid.

Cephas' and ATLA's suggestions that Dr. Letzter "stipulated" that *Stuart v. Hertz* remains viable are incorrect and mischaracterize Dr. Letzter's arguments below. Dr. Letzter correctly asserted below that section 768.81(3) applies to joint tortfeasors,

and since Drs. Letzter and Armand were joint tortfeasors, the trial court was compelled to apply the apportionment statute when entering the judgment. This does not *ipso facto* infer that *Stuart v. Hertz* remains viable, and Dr. Letzter never stipulated as such.

Additionally, the excerpt from Dr. Letzter's reply brief to the Fourth District to which ATLA cites (Amic. p. 13) omits pertinent portions of Dr. Letzter's argument which must be included for the proper context. Dr. Letzter has contended throughout the appellate proceedings, including in his reply brief, that *Stuart v. Hertz* may still be alive in a very limited number of cases where a defendant attempts to complicate the plaintiff's non-medical case by bringing an indemnity action against the plaintiff's doctor and thus turning a simple negligence case into a complicated medical malpractice action. (App. 1, 2).[3] However, Dr. Letzter went on to assert in his reply brief, and still asserts, "that the enactment of the apportionment statute abolished the need to apply the rule of *J. Ray Arnold* when liability can be apportioned," noting that the *Stuart v. Hertz* court had adopted the holding from *J. Ray Arnold Corp. v. Richardson*, 141 So. 133 (Fla. 1932), applying the common law rule that deems an initial tortfeasor liable for subsequent medical malpractice. (App. 2, p. 11). In fact, Dr. Letzter conceded below that the Fourth District was still applying certain provisions

[3] Because the Petitioner and Respondent have both made references to what the Respondent allegedly argued to the Fourth District, for the sake of completeness the Respondent has included both briefs it submitted below as an Appendix to this brief.

of *Stuart v. Hertz* in other cases, but then stated that "in light of the apportionment statute, *Stuart v. Hertz* should not be applied where the jury can apportion damages, and this issue may not have been fully explored in the cases cited." (App. 2, pp. 13-14). Thus, Dr. Letzter did in fact argue to the Fourth District that the apportionment statute abrogated that portion of *Stuart v. Hertz* which deems the initial tortfeasor liable for damages incurred as a result of subsequent medical malpractice, which is directly at issue in this action.

As Dr. Letzter asserted below and Judge Klein acknowledged in his special concurrence, in the era of the apportionment statute, *Stuart v. Hertz* is a relic that should be given only the most limited, if any, application. 26 Fla. L. Weekly at D296. *See also Association for Retarded Citizens-Volusia, Inc. v. Fletcher*, 741 So. 2d 520, 527 (Fla. 5th DCA 1999) (Harris, J., dissenting) (maintaining that apportionment statute has abrogated *Stuart v. Hertz*: "The legislature has now enacted a state public policy which requires that those found to have committed a negligent act shall be held responsible only to the extent that plaintiff's damages can be attributed to their percentage of fault."). The Legislature has set forth a comprehensive, fault-based system of liability that is to be applied in all actions for damages. The thrust of its codification of this area has been that where fault can be apportioned, it should be.

Thus, the policy reasons behind this Court's endorsement of the rule from *J.*

Arnold Lumber in its *Stuart v. Hertz* opinion no longer apply. As this Court has recently held by implication, where the damages incurred as a result of a separate tortfeasor can be apportioned, the jury should be instructed to apportion those damages and hold the defendant responsible for only those damages he or she caused. *Gross v. Lyons*, 763 So. 2d 276, 278 (Fla. 2000) (approving Fourth District decision holding that a previous tortfeasor may be liable for the harm caused by a subsequent tortfeasor if the jury cannot apportion the injury between the two). *See also Zane v. Coastal Unilube, Inc.*, 774 So. 2d 761 (Fla. 4th DCA 2000) (holding that trial court did not err in refusing to give an instruction under *Gross v. Lyons* where plaintiff's experts testified that the damages from two accidents could be apportioned). It follows that where it is possible for a jury to apportion fault among all of the tortfeasors under section 768.81, Fla. Stat., as in this case, it simply makes no sense to apply *Stuart v. Hertz*. Just as joint tortfeasors can no longer be held responsible for damages that they did not cause, it is totally arbitrary to make an "initial" tortfeasor responsible for damages caused by a different tortfeasor.

Significantly, *Stuart v. Hertz* stands alone in the otherwise fault-based system of liability that this Court and the Legislature have adopted over the last three decades. *See* § 768.81, Fla. Stat.; *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973) (discarding rule of contributory negligence and replacing with pure comparative negligence standard);

Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993) (holding that under apportionment statute defendants should not be held liable for the fault of negligent non-parties); *Gross*, 763 So. 2d at 278 (indicating that defendants should not be held liable for damages caused by other tortfeasors where damages can be apportioned). Under the apportionment statute, a defendant whose tortious acts combine with those of others to injure the plaintiff is only responsible for the non-economic damages that he or she caused. It simply makes no sense to arbitrarily distinguish torts that are "demonstrably separate in time and effect," and hold that in those circumstances the tortfeasor responsible for the "initial" tort is responsible for the fault of an unrelated tortfeasor. *See, e.g.*, *Leesburg Hosp. Assoc., Inc. v. Carter*, 321 So. 2d 433, 434 (Fla. 2d DCA 1975) (holding that *Stuart v. Hertz* only applies to torts that are "demonstrably separate in time and effect").

As Judge Klein aptly noted in his special concurrence, there is no language in the apportionment statute that limits its applicability to joint tortfeasors, *Letzter*, 26 Fla. L. Weekly at D296, and in fact the statute unambiguously holds that "the court shall enter judgment against each party liable on the basis of such party's fault . . ." Furthermore, it would have been unnecessary for the Legislature to add language specifically including cases involving separate tortfeasors, because when *Stuart v. Hertz* is applied the effect of the judgment is to impose joint and several liability. This

is graphically demonstrated by the instant case -- after improperly applying *Stuart v. Hertz*, the trial court below entered judgment against the defendants "jointly and severally." As with joint and several liability, with *Stuart v. Hertz* applied the tortfeasor chosen by the plaintiff is held responsible for the plaintiff's entire damages, even if others were equally or more at fault. As with joint and several liability, with *Stuart v. Hertz* applied the responsible tortfeasor's only remedy is to proceed in a separate action against the other tortfeasors. Under *Stuart v. Hertz*, just like with joint and several liability, a person who causes a minor accident that barely injures the plaintiff can be held responsible for significant, unrelated injuries if the plaintiff has the misfortune to seek inadequate medical treatment.

The legislative intent of the apportionment statute -- to limit the responsibility of tortfeasors to the non-economic damages that they caused -- should apply with equal force when the torts are separate. It would be illogical to impose a pure fault-based system where the tortious acts combine to cause a single injury to the plaintiff, but retain the old standard in those instances where the tortious acts were found to be demonstrably separate in time and effect. The continuing apparent viability of *Stuart v. Hertz* gives plaintiffs strong incentive to evade the requirements of the apportionment statute by presenting the facts in a manner that indicates separate torts, even if this involves the omission of relevant, inculpatory evidence. Such posturing

distracts from the trial of the real issues of negligence on which the parties and jury should be concentrating, and compromises the purpose and intent of the apportionment statute.

Because the application of *Stuart v. Hertz* is contrary to the apportionment statute and the law of this Court, Dr. Letzter submits that this Court hold that *Stuart v. Hertz* should no longer be applied to impose all of the liability on the initial tortfeasor where the torts happen to be separate instead of joint and several.

II. IN ANY EVENT, *STUART V. HERTZ* HAS NO APPLICATION WHERE BOTH THE ALLEGED INITIAL AND SUBSEQUENT TORTFEASOR ARE PHYSICIANS WHOM THE PLAINTIFF CHOSE TO SUE IN THE SAME ACTION.

This case exemplifies why, even if this Court declines to totally abrogate *Stuart v. Hertz*, it should nonetheless hold that *Stuart v. Hertz* has no application where all of the defendants are medical providers, particularly where, as in this case, the plaintiff has chosen to sue the doctors. As the panel majority aptly noted below, "a *Stuart v. Hertz* instruction is awkward when the plaintiff chooses to sue both tortfeasors in the same lawsuit and is particularly problematic when both tortfeasors are physicians." 26 Fla. L. Weekly at D295. Even the petitioner concedes that the concerns from *Stuart v. Hertz* are "perhaps a bit less significant when the initial act of negligence itself is medical malpractice, and it does not exist when the plaintiff also sues the second

medical provider." (I.B. p. 22) (emphasis added).[4] The *amicus curiae* likewise concedes in its brief on behalf of the petitioner that "it may be conceded that the complexity of the litigation rationale for the rule of Stuart vs. Hertz is not required in the area of a medical malpractice case." (Amic. pp. 2, 14, 32).

The inapplicability of *Stuart v. Hertz* to cases involving all physician defendants is best shown with a simple examination of that case. In *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977), Mrs. Johnson suffered orthopedic injuries in an automobile accident. She underwent surgery for those injuries and suffered an additional, unrelated injury when the physician accidentally severed her carotid artery during the course of surgery. A lawsuit was brought on Mrs. Johnson's behalf against Hertz, who owned the vehicle that struck her car. This Court held that Hertz was not entitled to bring a third-party indemnity action against Mrs. Johnson's doctor, because a defendant should not be entitled to force a plaintiff in a simple negligence case to litigate a complicated medical malpractice action by filing a third-party complaint against the plaintiff's physician.

As this Court held, "an active tortfeasor should not be permitted to confuse and

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[4]Cephas' suggestion that Dr. Letzter somehow waived this point (I.B. p. 23 n.16) is baseless. Section I.B. of Dr. Letzter's initial brief on appeal to the Fourth District was titled: "Additionally, *Hertz* Should Not Apply Where Both The Alleged Initial And Subsequent Tortfeasor Are Physicians Whom The Plaintiff Chose To Sue." (App. 1, p. 26). The same argument was asserted in Dr. Letzter's reply brief. (App. 2, p. 10).

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. Thus, this Court held that the third-party rule would not be expanded so that it could become "a tool whereby the tortfeasor is allowed to complicate the issues to be resolved in a personal injury suit and prolong the litigation through the filing of a third-party malpractice action." *Id.*

This holding has absolutely no application where all of the alleged torts arose out of medical negligence, particularly where, as here, the plaintiff chose to sue both physicians. *See, e.g., Knutson v. Life Care Retirement Communities, Inc.*, 493 So. 2d 1133 (Fla. 4th DCA 1986) (holding that *Stuart v. Hertz* does not hold the initial tortfeasor liable for all damages incurred as a result of subsequent medical negligence where the plaintiff also chose to proceed against the medical provider). Dr. Letzter did not compel Cephas to litigate against Dr. Armand or interfere with that patient-physician relationship. The litigation of Dr. Armand's negligence did not "confuse and obfuscate" the issues regarding Dr. Letzter's liability. In cases such as this where all of the alleged torts are medical, the first treating physician generally did not cause an "initial injury" that made subsequent medical treatment foreseeable. Rather, as in this case, a patient usually presents himself to a physician with a preexisting condition that makes any medical treatment foreseeable (*i.e.* diabetes). Any subsequent treatment of

the patient's medical condition is not an "aggravation" of an initial injury, but just one part of the patient's total medical treatment for the original, preexisting condition.

The application of *Stuart v. Hertz* in a case such as this serves absolutely no purpose other than to allow Cephas to execute against the more solvent defendant. The *Stuart v. Hertz* opinion contemplated protecting a plaintiff from a defendant's attempt to complicate the plaintiff's litigation and trial of a simple negligence action. There is no basis whatsoever for applying it after a case is fully tried, with both physicians voluntarily sued by the plaintiff, in order to funnel all financial responsibility to the physician who happened to treat the patient first and who also happens to be the only physician with insurance coverage. To apply *Stuart v. Hertz* every time the defendants are physicians who treated the plaintiff at different times, simply because the latter tortfeasor was a physician, improperly and unfairly expands its application. In all other instances involving initial and subsequent torts that are similar in nature, such as car accidents, the jury should be instructed to apportion the plaintiff's damages between the two accidents insofar as it is reasonably possible to do so. *See Gross v. Lyons*, 763 So. 2d 276 (Fla. 2000).

In fact, the application of *Stuart v. Hertz* to these facts makes even less sense in light of the enactment of section 768.81, Fla. Stat., which established a fault-based system of liability. As explained in the section above, by allowing the "initial

tortfeasor" exception that Cephas advocates, plaintiffs such as himself can evade the requirements of the apportionment statute simply by making a colorable argument to the trial court that his or her favored defendant "struck first." This exception was not intended by the Legislature, and should not apply here. *See Fletcher*, 741 So. 2d at 528 (Harris, J., dissenting) (discussing enactment of § 768.81, Fla. Stat.: "Although the legislature certainly intended that its new public policy would limit the amount of damages which can be assessed against those who combine to cause a single accident to the percentage of fault of each defendant, it did not intend that its limitation on the doctrine of joint and several liability contained within the statute should be construed as authority for permitting one whose negligence causes a minor injury to also be responsible for additional damages resulting from injuries caused by a separate negligent act committed by another *when the jury is able to apportion the percentage of fault of each*.").

Because all parties agree that *Stuart v. Hertz* should not apply to the facts of this case, the Fourth District properly remanded the judgment rendered against the defendants for apportionment based on the jury's verdict and section 768.81, Fla. Stat.

III. THE FOURTH DISTRICT PROPERLY HELD THAT THE PHYSICIANS WERE JOINT TORTFEASORS IN LIGHT OF THE JURY'S DEFINITIVE REJECTION OF THE *STUART V. HERTZ*

INSTRUCTION, AS WELL AS CEPHAS' OBJECTION TO HAVING THE JURY DETERMINE WHETHER THE PHYSICIANS WERE JOINT TORTFEASORS.

In the event this Court holds, despite the arguments presented, that *Stuart v. Hertz* applies to actions involving all physicians who were sued in the same action, it should nonetheless approve the Fourth District's opinion. The jury rejected the *Stuart v. Hertz* instruction that it was given and apportioned liability to both defendants, as it was entitled to do, as the evidence showed that the defendants' acts combined to cause a single injury to Cephas. In the alternative, this Court should hold that Drs. Letzter and Armand were joint tortfeasors as a matter of law.

Pursuant to Cephas' request and over Dr. Letzter's objection, the jury was instructed: "If Dr. Mark Letzter made a negligent diagnosis or rendered negligent medical treatment to Joseph Cephas and because of that negligence Joseph Cephas ultimately suffered injury as a result of the negligence, mistake, or lack of skill of Dr. Armand, the law regards the negligence of Dr. Letzter as the proximate cause of the damages flowing from the subsequent negligence or unskillful treatment by Dr. Armand and holds Dr. Letzter liable for all the damages." *Letzter*, 26 Fla. L. Weekly at D295.

As the Fourth District correctly held, by assigning fifty-five percent of the fault to Dr. Armand, the jury clearly found that Dr. Letzter was <u>not</u> the sole proximate cause

of Cephas' damages. *Id.* Rather, the jury found that the combined negligence of Drs. Letzter and Armand caused a single, indivisible injury to Cephas. Thus, the two physicians were joint tortfeasors, and the Fourth District properly ordered the application of the apportionment statute. *Id.* Dr. Armand has not been exonerated for his wrongdoing, as Cephas appears to suggest, as the District Court has ordered that a judgment be entered in favor of Cephas and against Dr. Letzter and Dr. Armand. *Id.*

The Fourth District was also eminently correct in holding that Cephas cannot be heard to complain about the lack of a clearer jury instruction on this issue, as he vigorously objected to any such instruction below (T8. 872-73) despite the fact that the case law in Florida unambiguously holds that in a medical malpractice action involving a single injury of disputed causation, the jury should be instructed on all applicable theories of causation. *See Haas v. Zaccaria*, 659 So. 2d 1130 (Fla. 4th DCA 1995); *Barrios v. Darrach*, 629 So. 2d 211 (Fla. 3d DCA 1993).

Although Cephas has appropriately chosen not to challenge this finding by the Fourth District, he nonetheless claims that the district court erred in holding that a reasonable jury could have found the physicians to be joint tortfeasors. As Dr. Letzter asserted on appeal to the Fourth District, if anything the evidence showed that the two physicians were joint tortfeasors as a matter of law, as the undisputed evidence showed that any negligent acts of the physician defendants combined to cause a single

injury to the plaintiff.

Cephas himself asserted in a Pretrial Stipulation signed and filed by all parties in August of 1998 that he was contending that "Dr. Letzter's failure to perform surgery resulted in a below the knee amputation of [Cephas'] right leg," and that Dr. Armand's failure to perform the correct surgery "resulted in a below the knee amputation of his right leg." (R2. 298). The theory against Dr. Letzter was essentially one of abandonment, which Cephas alleged led to his seeking of inadequate care and treatment by Dr. Armand. The evidence showed that the alleged negligence of Dr. Armand and Dr. Letzter thereafter combined to cause the improper procedure to be performed, which resulted in a single, indivisible injury -- a below-knee amputation.

Although the jury could have found based on the highly disputed evidence that Dr. Letzter's alleged inaction allowed an infection to linger in Cephas' right leg, there was no testimony or evidence indicating that this alleged infection, even if it existed, caused any discrete harm to Cephas. The standard of care experts for both Dr. Letzter and Cephas testified that the proper bypass procedure could have and should have been performed on Cephas at the time Dr. Armand performed the improper femoral-to-popliteal bypass, despite the existence of an alleged infection. (T3. 221-23; 305-06; T4. 450-52; 456). Thus, the proper procedure, had Dr. Armand performed it, would have prevented the spread of infection that led to the need for the amputation

of Cephas' leg.

As this Court has held, "if two or more wrongdoers negligently contribute to the personal injury of another by their several acts, *which operate concurrently*, so that in effect the damages suffered are rendered inseparable, they are jointly and severally liable." *Feinstone v. Allison Hosp., Inc.*, 143 So. 251, 252 (Fla. 1932). *See also Leesburg Hosp. Ass'n, Inc. v. Carter*, 321 So. 2d 433 (Fla. 2d DCA 1975).

In *Leesburg* (which pre-dated the apportionment statute), the plaintiff brought a medical malpractice action against a hospital, alleging that following her surgery there the hospital staff negligently regarded the results of tests and readings performed on the plaintiff and failed to call a physician when they knew or should have known her vital signs were becoming critical, and as a result the plaintiff suffered a heart attack. 321 So. 2d at 433. The hospital filed a third party complaint against Dr. Carter, asserting that the doctor examined the plaintiff and then abandoned her despite the fact that her condition was worsening. The trial court dismissed the third-party complaint, and the hospital appealed. The Second District reversed the dismissal, holding that the hospital was entitled to bring the third party claim, stating:

> While we agree with the principle of *Hertz*, we think it inapplicable in the instant case. The original tortfeasor and the doctor in *Hertz* were not joint tortfeasors as that term is generally understood. In *Hertz*, both the original tortfeasor and the doctor committed acts against the plaintiff which were *demonstrably separate in time and effect*. In the case at bar,

> even if it could be said that the alleged acts of the hospital and the doctor did not precisely coincide in time, nevertheless their acts combined to produce a single injury. The determination of whether two parties are joint tortfeasors should not depend upon split second timing.

Id. at 434.

Like the doctor and the hospital in *Leesburg*, the alleged acts of Dr. Armand and Dr. Letzter combined to produce a single injury -- the amputation of Cephas' right lower leg, and the two defendants were therefore joint tortfeasors. *Id. See also Randle-Eastern Ambulance Serv., Inc. v. Millens*, 294 So. 2d 38 (Fla. 3d DCA 1974) (although separate accidents were successive in time, resulting damages to plaintiff were inseparable; thus, defendants involved in accidents were jointly and severally liable); *Florida Farm Bureau Cas. Co. v. Batton*, 444 So. 2d 1128 (Fla. 4th DCA 1984) (state and contractor were joint tortfeasors where contractor negligently installed equipment in exhaust fan and state negligently failed to provide a warning or require a screen guard on fan, which resulted in single injury to plaintiff); *Walker v. U-Haul Co., Inc.*, 300 So. 2d 289, 290-91 (Fla. 4th DCA 1974) (both operator and owner of truck were joint tortfeasors where negligence of owners, "though separate and distinct from the negligent conduct of [the operator], necessarily concurred in bringing about the collision resulting in the death of Mrs. Walker"); *Sol Walker & Co. v. Seaboard Coast Line R.R. Co.*, 362 So. 2d 45, 50 (Fla. 2d DCA 1978) ("Even in the absence

of concerted action between Walker and Seaboard, there was a jury question on whether the negligent acts of these parties combined to become the direct and proximate cause of a single injury to Mr. Warder. Hence, we believe that Walker and Seaboard were tortfeasors within the scope of the Uniform Act.").

The cases cited by Cephas on this point in footnote 19 of his brief do not hold otherwise. Contrary to Cephas' parenthetical summary, the damages caused by the tortfeasors in *Beverly Enterprises-Fla. v. McVey*, 739 So. 2d 646 (Fla. 2d DCA 1999), arose out of totally separate injuries: the original injury was a subdural hematoma caused by the convalescent home, but the decedent's death resulted from "conditions which originated in the V.A. hospital," where he was later taken. *Id.* at 647. *Fletcher* also has no application on this point, as that case held that "acts of negligence in medically treating an injury are distinct and separate from the acts of negligence that caused the injury." *Id.* at 525. In contrast, all of the acts of negligence alleged in this case arose out of the medical treatment of Cephas' diabetes. *Lauth v. Olsten Home Healthcare, Inc.*, 678 So. 2d 447 (Fla. 2d DCA 1996), also involved unrelated damages against the different defendants: claims of negligence *per se* arising out of violations of the Florida Administrative Code requiring a nursing home patient's transfer to a different facility and the intentional disregard of statutory duties, and separate claims of medical malpractice arising out of the patient's actual nursing care

and treatment. *Gordon v. Marvin Rosenberg, D.D.S., P.A.*, 654 So. 2d 643 (Fla. 4th DCA 1995), clearly involved allegations of separate procedures and separate damages against the defendants. One defendant dentist performed an improper denture placement, which prevented the plaintiff from using his teeth, and the other defendant dentist performed an improper implant procedure sometime before that, which resulted in a number of mutually exclusive disabilities. *Touche Ross & Co. v. Sun Bank of Riverside*, 366 So. 2d 465 (Fla. 3d DCA 1979) and *VTN Consolidated, Inc. v. Coastal Engineering Assocs.*, 341 So. 2d 226 (Fla. 2d DCA 1976), have no application to these facts. Both of those cases involved economic damages arising out of unrelated acts of negligence.

Although the Fourth District ultimately rejected Dr. Letzter's argument that the physicians were joint tortfeasors as a matter of law, it held:

> During the proceedings below, causation was the critical issue. The bulk of the evidence suggested that medical experts believed that Dr. Armand's decision to perform a femoral-to-popliteal bypass on Cephas' right leg, which addresses blood supply from the femoral artery in the thigh to the popliteal artery above the knee, was negligent because the procedure did not address the real problem – the reduced blood flow to Cephas' foot. On the issue of Dr. Letzter's negligence, the evidence was more varied. There was evidence from which the jury could have found either (1) that Letzter's initial wait-and-see approach was negligent, allowing the infection to set in, and that this "initial injury" gave rise to all of the subsequent medical treatment given by Dr. Armand or (2) that Letzter's and Armand's negligence combined to cause the amputation, which was the initial injury. In short, given the evidence, it was up to the

> jury to decide if the negligent actions of Drs. Letzter and Armand combined to create the initial injury, i.e., whether the two physicians were joint tortfeasors.

26 Fla. L. Weekly at D295. Cephas does not appear to take issue with the Fourth District's characterization of the evidence, and in fact he correctly notes that the evidence merely "permitted" the jury to make the findings he now advocates. (I.B. p. 29). Thus, even if this Court agrees with the Fourth District that the doctors were not joint tortfeasors as a matter of law, Cephas does not provide any basis for a reversal of the Fourth District.

Cephas incorrectly argues to this Court that his "initial injury" was the forefoot amputation performed by Dr. Armand. This is contrary to all of the evidence and theories of liability asserted by Cephas throughout the litigation. As shown above, Cephas maintained all along that the injury caused by Dr. Letzter was the amputation of his lower leg, not the forefoot amputation. Furthermore, there was absolutely no evidence presented at trial to suggest that the forefoot amputation would not have been necessary but for Dr. Letzter's negligence. Rather, the evidence showed that, if the jury was to determine that Dr. Letzter's failure to act more promptly was below the standard of care, the effect of Dr. Letzter's negligence was Cephas' seeking of the inadequate care of Dr. Armand, which resulted in Dr. Armand's improper femoral-to-popliteal bypass and ultimately led to Cephas' below-knee amputation.

Dr. Letzter's failure to contact Dr. Armand after learning of the improper procedure, which occurred simultaneously with Dr. Armand's treatment of Cephas, was not a mere, passive continuation of all the alleged prior acts of negligence by Dr. Letzter, as Cephas asserts. (I.B. p. 30). To the contrary, at trial Cephas' own standard of care expert testified that at the time Dr. Armand performed the forefoot amputation, the proper bypass procedure still could have and should have been performed. (T3. 223-24; 227-28). Significantly, he believed that the point in time in which the loss of Cephas' leg became inevitable was when Dr. Armand performed the femoral-to-popliteal bypass. (T3. 305-06). Cephas' expert felt that after Dr. Letzter learned that Cephas had undergone the right-foot amputation, he should have contacted Dr. Armand and found out what he had done in order to inform Dr. Armand that additional revascularization was necessary. (T2. 225-26). He further testified that Dr. Letzter had adequate time to intervene in Dr. Armand's treatment before he performed the incorrect procedure on Cephas' leg. (T2. 226-27).

Thus, Cephas' own evidence and theories of liability and damages show that the alleged negligence of Drs. Letzter and Armand combined to produce a single injury -- the amputation of Cephas' right lower leg. Because Cephas has failed to show that, given all of the evidence, the physicians were separate tortfeasors as a matter of law, this Court should not disturb the Fourth District's finding on this issue, or should rule

that the doctors were joint tortfeasors as a matter of law.

IV. IN ADDITION TO THE FACT THAT THIS COURT HAS ALREADY HELD THAT THE APPORTIONMENT STATUTE IS CONSTITUTIONAL, THE VERSION OF THE STATUTE THAT APPLIED TO THIS ACTION HAS BEEN AMENDED.

This Court has already held that the apportionment statute, section 768.81(3), Fla. Stat., is constitutional, *Smith v. Department of Ins.*, 507 So. 2d 1080 (Fla. 1987), and this Court is bound to follow its own precedent unless a departure is "necessary to vindicate other principles of law or to remedy continued injustice." *Haag v. State*, 591 So. 2d 614, 618 (Fla. 1992).

Additionally, the constitutionality of the apportionment statute should not be revisited in this action in any event because the version of the apportionment statute that was applied in this case is no longer in effect. *See* § 768.71, Fla. Stat. (1999) (application of § 768.81 is based on date action accrued); *Metropolitan Dade County v. Jones Boatyard, Inc.*, 611 So. 2d 512 (Fla. 1993) (same). In 1999, long after Cephas' action had accrued, the Legislature made extensive amendments to subsection (3) of section 768.81, Fla. Stat., the portion of the statute which Cephas challenges. Thus, any interpretation by this Court of the former version of the statute that applied in this case would have virtually no application to the 1999 amended version, and would therefore be needless.

In addition to the futility of any revisitation of the former version of the statute, Cephas and ATLA have failed to show that the apportionment statute violates any of the constitutional provisions alleged. This Court has unanimously rejected Cephas' argument regarding the statute's effect on the right of access to courts in *Smith v. Department of Insurance*, holding: "We find no violation of the right of access to the court because that right does not include the right to recover for injuries beyond those caused by the particular defendant." 507 So. 2d at 1091. As Cephas identifies no "other principles of law" that require vindication or a "continued injustice" that must be remedied, there is no reason for this Court to revisit the issue.

Similarly, this Court has also rejected Cephas' arguments that the apportionment statute violates the Due Process and Equal Protection Clauses, holding: "We find no due process or equal protection violation because there is a rational basis for each exception." *Smith*, 507 So. 2d at 1091. Indeed, the apportionment of liability satisfies the legislative intent of balancing the interests of the injured party "against the interests of society as a whole, in that the interests of society as a whole, in that the burden of compensating for such losses is ultimately borne by all persons, rather than by the tortfeasor alone . . ." *Id.* at 1084 n.2 (citing the Legislature's preamble to the Tort Reform and Insurance Act).

It should additionally be noted that Cephas has waived any argument that

Florida's apportionment statute violates the right of access to courts or equal protection, as his sole contention below was that the statute violates constitutional due process rights. (R. 488-91; T. 847). *See Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.").

This Court should additionally decline to address Cephas' argument regarding the statute's alleged violation of equal protection because it primarily attacks the 1999 amendment to the statute, which is not at issue in this case. It is well-settled that "a court will not pass upon the constitutional validity of any statute unless it becomes necessary to do so in order to determine the issues in the case under consideration." *Johnson v. White Swan Laundry*, 41 So. 2d 874, 876 (Fla. 1949) (en banc).

Cephas' action accrued in 1996, when the medical treatment at issue was rendered by the defendants and, according to his claims, resulted in his below-knee amputation. Thus, the trial court below properly applied the former version of the apportionment statute to this action, and any ruling on the statute as amended would have no bearing on this case. Because any review by this Court of the amended version of the statute would have no effect on the instant case, this Court should

decline review of the 1999 version of the apportionment statute. *Id.*; *see also Palm Beach Mobile Homes v. Strong*, 300 So. 2d 881, 883 (Fla. 1974) ("[I]t is a fundamental principle that courts will not pass upon the validity of a statute or even a part of an act in a proceeding which does not involve the act . . ."); *In re Estate of Sale*, 227 So. 2d 199, 201 (Fla. 1969) ("[W]e need not decide the constitutional question under the well-settled rule that such a question ordinarily will be decided only when necessary to a disposition of the cause."); *Snedeker v. Vernmar, Ltd.*, 151 So. 2d 439, 441 (Fla. 1963) (a court may not pass on a statute's constitutional validity "in the abstract or upon any consideration other than its application in a certain case"); *North Am. Co. v. Green*, 120 So. 2d 603, 606 (Fla. 1959) ("It is a long established rule that the courts will not consider the alleged unconstitutionality of a statute unless it is necessary to do so in order to dispose of the problem at hand.").

For the reasons asserted above, this Court should decline Cephas' suggestion to review the constitutionality of the former version of the apportionment statute, which applied to this action, or the amended version of the statute, which has no bearing on this action.

V. THIS COURT SHOULD DECLINE TO REVISIT THE *FABRE* DECISION, AS IT HAS NO APPLICATION TO THE INSTANT ACTION.

Cephas' and ATLA's appeals to this Court to recede from its decision in *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993), are not properly before this Court, because the validity of the *Fabre* decision has no application to or bearing on this case. This Court held in *Fabre* that section 768.81(3), Fla. Stat., requires the jury to consider the negligence of all tortfeasors, including those not brought into the litigation, for the purposes of fault apportionment. Thus, a defendant who properly pleads the negligence of a non-party is entitled to present evidence that the non-party's negligence contributed to the plaintiff's injuries. Cephas and ATLA assert that the *Fabre* opinion's allowance of the apportionment of fault to non-parties renders the apportionment statute unconstitutional.

Fabre does not apply to this action because this case did not involve the potential fault of any non-parties. The only potential tortfeasors whose fault the jury was asked to consider were Dr. Letzter and Dr. Armand, both of whom were voluntarily sued by Cephas. Both parties had the opportunity to conduct discovery and defend themselves, and Dr. Armand was represented throughout most of the proceedings. In fact, Cephas took full advantage of Dr. Armand's status as a party at trial by using the deposition of Dr. Bandyk, Dr. Armand's standard of care expert, to lay blame on Dr. Letzter. (T. 5-10; R. 449-74).

Thus, a recession from *Fabre* would not alter Dr. Letzter's right to argue the fault of Dr. Armand, a co-defendant, and would not have any effect on the proceedings below. Cephas and ATLA are merely using their briefs as platforms for a general attack on an unrelated opinion that has absolutely no bearing on the instant case. *See State v. Champe*, 373 So. 2d 874, 877 (Fla. 1978) ("Persons not affected by the operation of a statute have no standing to challenge its validity."); *State v. Ginn*, 660 So. 2d 1118, 1120 (Fla. 4th DCA 1995) ("It is well established in Florida that a person to whom a statute can be constitutionally applied may not challenge the statute on the grounds that it may result in an impermissible application to someone else.").

CONCLUSION

It is respectfully submitted that this Court either decline to exercise its discretionary jurisdiction or approve the decision of the Fourth District and answer certified question (1) in the affirmative and certified question (2) in the negative.

Respectfully submitted,

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Cephas v. Letzter
CASE NO. SC01-374

CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with Rule 9.210. It is typed in Times New Roman 14 point type and is double spaced.

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