IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-374

JOSEPH CEPHAS,

Petitioner,

vs.

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

Respondents.
_________________________________/

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER JOSEPH CEPHAS

LYTAL, REITER, CLARK, FOUNTAIN
& WILLIAMS, LLP
P.O. Box 4056
West Palm Beach, Florida 33402-4056
(561) 655-1990 / Fax (561) 832-2932
-and-
PODHURST, ORSECK, JOSEFSBERG,
EATON, MEADOW, OLIN & PERWIN,
P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800 / Fax (305) 358-2382

By: JOEL S. PERWIN
Fla. Bar No. 316814

TABLE OF CONTENTS

Page

I. STATEMENT OF THE CASE AND FACTS 1

II. ARGUMENT 3

A. *STUART* WAS NOT ABROGATED BY §768.81(3). 3

B. *STUART* APPLIES IN MED.-MAL. CASES. 6

C. DRS. LETZTER AND ARMAND WERE JOINT TORTFEASORS AS A MATTER OF LAW. 7

D. SECTION 768.81(3), AS ORIGINALLY ENACTED IN 1986 AND AS AMENDED IN 1999, IS UNCONSTI-TUTIONAL ON ITS FACE. 13

III. CONCLUSION 15

TABLE OF CASES

Page

Albertson's, Inc. v. Adams,
473 So. 2d 231 (Fla. 2nd DCA 1985),
review denied, 482 So. 2d 347 (Fla. 1986) 11

Aldana v. Holub,
381 So. 2d 231 (Fla. 1980) 14

Association for Retarded Citizens-Volusia, Inc. v. Fletcher,
741 So. 2d 520 (Fla. 5th DCA),
review denied, 744 So. 2d 452 (Fla. 1999) 4, 7, 12

Beverly Enterprises-Florida, Inc. v. McVey,
739 So. 2d 646 (Fla. 2nd DCA 1999),
review denied, 751 So. 2d 1250 (Fla. 2000) 12

Clausell v. Hobart Corp.,
515 So. 2d 1275 (Fla. 1987),
appeal dismissed, cert. denied, 485 U.S. 1000, 108 S. Ct. 1459,
99 L. Ed.2d 690 (1988) 14

Fabre v. Marin,
623 So. 2d 1182 (Fla. 1993) 4, 15

General Mortgage Associates, Inc. v. Campolo Realty & Mortgage Corp.,
678 So. 2d 345 (Fla. 3rd DCA 1996) 2

Gordon v. Marvin Rosenberg,
654 So. 2d 643 (Fla. 4th DCA 1999) 12

Gross v. Lyons,
763 So. 2d 276 (Fla. 2000) 5, 10

J.A.B. Enterprises v. Gibbons,

TABLE OF CASES

Page

596 So. 2d 1247 (Fla. 4th DCA 1992) 2

Knutson v. Life Care Retirement Communities, Inc.,
493 So. 2d 1133 (Fla. 4th DCA),
review denied, 501 So. 2d 1282 (Fla. 1986) 7

Lauth by and Through Gadinsky v. Olsten Home Health Care, Inc.,
678 So. 2d 447 (Fla. 2nd DCA 1996) 12

Letzter v. Cephas,
26 Fla. L. Weekly D293, D294-95 (Fla. 4th DCA Jan. 24, 2001) 1

Louisville & Nashville R. Co. v. Allen,
67 Fla. 257, 65 So. 8 (1914) 10

Nash v. Wells Fargo Guard Services, Inc.,
678 So. 2d 1262 (Fla. 1996) 4

Rucks v. Pushman,
541 So. 2d 673 (Fla. 5th DCA),
review denied, 549 So. 2d 1014 (Fla. 1989) 9

Sands v. Wilson in 1939,
140 Fla. 18, 191 So. 21 (1939) 10

Smith v. Department of Insurance,
507 So. 2d 1080 (Fla. 1987) 14

Stuart v. Hertz,
351 So. 2d 703 (Fla. 1977) 2, 6-7

Touche Ross & Co. v. Sun Bank of Riverside,
366 So. 2d 465 (Fla. 3rd DCA),

TABLE OF CASES

Page

cert. denied, 378 So.2d 350 (Fla. 1979) 12

Underwriters at Lloyd's v. City of Lauderdale Lakes,
382 So. 2d 702 (Fla. 1980) 7-8

VTN Consolidated, Inc. v. Coastal Engineering Associates, Inc.,
341 So. 2d 226 (Fla. 2nd DCA 1976),
cert. denied, 345 So.2d 428 (Fla. 1977) 12

AUTHORITIES

Rule 32(a)(7)(B), Federal Rule of Appellate Procedure 18

§768.81(3), Fla. Stat. (1986) 3, 13

I
STATEMENT OF THE CASE AND FACTS

At the outset, we need to correct four mis-statements of fact in Dr. Letzter's brief. First, Dr. Letzter contends that the Plaintiff at no time alleged or proved that Dr. Letzter independently committed separate acts of negligence resulting in a discrete injury to Plaintiff Cephas, wholly apart from any conduct of Dr. Armand (*see* Dr. Letzter's brief at 6, 32-33, 39-38). These statements are false.

As we noted (brief at 2-3, 8 & n. 4, 29-30), the Plaintiff offered overwhelming evidence that long before Dr. Armand was involved, Dr. Letzter's negligence was ***solely*** responsible for the amputation of Mr. Cephas' right forefoot (*see* Tr. 179-81, 193-200, 214, 217, 700, 773, 794, 814, 830; *see* R. 382, pp. 10-11). Although Dr. Armand's subsequent negligence allowed the infection to spread further, requiring the further amputation of Mr. Cephas' lower leg, it was Dr. Letzter--and Dr. Letzter alone--whose pre-existing negligence was the sole cause of the amputation of Mr. Cephas' right forefoot. And contrary to Dr. Letzter's representation (brief at 5), the district court acknowledged the evidence that Dr. Letzter alone caused a discrete injury to Plaintiff Cephas. *See Letzter v. Cephas,* 26 Fla. L. Weekly D293, D294-95 (Fla. 4th DCA Jan. 24, 2001). Although we will re-establish that Drs. Letzter and Armand were not joint tortfeasors even if their conduct had caused an indivisible injury, the uncontradicted evidence is that if Dr. Letzter was negligent (and that question was answered by the jury), he was negligent in separately and independently causing a discrete injury to Plaintiff Cephas, which was later aggravated by Dr. Armand.

Second, we emphasized Dr. Letzter's concession ***at trial*** that §768.81(3), Fla. Stat. (1986) supplanted ***only*** the common-law doctrine of joint and several liability, leaving undisturbed the principle of *Stuart v. Hertz,* 351 So.2d 703 (Fla. 1977); and thus that the only issue framed by the parties was whether Dr. Letzter and Dr. Armand in fact were joint tortfeasors. *See* Tr. 848-52, 863-64, 869-70, 847-75; R. 543-44; *see also* Dr. Letzter's brief in the district court at 20-21. Dr. Letzter is correct (brief at 7) that he did assert "at trial that section 768.81 applied to the action"; but the ***only*** reason he gave was that the jury could find that he and Dr. Armand were joint tortfeasors. He argued that §768.81(3) was applicable ***only*** "[b]ecause the defendants were joint tortfeasors" (district court brief at 20). Contrary to Dr. Letzter's suggestion (brief at 21), his concession could not be undone by an argument made for the first time on appeal (*see* cases cited in our brief at 21 n. 14)--especially in his reply brief.[1/] The district court's majority opinion itself acknowledged Dr. Letzter's concession, and agreed with it, *see* 26 Fla. L. Weekly at D295.

Third (brief at 14, 15, 25-26), Dr. Letzter repeatedly ascribes to the Plaintiff the concession that the policies of *Stuart v. Hertz* are not furthered when both the initial and successive tortfeasor are doctors. These statements are false. We said (brief at 21-22) that "[o]ne rationale for *Stuart*"--"concern for the complexity of the litigation"--

---

[1/] *See General Mortgage Associates, Inc. v. Campolo Realty & Mortgage Corp.,* 678 So.2d 345 (Fla. 3rd DCA 1996); *J.A.B. Enterprises v. Gibbons,* 596 So.2d 1247 (Fla. 4th DCA 1992).

"is 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." But we then immediately added that this "is not the only rationale of *Stuart v. Hertz*. Equally applicable is the common-law principle that a tortfeasor is responsible for all reasonably foreseeable consequences of his actions" (brief at 22).[2/] Dr. Letzter's characterization of our position is false.

Fourth, Dr. Letzter says (brief at p. 29): "Because all parties agree that *Stuart v. Hertz* should not apply to the facts of this case, the Fourth District properly remanded the judgment . . . ." That statement is absurd.

II
ARGUMENT

A. *STUART WAS NOT ABROGATED BY §768.81(3).* We emphasized (brief at 21) Dr. Letzter's repeated stipulation that §768.81(3) applies only to joint tortfeasors, and therefore did not supplant the rule of *Stuart v. Hertz*. That stipulation is the law of this case, regardless of this Court's disposition of the first certified question. On the merits, both the circuit court and the district court were correct on this point: *Stuart* continues to apply in successor-tortfeasor cases, because §768.81(3) abrogated only the common-law doctrine of joint and several liability. The statute says

---

[2/] We also argued that even if avoiding confusion were the only rationale of *Stuart*, "it still would be impossible to administer an exception solely for medical-malpractice cases . . . . The sole effect of such a rule would be to induce the plaintiff to sue only the first doctor" (brief at 22).

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." Dr. Letzter quotes only the first half of that sentence (brief at 23)--not the second. The statute substitutes a "percentage of fault" for "joint and several liability"; it does not affect longstanding principles of responsibility for the intervening acts of successive tortfeasors. It was enacted in derogation of the common law, and it must be construed to preserve those principles.[3/]

Dr. Letzter also ignores this Court's interpretations of §768.81(3) (*see* our brief at 17-21). In *Fabre v. Marin,* 623 So.2d 1182, 1185 (Fla. 1993), the Court said that the statute "was enacted to replace joint and several liability . . . ." *Accord, Association for Retarded Citizens-Volusia, Inc. v. Fletcher,* 741 So.2d 520, 525 (Fla. 5th DCA),

---

[3/] Dr. Letzter argues (brief at 23-24) that "it would have been unnecessary for the Legislature to add language [to §768.81(3)] 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" (emphasis in original). But the rule of *Stuart* does ***not*** impose joint and several liability. As we explained (brief at 12-17), it holds the initial wrongdoer responsible for a subsequent treating physician's aggravation of the plaintiff's injury ***not*** because the two are joint tortfeasors, but because a negligent defendant is responsible for all foreseeable consequences of his wrongdoing, and an act of subsequent medical malpractice is foreseeable as a matter of law. Therefore, in creating §768.81(3), the Legislature could not have implicitly (and certainly not explicitly) intended to abrogate *Stuart*.

Dr. Letzter also makes a number of policy arguments to the effect that the rule of *Stuart* is inconsistent with the ***spirit*** of §768.81, and "[i]t would be illogical" to maintain *Stuart* in the face of such legislative intent (brief at 24; *see id.* at 19, 22). These are policy arguments which should be addressed to the Legislature.

review denied, 744 So.2d 452 (Fla. 1999). In *Nash v. Wells Fargo Guard Services, Inc.,* 678 So.2d 1262, 1264 (Fla. 1996), the Court said that §768.81(3) cannot reduce the fault of a vicarious wrongdoer--a suggestion followed by every district court to consider the issue (*see* our brief at p. 19 n. 12). The reason is that active and vicarious tortfeasors are not joint tortfeasors, *see* brief at 18-19 & n. 12.

Finally (*see* brief at 19-21), these conclusions are consistent with *Gross v. Lyons,* 763 So.2d 276 (Fla. 2000), in which the Court reaffirmed the common-law principle that successive tortfeasors are each responsible for all of the plaintiff's injury unless the jury can apportion the damages. The tortfeasors in *Gross* were successive tortfeasors (the two accidents were three months apart), yet this Court noted that the common-law rule did not run afoul of §768.81(3). Judge Klein said in dissent that this Court would have had no reason to discuss §768.81(3) unless that statute applied in successive-tortfeasor cases as well. But the more-obvious explanation, especially because a statute must be construed to cause the least offense to common-law rights, is that the Court in *Gross* intended to enforce the "indivisible injury rule" not only in cases of successive tortfeasors like the one before it, but also in cases governed by §768.81(3), involving joint tortfeasors. Thus the Court said without qualification, 763 So.2d at 280: "[W]e hereby adopt into Florida law the indivisible injury rule . . . <When the tortious conduct of more than one defendant contributes to one individual injury, the entire amount of damage resulting from all contributing causes is the total amount of damages recoverable by the plaintiff.'"

In any event (*see* brief at 21 n. 13), even if the Court in *Gross* had interpreted §768.81(3) to apply to both joint and successive tortfeasors, *Gross* itself would require affirmance of the judgment in this case, because *Gross* reaffirmed that when the ***ultimate*** injury (amputation of the lower leg) is indivisible--which Dr. Letzter repeatedly has argued in this case--both wrongdoers are responsible for the ***entire*** damage to the plaintiff. And on top of all this, Dr. Letzter conceded at trial that §768.81(3) does ***not*** apply in cases involving successive tortfeasors, and therefore does ***not*** abrogate the rule of *Stuart v. Hertz*. He argued only that he and Dr. Armand in fact were joint tortfeasors. That is the only issue which he preserved for appellate review.

B. STUART APPLIES IN MED.-MAL. CASES. On this point too (*see* our brief at 23 n. 16), the law of this case is controlled by Dr. Letzter's concession that the rule of *Stuart v. Hertz* remains viable as to successive tortfeasors, and therefore applied in this case if Drs. Letzter and Armand were not joint tortfeasors. Dr. Letzter protests (brief at 26 n. 4) that he did not waive the point, but again cites only his brief and reply brief in the district court. And even at the appellate level, the district court described Dr. Letzter's "argu[ment] that the [*Stuart*] instruction is not appropriate where the defendants are joint tortfeasors and that, as a matter of law, he and Dr. Armand are joint tortfeasors." 26 Fla. L. Weekly at D295. Therefore, the second certified question also is irrelevant to this particular case.

On the merits, we argued (brief at 21-23), the *Stuart* rule is equally applicable when the initial act of wrongdoing was medical malpractice, whether or not the plaintiff chooses to sue both doctors in the same lawsuit. The primary rationale for *Stuart v. Hertz* is that a tortfeasor should be held responsible for all reasonably foreseeable consequences of his actions; and an act of subsequent medical malpractice is foreseeable as a matter of law. *See Stuart*, 351 So.2d at 707: "[T]he law regards the negligence of the wrongdoers in causing the original injury as the proximate cause of the damages flowing from the subsequent negligent or unskillful treatment thereof, and holds them liable therefore." That is the basis for the unanimous decisions (*see* our brief at 16 n. 10) holding that *Stuart* applies to successive acts of medical malpractice.[4/]

We also noted (brief at 22 & n. 15) that to carve out this one scenario from the rule of *Stuart* would simply induce the plaintiff not to sue the second tortfeasor. But as this Court said in *Underwriters at Lloyd's v. City of Lauderdale Lakes,* 382 So.2d

---

[4/] Dr. Letzter perceives a dissenting view (brief at 27) in *Knutson v. Life Care Retirement Communities, Inc.,* 493 So.2d 1133 (Fla. 4th DCA), *review denied,* 501 So.2d 1282 (Fla. 1986), whose only holding is that because the plaintiff's settlement with the initial tortfeasor did not release the subsequent wrongdoer, the plaintiff could pursue a second lawsuit against the subsequent wrongdoer. *Knutson* says nothing about the scope of recovery available against the first wrongdoer, so long as the plaintiff does not collect twice.

702, 704 (Fla. 1980), that "would foreclose the victim's ability to control the nature and course of the suit." *Accord, Stuart v. Hertz,* 351 So.2d at 706; *Association for Retarded Citizens-Volusia, Inc. v. Fletcher,* 741 So.2d 520, 525 (Fla. 5th DCA), *review denied,* 744 So.2d 452 (Fla. 1999). In advocating a position which he waived at trial, Dr. Letzter has ignored both the fundamental objective and the practical significance of *Stuart*.

C. DRS. LETZTER AND ARMAND WERE JOINT TORTFEASORS AS A MATTER OF LAW. The two certified questions are irrelevant to the district court's holding in this case. The majority agreed with the trial court and both parties that "the rule in *Stuart v. Hertz* . . . does not apply to joint tortfeasors"; that "[s]ection 768.81" concerns only "joint tortfeasors"; and that "*Stuart v. Hertz* has expressly been held to apply even when the initial tortfeasor is a physician as well." 26 Fla. L. Weekly at D294-95. The district court reversed for two other reasons: 1) the jury should have decided whether Dr. Letzter and Dr. Armand, if negligent, were joint tortfeasors, and thus whether §768.81(3) applied; but 2) the error was harmless, because the jury necessarily decided for itself that the two were joint tortfeasors by apportioning fault between Dr. Letzter and Dr. Armand, because the rule in *Stuart* ***requires*** that if the first wrongdoer is found responsible for all of the damages, the second wrongdoer

must be exonerated entirely! Both holdings are wrong. We will take them in reverse order.

First (brief at 24-25), the jury did not find that Dr. Letzter and Dr. Armand were joint tortfeasors merely because it assigned fault to both of them. There is nothing in *Stuart*--which holds the first wrongdoer responsible for all the damages--which in any way relieves the second wrongdoer of all liability. This Court held in *Underwriters at Lloyd's v. City of Lauderdale Lakes,* 382 So.2d 702 (Fla. 1980) that after the plaintiff had secured a judgment against the initial tortfeasor for the ***entirety*** of his damages, the initial tortfeasor was subrogated to the ***plaintiff***'s claim against the subsequent treating physician. It held that under the rule in *Stuart,* ***both*** wrongdoers are liable, even if the first is liable for all of the damages. *Accord, Rucks v. Pushman,* 541 So.2d 673, 675 (Fla. 5th DCA), *review denied,* 549 So.2d 1014 (Fla. 1989). The jury's assignment of fault to both doctors, therefore, was entirely consistent with the rule of *Stuart v. Hertz.*

Dr. Letzter can offer no conceivable response to this point. He says, correctly (brief at 31), that in finding Dr. Armand 55% at fault, "the jury clearly found that Dr. Letzter was <u>not</u> the sole proximate cause of Cephas' damages." That is exactly our point; the second physician ***is*** a "proximate cause" of the plaintiff's damages, even if

the initial wrongdoer is responsible for all of the damages under *Stuart*. Assigning fault to both does ***not*** make them joint tortfeasors.[5/]

Second, the district court found that because of evidence that Dr. Letzter and Dr. Armand had caused an indivisible injury, it was up to the jury--not the trial court--to decide whether they were joint tortfeasors, and thus whether §768.81(3) applied.[6/] That holding depends upon the definition of a joint tortfeasor (*see* our brief at 25-31). We cited numerous cases holding that the mere creation of an indivisible injury does not alone make the wrongdoers joint tortfeasors. In addition, they must have acted ***in combination*** to create that injury, in the ***same*** transaction and

---

[5/] In a curious sentence apparently intended to obfuscate the point, Dr. Letzter says (brief at 31): "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." We have not argued that Dr. Armand either was or should have been exonerated. Dr. Armand was properly held accountable for his negligence, ***consistent*** with the rule in *Stuart*, even though Dr. Letzter was responsible under *Stuart* for ***all*** of the damages. The district court's error was in holding that because the jury did ***not*** exonerate Dr. Armand, it must have found that he and Dr. Letzter were joint tortfeasors. That was a non-sequitur.

[6/] As we noted, Dr. Letzter at no time argued that the trial court should decide the issue one way or another. His sole argument at trial was that the jury should decide whether he and Dr. Armand were joint tortfeasors. That is the only argument which he preserved for appellate review.

occurrence.[7] Dr. Letzter himself acknowledges that two wrongdoers are not joint tortfeasors unless their conduct "operate[d] concurrently . . ." (brief at 33).

In the instant case, because the evidence is undisputed that Dr. Letzter and Dr. Armand were negligent in separate transactions and occurrences, whether they caused an indivisible injury or not, the trial court was correct in ruling that they were successive tortfeasors--not joint tortfeasors.[8] Moreover, as we noted at the outset,

---

[7] *See Sands v. Wilson* in 1939, 140 Fla. 18, 191 So. 21, 22-23 (1939) (joint tortfeasors defined by their "[c]oncurring negligence"--their "common part in contributing to a wrong," through their "community in the wrong . . ."). Joint tortfeasors "combine to produce directly a single injury." *Louisville & Nashville R. Co. v. Allen,* 67 Fla. 257, 65 So. 8, 12 (1914). As we noted (brief at 27), if nothing more than an indivisible injury were required, then the rule of apportionment validated in *Gross v. Lyons,* 763 So.2d 276 (Fla. 2000)--the rule that either of two ***successive*** wrongdoers is liable for the entire injury unless the jury can apportion the damages caused by each--would never have been needed. That rule has always applied, and was applied again in *Gross*, to ***successive*** tortfeasors (in *Gross*, two car accidents three months apart); and yet the rule says that successive tortfeasors can be responsible for all of the damages when their conduct produces an indivisible injury. By definition, an indivisible injury is ***not*** enough to make them joint tortfeasors.

[8] We acknowledged (brief at 29-30) that Dr. Letzter continued to be negligent after Dr. Armand came into the picture, by his continued failure to recognize the need for a distal bypass. But that did not create a jury question as to whether Dr. Letzter and Dr. Armand were joint tortfeasors. *See, e.g., Albertson's, Inc. v. Adams,* 473 So.2d 231, 233 (Fla. 2nd DCA 1985), *review denied,* 482 So.2d 347 (Fla. 1986) (doctor's failure to discover in examining the patient that a pharmacist had dispensed the wrong medication "would not make them joint tortfeasors"). And in any event, Dr. Letzter did not ask for an itemized verdict isolating the basis for the jury's finding of negligence, thus waiving any such distinction under the "two-issue" rule. Apart from simply stating his belief that the temporal overlap between his own negligence and that of Dr. Armand could have made them joint tortfeasors (brief at 38), Dr. Letzter does

the evidence here is uncontradicted that if Dr. Letzter was negligent (an issue which the jury decided), his negligence was the ***sole*** cause of the spread of the infection which required that Mr. Cephas' ***forefoot*** be amputated. That amputation was the one part of the procedure performed by Dr. Armand which ***everyone*** agreed was necessary at that point, because of Dr. Letzter's prior negligence. Therefore, even if the negligent causation of a distinct injury alone were sufficient to define Dr. Letzter as a separate tortfeasor, the uncontradicted evidence in this case satisfies that criterion.

As we noted, however, Dr. Letzter's legal position, adopted by the district court, is simply wrong: the creation of an indivisible injury does ***not*** ipso facto make the wrongdoers joint tortfeasors, and therefore did not preclude the trial court's finding that Dr. Letzter and Dr. Armand, if negligent, were not joint tortfeasors as a matter of law. Dr. Letzter ignores almost all of the authorities which we cited. He observes (brief at 33) that two wrongdoers can be joint tortfeasors even if their conduct did not take place at precisely the same moment. We agree. He cites a handful of cases in which two wrongdoers produced an indivisible injury, and were found to be joint tortfeasors (brief at 34-35). In all of them, the wrongdoers produced an indivisible injury by acting ***in concert***--not severally. He also protests (brief at 35-36) that four

---

not address the argument.

of the dozens of cases which we cited "clearly involved allegations of separate procedures and separate damages against the defendants." But he has mischaracterizated even those four cases.[9]

---

[9] In *Beverly Enterprises-Florida, Inc. v. McVey,* 739 So.2d 646, 647, 650 (Fla. 2nd DCA 1999), *review denied,* 751 So.2d 1250 (Fla. 2000), the nursing home which caused the resident's subdural hematoma, and the hospital which failed properly to treat it, combined to cause the patient's death. There could hardly be a more indivisible injury. In *Association for Retarded Citizens-Volusia v. Fletcher,* 741 So.2d 520, 524-25 (Fla. 5th DCA), *review denied,* 744 So.2d 452 (Fla. 1999), the summer camp allowed an impaired child to suffer a seizure and aspirate water in the pool; the hospital's negligence in treating him contributed to the child's death--again an indivisible injury. In *Lauth by and Through Gadinsky v. Olsten Home Health Care, Inc.,* 678 So.2d 447, 447-49 (Fla. 2nd DCA 1996), one defendant allowed the patient to develop bed sores and ulcers; the other failed to recognize the problem and to transport the patient to the hospital, leaving him permanently bedridden--again an indivisible injury. And in *Gordon v. Marvin Rosenberg,* 654 So.2d 643, 645 (Fla. 4th DCA 1999), the second dentist "exacerbated" the injury caused by the first dentist's negligence--an indivisible injury.

Dr. Letzter also dismisses two other cases we cited on the ground that they "involved economic damages"--a distinction without a difference in terms of the underlying liability. Both involved indivisible injuries, and yet the wrongdoers were not joint tortfeasors. *See Touche Ross & Co. v. Sun Bank of Riverside,* 366 So.2d 465, 466-68 (Fla. 3rd DCA), *cert. denied,* 378 So.2d 350 (Fla. 1979) (one defendant accused of aiding and abetting the fraud; the other defendant accused of failing to discover it--identical injury); *VTN Consolidated, Inc. v. Coastal Engineering Associates, Inc.,* 341 So.2d 226, 228-29 (Fla. 2nd DCA 1976), *cert. denied,* 345 So.2d 428 (Fla. 1977) (one defendant failed to furnish accurate topical maps for location of road networks and drainage systems; other defendant misused the inaccurate maps--both combined to produce the damage).

Dr. Letzter cannot rebut the controlling point: whether or not he and Dr. Cephas combined to produce an indivisible injury (and here, Dr. Letzter created a ***separate*** injury before Dr. Cephas was even in the picture), they still were not joint tortfeasors as a matter of law. Upon a finding of negligence by the jury, it is the ***court*** which determines whether the wrongdoers were joint tortfeasors. In all the cases which we cited, the court made that decision--not the jury. Dr. Letzter entirely ignores the point.

We urge the Court to please address this argument. Dr. Letzter stipulated that the *Stuart* rule remains viable in cases not involving joint tortfeasors, and that it does apply when both wrongdoers are doctors. The district court agreed. The sole issue in this particular case is whether the trial court was correct in telling the jury that if it found Dr. Letzter negligent, he was liable under *Stuart* for all the damages. That ruling is critical to the administration of the rule of *Stuart v. Hertz*, and is dispositive of this particular appeal.

D. SECTION 768.81(3), AS ORIGINALLY ENACTED IN 1986 AND AS AMENDED IN 1999, IS UNCONSTITUTIONAL ON ITS FACE. Mindful that this Court can revisit a prior constitutional ruling in light of subsequent events, *see Aldana v. Holub,* 381 So.2d 231, 237 (Fla. 1980), we argued that this Court was incorrect in rejecting the constitutional challenges to §768.81(3) in *Smith v. Department of Insurance,* 507 So.2d 1080, 1090-91 (Fla. 1987). The Legislature's 1996 abrogation

of joint and several liability as it relates to non-economic damages; and by analogy, its 1999 extension of the abrogation to economic damages, violated several fundamental constitutional guarantees.

Dr. Letzter has chosen not to address any of the arguments on the merits--only to reiterate that the Court already has upheld the constitutionality of the statute. If the Court decides to revisit the issue, we have advanced the arguments, and Dr. Letzter has offered no response. Dr. Letzter also points out (brief at 39, 41-42) that the 1986 statute applied in this case, but has since been superseded by the 1999 version, which did not apply in this case. His apparent contention is that the new statute is not relevant because it was not yet in force, and the old statute is irrelevant because it is no longer in effect. That suggestion is nonsense. If the 1986 statute was unconstitutional, then the district court erred in enforcing it, even if it has since been amended. We remind the Court of the many product-liability statute-of-repose cases which had to be decided by this Court long after that statute had been repealed. *See, e.g., Clausell v. Hobart Corp.,* 515 So.2d 1275 (Fla. 1987), *appeal dismissed, cert. denied,* 485 U.S. 1000, 108 S. Ct. 1459, 99 L. Ed.2d 690 (1988). Given Dr. Letzter's inability to mount any substantive rebuttal of our constitutional arguments (all of which

were made in both at the trial court and the district court), we urge the Court to consider this point.[10]

III
CONCLUSION

It is respectfully submitted that the district court's decision should be disapproved, and the cause remanded with instructions to affirm the Plaintiff's judgment.

Respectfully submitted,
LYTAL, REITER, CLARK, FOUNTAIN
& WILLIAMS, LLP
P.O. Box 4056
West Palm Beach, Florida 33402-4056
(561) 655-1990 / Fax (561) 832-2932
-and-
PODHURST, ORSECK, JOSEFSBERG,
EATON, MEADOW, OLIN & PERWIN
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800 / Fax (305) 358-2382

By:________________________________

---

[10] We also urge the Court to revisit *Fabre v. Marin,* 623 So.2d 1182 (Fla. 1993). We recognize that Dr. Armand was technically a party in this action, and that *Fabre* interprets the statute to encompass the fault of non-parties. As Dr. Letzter points out, however (brief at 1), Dr. Armand "failed to appear or defend himself at trial." Therefore, the jury's consideration of his negligence at least illustrates some of the problems occasioned by *Fabre*'s interpretation of the statute. Even if that interpretation is not directly at issue in this lawsuit, it is a part of the statute's compass, which the Court might choose to consider if it decides to revisit either the scope or constitutionality of §768.81(3).

JOEL S. PERWIN
Fla. Bar No. 316814

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this _____ day of July, 2001, to all counsel of record on the attached service list.

By:___________________________________

JOEL S. PERWIN, ESQ.

SERVICE LIST

DINAH S. STEIN, ESQ.
MARK HICKS, ESQ.
Hicks & Anderson
799 Brickell Avenue, 9th Floor
Miami, Florida 33131

DAVID W. SPICER, ESQ.
Bobo, Spicer, Ciotoli, Fulford, Bocchino &
Romaguera, P.A.
1240 U.S. Highway One
North Palm Beach, FL 33408

LUCIEN ARMAND, M.D.
4101 N.W. 4th Street, Suite 109
Plantation, Florida 33317

WALLACE B. McCALL, ESQ.
1001 North U.S. Highway One, Suite 604
Jupiter, Florida 33477

JEFF TOMBERG, J.D., P.A.
626 S.E. 4th St.
P.O. Box 1426
Boynton Beach, FL 33317

CERTIFICATE OF COMPLIANCE AND TYPE SIZE FONT

I certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B). This brief is typed in Times New Roman 14.

By:________________________________

JOEL S. PERWIN, ESQ.