

SUPREME COURT OF FLORIDA

AMERICAN HOME ASSURANCE
COMPANY,

Appellant,

Case No. SC02-709

vs.

NATIONAL RAILROAD PASSENGER
CORPORATION, ETC., ET AL.

11th Circuit Case Nos.:
00-13986, 00-13811

Appellees.

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**ANSWER BRIEF OF APPELLEES NATIONAL RAILROAD PASSENGER
CORPORATION and CSX TRANSPORTATION, INC. ON THE
FIRST CERTIFIED QUESTION FROM THE UNITED STATES
COURT OF APPEALS FOR THE 11TH CIRCUIT**

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REFERENCES TO THE RECORD

Certain record references in this Answer Brief will be made to the Appendix and Record Excerpts filed by appellant American Home Assurance Company ("AHA") together with its Initial Brief herein. That Appendix will be referred to herein as "AHA App." Those references will be followed first by a number that corresponds to the specific item number in AHA's Appendix, and then by the page number of the item referenced. Thus, for example, the Court of Appeals' March 26, 2002 opinion contained in AHA's Appendix will be referenced as AHA App-1-1-83.

This Answer Brief also will refer to the original record items in the federal court actions, as filed in the district court dockets. There are two district court docket sheets which are applicable, as this case was filed and then consolidated with one action.

- A. AHA vs. NRPC Case No. 94-976-CIV-ORL-18C
 - B. NRPC vs. Rountree Case No. 93-01090-CIV-ORL-18
- Docket sheet record references will be referred to

herein as "RA" or "RB," as applicable. Those references will be followed first by a number that corresponds to the specific docket number, and then by the page number of the docket entry referenced. Thus, for example, the district court's December 3, 1996 Memorandum Ruling that Transport was Inherently Dangerous Activity (which is filed in the NRPC v. Rountree docket) will be referenced as RB-1979-1-22.

STATEMENT OF THE CASE

This Answer Brief is respectfully submitted on behalf of appellees/cross-appellees National Railroad Passenger Corporation ("Amtrak") and CSX Transportation, Inc. ("CSXT") (collectively "Railroad Appellees") in response to the Initial Brief of appellant American Home Insurance Company ("AHA") addressing the certified question described below.

Background

These consolidated lawsuits are before this Court following a lengthy opinion issued by the United States Court of Appeals in National Railroad Passenger Corp. v. Rountree Transp. & Rigging, Inc., 286 F.3d 1233 (11th Cir. 2002) ("Rountree").¹ During the course of resolving a host of legal issues presented, the Court of Appeals certified to this Court for review certain specific legal questions involving Florida law.

¹ A copy of the slip opinion issued by the Court of Appeals in Rountree is attached to AHA's Appendix to Initial Brief. AHA App-2-1-83.

Rountree, 286 F.3d at 1258 and 1269; AHA App-2-55, 81.

The first certified question involves the handling of a plaintiff's comparative fault under section 768.81, Florida Statutes, and is the subject of this Answer Brief. The Eleventh Circuit's certified question reads as follows:

SHOULD A VICARIOUSLY LIABLE PARTY HAVE THE NEGLIGENCE OF THE ACTIVE TORTFEASOR APPORTIONED TO IT UNDER FLORIDA STATUTE § 768.81 SUCH THAT RECOVERY OF ITS OWN DAMAGES IS REDUCED CONCOMITANTLY?²

Rountree, 286 F.3d at 1258; AHA App-2-55.

District Court Proceedings Below

This matter arises out of an accident that occurred on November 30, 1993, when a specially-equipped hauler rig carrying an 82-ton combustion turbine to the Cane Island Power Plant in Intercession City, Florida, became immobilized while trying to traverse a private grade

² The Eleventh Circuit's opinion indicates that its phrasing of this question is not meant to limit, in any way, how the Florida Supreme Court "responds to the question or analyzes the state law issues involved therein." Rountree, 286 F.3d at 1258; AHA App-2-55.

crossing over railroad tracks owned by CSXT. Rountree, 286 F.3d at 1237-1239; AHA App-2-5-10; see RB-1979-2. Thereafter, a regularly-scheduled Amtrak passenger train operating on those CSXT tracks collided with the huge, disabled vehicle. Id.

Multiple actions for personal injuries and property damages were filed as a result of this accident and consolidated for adjudication in the U.S. District Court for the Middle District of Florida. Rountree, 286 F.3d at 1239; AHA App-2-10-11; see RA-26. These consolidated district court actions included, among others, property damage claims asserted by the Railroad Appellees, CSXT and Amtrak, and also by appellant AHA, as subrogee of Stewart and Stevenson Services, Inc. ("S&S"). Rountree, 286 F.3d at 1239; AHA App-2-10; see RB-1; RA-1. Other parties to these consolidated actions included General Electric ("GE"), which had contracted with Kissimmee Utility Authority ("KUA") to furnish the turbine to KUA's Cane Island Power Plant; S&S, which had contracted with GE to manufacture and deliver the turbine to KUA;

WOKO Transportation Services, Inc. ("WOKO"), a transportation broker, which had arranged with S&S to transport the turbine from Tampa to the Power Plant; Rountree Transport & Rigging, Inc. ("Rountree"), the carrier with which WOKO contracted to transport the turbine to the Plant; Black & Veatch, which had provided engineering services to KUA relating to the Power Plant; KUA, which had contracted with GE to purchase the turbine for its Plant; and FMPA, a part owner of KUA's Power Plant. Rountree, 286 F.3d at 1238-39; AHA App-2-7-10; see RA-1979-2. CSXT and Amtrak, as well as these numerous other parties, also asserted appropriate cross-claims, counter-claims, and third-party claims against one another. See generally RA and RB (docket sheets).

In 1996, the district court conducted a three-week bifurcated jury trial solely to adjudicate tort liability issues concerning the cause of the accident. Rountree, 286 F.3d at 1240; AHA App-2-11; see RB-1876. At the conclusion of the liability trial, the jury found Rountree 59 percent negligent, CSXT 33 percent

negligent, and Amtrak 8 percent negligent. Rountree, 286 F.3d at 1240; AHA App-2-11-12; see RB-1984.

During this trial, the district court issued a memorandum decision ruling as a matter of law that the transportation of the huge combustion turbine was an inherently dangerous activity under Florida law and that three parties (GE, S&S and WOKO) were all vicariously liable for Rountree's negligence under the inherently dangerous activity doctrine. Rountree, 286 F.3d at 1240; RB-1979-1-22; AHA App-6-1-22. In April 1999, the district court reaffirmed application of the inherently dangerous activity doctrine to this dispute, rejecting AHA's contention that it should not be bound by the consequences of the district court's determination that S&S was vicariously liable for Rountree's negligence. RB-2183-1-4.

In December 1999, the district court conducted a jury trial to adjudicate AHA's recoverable property damages for the destruction of the combustion turbine as a result of the accident. Rountree, 286 F.3d at 1240;

AHA App-2-13; see RA-41; RA-99; RA-100. Thereafter, based on the probative, admissible evidence introduced by AHA during this trial, the district court ruled as a matter of law that AHA's total property damages were \$4,546,640. Rountree, 286 F.3d at 1241, 1243-44; AHA App-2-13-14, 18-20; see RA-100-61-88. The district court also ruled that AHA's damage recovery would be limited to 41 percent of AHA's proven damages based on the vicarious liability of AHA's subrogor, S&S, for Rountree's 59 percent fault. See Rountree, 286 F.3d at 1244, n.7, 1248 and 1254; AHA App-2-21, n.7,30-31 and 45-46; see RA-99-10-12, 14-16. AHA did not dispute, in this regard, that, as subrogee, it stood in the shoes of S&S, the subrogor. Rountree, 286 F.3d at 1248, n. 13; AHA App-2-31, n.13.

The district court also granted Rountree's motion for a ruling as a matter of law that Rountree's liability to S&S, and thus to AHA, was limited to \$1 million. Rountree, 286 F.3d at 1240; AHA App-2-12-13. The district court relied on undisputed facts that S&S

had executed a contract with the transportation broker, which made it aware that Rountree would be obligated to obtain \$1 million in insurance on the turbine and also obligated S&S to name Rountree as an additional insured on S&S's own insurance policy with AHA, a duty S&S failed to discharge. The district court concluded that S&S had violated Rountree's third-party beneficiary rights by failing to provide Rountree with additional insurance, beyond Rountree's own \$1 million coverage. AHA App-8-4-7; RB-2183-4-7.

Following entering of judgment, numerous appeals and cross-appeals were filed. Rountree, 286 F.3d at 1237-38; AHA App-2-5-7.³

The Court of Appeals' Opinion

On appeal to the United States Court of Appeals for

³ AHA has attached the wrong final judgment to its Appendix. See AHA App-2 (final judgment dated June 14, 2000). The correct judgment is an amended final judgment issued October 4, 2000. Rountree, 286 F.3d at 1241 n. 2; AHA App-2-14, n.2. The differences between the two judgments, however, are not germane to the certified question discussed in this Answer Brief.

the Eleventh Circuit, AHA challenged the district court's decision that, as a matter of law, transport of the combustion turbine constituted inherently dangerous work. Rountree, 286 F.3d at 1248; AHA App-2-31. After reviewing de novo the district court's ruling, the Court of Appeals upheld the determination that, applying Florida common law principles, transport of the huge turbine over Florida's roads was inherently dangerous as a matter of law. Rountree, 286 F.3d at 1248-50; AHA App-2-31-36. In doing so, the Eleventh Circuit cited the Florida Supreme Court's rule that a party is liable for "inherently or intrinsically dangerous" work performed by an independent contractor when "there is a recognizable and substantial danger inherent in the work" and when "in the ordinary course of events [the activity] . . . would probably, and not merely possibly, cause injury if proper precautions were not taken." Rountree, 286 F.3d at 1248-49 (quoting Florida Power & Light Co. v. Price, 170 So.2d 293, 295-96 (Fla. 1964)); AHA App-2-32. The Eleventh Circuit noted that when the

activity is inherently dangerous, "one engaged in or responsible for the performance of [the] work . . . is said to be under a nondelegable duty to perform or have others perform, the work in a reasonably safe and careful manner." Rountree, 286 F.3d at 1249 (quoting Baxley v. Dixie Land & Timber Co., 521 So.2d 170, 172 (Fla. 1st DCA 1988)); AHA App-2-32.

In addition, the Eleventh Circuit Court of Appeals rejected the argument that, even if transport of the turbine constituted inherently dangerous work, evidence presented at the liability trial showed Rountree was only "collaterally negligent." Rountree, 286 F.3d at 1250-53; AHA App-2-36-43. The Court of Appeals similarly rejected the contention that S&S should not be held vicariously liable for Rountree's negligence because S&S had no direct employment or contractual relationship with Rountree. Rountree, 286 F.3d at 1253-54; AHA App-2-43-44. In so doing, the Court of Appeals observed as follows:

By contracting with GE, S&S assumed the

duty of providing for the safe transport of the turbine. As part of its contractual duties, S&S arranged for the inherently dangerous activity of having the turbine transported in a specially-equipped vehicle. Because transport of the turbine constituted inherently dangerous work, the duty of S&S to provide for the safe transport of the turbine was nondelegable....

When a duty is nondelegable, "responsibility, i.e., ultimate liability, for the proper performance of that undertaking may not be delegated."

Rountree, 286 F.3d at 1254 (emphasis added; citations omitted); AHA App-2-44.

On appeal, AHA did not challenge the district court's determination that AHA could only recover \$1 million from Rountree. Rountree, 286, F.3d at 1254, n.22; AHA App-2-46, n.22. Instead, AHA argued that even if transport of the combustion turbine was inherently dangerous as a matter of law, the district court nevertheless should not have applied section 768.81, Florida Statutes, to limit its recovery against Amtrak and CSXT to 41 percent of AHA's damages. Rountree, 286 F.3d at 1254; AHA App-2-44-45.

The Court of Appeals discussed, but did not decide this comparative fault issue. Rountree, 286 F.3d at 1254-58; AHA App-2-44-55. The Eleventh Circuit noted that this Court has not directly addressed whether the comparative fault provisions set forth in section 768.81, Florida Statutes, apply to a claimant who is only vicariously liable. Rountree, 286 F.3d at 1254; AHA App-2-45. Calling this an unsettled question raising important public policy concerns, the Court of Appeals certified the question of law to this Court that is quoted at the outset of this Answer Brief. Rountree, 286 F.3d at 1254, 1258; AHA App-2-45, 55.

SUMMARY OF ARGUMENT

This Court should answer in the affirmative the question certified by the Eleventh Circuit Court of Appeals. Section 768.81, Florida Statutes, applies in this case to reduce AHA's property damage recovery against the Railroad Appellees.

Taking the legislature's words at face value, Rountree's 59 percent negligence is "chargeable" to S&S and its subrogee, AHA, under section 768.81(2) by reason of S&S's vicarious liability under Florida's inherently dangerous activity doctrine. Section 768.81(2) does not require that the claimant personally be at fault. It requires only "chargeable" fault.

The circumstances surrounding enactment of the comparative fault statute, § 768.81, Fla. Stat., fully support this result. The statute abandoned the "all or nothing rule" represented by common law principles of joint and several liability and contributory negligence. It embraced a "middle ground" in which each negligent party's liability depended on its degree of fault, not

the solvency of its co-defendants. AHA's position rejects the middle ground.

AHA's position also deviates from prior common law. Under the "all or nothing rule," vicariously-liable automobile owners were liable in full to injured third-parties for the driver's negligence and also were completely barred from obtaining any affirmative recovery against independent tortfeasors. This result was modified by this Court's landmark decision abrogating the contributory negligence bar, but that decision, properly applied, only allows a vicariously-liable auto owner to recover from an independent tortfeasor after reducing the claimant's total damages based on the percentage fault of the driver for whom the owner bore legal responsibility. AHA's proposed reading of section 768.81(2) to allow a vicariously-liable claimant full recovery thus violates fundamental rules of statutory construction that are applicable because section 768.81 is in derogation of common law.

Public policy further supports the Railroad

Appellees' position concerning section 768.81(2). AHA's subrogor breached its non-delegable duty to protect the safety of the public. It failed to take measures at the very outset to ensure that an inherently dangerous activity would be properly performed by an independent contractor. Moreover, to accept AHA's position violates the public policy proposition that a party which originates a dangerous activity is in the best position to make sure that there will be adequate resources with which to pay the damages caused by any ensuing negligent conduct that is attributable to the independent contractor.

The Railroad Appellees' position is also consistent with Florida's contribution statute, § 768.31, Fla. Stat. That statute treats the passive and active tortfeasor as one for fault allocation purposes, preserving the passive tortfeasor's common law right to full indemnification from the active tortfeasor.

The decisions of this Court cited by AHA do not support AHA's interpretation. None involves the

comparative fault of a claimant. None interprets or applies section 768.81(2). And AHA's position brushes aside this Court's teaching that the major thrust of section 768.81 is to apportion liability based on each particular tortfeasor's percentage of fault.

Applying section 768.81(2) to reduce AHA's damage recovery against Amtrak and CSXT is eminently fair. It requires AHA to look to Rountree for recovery on 59 percent of AHA's damages. If the conduct of AHA's insured now prevents AHA from achieving full recovery, that is as it should be. AHA's subrogor, S&S, had the duty to ensure that Rountree would not transport the combustion turbine over Florida's roads in a negligent manner and to make sure that there would be adequate resources to pay for any damages in the event of Rountree's negligence.

ARGUMENT

**ROUNTREE'S COMPARATIVE NEGLIGENCE WAS CHARGEABLE
TO AHA, AS S&S'S SUBROGEE, AND PROPERLY
APPLIED TO DIMINISH PROPORTIONATELY AHA'S
PROPERTY DAMAGE RECOVERY FROM CSXT AND
AMTRAK UNDER § 768.81(2), FLA. STAT.**

AHA does not contest that AHA stands in the shoes of S&S, its insured, for purposes of its property damage claim. Nor, in light of the Eleventh Circuit's decision, can AHA continue to contest that S&S is vicariously liable for Rountree's comparative negligence under the inherently dangerous activity doctrine. The only issue, therefore, is whether AHA's vicariously-imposed fault should be taken into account, rather than ignored, in applying the comparative fault provisions set forth in section 768.81, Florida Statutes.⁴

⁴ As the Court of Appeals' opinion points out, two versions of section 768.81 were referred to during briefing in the Eleventh Circuit, the version in effect when the accident occurred (see § 768.81, Fla. Stat. Ann. (West 1997)) and the version reflecting amendments effective October 1, 1999 (see § 768.81, Fla. Stat. Ann. (West Supp. 2002)). Rountree, 286 F.3d at 1258, n.24; AHA App-1-55-56, n.24. Subsection (2) reads the same in both versions and the Railroad Appellees respectfully submit that this Court need not address which version of

As a threshold matter, there can be no dispute that section 768.81 applies to all negligence cases, including "but . . . not limited to, civil actions for damages based on theories of negligence, strict liability, products liability, professional malpractice . . . or breach of warranty and like theories."

§ 768.81(4)(a), Fla. Stat. The inherently dangerous activity theory on which S&S (and thus AHA) have been held vicariously liable for Rountree's negligence is, beyond peradventure, a "theory of negligence" and indeed, it may also be viewed as a form of "strict liability." Either way, the applicable vicarious liability theory is clearly subject to Florida's comparative negligence statute, § 768.81, Fla. Stat. See Prosser & Keeton, The Law of Torts, §69 at 499 (5th ed. 1984) (describing "vicarious liability" as "in one sense a form of strict liability" but, in any event, an action for negligence in which the law broadens the

the statute applies to the certified question presented by the Eleventh Circuit for determination.

liability for that fault).

As a "claimant," AHA's recovery rights are appropriately examined against the requirements of subsection (2) of section 768.81, entitled "Effect of contributory fault." Under section 768.81(2), any "contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic. . . damages for an injury attributable to the claimant's contributory fault, but does not bar recovery." § 7681(2), Fla. Stat. AHA reads section 768.81(2), to ignore the fault chargeable to AHA, through S&S, from Rountree, notwithstanding S&S's breach of its "nondelegable duty to perform, or have others perform, [inherently dangerous] work in a reasonably safe and careful manner." Baxley, 521 So.2d at 172. Neither a fair reading of section 768.81(2), nor instructive case law, nor public policy supports AHA's position.

Although section 768.81(2) clearly addresses the handling of "contributory fault chargeable to the

claimant," AHA's Initial Brief never once directly confronts the legislature's use of this phrase. Instead, AHA asks this Court to focus only on the statute's use of the word "fault," insisting that since S&S was not itself negligent, it could not be deemed at "fault" for purposes of section 768.81. See AHA Initial Brief at 8-9, 12, 17, 22, 23. AHA's myopic attention to the single word "fault," rather than to the entire phrase used in subsection (2) - - "contributory fault chargeable" - - is revealing. It suggests AHA is all too aware that §768.81(2) covers far more "fault" than AHA would like. See Cody v. Kernaghan, 682 So.2d 1147, 1149 (Fla. 4th DCA 1996) (Under section 768.81(2), doctrine of comparative negligence applies "to reduce . . . economic damages by percentage of fault which can be attributed to the plaintiff")(emphasis added).

In point of fact, it blinks at reality for AHA to contend that "contributory fault chargeable" to a claimant refers only to negligent acts actually committed by that claimant, and not also to negligent

acts of another for which the claimant is held legally responsible under well-accepted common law principles of vicarious liability. The plain and ordinary meaning of the word "chargeable" is far too broad to permit such an unreasonably cramped interpretation. Black's Law Dictionary, for example, defines "chargeable" as follows:

This word, in its ordinary acceptance, as applicable to the imposition of a duty or burden, signifies capable of being charged, subject to the charged, liable to be charged, or proper to be charged.

Black's Law Dictionary at 295 (Revised 4th ed. 1968).

Similarly, Webster's Third New International Dictionary 377 (1961) defines "chargeable" as "liable to be accused or held responsible." Indeed, the basic definition of "vicarious liability" set forth in Prosser, The Law of Torts § 69 makes clear that a vicariously-liable claimant should be considered a party "chargeable" with fault, i.e., negligence:

§ 69. Vicarious Liability

"A is negligent, B is not. Imputed negligence" means that by reason of some relation existing between A and B, the negligence of A is to be charged against B....The result may be that B, in an action against C for his own injuries is barred from recovery because of A's negligence, to the same extent as if he had been negligent himself." (Emphasis added)

Prosser, § 69, p. 499. See also Restatement (Third) of Torts: Apportionment of Liability § 5 and comment b (1999) (instructing that when a party would be responsible as a defendant for a third person's negligence, that same negligence is imputed to the vicariously responsible party as a plaintiff).

In addition, the circumstances surrounding the Florida legislature's enactment of the comparative fault statute, §768.81, Fla. Stat., provide further support for the conclusion that section 768.81(2) must be read to reduce the amount recoverable by a vicariously-liable claimant. Enactment of section 768.81 "represented a policy shift in the State of Florida from joint and

several liability that resulted in a single recovery for the plaintiff to the apportionment of fault." Gouty v. Schnepel, 795 So.2d 959, 960 (Fla. 2001). For years prior to the emergence of this apportionment concept, Florida's tort law, as was true in all states, was rooted in principles of joint and several liability and contributory negligence, principles which amounted to an "all or nothing rule" for the plaintiff. See Smith v. Dep't of Insurance, 507 So.2d 1080, 1090 (Fla. 1987). The Florida legislature's "policy shift" was dictated by "principles of fairness," which were thought to "require elimination of joint and several liability by making each party's liability dependent upon his degree of fault -- not on the solvency of his co-defendants -- and . . . at least a modification of joint and several liability in order to balance the system." Smith, 507 So.2d at 1090. As this Court aptly framed the issue in Smith:

The real question in the joint and several liability problem is who should pay the damages

caused by an insolvent tort-
feasor....[a] problem ...
substantially compounded when
the plaintiff is also at
fault.

Smith, 507 So. 2d at 1091. The answer, according to
this Court, was as follows:

In answering the question of
who should pay damages for the
insolvent tortfeasor, the
legislature chose a middle
ground: both the plaintiff and
the solvent defendant.

Smith, 507 So. 2d at 1091.

By applying section 768.81(2) to diminish AHA's recovery based on the fault of Rountree, the district court below clearly embraced the Florida legislature's "middle ground." AHA was not permitted to recover in full, nor was its recovery barred entirely. Its recovery was simply reduced by charging AHA with Rountree's percentage of fault. AHA, on the other hand, now asks this Court to invoke what would amount to a convenient hybrid of the "all or nothing rule." For purposes of S&S's liability to injured third parties, AHA no doubt would embrace the comparative negligence rule to limit S&S's maximum liability to 59 percent. But for purposes of AHA's own recovery, AHA would shed its mantle of comparative fault so that it may recover in full from all other active tortfeasors, without any diminution based on relative fault. AHA's position is antithetical to the "middle ground" adopted by Florida's legislature in its comparative negligence statute.

AHA's current argument is also antithetical to common law principles governing the rights of a

vicariously-liable claimant prior to enactment of section 768.81. Under settled case law in Florida prior to the introduction of the comparative negligence concept, an auto owner was not only liable to injured third parties for the driver's negligence under the dangerous instrumentality doctrine, the "innocent" owner also was completely barred from any affirmative recovery against an independent third-party tortfeasor whose active negligence had contributed to the accident. See, e.g., Weber v. Porco, 100 So.2d 146 (Fla. 1956); Smith v. Cline, 158 So.2d 553 (Fla. 3d DCA 1963); Gulick v. Whitaker, 102 So.2d 847 (Fla. 2d DCA 1958); MacCurdy v. United States, 246 F.2d 67 (5th Cir. 1957), cert. denied, 355 U.S. 933 (1958). Shortly before enactment of section 768.81, this Court abolished the judicially-created doctrine of contributory negligence in the landmark decision of Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), and adopted a comparative negligence doctrine which receded from the harsh "all or nothing" rule. But Hoffman most

certainly did not mean that a vicariously-liable plaintiff could now obtain full recovery for its own damages. On the contrary, Hoffman was thereafter properly read to provide for reduction of the vicariously-liable claimant's damage recovery based on the percentage fault of the active tortfeasor for which the claimant bore legal responsibility. See Acevedo v. Acosta, 296 So.2d 526, 529-30 (Fla. 3d DCA 1974)(recovery of plaintiff car owner reduced by percentage of negligence of driver because of owner's vicarious liability under dangerous instrumentality doctrine). See also 6 Fla. Prac., Personal Injury & Wrongful Death Actions § 5.7 Imputed Comparative Negligence (2001-2002 ed.)("since the adoption of comparative negligence, imputing another person's negligence to an injured plaintiff will reduce the amount of his recovery in proportion to the degree of imputed negligence").

This case law demonstrates that AHA is asking this Court to substantially alter common law as it existed

when section 768.81 was enacted. In marked contrast to prior common law, AHA would read section 7678.81 to allow the vicariously-liable claimant to recover in full from other active tortfeasors, without any reduction for the relative fault of the tortfeasor for whom the claimant bears legal responsibility.

Since section 768.81 is clearly in derogation of common law on this issue, it must be strictly construed. Ady v. American Honda Finance Corp., 675 So.2d 577, 581 (Fla. 1996). In so construing, this Court should “presume that [the] statute was not intended to alter the common law other than what was clearly and plainly specified in the statute.” Ady, 675 So.2d at 581 (emphasis added). The language of the comparative negligence statute simply does not evince any affirmative legislative intent, let alone a clearly-specified intent, to so dramatically alter the common law rights of a vicariously liable claimant, on the one hand, as against independent concurrent tortfeasors, on the other. AHA’s position on section 678.81(2) thus

violates fundamental rules of statutory construction.

Public policy considerations also support an interpretation of section 768.81(2) that "charges" the vicariously-liable claimant with the fault of another active tortfeasor. S&S, and thus its subrogee AHA, may not have been "actively negligent," but, as the Eleventh Circuit held, S&S's vicarious liability indisputably resulted from its breach of a non-delegable legal duty to either personally perform or have others perform inherently dangerous work in a reasonably safe and careful manner. Rountree, 286 F.3d at 1248-49 and 1254, quoting Florida Power & Light Co., 170 So.2d at 295; Baxley, 521 So.2d at 172; Atlantic Coast Dev. Corp. v. Napoleon Steel Contractors, Inc., 385 So.2d 676, 679 (Fla. 1st DCA 1988). This duty is imposed under Florida law because the movement of an 82-ton combustion turbine over public and private roads in Florida involved a "recognizable and substantial danger," performance of which "in the ordinary course of events . . . would probably, and not merely possibly, cause injury if

proper precautions were not taken." Florida Power & Light Co., 170 So.2d at 295. S&S, in short, may not have itself been actively negligent, but there are ample public policy reasons for charging S&S with the contributory fault of Rountree.

The public policy considerations are perhaps best expressed by the Florida courts in the context of Florida's dangerous instrumentality doctrine, an analogous doctrine which applies to render automobile owners vicariously liable for the negligent operation of a motor vehicle entrusted to another party's care. E.g., Aurbach v. Gallina, 753 So.2d 60, 62-63 (Fla. 2000); Hertz Corp. v. Jackson 617 So.2d 1051, 1053 (Fla. 1993). Some Florida courts have reasoned that because motor vehicles are dangerous instrumentalities when operated on public roads, owners "are obligated to ensure that their vehicles are properly operated when on the public highway under their authority," and thus, "[p]ublic policy favors holding the owner liable, since the owner has the capacity to protect the safety of the

public by not relinquishing control of his vehicle to another person." Dockery v. Enterprise Rent-A-Car Co., 796 So.2d 593, 596 (Fla. 4th DCA 2001)(emphasis added); see, Union Air Conditioning, Inc. v. Troxtell, 445 So.2d 1057, 1058 (Fla. 3d DCA), pet. for review denied, 453 So.2d 45 (Fla. 1984); Hertz Corp. v. Helleus, 140 So.2d 73, 74 (Fla 2d DCA 1962). This Court has framed the public policy issue in a slightly different fashion, instructing that "one who originates danger is in the best position to make sure there will be adequate resources with which to pay the damages caused by...negligent operation [of an automobile entrusted to another]." Kraemer v. General Motors Acceptance Corp., 572 So.2d 1363, 1365 (Fla. 1990)(emphasis added). Accord, Aurbach, 753 So.2d at 62-63.

Both articulations of public policy considerations apply with full force to this case, involving the analogous inherently dangerous activity doctrine. S&S had the capacity to protect the safety of the public by taking steps to ensure that the 82-ton combustion turbine would be properly transported over Florida's roads to its destination, or at least, failing that, to make sure that there would be adequate resources to pay the damages caused by Rountree's negligent conduct. Having breached its non-relegable duties, public policy fully supports requiring S&S (and thus AHA) to bear the full financial burden of Rountree's substantial contributory fault in causing the accident.

The district court's application of section 768.81(2) to this case also is in harmony with the basic concepts in Florida's contribution statute, §768.31, Fla. Stat., which allocates a tortfeasor's right to contribution based on relative degrees of fault. See Florida Juris.2d, Contribution, Indemnity and Subrogation § 20 (1998). The Florida contribution

statute, which goes "hand in hand" with the comparative fault statute (In re Air Crash Near Cali, Columbia, 24 F.Supp.2d 1340, 1349 (S.D. Fla. 1998)) specifically provides for a "rule of equity" under which the common liability arising from vicarious relationships are to be treated as a single share. See Florida Statutes § 768.31(3)(b); see also Lincenberg v. Issen, 318 So.2d 386, 392-93 (Fla. 1975); F.H.W.C., Inc. v. American Hosp. of Miami, Inc., 575 So.2d 1300, 1302-04 (Fla. 3d DCA), rev. dismissed, 582 So.2d 622 (Fla. 1991). In substance, the active tortfeasor and the passive tortfeasor that is vicariously liable for the former's negligence are treated as one for purposes of allocating overall fault and determining all joint and concurrent tortfeasors' respective contribution rights. See, e.g., U.S. Security Services Corp. v. Ramada Inn, Inc., 665 So.2d 268 (Fla. 3d DCA), rev. denied, 675 So.2d 126 (Fla. 1996); F.H.W.C. Inc., 575 So.2d at 1302-04. The district court applied section 768.81(2) in much the same manner in this case, treating S&S and Rountree as

one for purposes of allocating fault and then determining AHA's recovery rights as a claimant against the other independent, concurrent tortfeasors.⁵

In an effort to escape the burden of vicarious liability, AHA cites three Florida cases, none of which justify the result AHA seeks. See AHA Initial Brief at 16-17. AHA relies principally on two Florida Supreme Court decisions, Fabre v. Marin, 623 So.2d 1182 (Fla. 1993), overruled in part on other grounds, Wells v. Tallahassee Mem'l Reg'l Med. Ctr., Inc., 659 So.2d 249 (Fla. 1995) and Nash v. Wells Fargo Guard Services, 678 So.2d 1262 (Fla. 1996). In Fabre, this Court concluded that by enacting section 768.81, the legislature

⁵ Also worthy of note is Florida case law interpreting the release or covenant not to sue provisions in what is now section 768.041, Florida Statutes. Section 768.041(1) addresses the effect of a release of one tortfeasor on the liability of "any other tortfeasor who may be liable for the same tort." This provision has been construed to apply "to all tortfeasors, whether joint or several, including vicarious tortfeasors." Vasquez v. Board of Regents, 548 So.2d 251, 253 (Fla.2d DCA 1989), quoting Hertz Corp., 140 So.2d at 73-74 (emphasis added).

intended to limit a party's liability based on that party's percentage of the whole fault, including any fault attributable to a non-party, even if the result is to preclude a fault-free plaintiff from recovering her total damages. See Fabre, 623 So.2d at 1185-86. Fabre does not involve an issue of comparative negligence by the plaintiff. Equally important, this Court did not remotely purport to decide whether the phrase "contributory fault chargeable to the claimant" under section 768.81(2) can only refer to the claimant's direct negligence, rather than also embrace fault chargeable to the claimant under well-recognized common law principles of vicarious liability.

In Nash, 678 So.2d 1262, this Court elaborated on Fabre, instructing that a defendant cannot rely on the vicarious liability of a non-party to establish the non-party's fault. Nash, 678 So.2d at 1264. Nash, like Fabre, does not involve comparative negligence by the plaintiff. And, once again, this Court did not address, let alone purport to decide, whether section 768.81(2)

allows the vicariously liable claimant to shed its legal responsibility for the active contributory negligence of another tortfeasor in calculating the claimant's own recoverable damages.

Indeed, Nash is a common sense result that has nothing to do with AHA's recovery rights in the instant dispute. If a party seeks to argue that the fact-finder must consider negligent conduct committed by a non-party in order to determine the total fault for an accident, the party must be prepared to prove the active negligence of that non-party wrongdoer. Any proof focused instead on the vicarious liability of non-party would be irrelevant to the fact-finder's specific determination of the litigants' respective shares of the overall fault, and, if anything, would be needlessly confusing to the fact-finder.

Here, the overall fault was determined in a liability trial to which AHA and S&S were party, and S&S's non-delegable responsibility for Rountree's negligence was conclusively established as a matter of

law. Nash does not remotely stand for the proposition that AHA should not be "chargeable" for the contributory fault of Rountree for purposes of reducing its property damage claim under section 768.81(2), Florida Statutes.

In addition, AHA essentially asks this Court to ignore its recent determination that "the major thrust of [§ 768.81] was to apportion a tortfeasor's liability for a claimant's damages on the basis of the particular tortfeasor's 'percentage of fault' in causing the accident." Y.H. Investments, Inc. v. Godales, 690 So.2d 1273, 1276 (Fla. 1997)(emphasis added). In Y.H. Investments, this Court was confronted with a negligence action by a mother on her son's behalf in which the jury had found the defendant building owner and the mother were each 50 percent negligent in causing the accident. This Court held that the mother's immunity from suit did not prevent section 768.81 from applying to limit the defendant owner's liability to only its 50 percent fault because:

[S]ection 768.81 provides that [defendant owner] Y.H. will be held liable only for its own fault, and not have to pay for the fault of [the mother] too.

Y.H. Investments, Inc., 690 So.2d at 1278.

Unlike AHA's position, the district court's application of section 768.81(2) here is entirely consistent with the Court's teaching in Y.H. Investments. Only the district court's application of section 768.81(2) achieves the result in which CSXT and Amtrak are liable to AHA for their own fault, but not for the fault of Rountree.

AHA also cites Walmart Stores v. McDonald, 676 So.2d 12 (Fla. 1st DCA 1996), aff'd sub nom. Merrill Crossings Assocs. V. McDonald, 705 So.2d 560 (Fla. 1997) ("Walmart"), which holds that criminal, intentional acts by tortfeasor are not covered by the comparative fault statute. The First District's opinion stresses that "by its express language in section 768.81, Florida Statutes, the legislature did not intend to treat negligent acts and criminal, intentional acts the same."

Walmart, 676 So.2d at 22. That decision is obviously irrelevant to this dispute. Here we are dealing with a party vicariously liable for another party's negligence, not for any intentional misconduct. Moreover, the theory of liability involved here plainly sounds in negligence or strict liability. Thus, unlike the liability theories in Walmart, the vicarious liability theory here falls well within the comparative negligence framework of section 768.81. In addition, unlike in Walmart, the use of the phrase "contributory fault chargeable" in section 768.81(2) fully supports the proposition that the Florida legislature intended that its comparative fault rules would apply to a claimant vicariously-liable for another's joint or concurrent negligence. See § 768.81(2) and (4), Fla. Stat.

For similar reasons, D'Amario v. Ford Motor Co., 806 So.2d 424 (Fla. 2001) and Association for Retarded Citizens-Yolusia, Inc. v. Fletcher, 741 So.2d 520, 524-25 (Fla. 5th DCA), rev. denied, 744 So.2d 452 (Fla.

1999), do not support AHA's position.⁶ In D'Amario, this Court, after analyzing established common law principles, concluded that apportionment was not possible as between an initial and subsequent tortfeasor, distinguishing successive tortfeasors from the joint or concurrent tortfeasors that clearly are covered by section 768.81. See D'Amario, 806 So.2d at 435-37, 441. Similarly, Ass'n For Retarded Citizens holds that, based on the "well-established" common law rule that the initial tortfeasor is liable for the entire financial burden of a victim's injuries, section 768.81 could not be construed to apportion liability as between the initial tortfeasor and subsequent tortfeasors. Ass'n for Retarded Citizens, 741 So.2d at 524-525. The Fifth District opinion in Ass'n for Retarded Citizens stressed that if the legislature had

⁶ The Eleventh Circuit's opinion references these two decisions, and simply suggests that "one could argue" that a vicariously liable party is not a joint or concurrent tortfeasor and, on that basis, is not within the embrace of section 768.81. See Rountree, 286 F.3d at 1256.

intended to "abrogate the well-settled common law rule ... the legislature no doubt would have specifically said so." Id., 741 So.2d at 525.

Those decisions do not remotely advance AHA's position. First, this case has nothing to do with successive, rather than joint or concurrent tortfeasors. Second, both the relevant language of section 768.81(2) ("any contributory fault chargeable to the claimant diminishes [recovery]"), and the teaching of prior common law (discussed earlier) make this case critically different from the circumstances presented in D'Amario and Ass'n for Retarded Children. In this case, both the statutory language and the prior common law firmly support, not undercut, the proposition that a vicariously-liable claimant should be subject to the comparative fault rule set forth in section 768.81(2).

The result reached by the district court in this matter is fair. Unlike other joint or concurrent tortfeasors subject to the comparative fault provisions of section 768.81, the passive tortfeasor has the

unquestioned right to full indemnification from the active tortfeasor for which it bears responsibility. See, e.g., Houdaille Indus., Inc. v. Edwards, 374 So.2d 490, 492 (Fla. 1979); Budget Rent-A-Car Systems, Inc. v. State Farm Mutual Automobile Ins. Co., 727 So.2d 287, 289 (Fla. 2d DCA 1999); Hart Properties, Inc. v. Eastern Elev. Serv. Corp., 357 So.2d 257, 258 (Fla. 3d DCA 1978); Florida Power Corp. v. Taylor, 332 So.2d 687, 690 (Fla 2d DCA 1976). See also § 768.31(2)(f), Fla. Stat. (contribution among tortfeasors act does not impair any right of indemnity under existing law). S&S, unlike Amtrak or CSXT, had the capacity, from the outset, to take necessary precautions to prevent Rountree from transporting the huge combustion turbine negligently (see Dockery, 796 So.2d at 596) and also to "make sure there [would] be adequate resources with which to pay the damages" in the event of "Rountree's negligence. Kraemer, 572 So.2d at 1365. If S&S acted in a way that now limits its insurer's ability to recover in full for Rountree's comparative negligence, it is entirely fair

and proper for S&S's insurer to bear the financial loss. Responsibility for that loss cannot and should not be shifted over the Railroad Appellees.

CONCLUSION

For all the reasons set forth in this Answer Brief, this Court should answer the Eleventh Circuit Court of Appeals' certified question in the affirmative.

Properly construed, section 768.81(2), Florida Statutes, requires that when the comparative negligence of an active tortfeasor is chargeable to a claimant under principles of vicarious liability, that chargeable fault diminishes the claimant's damage recovery accordingly.

Other joint or concurrent

tortfeasors should be held liable for their

proportionate share of the overall fault, no more.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to all counsel of record on the attached service list on May 28, 2002

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CERTIFICATE OF COMPLIANCE

Appellees/Cross-Appellees certify that this brief complies with the size and fonts requirements of Rule 9.210(a)(2) of the Florida Rules of Civil Procedure.

Respectfully submitted,

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