SUPREME COURT OF FLORIDA
Case No. SC02-709

Lower Tribunal Case Numbers: 00-13811, 00-13986

AMERICAN HOME ASSURANCE
COMPANY,

Appellant,

vs.

NATIONAL RAILROAD PASSENGER
CORPORATION, ETC., ET AL.

Appellees.
______________________________________/

AMENDED
BRIEF OF APPELLANT AMERICAN HOME ASSURANCE COMPANY ON THE FIRST CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE 11TH CIRCUIT

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REFERENCES TO THE RECORD

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References to the original record are made by referring to the District Court Docket Sheets. There are two District Court Docket Sheets which are applicable, as this case was filed and then consolidated into one action.

A. AHA vs. NRPC Case No. 94-976-CIV-ORL-18C

B. NRPC vs. Rountree Case No. 93-01090-CIV-ORL-18

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STATEMENT OF THE CASE

Appellant/Plaintiff, AMERICAN HOME, is seeking to recover damages in this subrogation claim for the loss of its insured's cargo which was destroyed in a truck/train collision. This appeal arises from a March 26, 2002 opinion of the United States Court of Appeals for the 11th Circuit which certified a question of Florida law to the Florida Supreme Court.

PROCEEDINGS IN THE COURT BELOW

The Appellant/Plaintiff, AMERICAN HOME, filed its claim for damages against Defendants NATIONAL RAILROAD PASSENGER CORPORATION, CSX TRANSPORTATION, ROUNTREE TRANSPORT AND RIGGING, and the other Defendants on September 12, 1994, Case No. 94-976-CIV-ORL-18C. (A-3) (R-A-1) This matter was consolidated with the original lawsuit, NATIONAL RAILROAD PASSENGER CORPORATION, et al. versus ROUNTREE TRANSPORT, et al., Case No. 93-01090-CIV-ORL-18 along with approximately one dozen claims arising out of this same incident. (A-1-5)

A trial solely on the issue of liability for the incident was held in November of 1996 and a jury verdict was rendered on November 21, 1996. (A-1-11) (R-B-1984) Damage trials were set for the personal injury claimants and on December 1, 1999, a

trial was held for AMERICAN HOME ASSURANCE COMPANY'S damages. On July 14, 2000, the Court issued its Final Order on the issue of liability and damages for AMERICAN HOME'S claim. (A-2) Appellant appealed from this Order to the United States Court of Appeals for the 11th Circuit. On March 26, 2002 the 11th Circuit issued an opinion certifying four questions to the Florida Supreme Court. AMERICAN HOME files this brief on the first question. (A-1-55)

STATEMENT OF FACTS

This case arises out of a November 30, 1993 collision in which an Amtrak train (NRPC) moving on the railroad tracks of CSX, hit a tractor-trailer owned by ROUNTREE TRANSPORT & RIGGING, whose vehicle had become immobilized on a railroad crossing in the course of transporting an 82-ton generator to a power plant of the KISSIMMEE UTILITY AUTHORITY, in Kissimmee, Florida. (A-6-1) This crash resulted in numerous personal injury and property damage claims arising out of this accident. (A-1-10)

The Appellant/Plaintiff, AMERICAN HOME, is the subrogated cargo insurer for Stewart & Stevenson Services, the shipper of the 82-ton turbine generator which was being transported by ROUNTREE at the time of the accident. The turbine was destroyed in the crash. (A-1-9) (R-A-100-30) AMERICAN HOME paid the insurance claim to Stewart & Stevenson for the loss of cargo. (A-1-10) (R-A-100-16)

Stewart & Stevenson (hereinafter "S&S") was the manufacturer and seller of a turbine generator unit. This turbine generator unit was sold to General Electric for $12,219,213. (R-A-100-20) General Electric then sold it to Defendants KUA and FMPA, in Kissimmee, Florida. The unit was to be delivered from Houston, Texas to the KUA plant near Kissimmee, Florida. (A-1-10) (R-A-1969-2)

S&S hired Woko Transportation for the inland portion of the trip between Tampa and the KUA plant. (R-A-1967-2) Woko contracted with ROUNTREE to carry the unit. ROUNTREE hired CSX Railroad personnel to serve as a flagman to accompany the transporter on the route and across railroad tracks. (R-B-1969-2)

The vehicle carrying the 82-ton S&S generator was not able to cross the tracks at the KUA plant access road. It was unable to negotiate the hump in the road on the railroad tracks and while attempting to free the truck, it was struck by the NRPC train, resulting in the destruction of the turbine riding on the truck. (R-B-1969-2) After paying the claim under the cargo insurance policy for that portion of the shipment destroyed on the truck, Appellant, AMERICAN HOME, brought this subrogation action for the loss of the cargo. (R-A-1)(R-A-100-16)

On October 23, 1996, Judge Robert Merhige, a visiting judge from the U.S. District Court in Eastern Virginia, separated this case into two trials on liability and damages. (R-B-178). A three-week combined trial for all claimants and defendants in all the consolidated cases was held on the issue of liability and on November 21, 1996, a jury verdict was entered in favor of the Plaintiffs, finding that the following Defendants were liable to the Plaintiff for the following percentages of negligence. (A-3) (R-B-1984)

ROUNTREE TRUCKING	59%
NRPC	08%
CSX	33%
Woko Transportation	0%
Black & Veatch	0%
FMPA	0%
Roy Benton Crain	0%.

The Court in a separate Order on November 20, 1996 granted Stewart & Stevenson (AMERICAN HOME'S insured) and General Electric's motions holding as a matter of law that Stewart & Stevenson and General Electric had no direct negligence. (A-4) (A-5) (R-B-1968) (R-B-1969)

The Court on December 3, 1996 granted Defendant Black & Veatch's motion, holding that the transportation of this cargo was inherently dangerous as a matter of law and held that Defendants Woko, Stewart & Stevenson and General Electric were all parties who may properly be held vicariously liable for the negligence of ROUNTREE. (A-6) (A-7) (R-B-1980-1979) The Court noted that S&S, GE and Woko were innocent parties who are vicariously liable for damages which are wholly the fault of ROUNTREE (A-7-20) (R-B-1980-20).

On April 1, 1999 , the Court ordered that ROUNTREE was entitled to a limitation of liability to the ($1,000,000) amount of its insurance based on the Stewart & Stevenson contract with Woko Transportation. (A-8) (R-B-2183)

The District Court then proceeded to the damage phase. On the eve of the damage trial Judge James Watson, a visiting judge from the Southern District of New York, held that Appellant/Plaintiff AMERICAN HOME, through its insured Stewart & Stevenson, would have ROUNTREE'S negligence applied to AMERICAN HOME and that AMERICAN HOME would be 41% negligent. (A-2-3) (R-A-99-16)

On December 1, 1999, the trial was held on the issue of AMERICAN HOME'S damages. (R-A-100) The Court directed a verdict and held that damages were found in the amount of $4,516.640 as the total damages suffered by AMERICAN HOME from the crash. (A-2-4) (R-A-100-79)

At the close of trial the Court then determined that this amount would be reduced by 41% of the total amount, as AMERICAN HOME would be held liable for ROUNTREE'S comparative fault, reducing the total amount of damages to $1,851,822.40. (A-2-4) (R-A-100-79)

The Court further found that ROUNTREE was entitled to its $1,000,000 limitation of liability for its percentage of the damages, and that Defendants NRPC and CSX would receive a setoff of $1,000,000 (paid by ROUNTREE) to their percentage of damages and they would only have to pay $851,822.40, (A-2-4) (R-A-100-80) or less than one-half of their combined percent of negligence. Appellant AMERICAN HOME appealed this Final Judgment.

The 11th Circuit Court of Appeals affirmed the District Court's ruling that AMERICAN HOME had proven damages totaling $4,546,640.00. (A-1- 30) The 11th Circuit further agreed with the District Court that ROUNTREE'S negligence resulted from its failure to take special precautions required for transporting an oversized combustion turbine in a complex, specially equipped vehicle. The 11th Circuit affirmed that the transportation of the turbine was inherently dangerous and that STEWART & STEVENSON could be held vicariously liable for ROUNTREE'S negligence. (A-1-43)

The final issue put before the 11th Circuit by AMERICAN HOME was that even if the transportation of the combustion turbine was an inherently dangerous activity, AMERICAN HOME should not have been limited in its recovery to 41% of its damages as it was merely a vicariously liable party. The 11th Circuit Found that this was a matter of Florida law and certified this question to this Court. (A-1-55)

SUMMARY OF THE ARGUMENT

AMERICAN HOME ASSURANCE COMPANY is seeking to recover the full extent of its damages as determined by the trial court. As the subrogee for Stewart & Stevenson, AMERICAN HOME claims that because Stewart & Stevenson was only vicariously liable for the collision, the District Court erred in its application of Florida comparative law fault principles, as set forth in Florida Statute §768.81 to reduce AMERICAN HOME'S damages to only 41% of the total amount.

In November 0f 1996, a jury trial was held in all the consolidated cases which found that only ROUNTREE, NRPC and CSX were negligent. (A-3-1) The Court further found that AMERICAN HOME'S subrogee, Stewart & Stevenson, had no negligence as a matter of law. (A-4) (A-5)

It is the Appellant/Plaintiff's contention that they are entitled to the full amount of their damages. Stewart & Stevenson should not be held to be negligent, as Stewart & Stevenson was found as a matter of law not to be negligent. (A-4) (A-5)

The District Court found that Stewart & Stevenson was only vicariously liable for ROUNTREE'S negligence. (A-2-3) Stewart & Stevenson (and AMERICAN HOME) were not negligent or at fault for this loss. The District Court incorrectly equated vicarious liability with negligence. Under Florida law these are not the same thing. As Stewart & Stevenson was held not to be negligent, and in fact held to be an

innocent party, the negligence of ROUNTREE cannot be applied to Stewart & Stevenson. This Court has differentiated "fault" from "vicarious liability". One is a matter of direct participation in a negligent action. The other is liability attributed to a party based solely on their relationship.

The Court further reduced the amount of the damage award by subtracting ROUNTREE'S negligence from AMERICAN HOME'S recovery, and then subtracting the amount ROUNTREE paid from that portion of the damages which would be paid by NRPC and CSX. (Essentially taking the ROUNTREE portion of the judgment and subtracting it from NRPC and CSX's 41% of damages, essentially giving CSX and NRPC an approximately 50% discount on their percentage of fault.) (A-2-4)

Florida Statute 768.81 should not be applied in this manner to reduce AMERICAN HOME'S damages, as they were not held to be at fault.

ARGUMENT

I. 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?

The Appellant/Plaintiff AMERICAN HOME brought its subrogation claim against the Defendants for destruction of the turbine which was being shipped to the KUA plant. This portion of the shipment was innocent cargo and was sitting on the back of the ROUNTREE transport when it was struck by the NRPC train.

A jury trial was held and based on the jury verdict on the issue of liability, the Court found that the defendants were negligent in the following percentages.

Rountree Trucking	59%	
NRPC	8%	
CSX	33%	
Woko Transportation	0%	
Black & Veatch	0%	
KUA	0%	
FMPA	0%	
Roy Benton Crane	0%	(A-3) (R-B-1984)

The Court in its Final Judgment ruled that at the conclusion of the jury trial on liability of the consolidated action, a verdict was entered assessing fault between the various parties as follows: 59% Rountree; 33% CSX and 8% NRPC. (A-2) (R-B-2363)

The District Court further ruled as a matter of law by Order dated December 3, 1996 that the transportation of the subject turbine was an inherently dangerous activity such that all of those entities in the chain of responsibility for delivery of said turbine, that is GE, S&S and Woko were vicariously liable for the 59% negligence assessed to ROUNTREE by the jury. (A-7) (R-B-1979)

The District Court further ruled on November 20, 1996 (A-4) (R-B-1968) (R-B-1969) in favor of General Electric and Stewart & Stevenson granting their motions for judgment as a matter of law on all negligence claims against GE and Stewart & Stevenson, that there was no "direct negligence" claims against GE and Stewart & Stevenson. No evidence was introduced by any of the parties of any act of negligence that can be said to have proximately caused the collision which is the subject of this trial. (R-B-1969-6). (The Court in its ruling differentiated between the lack of negligence and the fact that there may be potential liability under the inherently dangerous work doctrine, separating fault or negligence from liability.) (A-7-22)

The District Court in its December 3, 1996 Order held that GE and S&S and Woko are parties who may properly be held vicariously liable for the negligence of ROUNTREE under the inherently dangerous work doctrine. (A-6) (A-7) In a footnote the District Court noted that "GE and S&S may be entitled to indemnity from ROUNTREE as they are innocent parties who are vicarious liable for the damages

which are wholly the fault of ROUNTREE". (A-7-22) The Court again differentiates between fault and vicarious liability.

As a result of the jury verdict and these series of rulings, ROUNTREE, NRPC and CSX were found to have been negligent and at fault for this loss. AMERICAN HOME'S subrogee, Stewart & Stevenson, was found to have been not negligent as a matter of law by the Court. In essence, Stewart & Stevenson is zero percent negligent. While AMERICAN HOME, through its subrogee Stewart & Stevenson, was found to be zero percent negligent and not at fault, the Court nevertheless applied the vicarious liability of Stewart & Stevenson to ROUNTREE and limited their damages by 41%. (A-5-3) The Court erred by equating negligence or fault with vicarious liability.

Setting aside the vicarious liability ruling for the moment, the three Defendants would be responsible for the payment of these economic damages under the Doctrine of Joint and Several Liability. Florida Statute §768.81(comparative fault) controls the apportionment of damages for this claim. The Plaintiff has suffered what would be defined as "economic damages" under the Florida statute, which includes, replacement value of lost personal property, loss of construction repairs, including labor, overhead and profit; and any other economic loss which would not have occurred but for the injury giving rise to the cause of action. (A-9)

Here there are three negligent parties, and the question becomes one of apportionment of damages. Under Section 3 of the statute, as it was written and in effect at the time of the loss and the trial, apportionment of damages of economic damages are joint and several.

> (3) APPORTIONMENT OF DAMAGES - In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of joint and several liability; provided that, with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, <u>the court shall enter judgment with respect to economic damages against that party on the basis of the Doctrine of Joint and Several Liability.</u> (Emphasis added.) (A-9)

Section 768.81 of the Florida Statutes was amended in 1999. These amendments postdate the November 1993 accident when the cause of action accrued. Under the version of §768.81 in effect at the time of the accident, there was no limit to the amount of economic damages that could be recovered against each defendant whose fault was equal to or greater than the claimant's. (A-9) The 1999 amendments have since put constraints on the amount of damages that a plaintiff could recover.

This issues was examined recently in the case of <u>Basel v. McFarland & Sons, Inc.</u>, 27 Fla. L. Weekly D 792 (Fla. 5th DCA 2002) which held that the 1999 amendments constitute a further alteration in a plaintiff's right to recover from a

particular defendant for his injuries. The Court concluded that the 1999 amendment must be applied prospectively and is inapplicable to a case where the action accrued earlier in 1994. The Florida 5th District Court of Appeals reversed the entry of the final judgment award and remanded it back to the trial court to apply the version of §768.81(3), Florida Statutes that was in existence in August of 1994 when the accident occurred. See, Basel v. McFarland & Sons, Inc., 27 Fla. L. Weekly D 792 (Fla. 5th DCA 2002). Here the accident occurred in November of 1993, so the earlier version would apply.

All damages claimed by AMERICAN HOME are "economic damages." They involve the loss of the turbine generator itself, and not any non-economic damages. The Defendants, NRPC, CSX and ROUNTREE, each have a percentage of fault that equals or exceeds that of this particular claimant. (AMERICAN HOME or Stewart & Stevenson whose negligence was 0%). Therefore, a judgment with respect to economic damages should be entered on the basis of the Doctrine of Joint and Several Liability. The District Court in its Final Judgment has ruled that as a result of the vicarious liability ruling, AMERICAN HOME should be considered 59% negligent. However, the Court incorrectly equates fault or negligence with vicarious liability which is not in accordance with the statute.

The Court has ruled that the transportation of this item was an "inherently dangerous activity," (A-6) (R-B-1980) Specifically, the Court "finds that the transportation of the turbine was an inherently dangerous activity under Florida law. Moreover, the Court found that GE, S&S, and Woco are parties who may properly be held vicariously liable for the negligence of ROUNTREE under the Inherently Dangerous Work Doctrine." The Court further notes in a footnote that "The Court notes, without deciding, that under Atlantic Coast, 386 So.2d 676, GE, S&S and Woco may be entitled to indemnity from ROUNTREE as they are innocent parties who are vicariously liable for damages which are wholly the fault of ROUNTREE. (Footnote 17). (Emphasis added). (A-7-22) (R-B-1979-22)

Defendants CSX and NRPC are seeking to have the negligence of ROUNTREE (59%) applied to AMERICAN HOME through their insured, Stewart & Stevenson. This is wholly inappropriate as Stewart & Stevenson was found to be **without fault** and therefore, Florida Statute §768.81 (comparative fault) applies, and judgment will still be based on the doctrine and joint and several liability among negligent parties.

The statute is clear and unambiguous. It states that, "The Court shall enter judgment against each party liable on the basis of such party's percentage of fault." (A-9) Here, Stewart & Stevenson (and AMERICAN HOME) were found to be not at fault and to be 0% negligent.

When examining this issue, this Court, in the case of Fabre v. Marin, 623 So.2d 1182, (Fla. 1993), speaking in terms of the legislative intent of §768.81 stated "We concluded the statute is unambiguous. By its clear terms, judgment should be entered against the party liable on the basis of that party's percentage of fault." Clearly, the only means of determining a party's percentage of fault is to compare that party's percentage to all the other entities who contributed to the accident, regardless of whether they have been or could have been joined as defendants. Fabre, 623 So.2d at 1185.

In Fabre, this Court spoke in terms of fault arising from the context of an "accident." The "fault" which gives rise to the accident is the "whole" from which the fact finder determines the party-defendant's percentage of liability. Clearly, the only means of determining a party's percentage of fault is to compare that party's percentage to all of the other entities who contributed to the accident, regardless of whether they have been or could have been joined as defendants. Fabre, 623 So.2d at 1185. Here, the Court equated a defendant's "fault" with the amount of its "negligence." Walmart Stores v. McDonald, 676 So.2d 12 (Fla. 1st DCA 1996).

There was no negligence or fault on the part of Stewart & Stevenson. However, Defendants have claimed that because of the vicarious liability of Stewart &

Stevenson, they should be held to the same standard of negligence as ROUNTREE. This is direct contravention of the statute.

The statute speaks solely of fault. (A-9) Vicarious liability is not a question of fault, but only a party's liabilities to other claimants. Vicarious liability is liability without fault. This Court, in Nash v. Wells Fargo Guard Services, 678 So.2d 1262 (Fla. 1996), specifically did not hold vicarious liability to be the same as fault. In Nash, it was stated that:

> We further hold that the named defendant cannot rely on the vicarious liability of a non-party to establish the non-party's fault.

678 So.2d 1262 and 1264. There, this Court holds that vicarious liability is not equated to fault.

In the District Court's order on the issue of inherently dangerous activity, the vicarious liability of Stewart & Stevenson and General Electric is recognized to be different from fault by the court itself in which it states that they (GE, S&S and Woko) are innocent parties that are vicariously liable for damages which are wholly the fault of ROUNTREE. (A-7-22) In fact, the court recognizes as they are without fault, they may seek indemnity from ROUNTREE as they are "without fault." (Footnote 17). (A-8-22) (R-B-1979-22)

The District Court should not have limited the recovery of damages to 41% of its damages. AMERICAN HOME'S assured, Stewart & Stevenson, was only vicariously liable for the collision. The District Court had already determined that Stewart & Stevenson had no fault or direct negligence as set forth in the Order of November 20, 1996. (A-4) Therefore, the District Court should not have applied Florida Comparative Fault Principles as enunciated in Florida Statute §768.81. Section 768.81 applies solely to parties who are directly negligent, and that a party who only is vicariously liable should not have fault apportioned to it under §768.81.

The District Court, upon reaching this conclusion regarding the application of §768.81, having ruled already that Rountree's liability to AHA was limited to $1,000,000, entered judgment against the Rail Companies jointly and severally for the remaining $851,822.40. (A-1-46).

Therefore, the railroads whose combined negligence of 41% of the damages would have totaled $1,851,822.40, received a one million dollar setoff or windfall, as ROUNTREE'S payment was subtracted from their own percent of damage. It is AMERICAN HOME'S contention that the railroads, would at the very least, have to pay their entire 41% of the damages if not held to their full joint and several liability.

The United States Court of Appeals for the 11th Circuit in addressing this issue found that this was an unsettled question of state law which, in their view, raised important policy concerns and certified this issue to the Supreme Court.

The 11th Circuit, in its opinion stated that:

> In discussing the district court's conclusion, we turn first to Florida Statute §768.81, entitled "Comparative Fault." The section states that "any contributory fault chargeable to the claimant diminishes proportionally the amount awarded as economic...damages for an injury attributable to the claimant's contributory fault." Fla. Stat. Ann. §768.1(2) (West 1997).[1] The section further provides that "[t]he court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability." §768.81(3).
>
> AHA's primary assertion is that the district court improperly treated vicarious liability as synonymous with the word "fault" in §768.81, given that "fault," in AHA's view, means direct negligence. To substantiate its position, AHA points to Florida cases that treat vicarious liability as a matter of status or relationship, not of fault. See Nash v. Wells Fargo Guard Servs., Inc., 678 So.2d 1262, 1264 (Fla. 1996) ("We...hold that the named defendant cannot rely on the vicarious liability of a nonparty to establish the nonparty's fault"); Mercury Motors Express, Inc. v.

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[1] In its appellate brief, AHA references Florida Statutes Annotated §768.81 (West 1997) as the version of the section applicable to this case. This version was last amended in 1992, before the turbine collision occurred. The Florida legislature amended §768.81 in 1999, before the damages trial over AHA's damages took place. See Fla. Stat. Ann. §768.81 (West Supp. 2002). FMPA argues that the 1999 version of the section should apply. The 1999 amendments, however, did not change the substantive language quoted in the paragraph above.

Smith, 393 So.2d 545, 549 (Fla. 1981) ("An employer is vicariously liable...[for] the negligent acts of employees committed within the scope of their employment even if the employer is *without fault*. This is based upon the long-recognized public policy that victims...should be compensated even though it means placing vicarious liability on an *innocent* employer.") (emphasis added); Crowell v. Clay Hyder Trucking Lines, Inc., 700 So.2d 120, 125 (Fla. Dist. Ct. App.1997) ("Vicarious liability awards compensate for injuries without regard to fault.") AHA also notes that in this case, the district court specifically stated that S&S is an "innocent part[y] who [i]s vicariously liable for damages which are wholly the fault of Rountree." (R100-1979-22 n.17)

As a consequence of such case law, AHA concludes that when Florida Statute §768.81(3) states that damages are to be apportioned based on a party's "percentage of fault," it means based on a party's direct negligence, not on a party's status or relationship with another party. Fla. Stat. Ann.§768.81(3); see also Fabre v. Marin, 623 So.2d 1182,m 1185 (Fla. 1993), overruled in part on other grounds,Wells v. Tallahassee Mem'l Reg'l Med. Ctr., Inc., 659 So.2d 249 (Fla. 1995) ("We conclude that [§768.81] is unambiguous. By its clear terms, judgment should be entered against each party liable on the basis of *that* party's percentage of fault") (emphasis added). Indeed, AHA indicates that at least one Florida appellate panel has interpreted Fabre as equating fault under Florida Statute §768.81 with direct negligence. See Walmart Stores, Inc. v. McDonald, 676 So.2d 12, 20 (Fla. Dist. Ct. App. 1996), aff'd sub nom, Merrill Crossing Assocs. v. McDonald, 705 So.2d 560 (Fla. 1997) (stating that, in addressing §768.81, the Fabre court "equated a defendant's fault with the amount of its negligence") (Quotations omitted). The essence of AHA's contention, therefore, is both that Florida law consistently has drawn a sharp

distinction between vicarious liability and fault, and that this same distinction should be recognized in the application of Florida Statute §768.81, which refers only to fault and never specifically mentions vicarious liability.

Additional arguments can be made in favor of AHA's position. AHA claims that a vicariously liable party cannot be said to have contributed to, or to have participated in, the accident at issue in a given torts case. But the Fabre court stated that apportionment of damages under §768.81 is between "*participants* to the accident." Fabre, 623 So.2d at 1185 (emphasis added). Furthermore, one can argue that a vicariously liable party is not a joint or concurrent tortfeasor, given that such a party is being held liable solely for the conduct of another. Some Florida cases, however have indicated that §768.81 only applies to joint or concurrent tortfeasors. See D'Amario v. Ford Motor Co. ___ So. 2d ___ (Fla. November 21, 2001) (No. SC95881, SC96139) (per curium) (holding that, in a crash worthiness case between a car accident victim and an automobile manufacturer, the third-party driver responsible for the initial collision cannot have fault apportioned to him under §768.81 because the third-party driver and manufacturer are not joint or concurrent tortfeasors); Association for Retarded Citizens-Volusia, Inc. v. Fletcher, 741 So.2d 520, 524-25 (Fla. Dist. Ct. App. 1999) (stating that, in an action between an injured party and an initial tortfeasor, a health care provider who aggravates the initial injury cannot have fault apportioned to him under §768.81 because the physician and initial tortfeasor are successive, rather than joint, tortfeasors).

In sum, AHA's assertion is that a party who is only vicariously liable cannot have another's fault apportioned to him under §768.81, which AHA argues only applies to parties who are directly negligent, who actively participate in the accident at issue, or who constitute joint or

> concurrent tortfeasors. The subrogee AHA therefore contends that it should be able to recover all of the damages that it had proven were incurred by S&S without having Rountree's negligence apportioned to it under §768.81. (A-1-46-50)

The District Court erred in equating "negligence" with "vicarious liability". The 11th Circuit recognized this conflict between the two terms. This Court has already recognized that these two concepts are different. Florida Statutes recognize that in cases of economic damages (as here) that damages are found to be joint and several. Therefore, the Appellant would respectfully request this Court to answer the first certified question in the negative and issue an order holding that Florida law recognizes that "vicarious liability" is not the same as "fault" and, therefore, under Florida Statute §768.81, damages should not be limited by the Plaintiff's vicarious liability.

CONCLUSION

Vicarious liability by its very nature is liability without fault. Here, AMERICAN HOME and its insured, Stewart & Stevenson, were found to be without fault. The trial court specifically found that they were innocent parties who were vicariously liable for damages which were wholly the fault of the trucker. The Court and the jury found that the only negligent parties were ROUNTREE, CSX and NRPC.

The statute speaks solely of fault, not of imputed liability. This Court has differentiated vicarious liability from fault. AMERICAN HOME/Stewart & Stevenson were not directly negligent, they did not participate in the accident at issue, they were not joint or concurrent tortfeasors and, as such, they did not have a percentage of fault attributed to them as required under the statute.

The first certified question should be answered in the negative. The merely vicariously liable parties should not have the negligence of an active tortfeasor apportioned to it under Florida Statute §768.81 so as to reduce its own damages. This Court should answer the certified question in the negative and instruct the United States Court of Appeals for the Eleventh Circuit that AMERICAN HOME ASSURANCE COMPANY should not have its own damages reduced by the proportion of negligence attributed to ROUNTREE TRUCKING and that the Defendants should pay the full extent of the damages in accordance with Florida law.

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 ____ , 2002.

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CERTIFICATE OF COMPLIANCE

Appellant certifies 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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