IN THE SUPREME COURT OF FLORIDA

AMERICAN HOME ASSURANCE COMPANY,

Appellant,

vs.

NATIONAL RAILROAD PASSENGER CORPORATION, ETC., ET AL.

Appellees.
_____/

CASE NO. SC02-709

11th Cir. Case Nos. 00-13811
00-13986

JOINT ANSWER BRIEF OF APPELLEES FLORIDA MUNICIPAL POWER AGENCY (FMPA)AND KISSIMMEE UTILITY AUTHORITY (KUA), ADDRESSING THE FIRST CERTIFIED QUESTION FROM THE U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, RELATING TO THE EFFECT OF VICARIOUS LIABILITY UPON THE CLAIM OF AMERICAN HOME (AHA)

Michael J. Roper
Florida Bar No. 0473227
Ernest H. Kohlmyer, III
Florida Bar No. 0110108
BELL, LEEPER & ROPER, P.A.
Post Office Box 3669
Orlando, FL 32302
(407) 897-5150
(407) 897-3332 (Fax)
Attorneys for Kissimmee Utility Authority ("KUA")

Alton G. Pitts
Florida Bar No. 063500
ALTON G. PITTS, P.A.
401 West Colonial Drive, Suite 2
Post Office Box 540447
Orlando, FL 32854-0447
(407) 650-1610
(407) 650-1611 (Fax)
Attorney for Florida Municipal Power Agency ("FMPA")

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INTRODUCTION

This is the Joint Answer Brief of Appellees Florida Municipal Power Agency (FMPA) and Kissimmee Utility Authority (KUA), upon the first question which has been certified to this Court by the United States Court of Appeals for the Eleventh Circuit, dealing with the subjects of comparative fault and vicarious liability. KUA and FMPA are interested parties to the resolution of this question, even though each of them has been absolved of all primary liability for the happening of the underlying casualty. KUA and FMPA are interested parties in the proper resolution of this question, because (a) KUA entered into a private road grade crossing agreement with CSX Transportation, Inc. (CSX), so that access to the Cane Island Power Plant might be achieved, (b) this grade crossing agreement contained an indemnity agreement running from KUA to CSX, (c) the federal district court has ruled that under the terms of this indemnity agreement, KUA is obligated to indemnify CSX and National Railroad Passenger Corporation (Amtrak), and (d) pursuant to a participation agreement between FMPA and KUA, FMPA is contractually obligated to share in KUA's liability, if any, to CSX and Amtrak.

Both KUA and FMPA are contesting in the Eleventh Circuit and in this Court, that KUA is obligated to indemnify either CSX or Amtrak. A portion of this specific question is the subject of a joint initial brief of KUA and FMPA, which has been only

recently filed in this Court.

Insofar as the first certified question is concerned, FMPA and KUA are Defendants only because of the indemnity agreement as contained within the private road grade crossing agreement. Thus, as to the present certified question, the interests of FMPA and KUA are the same as the interests of CSX and Amtrak. FMPA and KUA are presenting this brief, only as putative indemnitors of CSX and Amtrak.

All of the facts which are necessary to formulate a correct answer to the first certified question are contained within the opinion of the Eleventh Circuit. We have not attached an Appendix to this brief, as the Appendix to the initial brief of Appellant American Home contains a copy of the opinion of the Eleventh Circuit, as well as other pertinent documents. In this brief, we shall make references to the Appendix to American Home's initial brief. References to the Appendix of AHA's initial brief will be indicated by the letter "A", by the number of the document, and then by the page number of the document (as for example A-1-1).

STATEMENT OF THE CASE AS CONCERNS THE FIRST CERTIFIED QUESTION

This lawsuit arises from a collision which occurred on November 30, 1993, between an Amtrak passenger train on the one hand, and a tractor-trailer transporter rig upon the other hand, at the place where the access road to the Cane Island Power Plant in Osceola County, crosses the rail tracks of CSX Transportation, Inc. (A-1-9).

Many lawsuits and claims were filed and have been processed, from this collision. The remaining lawsuit, and the one that is before this Court, is one which has been filed by American Home Assurance Corporation Ltd. (AHA) (A-1-13).

AHA insured for loss, the cargo which was being transported by the tractor-trailer transporter rig. This cargo suffered substantial loss as a result of the collision. AHA made a settlement with its insured, Stewart & Stevenson Services (S&S), for the loss to the cargo, and has now been subrogated to the rights of S&S. In an effort to recover for its payment for this loss, AHA filed suit in the United States District Court for the Middle District of Florida, Orlando Division, against CSX Transportation, Inc. (CSX), the owner of the rail tracks; National Railroad Passenger Corporation (Amtrak), the owner and the operator of the train which collided with the transporter rig; Rountree Transport and Rigging (Rountree), the owner and the operator of the tractor-trailer transporter rig which was hauling the insured cargo; Kissimmee Utility

Authority (KUA), a part owner of the Cane Island Power Plant (the Plant), who had contracted with others for the construction of the Plant, who had contracted with General Electric Corporation for the purchase and delivery of the combustion turbine and other accessories for use at the Plant, and who had contracted with CSX for a license for a crossing over the rail tracks of CSX, to achieve access to the Plant; Florida Municipal Power Agency (FMPA), a joint action agency which has been created by the Legislature of Florida to assist municipalities in financing and in operating municipal power plants, and a part-owner of the Plant; Black & Veatch (B&V), who had contracted with KUA to design the Plant and the access road leading to it; General Electric Corporation (GE), who had contracted with KUA for the sale and delivery to the Plant of the electric generating facilities; Stewart and Stevenson Services (S&S) who had contracted with GE to assemble the electric generating facilities and to deliver them to the Plant; WOKO Transportation Brokers (WOKO), who had contracted with S&S to deliver the electric generating facilities to the Plant, and who in turn contracted with Rountree for the physical delivery of these electric generating facilities to the Plant; and others (A-1-10).

A trial on the question of liability for the happening of the collision was held in the federal district court in Orlando in the autumn of 1996. At that trial, the jury found that Rountree was guilty of negligence and that Rountree's negligence had contributed

to the happening of the collision on the order of 59%; that CSX was guilty of negligence and that its negligence had contributed to the happening of the collision on the order of 33%, and that Amtrak was guilty of negligence and that its negligence had contributed to the happening of the collision on the order of 8%. The jury found each of KUA, FMPA, and B&V to have been free of any negligence (A-1-11,12). At the trial on the question of liability, the federal district court granted the motions for directed verdict of GE and of S&S, to the effect that neither one of them had any primary liability for the happening of the collision.

Following the jury trial upon the question of liability for the happening of the collision, the federal district court ruled that the methods used for the transportation of the cargo aboard the transporter rig constituted an inherently dangerous endeavor, and that as a result, GE, S&S and WOKO, were all vicariously liable for the negligence of Rountree (A-1-12).

A jury trial upon the issue of AHA's claimed damages against the railroad entities and Rountree, was conducted by the federal district court in December of 1999 (A-1-13). The district court ruled that inasmuch as S&S was vicariously liable for the negligence of Rountree, and as AHA (as subrogee of S&S) had no greater rights than S&S against the railroads and Rountree, Rountree's negligence was chargeable under §768.81(2), Florida Statutes, to AHA's claim for damages. As Rountree's negligence

had contributed to the happening of the collision on the order of 59%, this meant that AHA would be entitled to collect only 41% of its provable damages (A-1-14). The district court ruled that Rountree's liability to AHA would be capped at $1,000,000.00, inasmuch as AHA's insured, S&S, had agreed that Rountree need furnish liability insurance for the transportation of the cargo, only to the extent of $1,000,000.00 (A-1-14). (Except for the fact that the district court capped Rountree's liability at $1,000,000.00, AHA would have been entitled to have claimed against Rountree, the value of AHA's entire provable damages. It was only in AHA's claim against the other Defendants — such as the Railroads — that AHA was chargeable with the negligence of Rountree. In its appeal to the Eleventh Circuit, AHA has not challenged the district court's capping Rountree's liability at $1,000,000.00.)

At the jury trial upon AHA's claimed damages, the district court ruled that AHA's proven damages amounted to $4,516,640.00. The district court reduced this figure by 59% (the percentage which Rountree's negligence contributed to the happening of the collision), and reached a net reduced figure for AHA' s allowable damages of $1,851,822.40. (There are two inadvertent mathematical misstatements on page 21 of the opinion of the Eleventh Circuit. The opinion of the Eleventh Circuit inadvertently misstates the net proven damages of AHA as being $4,546,640.00, rather than $4,516,640.00. This mathematical error was made in the subtraction of

$130,000.00 from $4,646,640.00. Also, in footnote 7, on page 21 of the opinion, the Eleventh Circuit says that the district court reduced the proven damages by 41%. Actually, the district court reduced AHA's proven damages by 59%, to reach the net reduced figure of $1,851,822.40.) As the district court had already ruled that Rountree's liability would be capped at $1,000,000.00, final judgment was entered in favor of AHA and against Rountree in the amount of $1,000,000.00, and against the railroad entities in the amount of $851,822.40, jointly and severally.

The district court ruled, on motions for summary judgment, that because of the terms of the license granted by CSX for the railroad crossing, KUA was liable in indemnity, to indemnify and to hold harmless, not only CSX but also Amtrak. While the district court did not specifically rule that FMPA was obligated in indemnity to these railroad entities, as a practical matter FMPA shares the liability of KUA for indemnity to the railroads, because of the operation of a participation agreement between KUA and FMPA.

An appeal was taken by AHA from this final judgment, to the United States Court of Appeals for the Eleventh Circuit. KUA and FMPA crossed-appealed the ruling of the district court that KUA is liable in indemnity to the railroads. The Eleventh Circuit has published its decision and opinion on some of the issues which have been raised in these appeals, but has certified to this court several questions to

be answered under Florida law.

This Joint Answer Brief of KUA and FMPA, addresses the first certified question, that is the one which deals with the subjects of comparative fault and vicarious liability.

AHA is claiming in its appeal to the Eleventh Circuit, and is claiming in its initial brief to this Court on the certified question dealing with comparative fault, that the railroads should be held jointly and severally liable for AHA's entire proven damages of $4,516,640.00, or alternatively, that the railroads should be jointly and severally liable for 41% of AHA's proven damages, or $1,851,822.40, thus giving the railroads no credit for the $1,000,000.00 which must be paid by Rountree. The federal district court had ruled that the railroads were entitled to the credit of $1,000,000.00, which must be paid by Rountree. FMPA and KUA contend that at the very most, each of the railroads is liable only for its percentage of fault, rather than being jointly and severally liable, and that at the most, CSX is liable only for 33% of AHA's proven damages of $4,516,640.00, or $1,490,491.20, and that at the most, Amtrak is liable only for 8% of AHA's proven damages of $4,516,640.00, or $361,331.20, thus making the railroads liable at most for $1,851,822.40.

STATEMENT OF THE FACTS

KUA is an arm of the government of the City of Kissimmee. KUA owns and operates one or more electric generating plants, to provide electricity to its customers (A-1-7). FMPA is a joint action agency which has been created by the Legislature of Florida to assist municipalities in the financing, the construction, and the operation of electric generating plants. As a part of these functions, FMPA is authorized to take ownership positions in power plants (A-1-7).

KUA decided to construct a new power plant, to be known as the Cane Island Power Plant. Through a participation agreement between FMPA and KUA, FMPA took a one-half interest in the Plant (A-1-7). Unfortunately, the site which was chosen for the Plant was on "the other side" of the mainline tracks of CSX. Thus, to achieve traffic access to the Plant, it was necessary for KUA to arrange for a crossing to cross the tracks of CSX. As a prerequisite to granting a crossing, CSX insisted upon its receiving an indemnity agreement from KUA, along with other conditions (A-1-7, 8). Although FMPA was not a signatory to the Private Road Grade Crossing Agreement between KUA and CSX, under the terms of the participation agreement between FMPA and KUA, FMPA shares KUA's exposure to indemnity, flowing from KUA's having executed the Private Road Grade Crossing Agreement, with CSX (A-1-7).

The underlying accident occurred on November 30, 1993, while the Plant was

still under construction. The accident or collision which gave rise to all of this litigation, was between a northbound Amtrak passenger train, and a large tractor-trailer rig of Rountree Transport and Rigging (Rountree), which was attempting to deliver a combustion turbine and some of its accessories to the Plant. The Amtrak train was rolling on the rail tracks of CSX, pursuant to an agreement between CSX and Amtrak (A-1-9).

KUA had entered into a contract to purchase the combustion turbine, its accessories and its housing, from GE. The contract between KUA and GE obligated GE to deliver the turbine in a usable condition to KUA at the Plant. GE in turn contracted out to S&S, the responsibility of "customizing" the turbine, its accessories, and its housing, and the obligation to deliver the turbine to KUA at the Plant. S&S contracted with WOKO to transport the turbine and its accouterments from the Port of Tampa to the Plant. The turbine had been shipped by barge from Houston, Texas to the Port of Tampa. WOKO in turn contracted with Rountree to perform the physical transportation of the turbine, its accessories and its housing, from the Port of Tampa to the Plant (A-1-8).

Rountree employed a huge tractor-trailer transporter rig to transport the turbine and some of its accessories from the Port of Tampa to the Plant. The transporter rig was in the process of attempting to cross the CSX tracks so as to reach the Plant, at

the time it was struck by the Amtrak passenger train (A-1-9).

The jury found that the collision was caused by the combined negligence of Rountree, of CSX, and of Amtrak. The jury found that Rountree's negligence had contributed to the happening of the collision on the order of 59%; that the negligence of CSX had contributed to the happening of the collision on the order of 33%; and that the negligence of Amtrak had contributed to the happening of the collision on the order of 8% (A-1-11,12).

The federal trial court held that the transportation of the combustion turbine was an inherently dangerous operation, and that as a consequence, GE, S&S and WOKO were all vicariously liable for the negligence of Rountree (A-1-12). These rulings of the federal trial court have been affirmed by the United States Court of Appeals for the Eleventh Circuit.

The trial jury for the trial on the questions of liability in the federal district court, held that each of KUA and FMPA were guilty of 0% negligence. That is to say, each of KUA and FMPA was completely absolved of any primary liability for the happening of the collision (A-3-2). Prior to the submission of the case to the jury on the questions of liability, the federal district court granted the motions of S&S and GE for a directed verdict in their favor, on the question of primary negligence or primary liability for the happening of the accident (A-1-11).

THE ISSUE ADDRESSED BY THIS BRIEF

THE FIRST CERTIFIED QUESTION FROM THE U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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?

SUMMARY OF ARGUMENT

THE FIRST CERTIFIED QUESTION:

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 answer to this question is two-fold:

(1) In AHA's processing its claim as a plaintiff (as the subrogee of S&S) against CSX and Amtrak, the answer to this certified question should be in the affirmative.

(2) On the other hand, in AHA's processing its claim as a plaintiff (as the subrogee of S&S) against Rountree, the answer to this certified question would appear to be in the negative.

Florida has a long history of charging a plaintiff with the negligence of one for whose conduct the plaintiff is only vicariously liable. This principle has been demonstrated time and time again in automobile collision cases, under the dangerous

instrumentality doctrine.

In the Legislature's selecting the operative language for subsection 2, the Legislature knew of the long history of Florida's charging a plaintiff with the negligence of one for whose conduct the plaintiff is vicariously liable. This is the reason why, in its composing the language for subsection 2 of §768.81, the Legislature chose the expression "...any contributory fault chargeable to the claimant" diminishes proportionately the plaintiff's claim, rather than using the expression, "any contributory fault of which the claimant is guilty" diminishes proportionately the plaintiff's claim.

The inherently dangerous work doctrine (which is involved in our case), and the dangerous instrumentality doctrine, both arose out of the same needs of society for the protection of members of the public, and these two doctrines are virtually identical, and the rights and responsibilities of the parties and of members of the public, arising out of these two doctrines, are the same.

Neither CSX nor Amtrak is liable on a joint and several basis for AHA's proven damages of $4,516,640.00. Rather, at the most, CSX is liable for 33% and Amtrak is liable for 8% of AHA's proven damages.

On the other hand, Rountree is liable on a joint and several basis for all of AHA's proven damages, and judgment could have been entered against Rountree for

the amount of AHA's proven damages of $4,516,640.00, except for the fact that AHA's insured, S&S, contracted away its and AHA's rights against Rountree, for any sum of money above $1,000,000.00. Rountree is liable on a joint and several basis for AHA's entire proven damages, because in AHA's suit against Rountree, AHA is considered an innocent party (inasmuch as in that instance, Rountree's negligence is not attributable to AHA), and in any event, Rountree's fault is greater than that of AHA.

Inasmuch as (a) Rountree's negligence and its contribution to the happening of the collision (59%) is greater than the percentage of fault of CSX (33%), and is greater than the percentage of fault of Amtrak (8%), and (b) AHA is chargeable with the negligence of Rountree in AHA's suit against the railroads, then under §768.81(3), neither CSX nor Amtrak is jointly and severally liable for AHA's damages.

AHA is maintaining that the term "fault," means active, primary negligence, rather than one's vicarious liability for the active, primary negligence of another. FMPA and KUA, on the other hand, maintain that the term "fault," includes one's fault in vicarious liability for the primary, active negligence of another.

ARGUMENT

The First Certified Question:

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 answer to this question is two-fold:

(1) **In AHA's processing its claim as a plaintiff (as the subrogee of S&S) against CSX and Amtrak, the answer to this certified question should be in the affirmative**. Under the plain terms of §768.81(2), and the cases which are cited below, AHA is chargeable with the negligence of Rountree, which contributed to the happening of the collision on the order of 59%. Moreover, since Rountree's negligent contribution to the happening of the collision exceeds that of each of CSX (33%) and Amtrak (8%), then under the plain terms of §768.81(3), neither CSX nor Amtrak is jointly or severally liable for AHA's proven damages. At the very most, CSX should be held liable for only 33% and Amtrak for only 8% of AHA's proven damages of $4,516,640.00.

(2) **On the other hand, in AHA's processing its claim as a plaintiff (as the**

subrogee of S&S) against Rountree, the answer to this certified question would appear to be in the negative. In AHA's processing its claim against Rountree, for whose negligence S&S (and thus AHA) is vicariously liable, AHA is not chargeable with the negligence of Rountree. This would appear to be the case, under the holdings of Hale v. Adams, 117 So.2d 524 (1st DCA 1960); Kaczmarek v. Kelly, 479 So.2d 222 (5th DCA 1985); and Nash v. Wells Fargo Guard Services, 678 So.2d 1262 (Fla. 1996). The principle of law under these cited cases is that when the principal or master sues his agent or servant for damages to the principal or master, which were caused by the negligence of the agent or servant (for whose negligence the principal or master would be vicariously liable to a third person), the principal or master is entitled to claim all of his damages. As we shall explain later in this brief, under the inherently dangerous work doctrine, S&S is considered to be the principal or master of Rountree, and Rountree is considered to be the agent or servant of S&S. Except for the fact that AHA's insured, S&S, agreed that Rountree needed to provide liability insurance only in the amount of $1,000,000.00, AHA could have received a final judgment against Rountree in the entire amount of AHA's proven damages, that is $4,516,640.00. However, because of S&S' contractual arrangement with Rountree to limit the amount of liability insurance which Rountree needed to produce, the federal district court ruled that AHA was entitled to claim only $1,000,000.00 against

Rountree. In its appeal to the Eleventh Circuit, AHA has not challenged this ruling of the district court.

There are two very basic subparts to §768.81, Florida Statutes. The first one of these subparts, §768.81(2), applies only to the claims of plaintiffs, such as AHA's claim in this case. This subpart is simply a restatement of what the common law in Florida has been, since the adoption of the doctrine of comparative negligence. It has nothing whatsoever to do with joint and several liability, or with apportionment of fault for plaintiff's damages, between or among tortfeasors. From the time of the enactment of §768.81, by the 1986 Legislature, until now, the wordage of subsection (2) of this Statute has remained constant. The wordage of subsection (3) of this Statute, however, has changed and evolved over the years, as the Legislature has given periodic or episodic attention to it.

The second basic subpart of this statute is contained in §768.81(3). This subpart deals with the question of apportionment among defendants of the responsibility for plaintiff's damages, and with the question of when apportionment is proper. It further deals with the question of how this apportionment is to be allocated – depending upon such factors as whether or not the plaintiff is at fault, and of the percentage of fault of each of the defendants.

Under Subsection (2) of §768.81, Florida Statutes, and Pre-existing Case Law, the Certified Question Should be Answered in the Affirmative, as Regards AHA's Claim Against CSX and Amtrak

Insofar as the claims of AHA (as the subrogee of S&S) against CSX and Amtrak are concerned, the answer to the first certified question is to be found by one's looking at §768.81(2), and at the common law of Florida which preceded the enactment of this statute, and which has now been codified by this statute. Section 768.81(2), did not change the common law of Florida; it simply declared -- in codified form – what the common law had been all along, first under contributory negligence and later under comparative negligence. Section 768.81(3) on the other hand, changed the preexisting common law of Florida, with reference to joint and several liability between or among defendants. Prior to the adoption of §768.81(3), each of joint and concurrent tortfeasors whose combined negligence had brought about plaintiff's damages, was jointly and severally liable with the other defendant or defendants, for the full amount of plaintiff's recoverable damages, regardless of the extent to which the negligence of each of them had contributed to the happening of plaintiff's damages. Walt Disney World v. Wood, 515 So. 2d 198 (Fla. 1987). In the Disney case, this Court recognized the apparent unfairness of this doctrine, but held that this was a matter for the Legislature rather than for the courts to correct. In the year 1986, the Legislature undertook a revision of the tort law of Florida -- in the name

of "tort reform" — and enacted Chapter 86-160, Laws of Florida, 1986, Section 60 of which, created §768.81, Florida Statutes. Section 768.81(3), changed the common law of Florida, with reference to the subject of joint and several liability.

The Close Identity Between the Dangerous Instrumentality Doctrine and the Inherently Dangerous Work Doctrine

Very closely related to each other in the law of Florida are two doctrines: (a) the doctrine that the owner of a dangerous instrumentality (such as an automobile in motion) is liable for the negligence of one whom the owner allows to use the instrumentality; and (b) the doctrine that if one contracts with another to perform an act which is inherently dangerous, the one who arranges to have the act performed is liable for the negligence of the person who performs the act, even though the arrangement between them purports to be an independent contractual relationship. The rules which bear upon the rights and responsibilities of the parties and of members of the public, arising out of both of these doctrines are virtually identical.

Florida Has a Long History of Charging a Plaintiff With The Negligence of One For Whose Conduct The Plaintiff Is Vicariously Liable

The Supreme Court of Florida – early on in the development of the automobile – ruled and continues to rule that an automobile in motion is a dangerous instrumentality, and that the owner of such automobile who allows another to use it upon the public roads is liable for the negligent operation of the automobile by the driver. Because of the Supreme Court's view of the automobile in this regard, Florida has a long history of *charging* a plaintiff-owner of such a vehicle with the negligence of the driver of the vehicle . Inherent in the holdings that the owner is liable for the negligent operation of his motor vehicle by the driver to whom he has given his consent, is that the owner is held to be the principal or master, and the driver is held to be the agent or servant. Anderson v Southern Cotton Oil Co., 73 Fla. 432, 74So. 975; Southern Cotton Oil Co. v. Anderson, 1920, 80 Fla. 441, 86 So. 629, 16 ALR 255; Herr v. Butler, 101 Fla. 1125, 132 So. 815; May v. Palm Beach Chemical Co., 77 So.2nd 468 (Fla. 1955); Petitte v. Welch, 167 So.2d 20 (3rd DCA 1964); and Raydel, Ltd. v. Medcalfe, 178 So.2d 569 (Fla. 1965). One way of stating this principle is to say that Florida has a long history of imputing to the plaintiff-owner of a motor vehicle, the negligence of someone whom the plaintiff-owner has allowed to drive the motor vehicle. Another way of stating this principle is to say that Florida has a long history

of *charging* to the plaintiff-owner of a motor vehicle, the negligence of someone whom the plaintiff-owner has allowed to drive the motor vehicle. It is a fundamental principle of law that the principal or master is liable for tortious acts which have been committed by the agent or servant, while he is acting within the scope and course of his employment. The law imputes to the principal or master, the negligence of the agent or servant. This means that the principal or master is *chargeable* with the negligence of the agent or servant. This is the very reason why the Legislature chose the expression in §768.81(2) that, "...any contributory fault chargeable to the claimant" diminishes proportionately the plaintiff's claim, rather than using the expression, "any contributory fault of which the claimant is guilty" diminishes proportionately the plaintiff's claim.

In enacting Chapter 86-160, Laws of Florida, 1986 -- the tort reform legislation -- the Legislature composed §768.71, Florida Statutes, which is the introductory section to the applicability of §768.81. This introductory section, that is Section 768.71, says that, "Except as otherwise specifically provided, this part applies to any action for damages, whether in tort or in contract." Section 768.81(4)(a), provides that the entire statute, §768.81, should apply not only to negligence actions but to all

> ...civil actions for damages based upon theories of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or

breach of warranty and the like theories.

It is obvious, therefore, that by the Legislature's use of the word "fault" in §768.81(2), the Legislature meant this word to have a much broader meaning than the word "negligence," or the expression "primary negligence," or the expression "active negligence." We submit that the use of the word "fault" in §768.81(2), was intended by the Legislature to include a claimant's being vicariously liable for the active or primary negligence or fault of another. Our statement in this regard is borne out by the wordage of Standard Jury Instruction #3.8(f) *Apportionment of fault*, of the Florida Standard Jury Instructions in Civil Cases, and the Committee's comments on this instruction.

In the case of Weber v. Porco, 100 So.2d 146 (Fla. 1958), this Court held that when the owner of an automobile (who is a passenger therein), which is being driven with his consent by another, sues a motorist for injuries which the plaintiff-owner has received in the collision, any contributory negligence (nowadays comparative negligence) of the plaintiff-owner's driver is *chargeable* to, or imputed to, the owner. At the time the Weber case was decided, Florida still adhered to the contributory negligence doctrine, and in the Weber case, the contributory negligence of the plaintiff-owner's driver, completely barred any cause of action by the plaintiff-owner against the other motorist. Now that Florida has adopted the doctrine of comparative

negligence, the negligence of the plaintiff-owner's driver would, of course, only diminish the value of the plaintiff-owner's claim for personal injury against the other motorist.

In the case of Smith v. Cline, 158 So.2d 553 (3d DCA 1963), Mr. Cline owned the automobile which was being driven by a relative of his, and in which his wife was riding as a passenger, when this automobile was involved in a collision with another vehicle. The owner's wife, Mrs. Cline, suffered injuries in this collision, and she and her husband, Mr. Cline, filed suit against those responsible for the operation of the other vehicle. Those responsible for the operation of the other vehicle, pleaded the contributory negligence of the person who was driving the Cline automobile. The appellate court held that the claim of Mr. Cline could be defeated by the contributory negligence of the person who was driving his automobile, simply because of his ownership and of his giving his consent to the driver, and that if the driver was acting as the agent of Mrs. Cline, the contributory negligence of the driver could defeat Mrs. Cline's claim. Again, at the time the Cline case was decided, Florida still adhered to the doctrine of contributory negligence. Presently, the comparative negligence of the driver of the Cline automobile would diminish – but would not defeat – the claim of Mr. Cline, as the owner of the vehicle, and would diminish – but not defeat – the claim of Mrs. Cline, assuming the driver was acting as the agent for Mrs. Cline.

In the case of Gulick v. Whitaker, 102 So.2d 847 (2d DCA 1958), the Gulick automobile which was involved in a collision with Mr. Whitaker's automobile, was owned by Mrs. Gulick (who was riding as a passenger in it), but it was being driven by Mr. Gulick. Mrs. Gulick suffered injuries, and Mr. and Mrs. Gulick filed suit against Mr. Whitaker. The trial court instructed the jury that any contributory negligence of Mr. Gulick, the driver, would defeat not only Mr. Gulick's claim, but also Mrs. Gulick's claim, inasmuch as Mrs. Gulick was the owner of the vehicle and she had given permission to Mr. Gulick to drive it. The jury returned a verdict in favor of the defendant, Mr. Whitaker, and the Gulicks appealed, claiming that the negligence of Mr. Gulick should not be chargeable to the claim of Mrs. Gulick. The appellate court held that Mr. Gulick's negligence was properly chargeable to Mrs. Gulick, and that

> ...When one permits another to operate his automobile under his license, he becomes as a matter of law the principal and the driver becomes his agent for this purpose.

In the case of Acevedo v. Acosta, 296 So.2d 526 (3d DCA 1974), the plaintiff-husband owned the automobile which was being driven by his plaintiff-wife, when the automobile was involved in a collision with another vehicle. The plaintiff-wife was injured in the collision, and she sued the other motorist for her injuries. The plaintiff-husband joined in his wife's suit, seeking a recovery for his consequential damages

based upon the injuries to his wife. The appellate court held that the plaintiff-husband was charged with the plaintiff-wife's contributory negligence, flowing from his ownership of the automobile.

In each of these cited cases, the plaintiff was vicariously liable for the negligence of another, and in each of these cases the plaintiff's claim was either defeated (under contributory negligence) or diminished in value (under comparative negligence), because – although he was free of primary negligence or primary fault himself – the plaintiff was *charged* with the negligence or fault of another.

In the non-automobile case of Cody v. Kernaghan, 682 So.2d 1147 (4th DCA 1996), the minor Plaintiff David Kernaghan was injured while he was attending a birthday party at the home of the Defendants, Mr. and Mrs. Cody. The minor Plaintiff and his parents all sued Mr. and Mrs. Cody. At the trial of the case, the jury found that the negligence of Mr. and Mrs. Cody contributed on the order of 65% to the happening of the minor Plaintiff's injuries, and that the minor Plaintiff's negligence contributed on the order of 35% to the happening of his own injuries. The Plaintiffs Mr. and Mrs. Kernaghan, as parents of the minor Plaintiff, were not found to be at fault in any percentage. The appellate court nevertheless held that the value of the individual claims of Plaintiffs Mr. and Mrs. Kernaghan should be reduced by the 35% of negligence which the jury attributed to their son, David, because the claims of the

parents were derivative claims and the negligence of the Plaintiff child was chargeable to them, even though they, themselves, were innocent of negligence.

As basic an encyclopedic text as Florida Jurisprudence, states at 4A Fla Jur 2d, Automobiles and Other Vehicles §601:

> Imputed negligence is the placement of responsibility on one person for the negligence of another person. In the context of civil liability for automobile accidents the imputation of the negligent conduct of one person to another person may either render the latter liable for injuries sustained by a third person as a result of such negligent conduct, or may preclude or limit the latter's recovery for injuries which similarly result from such negligent conduct.

The principles which we have cited above, describe exactly the factual situation which underlies the first certified question. These court rulings and these citations of authority, as well as authorities which will be cited later in this brief, mandate that the first certified question be answered in the negative, as regards the claim of AHA against Rountree, and in the affirmative as regards the claims of AHA against the railroad entities.

The above-cited cases and authorities deal with automobile accidents. However, the principle or rule is the same when the subject under discussion is the doctrine of inherently dangerous activity. Price v. Florida Power & Light, Co., 159 So.2d 654 (2nd DCA 1963), reversed on grounds not applicable here by this Court

under the name of Florida Power & Light Co. v. Price, 170 So.2d 293 (Fla. 1964); Channell v. Musselman Steel Fabricators, Inc., 224 So.2d 320 (Fla. 1969); Baxley v. Dixie Land & Timber Co., 521 So.2d 170, (1st DCA 1988); and Midyette v. Madison, 559 So.2d 1126 (Fla. 1990). The rules of liability which flow from the dangerous instrumentality doctrine are the same as those which flow from the inherently dangerous work doctrine. The courts of Florida have held that when the first person contracts with another to engage in an activity on behalf of the first person which is inherently dangerous, the actor becomes the agent or servant of the first person, and the first person becomes the principal or master of the actor, even though the relationship between the first person and the actor has been structured between them as one of an independent contractor. Another way of expressing this principle is that the first person can contract away the obligation to perform the inherently dangerous endeavor, but he cannot contract away his liability for the negligence of the actor in performing the inherently dangerous maneuver. This is exactly the factual situation in our case, as will be demonstrated below.

Initially, GE contracted with KUA to assemble, to sell, and to deliver to KUA at the Plant, the combustion turbine and its accouterments. GE contracted away this responsibility to S&S. S&S, in turn, contracted with WOKO to arrange for the transport of the turbine ensemble from the Port of Tampa to the Plant. WOKO, in

turn, contracted with Rountree to make the physical delivery of the combustion turbine and its accouterments from the Port of Tampa to the Plant. Because the trial court in our case held that the transporting of the combustion turbine was an inherently dangerous maneuver, the Court ruled that GE, S&S and WOKO are all liable for the negligence of Rountree. Under the inherently dangerous work doctrine, GE, S&S, WOKO and Rountree all had the responsibility to use reasonable care to deliver the combustion turbine to the Plant. GE, S&S and WOKO – all of whom were in the chain of responsibility for the safe delivery of the turbine – are secondarily liable for Rountree's negligence. The trial court held that Rountree was negligent and that Rountree's negligence contributed to the happening of the collision between the Rountree transporter and the Amtrak passenger train, on the order of 59%. Rountree is primarily responsible to those who were injured or damaged by Rountree's negligence; GE, S&S and WOKO are secondarily liable to those who were injured or damaged by Rountree's negligence. GE, S&S and WOKO are each vicariously liable for Rountree's negligence. They are all *chargeable* with Rountree's negligence. Therefore, AHA (through S&S) is *chargeable* with this contributory fault of Rountree.

Under the common law of Florida, "as it has existed since the memory of man runneth not to the contrary," and under §768.81(2), Florida Statutes, S&S is vicariously liable, or is secondarily liable, for the negligence of Rountree, and if S&S

had sued CSX and Amtrak for S&S's own losses, there can be no question that S&S would have been bound by the comparative negligence of Rountree, and thus S&S could have collected only 41% of its proven losses against the railroad companies. Inasmuch as S&S's insurer, AHA, can have no greater rights than S&S, it necessarily follows that AHA can recover only 41% of its losses against the combination of Rountree and the railroad entities. Conversely, if S&S had been sued for the negligence of Rountree, there is no question but that S&S's vicarious liability for the negligence of Rountree, would have cast S&S in liability on account of its vicarious liability. As the opinion of the Eleventh Circuit brings out, the Restatement (Third) of Torts: Apportionment of Liability §5, says that "[t]he negligence of another person is imputed to a plaintiff whenever the negligence of the other person would have been imputed had the plaintiff been the defendant." Inasmuch as S&S as a defendant, would have had Rountree's negligence imputed to it, so as a Plaintiff AHA (as the subrogee of S&S) is chargeable with the negligence of Rountree.

AHA has confused the issue by improperly trying to mix or mingle the provisions of §768.81(3) (which applies to the question of allocation among defendants of the responsibility to pay for plaintiff's damages) with §768.81(2) (which applies only to the claims of plaintiffs). Every case which has been cited by AHA to the Eleventh Circuit, and to this Court, involves the allocation or attempted allocation

among defendants of the responsibility for paying for plaintiff's damages. This is also true of the cases which have been cited in the opinion of the Eleventh Circuit upon this point, except for the case of Cody v. Kernaghan, *supra*. No case which has been cited in AHA's briefs, or which has been referred to in the opinion of the Eleventh Circuit, involves the reduction or diminution of the value of a plaintiff's claim on account of the plaintiff's secondary or vicarious liability for the primary negligence of another, except for Cody.

Section 768.81(2), Florida Statutes, plainly says that

> ...any contributory fault chargeable to the claimant [S&S and thus AHA] diminishes proportionately the amount awarded as ... damages ... [emphasis added and names supplied]

AHA, however, contends that because S&S is only vicariously liable for the fault of Rountree – rather than its being primarily negligent or its being primarily at fault, the value of its claim should not be reduced by the negligence of Rountree. In its urging this specious conclusion, AHA has made three significant mistakes:

1. It has misconstrued the expression "contributory fault chargeable to the claimant," as used in §768.81(2), by improperly claiming that this language means that the claimant itself (S&S, and thus AHA) must be guilty of primary fault or primary negligence before the value of its claim can be diminished. This, however, is not what

the Statute says. There is no doubt that Rountree was guilty of negligence and guilty of fault. There is no doubt that under the inherently dangerous work doctrine, this negligence or fault of Rountree is *chargeable* to S&S, and thus to AHA. The question is not whether AHA or S&S has been guilty of negligence or fault, but the question is whether S&S and AHA are *chargeable* with the negligence or fault of Rountree. Everyone concedes that S&S was not guilty of primary fault or primary negligence, but the fact remains that the trial court properly held that S&S (and thus AHA) is *chargeable* with the negligence or fault of Rountree, because of the operation of the inherently dangerous work doctrine. There is no doubt that AHA is so *chargeable*, under the inherently dangerous work doctrine.

There is no legal difference between our case, and the cases which are cited above in an automobile accident context, which held that the plaintiff's claim would be either barred or diminished, on account of the negligence of the plaintiff's driver, which was *chargeable* to the plaintiff, nor is there any legal difference between our case and the case of Cody v. Kernaghan, *supra,* which held that the parents -- though innocent of negligence -- were chargeable, in the processing of their plaintiff claims, with the negligence of their child. Nothing is accomplished or proven by AHA's constantly urging in its briefs that S&S was held not to be primarily negligent or primarily at fault for the happening of the accident. No one disputes that S&S (and

thus AHA) was free of primary fault, and that it was held liable only secondarily or vicariously for the primary negligence of Rountree. So what? The owners in the automobile cases which we have cited above, were only secondarily, or vicariously, liable for the primary negligence of their drivers, but the fact of the matter is, the courts defeated or diminished the value of their plaintiff claims, because they were vicariously liable for the negligence of others. This is not a new or an uncertain principle of Florida law! AHA cannot properly claim that its opponents in this case are asking the courts to announce a new principle of law, in their asking the courts to charge AHA with the negligence of Rountree, and thus to diminish the value of AHA's claim to the extent of Rountree's negligent participation in the causing of the accident.

2. While we do not intend our expressions to be in any way scornful of AHA's efforts to set forth its arguments in the light most favorable to it, we must say that AHA has unwarrantedly attempted to mix and to mingle the provisions of §768.81(3) with the provisions of §768.81(2), and in furtherance of this process, has brought forth an illogical and unconnected farrago or stew of abstract legal pronouncements and out-of-context quotations from reported cases, dealing with the subjects of vicarious liability, joint and several liability, and whether liability for a plaintiff's damages can be apportioned, under §768.81(3), between two defendants when one of them is liable only vicariously. The mental fog which has been created

by the presence of these impertinent pronouncements and out-of-context quotations, makes it difficult for the Court to unscramble this mosaic, so as to make some logical sense of it. Such cases as Nash v. Wells Fargo Guard Services, *supra*; and J. R. Brooks & Son, Inc., v. Quiroz, 707 So.2d 861 (3rd DCA 1998), do not bear upon the proper answer to this first certified question, as regards the claims of AHA against CSX and Amtrak. The question of whether two or more "parties" are joint tortfeasors, is a question which comes into play only under §768.81(3), when the point at issue is whether the liability for the plaintiff's damages will be visited upon the defendants in accordance with their percentages of fault, or in accordance with the rule of joint and several liability. But this is not the point at issue in the first certified question, at least as regards AHA's claims against the railroads.

3. Insofar as AHA's claims against CSX and Amtrak are concerned, AHA has mis-read the import of Nash v. Wells Fargo Guard Services, 678 So.2d 1262 (Fla. 1996), and has taken out of context, the quotation from the opinion in Nash at page 1264, to the effect 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.

This quotation is a correct statement of the law, when the question at hand is whether a defendant who is primarily negligent, or primarily at fault, makes an effort to lessen the extent of his liability by trying to spread it to an entity who is only vicariously or secondarily at fault, for the defendant's active or primary negligence or fault. This is the situation as regards AHA's claims against Rountree. However, in the context of the Court's consideration of the first certified question, insofar as AHA's claims against CSX and Amtrak are concerned, this quotation from Nash, has nothing whatsoever to do with providing the proper answer to the certified question. The decision and opinion in Nash, did not involve §768.81(2), at all. Mrs. Nash, the plaintiff who was making the claim against Wells Fargo, was not vicariously or secondarily liable for the primary negligence of anyone else. Therefore, there is no way that §768.81(2), could have had any application whatsoever to the opinion and decision in the Nash case. Wells Fargo, the defendant in Nash, made an effort to have the responsibility for its active or primary negligence, spread between it and the Methodist Hospital, simply because the Methodist Hospital was vicariously or secondarily liable for the primary negligence of Wells Fargo. This Court properly held that Wells Fargo could not succeed in this effort. This unsuccessful effort on the part of Wells Fargo to have the effect of its primary negligence apportioned between it and the hospital, necessarily was made under the provisions of §768.81(3), rather than

§768.81(2), which is the section of this statute which is applicable to the claim of AHA. In effect, in Nash, supra., the Supreme Court of Florida held that a defendant who is seeking to have its liability lessened and a portion of it transferred to someone who is not guilty of active negligence, but who is only vicariously liable for the defendant's own primary negligence, cannot succeed in doing so. This is a far cry from AHA's claim that it and its insured, S&S, are not chargeable with the liability of Rountree, as regards AHA's claims against the railroads. Insofar as our case is concerned, the holding in Nash, is pertinent only to the point that AHA is not chargeable with Rountree's negligence, only in AHA's processing its claim against Rountree.

It should be borne in mind that S&S (and thus AHA) is chargeable with the negligence of Rountree, only when it sues someone else than Rountree. When AHA sues Rountree (as it did in this case), the value of AHA's claim against Rountree should not be reduced by Rountree's own negligence, for which S&S is only vicariously liable. Unfortunately for AHA (for other reasons than this principle of law), the federal trial court in this case limited Rountree's responsibility for AHA's damages to the value of one million ($1,000,000.00) dollars. For reasons best known to it, AHA has not challenged this ruling of the trial court in its appeal to the United States Court of Appeals for the Eleventh Circuit. Except for the fact that in its contract with

WOKO for the transport of the turbine and accessories, AHA's insured, S&S, agreed that the transporter of the turbine need have insurance only to the extent of one million ($1,000,000.00) dollars, AHA would have received final judgment against Rountree for $4,516, 640.00, the full amount of its proven damages. Surely the railroad entities are not responsible for the fact that AHA's insured, S&S, contracted away all of its rights against Rountree except its entitlement to $1,000,000.00.

UNDER §768.81(3), FLORIDA STATUTES, NEITHER CSX NOR AMTRAK IS LIABLE ON A JOINT AND SEVERAL BASIS FOR AHA'S PROVEN DAMAGES OF $4,516,640.00

Subsection (3) of §768.81 in pertinent part, 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; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.

Under the plain language quoted above, there is no doubt that Rountree is liable on a joint and several basis, for the entire extent of AHA's proven damages, and judgment should have been entered against Rountree for the entire proven damages of AHA in the amount of $4,516,640.00 -- except for the fact that AHA's insured, S&S, had contracted away all of its and AHA's claim against Rountree except for

$1,000,000.00. Rountree was liable on a joint and several basis for AHA's entire proven damages, not for just 59% of AHA's proven damages. This is true because (a) in AHA's suit against Rountree, AHA is not considered to be at fault at all, inasmuch as it is not chargeable with Rountree's negligence when it is suing Rountree, and (b) in any event, Rountree's fault is greater than that of S&S (and thus AHA). Therefore, under the plain language of subsection (3), Rountree was liable on a joint and several basis for the full extent of AHA's proven damages.

On the other hand, as regards the claim of AHA against CSX and Amtrak, inasmuch as AHA is chargeable with Rountree's negligent contribution of 59%, AHA's contributory fault is greater than that of either CSX (33%) or Amtrak (8%). Therefore, neither CSX nor Amtrak is liable on a joint and several basis for AHA's proven damages. At the very most, under the provisions of subsection (3) of the statute, CSX should be liable for only 33% ($1,490,491.20) of AHA's proven damages, and Amtrak should be liable for only 8% ($361,331.20) of AHA's proven damages.

THE CASES WHICH HAVE BEEN CITED BY AHA, AND THE CASES WHICH ARE REFERRED TO IN THE OPINION OF THE ELEVENTH CIRCUIT, WHICH MAY APPEAR TO THROW DOUBT UPON WHETHER AHA IS CHARGEABLE WITH THE NEGLIGENCE OF ROUNTREE, ARE DISTINGUISHABLE

The cases which have been cited by AHA, and the cases which have been referred to in the opinion of the Eleventh Circuit, and which have given the Eleventh Circuit pause as to whether the negligence of Rountree is properly *chargeable* to AHA, are distinguishable from our case, as regards AHA's claim against CSX and Amtrak. We have already distinguished the cases of Nash v. Wells Fargo Guard Services, *supra* and J. R. Brooks & Son, Inc., v. Quiroz, *supra*. The case of Wal-Mart Stores, Inc. v. McDonald, 676 So.2d 12,20 (1st DCA 1996), *affirmed sub nom*., Merrill Crossing Associations v. McDonald, 705 So.2d 560 (Fla. 1997) has no bearing upon the claim of AHA against the railroads. The Wal-Mart case did not deal with the question of whether the value of the Plaintiff's claim would be proportionately reduced on account of the Plaintiff's being vicariously liable for the conduct of someone else. The Plaintiff in Wal-Mart was not vicariously liable for the conduct of anyone else. Anyway, Wal-Mart dealt only with subsection (3) of §768.81, not subsection (2), which is the subsection which is applicable to our case, regarding the claim of AHA against the railroads. This is also true of such cases as D'Amario v. Ford Motor Co.,

806 So.2d 424 (Fla. November 21, 2001) (No. SC95881, SC96139) (per curiam); Suarez v. Gonzalez, 27 Fla. L. Weekly D730, 732 (4th DCA 2002); Association for Retarded Citizens-Volusia, Inc. v. Fletcher, 741 So.2d 520, 524-25 (Fla. Dist. Ct. App. 1999); and Fabre v. Marin, 623 So.2d 1182, 1185 (Fla. 1993), *overruled in part on other grounds*, Wells v. Tallahassee Memorial Regional Medical Center, 659 So.2d 249 (Fla. 1995). These cases are distinguishable from our case, upon the point of whether AHA is chargeable with the negligent contribution of Rountree to the collision, in AHA's suit against the railroads, because these cases do not deal with the question of whether a plaintiff in the processing of its own claim against a defendant for whose negligence the plaintiff is not vicariously liable, will be chargeable with the negligence of a party for whose negligence or fault the plaintiff is vicariously liable. Our case of AHA against the railroads does specifically deal with this question. The cases which we have cited in this brief plainly and unambiguously hold that a plaintiff is so chargeable. So does the plain language of subsection (2), of the statute.

CONCLUSION

For all of the reasons stated above, KUA and FMPA, as putative indemnitors of the railroads, urge upon the Court the conclusion that, as regards the claim of AHA (as the subrogee of S&S) against CSX and Amtrak, the first certified question should be answered in the affirmative, that the value of AHA's claim against CSX and Amtrak should be reduced by the percentage of negligent contribution to the happening of the collision of Rountree (59%). Thus, at the very most, CSX should be liable for no more than 33%, and Amtrak should be liable for no more than 8%, of AHA's proven damages of $4,516,640.00.

Michael J. Roper
Florida Bar No. 0473227
Ernest H. Kohlmyer, III
Florida Bar No. 0110108
BELL, LEEPER & ROPER, P.A.
Post Office Box 3669
Orlando, FL 32302
(407) 897-5150
(407) 897-3332 (Fax)

Alton G. Pitts
Florida Bar No. 063500
ALTON G. PITTS, P.A.
401 West Colonial Drive, Suite 2
Post Office Box 540447
Orlando, FL 32854-0447
(407) 650-1610
(407) 650-1611 (Fax)

By:_____
Michael J. Roper
Attorney for KUA

By: _____
Alton G. Pitts
Attorney for FMPA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of this brief have been furnished via U.S. Mail to those who are listed on the attached service list, this 28th day of May, 2002.

_____
Alton G. Pitts

CERTIFICATE OF TYPE FACE COMPLIANCE

The undersigned counsel hereby certifies that the size and style of type used in this brief is: Times New Roman, 14-point.

_____
Alton G. Pitts
Florida Bar No. 063500

SERVICE LIST

L. Lee Williams, Jr., Esq.
Williams & Gautier, P.A.
P. O. Box 4128
Tallahassee, FL 32315-4128

Michael J. Roper, Esq.
Bell, Leeper & Roper, P.A.
P. O. Box 3669
Orlando, FL 32802

Thomas M. Burke, Esq.
Holland & Knight
Post Office Box 1526
Orlando, FL 32802-1526

James M. Warden, Esq.
Warden Triplett Grier
40 Corporate Woods, Suite 120
9401 Indian Creek Pkwy.
Overland Park, KS 66210

Daniel J. Fleming, Esq.
Melkus, Fleming & Gutierrez
410 Ware Blvd., Suite 1101
Tampa, FL 33619

William G. Ballaine, Esq.
Landman, Corsi, Ballaine & Ford, PC
120 Broadway, 27th Floor
New York, NY 10271

Michael Karcher, Esq.
Underwood, Karcher & Karcher
Grove Plaza Bldg., 6th Floor
2900 Middle Street
(S.W. 28th Terrace)
Miami, FL 33133

Sutton G. Hilyard, Jr., Esq.
Hilyard, Bogan, Palmer & Lockeby
Post Office Box 4973
Orlando, FL 32802-4973

John W. Bussey, III, Esq.
Bussey & Associates
Post Office Box 531086
Orlando, FL 32853-1086