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Messmer v. Teacher's Insurance Company: Turning Florida Law On Its Head

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Abstract

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KEYWORDS: problems, teacher, insurance

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I. INTRODUCTION

In our society, damages are often caused by the activities of multiple actors. The apportionment of fault for such damages among various responsible actors raises difficult and controversial questions.[1] Recently, in *Messmer v. Teacher's Insurance Company*[2] and *Fabre v. Marin*,[3] the Fifth and Third District Courts of Appeal, respectively, were confronted with one of these questions in interpreting section 768.81(3) of the Florida Statutes. The statute, entitled "Apportionment of Damages," reads, in its entirety, as follows:

1. The narrow focus of this comment does not undertake to consider the current movement in American jurisprudence to sweep across the nation with tort reform. Rather, this comment asserts the controversies and inconsistencies born out of recent Florida case law and analyzes them in conjunction with well-established concepts of apportionment of damages.

2. 588 So. 2d 610 (Fla. 5th Dist. Ct. App. 1991), *review denied*, 598 So. 2d 77 (Fla. 1992).

3. 597 So. 2d 883 (Fla. 3d Dist. Ct. App. 1992).

> 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 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.[4]

While interpreting section 768.81(3), the Fifth and Third District Courts of Appeal determined whether the fault of a non-party must be considered in determining the liability of the parties to an action. In *Messmer*, the Fifth District Court interpreted section 768.81(3) to require allocation of fault among all negligent actors causing a plaintiff's injuries, regardless of whether the actor has been or may be joined in the action.[5] In *Fabre*, however, the Third District Court flatly rejected the Fifth District Court's interpretation and construed section 768.81(3) to require allocation of fault only against an actor made a party to the action.[6] In their inconsistent interpretations of section 768.81(3), the Fifth and Third District Courts have placed themselves in direct conflict with each other.

This conflict, however, is soon to be resolved by the Florida Supreme Court in *Fox v. Allied-Signal, Inc.*[7] Through *Fox*, the Eleventh Circuit Court of Appeals certified to the Florida Supreme Court the question of whether the interpretation of section 768.81(3) requires consideration by the jury of a non-party's comparative fault in order to determine a party's liability.

In evaluating this question, section 768.81(3) presents several complex interpretation problems for the Florida Supreme Court which may not be simply resolved. Admittedly, the *Messmer* interpretation recognizes that the failure to consider the negligence of all actors, whether parties or not, prejudices the defendant who is otherwise required to bear a greater portion of the plaintiff's loss than is attributable to the defendant's fault.[8] Nonetheless, the *Fabre* court espoused a more well-reasoned construction of section 768.81(3) in that its interpretation is consistent with preexisting common law and the Florida Legislature's intent, as revealed in the statute's language and

4. FLA. STAT. § 768.81(3) (1991) (as originally codified in 1986).
5. 588 So. 2d at 610.
6. 597 So. 2d at 883.
7. 966 F.2d 626 (11th Cir. 1992).
8. 588 So. 2d at 612.

legislative history.[9]

This comment critiques the *Messmer* court's poorly reasoned interpretation of section 768.81(3) and analyzes the interpretation's inconsistencies with previously settled legal and social policies of apportionment of damages. Part two of this comment sets forth the factual and legal similarities of *Messmer* and *Fabre* and the inconsistent opinions which were reached by their respective courts. Part three of this comment consists of a discussion interpreting section 768.81(3) which focuses, primarily, on statutory language and statutory construction; and secondarily, on an interpretation of the language of the Uniform Comparative Fault Act and other state apportionment of fault statutes with language similar and dissimilar to the language of section 768.81(3). Part four of this comment encompasses a discussion of the troublesome practical effects and ramifications the *Messmer* decision advances, not only for plaintiffs and non-parties, but for the defendants it appears to support.

II. THE *MESSMER/FABRE* SPLIT

A. *Messmer v. Teacher's Insurance Company*

On January 22, 1988, Ann Messmer was injured in a car accident when the car, in which she was a passenger, and which was driven by her husband, Arthur Messmer, was involved in a collision with an uninsured driver.[10] Ann Messmer was insured under a $300,000 uninsured motorist policy issued by Teacher's Insurance Company ("Teacher's").[11] As stipulated in the insurance contract, Ann Messmer's entitlement to benefits was resolved by a three person arbitration panel.[12] The only named parties to the arbitration action were Ann Messmer and Teacher's, the uninsured motorist carrier, standing in the shoes of the uninsured driver.[13] Arthur Messmer was not a joint plaintiff nor a defendant because he was immune from suit under the doctrine of interspousal immunity.[14]

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9. 597 So. 2d at 885-86.
10. *Messmer*, 588 So. 2d at 611.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* Under Florida's doctrine of interspousal immunity, actions between spouses are barred under conditions which involve policy reasons for maintaining the doctrine such as domestic peace and the potential for fraud and collusion. Sturiano v. Brooks, 523 So. 2d 1126, 1128 (Fla. 1988).

The arbitration panel concluded that Arthur Messmer was eighty percent at fault in the accident and the uninsured motorist was twenty percent at fault.[15] The panel awarded Ann Messmer $252,455 as compensation for the injuries she received in the accident: $52,455 in economic damages and $200,000 in non-economic damages.[16] Thereafter, Teacher's paid Ann Messmer the $52,455 in economic damages—but only $40,000, representing the uninsured motorist's percentage, of the $200,000 non-economic damages awarded.[17]

Ann Messmer appealed Teacher's unilateral reduction to the Fifth District Court of Appeal.[18] In justification for upholding the reduction of the amount of non-economic damages, the Fifth District Court relied on the pivotal language of section 768.81(3) allowing the trial court to enter judgment against liable parties on the basis of each party's percentage of fault. The court determined that the aggregate fault on which each party's percentage of fault must be based is "the total fault of *all participants in the accident* . . . ."[19]

In support of its opinion, the court interpreted the express language of section 768.81(3) to the effect that

> the word "party" simply describes an entity against whom judgment is to be entered and is not intended as a word of limitation. Had the legislature intended the apportionment computation to be limited to the combined negligence of those who happened to be parties to the proceeding, it would have so stated.[20]

Additionally, in reviewing the history of section 768.81(3), the court stated that the intent and purpose of the legislature's adoption

> was to implement a system of equating fault with liability, at least as to non-economic damages. The obvious purpose of the statute was to partially abrogate the doctrine of joint and several liability by barring its application to non-economic damage. To exclude from the computation the fault of an entity that happens not to be a party to the particular proceeding would thwart this intent.[21]

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15. *Messmer*, 588 So. 2d at 611.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 611 (emphasis added).
20. *Messmer*, 588 So. 2d at 611-12.
21. *Id.* at 612.

B. *Fabre v. Marin*

In April, 1992, the Third District Court of Appeal was presented with *Fabre v. Marin*,[22] a case factually indistinguishable from *Messmer*. The Third District Court, however, refused to adopt the Fifth District Court's interpretation of section 768.81(3).[23]

Ann Marin was injured in a car accident when the car, in which she was a passenger, and which was driven by her husband, Ramon Marin, struck an expressway median wall.[24] Ann Marin filed suit against Eddy and Marie Fabre, alleging that Marie Fabre was driving the automobile which cut the Marins off while changing into their lane, and that Marie Fabre's negligence was the cause of Ann Marin's injuries.[25] During discovery, Ann Marin learned that the Fabre's liability insurance coverage was limited to $10,000.[26] The trial court granted Ann Marin leave to amend her complaint to include a claim against her own insurance company, State Farm Mutual Automobile Insurance Company ("State Farm"), which provided her with $500,000 in uninsured/underinsured motorist coverage.[27]

Thereafter, the jury returned a verdict in favor of Ann Marin finding Marie Fabre and Ramon Marin each fifty percent at fault in the accident.[28] The jury awarded Ann Marin $12,750 in economic damages and $350,000 in non-economic damages.[29]

The Fabres and State Farm moved for a new trial, for remittitur,[30] and for a reduction of Ann Marin's recovery to half the verdict.[31] State Farm's motion for a new trial was denied, but the trial court granted the motion for remittitur and reduced Ann Marin's award of economic damages to $2,750.[32] An amended final judgment was entered in the total amount of $357,750 against the Fabres and State Farm.[33] There was no written order

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22. 597 So. 2d 883 (Fla. 3d Dist. Ct. App. 1992).
23. *Id.*
24. *Id.*
25. *Id.* Ann Marin sued Eddy Fabre as owner of the automobile.
26. *Id.* at 884.
27. *Fabre*, 597 So. 2d at 884.
28. *Id.*
29. *Id.* at 885.
30. *See* BLACK'S LAW DICTIONARY 1295 (6th ed. 1990), which defines remittitur as "[t]he procedural process by which an excessive verdict of the jury is reduced . . . . If money damages awarded by a jury are grossly excessive as a matter of law, the judge may order the plaintiff to remit a portion of the award."
31. *Fabre*, 597 So. 2d at 885.
32. *Id.*
33. *Id.*

with regard to a reduction of the verdict by half.[34] Both the Fabres and State Farm appealed.[35]

The Fabres and State Farm contended that *Messmer*, being indistinguishable from their case, should apply and that section 768.81(3) required that the judgment against them be limited to fifty percent of the damages awarded in accordance with the percentage of fault the jury attributed to Ramon Marin.[36] Nonetheless, the Third District Court declined to adopt the *Messmer* construction and stated that, with regard to an innocent plaintiff, section 768.81(3) limits the total on which damages are to be apportioned only to a defendant's degree of fault.[37]

The court stated that section 768.81(3) was unclear in that it failed to "indicate what quantity or total the court should utilize to factor the 'percentage of fault' for which judgment shall be entered, that is, whether to consider the fault attributable *to all defendants*, or *to all participants in the accident*."[38] Finding section 768.81(3) ambiguous, the court engaged in statutory construction to define the term "party" as the legislature intended it to be construed.[39] The court found that the term "party" could be referred to in one of three ways: 1) all persons involved in the accident, 2) defendants in the lawsuit, or 3) all litigants in the lawsuit.[40]

Reasoning that subsection three requires a court to enter judgment against "parties liable," and that a court lacks jurisdiction to enter a judgment against non-parties, the court declined to adopt the first construction.[41] The court held that it was not the intent of the legislature to allow consideration of non-party fault and thereby "bar a fault-free claimant from recovery in the many situations where one of the tortfeasors is immune from liability."[42] The court found that such a result would ensue if the *Messmer*

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34. *Id.*
35. *Id.* at 883.
36. *Fabre*, 597 So. 2d at 883.
37. *Id.* at 885.
38. *Id.* (emphasis added). Had this case involved a plaintiff at fault, the court would have included the plaintiff, Ann Marin, in its scenario and decided whether, in apportioning damages, to consider the fault attributable to all plaintiffs and defendants (rather than just to all defendants) or to all participants in the accident.
39. *Id.*
40. *Id.*
41. *Fabre*, 597 So. 2d at 885. This first construction, that the term "party" refers to all individuals involved in the accident, is precisely the construction that the *Messmer* court adopted.
42. *Id.* at 886.

court's construction was accepted.[43]

III. Interpreting Florida Statute Section 768.81(3), Entitled "Apportionment of Damages"

In their inconsistent interpretations of section 768.81(3), the Fifth and Third District Courts have placed themselves in direct conflict with each other.[44] Resolution of this controversy depends upon an analysis of section 768.81(3).

A. *Statutory Language*

When giving effect to a statute, the primary objective is to determine the legislative intent from the literal meaning of the language of the statute.[45] Where the legislative intent of the statute is clear and certain from the plain meaning of the statute's language, the statute need only be applied to give effect to its terms.[46]

The Florida Legislature expressed its intent that apportionment of fault applies only to parties to an action by using the term "party."[47] The

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43. *Id.* The *Fabre* court did not specifically state whether it construed the term "party" to mean "defendants in the lawsuit" or "all litigants in the lawsuit." However, it can be logically inferred from the court's reasoning that if an accident involves a fault-free plaintiff, the term "party" shall be read as "defendants in the lawsuit;" but if the accident involves a plaintiff at fault, the term "party" shall be read as "all litigants in the lawsuit."

44. *See supra* text accompanying notes 5-6.

45. Vocelle v. Knight Bros. Paper Co., Inc., 118 So. 2d 664, 666 (Fla. 1st Dist. Ct. App. 1960); S.R.G. Corp. v. Department of Revenue, 365 So. 2d 687, 689 (Fla. 1978). *See generally* 49 Fla. Jur. 2d *Statutes* § 110 (1984 & Supp. 1992) (discussing the interpretive powers of courts).

46. State v. Egan, 287 So. 2d 1, 4 (Fla. 1973); Rinker Materials Corp. v. North Miami, 286 So. 2d 552, 553-54 (Fla. 1973); Englewood Water Dist. v. Tate, 334 So. 2d 626, 628 (Fla. 2d Dist. Ct. App. 1976); Brooks v. Anastasia Mosquito Control Dist., 148 So. 2d 64, 66 (Fla. 1st Dist. Ct. App. 1963). *See generally* 49 Fla. Jur. 2d *Statutes* §§ 110, 121 (1984 & Supp. 1992) (discussing the interpretive powers of courts and adherence to the literal meaning of statutes).

47. Section 768.81(3) reads as follows:

> 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 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.

legislature did not refer to "non-parties," "all participants in an accident," "tortfeasors," "wrongdoers," or any other term which would describe an actor who may have contributed to the plaintiff's loss.[48] As defined, the ordinary use and meaning of the term "party" is

> a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought, whether in law or in equity, *the party plaintiff or defendant . . . all others* who may be affected by the suit, indirectly or consequently, *are* persons interested but *not parties*."[49]

Additionally, section 768.81(3) requires a court "to enter judgment against each party liable."[50] If an actor is not a named party to the action over which a court has jurisdiction, an assessment of fault made by the jury is not legally binding on the actor.[51] Thus, it would be improper for a court to enter judgment against a non-party.[52] Therefore, the legislature could not have intended the term "party" to include a non-party.

An argument for apportioning fault to a non-party arises, however, since the clear language of section 768.81(3) provides that judgment shall be entered "on the basis of such party's percentage of fault and *not* on the basis of the doctrine of joint and several liability."[53] The statute, however, fails to indicate on what "total" each party's percentage of fault is to be based. Nevertheless, the fact that the phrase "the court shall enter judgment against each party liable" precedes this portion of the statute, dictates that

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FLA. STAT. § 768.81(3) (1991) (emphasis added).

48. *Id.*

49. BLACK'S LAW DICTIONARY 1122 (6th ed. 1990) (emphasis added). Additionally, as to the applicability of the maxim "Expressio Unius Est Exclusio Alterius," the mention of one thing, in this case, the term "party," implies the exclusion of another, the term "non-party." Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976). *See generally* 49 FLA. JUR. 2d *Statutes* § 126 (1984) (construing the expression "Expressio unius est exclusio alterius").

50. FLA. STAT. § 768.81(3) (1991).

51. *See* Chastain v. Uiterwyk, 462 So. 2d 1212, 1213 (Fla. 2d Dist. Ct. App. 1985) (stating that a court cannot effect a ruling over any actor not a party); *see also* Blocker v. Wynn, 425 So. 2d 166, 169 (Fla. 1st Dist. Ct. App. 1983) (refusing to instruct the jury that it could apportion negligence to the non-party employer since no effort was made to join the employer as a party).

52. *See* Creamer v. Beech Aircraft Corp., 568 So. 2d 547, 547 (Fla. 1st Dist. Ct. App. 1990) (holding it is reversible error for the trial court to enter judgment on a contribution claim against an entity who is not a named party to the suit).

53. FLA. STAT. § 768.81(3) (1991) (emphasis added).

the "total" should be based on the combined fault of only the parties to the action.

Applying the literal definition of the term "party" and thus, the Florida Legislature's intent to *Messmer*, the Fifth District Court was incorrect in diminishing Ann Messmer's judgment by allocating fault to Arthur Messmer since he was not a party to the action. However, as measured against the *Fabre* court's decision not to allocate fault to Ramon Marin to reduce Ann Marin's judgment, the *Fabre* court, by construing the term "party" to include only those actors who are parties to the action, maintained the legislature's intent as set forth in the statutory language of section 768.81(3).

Additionally, the *Fabre* court's construction illustrates the thoroughly misplaced fear of the *Messmer* court that failing to include a non-party's fault in the "total" on which each party's percentage of fault is to be based defeats the legislature's intent to partially abrogate the doctrine of joint and several liability. As construed in *Fabre*, the "total" on which each party's percentage of fault is to be based is the combined fault of only the parties to the action.[54] Therefore, where there are multiple defendants, since, in accordance with section 768.81(3), the doctrine of joint and several liability shall not apply,[55] each defendant must bear the burden of compensating the plaintiff in accordance with each defendant's apportioned fault. Thus, a partial abrogation of the doctrine of joint and several liability, as the legislature intended, is achieved. If, however, there is only one named defendant to the action, the defendant shall bear the total burden of all tortfeasors since it is only that defendant's fault which may be evaluated and apportioned.[56] Notwithstanding, lacking a clear definition with regard to on what "total" each party's percentage of fault is to be based, section 768.81(3) may be deemed ambiguous.[57]

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54. 597 So. 2d 883 (Fla. 3d Dist. Ct. App. 1992).

55. Section 768.81(3) reads, in pertinent part: "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 the doctrine of joint and several liability* . . . ." FLA. STAT. § 768.81(3) (1991) (emphasis added).

56. This scenario assumes the plaintiff is fault-free. If, however, the plaintiff is determined to be at fault, the plaintiff's fault would be evaluated and apportioned as well since the plaintiff would be a party to the action.

57. Whether § 768.81(3) is clear on its face or ambiguous is for the Florida Supreme Court to determine. However, an opinion either way will not defeat the arguments presented which dictate that § 768.81(3) must be read as requiring apportionment of fault only to parties to the action.

B. *Statutory Construction*

Ambiguity of a statute is a prerequisite for statutory construction.[58] When interpreting an ambiguous Florida statute, three primary rules of statutory construction come into play: first, the statute should be construed to reflect its legislative history;[59] second, the statute should be construed strictly, so as not to displace the common law further than is clearly necessary;[60] and third, the statute should be construed to preserve the force of any unrepealed conflicting statutes.[61]

Under the first rule of statutory construction, when a statute is ambiguous, it is appropriate to consult its legislative history to determine its meaning.[62] In doing so, the Florida Senate and House Legislative Staff Analyses which create section 768.81(3) become imperative.[63] In the staff analyses, the legislature did not use the term "non-party."[64] Additionally,

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58. *See generally* 49 FLA. JUR. 2d *Statutes* § 111 (1984 & Supp. 1992) (discussing ambiguity as a prerequisite for statutory construction).

59. *See generally* 49 FLA. JUR. 2d *Statutes* §§ 114, 157, 160 (1984 & Supp. 1992) (discussing legislative intent as a controlling factor of statutory construction, the history of an enactment as an aid in determining legislative intent, and legislative history and conditions surrounding a statute in question).

60. *See generally*, 49 FLA. JUR. 2d *Statutes* § 192 (1984) (discussing the construction of statutes in derogation of the common law).

61. *See generally* 49 FLA. JUR. 2d *Statutes* § 213 (1984) (discussing judicial policies and presumptions of statutory construction).

62. City of Ft. Lauderdale v. Taxi, Inc., 247 So. 2d 467, 469 (Fla. 4th Dist. Ct. App. 1971). *See supra* note 59 and accompanying text.

63. *See* Amos v. Moseley, 77 So. 619, 621 (1917) (stating that the reports of the legislature may be consulted in construing a statute).

64. The relevant part of Section 60 of the July 16, 1986 staff analysis reads:

> Pursuant to the doctrine of joint and several liability, if two or more *defendants* are found to be jointly responsible for causing the *plaintiff* injuries, the *plaintiff* can recover the full amount of damages from any of the *defendants* who, in turn, can attempt to seek recovery in a contribution action against the *co-defendants* for their equitable share of the damages.
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> The act's modified version of joint and several liability applies to all negligence cases which are defined to include, but not be limited to, civil actions based upon theories of negligence, strict liability, products liability, professional malpractice, breach of warranty, and other like theories. In such cases in which the award for damages does not exceed $25,000, joint and several liability applies to all of the damages. In cases in which the award of damages is greater than $25,000, liability for damages is based on *each party's proportionate fault*, except that each *defendant* who is equal to or more at fault than the *claimant* is jointly and severally liable for all economic damages.

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the staff analyses foster the implication that a plaintiff's total judgment can be reduced *only* by the percentage of fault attributable to the plaintiff, and not by that of a non-party.[65] Further, the staff analyses dictate that as to the latter portion of section 768.81(3), the doctrine of joint and several liability, as it applies to apportionment of economic damages, applies only to defendants,[66] parties to the action.[67] Thus, it must logically follow that

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MATERIALS ON TORT REFORM AND INSURANCE OF 1986, at Section 60 (July 16, 1986) (emphasis added).

The relevant part of Section 60 of the June 6, 1986 staff analysis reads:

> The principles of comparative negligence are also applicable in cases involving multiple *defendants*, with fault being apportioned *among all negligent parties* and the *plaintiff's* total damages being divided among *those parties* according to their proportionate degree of fault. However, in these cases, one or more of the *defendants* may ultimately be forced to pay more then their proportionate shares of the damages, pursuant to the doctrine of joint and several liability. Under this doctrine, if two or more *defendants* are found to be responsible for causing the *plaintiff's* injuries, the *plaintiff* can recover the full amount of damages from any one of them.
>
> Under the bill, joint and several liability applies to all cases in which the award for damages does not exceed $25,000. In cases in which the award of damages is greater than $25,000, liability for damages is based on *each party's* proportionate fault, except that each *defendant* who is more at fault than the *claimant* is jointly and severally liable for all economic damages.
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> . . . .
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> Under the bill, neither the court nor the attorneys would be permitted to discuss joint and several liability in front of the jury. The trier of fact would be required to specify the amounts awarded for economic and noneconomic damages, in addition to *apportioning percentages of fault among the parties*
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> . . . .

STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, STAFF DATA AND MATERIALS ON LIABILITY INSURANCE/TORT REFORM OF 1986, at Section 60 (June 6, 1986) (emphasis added).

65. "Under comparative negligence, a plaintiff's total judgment against a negligent defendant *is reduced by the percentage of the plaintiff's fault*." H.R. COMM. ON HEALTH CARE AND INSURANCE STAFF ANALYSIS, STAFF DATA AND MATERIALS ON TORT REFORM AND INSURANCE OF 1986, at Section 60 (July 16, 1986); STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, STAFF DATA AND MATERIALS ON LIABILITY INSURANCE/TORT REFORM OF 1986, at Section 60 (June 6, 1986) (emphasis added).

66. The relevant part of Section 60 of the July 16, 1986 staff analysis reads:

> Pursuant to the doctrine of joint and several liability, if *two or more defendants* are found to be jointly responsible for causing the plaintiff injuries, the plaintiff can recover the full amount of damages from any of the *defendants* who, in turn, can attempt to seek recovery in a contribution action against the *co-defendants* for their equitable share of the damages.

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the legislature's intent in the former portion of the statute, that the doctrine be excluded as to apportionment of non-economic damages, likewise shall apply only to parties to the action.

Applying this first rule of statutory construction to *Messmer*, the Fifth District Court was incorrect in diminishing Ann Messmer's judgment by allocating fault to Arthur Messmer since he was not a party to the action as expressed and intended by the legislative history of section 768.81(3). This same rule, however, as measured against the *Fabre* court's decision not to allocate fault to Ramon Marin to reduce Ann Marin's judgment, meets the construction requirement as it is consistent with the statute's legislative history.

A second rule of statutory construction requires that to the extent that statutes limit the common law, such statutes

> are to be construed strictly . . . . *They will not be interpreted to displace the common law further than is clearly necessary.* Rather, the courts will infer that such a statute was not intended to make any alteration other than was specified and plainly pronounced. A statute, therefore, designed to change the common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard.[68]

Numerous cases firmly establish the common law principle that in apportioning fault, the fault of a non-party tortfeasor cannot be apportioned to diminish the defendant's liability.[69] In fact, Florida courts have

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MATERIALS ON TORT REFORM AND INSURANCE OF 1986, at Section 60 (July 16, 1986) (emphasis added).

67. A defendant is defined as "the person defending or denying; the *party against whom relief or recovery is sought in an action or suit* . . . ." BLACK'S LAW DICTIONARY 419 (6th ed. 1990) (emphasis added).

68. Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362, 364 (Fla. 1977) (emphasis added). *Accord State*, 287 So. 2d at 4; MacIntyre v. Hark, 528 So. 2d 1276, 1277 (3d Dist. Ct. App. 1988); Allstate Mortg. Corp. v. Strasser, 277 So. 2d 843, 845 (Fla. 3rd Dist. Ct. App. 1973), *aff'd*, 286 So. 2d 201 (Fla. 1973). *See generally*, 49 FLA. JUR. 2d *Statutes* § 192 (1984) (discussing the construction of statutes in derogation of the common law).

69. Lincenberg v. Issen, 318 So. 2d 386 (Fla. 1975); Blocker v. Wynn, 425 So. 2d 166 (Fla. 1st Dist. Ct. App. 1983); Davis v. Lewis, 331 So. 2d 320 (Fla. 1st Dist. Ct. App. 1976); Travelers Ins. Co. v. Ballinger, 312 So. 2d 249 (Fla. 1st Dist. Ct. App. 1975); Echeverria v. Barczak, 308 So. 2d 633 (Fla. 3d Dist. Ct. App. 1975); Model v. Rabinowitz, 313 So. 2d 59 (Fla. 3d Dist. Ct. App. 1975); Souto v. Segal, 302 So. 2d 465 (Fla. 3d Dist. Ct. App. 1974); Gutierrez v. Murdock, 300 So. 2d 689 (Fla. 3d Dist. Ct. App. 1974).

acknowledged the principle that in cases of comparative negligence, it is improper for the jury to apportion fault to joint or phantom tortfeasors, or to a Supreme Being, not before the court.[70]

Moreover, Florida's case law holds that an initial tortfeasor is obligated to the entire financial burden of the plaintiff's injuries.[71] Florida courts have not previously required a plaintiff to have any and all possible tortfeasors before the court in order to obtain a full recovery, but rather have provided the defendant who pays more than his proportionate share of the damages remedies to procure recovery against other tortfeasors through contribution,[72] indemnity,[73] and subrogation.[74]

In section 768.81(3), the legislature did not specify or plainly pronounce that a plaintiff is now required to sue not only the initial, but any and all subsequent tortfeasors in order to fully recover; or that a jury must apportion fault to non-party tortfeasors; or that an initial tortfeasor is no longer obligated to the plaintiff's total financial burden.[75] Thus, the

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70. *See Lincenberg*, 318 So. 2d at 386 (holding it is improper in comparative negligence cases to apportion negligence to a joint tortfeasor not before the court); *Souto*, 302 So. 2d at 465 (holding it is improper in comparative negligence cases to apportion negligence to a phantom tortfeasor not before the court); *Model*, 313 So. 2d at 59 (holding it is improper in comparative negligence cases to apportion negligence to a Supreme Being not before the court).

71. *See* Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So. 2d 702, 704 (Fla. 1980) (holding the city liable for all of the plaintiff's injuries incurred in an automobile accident and the subsequent treatment thereof by an allegedly negligent physician); Stuart v. Hertz Corp., 351 So. 2d 703, 706-07 (Fla. 1977) (holding the automobile rental corporation and negligent automobile driver liable for all of the plaintiff's injuries caused from an automobile accident and the allegedly negligent subsequent treatment rendered by a physician); Rucks v. Pushman, 541 So. 2d 673, 675 (Fla. 5th Dist. Ct. App. 1989) (where the plaintiff settles with and releases the initial tortfeasor and fails to reserve a cause of action against the health care provider, the legal presumption is that the plaintiff's recovery from the initial tortfeasor included recovery for injuries caused by the health care provider).

72. *See Lincenberg*, 318 So. 2d at 386 (providing a remedy in contribution among joint tortfeasors through Florida's Uniform Contribution Among Tortfeasors Act, specifically section 768.31(2)(a)).

73. *See* Houdaille Indus., Inc. v. Edwards, 374 So. 2d 490, 492-93 (Fla. 1979) (providing a remedy in indemnity where a manufacturer who is determined to be only passively negligent may pursue a claim against an actively negligent party).

74. *See Underwriters at Lloyds*, 382 So. 2d at 702 (providing a remedy in subrogation against the alleged negligent physician where the initial tortfeasor, a city, was subject to the total financial burden of the plaintiff's injuries, including those directly attributable to the physician's subsequent alleged medical malpractice).

75. FLA. STAT. § 768.81(3) reads as follows:

> 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

Messmer court's interpretation of section 768.81(3) is a blatant disregard of the rule of statutory construction which requires the legislature to state in clear and unequivocal terms any changes in the common law.

Fabre, however, acknowledges this second rule of statutory construction. Its reading of section 768.81(3) does not, in any way, limit Florida common law, but rather, preserves it in such a way as to continue to apportion fault only to those actors made parties to the action.[76] Notwithstanding, the *Fabre* construction takes a step further and supports additional Florida law since, if the defendant so chooses, and in accordance with the Florida Rules of Civil Procedure, the defendant may add other tortfeasors as parties to the main action so that the apportionment provision of section 768.81(3) will apply.[77] Otherwise, *Fabre* still allows the defendant to seek recourse against non-party tortfeasors in a separate contribution action.[78]

Under a third rule of statutory construction, repeals by implication[79] are not favored and two or more statutes should be construed in such a way as to preserve the force of each and, if at all possible, render them consistent.[80] When the legislature enacted section 768.81(3), it did not repeal any of the several existing statutes which are plainly inconsistent with the *Messmer* court's interpretation of the statute.[81] The most obvious example

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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.

76. 597 So. 2d at 883.

77. FLA. R. CIV. P. 1.180(a), entitled "Third Party Practice," reads: "At any time after commencement of the action a defendant may have a summons and complaint served on a person not a party to the action who is or may be liable to the defendant for all or part of the plaintiff's claim against the defendant . . . ."

78. FLA. STAT. § 768.31(2)(a) (1991) reads as follows:

Right to Contribution.

(a) Except as otherwise provided in this act, when two or more persons become jointly or severally liable in tort for the same injury to person or property, or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

79. Repeals by implication occur when the creation of one thing, though is does not expressly state the repeal of another, suggestively, due to a conflict, requires it.

80. Palm Harbor Special Fire Control Dist. v. Kelly, 516 So. 2d 249, 250 (Fla. 1987); Garner v. Ward, 251 So. 2d 252 (Fla. 1971); Richey v. Town of Indian River Shores, 337 So. 2d 410, 413 (Fla. 4th Dist. Ct. App. 1976). *See generally* 49 FLA. JUR. 2d *Statutes* § 213 (1984) (discussing judicial policies and presumptions of statutory construction).

81. *See* JOURNALS OF THE FLA. H.R. AND S. OF 1986 (1986) (for a discussion of the procedural processes involved in establishing section 768.81(3) prior to its enactment).

is section 768.31 entitled, "Contribution Among Tortfeasors."[82] For purposes of illustration, consider the following:[83]

Assume that a plaintiff is injured in an automobile accident by the negligence of defendants A and B. Each defendant is equally to blame, and the plaintiff suffers damages in the amount of $100,000. The plaintiff settles with defendant A for $50,000 and subsequently, gives defendant A a release and dismisses him from the lawsuit. Thus, the case goes to trial only against defendant B. Defendant B is found liable for the plaintiff's damages, the total of which is assessed in the amount of $100,000.

Based on these facts, the plaintiff's damages are apportioned between defendants A and B in accordance with sections 768.31(5), 768.041(2), and 46.015(2) of the Florida Statutes.[84] According to the language of these statutes, defendant B is given a credit for the $50,000 paid by defendant A;[85] defendant B is not entitled to contribution from defendant A;[86] and defendant B properly owes the plaintiff half her damages, or $50,000.[87]

However, under the *Messmer* court's interpretation of section 768.81(3), at trial, defendant B is entitled to have the jury assess fifty percent of the

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82. FLA. STAT. § 768.31 (1991).

83. *See* Brief of Appellee Ann Marin 16-18, Fabre v. Marin, 597 So. 2d 883 (Fla. 3d Dist. Ct. App. 1992) (No. 91-00210, 91-00223) for a comparable example.

84. FLA. STAT. § 768.31(5) (1991) reads as follows:

> Release Or Covenant Not To Sue. When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,
>
> (b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

FLA. STAT. § 768.041(2) (1991) reads as follows:

> Release Or Covenant Not To Sue.
>
> (2) At trial, if any defendant shows the court that the plaintiff, or any person lawfully on his behalf, has delivered a release or covenant not to sue any person, firm, or corporation in partial satisfaction of the damages sued for, the court shall set off this amount from the amount of any judgment to which the plaintiff would be otherwise entitled at the time of rendering judgment and enter judgment accordingly.

(Section 46.015(2) reads virtually identical to section 768.041(2)).

85. FLA. STAT. §§ 768.041(2), 46.015(2) (1991).

86. *Id.* § 768.31(5).

87. *Id.*

blame against defendant A on the verdict form, notwithstanding that defendant A has settled with the plaintiff and is no longer a party to the action. Thus, defendant B obtains a reduction of the verdict against him in the amount of defendant A's fault in the accident and defendant B's liability to the plaintiff is limited to $50,000. While this result appears similar to the result in the previous example, because sections 768.31(5), 768.041(2), and 46.015(2) have not been repealed, the trial court is forced to set off the $50,000 the plaintiff received from defendant A against the $50,000 owed to the plaintiff by defendant B.[88] As a result, the plaintiff's recovery is zero.[89] Therefore, the plaintiff recovers only $50,000, half her damages, and defendant B pays nothing, notwithstanding the fact that he was fifty percent responsible for the plaintiff's $100,000 loss.[90]

In this regard, the *Messmer* court's interpretation of section 768.81(3) fails to preserve the equitable and consistent effects of applying sections 768.31(5), 768.041(2), and 46.015(2). Thus, the third rule of statutory construction, that two or more statutes should be construed in such a way as to preserve the force of each and render them consistent, is ignored by the *Messmer* court. Further, the *Messmer* court overlooks the portion of the rule that disfavors repeals by implication. By interpreting section 768.81(3) to require allocation of fault to all actors who contributed to a plaintiff's injuries, whether parties to the action or not, defendants will hardly be in need of the remedy of contribution among tortfeasors and section 768.31(2)(a) will become useless.[91]

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88. *Id.* §§ 768.041(2), 46.015(2).

89. Compare:

Example 1:

$100,000 total damages
-$50,000 settlement (paid by defendant A)
$50,000 final judgment (paid by defendant B)

with Example 2:

$100,000 total damages
-$50,000 settlement (paid by defendant A) + $50,000 automatic apportionment (assessed against defendant A)
$0 final judgment (paid by defendant B)

90. It is doubtful that this rather formalistic mechanical approach would be followed by any court. Nonetheless, this example illustrates the inequitable and problematic results which the *Messmer* interpretation of § 768.81(3) fosters.

91. FLA. STAT. § 768.31(2)(a) reads as follows: "Except as otherwise provided in this act, when two or more persons become jointly or severally liable in tort for the same injury . . . there is a right of contribution among them even though judgment has not been rendered against all or any of them." It is apparent, however, that § 768.31(2)(a) is not made thoroughly useless by the *Messmer* court's interpretation of § 768.81(3) since joint and

On the other hand, the *Fabre* court's construction of section 768.81(3), that fault shall be apportioned only among parties to the action, does not conflict with the contribution statute and thus, can be recognized and applied without incident. Under *Fabre*, following apportionment of damages among the parties to the action in the main claim, if the defendant chooses not to add other tortfeasors to the main action, the defendant may seek recovery against any and all non-party tortfeasors in a separate contribution action.[92] Thus, under *Fabre*, sections 768.81(3) and 768.31(2)(a), though separate in their applications as to main claims and contribution actions, are rendered consistent in their effects with each other.

C. *Guidance from the Uniform Comparative Fault Act and Other Jurisdictions*

As reflected above, rules of statutory construction are the primary source for accurately interpreting ambiguous statutes. However, Florida courts may look to constructions of related foreign state statutes in an effort to interpret a Florida statute in a way that will best achieve its purpose.[93]

Since 1973, Florida has been a state of comparative negligence.[94] A number of states, including Florida, which have adopted comparative negligence have done so under a theory of "pure" comparative negligence.[95] This is the form of comparative negligence as applied in the

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several liability remains for economic damages, and as such, the remedy of contribution remains viable.

92. FLA. STAT. § 768.31(2)(a) (1991).

93. *See* Reply Brief of Appellant 9-14, Messmer v. Teacher's Ins. Co., 588 So. 2d 610 (Fla. 5th Dist. Ct. App. 1991) (No. 90-2557). *Cf.* Carson v. Gulf Oil Corp., 123 So. 2d 35, 38 (Fla. 2d Dist. Ct. App. 1960) (in construing federal statutes in a manner that will best effectuate its purpose, states must look to related decisions of federal courts).

94. *See* Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973) (abolishing Florida's doctrine of contributory negligence and adopting the doctrine of comparative negligence. Under the latter doctrine, the plaintiff's contributory negligence does not operate to bar recovery altogether, but serves merely to reduce the plaintiff's damages in proportion to the plaintiff's fault). *See generally* 38 FLA. JUR. 2d *Negligence* §§ 66-73 (1982 & Supp. 1992) (discussing Florida's doctrine of comparative negligence).

95. Under a "pure" form of comparative negligence, the plaintiff's damages are simply reduced in proportion to the amount of negligence which is attributed to the plaintiff. *Hoffman*, 280 So. 2d at 431; Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975); Alvis v. Ribar, 421 N.E.2d 886, 891-92 (Ill. 1981) (listing by jurisdiction each state's judicial decision or adopting statute); Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982); Placek v. City of Sterling Heights, 275 N.W.2d 511 (Mich. 1979); Scott v. Rizzo, 634 P.2d 1234 (N.M. 1981).

Uniform Comparative Fault Act.[96] Thus, it is appropriate to look to other states of "pure" comparative negligence which have adopted the Uniform Comparative Fault Act, as well as to the Act itself, for guidance in interpreting Florida's apportionment of damages provision.

Iowa has adopted a version of the Uniform Comparative Fault Act[97] in its comparative fault statute.[98] The Iowa Supreme Court has interpreted the statute's apportionment provision to prohibit apportionment of fault to non-parties, whether they are unknown or unnamed,[99] dismissed prior to trial,[100] or known actors in the occurrence from whom no relief is

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96. Section one of the UNIFORM COMPARATIVE FAULT ACT 1977 ACT, 12 U.L.A. 46 (West 1992) (as originally codified in 1977), entitled "Effect of Contributory Fault," reads: "In an action based on fault seeking to recover damages for injury . . . any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery."

97. *Id.* § 2, 12 U.L.A. 46 states:

> Apportionment of Damages.
>
> (a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released . . . the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating . . . .
>
> . . . .
>
> (2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability . . . .

98. IOWA CODE ANN. § 668.3 (West 1992) reads as follows:

> Comparative Fault - effect - payment method.
>
> 1. Contributory fault shall not bar recovery in an action by a claimant to recover damages . . . but any damages allowed shall be diminished in proportion to the amount of fault attributable to the claimant.
>
> 2. In the trial of a claim involving the fault of more than one party to the claim, including third-party defendants and persons who have been released . . . the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating all of the following:
>
> a. The amount of damages each claimant will be entitled to recover if contributory fault is disregarded.
>
> b. The percentage of the total fault allocated to each claimant, defendant, third-party defendant, and person who has been released from liability . . . .

99. Baldwin v. City of Waterloo, 372 N.W.2d 486, 492-93 (Iowa 1985).

100. Payne Plumbing & Heating Co. v. Bob McKiness Excav. & Grading, Inc., 382 N.W.2d 156, 159 (Iowa 1986).

sought.[101] The Iowa court grounded its decisions on the strict definition of the term "party" contained in its statute which, as read, clearly limits apportionment of fault among the claimant, named defendants, third-party defendants, and settling parties.[102] Additionally, in fairly reading the terms of its statute, the court stated, "[h]ad our legislature intended to include in the . . . definition of 'party' all those persons involved in an occurrence, whether or not named as a claimant or defendant, it could easily have done so."[103]

Moreover, in a comment to the Uniform Comparative Fault Act, the creators clearly purport that its apportionment provision is to operate only against parties to the action.[104] The creators support this conscious decision with a multitude of reasons. Primarily, they recognize that an allocation of fault to a non-party requires an allocation of blame to an actor without actually knowing whether that actor is truly at fault, and even if so, precisely how much at fault.[105] Further, the creators recognize the inequities of being able to allocate fault to an actor who cannot be made a party to the action to begin with, either due to immunity or the running of the statutes of limitations.[106] The creators also note the inability of a court to bind a non-party actor to settlement agreements.[107] Finally, the creators recognize that there is substantial incentive, for both the plaintiff and defendant, to join any potentially liable actors to the action; undoubtedly, the greater the number of potentially liable parties in an action, the lower the percentage of fault available which can be apportioned to all of the parties to the action.[108] In light of the foregoing, when the Florida Legislature

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101. Peterson v. Pittman, 391 N.W.2d 235, 238 (Iowa 1986); Selchert v. State, 420 N.W.2d 816, 819 (Iowa 1988).

102. *Selchert*, 420 N.W.2d at 819; *see supra* note 98.

103. *Id.* at 820.

104. Section two of the comment to the 1977 Uniform Comparative Fault Act reads as follows: "Parties. *The limitation to parties to the action means ignoring other persons who may have been at fault with regard to the particular injury but who have not been joined as parties.* This is a deliberate decision." UNIFORM COMPARATIVE FAULT ACT 1977 ACT § 2, comment, 12 U.L.A. 46 (West Supp. 1992) (emphasis added).

105. "It cannot be told with certainty whether that person was actually at fault or what amount of fault should be attributed to him . . . ." *Id.*

106. "[O]r whether he will ever be sued, or whether the statue of limitations will run on him . . . ." *Id.*

107. "An attempt to settle these matters in a suit to which he is not a party would not be binding on him." *Id.*

108. "Both plaintiff and defendants will have significant incentive for joining available defendants who may be liable. The more parties joined whose fault contributed to the injury, the smaller the percentage of fault allocated to each of the other parties, whether plaintiff or

composed the apportionment provision of its comparative fault statute, using the term "party," it intended that apportionment of fault operate only among and between the parties to the action, an interpretation consistent with the *Fabre* court's construction.[109]

Notwithstanding the foregoing, direction may also be found by negative implication[110] in the reasoning of courts that have construed apportionment provisions of comparative negligence statutes dissimilar to Florida's Comparative Fault Statute. For example, several comparative fault jurisdictions *expressly* allow for apportionment of fault to non-parties.[111] However, in doing so, these jurisdictions additionally either expressly restricted the apportionment of fault to non-parties for a limited purpose, or expressly provided for consistency in apportioning such fault with regard to relevant rules of procedure.[112]

For example, the Arizona Legislature has certified that in apportioning degrees of fault, the fault of all actors who contributed to the injury, whether parties to the action or not, shall be considered.[113] However, the legislature followed this stipend with an explicit limitation that apportioning fault to non-parties may be done only for the purpose of accurately determining the fault of the named parties to the action.[114]

Similarly, in its comparative negligence statute,[115] the Wyoming

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defendant." *Id.*

109. 597 So. 2d 883 (Fla. 3d Dist. Ct. App. 1992).

110. Negative implication is a useful tool by which it can be shown that construing one enactment in such a way based on its express terms and intent, is grounds for opposing similar constructive treatment or development of another enactment missing those express terms and intent; *see* Reply Brief of Appellant at 12, *Messmer* (No. 90-2557).

111. *See* ARIZ. REV. STAT. ANN. § 12-2506 (West 1991); WYO. STAT. §1-1-109 (West 1992); COLO. REV. STAT. ANN. § 13-21-111.5(2) (West 1992); IND. CODE ANN. § 34-4-33-10 (West 1992).

112. *See* statutes cited *supra* note 111.

113. ARIZ. REV. STAT. ANN. § 12-2506(B) (West 1991) reads, in pertinent part, as follows: "In assessing percentages of fault the trier of fact shall consider the fault of all persons who contributed to the alleged injury, death or damage to property, regardless of whether the person was, or could have been, named as a party to the suit."

114. "Assessments of percentages of fault for nonparties are used only as a vehicle for accurately determining the fault of the named parties. Assessment of fault against nonparties does not subject any nonparty to liability in this or any other action, and it may not be introduced as evidence of liability in any action." *Id.* Dietz v. General Elec. Co., 821 P.2d 166, 168 (Ariz. 1991).

115. *See* WYO. STAT. § 1-1-109(b) (West 1992) which reads, in pertinent part, as follows: "The court may . . . [d]irect the jury to find separate special verdicts determining the total amount of damages and the percentage of fault attributable to each actor whether or not a party . . . ."

Legislature has provided that the jury may apportion fault to non-parties.[116] However, in mirroring the Arizona Legislature's intent, the Wyoming Legislature permits such apportionment only for the purpose of informing the jury of the consequences of determining fault to the parties to the action.[117]

Although the Colorado Legislature has ascertained that the fault of all tortfeasors, whether parties to the action or not, shall be regarded in apportioning fault for damages,[118] its explicit language is not accompanied by a limited purpose for doing so. Rather, the language is accompanied by congruous rules of procedure which underscore the legislature's intent to apportion fault to non-parties.[119] The Colorado Legislature has included the express stipulation in its statute that an allocation of fault to a non-party will only be made if that non-party has been given notice of the action.[120] Additionally, the Colorado Legislature has expressly provided for notice provisions which put the burden of pleading the non-party on the defendant who wishes to apportion fault to the non-party.[121]

Similarly, the Indiana Legislature has placed express "non-party" language in its comparative fault statute, and just as Colorado, requires a defendant to convene a non-party defense by specifically designating the non-party in its pleading.[122] Likewise, the burden of pleading and proving

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116. *Id.*

117. "The court may . . . [i]nform the jury of the consequences of its determination of the percentage of fault." *Id.* Kirby Bldg. Sys. v. Mineral Explor. Co., 704 P.2d 1266, 1272 (Wyo. 1985).

118. Section 13-21-111.5(2) provides: "The jury shall return a special verdict, or, in the absence of a jury, the court shall make special findings determining the percentage of negligence or fault attributable *to each of the parties and any persons not parties to the action* of whom notice has been given . . . ." COLO. REV. STAT. ANN. § 13-21-111.5(2) (West 1992) (emphasis added).

119. *Id.*

120. *Id.*

121. *Id.* § 13-21-111.5(3)(b), which provides:

> [N]otice shall be given by filing a pleading in the action designating such nonparty and setting forth such nonparty's name and last-known address, or the best identification of such nonparty which is possible under the circumstances, together with a brief statement of the basis for believing such nonparty to be at fault . . . .

Id.

122. IND. CODE ANN. § 34-4-33-10 (West 1992) reads:

> Nonparty defense; assertion; burden of proof; pleadings; application
>
> a) In an action based on fault, a defendant may assert as a defense that the damages of the claimant were caused in full or in part by a nonparty. Such a defense is referred to in this section as a nonparty defense.

a non-party defense is on the defendant.[123] Further, the Indiana Legislature has defined the term non-party as "a person who is, *or may be*, liable to the claimant in part or in whole for the damages claimed but who has not been joined in the action as a defendant by the claimant."[124]

With respect to the foregoing, the Arizona, Wyoming, Colorado, and Indiana Legislatures *expressly* intend for apportionment of fault to include non-parties, as well as, parties to the action. Thus, if the Florida Legislature intended for apportionment of fault to include non-parties, it should have directly stated so, at least in the language of its comparative fault statute, if not specifically in the language of section 768.81(3). Additionally, in evidencing this intent, as shown by the actions of the Arizona and Wyoming Legislatures, the Florida Legislature should have expressly limited such apportionment for the purpose of accurately gauging the jury in determining the required percentage of participation of each actor. Finally, just as shown by the actions of the Colorado and Indiana Legislatures, the Florida Legislature should have simultaneously revised Florida's Standard Jury Instructions,[125] revoked conflicting Florida Statutes,[126] and revamped contradictory Florida Rules of Civil Procedure.[127]

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b) The burden of proof of a nonparty defense is upon the defendant

. . . .

c) A nonparty defense that is known by the defendant when he files his first answer shall be pleaded as a part of the first answer.

123. *Id.*

124. *Id.* § 34-4-33-2 (emphasis added).

125. Florida Standard Jury Instruction (Civ.) 6.1b reads: "[In entering a judgment for damages based on your verdict against [either] [any] defendant, the court will take into account the percentage of that defendant's [negligence] [fault] *as compared to the total [negligence] [fault] of all parties to this action.*]" Florida Standard Jury Instructions in Civil Cases § 6.1b (1992) (emphasis added). If the Florida Legislature intended apportionment of fault to apply to a non-party, the legislature should have changed the language of the jury instruction so that the last line reads "*as compared to the total [negligence] [fault] of all parties and non-parties to this action.*]"

126. The multitude of immunities which exist whereby a tortfeasor may not be made a party to the action must be extinguished or waived. *See* FLA. STAT. § 440.11 (1991) (creating employer immunity from liability); *Sturiano*, 523 So. 2d at 1128 (holding that the doctrine of interspousal tort immunity is still good law).

127. Florida Rule of Civil Procedure 1.180(a), entitled "Third Party Practice," reads: "At any time after commencement of the action a defendant *may* have a summons and complaint served on a person not a party to the action who is or may be liable to the defendant for all or part of the plaintiff's claim against the defendant." FLA. R. CIV. P. 1.180(a) (emphasis added). If the Florida Legislature intended apportionment of fault to apply to a non-party, the legislature should have rewritten the language of rule 1.180(a) so that the word "may" reads as "must," thereby requiring the defendant to implead any non-party the defendant

IV. Practical Effects and Ramifications

The effects and ramifications of the *Messmer* decision are numerous. Not only is the decision fraught with dilemmas for plaintiffs and non-parties, but also for the judicial system and the defendants it appears to support.[128]

A. *Problems for the Plaintiff and Non-Party*

The traditional notion of litigation is that the plaintiff directs the lawsuit; the plaintiff sues and the defendant defends the suit as tailored. With *Messmer*, however, the defendant, in addition to defending the suit as presented, can inject potential fault of actors not parties to the suit.

Consider, first, the unsettling effects the *Messmer* decision has on the plaintiff and non-party professional. Assume a defendant negligently injures a plaintiff in an automobile accident and the plaintiff's injuries have been aggravated, or additional injuries have been caused thereafter by the negligence of the plaintiff's treating physician. According to well-settled principles of case law, the initial tortfeasor is responsible for all of the plaintiff's damages because the possibility of malpractice in treatment of the plaintiff's injuries is reasonably foreseeable.[129] Assume, therefore, that the plaintiff chooses not to sue her physician.

Under *Messmer*, however, the defendant can drag the physician into the lawsuit, without making him a party to the action, and have his percentage of fault determined by the jury on the verdict form. In this instance, not only will the physician not be present to defend himself, but the plaintiff will be forced to defend what amounts to a medical malpractice suit against her treating physician.

For the plaintiff, this will force her to succumb to the enormous costs which defending such a suit normally entails. For the physician, a jury verdict finding that he committed malpractice may potentially damage his reputation. Consequently, the physician's malpractice insurance premiums may increase and the physician may be subject to disciplinary action by his

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intends to attempt to apportion fault to on the jury verdict form.

128. *See* John W. Wade, *Should Joint and Several Liability of Multiple Tortfeasors be Abolished?*, 10 Am. J. Trial Advoc. 193 (1986), and Brief of Appellee Ann Marin 20-24, *Fabre* (No. 91-00210, 91-00223), for a thoughtful discussion of the following examples and others.

129. *See supra* note 71 and accompanying text.

medical peers.[130] All of these things are feasible, notwithstanding that the physician was not a party to the action, and that his defense was supplied at trial by his patient. Ironically, the patient may then find herself in the awkward position of subsequently having to sue the physician she previously defended.

Assume now that the plaintiff, wanting to avoid the enormous cost of defending her physician's medical malpractice suit, elects to sue her physician. Under *Messmer*, the physician may, for example, add ten unnamed health care providers to the verdict form to have their percentages of fault determined by the jury. As opposed to the earlier example in which the plaintiff was forced to defend one medical malpractice case, now the plaintiff is forced to prove one medical malpractice case and defend ten others.

Consider a second scenario. Assume a defendant negligently injures a plaintiff in an automobile accident in which there may have been a "phantom" vehicle involved which partially caused the accident. In accordance with case law, where the plaintiff is not at fault, the defendant is responsible for all of the plaintiff's damages and the defendant has the burden of obtaining contribution against the "phantom" tortfeasor.[131]

Nevertheless, under *Messmer*, the burden of producing the "phantom" tortfeasor shifts to the plaintiff as the defendant can interject the "phantom" tortfeasor into the lawsuit even though the defendant could potentially never bring in the "phantom" tortfeasor as a party to the action. Further, the defendant is permitted to place the name of the "phantom" tortfeasor on the jury verdict form for the purpose of apportioning fault to the "phantom" tortfeasor. Thus, the plaintiff is required to defend a suit against a nonexistent person or entity with whom or which the plaintiff cannot engage in discovery and therefore, not prepare a defense against. This concept advances beyond that of the "empty chair" doctrine as that doctrine does not permit the fault of non-parties to be apportioned on the verdict form.[132]

Consequently, in both scenarios, under *Messmer*, the plaintiff has no choice but to endure the enormous cost of defending one suit or another, despite the cost required to pursue the initial action. Moreover, the plaintiff

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130. *See generally* FLA. STAT. § 458.331 (1991) (discussing grounds for disciplinary action taken against medical personnel for medical malpractice).

131. *Souto*, 302 So. 2d at 466.

132. Under the "empty chair doctrine," a trial judge may instruct a jury that it may infer from a party's failure to produce an available witness, that had the witness occupied the "empty chair," the witness would have testified adversely to the party. Myles v. Women & Infants Hosp., 504 A.2d 452, 454 (R.I. 1986).

is forced to endure such costs as would be required in deriving a defense against whatever scenario the defendant chooses to concoct with regards to the "missing" tortfeasor.

Most disturbing, is the fact that *Messmer* does not require the defendant to inform the plaintiff of the defendant's intentions to include any non-party on the verdict form. There are no requirements of specificity or limitations as to non-parties the defendant may include on the verdict form, or when the defendant is obligated, through the pleadings, to notify the plaintiff of the defendant's intent to apportion fault to a non-party. Thus, under *Messmer*, the concept of "fair play" and the traditional notion that the plaintiff dictates the lawsuit is forgone as the plaintiff is ambushed at trial by a defendant trying a non-party, of whom the plaintiff has no knowledge, by innuendo. Perhaps the most dramatic and damaging consequence which will result from this is a return to the plaintiff's philosophy of "sue anybody and everybody."

Additionally, under *Messmer*, since fault may be apportioned against a non-party, there will be little incentive for a plaintiff to settle with a defendant and dismiss the defendant from the action. If one defendant settles out, the remaining defendant will use the settling defendant to the remaining defendant's advantage by seeking a determination of the level of fault attributable to the settling defendant, thereby reducing the remaining defendant's own percentage of fault to be apportioned by the jury. The effect is that a plaintiff's judgment will be diminished because the remaining defendant will end up with a lower percentage of fault by having fault attributed to the settling defendant.

A similar effect on a plaintiff's judgment will result in cases involving venue privileges. Such cases frequently require that separate suits be filed against joint tortfeasors.[133] Assume such a "split suit" occurs and a plaintiff is required to sue a state agency defendant in jurisdiction A and a private defendant in jurisdiction B. In jurisdiction A, a jury may find the state agency defendant five percent at fault and the private defendant ninety-five percent at fault. Conversely, in jurisdiction B, a jury may find the private defendant five percent at fault and the state agency defendant ninety-five percent at fault. Under *Messmer*, the plaintiff will ultimately recover

133. It is occasionally necessary to file separate suits against joint tortfeasors because of the inability to obtain personal jurisdiction over one of them in the only forum which can assert jurisdiction over the other. *See* Smith v. Williams, 35 So. 2d 844, 847-48 (Fla. 1948) (recognizing that the State and its agencies enjoy a common law venue privilege in civil actions wherein they can elect to be sued only in the counties in which they maintain their principal headquarters).

only five percent of the damages from each defendant, for a total of ten percent, notwithstanding the verdicts by the two juries which would have required the defendants to pay 100% of the plaintiff's damages if only the defendants could have been joined in a single action.

Truly, in every case in which a plaintiff chooses not to sue a particular actor for one reason or another,[134] the defendant may drag that actor into the case, without process, litigate the actor's liability, and have the actor's percentage of fault determined by the jury.[135] Worse still, the defendant can drag actors into the action who could not have been sued by the plaintiff in the first place.[136] As a result, an already flooded judicial system will become even more inundated as one day trials turn into one week trials and one week trials turn into one month trials. Eventually, the judicial system will be overwhelmed by the enormous burden involved in apportioning the fault of the "whole world."

B. *Problems for the Defendant*

While on the surface *Messmer* appears to favor the defense, it will nevertheless present problems for the defendant and the defense lawyer. The more parties involved in an action, especially on the defense side, the more confusing and complicated the issues for the fact finder. Although in most cases a multitude of defendants may help a particular defendant, more often than not it increases the potential of a verdict in favor of the plaintiff.[137] Further, the capability of parties with minor responsibility to procure releases from the plaintiff will more than likely decline because a release of any defendant from the action will jeopardize a 100% recovery by the plaintiff.[138]

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134. A plaintiff may choose not to file suit against a person or entity for numerous reasons, such as: the plaintiff cannot prove a prima facie case; the plaintiff does not wish to incur the added expense or complexity; the plaintiff does not wish to sue his girlfriend or grandmother; the plaintiff has already settled with the tortfeasor, etc.

135. All of this is possible despite a violation of the non-party's right to due process under the United States Constitution. U.S. CONST. amend. XIV, § 1. Not only is the non-party not given any notice advising the non-party of an allocation of fault to be made, but the non-party is not given any opportunity to present a defense.

136. Such actors would include phantom, immune, and dissolved tortfeasors, tortfeasors discharged in bankruptcy, and tortfeasors over whom jurisdiction cannot be obtained.

137. *See* Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147 (1992) for a discussion of a multitude of misunderstood facts about the legal system.

138. *See supra* text accompanying notes 83-90.

Additionally, it will be more difficult to organize defense strategies for multiple defendants because each defendant will benefit individually if a co-defendant's portion of liability increases. Because there will be less motivation for defendants to adopt joint defenses and work collectively, more lawyers will be involved in the action because each party will require its own lawyer. All of this will have the effect of diverting attention from the real issue of litigation, the recovery of the plaintiff, to the secondary issue of apportioning fault.[139]

In contrast, with the *Fabre* construction of section 768.81(3), none of the above discussed effects or ramifications will ensue. The plaintiff will continue to dictate the lawsuit and bear only those costs required to prove the case and pursue recovery. Further, the theory of due process will remain intact since a non-party's professional and personal reputation cannot be dragged through the mud without the non-party being given notice and an opportunity to be heard, either by being impled into the main claim, or being sued in a contribution action.

More importantly, under *Fabre*, the theory behind the "empty chair" defense will remain.[140] Thus, the defendant may still present *evidence* of a non-party's fault based on the previously pleaded denial in the defendant's answer to the plaintiff's claim. However, the jury cannot apportion fault on the verdict form to the non-party.

V. CONCLUSION

By allowing apportionment of a non-party's fault, *Messmer* is a gross misstatement of the language and legislative history of section 768.81(3), as well as, Florida case and statutory law. *Fabre*, however, measured against the same standards, ascribes to a more well-reasoned construction of section 768.81(3) in that it is consistent with preexisting common law and the Florida Legislature's intent, as revealed on the face of the statute, as well as in the history. Thus, *Fabre* is the better interpretation of section 768.81(3), the interpretation which the Florida Supreme Court must preserve in *Fox v. Allied-Signal, Inc.*[141]

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139. Defendants may not consider recovery by the plaintiff to be the "real issue" of litigation. However, since the plaintiff leads the lawsuit by initiating the action, and the defendant merely defends the suit as tailored, it follows that the plaintiff's purpose, that of recovery, should be the "real issue."

140. *See supra* note 131 and accompanying text.

141. 966 F.2d 626 (11th Cir. 1992). *See supra* text accompanying note 7.

Notwithstanding the foregoing discussion, the inequities which result when a non-party's fault is not contemplated along with the fault of the parties to the action should not be ignored. In any comparative negligence calculation, a failure to include the fault of a non-party may result in an inflation of the percentage of fault of the plaintiff and defendant. Thus, a plaintiff may be precluded from a proper recovery or a defendant may be forced to bear a greater portion of the plaintiff's loss than is attributable to the defendant's fault. However, this is not a matter for the Florida courts to displace;[142] rather, it is one for the Florida Legislature.

Nationwide, the trend in modern jurisprudence is steadfastly moving in the direction of equating liability with fault. If the Florida Legislature chooses to recognize this trend and amend Florida's Apportionment of Damages Statute, it must do so in clear and plain language. Yet, until such time, the fault of a non-party may not be considered in determining the liability of the parties to an action.

Stephanie A. Yelenosky

142. *See* Pfeiffer v. Tampa, 470 So. 2d 10, 16 (Fla. 2d Dist. Ct. App.), *review denied sub nom.* Grieves v. Pfeiffer, 478 So. 2d 53 (Fla. 1985) (stating that the court should limit its construction of a statute to a rational interpretation of the statute, as written, based on the legislative intent in enacting the statute; the court should not seek a rational effect of the statute, and following, tailor the statute's interpretation to fit that effect); Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984) (stating that it is neither the court's responsibility nor privilege to alter or cloak expressed legislative intent for the purpose of advocating a policy which the court favors).

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The *Nova Law Review* is pleased to announce the formation of the *Nova Law Review* Alumni Association. The Association has been formed to establish a vital link between the present membership of the *Nova Law Review* and its alumni whose continued involvement enriches the *Review*. The Association will endeavor to provide settings for alumni to meet and exchange ideas as well as create opportunities for alumni and students to interact.

The Alumni Association meets on the third Tuesday of each month at Nova University's Shepard Broad Law Center, and all *Law Review* alumni are invited to attend. For more information on membership, please contact the office of the *Nova Law Review* at (305)452-6196.

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