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Fabre v. Marin: Its Effect on Florida Tort Law - July 1, 1994 to Present

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TABLE OF CONTENTS

I.	INTRODUCTION	496
II.	PRECEDENT FLORIDA CASES	496
	A. <i>Messmer Came First</i>	496
	B. <i>Then There Was Fabre</i>	498
	C. <i>The Showdown</i>	500
III.	SURVEY OF FLORIDA CASES BETWEEN JULY, 1994 AND JULY, 1995	501
	A. <i>First District Court of Appeal</i>	502
	B. <i>Second District Court of Appeal</i>	504
	C. <i>Third District Court of Appeal</i>	506
	D. <i>Fourth District Court of Appeal</i>	507
	E. <i>Fifth District Court of Appeal</i>	509
	F. <i>Supreme Court of Florida</i>	510
IV.	CONCLUSION	511

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I. INTRODUCTION

The so-called *Fabre/Messmer*¹ line of cases constitutes perhaps the most poorly reasoned and politically biased decisions in Florida jurisprudence. In these cases, Florida courts seem to abandon fundamental principles of fairness which provide that only those who are given fair notice and opportunity to respond can be legally blamed for a wrongful act. The following article outlines both the *Fabre* and *Messmer* decisions, and analyzes those decisions from the defense and plaintiff perspectives. Next, the article surveys subsequent decisions. It notes the impact of these cases on our judicial system and the probable resulting negative public perception of the judicial system's ability to be fair and just.

II. PRECEDENT FLORIDA CASES

A. *Messmer Came First*

The first in this historic line of cases was decided by the Fifth District Court of Appeal in *Messmer v. Teacher's Insurance Co.*² That case arose out of a car crash in which the plaintiff was a passenger in a car driven by her husband. The defendant truck driver was uninsured, but the plaintiff had uninsured motorist coverage in the amount of \$300,000. The uninsured motorist claim was submitted to arbitration as required by the terms of the Teacher's Insurance Company ("Teacher's") policy.³

The arbitrators found that the defendant was 20% responsible for causing the accident. They awarded the plaintiff total economic damages in the amount of \$52,455, and total noneconomic damages in the amount of \$200,000.⁴ Plaintiff's husband was not a party to the lawsuit, either as a defendant or as a third party defendant, under Florida's then existing law of contribution.⁵ The policy, which also insured the husband, contained an exclusion for liability claims by members of the insured's household, so there was no liability insurance coverage for plaintiff's injuries caused by her husband.⁶ Notwithstanding her husband's absence of liability coverage,

1. *Fabre v. Marin*, 597 So. 2d 883 (Fla. 3d Dist. Ct. App. 1992), *quashed by* 623 So. 2d 1182 (Fla. 1993); *Messmer v. Teacher's Ins. Co.*, 588 So. 2d 610 (Fla. 5th Dist. Ct. App. 1991).

2. 588 So. 2d at 610.

3. *Id.* at 611.

4. *Id.*

5. See FLA. STAT. § 768.31(2)(f) (1987).

6. *Messmer*, 588 So. 2d at 611 n.1.

plaintiff's insurance policy did not provide coverage for her husband's negligence. The trial court's interpretation was affirmed.⁷ The trial court and the Fifth District Court of Appeal and ultimately the Supreme Court of Florida failed to follow Florida's well-established rules of statutory construction.⁸ There even appears to be an internal conflict within the court's own holding, when it states that "[t]he use of the word 'party' simply describes an entity against whom judgement is to be entered."⁹ By its own holding, the court should not have considered plaintiff's husband as a party, since he was not an entity against whom judgment was or could have been entered.

Teacher's paid the economic damage award in full, plus costs.¹⁰ But the trial court, interpreting Florida's law on apportionment of damages,¹¹ ruled that Teacher's only had to pay 20% of noneconomic damages.¹² The appellate court determined that "party" meant party to the incident, rather than party to the lawsuit.¹³ This analysis, that the legislature intended to equate liability with fault, meant a wrongdoer could and should escape full

7. *Id.* at 611.

8. *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984), stated: "[w]hen the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Id.* at 219 (quoting *A.R. Douglass, Inc. v. McRainey*, 137 So. 157, 159 (Fla. 1931)). *Holly* stated that courts in the State of Florida are "without power to construe an unambiguous statute in a way which would extend, modify or *limit*, its express terms or its *reasonable and obvious implications*. To do so would be an abrogation of legislative power." *Holly*, 450 So. 2d at 219 (quoting *American Bankers Life Assur. Co. of Fla. v. Williams*, 212 So. 2d 777, 778 (Fla. 1st Dist. Ct. App. 1968)). *But see City of Boca Raton v. Gidman*, 440 So. 2d 1277, 1281 (Fla. 1983) (holding that statutes should be construed so as to ascertain and give effect to the intention of the legislature); *State v. Webb*, 398 So. 2d 820, 824 (Fla. 1981) (holding that legislative intent should be given effect regardless of whether such construction varies from statute's literal meaning).

9. *Messmer*, 588 So. 2d at 611.

10. *Id.*

11. FLA. STAT. § 768.81(3) (1987) provides:

(3) APPORTIONMENT OF DAMAGES. - In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of 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.

Id.

12. *Messmer*, 588 So. 2d at 611.

13. *See id.*

responsibility to an innocent victim whenever it could share blame upon an entity absent from the proceedings. Such reasoning was flawed because it failed to consider Florida's law of contribution¹⁴ in pari materia. Furthermore, the court failed to consider, or perhaps was not provided with, the argument that the legislative intent in abrogating part of the joint and several liability doctrine was based upon a belief that well-heeled tortfeasors were too often footing the bill for other tortfeasors *who were parties to the lawsuit* and could not pay their share of the damages.

Nevertheless, *Messmer* opened the door to allow the apportionment of liability on the verdict form to people or entities who were not parties to the lawsuit and were not given a chance to defend themselves by their accusers.

B. *Then There Was Fabre*

About seven months after the Fifth District Court of Appeal decided *Messmer*, a similar issue came before the Third District Court of Appeal in *Fabre v. Marin*.¹⁵ In that case, the plaintiff was also a passenger in an automobile that was hit by another car. As in *Messmer*, plaintiff's driver was her husband. The plaintiff alleged that she was injured when the defendant's car ran plaintiff's car off the road and into a guardrail. Defendants were underinsured and so plaintiff sued both Fabre and her own uninsured/underinsured carrier, State Farm Mutual Automobile Insurance Company ("State Farm"). The jury found plaintiff's husband 50% liable and the defendant 50% liable, and awarded total damages of \$12,750 for economic losses and \$350,000 for noneconomic losses.¹⁶ The court entered judgment against both defendants (the Fabres and State Farm) for the total amount of the damages, \$362,750.¹⁷ Defendants filed several post-trial motions, but the salient one was a motion to reduce plaintiff's recovery by 50%, the amount of fault attributed to the defendants. The trial court denied the motion.¹⁸

The Third District Court of Appeal agreed the case was factually indistinguishable from *Messmer* but declined to adopt *Messmer's* holding.¹⁹ The *Fabre I* court concluded that section 768.81(3) of the *Florida Statutes* was in fact ambiguous with regard to the meaning of the word "party." The

14. See generally FLA. STAT. § 768.31 (1987).

15. 597 So. 2d 883 (Fla. 3d Dist. Ct. App. 1992) ("*Fabre I*").

16. *Id.* at 884-85.

17. *Id.*

18. *Id.* at 885.

19. *Id.*

court noted that the legislature did not define the term, and that the word could in fact have three possible meanings.²⁰ They declined to adopt the definition that the word “party” could include non-parties to the lawsuit, since subsection three of the relevant statute requires the trial court to enter judgment against liable parties and the court could not have jurisdiction to enter judgment against non-parties.²¹

Although the *Messmer* and *Fabre I* courts both applied the same standards in analyzing their respective cases, the Third District Court of Appeal considered and applied fundamental rules of statutory construction to give full force and effect to all statutes whenever possible.²² The *Fabre I* court, in an in-depth review, also fully considered the comparative fault statute²³ and the doctrine of interspousal immunity.²⁴ The court stated that sections 768.81(2) and 768.81(3) of the *Florida Statutes* revealed that the legislative language consistently reduced claimant’s recovery only as a result of the claimant’s own fault.²⁵ The *Fabre I* court, unlike the *Messmer* court, took into account the history of Florida jurisprudence as well as the legislative history on the relevant issues.

Importantly, the *Fabre I* court defined intellectual honesty when it stated that “[w]hen the meaning of a statute is in doubt, a rational, sensible construction, avoiding unreasonable consequences, is favored.”²⁶ Writing for a unanimous court, Judge Baskin declined to usurp the legislative function by adding to the statute, writing: “[i]n the absence of any language in subsection three reducing an innocent plaintiff’s recovery, and in view of the statute’s express provision of the measure by which to reduce a negligent claimant’s award, we conclude that subsection three should not be applied to bar Mrs. Marin’s recovery.”²⁷ The case was then certified to the supreme court as being in conflict with *Messmer*.²⁸

20. *Fabre I*, 597 So. 2d at 885. The word could mean “1) persons involved in an accident; 2) defendants in a lawsuit; or 3) all litigants in the lawsuit.” *Id.*

21. *Id.*

22. *See generally id.* at 885-86.

23. *Id.* (analyzing FLA. STAT. § 768.81(2), (3) (Supp. 1988)).

24. *Fabre I*, 597 So. 2d at 886.

25. *Id.* at 885.

26. *Id.* at 886 (citing *Wakulla County v. Davis*, 395 So. 2d 540 (Fla. 1981) and *Radio Tel. Communications, Inc. v. Southeastern Tel. Co.*, 170 So. 2d 577 (Fla. 1964)).

27. *Id.*

28. *Id.*

C. *The Showdown*

The Supreme Court of Florida broke the tie on August 26, 1993 in its review of *Fabre v. Marin*.²⁹ Writing for the majority, Justice Grimes reviewed the facts and holdings of both *Messmer* and *Fabre I*.³⁰ The court then provided an overview of the historical doctrines of contributory negligence, joint and several liability, comparative negligence, and contribution among joint tortfeasors.³¹ The court compared *Fabre*, in which the plaintiff was entirely innocent, to *Walt Disney World Co. v. Wood*.³² In *Disney*, the jury found the defendant was only 1% negligent, a non-party to the lawsuit was 85% negligent and, most importantly, the plaintiff was 14% negligent.³³ Thus, the *Disney* plaintiff was both negligent *and was more negligent than the defendant!* However, the *Disney* court reasoned that section 768.81 of the *Florida Statutes* did not completely replace the concept of joint and several liability and that judgment should be entered against each party liable on the basis of that party's fault.³⁴ The *Disney* court never considered that Florida's contribution statute³⁵ and third party practice rule³⁶ allowed Disney to make the plaintiff's fiancé, the non-party, a defendant in the case, since it was Disney and not the plaintiff who felt the fiancé was at fault. Of course, no one will ever know whether apportionment would have been the same if Disney, the accuser, had been required to openly name the fiancé and provide a fair chance for a response, rather than accuse him behind his back. The court's opinion seems to presume that the results would have been the same. Therein lies the flawed reasoning. This concept flies in the face of centuries old tradition and experience of adversarial jurisprudence. That tradition holds as its fundamental principle that justice is best served when all sides have their say. Instead, Florida's high court allowed the defendant to point the finger of blame away from itself. It simultaneously placed the burden of suing all potentially liable entities upon the plaintiff, even if the plaintiff does not

29. See generally *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993) (reviewing *Fabre I*, 597 So. 2d at 883).

30. *Id.* at 1183-84.

31. *Id.* at 1184-85.

32. 515 So. 2d 198 (Fla. 1975).

33. *Fabre*, 623 So. 2d at 1185 (analyzing *Disney*, 515 So. 2d at 198).

34. *Disney*, 515 So. 2d at 201 (assessing Disney 86% of damages despite jury findings of non-party fiancé's 85% fault).

35. See FLA. STAT. § 768.31 (Supp. 1986).

36. FLA. R. CIV. P. 1.180.

believe those entities are liable. This requirement raises ethical concerns for plaintiff's counsel.

Interestingly, the *Fabre* court bolstered its position by saying that even if the statute was ambiguous, "[we] believe that the legislature intended that damages be apportioned among all participants to the accident."³⁷ But the court provided no basis for reaching that conclusion, such as references to legislative hearings or committee meetings. There was no legislative directive that the statute should be liberally construed to limit a defendant's liability. There was no reference to support further constriction of the joint and several doctrine beyond what the legislature had already done.

The court did make reference to a seven-year-old legislative finding which states the reasons why the legislature wanted comprehensive tort reform and would enact such reform themselves.³⁸ It would seem, then, that the court should not have added to or expanded the statute. Nevertheless, the law today is as follows: Any entity who is potentially liable may be blamed by a named defendant and may be placed on the verdict form for apportionment of liability, without being made a party to the lawsuit.

The supreme court's holding forces plaintiffs and their counsel into a conflict between themselves. For example, plaintiff's counsel is ethically bound to name only those defendants whom he or she believes in good faith to be liable, yet the *Fabre* decision by the Supreme Court of Florida forces counsel to name all potential entities the defense may use to avoid or reduce its own responsibility. As a result, plaintiff is forced to sue entities he or she may not believe liable. There is no doubt that the legislature has the right and the power to modify or eliminate joint and several liability. Likewise, it has the ability to prescribe apportionment among entities who are not parties to the lawsuit. And of course, the supreme court has the power to do as it did in *Fabre*. But where the legislature has expressly addressed the issue to the extent it thought necessary, the question is not whether the court could, but whether it should, expand the legislation beyond its strict meaning.

III. SURVEY OF FLORIDA CASES BETWEEN JULY, 1994 AND JULY, 1995

Florida courts have repeatedly confronted *Fabre/Messmer* party liability issues since the final disposition of the cases. The remainder of this article

37. *Fabre*, 623 So. 2d at 1185.

38. *Id.* (citing Tort Reform Insurance Act of 1986, ch. 86-160, § 2, 1986 Fla. Laws 695, 699 (codified at FLA. STAT. § 768.81 (Supp. 1986)).

surveys post *Fabre/Messmer* cases, focusing on the *Fabre/Messmer* issue of liability in each case and, perhaps, gives insight into the future of Florida decisions.

A. *First District Court of Appeal*

In *Department of Corrections v. McGhee*,³⁹ two felons escaped from the custody of the Department of Corrections (“DOC”) while being taken to a doctor for an eye examination. The escapees fled from Florida to Alabama and then to Mississippi, where they later shot plaintiff’s husband, a park ranger. Suit was filed against the DOC, alleging that the agency was negligent in its care, supervision and control of the felons and that, as a result of such negligence, the inmates escaped and thereafter caused the death of Robert McGhee, Jr., plaintiff’s husband.⁴⁰

The *Fabre/Messmer* issue in this case was whether the jury should be permitted to apportion noneconomic damages between negligent and intentional tortfeasors. In his concurring and dissenting opinion, Judge Ervin also discussed pertinent aspects of section 768.81 of the *Florida Statutes*.⁴¹ He specifically pointed to the language of section 768.81(4):

(b) *The section does not apply* to any action brought by any person to recover actual economic damages resulting from pollution, to any action based upon an intentional tort, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by chapter 403, chapter 498, chapter 517, chapter 542, or chapter 895.⁴²

Judge Ervin notes that the DOC argued in the trial court that the felons, who were not named defendants, were partially at fault based upon their intentional and criminal conduct and, therefore, the jury should consider the various percentages of fault of all tortfeasors.⁴³ Mrs. McGhee took the position that DOC’s claim for apportionment was barred by the provisions of section 768.81(4)(b) of the *Florida Statutes* since the felons committed intentional acts.⁴⁴

39. 653 So. 2d 1091 (Fla. 1st Dist. Ct. App. 1995) (Ervin J., concurring in part and dissenting in part).

40. *Id.* at 1091-92.

41. *Id.* at 1099-1101; *see generally* FLA. STAT. § 768.81 (1993).

42. *McGhee*, 653 So. 2d at 1099-1100 (citing FLA. STAT. § 768.81(4)(a) (1989)).

43. *Id.* at 1100.

44. *Id.*

Judge Ervin reasoned, agreeing with the decision of the trial court, that since plaintiff's action against the DOC was based on negligence, plaintiff's argument must fail.⁴⁵ He specifically noted that, "[n]o action was brought by appellee on the theory of intentional tort."⁴⁶ Section 768.81 of the *Florida Statutes* requires a jury's consideration of each individual's "fault" contributing to an injured person's damages even if such person is not or cannot be a party to the lawsuit.⁴⁷ According to Judge Ervin:

I consider that the comparative fault statute, in precluding the comparing of fault in any action based upon intentional fault, expressed an intent to retain the common law rule forbidding an intentional tortfeasor from reducing his or her liability by the partial negligence of the plaintiff in an action based on intentional tort. However, such exclusion has no applicability to an action, such as that at bar, based solely on negligence, and, consequently, the fault of both negligent and intentional tortfeasors may appropriately be apportioned as a means of fairly distributing the loss according to the percentage of fault of each party contributing to the loss. I would therefore affirm as to this issue.⁴⁸

Wells Fargo Guard Services, Inc. v. Nash,⁴⁹ involved a plaintiff, Lucille Nash, who was robbed and pistol-whipped in the parking garage of Methodist Hospital in Jacksonville.⁵⁰ She sued defendant, a security guard service, for negligence. The *Fabre/Messmer* issue dealt with the verdict form. Defendant, Wells Fargo, moved to include the hospital, a non-party, on the verdict form. The trial court denied defendant's motion and the case was submitted to the jury with only the defendant appearing on the verdict form.⁵¹

In this decision, the First District Court of Appeal, following *Fabre*, held that the case must be reversed and that the hospital, a non-party, must be included on the verdict form, even though Nash had not included the hospital in the suit.⁵² There was no discussion in this decision of the extent to which there was any "evidence" of fault on the part of the hospital.

45. *Id.* at 1101.

46. *Id.*

47. *See* FLA. STAT. § 768.81 (1989).

48. *McGhee*, 653 So. 2d at 1101.

49. 654 So. 2d 155 (Fla. 1st Dist. Ct. App. 1995).

50. *Id.* at 156.

51. *Id.*

52. *Id.*

B. *Second District Court of Appeal*

In *Peterson v. Morton F. Plant Hospital Ass'n, Inc.*,⁵³ a wrongful death suit was filed alleging medical malpractice against a hospital and two of its employees, a nurse and a nurse midwife.⁵⁴ A Dr. Keller, who specialized in obstetrics and gynecology, was also a defendant. Before trial, Dr. Keller reached an informal settlement with no documentation. Plaintiff unsuccessfully moved in limine to exclude any evidence of the \$250,000 settlement, and both the fact of the settlement and the amount of the settlement were disclosed to the jury during the trial.⁵⁵ Defense counsel stated in final argument:

[T]hey have already received or will receive funds from Dr. Keller. When you couple that with the amount that they've received or are receiving from the government, it more than equals the amount of money [the plaintiffs' attorney] has asked you for for [sic] care and services. More, greater than.⁵⁶

Later, the trial court instructed the jury that Dr. Keller had settled and the hospital was blameless for his actions. However, the court instructed the jury it could still assign Dr. Keller a percentage of liability regardless of any insurance coverage. The jury then returned a verdict for the hospital and its two nurses.⁵⁷

The court treated Dr. Keller in this instance as a *Fabre* party. Nevertheless, the District Court of Appeal reversed this verdict and remanded the case for a new trial holding that the disclosure of the amount of the settlement clearly prejudiced the plaintiffs in this case.⁵⁸ "In many respects, the trial court allowed the defendants to treat Dr. Keller as both a party who had settled and as one who had not."⁵⁹

In *Owens-Illinois, Inc. v. Baione*,⁶⁰ a wrongful death action, Baione's estate brought an action for damages against the manufacturer of asbestos products. The suit claimed that Baione's death was caused by his exposure to asbestos products during the course of his employment. The

53. 656 So. 2d 501 (Fla. 2d Dist. Ct. App. 1995).

54. *Id.* at 502.

55. *Id.* at 502.

56. *Id.*

57. *Id.*

58. *Peterson*, 656 So. 2d at 501.

59. *Id.* at 503.

60. 642 So. 2d 3 (Fla. 2d Dist. Ct. App. 1994)

Fabre/Messmer issue in this case was whether or not there was sufficient evidence to permit the apportionment of fault against non-parties to the suit, other manufacturers of the asbestos. The Second District Court of Appeal held that the evidence was insufficient and, therefore, the trial court judge correctly denied the manufacturer's request to have the jury make assessments of fault of non-party entities.⁶¹

In *Seminole Gulf Railway, Ltd. v. Fassnacht*,⁶² plaintiffs, a retired couple, suffered injuries when their vehicle, driven by the husband, collided with defendant's train.⁶³ Plaintiffs brought a negligence suit and a suit for personal injury damages against the owner of the Seminole Gulf Railway. The jury verdict form directed the jury to consider the liability of defendant Seminole, the liability of the plaintiff husband, and the amount of noneconomic damages, if any. The jury found defendant and the plaintiff husband each 50% negligent and awarded plaintiffs \$35,000 each for past and future noneconomic damages.⁶⁴

Relying on section 768.81(3) of the *Florida Statutes*, Seminole moved to have Mrs. Fassnacht's award reduced by Mr. Fassnacht's percentage of comparative fault.⁶⁵ The Second District Court of Appeal ultimately held that Seminole's position was correct in accordance with the holding of *Fabre* and directed Mrs. Fassnacht's award be accordingly reduced.⁶⁶

It should be noted that in a partially concurring and partially dissenting opinion, Judge Altenbernd concluded that the *Fabre/Messmer* issue had not been adequately preserved by the defendant in trial court.⁶⁷ Judge Altenbernd stated:

The record does not reflect that the defendant asked for relief under section 768.81 until after the jury returned its verdict. In my opinion, a defendant should raise section 768.81 as an affirmative defense, just as defendants have always raised contributory or comparative negligence. A defendant should request jury instructions on this issue similar to the standard instructions for comparative negligence. . . . If a defendant wants the benefit of section 768.81, the jury should be told

61. *Id.*

62. 635 So. 2d 142 (Fla. 2d Dist. Ct. App. 1994) (Altenbernd, J., concurring in part and dissenting in part).

63. *Id.* at 143.

64. *Id.*

65. *Id.* at 144; see also FLA. STAT. § 768.81(3) (1989).

66. *Seminole Gulf*, 635 So. 2d at 144.

67. *Id.*

about the effect that statute will have on its verdict, just as it is told about the effect of traditional comparative negligence.⁶⁸

On a further review of the apportionment of damages issue, Judge Altenbernd noted that the majority's opinion awarded Mrs. Fassnacht only \$17,500 since section 768.81(5) of the *Florida Statutes* does not apply to cases with damages of \$25,000 or less.⁶⁹ Ironically, the plaintiff's recovery was smaller due to the larger jury award. Judge Altenbernd noted:

[t]his result may seem logical and fair to the legislature, but I doubt it is the result that most jurors would anticipate. In assessing damages, a jury should have a general understanding of the overall ramifications of its verdict. This jury had no reason to anticipate that Mrs. Fassnacht's award would be 50% of what they actually awarded.⁷⁰

C. *Third District Court of Appeal*

The wrongful death action in *Chesterton v. Fisher*,⁷¹ involved a plaintiff who died of mesothelioma, an asbestos-related cancer, and the defendants, manufacturers and sellers of packing and gasket materials. Plaintiffs previously settled with approximately twenty-six manufacturers of asbestos-containing insulation. Although this case was reversed and sent back for a new trial on other grounds,⁷² the court mentioned that *Fabre* was decided subsequent to the first trial.⁷³ The Third District Court of Appeal wrote:

[a]t the time of trial, the trial court did not have the benefit of the Florida Supreme Court's decision in *Fabre v. Marin* Therefore, on remand if there is sufficient "evidence to consider the liability of other nonparties," the jury is to be instructed pursuant to Section 768.81(3), Florida Statutes (1993), and provided with jury instructions and a verdict form that permits the jury to apportion liability among all alleged tortfeasors.⁷⁴

68. *Id.*

69. *Id.* at 145; *see also* FLA. STAT. § 768.81(5) (1989).

70. *Seminole Gulf*, 635 So. 2d at 145.

71. 655 Fla. 2d 170 (Fla. 3d Dist. Ct. App. 1995).

72. *Id.* at 171.

73. *Id.* at 172.

74. *Id.* (citing *W.R. Grace & Co. v. Dougherty*, 636 So. 2d 746, 748 (Fla. 2d Dist. Ct. App. 1994)).

In *City of Homestead v. Martins*,⁷⁵ the Third District Court of Appeal held that the amount of a judgment against a defendant hospital could not exceed the percentage of liability apportioned against it by the jury.⁷⁶ The court held that pursuant to *Fabre*, it was error for the trial court to award an amount that exceeded the percentage of liability attributed to it by the jury.

The Third District Court of Appeal, in *Ashraf v. Smith*,⁷⁷ a medical malpractice case, followed *Fabre* by holding that a defendant physician's request to include a non-party hospital on the verdict form should have been granted.⁷⁸ The court ruled that if, at retrial, the jury determined the hospital was not a negligent cause of the plaintiff's death, then the original judgment against the defendant physician and the physician's protective trust fund would be reinstated.⁷⁹

In *Schindler Elevator Corp. v. Viera*,⁸⁰ the wife of a man killed from an elevator shaft fall brought an action against the elevator maintenance company and Dade County, the elevator owner. The plaintiff privately settled with Dade County and went to trial against the elevator company. The elevator company, Schindler, requested that Dade County be listed on the verdict form for apportioning liability. The trial court denied the request and the jury only considered the liability of the elevator company and the deceased. The jury entered a verdict finding the elevator company 75% at fault and the decedent 25% at fault. On appeal, the Third District Court of Appeal held that reversal was required under *Fabre* and the jury should apportion liability among "all persons responsible for the accident,"⁸¹ including Dade County.

D. Fourth District Court of Appeal

The plaintiff in *Yablon v. North River Insurance Co.*,⁸² was injured in a car wreck. She and her husband privately settled with two tortfeasors, Ford Motor Company and Pompano Lincoln Mercury. At the time of the crash, plaintiff had insurance with North River, under a policy which contained benefits for uninsured/underinsured coverage. The policy provided that uninsured motorist ("UM") benefits would not apply if there

75. 645 So. 2d 187 (Fla. 3d Dist. Ct. App. 1994).

76. *Id.*

77. 647 So. 2d 892 (Fla. 3d Dist. Ct. App. 1994).

78. *Id.* at 893.

79. *Id.*

80. 644 So. 2d 563 (Fla. 3d Dist. Ct. App. 1994).

81. *Id.* at 564.

82. 654 So. 2d 1033 (Fla. 4th Dist. Ct. App. 1995).

was a settlement “without our consent.”⁸³ Due to the settlements without the UM carrier’s “consent,” the lower court held, in a declaratory judgment action, that there was no UM coverage.⁸⁴ The crux of the case was really whether or not the nonconsensual settlement with these tortfeasors had somehow “prejudiced” the UM carrier.⁸⁵ In this instance, the appellate court held that plaintiffs had made a requisite showing of lack of prejudice to defeat coverage based, at least in part, on the *Fabre* decision.⁸⁶ With the abrogation of joint and several liability, North River would not be compromised by private settlements. They would still only be liable for their percentage share of liability.⁸⁷ Accordingly, the finding of “no coverage” was reversed.⁸⁸

With regard to our discussion of *Fabre/Messmer* issues, *Brown v. City of Lauderdale*⁸⁹ assists us only in that it provides a further definition of a “party” under section 768.81(3) of the *Florida Statutes*. The court here was simply trying to determine whether or not a city is a real party in interest to various attorney’s fee claims. The court noted that “often the term ‘party’ is recognized as including those who are real parties in interest.”⁹⁰

In *Bell South Human Resources Administration, Inc. v. Colatarci*,⁹¹ a Southern Bell employee was injured while participating in a physical activities program sued the corporation operating the program for damages. Defendant appealed, arguing that the court erred in failing to include nonparty tortfeasors on the verdict form. Following *Fabre*, the court decided that failure to include nonparty tortfeasors on a verdict form required reversal of the plaintiff’s verdict in this personal injury case despite plaintiff’s contention that the defendant’s proffer did not show sufficient evidence of negligence by nonparties.⁹²

In *East West Karate Ass’n, Inc. v. Riquelme*,⁹³ a karate student who ruptured his spleen brought a negligence action against a karate association. On appeal, the karate association claimed that the trial court erred by not including the sparring partner’s name to the jury on the verdict form.

83. *Id.* at 1034.

84. *Id.*

85. *See id.* at 1035.

86. *Id.*

87. *Yablon*, 654 So. 2d at 1035.

88. *Id.* at 1036.

89. 654 So. 2d 302 (Fla. 4th Dist. Ct. App. 1995).

90. *Id.* at 303 (citing *Fabre*, 623 So. 2d 1182 (Fla. 1993) as an example).

91. 641 So. 2d 427 (Fla. 4th Dist. Ct. App. 1994).

92. *Id.* at 428.

93. 638 So. 2d 604 (Fla. 4th Dist. Ct. App. 1994).

Following *Fabre*, the Fourth District Court of Appeal agreed and reversed the case.⁹⁴

E. *Fifth District Court of Appeal*

The plaintiff in *Wet 'n Wild Florida, Inc. v. Sullivan*,⁹⁵ was injured while pulling a drowning woman from a "wave pool." The complaint alleged negligence on the part of the lifeguard employees of defendant Wet 'n Wild. According to the plaintiff, if the employees had rescued the victim, the plaintiff would not have been injured. Wet 'n Wild took the position "that it had not breached any duty owed to Sullivan and that Sullivan was herself negligent and that the victim was negligent."⁹⁶ The *Fabre/Messmer* issue noted in this case was whether or not the trial court erred in not submitting the issue of the victim's negligence to the jury for its consideration.⁹⁷ The court decided that the jury should consider, and apportion accordingly, the relative negligence of all parties, including the drowning victim.⁹⁸

A car wreck led plaintiff to sue in *DeWitt Excavating, Inc. v. Walters*.⁹⁹ In 1988, a DeWitt employee negligently directed Hashim to turn into the path of Walters' oncoming vehicle. Plaintiff Walters settled privately with Hashim and went to trial against DeWitt Excavating. The jury found the remaining defendant, DeWitt Excavating, 25% negligent. Consequently, DeWitt was held liable for the first \$25,000 in damages and for 25% of the excess, after subtracting the settlement amount.¹⁰⁰ The jury found Hashim 75% negligent and plaintiff 0% negligent.¹⁰¹

The case was reversed and remanded holding that once damages exceed \$25,000, the doctrine of joint and several liability is inapplicable to the action and, thus, a nonsettling defendant is responsible for only that portion of the entire noneconomic damages equivalent to the percentage of

94. *Id.* at 605.

95. 655 So. 2d 1171 (Fla. 5th Dist. Ct. App 1995).

96. *Id.* at 1172.

97. *See id.* at 1174.

98. *Id.*

99. 642 So. 2d 833 (Fla. 5th Dist. Ct. App. 1994).

100. *Id.* at 834.

101. *Id.* at 833.

fault.¹⁰² Therefore the defendant was not jointly and severally liable for the first \$25,000 in damages.¹⁰³

*Turner v. Gallagher*¹⁰⁴ deals primarily with the 120-day service rule regarding service of a summons and complaint and whether or not the 120-day rule applies to the Department of Insurance in a sovereign immunity case. Here, the court looks to *Messmer* for guidance in defining the term "party."¹⁰⁵ Further, "the term 'defendant' unambiguously means a party named in a lawsuit against whom some type of relief or recovery is sought or who claims an interest adverse to the plaintiff."¹⁰⁶ The court held that the rule requiring service of process upon a defendant within 120 days after the filing of the initial pleading does not apply to the Department of Insurance in a negligence action/sovereign immunity action under the statute requiring service of process upon the Department of Insurance.¹⁰⁷

F. *Supreme Court of Florida*

In the *Wells v. Tallahassee Memorial Regional Medical Center, Inc.*,¹⁰⁸ decision, considered by many legal scholars to be the most instructive, informative and well-reasoned decision on the *Fabre/Messmer* issue, the Supreme Court of Florida favorably resolved the confusion and conflict surrounding the treatment of liability settlements and setoffs after *Fabre*. This case involved a medical malpractice action in which the claimant settled before trial with defendant doctors for \$300,000 and later went to trial against the defendant hospital. The jury determined claimant's total damages at approximately \$575,000 and apportioned 90% of the fault to the hospital. The trial court denied the hospital's motion for a reduction in the judgment based upon the \$300,000 already paid by the settling defendants.¹⁰⁹ The hospital appealed the trial court's decision and the First District Court of Appeal reversed, citing footnote three in *Fabre* and

102. *Id.* at 834.

103. *See id.* The opinion provides a step-by-step review of how to determine a damages award in similar situations. *DeWitt*, 642 So. 2d at 834-35.

104. 640 So. 2d 120 (Fla. 5th Dist. Ct. App. 1994).

105. *Id.* at 121. The *Messmer* court noted that "party" is a non-limiting term. *Id.* (citing *Messmer*, 588 So. 2d at 611).

106. *Turner*, 640 So. 2d at 121 (citing FLA. R. CIV. P. 1.210(a) and *Messmer*, 588 So. 2d at 610).

107. *Id.*

108. 20 Fla. L. Weekly S278 (June 15, 1995).

109. *Id.*

deviating from conflicting portions.¹¹⁰ The First District Court of Appeal certified the following questions to the Supreme Court of Florida:

- (A) IS A NONSETTLING DEFENDANT IN A CASE TRIED UNDER SECTION 768.81(3) ENTITLED TO SETOFF OR REDUCTION OF HIS APPORTIONED SHARE OF THE DAMAGES, AS ASSESSED BY THE JURY, UNDER THE PROVISIONS OF SECTIONS 768.041(2), 46.015(2) OR 768.31(5)(a), BASED UPON SUMS PAID BY SETTLING DEFENDANTS IN EXCESS OF THEIR APPORTIONED LIABILITY AS DETERMINED BY THE JURY?
- (B) DOES THE RULE AS TO SETOFF APPLY EQUALLY TO BOTH ECONOMIC AND NONECONOMIC DAMAGES?¹¹¹

Both certified questions were answered in the negative.¹¹²

In a decision authored by Chief Justice Grimes and concurred with by every other justice, the court held that the setoff statutes apply *only* to damages for which the parties are jointly and severally liable.¹¹³ They do not apply to damages for which there is only proportional liability. Accordingly, there is no setoff for any portion of a settlement attributable to noneconomic damages.¹¹⁴ The allocation of settlement proceeds between economic and noneconomic damages must be determined by the respective percentages ultimately fixed by the jury.

In a separate concurring opinion, Justices Wells and Kogan noted that this issue is but one of many problems arising from the *Fabre* decision and called for a reexamination of *Fabre*.¹¹⁵ In another concurring opinion, Justice Anstead expressed his concern that the legislature had not acted to clear up these problems.¹¹⁶

III. CONCLUSION

At one point in time in the not-too-distant past history of tort law, any amount of contributory negligence completely barred a plaintiff's claim. As a result of the extreme harshness of this concept, the doctrine of joint and

110. *Id.* at S280 (citing *Fabre*, 623 So. 2d at 1186 n.3).

111. *Id.* at S278.

112. *Id.*

113. *See Wells*, 20 Fla. L. Weekly at S279.

114. *Id.* at S280.

115. *See id.* at S281 (Wells, J., and Kogan, J., concurring).

116. *See id.* (Anstead, J., concurring).

several liability developed slowly throughout the country. The theory of joint and several liability allows the plaintiff to collect the full amount of damages from any tortfeasor who caused the plaintiff's injuries. Members of the Florida Bar Association during these years discussed whether the doctrine of joint and several liability caused inequities. The matter was a choice: If there had to be a loss, the question was whether the loss should be borne by the guilt-free victim or by the wrongdoing tortfeasor. The obvious answer and the one uniformly chosen by the courts was that the cost should be borne by the parties sharing responsibility for the injury.

In the late 1960s and throughout the 1970s, statutes and case law developed the concept of comparative negligence. Replacing contributory negligence with comparative negligence eliminated what had been an illogical and antiquated bar to compensation. Eventually, defendants began to argue that the doctrine of comparative negligence was logically inconsistent with the common law doctrine of joint and several liability. In Florida, the doctrine of joint and several liability was retained. This was so until the enactment of the 1986 Tort Reform Act and subsequent interpretations of that Act, including the decision in *Fabre*. The *Fabre* case represents a policy decision that losses resulting from negligence of unknown or uninsured tortfeasors should be borne by the injured plaintiff, even when that plaintiff may be totally free from any fault or wrongdoing. Such a policy is abhorrent to the fundamentals of our system of justice.