

IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No. SC 01-374

JOSEPH CEPHAS

Petitioner,

vs

MARK J. LETZTER, M.D., et al

Respondents.

AMICUS BRIEF OF
THE ACADEMY OF FLORIDA TRIAL LAWYERS

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INTRODUCTION

The Academy of Florida Trial Lawyers, a voluntary organization of lawyers who represent victims of the wrongdoing of others, files this amicus brief in support of the Appellees.

Following the mandate of Ciba Geigy Limited BASFAG vs The Fish Peddler, Inc., 691 So.2d 1111 (Fla. 4DCA 1997), the Academy of Florida Trial Lawyers forgoes a statement of the case and facts.

SUMMARY OF ARGUMENT

An exception to this general law applies in the area of subsequently caused injury due to medical malpractice. A tortfeasor who causes an injury which is later aggravated by medical malpractice is liable, as a matter of law, for that subsequent injury so long as the plaintiff has not been negligent in choosing his physician who causes the aggravation or in following the directions of that physician. J. Ray Arnold Lumber Corp. of Olustee vs Richardson, 141 So. 133 (Fla. 1932); Texas & Pacific Ry. Co. vs Hill, 237 U.S. 208 (1915).

In Stuart vs Hertz Corp., 351 So.2d 703 (Fla. 1977), the Florida Supreme Court enunciated the doctrine as follows:

'Where one who has suffered personal injuries by reason of the negligence of another exercises reasonable care in securing the services of a competent physician or surgeon, and in following his advice and instructions, and his injuries are thereafter aggravated or increased by the negligence, mistake or lack of skill of such physician or surgeon, the law regards the negligence of the wrongdoer in causing the original injury as the proximate cause of the damages flowing from the subsequent negligent or unskillful treatment thereof, and holds him liable therefore.

Although it may be conceded that the complexity of the litigation rationale for the rule of Stuart vs Hertz is not required in the area of a medical malpractice case, the issue of a factual distinction between joint tort feasons in a medical malpractice case and a subsequent malpractice are issues best left to a jury for resolution. See Haas vs Zaccaria, 659 So.2d 1130 (Fla 4DCA 1995). Review denied 669 So.2d 253 (Fla. 1996).

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."¹ This essential duty was made explicit in the constitutions of the vast majority of states.² Other states have interpreted their constitutions to embrace such a right.³ Florida's Constitution similarly and

¹Marbury vs Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

²Thirty-eight states have constitutional provisions that guarantee a right to a "certain remedy." Jennifer Friesen, *State Constitutional Law*, § 6-2(a), at 347 (Michie Co. 1996).

³See, e.g. Richardson vs Carnegie Library Restaurant, Inc., 763 P.2d 1153 (N.M. 1988)(imit on liability violates an implicit guarantee of fundamental right to access to the courts

explicitly guarantees courts available "to every person for redress of any injury, and justice...administered without sale, denial or delay.

The Florida Supreme Court has adopted a similarly strong stance against legislative interference with access to the courts. In Kluger vs White, 289 So.2d 1 (Fla 1973), the Court held that the legislature was without power to abolish a common-law cause of action unless it provided an adequate alternative or was able to assert both overwhelming public necessity and a lack of alternatives.

Florida courts have consistently held when several independent acts of negligence combine to produce a single injury (emphasis added), each party is liable for the entire result.

Justice Wells wrote:

"I write though to state my awareness and concern regarding the current status of tort law in our State. The issue with which we are confronted in applying *Fabre* to the facts of this case presents but one of the myriad of imponderable reconciliations between common law and statutory law that have plagued the proper administration of justice in tort cases since this Court's construction of the term "party" in *Fabre* and *Allied Signal, Inc. vs Fox*, 263 So.2d 1180 (Fla. 1993)

that is part of rights of redress for grievances and to due process).

ARGUMENT 1

A. The doctrine of Stuart vs Hertz Corp., 351 So.2d 703 (Fla. 1977) was not abrogated by the 1986 enactment of Section 768.81(3), Florida Statutes.

This matter comes to the Supreme Court on a question of great public importance certified by the Fourth District Court of Appeal in Letzter vs Cephas. The question certified by the Fourth District Court of Appeal is, "has the doctrine of Stuart vs Hertz been abrogated by the tort reform and insurance act of 1986." Chapter 86.170, laws of Florida, and 2) does Stuart vs Hertz apply when the initial cause of action is one in medical malpractice and both the initial and subsequent tort feasons are sued in the same action.

Since this Court's seminal decision in Hoffman vs Jones, 280 So.2d 431 (Fla. 1973) in which this Court took the step of removing the law of contributory negligence toward the compassionate and modern thinking comparative negligence, this Court and the legislature have been bombarded by crisis after crisis after crisis relating to liability insurance in various arenas. As a result, this Court has been required to interpret reams of statutory regulations relating to the imminent doom and gloom crisis *du jour* of the insurance companies, eroding the shoreline of protections guaranteed by the Florida

constitution⁴.

This Court has long been the bastion of determining the evolution of law as it relates to negligence.

From the historical prospective, this Court as quoted in Fabre vs Marin, 623 So. 2d 1182 (Fla. 1993):

"The doctrines of contributory negligence and joint and several liability have been part of our common law for many years. *See Smith vs. Department of Ins.*, 507 So.2d 1080 (Fla. 1987). In the case of the former, even if the plaintiff's negligence was only partially responsible for the accident, there could be no recovery from defendants who may have been guilty of even greater negligence. *Louisville & N.R.R. vs. Yniestra*, 21 Fla. 700 (1886). In the case of the latter, all negligent defendants were held responsible for the total of the plaintiff's damages regardless of the extent of each defendant's fault in causing the accident. *Louisville & N.R.R. vs. Allen*, 67 Fla. 257, 65 So. 8 (1914).

In *Hoffman vs. Jones*, 280 So.2d 431 (Fla. 1973), this Court took the first step toward equating liability with fault. In receding from the doctrine of contributory negligence, this Court said:

If fault is to remain the test of liability, then the doctrine of comparative negligence which involves apportionment of the loss among those whose fault contributed to the occurrence is more consistent with liability based on a fault premise.

Id at 436. Thereafter, in *Lincenberg vs Issen*, 318 So.2d 386, 391 (Fla. 1975), we abolished the rule against contribution among joint tortfeasors, stating that 'it would be undesirable for this Court to retain a rule that

⁴ Florida Constitution, §21 ...guarantees "...to any person for redress of any injury, and justice...administered without denial or delay.

under a system based on fault, cases the entire burden of a loss for which several may be responsible upon only one of those at fault...' Subsequently the doctrine of joint and several liability was severely tested in *Walt Disney World Co. vs Wood*, 515 So.2d 198 (Fla. 1987), a case in which the jury had returned a verdict finding the plaintiff 14% at fault, Walt Disney World 1% at fault, and the plaintiff's fiances who was not joined as a defendant 85% at fault. While recognizing the logic in Disney's position that it should not be responsible for 86% of the damages, we declined to judicially eliminate joint and several liability on the premise that this was a public policy matter which would be best decided by the legislature. The legislature acted upon the subject by enacting section 768.81(3)."

Joint and several liability refers to the doctrine under which tortfeasors who are jointly at fault in causing the harm are potentially each held individually liable for total damages caused by all of the joint tortfeasors. Dean John W. Wade has explained that the notion of assigning a percentage share of fault to each of several defendants but holding each 100 percent liable to the plaintiff was developed *for the benefit of defendants*. Previously, a plaintiff could sue any tortfeasor who was the proximate cause of plaintiff's injury and recover fully. It fell to the defendant to bring separate actions against other responsible actors for contribution. Permitting the joinder of multiple wrongdoers and assigning percentages of fault eliminated the burden on defendants of pursuing a multiplicity of actions with potentially inconsistent results. The percentage share did not represent the amount of harm defendant caused, but

rather the amount he could be required by other joint tortfeasors to contribute⁵.

For example, if a plaintiff visited three doctors, each of whom negligently failed to diagnose the plaintiff's cancer, each could be 100 percent liable to the plaintiff. It is irrational to insist that each only caused one-third of plaintiff's injury -- or that the same negligence caused only one-fourth the harm if yet another doctor misdiagnosed. It is even more irrational to insist that it is more equitable that the innocent plaintiff, rather than the negligent defendant, bear risk of nonrecovery from one or more joint tortfeasors⁶.

The misconception of the doctrine of joint and several liability among legislators interfering with the centuries-old common-law concept has been generally and directly attributed by scholars to an "intensive, lavishly financed campaign" for "special-interest legislation...primarily for the benefit of insurance companies⁷." "Reform" of joint and several liability is merely the result of "raw interest group politics" with little regard to fairness⁸.

⁵John W. Wade, *Should Joint and Several Liability of Multiple Tortfeasors Be Abolished?*, 10 Am. J. Trial Adv. 193, 194-97 (1986).

⁶ *Id.* at 197.

⁷ *Id.* at 209.

⁸Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. Davis L. Rev. 1141, 1148 (1988).

The doctrine of joint and several liability has been a part of the common law since early times and was explicitly adopted in Florida by the Supreme Court in 1914⁹. When the Florida Supreme Court discarded the harsh doctrine of contributory negligence in favor of comparative negligence in 1973, it retained the doctrine of joint and several liability¹⁰. Shortly thereafter the Florida Supreme Court and the legislature, nearly simultaneously, created a right of contribution -- the right of one joint tortfeasor who has paid more than his share of a judgment to seek reimbursement from the other joint tortfeasors¹¹.

The application of the doctrine of joint and several liability was substantially limited by the legislature in 1986 as part of the Tort Reform and Insurance Act of 1986¹². The changes included: 1) abolition of joint and several liability for noneconomic damages; 2) abolition of joint and several liability for economic damages except with respect to a defendant whose fault for the injury equals or exceeds that of the plaintiff; and 3) retention of joint and several liability in cases where the total damages are \$25,000 or less, notwithstanding the foregoing. This scheme was further

⁹*Louisville & Nashville Railroad vs Allen*,, 67 So. 8 (Fla. 1914).

¹⁰*Hoffman vs Jones*, 280 So.2d 431 (Fla 1973).

¹¹Section 768.31, Florida Statutes, which took effect while the Supreme Court was preparing its decision in *Lincenberg vs Issen*, 318 So.2d 386 (Fla. 1975).

¹²Ch. 86-160, Laws of Fla.

altered by a 1993 Florida Supreme Court decision and subsequent lower court decisions, which decreed that juries are required to reduce a defendant's liability by apportioning fault to persons who are not parties to the suit (including parties immune from suit).¹³

Ordinarily a tortfeasor is responsible for only the reasonably foreseeable consequences of his or her actions. Stark vs Holtz, 105 So. 330 (Fla. 1925). Cole v Leach, 405 So.2d 449 (Fla. 4DCA 1981). An independent, unforeseeable intervening act may break a causal connection and prevent the tortfeasor from being responsible for damages caused by that independent act. Gibson vs Davis Rent-A-Car Sys, Inc., 386 So.2d 520 (Fla. 1980).

An exception to the general law applies in the area of subsequently-caused injury due to medical malpractice.

"An exception to this general law applies in the area of subsequently caused injury due to medical malpractice. A tortfeasor who causes an injury which is later aggravated by medical malpractice is liable, as a matter of law, for that subsequent injury so long as the plaintiff has not been negligent in choosing his physician who causes the aggravation or in following the directions of that physician. J. Ray Arnold Lumber Corp. of Olustee vs Richardson, 141 So. 133 (Fla. 1932); Texas & Pacific Ry. Co. vs Hill, 237 U.S. 208 (1915).

In Stuart vs Hertz Corp., 351 So.2d 703 (Fla. 1977), the Florida Supreme Court enunciated the doctrine as follows:

¹³Fabre vs Marin, 623 So.2d 1182 (Fla. 1993).

'Where one who has suffered personal injuries by reason of the negligence of another exercises reasonable care in securing the services of a competent physician or surgeon, and in following his advice and instructions, and his injuries are thereafter aggravated or increased by the negligence, mistake or lack of skill of such physician or surgeon, the law regards the negligence of the wrongdoer in causing the original injury as the proximate cause of the damages flowing from the subsequent negligent or unskillful treatment thereof, and holds him liable therefore.'

Stuart vs Hertz, 351 So.2d 703 at 706:

"An active tortfeasor should not be permitted to confuse and obfuscate the issue of his liability by forcing the plaintiff to concurrently litigate a complex malpractice suit in order to proceed with a simple personal injury suit. To hold otherwise would in effect permit a defendant to determine the time and manner, indeed the appropriateness, of a plaintiff's action for malpractice. This decision eliminates the traditional policy of allowing the plaintiff to choose the time, forum and manner in which to press his claim. See C. Wright and A. Miller, Federal Practice and Procedure § 1459, at 316.

...The choice of when and whether to sue his treating physician for medical malpractice is a personal one which rightfully belongs to the patient. A complete outsider, and a tortfeasor at that, must not be allowed to undermine the patient-physician relationship, nor make the plaintiff's case against the original tortfeasor longer and more complex through the use of a third-party practice rule which was adopted for the purpose of expediting and simplifying litigation.

The complex issues of liability to be resolved in a medical malpractice action are foreign to the resolution of liability in the typical personal injury suit. Indeed Fla.R.Civ.P. 1.180 itself recognizes that not all third party claims should be allowed to proceed by providing that any party may, in addition to a motion to strike, move for its severance or separate trial. The courts in the past have exercised this discretion in furtherance of

convenience or to avoid prejudice, or when separate trials are conducive to expedition and economy. C. Wright and A. Miller, *supra*, § 1460.

In summary, to allow a third party action for indemnity, as in the case *sub judice*, would not only incorrectly expand traditional concepts of indemnity to the point of making it indistinguishable from contribution, but also expand the applicability of the third-party rule and make it a tool whereby the tortfeasor is allowed to complicate the issues to be resolved in a personal injury suit and prolong the litigation through the filing of a third-party malpractice action.

...This holding is in conformity with the rule announced in *J. Ray Arnold Corporation, etc. vs Richardson*, 105 Fla. 204, 141 So. 133 (1932), which reads as follows:

'Where one who has suffered personal injuries by reason of the negligence of another exercises reasonable care in securing the services of a competent physician or surgeon, and in following his advice and instructions, and his injuries are thereafter aggravated or increased by the negligence, mistake or lack of skill of such physician or surgeon, the law regards the negligence of the wrongdoer in causing the original injury as the proximate cause of the damages flowing from the subsequent negligent or unskillful treatment thereof, and holds him liable therefor. Texas & Pacific Ry. Co. vs Hill, 237 U.S. 208, 35 S.Ct. 575, 59 L.Ed. 918' at 135.

Florida is not alone in adhering to this principle for, as stated in 57 Am.Jur. 2d *Negligence* § 149, at 507,

'The rule is well established that a wrongdoer is liable for the ultimate result, although the mistake or even negligence of the physician who treated the injury may have increased the damage which would otherwise have followed from the original wrong.'

The Fourth District Court of Appeals' conclusion that Stuart vs Hertz is still good law is consistent with current case law. See Haas vs Zuccharia, 659 So.2d 1130 (Fla. 4DCA 1995, Barios vs Darrach, 629 So.2d 211 (Fla. 3DCA), review denied 637 So.2d 324 (Fla. 1994) and Ruykas vs Halifax Hospital District, 627 So.2d 967 (Fla. 5DCA 1995).

This Court has had a similar issue recently before it in Gross vs Lyons, 721 So.2d 304 (Fla. 4DCA 1998). A motorist who had been involved in two accidents brought personal injury action against the alleged tort feisor in the first accident. Where the jury was unable to apportion the injury between the first and the second accident, the court sustained a jury verdict against the defendant. The well-settled law is that

"...where injuries aggravate an existing ailment or develop a latent one, the person whose negligence caused the injury is required to respond in damages for the results of the disease as well as the original injury. In such cases, the injury is the prime cause which opens the way to and sets in motion the other cause and the latter cannot be regarded as an independent cause of injury; nor can the wrongdoer be allowed to apportion the measure of responsibility to the initial cause. Defendant must be responsible for damages for such part of the disease condition as his negligence has caused. If there can be no apportionment, or if it cannot be said disease would have existed apart from the injury, then he is responsible for the diseased condition." C. F. Hamblin, Inc. vs Owens, 127 Fla. 91 at 95 and 96.

In Gross vs Lyons, this Court adopted the indivisible injury rule as quoted from the

Arizona Supreme Court when the tortious conduct of more than one defendant contributes to one indivisible injury, the entire amount of damage resulting from all contributing causes is the total amount of damages recoverable by the plaintiff.

There is no rationale for the certification by the District Court of Appeal. The Appellees did not seek abrogation of Stuart vs Hertz in his brief:

"Dr. Letzter does not invite this Court to wholly reject the application of Hertz, or to hold that Hertz "does not apply in medical malpractice cases", as Cephas asserts. (A.B. p. 18). No case or legislative enactment has indicated an intent to retreat from Hertz's holding that a simple negligence case should not be complicated at a defendant's option with a medical malpractice action."

Since the statute specifically deals with joint and several liability, and the rule of Stuart vs Hertz deals with a subsequent medical malpractice occasioned by injuries sustained from the original tortfeasor yielding that the original tortfeasor is responsible for the subsequent medical malpractice, the doctrine of Stuart vs Hertz was not addressed by the statute and therefore cannot be abrogated *sub silentio*. Since subsequent medical negligence constitutes an exception to the joint and several liability doctrine, it is not affected by the enactment of 768.81(3), Florida Statutes. Further, since the respondents did not advance the theory that Stuart vs Hertz doctrine has been abrogated under the certification by the Fourth District Court of Appeal, it is puzzling at best and not right for review at worst.

The doctrine of Stuart vs Hertz does apply when the initial cause of action is medical malpractice and both the initial and subsequent tort feors are sued in the same action. The overriding rationale for applying Stuart vs Hertz in a medical malpractice case is the common law principle that a tort feor is responsible for all reasonably foreseeable consequences of his actions. Stark vs Holzclaw, 90 Fla. 207, 105 So. 330 (Fla. 1925). In Stuart this Court held that every tort feor can reasonably foresee that his conduct may create the occasion for subsequent medical malpractice, and thus the law regards the negligence of the wrong doer in causing the original injury as the proximate cause of the damages flowing from the subsequent negligent or unskilled full treatment thereof, and holds him liable therefor. 351 So.2d at 707. There is no fundamental rational explanation why this rule would not apply equally in medical malpractice as it would in product liability, automobile negligence, premises liability or any other form of negligent act. There is no logical distinction to separate or segregate the issue between doctors in a medical malpractice case. Although it may be conceded that the complexity of the litigation rationale for the rule of Stuart vs Hertz is not required in the area of a medical malpractice case, the issue of a factual distinction between joint tort feors in a medical malpractice case and a subsequent malpractice are issues best left to a jury for resolution. See Haas vs Zaccaria, 659 So.2d 1130 (Fla 4DCA 1995). Review denied 669 So.2d 253 (Fla. 1996). Second doctor's alleged

negligence commenced during the same operation as that conducted by the first doctor. See also Barios vs Darrich, 629 So.2d 211 at 213 (Fla. 3DCA 1993). Review denied 637 So.2d 234 (Fla. 1994). Leesburg Hospital Association vs Carter, 321 So.2d 433 at 434 (Fla. 2DCA 1975).

In light of the holding in Gross vs Lyons, supra, the indivisible injury rule was available. If the injury is separate and distinct, Stuart vs Hertz naturally would apply. If it is one indivisible injury, then it's very likely that the first doctor is going to be responsible under Gross vs Lyons.

ARGUMENT 2

This Court's previous decision in Fabre was incorrect and should be overruled.

Apportionment of fault to non-parties does not work and the statute is therefore unconstitutional as applied. It is critical to understand that the right of the people to seek redress for their injuries in court is a constitutional right of the first order. No lesser an authority than the seminal decision in all of constitutional law declared: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."¹⁴ This essential duty was made explicit in the

¹⁴Marbury vs Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

constitutions of the vast majority of states.¹⁵ Other states have interpreted their constitutions to embrace such a right.¹⁶ Florida's Constitution similarly and explicitly guarantees courts available "to every person for redress of any injury, and justice...administered without sale, denial or delay."¹⁷

As such, meaningful access to the courts is a fundamental right -- a right that the U.S. Supreme Court has recognized as well.¹⁸ The importance of this right cannot be overemphasized. No law can pass constitutional muster if it bars the people "from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped."¹⁹ The vindication of rights that courts comprehend within this constitutional protection includes full and fair compensation for the full range of civil wrongs. In 1992, for example, the U.S. Supreme Court acknowledged that "one of the hallmarks of traditional tort liability is the availability of a broad range of

¹⁵Thirty-eight states have constitutional provisions that guarantee a right to a "certain remedy." Jennifer Friesen, *State Constitutional Law*, § 6-2(a), at 347 (Michie Co. 1996).

¹⁶See, e.g. Richardson vs Carnegie Library Restaurant, Inc., 763 P.2d 1153 (N.M. 1988)(limit on liability violates an implicit guarantee of fundamental right to access to the courts that is part of rights of redress for grievances and to due process).

¹⁷Fla. Const. Art. I, §21.

¹⁸See United Transportation Union vs State Bar of Michigan, 401 U.S. 576, 585 (1971).

¹⁹Brotherhood of Railway Trainmen vs Virginia ex rel. Virginia State Bar, 377 U.S. 1, 7 (1964).

damages to compensate the plaintiff 'fairly for injuries caused by the violation of his legal rights.'"²⁰ These injuries may well include emotional distress and pain and suffering.^{21 22}

The guarantee of access to the courts would be hollow indeed if it was capable of being eroded by the kinds of indirect restraints contained in 768.81(3). Traditionally, however, the due process clauses of the nation's constitutions stand as a bulwark against such erosion by guaranteeing, at the most fundamental of levels, an opportunity to be heard "at a meaningful time and in a meaningful manner."²³ As the Florida Supreme Court has recognized legislation that affects the judicial process must assure "a fair trial in a fair tribunal."²⁴ The Court went on to note that "[n]ot only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always

²⁰United States vs Burke, 504 U.S. 229, 235 (1992)(quoting Carey vs Piphus, 435 U.S. 247, 257 (1978)).

²¹ *Id.*

²² *Tort Refort 1999: A Building Without a Foundation*. Robert S. Peck, Richard Marshall and Kenneth D. Kranz.

²³ See, e.g., Mathews vs Eldridge, 424 U.S. 319, 333 (1976)(quoting Armstrong vs Manzo, 380 U.S. 545, 552 (1965)).

²⁴ Koehler vs Florida Real Estate Comm'n, 390 So.2d 711, 712(1980)(quoting In re Murchison, 349 U.S. 133, 136 (1965)(finding that such fairness was "a basic requirement of due process.")).

endeavored to prevent even the probability of unfairness."²⁵ "Reforms" that tilt the civil justice playing field in a manner that encumbers the quest for fairness in the process violate these fundamental constitutional tenets.

²⁵Id. (quoting from Murchison, id.).