

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-374

JOSEPH CEPHAS,

Petitioner,

vs.

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

Respondents.

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER JOSEPH CEPHAS

LYTAL, REITER, CLARK, FOUNTAIN
& WILLIAMS, LLP

P.O. Box 4056

West Palm Beach, Florida 33402-4056

(561) 655-1990 / Fax (561) 832-2932

-and-

PODHURST, ORSECK, JOSEFSBERG,
EATON, MEADOW, OLIN & PERWIN,
P.A.

25 West Flagler Street, Suite 800

Miami, Florida 33130

(305) 358-2800 / Fax (305) 358-2382

By: JOEL S. PERWIN

Fla. Bar No. 316814

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I. STATEMENT OF THE CASE AND FACTS

This case is here on certification of two issues: 1) whether the doctrine of *Stuart v. Hertz*, 351 So.2d 703 (Fla. 1977) has been abrogated by the Tort Reform and Insurance Act of 1986, Chapter 86-160, Laws of Florida, creating §768.81(3) ("the court shall enter judgment against each party liable on the basis of such party's percentage at fault and not on the basis of the doctrine of joint and several liability");^{1/} and 2) whether the doctrine of *Stuart v. Hertz* should continue to apply to two successive acts of medical malpractice, when both tortfeasors are sued in the same action. *Letzter v. Cephas*, 26 Fla. L. Weekly D293, D295-96 (Fla. 4th DCA Jan. 24, 2001). Regardless of the Court's disposition of those two questions, because the parties in this case stipulated that *Stuart v. Hertz* survives the statute, the remaining question is whether the district court erred in holding that the jury's assignment of fault to both doctors in this case necessarily imported the jury's finding that they were joint tortfeasors (even in the absence of a jury instruction on the issue), and thus that §768.81(3) required that judgment be entered according to its allocation of fault. We respectfully submit that a jury's assignment of fault to both of two tortfeasors--its finding that the second of the two tortfeasors was also a legal cause of all or part of the plaintiff's injury--does not *ipso facto* import the conclusion that the two were joint tortfeasors and that the doctrine of *Stuart v. Hertz* therefore should not apply. To the contrary, it is commonplace that a subsequent tortfeasor--here, the second of two

^{1/} This issue has been briefed and argued in *D'Amario v. Ford Motor Co.*, Case No. 95,881. It may not be decided in *D'Amario*, however, if the Court accepts the plaintiff's contention that the initial act of wrongdoing was intentional.

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treating physicians--can be held liable to the plaintiff even if a prior tortfeasor's negligence was a legal cause of the entire injury.

A. *The Facts.* The following facts are all stated in the district court's opinion. In 1990, Plaintiff Joseph Cephas was diagnosed with diabetes, which narrows the blood vessels and therefore increases the risk of peripheral vascular disease, which restricts blood flow to the extremities and makes it difficult for wounds to heal. In January of 1996, Mr. Cephas was treated at St. Mary's Hospital in West Palm Beach for an ulcer on the toe of his right foot. Defendant Mark Letzter, a vascular specialist, diagnosed dry gangrene of the right middle toe as the result of arterial blockage, but recommended that Mr. Cephas wait and see whether the toe would fall off by itself, instead of preventing infection by surgically amputating the toe and/or conducting a distal bypass to restore blood flow to the foot. A Plaintiff's expert testified that Dr. Letzter's recommendation constituted medical malpractice.

When Mr. Cephas saw Dr. Letzter again in early February of 1996, he was suffering from fluid drain from the toe and pain in his thigh. Dr. Letzter ran some tests on the thigh, and told Mr. Cephas that the fluid drain was not indicative of wet gangrene, but rather that the toe was in the process of autoamputating. A Plaintiff's expert testified that this diagnosis was erroneous, and that Dr. Letzter should have performed a distal bypass.

When Dr. Letzter saw Mr. Cephas on February 20 he finally said that surgery was necessary, but that there was no emergency and it could be performed the

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following week. The Plaintiff's expert testified that this conclusion was erroneous; the surgery should have been performed within a day or two. When Mr. Cephas called Dr. Letzter on February 25 complaining of pain and reporting that his toe was starting to fall off, Dr. Letzter advised Mr. Cephas to "stay the course" and that surgery would be scheduled within the next few days.

By March 1, however, Dr. Letzter's inaction had allowed the infection to get out of control, and Mr. Cephas was required to go to the emergency room at Glades Hospital near his house in West Palm Beach, because of pain in his foot. He was treated by Defendant Dr. Lucien Armand, a general surgeon who amputated Mr. Cephas' entire forefoot--which all witnesses said was necessary at that point; and he also performed a femoral-to-popliteal artery bypass on Mr. Cephas' right leg--a procedure which enhanced only the blood supply from the femoral artery in the thigh to the popliteal artery above the knee, but did not relieve the reduced blood flow to the foot. Dr. Letzter learned of the surgery three days later, but did not contact Dr. Armand to advise that a distal bypass was necessary. A Plaintiff's expert testified that this omission by Dr. Armand was also medical malpractice.

On April 5, 1996, Mr. Cephas was readmitted to Glades because the bypass performed by Dr. Armand had failed and the infection had spread even more. Four days later, Dr. Armand amputated Mr. Cephas' right leg below the knee.

B. In the Circuit Court. Plaintiff Cephas sued Drs. Letzter and Armand. Dr. Armand did not appear at trial. At the close of the evidence, the Plaintiff moved

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for a directed verdict on the inapplicability of §768.81(3) because it applies only to joint tortfeasors, and Drs. Letzter and Armand were not joint tortfeasors as a matter of law (*see* R. 488-92; Tr. 845-47, 849-50).^{2/} Under *Stuart v. Hertz*, the plaintiff argued, Dr. Letzter was responsible for all of the Plaintiff's damages (Tr. 850); and the Plaintiff also moved for a directed verdict on the applicability of *Stuart v. Hertz* (R. 482-87; Tr. 850-52). Dr. Letzter, who did *not* move for a directed verdict at any time before the verdict, agreed with the Plaintiff's legal position; but he argued that he and Dr. Armand were joint tortfeasors, because they created "one bottom-line injury", and thus that §768.81(3) required apportionment (Tr. 848-52). The Plaintiff suggested that regardless of the trial court's ruling on the two motions, if the jury should find both Defendants negligent, it should apportion fault between them "to obviate the necessity

^{2/} Dr. Letzter has agreed throughout that §768.81(3)--prescribing liability "on the basis of [each] party's percentage of fault and not on the basis of the doctrine of joint and several liability"--by its terms applies only where the common law doctrine of joint and several liability would otherwise have applied. *See* Tr. 863-64, 869-70, 847-75; Initial Brief of Appellants at 20-21 ("Because the defendants were joint tortfeasors as a matter of law, it was also error for the trial court to enter judgment against them jointly and severally instead of apportioning the judgment in accordance with the jury's verdict [under §768.81]"). As we will argue, Defendant Letzter's concession on the limited reach of the statute constitutes the law of this particular case, and is binding upon Dr. Letzter, regardless of this Court's disposition of the certified question on this point. The district court also agreed that §768.81(3) only applies to joint tortfeasors, 26 Fla. L. Weekly at D295: "Section 768.81, Florida Statutes, requires the apportionment of the non-economic damages portion of the judgment in cases involving joint tortfeasors."

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of a retrial" *Fabre v. Marin*, 623 So.2d 1182, 1183 (Fla. 1993), if the trial or appellate court should decide that §768.81(3) applied; and to allow Dr. Letzter to pursue a subrogation claim against Dr. Armand (Tr. 849-50, 868).

Plaintiff Cephas also asked for a jury instruction on the rule of *Stuart v. Hertz* (Tr. 850, 865-68). Dr. Letzter responded that if the jury was to be instructed on the law of *Stuart v. Hertz*, it should also determine whether the two doctors, if negligent, were in fact joint tortfeasors--and thus whether the *Stuart* rule--applicable to successive tortfeasors--or §768.81(3)--applicable to joint tortfeasors--should apply (Tr. 851, 863-64, 869-70, 874-75). The Plaintiff maintained that if the jury found both Defendants negligent, the issue of whether they were joint tortfeasors was a question of law for the court; and on the undisputed facts of record, assuming the jury found them negligent, Drs. Letzter and Armand were not joint tortfeasors as a matter of law (Tr. 872-73). As Dr. Letzter subsequently acknowledged (Tr. 876-77; R. 544), the trial court effectively agreed with the totality of the Plaintiff's position--that the two defendants, if negligent, were not joint tortfeasors; that §768.81(3) therefore did not apply; and that *Stuart v. Hertz* did apply--because the trial court agreed to instruct the jury that *Stuart v. Hertz* was applicable as a matter of law (Tr. 871, 875-77). It instructed that if the jury found that both doctors were a negligent cause of Mr. Cephas' injury, "the law regards the negligence of Dr. Letzter as the proximate cause of the damages flowing from the subsequent negligence or unskillful treatment by Dr. Armand and holds Dr. Letzter liable for all the damages" (Tr. 1009-10). However, it

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also took the Plaintiff's suggestion and instructed the jury to "determine and write on the verdict form what percentage of the total negligence of both defendants is chargeable to each" (Tr. 1009). The jury assigned 45% of the fault to Dr. Letzter and 55% of the fault to Dr. Armand, and awarded the Plaintiff approximately \$1.8 million in damages (Tr. 504-06).

Dr. Letzter's post-trial motion for directed verdict reiterated his contention (never before raised in a motion for directed verdict) that *Stuart* was inapplicable because Drs. Letzter and Armand were joint tortfeasors, and thus that §768.81(3) was applicable (R. 543-44). Dr. Letzter also moved for a new trial in the alternative, on the ground that the issue of whether the two doctors were joint tortfeasors should have been submitted to the jury (R. 544-45). Plaintiff Cephas moved post-trial for a directed verdict on the inapplicability of §768.81(3), on the ground that the defendants were not joint tortfeasors as a matter of law (R. 516-17, 540-41). The trial court denied all of these motions, but nonetheless agreed with the Plaintiff's position by holding Dr. Letzter jointly and severally liable for all the damages (*see* R. 585-86, 626-28, 630, 645-46, 647-49).

C. *The District Court's Decision.* Dr. Letzter appealed, arguing primarily that he and Dr. Armand were joint tortfeasors as a matter of law (an argument made for the first time post-trial); that *Stuart v. Hertz* therefore was inapplicable; and thus that the trial court had to apportion the non-economic damages under §768.81(3). *See* Initial Brief of Appellants at 22-32. In the alternative, Dr. Letzter argued that the trial

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court had erred in declining to submit to the jury the question of whether he and Dr. Armand were joint tortfeasors, which would require apportionment under §768.81 instead of the rule of *Stuart v. Hertz* (*id.* at 33-36).

In a 2-1 decision, the district court reversed with instructions to divide the non-economic damages between Drs. Letzter and Armand under §768.81(3). It held 1) that §768.81(3) applies only to joint tortfeasors, *Stuart v. Hertz* therefore remains viable, and the trial court therefore did not err in so instructing the jury; 2) that the trial court should have allowed the jury to decide whether the two doctors were joint tortfeasors, and thus whether *Stuart* applied in this case; and 3) that notwithstanding the absence of such an instruction, the jury still must have found that Drs. Letzter and Armand were joint tortfeasors, because it allocated legal fault to both doctors, finding that Dr. Armand was a legal cause of injury to the Plaintiff. 26 Fla. L. Weekly at D295. If Dr. Armand was a legal cause of the Plaintiff's injury, the district court reasoned, then the jury must have found that he and Dr. Letzter were joint tortfeasors. The district court also rejected Plaintiff Cephas' cross-appeal (*id.* at D296 n.3), contending that §768.81(3) is unconstitutional both as enacted in 1986 and amended in 1999, and as interpreted in *Fabre v. Marin*, 623 So.2d 1182 (Fla. 1993) (*see* Appellee's brief at 29-43).

On the first point, the district court agreed with both parties that "by its very definition, the rule in *Stuart v. Hertz*, which contemplates an initial negligent act causing injury followed by negligent medical treatment for that injury, does not apply

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to joint tortfeasors" 26 Fla. L. Weekly at D295. In the instant case, "[s]ince at least one view of the evidence . . . would support the suggestion that Letzter and Armand were not joint tortfeasors, we find that the trial court did not err in giving the *Stuart v. Hertz* instruction" (*id.*).^{3/}

On the second point, the district court held that "[w]hether or not defendants are joint tortfeasors is a question of fact determined by the circumstances of the particular case"; and thus "it was up to the jury to decide if the negligent actions of Drs. Letzter and Armand combined to create the initial injury, i.e., whether the two physicians were joint tortfeasors" (26 Fla. L. Weekly at D295). As we have noted, the claim against Dr. Letzter was that he was negligent in deciding to do nothing about the dry gangrene in Mr. Cephas' toe when he first examined him on January 22, 1996; that he was negligent on February 6 when he failed to diagnose wet gangrene and did nothing; that he was negligent on February 20 when he finally advised that surgery was necessary but failed to schedule it immediately; that he was negligent on February 25

^{3/} As we have noted, however, the trial court instructed the jury that if it found that Drs. Cephas and Armand were both negligent causes of the injury, "the law regards the negligence of Dr. Letzter as the proximate cause of the damages flowing from the subsequent negligence or unskillful treatment by Dr. Armand and holds Dr. Letzter liable for all the damages" (Tr. 1010). Effectively, therefore, the trial court told the jury that Drs. Armand and Letzter were not joint tortfeasors. Thus, it appears that the district court approved of the *Stuart v. Hertz* instruction only to the extent that it told the jury of the rule in *Stuart*, but not in foreclosing a decision by the jury that the two doctors in fact were joint tortfeasors, and thus that *Stuart* did not apply.

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when Mr. Cephas called to say that his toe was starting to fall off, but Dr. Letzter said only to "stay the course" and wait for the scheduled surgery; and that he was negligent yet a fifth time on March 7, 1996--three days after Dr. Armand performed the surgery--when he failed to call Dr. Armand after learning of the inappropriate procedure which Dr. Armand had performed.

Dr. Armand, in contrast, was allegedly negligent after he had amputated Mr. Cephas' forefoot--a procedure which "[n]one of the experts criticized" (26 Fla. L. Weekly at D294)--by also performing a femoral-to-popliteal artery bypass of Mr. Cephas' right leg, instead of doing the distal bypass which was required. Notwithstanding the separate temporal and spatial spheres of the two doctors' negligence, the district court found that they could be joint tortfeasors because the Plaintiff had suffered an indivisible injury--that is, their "negligence combined to cause the amputation [of Mr. Cephas' right leg], which was the initial injury" (26 Fla. L. Weekly at D295).^{4/} Therefore, although the district court agreed that the jury should have been told of the rule of *Stuart v. Hertz*, it held that the jury also should have been told to decide whether Drs. Letzter and Armand were joint tortfeasors, and thus whether the rule of *Stuart*, or instead §768.81(3), was applicable.

^{4/} The "initial injury," of course, was not the amputation of Mr. Cephas' leg, but the earlier amputation by Dr. Armand of Mr. Cephas' forefoot--a procedure which "[n]one of the experts criticized" (26 Fla. L. Weekly at D294), and was necessitated entirely by Dr. Letzter's negligence.

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Third, however, the district court held that even in the absence of such an instruction, the jury must have concluded that Drs. Letzter and Armand were joint tortfeasors, and thus the trial court was required to enforce §768.81(3) by apportioning the non-economic damages between them. The district court's holding was not that §768.81(3) should apply whether or not the two doctors were joint tortfeasors. To the contrary, as we have noted, both parties had stipulated (thus defining the law of the case) that the statute only applies to joint tortfeasors, and the district court agreed with that conclusion. The district court's holding was that notwithstanding the trial court's instruction on the law of *Stuart v. Hertz*--which told the jury that if both doctors were negligent, "the law regards the negligence of Dr. Letzter as the proximate cause of the damages flowing from the subsequent negligence or unskillful treatment by Dr. Armand and holds Dr. Letzter liable for all the damages" (Tr. 1010)--the jury must have disobeyed that instruction, finding that the two doctors were joint tortfeasors, thus requiring the trial court to apply §768.81(3). The court's reasoning is found in a single paragraph, which ironically begins by acknowledging that the jury must be presumed to have followed the trial court's instructions (26 Fla. L. Weekly at D295):

In assessing how the jury resolved this issue, we must presume that the jury followed the court's instructions and applied the law to the facts as it found them. *See Eley v. Moris*, 478 So.2d 1100, 1103 (Fla. 3rd DCA 1985). By finding Dr. Armand the legal cause of damages to Cephas, and allocating fault against Drs. Letzter and Armand, the jury must have rejected the application of *Stuart v. Hertz*

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and found the physicians joint tortfeasors. Otherwise, the jury would not have found any negligence on the part of Dr. Armand which was the *legal* cause of injury to Cephas since, under *Stuart v. Hertz*, Letzter would have been legally responsible for any injury caused by Armand's negligence. Thus, it was error for the trial judge to refuse to apportion the non-economic damages award pursuant to section 768.81.

Thus, the sole rationale was that the jury had disobeyed the court's charge that *Stuart* applied if Dr. Letzter was negligent, and had relieved Dr. Letzter of his responsibility for all of the damages, by finding that Dr. Armand also was legally responsible for some or all of the damages. In the district court's view, even if a subsequent treating physician was negligent, and even if such negligence was a cause in fact of the plaintiff's injury, any such negligence cannot be a "legal cause" of the injury if the initial wrongdoer is liable for all the damages. In short, if *Stuart* applies, the subsequent treating doctor is not liable (and of course, the initial wrongdoer has no right of subrogation, *see infra* p. 24). On this premise, because the jury had found that Dr. Armand was a legal cause of the Plaintiff's injury, it must have found that the two doctors were joint tortfeasors, and thus §768.81(3) required apportionment. And if there was any ambiguity about that conclusion, the Plaintiff was "in no position to complain about the lack of a clearer or more definitive jury finding on this issue as it was he who objected to specifically asking the jury whether the physicians were joint tortfeasors" (26 Fla. L. Weekly at D295).

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Finally, even though both parties had stipulated, thus defining the law of this particular case, that §768.81(3) applies only to joint tortfeasors and thus that *Stuart v. Hertz* remains viable, the district court certified to this Court the questions of whether *Stuart v. Hertz* was supplanted by the statute; and if not, whether it continues to apply when the initial negligence is medical malpractice, and both the initial and subsequent tortfeasors are sued in the same case.^{5/}

II. SUMMARY OF THE ARGUMENT

First, the doctrine of *Stuart v. Hertz* survives §768.81(3), because that statute applies only where the common law doctrine of joint and several liability otherwise

^{5/} Judge Klein concurred on the alternative ground that §768.81(3) applied to both joint and successive tortfeasors, thus rendering *Stuart v. Hertz* "no longer good law" (26 Fla. L. Weekly at D296). Notwithstanding that the statute prescribes the entry of judgment based upon a "party's percentage of fault and not on the basis of the doctrine of joint and several liability," Judge Klein found "no language in the legislation which limits its applicability to joint tortfeasors" (*id.*). He found support for his position in *Gross v. Lyons*, 763 So.2d 276 (Fla. 2000), in which this Court enforced the longstanding rule that when two tortfeasors cause an indivisible injury, both the initial and the subsequent tortfeasor, regardless of whether one or both is sued, is responsible for the entire loss unless the jury can apportion the injury between the two. This Court added in *Gross* that the rule "is not inconsistent with the Florida statutory law concerning the apportionment of damages among tortfeasors based on fault--i.e., §768.81(3)." 763 So.2d at 279. From this passage, Judge Klein found it "apparent . . . that if the injuries [in *Gross*] could have been apportioned, the party causing the first accident would only have been liable for her portion. Gross is consistent with my conclusion that Stuart has been abrogated by the Act." As we hope to establish, this reading of *Gross* is erroneous, and in successive-tortfeasor cases, *Stuart* remains good law.

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would have applied. Second, the rule in *Stuart* has always applied even when the original act of negligence was medical malpractice, and the plaintiff chose to sue both the initial and subsequent wrongdoer in the same lawsuit. There is no reason in law or logic why the rule should not continue to apply in this situation. In any event, in the instant case the Court's answers to both certified questions should not affect the outcome, because in this case Dr. Letzter stipulated that the statute applies only to joint tortfeasors, and that the rule of *Stuart v. Hertz* would apply in this case if he and Dr. Armand were not joint tortfeasors.

Third, although the district court agreed with the parties' stipulation on this point, it held that the jury should have been told to decide whether Drs. Letzter and Armand were joint tortfeasors; but that the asserted error was harmless because the jury, in deciding to assign legal fault to Dr. Armand, necessarily found in the process that the two doctors were joint tortfeasors. This holding was fundamentally erroneous. The rule of *Stuart* unquestionably permits the assignment of legal fault to the subsequent treating doctor, even though the initial tortfeasor is responsible for all of the damages. In the instant case, because the two doctors were not joint tortfeasors as a matter of law, the trial court correctly entered judgment against Dr. Letzter for the full amount of the Plaintiff's damages.

Finally, the trial court was right for the wrong reason on this issue, because §768.81(3), both as originally enacted in 1986 and as amended in 1999, is unconstitutional. Moreover, its interpretation in *Fabre v. Marin*, 623 So.2d 1182 (Fla. 1993),

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was incorrect, and should be revisited. The district court's holding should be disapproved, and the trial court's judgment should be affirmed.

III. ARGUMENT

A. THE DOCTRINE OF *STUART v. HERTZ* WAS NOT ABROGATED BY THE 1986 ENACTMENT OF §768.81(3), FLA. STAT.

A. *The Doctrine of Stuart v. Hertz*. *Stuart v. Hertz Corp.*, 351 So.2d 703 (Fla. 1977), qualified two common-law rules of causation in cases involving subsequent medical malpractice. The first is that it is generally up to the jury to decide whether an intervening act of negligence was foreseeable by the defendant, and thus whether the defendant is liable for any additional or aggravated injuries caused by that negligence. *See Springtree Properties, Inc. v. Hammond*, 692 So.2d 164, 167 (Fla. 1997); *McCain v. Florida Power Corp.*, 593 So.2d 500, 503-04 (Fla. 1992). This principle is codified in Florida Standard Jury Instruction 5.1, on intervening causation. The second rule is that a defendant can only escape that outcome by satisfying the burden of segregating the damages which he caused from those which were caused by a subsequent tortfeasor. This is the "indivisible injury rule"; it holds that the defendant--whether the initial or the subsequent tortfeasor--is liable for the entirety of the injury if it is indivisible.^{6/} This Court qualified both rules in *Stuart v. Hertz*, in

^{6/} *See C.F. Hamblen, Inc. v. Owens*, 127 Fla. 91, 172 So. 694, 696 (Fla. 1937); *Keith v. B.E.W. Ins. Group, Inc.*, 595 So.2d 178, 179-80 (Fla. 2nd DCA 1992); *Rucks v. Pushman*, 541 So.2d 673, 675 & n.2 (Fla. 5th DCA), *review denied*, 549 So.2d 1014

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holding that an act of subsequent medical malpractice is foreseeable as a matter of law, and the initial tortfeasor in such cases is always responsible for the entirety of the plaintiff's damages.

In *Stuart* the plaintiff was injured in an auto accident caused by the driver of a car owned by Hertz Corporation. The plaintiff was treated by Dr. Stuart, who negligently aggravated her injuries, and Hertz asserted a third-party claim for indemnity against Dr. Stuart. This Court cited *J. Ray Arnold Lumber Corp. of Olustee v. Richardson*, 105 Fla. 204, 141 So. 133, 135 (1932), and quoted *Texas & Pacific Ry. v. Hill*, 237 U.S. 208, 214-15, 35 S. Ct. 575, 577-78, 59 L. Ed. 918 (1915), in holding that Hertz was liable as a matter of law for the subsequent medical aggravation of the injury, *id.* at 707:

"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."

(Fla. 1989) (and cases cited); *McCutcheon v. Hertz Corp.*, 463 So.2d 1226, 1228 (Fla. 4th DCA), *review denied*, 476 So.2d 674 (Fla. 1985); *Washewich v. LeFave*, 248 So.2d 670, 672 (Fla. 4th DCA 1971). *See generally Restatement (Second) of Torts* §433A (1965).

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Because the initial tortfeasor and the doctor were not joint tortfeasors (notwithstanding that they had caused an indivisible injury to the plaintiff), Hertz could not assert a third-party claim against Dr. Stuart. *See Albertson's, Inc. v. Adams*, 473 So.2d 231, 233 (Fla. 2nd DCA 1985), *review denied*, 482 So.2d 347 (Fla. 1986).^{7/}

In *Underwriters at Lloyds v. City of Lauderdale Lakes*, 382 So.2d 702, 704 (Fla. 1980), while reiterating the *Stuart* holding that settlement with the initial tortfeasor precludes an action for indemnity or contribution--so that the initial wrongdoer "may not benefit from his own wrong," *id.* at 703-04--the Court held that the initial wrongdoer does become subrogated to the plaintiff's claim against the second tortfeasor, and therefore may pursue "a separate, independent action against a subsequent tortfeasor . . ." *Id.* at 704. *See Benchwarmers, Inc. v. Gorin*, 689 So.2d

^{7/} On remand, the district court held that the plaintiff could not sue Dr. Stuart because she had "collected" from Hertz all of the damages caused by both tortfeasors. *McCutcheon v. Hertz Corp.*, 463 So.2d 1226, 1228 (Fla. 4th DCA), *review denied*, 476 So.2d 674 (Fla. 1985). *See Keith v. B.E.W. Ins. Group, Inc.*, 595 So.2d 178, 180 (Fla. 2nd DCA 1992) (settlement precludes subsequent action if it "does not clearly reserve his cause of action against the successor or tortfeasor," in which case "the initial tortfeasor is subrogated to that cause of action"), *citing Rucks v. Pushman*, 541 So.2d 673, 675-76 (Fla. 5th DCA), *review denied*, 549 So.2d 1014 (Fla. 1989) (same). *Compare Knutson v. Life Care Retirement Communities, Inc.*, 493 So.2d 1133, 1135 (Fla. 4th DCA), *review denied*, 501 So.2d 1282 (Fla. 1986) (because settlement with initial tortfeasor did not purport to release the nursing home which aggravated the plaintiff's injuries, plaintiff's subsequent lawsuit against the nursing home was permissible).

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1197, 1198 (Fla. 4th DCA 1997); *Keith v. B.E.W. Ins. Group, Inc.*, 595 So.2d at 179.^{8/}

^{8/} As we note *infra*, the Court's decision in *Underwriters* recognizes that the plaintiff has a cause of action against the subsequent tortfeasor even though the original tortfeasor is responsible for the entire harm, and therefore debunks the entire rationale of the district court in this case--that under *Stuart* the second tortfeasor is not legally responsible for the injury. The district court's ruling would cut off the first wrongdoer's subrogated right under *Underwriters*, because it requires exoneration of the subsequent treating doctor. As *Underwriters* and numerous decisions make clear, both tortfeasors remain legally responsible for the plaintiff's injury, and thus the jury's assignment of legal responsibility to both defendants does not in any way mean that the two defendants were joint tortfeasors.

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The rule of *Stuart v. Hertz* is firmly entrenched in Florida's common law.^{2/} And as the district court recognized (26 Fla. L. Weekly at D294), the *Stuart* rule has been no less applicable when the initial tort is medical malpractice, and the plaintiff's

^{2/} See, e.g., *Association for Retarded Citizens-Volusia Inc. v. Fletcher*, 741 So.2d 520, 522-25 (Fla. 5th DCA), *review denied*, 744 So.2d 452 (Fla. 1999) (affirming judgment against owner of summer camp for failing to properly monitor disabled camper in pool, both for initial lung injury caused by inhalation of water, and for subsequent medical negligence contributing to child's death); *Beverly Enterprises-Florida, Inc. v. McVey*, 739 So.2d 646, 647, 650 (Fla. 2nd DCA 1999), *review denied*, 751 So.2d 1250 (Fla. 2000) (nursing home whose negligence assertedly caused patient's subdural hematoma held responsible for death of patient assertedly caused by hospital's negligent care); *Benchwarmers, Inc. v. Gorin*, 689 So.2d 1197, 1198 (Fla. 4th DCA 1997) (property owner responsible for decedent's fractured foot, leading to blood clots, properly held liable for subsequent medical malpractice resulting in the patient's death; entitled to pursue claim for equitable subrogation against the doctor); *Emory v. Florida Freedom Newspapers*, 687 So.2d 846, 847-48 (Fla. 4th DCA 1997) (original tortfeasor causing automobile accident responsible for medical malpractice worsening the injury; plaintiff entitled to an instruction on intervening causation because "[a]bsent such an instruction, the jury may have erroneously concluded that the surgery was a substantial cause of [the plaintiff's] injuries which served to sever the causal link . . ."); *Dungan v. Ford*, 632 So.2d 159, 161-63 (Fla. 1st DCA), *review denied*, 641 So.2d 1347 (Fla. 1994) (auto accident; subsequent medical negligence; plaintiff entitled to instruction); *Rucks v. Pushman*, 541 So.2d 673, 675 (Fla. 5th DCA), *review denied*, 549 So.2d 1014 (Fla. 1989) (tortfeasor who assaulted plaintiff liable for medical aggravation); *Albertson's, Inc. v. Adams*, 473 So.2d 231, 233 (Fla. 2nd DCA 1985), *review denied*, 482 So.2d 347 (Fla. 1986) (pharmacy which negligently dispensed the wrong drug was responsible for entirety of plaintiff's injury notwithstanding the physician's alleged subsequent negligence in failing to discover the error; not entitled to seek contribution from the doctor because the two were not "joint tortfeasors but, at most, distinct and independent tortfeasors").

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condition is aggravated by a subsequent act of medical malpractice.^{10/} As *Farina*, *Davidson*, and *Gonzalez* hold, when the *Stuart* rule applies, the plaintiff is entitled to an instruction that if the jury finds the first tortfeasor negligent, he is responsible for the consequences of the subsequent treating doctor's negligence. *Accord*, *Emory v. Florida Freedom Newspapers*, 687 So.2d 846, 848 (Fla. 4th DCA 1997); *Dungan v. Ford*, 632 So.2d 159, 163 (Fla. 1st DCA 1994), *review denied*, 641 So.2d 1347 (Fla. 1994).

^{10/} See, e.g., *Haas v. Zaccaria*, 659 So.2d 1130, 1133-34 (Fla. 4th DCA 1995), *review denied*, 669 So.2d 253 (Fla. 1996) (physicians who negligently severed popliteal artery and vein in child's leg responsible under *Stuart* for asserted negligence of vascular surgeon during the same and subsequent operations, resulting in loss of child's leg; but defendants were entitled to defend on the ground that vascular surgeon's negligence was sole cause of child's injury--that is, that they were not negligent at all); *Barrios v. Darrach*, 629 So.2d 211, 213 (Fla. 3rd DCA 1993), *review denied*, 637 So.2d 234 (Fla. 1994) (under *Stuart* doctor who negligently failed to discover infection while treating fractured leg was responsible for aggravation caused by subsequent physician's failure to discover infection, but first doctor was entitled to defend on the ground that second doctor was entirely at fault); *Farina v. Zann*, 609 So.2d 629, 629-30 (Fla. 4th DCA 1992) (plaintiff entitled to instruction that first doctor was liable for entirety of harm caused by subsequent surgeries, even though plaintiff's "most serious injuries resulted from the actions or inactions of other physicians . . ."); *Davidson v. Gaillard*, 584 So.2d 71, 73 (Fla. 1st DCA), *review denied*, 591 So.2d 181, 182 (Fla. 1991) (plaintiff entitled to instruction that physician who failed to diagnose lymphoma was responsible for subsequent negligence of surgeons, resulting in patient's death); *Gonzalez v. Leon*, 511 So.2d 606 (Fla. 3rd DCA 1987) (plaintiff entitled to instruction that first doctor was responsible for consequences of second doctor's negligence, but error was harmless under the two-issue rule, because jury could have found that first doctor was not negligent at all), *review denied*, 523 So.2d 577 (Fla. 1988).

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B. *The Rule of Stuart v. Hertz Was Not Supplanted by the Tort Reform and Insurance Act of 1986, Creating §768.81(3), Florida Statutes.* Notwithstanding Judge Klein's concurring assertion that "there is no language in the legislation which limits its applicability to joint tortfeasors" (26 Fla. L. Weekly at 296), §768.81(3) provides that "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." That language was enacted in derogation of the common law, and it therefore must be construed as the narrowest possible limitation of pre-existing common-law principles.^{11/}

That is precisely how this Court read the statute in *Fabre v. Marin*, 623 So.2d 1182, 1185 (Fla. 1993): "We are convinced that section 768.81 was enacted to replace joint and several liability with a system that requires each party to pay for noneconomic damages only in proportion to the percentage of fault by which that defendant contributed to the accident." The statute was only "enacted to replace joint and several liability" And as the court pointed out in *Association for Retarded Citizens-Volusia, Inc. v. Fletcher*, 741 So.2d 520, 525 (Fla. 5th DCA), *review denied*, 744 So.2d 452 (Fla. 1999), the quotation from *Fabre* underscores that the statute

^{11/} See *Kitchen v. K-Mart Corp.*, 697 So.2d 1200, 1207 (Fla. 1997); *Carlile v. Game & Freshwater Fish Comm'n*, 354 So.2d 362 (Fla. 1977); *Graham v. Edwards*, 472 So.2d 803 (Fla. 3rd DCA 1985), *review denied*, 482 So.2d 348 (Fla. 1986); *Rudolph v. Unger*, 417 So.2d 1095 (Fla. 3rd DCA 1982); *Phillips v. Hall*, 297 So.2d 136 (Fla. 1st DCA 1974).

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allocates a percentage of "fault" according to the defendant's contribution to "the accident"--*not* a percentage of the "damages" according to the defendants' contributions to the "injury." In *Fletcher* the summer camp which allowed a disabled child to suffer a seizure and aspirate water while swimming in its pool was responsible for the child's subsequent death as a result of medical malpractice. The court held that *Fabre's* description of the statute cannot apply in a *Stuart v. Hertz* scenario, because the subsequent treating physician is never at "fault" for the original "accident": "In the instant case, it obviously cannot be said that subsequent negligent medical treatment contributed to Nathan's swimming accident."

Moreover, this Court held in *Nash v. Wells Fargo Guard Services, Inc.*, 678 So.2d 1262, 1264 (Fla. 1996) that notwithstanding §768.81(3), "[w]e further hold that the named defendant cannot rely on the vicarious liability of a nonparty to establish the nonparty's fault." Active and vicarious tortfeasors are not joint tortfeasors. See *Phillips v. Hall*, 297 So.2d 136, 137 (Fla. 1st DCA 1974), and cases cited *infra* note 12. Therefore, the *Nash* holding could only have been based on the assumption that the statute covers only joint tortfeasors. In addition to *Fletcher*, several district courts have so held.^{12/}

^{12/} See *Beverly Enterprises-Florida v. McVey*, 739 So.2d 646, 650 (Fla. 2nd DCA 1999), *review denied*, 751 So.2d 1250 (Fla. 2000) ("[S]ection 768.81, Florida Statutes (1993), and *Fabre* are limited to incidents involving joint tortfeasors"); *J.R. Brooks & Son, Inc. v. Quirioz*, 707 So.2d 861, 863 (Fla. 3rd DCA 1998) (no apportionment between active and vicarious tortfeasors, because they are not joint tortfeasors); *U.S.*

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We also disagree with Judge Klein's reliance on a passage from *Gross v. Lyons*, 763 So.2d 276 (Fla. 2000), which reaffirmed that the first of two tortfeasors is responsible for all of the injury unless the jury can apportion the damages. *See* cases cited *supra* note 6. In *Gross* the two accidents were three months apart; thus the wrongdoers were not joint tortfeasors. Judge Klein reasoned that if §768.81(3) were limited to joint tortfeasors, the Court would not have needed to point out that the common law rule which it was reaffirming is not inconsistent with that statute. Yet the Court in *Gross* did note that "[a]pplication of the indivisible injury rule is not inconsistent with Florida statutory law concerning the apportionment of damages among tortfeasors based on fault." 763 So.2d at 276. After quoting §768.81(3) and reviewing *Fabre*, the Court continued, *id.*: "The indivisible injury rule and the apportionment of damages based on fault are not mutually exclusive. Here, for example, petitioner was the sole legal cause for the accident; therefore, if that accident

Security Services Corp. v. Ramada Inn, Inc., 665 So.2d 268, 270 (Fla. 3rd DCA 1995), *review denied*, 675 So.2d 121 (Fla. 1996) (same as *J.R. Brooks*); *Kronbach v. Balsys*, 656 So.2d 614 (Fla. 1st DCA 1995) (same as *J.R. Brooks*); *F.H.W. & C. Inc. v. American Hospital Trust Fund*, 575 So.2d 1300 (Fla. 3rd DCA), *review dismissed*, 582 So.2d 622 (Fla. 1991) (same as *J. Brooks*). *See generally De Los Santos v. Saddlehill, Inc.*, 211 N.J. Super. 253, 264 n.2, 511 A.2d 721, 727 n.2 (1986) ("The Comparative Negligence Act is applicable where there are joint tortfeasors. Clearly, the Act does not apply where the liability of one of the defendants is solely vicarious"), *cert. denied*, 107 N.J. 101, 526 A.2d 175 (1987).

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was a substantial factor in causing respondent to suffer an indivisible injury, then petitioner would be liable for the entire damage."

There is nothing in this passage which retracts this Court's declaration in *Fabre* and suggestion in *Nash* that §768.81(3) operates only where the common law doctrine of joint and several liability would otherwise operate. To the contrary, especially because the statute must be construed to cause the least offense to common law rights, the quoted passage from *Gross* must be read to enforce the "indivisible injury rule" not only in situations like *Gross* involving successive tortfeasors, but also in cases involving joint tortfeasors, now are governed by §768.81(3). In other words, the Court made clear in *Gross* that even in joint-tortfeasor cases governed by the statute, apportionment is appropriate only when the injury is divisible. Thus, in stating its ultimate holding, this Court announced the rule without qualification, 763 So.2d at 280:

Accordingly, we hereby adopt into Florida law the indivisible injury rule to be applied when a jury cannot apportion injury, 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." *Piner v. Superior Court*, 192 Ariz. 182, 962 P.2d 909, 915-16 (1998) (internal quotation marks omitted).

Gross v. Lyons announced a rule of general applicability to both cases governed by §768.81(3) (that is, cases involving joint tortfeasors) and cases governed by *Stuart v. Hertz* (that is, cases involving the aggravation of an injury in a separate transaction

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or occurrence). *Gross* is consistent with the language of the statute, and with the Court's characterization of the statute in *Fabre* and *Nash*. Therefore, the first certified question should be answered in the negative.^{13/}

One final point. Even if the Court should hold that the statute applies in successive-tortfeasor cases, and thus supplants *Stuart*, any such holding should not affect this case. Here both parties stipulated that §768.81(3) applies only to joint tortfeasors, and therefore does not supplant *Stuart v. Hertz* (see *supra* note 2). Whether right or wrong, that stipulation represents the law of this particular case.^{14/} Therefore, although the district court certified the question as one of great public importance, it should not change the outcome of this case.

B. THE DOCTRINE OF *STUART v. HERTZ* DOES APPLY WHEN THE INITIAL CAUSE OF ACTION IS

^{13/} Even if Judge Klein were correct that the Court in *Gross v. Lyons* intended to interpret §768.81(3) to apply to both joint and successive tortfeasors, the Court's holding in *Gross* still would require affirmance of the judgment in this case. The Court in *Gross* imported the indivisible injury rule into the statute, holding that when the injury is not divisible, "the entire amount of damage resulting from all contributing causes is the total amount of damages recoverable by the plaintiff." Here, as Dr. Letzter repeatedly has argued, the injury clearly was not divisible, and therefore, even if §768.81(3) were applicable, Dr. Letzter would remain liable for "the total amount of damages recoverable by the plaintiff."

^{14/} See *Bould v. Touchette*, 349 So.2d 1181, 1186 (Fla. 1977); *Wagner v. Nottingham Associates*, 464 So.2d 166, 169-70 (Fla. 3rd DCA), review denied, 475 So.2d 696 (Fla. 1985); *Johnson v. Lasher Milling Co.*, 379 So.2d 1048, 1050 (Fla. 1st DCA), cert. denied, 388 So.2d 1114 (Fla. 1980).

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MEDICAL MALPRACTICE AND BOTH THE INITIAL AND SUBSEQUENT TORTFEASORS ARE SUED IN THE SAME ACTION.

One rationale for *Stuart* is that litigating issues of subsequent medical malpractice would "confuse and obfuscate" the issue of the original tortfeasor's liability, 351 So.2d at 706; see *Association for Retarded Citizens-Volusia, Inc. v. Fletcher*, 741 So.2d 520, 525 (Fla. 5th DCA), review denied, 744 So.2d 452 (Fla. 1999). That concern is perhaps a bit less significant when the initial act of negligence itself is medical malpractice, and it does not exist when the plaintiff also sues the second medical provider. But even if the problem of confusion and obfuscation were the only consideration informing the *Stuart* rule, it still would be impossible to administer an exception solely for medical-malpractice cases when the plaintiff chooses to sue the second provider. The sole effect of such a rule would be to induce the plaintiff to sue only the first doctor. Thus, "the original tortfeasor would be empowered . . . to decide whether a victim must sue his or her [second] doctor." *Association for Retarded Citizens-Volusia, Inc. v. Fletcher*, 741 So.2d at 525.^{15/} Thus, if the *Stuart* rule is to continue, it must continue across the board.

^{15/} See *Underwriters at Lloyds v. City of Lauderdale Lakes*, 382 So.2d 702, 704 (Fla. 1980) (a rule other than *Stuart* "would foreclose the victim's ability to control the nature and course of the suit"); *Stuart*, 351 So.2d at 706 ("The choice of when and whether to sue his treating physician for medical malpractice is a personal one which rightfully belongs to the patient").

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Moreover, concern for the complexity of the litigation is not the only rationale of *Stuart v. Hertz*. Equally applicable is the common-law principle that a tortfeasor is responsible for all reasonably foreseeable consequences of his actions. *See Stark v. Holtzclaw*, 90 Fla. 207, 105 So. 330, 331 (1925). This Court held in *Stuart* that every tortfeasor can reasonably foresee that his conduct may create the occasion for subsequent medical malpractice, and thus "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." 351 So.2d at 707. That truth is no less fundamental when the original act of wrongdoing itself is medical malpractice. That is the rationale for those decisions which have applied the *Stuart* rule in cases involving successive acts of medical malpractice. *See supra* note 10. Thus, so long as *Stuart v. Hertz* remains the law of Florida, it cannot logically draw a distinction when the original act of negligence is medical malpractice. The second certified question should be answered in the affirmative.^{16/}

C. THE DISTRICT COURT ERRED IN HOLDING THAT THE JURY'S REFUSAL TO EXONERATE DR. ARMAND NECESSARILY IMPORTED ITS CONCLUSION THAT DRs. LETZTER AND ARMAND WERE JOINT TORTFEASORS.

^{16/} Here too, the Court's answer should not affect this case. Dr. Letzter stipulated that if he and Dr. Armand were successive tortfeasors, *Stuart* applied.

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The district court held that the jury should have been asked to decide whether Drs. Letzter and Armand were joint tortfeasors--and thus whether §768.81(3) applied--but that the error was harmless because the jury, without the benefit of such an instruction, necessarily decided by its verdict that the two doctors were joint tortfeasors. Thus the majority's holding that §768.81(3) applies in this case was not based upon its conclusion that *Stuart v. Hertz* was abrogated by §768.81(3). To the contrary, the district court agreed with both parties that the statute only applies in the case of joint tortfeasors. Instead, the district court held (25 Fla. L. Weekly at D295) that "[b]y finding Dr. Armand the legal cause of damage to Cephas, and allocating fault amongst Drs. Letzter and Armand, the jury must have rejected the application of *Stuart v. Hertz* and found the physicians joint tortfeasors. Otherwise, the jury would not have found any negligence on the part of Dr. Armand which was the *legal* cause of injury to Cephas. Under *Stuart v. Hertz*, Letzter would have been legally responsible for any injury caused by Armand's negligence." The holding is that if *Stuart* applied and Dr. Letzter was "legally responsible for any injury caused by Armand's negligence," then the jury was required to exonerate Dr. Armand entirely.

That holding is a non-sequitur. Although a plaintiff may not *collect* his damages twice, Dr. Letzter's legal responsibility for the entire injury did not in the slightest exonerate Dr. Armand of his own legal responsibility for the consequences of his wrongdoing. That was the necessary conclusion of this Court in *Underwriters at Lloyds v. City of Lauderdale Lakes*, 382 So.2d 702 (Fla. 1980), holding that after the

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plaintiff had secured a judgment against the initial tortfeasor for the entirety of his damages, the initial tortfeasor was subrogated to the *plaintiff's* claim against the subsequent treating physician. The initial tortfeasor's claim, of course, is entirely derivative of the plaintiff's rights. See *Underwriters at Lloyd's*, 382 So.2d at 704; *Benchwarmers, Inc. v. Gorin*, 689 So.2d 1197, 1198-99 (Fla. 4th DCA 1997). The defendant's right of subrogation, therefore, necessarily means that the plaintiff's judgment against the initial tortfeasor for the entirety of his damages does not in any way relieve the subsequent treating physician of culpability for his own wrongdoing.

Thus, as one court has noted, even though the rule of *Stuart* holds the first tortfeasor responsible for all of the damages, the plaintiff still has two options; he "can recover from the initial tortfeasor for injuries caused by the original tort *AND* the victim can recover from the subsequently negligent health care providers for the injuries caused, or aggravated by, their negligence *OR* the victim can recover from the initial tortfeasor for all injuries resulting from both torts but, of course, the victim cannot recover from the initial tortfeasor for injury caused by the negligent health care providers and also recover for the same injuries from the health care providers." *Rucks v. Pushman*, 541 So.2d 673, 675 (Fla. 5th DCA), *review denied*, 549 So.2d 1014 (Fla. 1989). No other decision has read *Stuart* to exonerate the subsequent treating physician merely because the initial tortfeasor is responsible for all of the damages. Yet that was precisely the district court's holding. It was incorrect.

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We must acknowledge, however, that the district court's legal error does not alone compel the entry of judgment against Dr. Letzter for the entire amount of the damages. A second step is required. The reason is that the district court also held that the trial court had erred in failing to submit to the jury the question whether Drs. Letzter and Armand were joint tortfeasors; but it held that such error was harmless because the jury's verdict must be read to find them to be joint tortfeasors even without such an instruction. Thus the question remains whether the district court erred in holding that "it was up to the jury to decide if the negligent actions of Drs. Letzter and Armand combined to create the initial injury, i.e., whether the two physicians were joint tortfeasors" (26 Fla. L. Weekly at D295). We respectfully submit that in this case, no reasonable jury could find that Drs. Letzter and Armand were joint tortfeasors, and thus the trial court did not err in declining to submit that question to the jury.

This Court defined joint tortfeasors in *Sands v. Wilson*, 140 Fla. 18, 191 So. 21, 22, 23 (1939):

[W]here more than one person combine to commit a wrong, all are joint tortfeasors and each is responsible for the acts of the other. If the tort is single, there can be but one restitution and the release of one releases all. On the other hand, if separate and independent acts of negligence committed by different persons merge in a single tort, each tortfeasor is responsible for the injury. In such cases the injured party may elect to proceed against any or all the joint

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tortfeasors, and the courts will not attempt to apportion the damages.

* * * * *

Joint tortfeasors are those who have a common part in contributing to a wrong. To make them liable jointly, . . . there must be community in the wrong act though such community may not always be equal in degree. It is sufficient if the wrong be the product of the joint act but whether committed in concert or in severalty is not material. Concurring negligence must produce the wrong.^{17/}

Thus the status of joint tortfeasors requires more than an indivisible injury. Indeed, if nothing more were required to define joint tortfeasors, then the rule of

^{17/} See *Hernandez v. Pensacola Coach Corp.*, 141 Fla. 441, 193 So. 555, 558 (1940) ("Where an injury results from two separate acts of negligence committed by different persons operating concurrently, both are regarded as 'the proximate cause' . . ."); *Feinstone v. Allison Hospital, Inc.*, 106 Fla. 302, 143 So. 251, 252 (1932) (joint and several liability exists where "two or more wrongdoers negligently contribute to the personal injury of another by their several acts, *which operate concurrently* so that in effect the damages suffered are rendered inseparable") (emphasis in original); *Louisville & Nashville R. Co. v. Allen*, 67 Fla. 257, 65 So. 8, 12 (1914) ("separate and independent acts of negligence of several combine to produce directly a single injury"); *Albertson's, Inc. v. Adams*, 473 So.2d 231, 233 (Fla. 2nd DCA 1985), *review denied*, 482 So.2d 347 (Fla. 1986) ("Joint and several liability exists where two or more wrongdoers negligently contribute to the injury of another by their several acts, which operate concurrently, so that in effect the damages suffered are rendered inseparable"); *Phillips v. Hall*, 297 So.2d 136, 139 (Fla. 1st DCA 1974), *quoting McNamara v. Chapman*, 81 N.H. 169, 123 A. 229 (1923) ("In the case of joint tort-feasors . . . essential to liability, lies some wrong done by each tort-feasor contributing in some way to the wrong complained of").

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apportionment recently validated in *Gross v. Lyons*, 763 So.2d 276 (Fla. 2000)--the rule that either of two successive wrongdoers is liable for the entire injury unless the jury can apportion the damages caused by each--would never have been needed. That rule unquestionably applies to successive tortfeasors--indeed, the wrongdoers in *Gross v. Lyons* were responsible for car accidents three months apart; and yet the *Gross* decision, and the rule which it enforces, necessarily mean that two tortfeasors can be successive tortfeasors--not joint tortfeasors--even if their conduct produces an indivisible injury. In light of the rule reaffirmed by this Court in *Gross v. Lyons*, it cannot be that the infliction of an indivisible injury alone defines the wrongdoers as joint tortfeasors.

Something more is required. In *Sands v. Wilson*, the Court said that the actors must "combine" not to create the *injury*, but "to commit a wrong"; they must have "a common part in contributing to a wrong"; their "acts of negligence" must "merge in a single tort", constituting "a community in the wrong"--"the product of the joint act", produced by "concurring negligence." 140 Fla. 18, 191 So. at 22, 23, 22, 23. The acts must "combine to produce directly a single injury." *Louisville & Nashville R. Co. v. Allen*, 67 Fla. 257, 65 So. at 12. A "single injury" alone is not enough.

There may be times when the relevant facts are disputed or close, and the wrongdoers' status must be submitted to a jury.^{18/} But in the overwhelming majority

^{18/} See *Haas v. Zaccaria*, 659 So.2d 1130 (Fla. 4th DCA 1995), *review denied*, 669 So.2d 253 (Fla. 1996) (second doctor's negligence commenced during same operation

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of cases--including this one, *see infra*, and including *Stuart v. Hertz*--although the jury of course must decide if the actors in question were negligent, it is the court which decides if their conduct satisfies the definition of joint tortfeasors. In each of the cases cited below--to list only a few--it was the court which defined the wrongdoers as either joint or successive tortfeasors.^{19/}

as that conducted by the first doctors). *See generally Barrios v. Darrach*, 629 So.2d 211, 213 (Fla. 3rd DCA 1993), *review denied*, 637 So.2d 234 (Fla. 1994); *Leesburg Hospital Ass'n v. Carter*, 321 So.2d 433, 434 (Fla. 2nd DCA 1975).

^{19/} *See, e.g., Beverly Enterprises-Florida, Inc. v. McVey*, 739 So.2d 646, 647, 650 (Fla. 2nd DCA 1999), *review denied*, 751 So.2d 1250 (Fla. 2000) (nursing home which caused resident's subdural hematoma, and hospital which failed properly to treat it, resulting in patient's death--an indivisible injury--were successive tortfeasors); *Association for Retarded Citizens-Volusia v. Fletcher*, 741 So.2d 520, 524-25 (Fla. 5th DCA), *review denied*, 744 So.2d 452 (Fla. 1999) (summer camp whose inattention allowed impaired child to suffer seizure and aspirate water in pool, and hospital whose negligence failed to prevent child's death--an indivisible injury--were successive tortfeasors; "it obviously cannot be said that subsequent negligent medical treatment contributed to Nathan's swimming accident"); *Lauth by and through Gadansky v. Olsten Home Healthcare, Inc.*, 678 So.2d 447, 447-49 (Fla. 2nd DCA 1996) (where independent health-care providers at adult congregate living facility allowed patient to develop bedsores and ulcers, and the facility failed to recognize that patient required transfer to hospital, with the result that the patient was left permanently bedridden--an indivisible injury--"[t]he claims of negligence per se and intentional disregard of [the facility's] duties to Mrs. Lauth are different from the medical malpractice claim against [the independent health-care providers]"); *Gordon v. Rosenberg*, 654 So.2d 643, 645 (Fla. 4th DCA 1995) (dental injury "exacerbated" by subsequent dental negligence); *Touche Ross & Co. v. Sun Bank of Riverside*, 366 So.2d 465, 466-68 (Fla. 3rd DCA), *cert. denied*, 378 So.2d 350 (Fla. 1979) (where hospital sued accounting firm for failing to discover its chief executive's fraud, and accounting firm contended that the hospital's bankers had aided and abetted the fraud--thus producing the identical injury-

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In every one of these cases, notwithstanding that the wrongdoers' conduct produced an indivisible injury, the court ruled that there was no issue of fact regarding the wrongdoers' status as successive tortfeasors, because their conduct took place in separate transactions and occurrences. That is equally true here, and thus the trial court was correct in its implicit ruling that Drs. Letzter and Armand could not be joint tortfeasors, and thus in charging the jury that *Stuart v. Hertz* applied. The dispositive point is not that the injury to Mr. Cephas was indivisible, but that the two doctors acted at different times, in different places, and in different ways, and they therefore acted upon Mr. Cephas' ultimate injury independently.

The evidence permitted the jury to find that Dr. Letzter was negligent first when he examined Mr. Cephas and failed to order a distal bypass; second, when he failed to diagnose wet gangrene and perform the operation; third, when he advised that

-the "damages were in no way the result and/or outcome of either joint or concurrent actions on the part of the parties thereto. . . . There is neither joint nor concurrent tortious action in the conduct giving rise to the alleged damages nor is there a joint or concurrent loss as a result of the alleged conduct"); *VTN Consolidated, Inc. v. Coastal Engineering Associates, Inc.*, 341 So.2d 226, 228-29 (Fla. 2nd DCA 1976), *cert. denied*, 345 So.2d 428 (Fla. 1977) (where landowner sued furnisher of topical maps required for the location of road networks and drainage systems, claiming that the maps were inaccurate, and the defendant asserted third-party claim against engineering firm for allegedly misusing the maps--thus producing the identical damage--defendant's claim for contribution did not "arise out of the same transaction or series of transactions. . . . It can hardly be said that [the defendant and the engineering firm] are liable under the same set of circumstances, let alone a series of circumstances, nor do they share a common burden").

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surgical intervention was required, but did not schedule it immediately; and fourth, when Mr. Cephas complained of pain but Dr. Letzter told him to "stay the course" until the surgery a few days later (*see* 26 Fla. L. Weekly at D294).

It was only after that that Dr. Armand came into the picture. Given Mr. Cephas' condition as a result of Dr. Letzter's negligence, all witnesses agreed that Dr. Armand acted properly in amputating Mr. Cephas' forefoot (*see* 26 Fla. L. Weekly at D294). That was Mr. Cephas' initial injury, caused entirely by Dr. Letzter's negligence. However, Dr. Armand was also negligent in then choosing to perform a femoral-to-popliteal artery bypass, which did not address the reduced blood flow to Mr. Cephas' foot. As a result the infection spread, and Dr. Armand was required to perform a below-the-knee amputation about a month later.

The only negligence assigned to Dr. Letzter during the interim was his failure to call Dr. Armand after learning of the incorrect femoral-to-popliteal artery bypass which Dr. Armand had performed. But that omission was only the continuation of all the prior acts of negligence by Dr. Letzter, amounting to his consistent failure to appreciate the urgency of Mr. Cephas' need for a distal bypass. That passivity, even if it extended into the temporal parameters of Dr. Armand's involvement, is hardly enough to make them joint tortfeasors. *See Albertson's, Inc. v. Adams*, 473 So.2d 231, 233 (Fla. 2nd DCA 1985), *review denied*, 482 So.2d 347 (Fla. 1986) (doctor's

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failure to discover in examining patient that pharmacist had dispensed the wrong medication "would not make them joint tortfeasors").^{20/}

Drs. Letzter and Armand were not joint tortfeasors, and the trial court did not err in instructing the jury to apply the doctrine of *Stuart v. Hertz* if it found that Dr. Letzter was negligent. The jury's assignment of legal responsibility to Dr. Armand does not in any way connote its conclusion that he and Dr. Letzter necessarily were joint tortfeasors, because the doctrine of *Stuart v. Hertz* does not relieve the subsequent tortfeasor of legal responsibility for its conduct. Therefore, the decision of the district court should be quashed, and the cause remanded with instructions to affirm the judgment against Dr. Letzter in the entire amount of the jury's award.

D. THE TRIAL COURT WAS RIGHT FOR THE WRONG REASON IN HOLDING THAT *STUART* WAS NOT ABROGATED BY §768.81(3), BECAUSE THE STATUTE, AS ORIGINALLY ENACTED IN 1986 AND

^{20/} Moreover, even if it could have been argued that the final omission of Dr. Letzter made him and Dr. Armand joint tortfeasors, all of the other wrongdoing by Dr. Letzter occurred before Dr. Armand was even in the picture; and neither defendant asked for an itemized verdict which would isolate any specific act of negligence found by the jury. Absent such a request, the "two-issue" rule requires the conclusion that the wrongdoing attributed to Dr. Letzter consisted of his failure to appreciate Mr. Cephas' condition before Dr. Armand had even been consulted. See *First Interstate Development Corp. v. Ablanado*, 511 So.2d 536 (Fla. 1987).

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AS AMENDED IN 1999, IS UNCONSTITUTIONAL ON ITS FACE.^{21/}

1. *Access to Courts.* In *Smith v. Department of Insurance*, 507 So.2d 1080, 1090-91 (Fla. 1987), this Court upheld the 1986 abrogation of joint and several liability in §768.81(3), primarily against a challenge under the access-to-courts guarantee of the Florida Constitution, Article I, §21: "We find no violation of the right of access to the court because that right does not include the right to recover for injuries beyond those caused by the particular defendant." We respectfully submit that the Court in *Smith* mis-stated and substantially undervalued the nature of the plaintiff's common law right against a "particular defendant," and therefore misapplied the fundamental constitutional principles which informed that right.

Throughout the following discussion, we will emphasize repeatedly that the common law doctrine of joint and several liability is based on two fundamental premises. First, as this Court reaffirmed most recently in *Gross v. Lyons*, 763 So.2d 276 (Fla. 2000), a negligent defendant whose conduct satisfies the requirements of actual and proximate causation is in every sense responsible for *all* of the plaintiff's

^{21/} Plaintiff Cephas argued both at trial (R. 488-92; Tr. 846-47) and on appeal (*see* Appellee's brief at 29-43) that the statute is unconstitutional on its face and as applied. However, this Court may consider such issues for the first time at this level, even on its own motion. *See, e.g., Kinney System, Inc. v. Continental Ins. Co.*, 674 So.2d 86 (Fla. 1996) (overruling prior decision even though neither party (only an amicus) had raised the issue).

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damages--not just a portion--even if some other wrongdoer also was at fault, and therefore also was responsible for *all* of the plaintiff's damages. As one writer has put it, "[a] Defendant's individual full responsibility for an injury that was an actual and proximate result of her tortious behavior is not diminished if some other person's tortious behavior also was an actual and proximate cause of the injury. . . . Neither Defendant is merely 50% negligent or 50% responsible. Such statements make as much sense as saying that someone is 50% pregnant." Wright, *The Logic and Fairness of Joint and Several Liability*, 23 Memphis State U. L. Rev. 45, 55-56 (1992). Thus, no defendant could *ever* be asked to pay more than his "fair share" of the damages which he caused.

Second, the common-law doctrine reflects a fundamental value judgment--that in cases in which all wrongdoers could not be held accountable because some are unidentified, immune from suit, or unable to pay a judgment, it is obviously better that a single wrongdoer (whose conduct of course had caused the *entirety* of the plaintiff's injury) pay all of the damages than it is to deprive the plaintiff of the full value of his loss. The defendant could seek contribution, *see Lincenberg v. Issen*, 318 So.2d 386 (Fla. 1975); but if he was unable to collect, the financial burden would fall on the defendant--the wrongdoer--and not on the plaintiff. These are the two fundamental common-law principles which were taken away by §768.81(3) without any defensible rationale, and without any quid pro quo.

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The plaintiff's right to full compensation for his injury is one of the oldest and most fundamental tenets of the common law. Even before the Norman Conquest in 1066, it was "the main object of the law to suppress [violence] by insuring the payment of compensation to the injured person or his kin." E.A. Terk, *Comparative Negligence on the March*, 28 Chicago-Kent L. Rev. 189, 191 (1995). Thus, even before the Magna Carta, a new "form of civil liberty separate and apart from . . . criminal liability" had been created to replace vengeance as a means of redressing bodily injuries. See W. Malone, *Ruminations on the Role of Fault*, 31 La. Rev. 1, 1-3 (1970). The doctrine of joint and several liability, integral to the plaintiff's fundamental right of receiving full compensation, was cemented in the law of torts more than 450 years before the American Revolution. See *De Bodreugam v. Arcedekne*, Y.B. 30 Edw. I (ROLS Series 106) (1302) (joint and several liability for participating in a beating and kidnapping).

The principle was consistently enforced at common law by the Florida courts.^{22/} This Court recognized its twin foundations in *Walt Disney World Co. v. Wood*, 515 So.2d 198, 201 (Fla. 1987), in citing *Coney v. J.L.G. Industries, Inc.*, 97 Ill.2d 104,

^{22/} See, e.g., *Walt Disney World Co. v. Wood*, 515 So.2d 198 (Fla. 1987); *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973); *Hudson v. Weiland*, 150 Fla. 523, 8 So.2d 37, 38 (1942); *Hernandez v. Pensacola Coach Corp.*, 141 Fla. 441, 193 So. 555, 558 (1940); *Feinstone v. Allison Hospital*, 106 Fla. 302, 143 So. 251, 252 (1932); *Louisville & N.R. Co. v. Allen*, 67 Fla. 257, 65 So. 8 (1914); *Leesburg Hospital Ass'n, Inc. v. Carter*, 321 So.2d 433, 434 (Fla. 2nd DCA 1975).

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454 N.E.2d 197 (1983), which reaffirmed that fault is not divisible because every defendant's negligence is the actual and proximate cause of the *entire* injury; and that it is better to hold a liable defendant responsible for all of a plaintiff's damages than to deprive the plaintiff of the full amount of the damages which he suffered.

At the same time, the Court in *Walt Disney World* also acknowledged the competing consideration that a defendant who is less at fault than the plaintiff could end up shouldering responsibility for all of the plaintiff's damages. *See Y.H. Investments, Inc. v. Godales*, 690 So.2d 1273, 1275-76 (Fla. 1997). It thus invited the Florida Legislature to address the issue. The result was a sweeping revision in the Tort Reform and Insurance Act of 1986, Chapter 86-160, Laws of Florida, creating §768.81(3), which far exceeded the *Walt Disney World* problem, by providing that as to non-economic damages, "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."

This Court upheld its constitutionality in *Smith*. As the Court noted, 507 So.2d at 1091, its sole legislative purpose (as opposed to the broader purpose of the entire Act, related to insurance rates and reform) was to move toward a system of "pure" comparative fault. *See Hoffman v. Jones*, 280 So.2d 431, 438 (Fla. 1973) ("the equation of liability with fault"). The Court also recognized in *Smith* that the doctrine of joint and several liability does not conflict with that goal when all of the alleged wrongdoers are available to shoulder their own responsibility. The problem, and the

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need for a fundamental value judgment, arises when one or more of the wrongdoers cannot be held accountable for his conduct. As the Court put it, 507 So.2d at 1091: "The real question in the joint and several liability problem is who should pay the damages caused by an insolvent tortfeasor."

In answering that question, this Court attributed to the statute the deceptively-benign objective of limiting every defendant to the amount of damages which he had "caused", and on that assumption held that the plaintiff's pre-existing common law right did not "include the right to recover for injuries beyond those caused by the particular defendant." 507 So.2d at 1091. But this holding fundamentally misconstrued the plaintiff's common law right. First, the common law right abrogated had never required the payment of damages "beyond those caused by the particular defendant." And second, even if it had, the common law reflected the unassailable principle that when a "pure" allocation of fault is impossible, given a choice between "overcharging" a wrongdoer and failing to compensate an innocent (or less negligent) plaintiff, the answer was obvious.

Without question, §768.81(3) took away a fundamental common law right without any compensating benefit. In the only cases practically implicated by the statute (which is a valid judicial consideration, *see Aldana v. Holub*, 381 So.2d 231, 237 (Fla. 1980) ("practical operation and effect of the statute"))--cases in which a "pure" fault system is impossible--the plaintiff lost his pre-existing entitlement to recoup all of his damages, if possible, from a given defendant, and he received nothing

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in return. The plaintiff got no right of action or recovery which he did not have before the statute. Moreover, there was no public necessity for that deprivation, because the only proffered justification--"pure" comparative fault--was not furthered. Thus the statute merely substituted the plaintiff's inequity for the defendant's asserted inequity. It therefore unquestionably violated the right of access to the courts.^{23/}

2. *Due Process.* In light of the foregoing, the statute as drafted is not rationally related to any public purpose--which is the due process standard under Article I, §9. See *Psychiatric Associates v. Siegel*, 610 So.2d 419, 426 (Fla. 1992); *Lasky v. State Farm Ins. Co.*, 296 So.2d 9 (Fla. 1974). Most important is the indefensible fiction that a negligent defendant only causes a "percentage" of the plaintiff's damages, and should not have to pay more than his "fair share." It is utterly

^{23/} See *Nationwide Mutual Tire Ins. Co. v. Pinnacle Medical, Inc.*, 753 So.2d 55, 59 (Fla. 2000); *Psychiatric Associates v. Siegel*, 610 So.2d 419, 423-24 (Fla. 1992); *Kluger v. White*, 281 So.2d 1, 4-5 (Fla. 1973). Compare *Abdala v. World Omni Leasing, Inc.*, 583 So.2d 330 (Fla. 1991), upholding legislative constriction of the dangerous-instrumentality doctrine, thus limiting the liability of the passive tortfeasor, because the plaintiff can still sue the active tortfeasor. Here, the plaintiff *cannot* sue the non-parties, because they are unknown, immune or judgment-proof. The plaintiff has no other means of securing the totality of his damages. As even the Court in *Smith* acknowledged, in striking down a statutory cap on damages, a plaintiff who receives less than the amount of his now-liquidated damages "has not received a constitutional redress of injuries" "[n]or . . . the constitutional benefit of a jury trial"; and if the Legislature could cap at \$450,000, "there is no discernible reason why it could not cap [at] \$50,000, or \$1,000, or even \$1." 507 So.2d at 1088-89. These sentiments apply precisely to the deprivation effected by §768.81(3).

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irrational. Moreover, even if we indulged the fiction, it is a fundament of due process that "the means selected by the legislature [must] bear a reasonable and substantial relationship to the purpose sought to be obtained." *Department of Law Enforcement v. Real Property*, 588 So.2d 957, 962-64 (Fla. 1991).^{24/}

From this perspective, it is critical that this statute "does nothing to further" its stated objective. *Nationwide Mutual Fire Ins. Co. v. Pinnacle Medical, Inc.*, 753 So.2d 55, 59 (Fla. 2000). It does not in any way approach its proffered justification of achieving "pure" comparative fault. It simply isolates certain cases--cases involving more than one wrongdoer--in which a defendant is to be relieved of responsibility for the *entire* amount of damages caused by his conduct--at the expense of the plaintiff. And shouldering the plaintiff with responsibility for someone else's wrongdoing is *not* comparative fault. As Dean Emeritus John W. Wade has put it: "If it was unfair to impose [the shortfall] on 'Mr. Deep Pocket' or any of the other negligent defendants, can it be fair to cast the burden on an innocent, or even negligent, injured party? Surely this question is not even debatable." Wade, *Should Joint & Several Liability of Multiple Tortfeasors be Abolished?* 10 Am. J. Trial Advoc. 193, 198 (1986). Or

^{24/} The statute must be "reasonably related to the accomplishment of the desired end. This means that the interference with or sacrifice of the private rights must be necessary, i.e. must be essential to the reasonable accomplishment of the desired goal." *State v. Leone*, 118 So.2d 781, 784-85 (Fla. 1960). Accord, *Nationwide Mutual Fire Ins. Co. v. Pinnacle Medical, Inc.*, 753 So.2d 55 (Fla. 2000); *In Re Forfeiture of 1969 Piper Navajo*, 592 So.2d 233, 236 (Fla. 1992); *Hamilton v. State*, 366 So.2d 8, 10 (Fla. 1978); *Carroll v. State*, 361 So.2d 144, 146 (Fla. 1978).

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as the Arizona Supreme Court put it in *Kenyon v. Hammer*, 688 P.2d 961, 976 (Ariz. 1984), the objective of benefitting the wrongdoer is not an acceptable legislative rationale. Other than providing a gratuitous award to wrongdoers, this statute has no purpose whatsoever. It is utterly irrational, and it therefore violates the fundamental right of due process.

3. *Equal Protection.* As originally enacted in 1986, the statute also created invidious distinctions with no justification--distinctions between cases involving one wrongdoer and those involving more than one; cases involving known wrongdoers and those involving undiscovered wrongdoers; cases involving wrongdoers amenable to suit and those involving wrongdoers immune from suit; cases involving wrongdoers who are good for the judgment and those involving wrongdoers who are insolvent. Given that in every case, the defendant found negligent is responsible for all of the plaintiff's damages, and that the outcome in such cases is merely to shift an assertedly-unfair burden from the defendant to the plaintiff, these distinctions are utterly irrational. They therefore violate the plaintiff's right of equal protection under Article I, §2.^{25/}

^{25/} See *Mikell v. Henderson*, 63 So.2d 508, 509 (Fla. 1953); *Georgia S. & F.R. Co. v. Seven-Up Bottling Co.*, 175 So.2d 39, 40-42 (Fla. 1965); *Caldwell v. Mann*, 157 Fla. 633, 26 So.2d 788, 791 (1946); *State ex rel. James v. Gerrell*, 137 Fla. 324, 188 So. 812, 814 (1938); *Richey v. Wells*, 123 Fla. 284, 166 So. 817 (1936); *Teuton v. Thomas*, 100 Fla. 78, 129 So. 330, 332 (1930). The statute also exempts actions concerning pollution, securities transactions, restraint of trade, and racketeering, §768.81(4)(b); and it also provides that no damages awarded against a teaching hospital will ever be joint and several, §768.81(5). No conceivable justification is

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These violations, however, bad as they are, pale in comparison to the venal and indefensible distinctions added to the statute by Chapter 99-225, Laws of Florida. That scorched-earth attack on the civil justice system, enacted with no underlying legislative findings,^{26/} not only sweeps economic damages into its ambit in amending §768.81(3)^{27/}; it also creates a Byzantine set of both horizontal and vertical distinctions in its application, depending upon whether the plaintiff was negligent to any extent, and upon the amount of economic damages awarded. *See* §768.81(3), Fla. Stat. (2000).^{28/}

offered for isolating these types of actions for special treatment. *See Georgia S. & F. R. Co. v. Seven-Up Bottling Co.*, 175 So.2d 39, 40-42 (Fla. 1965).

^{26/} Compare *University of Miami v. Echarte*, 618 So.2d 189, 191, 195 (Fla.), *cert. denied*, 510 U.S. 915, 114 S. Ct. 304, 126 L. Ed.2d 252 (1993); *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987); *City of Ft. Lauderdale v. Ilkine*, 683 So.2d 563, 564 (Fla. 4th DCA 1996), *approved*, 705 So.2d 1371 (Fla. 1998); *Bradley v. Hurricane Restaurant*, 670 So.2d 162, 165 (Fla. 1st DCA), *review denied*, 678 So.2d 337 (Fla. 1996).

^{27/} Compare *Smith v. Department of Insurance*, 507 So.2d at 1091 (rejecting the access-to-courts argument in part because "the legislature chose not to abolish joint and several liability in its entirety. Instead, the doctrine was modified by this act and continues to exist as to economic damages when a defendant's negligence is equal to or accedes the plaintiff's. In this circumstance, each defendant is liable for only his own percentage share of *non-economic* damages") (emphasis in original).

^{28/} Under §768.81(3)(a), when the plaintiff is at fault, a defendant found 10% or less at fault is not jointly and severally liable; a defendant between 10% and 25% is jointly and severally liable for economic damages up to \$200,000; a defendant 25-50% at fault, economic damages up to \$500,000; a defendant over 50%, economic damages up to \$1 million. Under sub-section (3)(b), when the plaintiff is without fault, a defendant less than 10% is not subject to joint and several liability; 10-25%, joint and

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One would think that any such distinctions would protect the most-injured plaintiffs by retaining joint and several liability to a greater extent in the higher-damage cases. *See Lasky v. State Farm Ins. Co.*, 296 So.2d 9, 19 (Fla. 1974) (upholding workers' compensation as "a reasonable classification allowing those most likely to recover damages to recompense them, while not granting right of recovery to those substantially less likely to incur any prolonged pain"). This statute, in contrast, gives only lip service to the *Lasky* principle, by ostensibly allocating a greater percentage of joint and several responsibility (as to economic damages only) as the fault of the defendant increases, but only up to a maximum of \$1 million if the plaintiff has been found even 1% at fault, or a maximum of \$2 million when the plaintiff is not at fault. The distinctions are entirely arbitrary; they have nothing to do with the sole proffered goal of "pure" comparative fault.

That means that without any justification, the statute purposefully discriminates against those plaintiffs who have suffered the most egregious economic damages, including their medical expenses. Above \$2 million (\$1 million if the plaintiff was even 1% at fault), there is no joint and several recovery for the plaintiff's medical or economic losses. Even apart from the self-defeating burden on the taxpayer of caring for those catastrophically-injured people who have the misfortune to be hurt by

several liability up to \$500,000 in economic damages; 25-50%, joint and several liability up to \$1 million in economic damages; above 50%, joint and several liability for economic damages up to \$2 million.

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undiscovered, immune or impecunious wrongdoers, there is no justification for the distinction between large and small cases which this statute draws. Plaintiffs whose economic damages are under a certain amount get joint and several liability for all of them; plaintiffs whose economic damages are above a certain amount do not. At least two state supreme courts have invalidated statutes on precisely this ground. *See Carson v. Maurer*, 424 A.2d 825, 830 (N.H. 1980) (statute hurts "the most seriously injured victim," depriving them of "full compensation for their injuries"); *Arneson v. Olson*, 270 N.W.2d 125, 133, 135 (N.D. 1978) (statute hurts "the most seriously injured claimants").^{29/}

Moreover, the statutory distinctions between plaintiffs who are not at all at fault, and plaintiffs who are 1% at fault or more, are also indefensible. A system of "pure" comparative fault is the sole objective of this statute, but the differing portions of joint and several liability allocated to the economic damages, depending on whether the plaintiff is 0% at fault or 1% at fault, have nothing whatsoever to do with that objective. They are utterly irrational.^{30/} We have cited already, *supra* page 36, the

^{29/} This was the reason that Governor Chiles vetoed a former version of the statute, *see* 50 Veto Message Re: CS/SB 874 (1998) ("This [provision] has the potential to deny full compensation to those who need it most: those victims who suffer catastrophic injuries, some of whom may require a lifetime of medical care, or the families of victims who are killed by a wrongful act. If these costs are not borne by the wrongdoers, they inevitably will be unfairly borne by all Floridians").

^{30/} We will spare the Court the endless mathematical calculations which illustrate the significant differences in recovery prescribed by the arbitrary statutory categories, for

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decisions holding that a statute which reaches beyond its stated objective violates due process. This statute's matrix of horizontal and vertical cut-offs reaches well "beyond all the necessities for the legislation." *State ex rel James v. Gerrell*, 137 Fla. 324, 188 So. 812, 814 (1939).

In light of the foregoing, the Plaintiff respectfully submits that §768.81(3) violates the constitutional rights of access to courts, due process and equal protection. It is respectfully submitted that this Court should revisit its decision in *Smith*.

E. AS A MATTER OF STATUTORY CONSTRUCTION AND CONSTITUTIONAL NECESSITY, THE *FABRE* DECISION MUST BE OVERRULED.

Section 768.81(3) provides that the court "shall enter judgment against each party liable on the basis of such party's percentage of fault . . ." The ambiguity is not the word "party" but the phrase "percentage of fault." The word "party" plainly refers to the parties to the lawsuit, because the court can only "enter judgment" against a party to the lawsuit. The ambiguity is that the statute requires the entry of judgment against each party to the lawsuit found liable, based upon that party's "percentage of fault"; but it does not define the universe of "fault" upon which that percentage is

no purpose whatsoever. Obviously the differences can be enormous, depending upon whether it is the solvent defendant or the judgment-proof wrongdoer who is found 50% at fault rather than 49%, or 25% rather than 24%, or whether the plaintiff was 0% or 1% at fault. These distinctions do nothing more than subject the plaintiff to the vagaries of chance. They have nothing to do with "pure" comparative fault.

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based. Is it the "fault" of the parties to the lawsuit (which is the common-sense and historical meaning of the phrase), or is it for the first time in history the entire universe of actors who may have been at fault. When a statutory phrase is not defined by the Legislature, it is inherently ambiguous and the court must interpret it. *See Garden v. Frier*, 602 So.2d 1273 (Fla. 1992).^{31/}

In *Fabre v. Marin*, 623 So.2d 1182 (Fla. 1993), without addressing the ambiguity, the legislative history, or any rules of statutory construction, this Court adopted the latter definition. It is respectfully submitted that the Court's interpretation in *Fabre* was wrong.

Given the ambiguity, we must start with the controlling proposition that any "change in the common law rule must speak in clear, unequivocal terms," *Carlile v.*

^{31/} The ambiguity is illustrated by comparing other statutes which are not ambiguous. The Uniform Comparative Fault Act explicitly allows apportionment only between claimants, named defendants, persons who have been released from the action, and third-party defendants--and it expressly excludes all others. *See* 12 Uniform Laws Annotated, at 42 (1992 Supp.); *Selchert v. State*, 420 N.W.2d 816 (Iowa 1988); *Lake v. Construction Machinery, Inc.*, 787 P.2d 1027 (Alaska 1990); Conn. Gen. Stats. Ann. §52-572h. *See generally* Wade, *Should Joint and Several Liability of Multiple Tortfeasors be Abolished?*, 10 Am. J. Trial Advoc. 193 (1986). Other states which have allowed apportionment beyond parties to the lawsuit have plainly said so. *See* §12-2506B, Ariz. Stat. (1991) ("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"). And those states which have retained joint and several liability and contribution also say so expressly. *See, e.g.*, Ill. Ann. Stat., ch. 70, ¶301-04; N.Y. Civ. Prac. L. & R. §1401-04; 14 Maine Rev. Ann. Stats. §156.

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Game & Freshwater Fish Comm'n, 354 So.2d 362, 364 (Fla. 1977). See cases cited *supra* note 11. Without question, there are two possible constructions of the critical phrase "percentage of fault." It could mean the percentage of everyone in the universe who may have contributed in any way to the plaintiff's damages, including those who are unidentified, immune or judgment-proof. It could also mean the parties to the lawsuit. Given that the latter interpretation does the least violence to the pre-existing common law rule, it must be adopted. At this point, therefore, the discussion should end.

The other rules of statutory construction yield the same conclusion. First is the legislative history. We have included as an appendix the legislative staff analyses of Chapter 86-160. They are appropriate sources of legislative history.^{32/} The Senate staff analysis is crystal clear on this question (*see* A. 4-5). It said that the goal "of comparative negligence [was] 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"--an objective which is frustrated if "one or more of the defendants may ultimately be forced to pay more than their proportionate shares of the damages . . ." (emphasis added). Therefore, the statute prescribed "liability for

^{32/} See *Public Health Trust of Dade County v. Menendez*, 584 So.2d 567 (Fla. 1991); *Pershing Industries, Inc. v. Department of Banking and Finance*, 591 So.2d 991 (Fla. 1st DCA 1991); *Commenos v. Family Practice Medical Group, Inc.*, 588 So.2d 629 (Fla. 1st DCA 1991).

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damages" "based on each party's proportionate fault"; and "[t]he trier of fact would be required to specify the amounts awarded for economic and non-economic damages, in addition to *apportioning percentages of fault among the parties*" (*id.*, emphasis added). That last phrase could not be more clear: the "trier of fact" is "to apportion[] percentages of fault among the parties."^{33/}

A second rule of statutory construction is that repeals of statutes by implication are not favored, and therefore two or more statutes should be construed in a way to preserve the force of each--that is, to render them consistent if possible. *See Palm Harbor Special Fire Control District v. Kelly*, 516 So.2d 249 (Fla. 1987); *Garner v. Ward*, 251 So.2d 252 (Fla. 1971). That rule is squarely implicated here, and in this context it is important to note that §768.81(3) is contained in Part II of Chapter 768 of the Florida Statutes, which provides in §768.71(3): "If a provision of this part is in conflict with any other provision of the Florida Statutes, such other provision shall apply." *See Gurney v. Cain*, 588 So.2d 244 (Fla. 4th DCA 1991), *review denied*, 599 So.2d 656 (Fla. 1992).

^{33/} The House Committee on Health Care and Insurance staff analysis is a little more ambiguous, but also suggests the same construction (*see* A. 2). It describes the pre-existing common law doctrine prescribing the liability of "defendants" and "co-defendants"; and it says that under the new statute, "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." Here too, the staff analysis strongly indicates that the division prescribed by the statute is limited to "each party's proportionate fault"

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The most obvious conflict is with the contribution statute, §768.31, Fla. Stat. Obviously a "pure" system of comparative fault would eliminate contribution, and render §768.81 a nullity. *See Walt Disney World Co. v. Wood*, 515 So.2d 198 (Fla. 1987). *See also Wells v. Tallahassee Memorial Regional Medical Center, Inc.*, 659 So.2d 249, 255-56 (Anstead, J., concurring). And it is no answer that *Fabre* does not render the contribution statute entirely meaningless, because joint and several liability is preserved to some extent. The above-cited cases require that the statutes be harmonized to the greatest extent possible, and the *Fabre* construction renders a major portion of §768.81 meaningless. The statutes can best be harmonized by defining the universe of "fault" as that created by the parties to the lawsuit.^{34/}

^{34/} A similar inconsistency is reflected in §440.39, Fla. Stat. (1991), which provides employers (and their workers' compensation carriers) with liens upon their employees' third-party tort recoveries. Suppose an employee is injured in the amount of \$200,000 by his employer and a third party, each about 50% at fault. Suppose the employer pays workers' compensation benefits of \$50,000. *Fabre* requires that the plaintiff's recovery against the third party be limited to 50% of his damages, or \$100,000. But §440.39 precludes the plaintiff from keeping that amount. It presumes a joint and several recovery of the plaintiff's damages in the third-party action, and therefore authorizes the employer to recoup his workers'-compensation benefits out of the plaintiff's recovery. Even though the employer's lien would be reduced by half (to \$25,000) because the plaintiff's recovery was reduced by half, the plaintiff would still lose another \$25,000 from his \$100,000 recovery from the third-party tortfeasor. The two statutes, in short, are inconsistent.

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Third, a statute should be construed to achieve its legislative purpose.^{35/} This statute was intended to move toward "pure" comparative fault. *See Smith v. Department of Insurance*, 507 So.2d at 1091. That objective is not advanced in any way by reducing a defendant's exposure by the fault of non-parties. That outcome is even more "unpure": the plaintiff's recovery is reduced not only by his own percentage of fault, but also by the percentage of someone else's fault--the phantom, immune, dissolved or bankrupt tortfeasor, and those over whom jurisdiction cannot be obtained.

Moreover, the Legislature should not be assumed, without saying so explicitly, to have intended the plethora of problems which have occurred in the wake of *Fabre*. Justice Wells described them as "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*." *Wells v. Tallahassee Memorial Medical Center*, 659 So.2d 249, 255 (Fla. 1995) (Wells, J., concurring). One is the substantial expansion of the scope and time of litigating the asserted fault of non-parties. *See Selchert v. State*, 420 N.W.2d 816 (Iowa 1988). Whenever there is a *Fabre* issue, tort cases do not settle, because the settling party goes on the verdict form anyway, and the plaintiff's lawyer faces a malpractice suit if

^{35/} *See Deason v. Florida Department of Corrections*, 705 So.2d 1374 (Fla. 1998); *Miele v. Prudential-Bache Securities, Inc.*, 656 So.2d 470 (Fla. 1995); *Vildibill v. Johnson*, 492 So.2d 1047 (Fla. 1986).

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the jury assigns a greater percentage of fault to the settling party (which of course all of the other defendants strongly urge) than the percentage of a plaintiff's damages absorbed by that settlement. And the fight in these cases no longer is only with the named defendants. Now the parties fight daily about the phantom vehicle which the defendant driver suddenly remembers; the immune employer; and in every medical-malpractice case, every single health-care provider--from the lowliest orderly to every member of every professional association--who even arguably had anything to do with the patient. In Florida, tort cases do not settle, and tort cases never end.

A second example is the problem of inconsistent outcomes. Not all potential wrongdoers can be sued in the same place. Pre-suit notices requirements, venue privileges, and limits on personal jurisdiction often require more than one lawsuit. What if a jury in Leon County finds the governmental defendant 10% at fault and the private non-party 90% at fault? What if a jury in Dade County finds the private defendant 10% at fault and the governmental non-party at 90% at fault? The plaintiff recovers 10% of his damages from each defendant, or a total of 20%.

Could the Legislature have intended the result in *Y.H. Investments, Inc. v. Godales*, 690 So.2d 1273 (Fla. 1997), allowing the immune parent's fault to reduce his child's recovery, thus significantly undermining the parent's incentive to bring the action on behalf of his child? To what extent must the defendant comply with statutory pre-suit notice requirements if he alleges that a non-party health-care provider is at fault? Can the accused non-party resist discovery to protect himself? Can he

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insist upon confidentiality? Can the plaintiff bring in a party accused by the defendants, and then defend him? Can the non-party intervene to protect his reputation? The interpretative problems in the wake of *Fabre* are endless. The Legislature should not be held to have intended them without saying so.

Finally, the statute must be interpreted if possible to avoid constitutional infirmities.^{36/} And this Court may revisit a statute which it earlier upheld, in order to address constitutional issues revealed in the course of its administration. *See Aldana v. Holub*, 381 So.2d 231, 237 (Fla. 1980); *Caldwell v. Mann*, 157 Fla. 633, 26 So.2d 788,790 (1953). One persistent question, as Justice Wells pointed out in *Wells v. Tallahassee Memorial Medical Center*, 659 So.2d 249, 255 (Fla. 1995) (Wells, J. concurring), concerns the due process rights of both parties and non-parties in litigating the asserted fault of strangers to the lawsuit. *See id.* at 255:

[I]n addition to the reconciling of the applicable statutes, another troubling question specifically highlighted by this case is whether the jury's determination of the percentage of fault, which includes a determination of the fault of individuals who are no longer parties in the proceedings, has sufficient reliability to meet due-process requirements. Settling parties who are no longer parties in the judicial proceedings present no evidence, cross-examine no witnesses, and make no arguments. Nevertheless, pursuant to *Fabre*, the jury determines in its verdict the settling parties' percentage of fault just as it does with respect to the

^{36/} *See Russo v. Akers*, 724 So.2d 1151 (Fla. 1998); *State v. Mitro*, 700 So.2d 643 (Fla. 1997); *Vildibill v. Johnson*, 492 So.2d 1047 (Fla. 1986).

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parties who continue in the proceedings and actively participate in the trial. A procedure which mandates such a verdict is plainly inapposite to my view of due process as it exists in our courts. Due process has as a fundamental premise the adversarial presentation and examination of evidence by the parties whom the jury's verdict addresses.^{37/}

For non-parties whose fault is asserted, there are obviously significant consequences even though no adverse judgment is entered against them. There is the social consequence of a jury determination of fault, against a person or entity which was not present to defend itself. There may be financial or professional implications--investigations or sanctions by peer-review bodies, threats to licensure, the loss or increased cost of insurance. For parties, there are significant due process implications of having to protest the innocence of strangers. It diverts the attention and the resources of the plaintiff and his counsel. Moreover, as Justice Wells noted and as every plaintiffs' lawyer has learned, juries invariably assign more fault to non-parties than they deserve, because the defendant is attacking them and they are not present to defend themselves. That systemic outcome unquestionably undermines the

^{37/} See *Complaint of Sheen*, 709 F. Supp. 1123, 1131-32 n.9 (S.D. Fla. 1989) (in limitation-of-liability action against vessel under 46 U.S.C. §181 et seq., in which the plaintiff's claims against other defendants had been severed, although the court might have concluded from the evidence that the others were at fault, it "cannot constitutionally so find. The individuals aboard the towing vessel are not before this court. To find them negligent without their appearance would violate their due process rights").

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plaintiff's due process rights, by skewing the process to the plaintiff's disfavor. For these reasons the Montana Supreme Court invalidated that state's comparative negligence statute in *Newville v. State Department of Family Services*, 883 P.2d 793, 802 (Mont. 1994). Although the Montana court reacted in part against the unfairness of asserting the fault of third parties at the last minute, it also expressed in constitutional terms a broader concern for the unfairness of requiring a plaintiff both to prove the defendant's fault and disprove the fault of somebody else.

All of these considerations--some of which were overlooked in *Fabre*, others of which have emerged since *Fabre*--compel the conclusion that the judicial extension of §768.81(3) to non-parties was erroneous, because it construed the statute in a manner which renders it unconstitutional. Given that a reasonable alternative construction exists, the Court should have adopted that construction. It is respectfully submitted that the ultimate outcome of *Fabre* should be reconsidered.

IV. CONCLUSION

It is respectfully submitted the district court's decision should be disapproved, and the cause remanded with instructions to affirm the Plaintiff's judgment.

Respectfully submitted,

LYTAL, REITER, CLARK, FOUNTAIN
& WILLIAMS, LLP
P.O. Box 4056
West Palm Beach, Florida 33402-4056
(561) 655-1990 / Fax (561) 832-2932

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PODHURST, ORSECK, JOSEFSBERG,
EATON, MEADOW, OLIN & PERWIN,
P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800

By: _____

JOEL S. PERWIN
Fla. Bar No. 316814

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JOEL S. PERWIN, ESQ.

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SERVICE LIST

Dinah S. Stein, Esq.
Hicks & Anderson
100 Biscayne Blvd.
Suite 2402
Miami, FL 33132-2306

David C. Spicer, Esq.
Bobo, Spicer, Ciotoli, Fulford, Bocchino & Ramguera, P.A.
1240 U.S. Highway 1
Second Floor
North Palm Beach, FL 33408

Lucien Armand, M.D.
4101 N.W. 4th Street
Suite 109
Plantation, FL 33317

Wallace B. McCall, Esq.
1001 North U.S. Highway 1
Suite 604
Jupiter, FL 33477

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