D'Amario v. Ford
Time to Expressly State the Decision Is No Longer Viable

by Charles T. Wells, Douglass B. Lampe, and Larry M. Roth

As a result of the Florida Supreme Court's 2001 ruling in *D'Amario v. Ford*, 806 So. 2d 424 (Fla. 2001), which broadly denied apportionment of fault to the party who caused the accident in a products liability crashworthiness case, Florida has become an outlier state in this significant area of the law. This article sets out the public policy and economic considerations that demonstrate the immediate need for judicial and legislative action to specifically eliminate *D'Amario's* adverse consequences from Florida's tort law. The article will also examine the judicial legacy of the *D'Amario* decision. Even the so-called "minority" jurisdictions then relied upon by the court to support its holding have now been mostly overturned, and other courts around the country that have examined *D'Amario* ab initio have specifically rejected its legal reasoning. As such, a decade after issuance by a divided court, the majority's holding in *D'Amario* stands mostly alone in this country.

Moreover, *D'Amario* is in direct conflict with the Florida "comparative fault" statute which was revised and readopted after the *D'Amario* decision, F.S. §768.81 (effective April 2006). The statute mandates that apportionment of fault is applicable to all "negligence cases." The revised statute readopted the definition of "negligence cases" as including "products liability." However, because *D'Amario* held that F.S. §768.81 did not apply in a crashworthiness case, even though the case was a "products liability" case, arguments continue as to the applicability of F.S. §768.81 in products liability cases pursued on a crashworthiness theory against automobile manufacturers.

D'Amario: The Problem

• *A Primer on Crashworthiness Law and* D'Amario v. Ford — In 1968, *Larson v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968), first recognized a manufacturer's liability for a crashworthiness defect. *Larson* and later cases[1] established that the manufacturer of a motor vehicle had a duty to make the vehicle reasonably safe to protect occupants from suffering greater injuries in a foreseeable accident than they would have suffered *but for* the alleged crashworthiness defect.

In ordinary products liability actions, the plaintiff claims that a defect caused the accident — for example, a tire fails. A crashworthiness defect is distinct in that the alleged defect does not cause the accident. Rather, the plaintiff claims that a defect caused him or her to suffer injuries he or she would not have suffered in the absence of the defect. Common crashworthiness allegations include airbags that fail to deploy or deploy too forcefully, seatbelts that fail to restrain an occupant, inadequate seatback strength in rear-end collisions, and inadequate roof strength in rollover crashes. Crashworthiness cases are often (and, as shown below, misleadingly) called "second collision" cases; the "first collision" is said to occur when the vehicle strikes an object or another vehicle and the "second collision" is said to occur when the occupants' body strikes the interior of the motor vehicle.

The Florida Supreme Court judicially adopted crashworthiness in negligence cases in *Ford Motor Co. v. Evancho*, 327 So. 2d 201, 201 (Fla. 1976). The doctrine was expanded to strict liability cases in *Ford Motor Co. v. Hill*, 404 So. 2d 1049, 1052 (Fla. 1981).

Following Florida's adoption of the crashworthiness

doctrine, the Florida Legislature recognized in 1986 "that there is in Florida a financial crisis in the liability insurance industry" and "that the current tort system has significantly contributed to the insurance availability and affordability crisis," and thus enacted the Tort Reform and Insurance Act of 1986.[2] As part of that reform, the legislature adopted §768.81, which required that liability be apportioned in accordance with fault.[3]

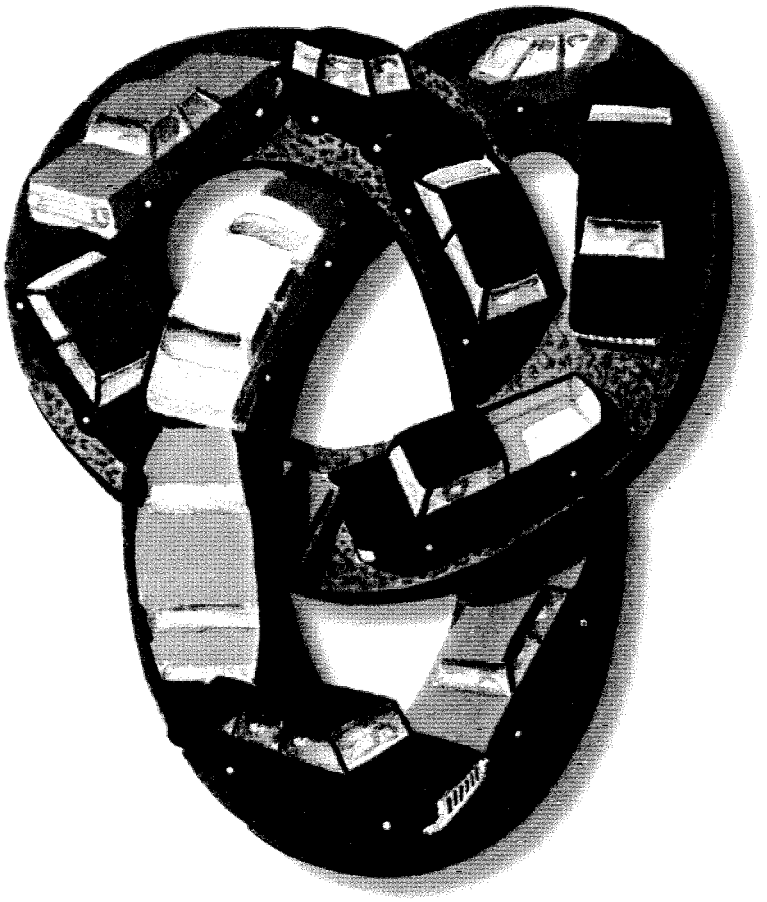
The court in *Fabre v. Martin*, 623 So. 2d 1182 (Fla. 1993), had decided that consistent with F.S. §768.81, the jury should be permitted to apportion fault to each entity that caused plaintiffs' injuries, regardless of whether the tortfeasor is a party in the case before a court. The legislature thereafter codified the procedure for the apportionment of fault with respect to noneconomic damages in 1999, and then with respect to all damages in F.S. §768.81(2), effective April 2006.

These legal principles were relevant to the factual circumstances in *D'Amario*. In *D'Amario*, a drunk minor drove his vehicle into a tree at a high rate of speed. The vehicle subsequently caught fire, resulting in injury to a passenger. Plaintiff claimed the fire was caused by a defect in the fuel system of the vehicle, while the automobile manufacturer contended the fire was the result of the forces in the collision that ignited fluids in the engine compartment. Among other issues, the Supreme Court dealt with the question of whether the drunk driver would be named on the verdict form so that the jury could apportion liability between the manufacturer being charged with a crashworthiness defect — a defect which was not a cause of the initial crash — and the drunk tortfeasor who was responsible for the initial crash.[4]

The court, in *D'Amario*, held that *Fabre* and §768.81 did not apply to crashworthiness cases.[5] The court reached its conclusion without analyzing the language of §768.81. Instead, the court based its ruling on the conclusion that a tortfeasor who caused the initial accident was not a joint tortfeasor with the manufacturer who was being charged with enhancing an injury due to the crashworthiness defect.[6] *D'Amario* held:

> In sum, we hold that the principles of comparative fault involving the causes of the first collision do not generally apply in crashworthiness cases. Such a rule, we believe, recognizes the important distinction between fault in causing the accident and fault in causing additional or enhanced injuries as a result of a product defect, a distinction that defines and limits a manufacturer's liability in crashworthiness cases.

The essential rationale was that a manufacturer was not being held liable for injuries suffered in the "initial collision," but could only be liable for the "separate and distinct" injuries suffered in the "second collision." The court reasoned that since the manufacturer's liability was limited to "second collision" injuries and damages, it would be unfair to apportion liability for the "second collision" injuries to the "initial tortfeasor."[7] Thus, the tortfeasor who caused the crash could not be on the verdict form to reduce the liability of the auto manufacturer. In reaching this conclusion, and avoiding application of §768.81 for crashworthiness cases, the court joined what it acknowledged was the minority of jurisdictions in the United States, which had ruled on apportionment of fault under the crashworthiness doctrine.[8] Since *D'Amario*, as will be discussed later in this article, other states have examined and rejected the reasoning upon which *D'Amario* is based.



Also importantly, the Florida Legislature has since expanded apportionment of fault to all damages recoverable in "negligence cases," specifically readopted the definition of negligence cases to include "strict liability and products liability," and made no exception for crashworthiness cases.[9] Nevertheless, even after F.S. §768.81 was revised and readopted effective April 26, 2006, whether the statute applies to products liability cases against automobile manufacturers based upon a crashworthiness theory continues to be the subject of disagreement and argument. The disagreement and argument is rooted

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in competing Florida case law as to the application of revised statutes enacted subsequent to the adoption of a rule of common law set out in a Florida court decision. In *Capelouto v. Orkin Exterminating Company of Florida*, 183 So. 2d 532, 534 (Fla. 1966), the Florida Supreme Court stated the long accepted rule: "There can be no doubt that the legislature of our state has power to enact legislation superseding the common law."

On the other hand, in *Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administrative Hearings*, 686 So. 2d 1349, 1354-55, the Supreme Court approved *Adventist Health System/Sunbelt v. Hegwood*, 569 So. 2d 1295 (Fla. 5th DCA 1990), stating that statutes designed to supersede or modify rights provided by common law must be strictly construed and will not displace common law remedies unless such an intent is expressly declared.

• *The Myth of the "First Collision" Injury* — The *D'Amario* court held that, in a crashworthiness case, the plaintiff is not seeking recovery for injuries sustained in the "first collision" but is only seeking recovery for injuries sustained in the "second collision" and, therefore, the cause of the accident is not relevant.[10] This holding logically must rely upon the conclusion that a plaintiff or third-party tortfeasor could not have caused the same injuries as the defendant manufacturer. This conclusion suffers from factual and legal flaws.

First, the *D'Amario* analysis ignores causation-in-fact and scope of liability, the two recognized components of proximate causation. Causation-in-fact exists when, except for the alleged tortious conduct, the injury would not have occurred.[11] The scope of liability is satisfied when the injury was a natural and probable consequence of the conduct which should have been foreseen.[12] Under these accepted principles, a defendant in a tort case is responsible only for the damages a defendant caused.[13] But the fact that a vehicle manufacturer's liability is limited to injuries it has caused does not establish, factually or legally, that the driver of a motor vehicle whose negligence caused the crash was not a cause of those same injuries. A basic principle of proximate causation is that there can be multiple proximate causes of a resulting event.[14]

For example, assume circumstances in which a driver is drunk, collides with another drunk driver, and sustains an indivisible brain injury. In an action by the first driver against the other drunk driver there is no question that the jury would be allowed to consider the first driver's own intoxication in allocating fault between the first driver and the other drunk driver. But, if the first driver sues the automobile manufacturer in a crashworthiness products liability action seeking recovery for the same indivisible brain injury, which was earlier claimed to have been caused by the other drunk driver, *D'Amario* does not allow the jury to even hear about the first driver's intoxication, and the jury is not to allocate fault to the first driver. This is patently illogical and unjust. The effect of *D'Amario* is to create a fiction in place of causation-in-fact by concealing from the jury the actual facts of the accident resulting in a false analysis as to the scope of liability.

A second flaw in *D'Amario*'s holding was that it relied upon an illusory distinction between injuries suffered in the "first collision" and the "separate and distinct" injuries suffered in the "second collision." Injuries received in a car crash, which typically lasts less than one second, are in most instances so intertwined that a logical and reliable separation of the two cannot be made.[15]

Effects of *D'Amario* and Need for Legislative Reform

D'Amario quickly became a shield preventing the admissibility of clearly relevant and material accident fact evidence, particularly driver intoxication evidence, thereby creating litigation predicated on less than complete facts concerning the causes of the claimed injuries and damages. In *General Motors Corporation v. McGee*, 837 So. 2d 1010 (Fla. 4th DCA 2002), the Fourth District affirmed a $60 million judgment against the automobile manufacturer. In that case, the injury-producing event was initiated when a trailer became disconnected from a pick-up truck, crossed four lanes of traffic, and hit the General Motors' automobile with the tongue of the trailer piercing the gas tank of the automobile, igniting a fire that resulted in the injuries to the claimants who were in the automobile. Based upon *D'Amario*, the negligence of the owner and driver of the pick-up was not allowed in evidence or to be apportioned in the allocation of fault. In *Ferayorni v. Hyundai Motor Company*, 822 So. 2d 502 (Fla. 2002), the Supreme Court remanded for reconsideration in light of *D'Amario*, a case in which the Fourth District had approved apportionment of fault with the nonparty accident causing driver and evidence that the driver was drunk.[16] The Fourth District then approved a verdict of $6.5 million against the automobile manufacturer,

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even though the evidence not allowed to be considered was that the victim was in an accident caused by a drunk driver and that the victim was not properly using a seat belt.[17] In *Griffin v. Kia Motors Corporation*, 843 So. 2d 336 (Fla. 1st DCA 2003), the First District reversed and remanded to the trial court a case in which the district court determined, based upon *D'Amario*, that the trial court erred in allowing apportionment of fault between the automobile manufacturer and the driver of the automobile. The plaintiff was injured in an accident when the driver of the automobile in which the plaintiff was a passenger fell asleep while driving on an interstate highway. The vehicle went off the highway, crashed, and the plaintiff was injured. The First District held that the negligence of the sleeping driver, which was obviously a cause of the crash, should not have been part of the original trial.

In a workshop hearing before the Florida Senate Judiciary Committee in March 2010, in which the viability of a bill repealing *D'Amario* was discussed, a Ford Motor Company representative testified that the number of crashworthiness cases filed in Florida has increased 400 percent since *D'Amario*, and that the total costs to Ford to resolve its Florida crashworthiness cases have increased 1,000 percent as each case has greater exposure because Ford is now typically the only party on the verdict form. Ford further testified that it is spending millions of dollars each year on this growing inventory of crashworthiness cases in Florida — money that would otherwise be available to Ford for domestic engineering, manufacturing jobs, R&D, and employee benefits during union negotiations.[18] Of course, as seen in the reported appellate cases, it is not only Ford that has been affected. General Motors, Hyundai Motors, Kia, and other automobile manufacturers have such costs.

Policy Implications of *D'Amario*

By holding that accident facts are not relevant and drivers, either plaintiff or a third party, will not be held accountable for their own negligence, the authors of this article conclude that the *D'Amario* opinion sends an errant and dangerous signal to drivers on Florida's highways that civil responsibility does not necessarily attach to antisocial and illegal driving behavior. Indeed, it is almost always true that plaintiffs in crashworthiness cases do not even name the negligent driver as a defendant — and, therefore, there is no civil accountability for illegal driving, so as to avoid the risk of the jury learning of the accident facts. Plainly this is bad public safety policy for all Floridians and is squarely counter to common sense standards of accountability for conduct.

This bad public policy has fostered a Florida tort system in which fault is shifted from a grossly negligent driver who has abused the privilege of using a motor vehicle by drinking and driving or sleeping and driving to a manufacturer whose conduct is not at fault in causing the initial injury-producing circumstances. This fault-avoiding policy is squarely contrary to the justifying policy of the present tort system as a fair method of controlling and preventing tortious conduct by exposure of the actual wrongdoer to monetary damages.

Another public policy consideration is what responsibility should be assigned to manufacturers for injuries resulting from vehicle accidents. A premise of products liability law, which relieves plaintiffs from the burden of proving negligence and approves strict liability, is that the manufacturer is in a position to avoid harm through product design.[19] Principles of comparative fault, meanwhile, recognize that product users are also in a position to avoid harm through responsible behavior. Nearly everywhere, except Florida, a jury in a crashworthiness case considers both roles and can apply common sense in apportioning responsibility. The *D'Amario* holding turns that two-way street into a one-way street.

The *D'Amario* holding also undermines the validity of truth seeking by jurors and of the civic duty associated with jury duty. In Florida, as elsewhere, the justice system imposes tremendous responsibility on jurors. We ask that jurors sit for complicated and lengthy product liability trials with little or no pay, endure weeks of testimony from engineers and scientists, and to maintain a rigid time schedule. Yet, in a crashworthiness case under *D'Amario*, the jury is not given the basic facts of why they are in the courtroom: the cause of the accident or the overall facts to determine truth and justice. In another context, in *Dosdourian v. Carsten*, 624 So. 2d 241, 247 (Fla. 1993), the Florida Supreme Court expressly recognized that "the integrity of our justice system is placed in question when a jury is charged to determine the liability and damages of the parties is deprived of the knowledge that there is in fact no dispute between two of the parties." By this, the court recognized it is essential for the jury to know the whole truth and all the facts about a dispute the jury is deciding.

However, *D'Amario* determined that jurors cannot be told the whole truth and reliably apportion fault in a crashworthiness case because it would be "confusing."[20] Yet after a decade, the Florida Supreme Court still has not approved for publication standard crashworthiness instructions in an effort to lessen jurors' confusion as to why they are deciding a case involving an automobile crash without being presented the facts of how and why the crash happened. Instead, most Florida courts in crashworthiness cases provide a nonstandard jury instruction not to speculate about the accident facts. Every day throughout Florida, however, jurors apportion fault in all other complicated tort cases.

D'Amario's Legal Odyssey: 2001-11

As stated earlier in this article, the *D'Amario* decision has arguably been rendered moot by the 2006 revision to §768.81, which readopted the definition of negligence cases to include products liability cases with no exception or exclusion of crashworthiness cases. Importantly, *D'Amario* also has been distinguished and limited by Florida's district courts and clearly has lost support in several of the minority jurisdictions upon which it relied.

• *Florida Cases* — Although the Florida Supreme Court has not revisited crashworthiness since *D'Amario*, the Fifth District Court of Appeal[21] and the Third District Court of Appeal[22] rejected plaintiffs' attempts to expand *D'Amario* to defendants who were not automobile manufacturers, demonstrating the shaky legal pylons upon which *D'Amario* rests.

The *D'Amario* court analogized the enhanced injuries of crashworthiness cases to successive accidents like medical malpractice occurring after the original tort. This concept was expressly addressed by the Fifth District in *Jackson v. York Hanover Nursing Center*, 876 So. 2d 8 (Fla. 5th DCA 2004). The *Jackson* court correctly recognized that a first and second tortfeasor could be both held liable and apportioned liability:

> It appears therefore that *D'Amario* only applies in Ms. Johnson's case if there were two distinguishable injuries, one caused by the Medical Center, and either a second separate and distinct injury caused by the Nursing Home, or an aggravation by the Nursing Home of an existing injury to Ms. Johnson originally caused by the Medical Center.
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> The limited record that we have of the proceedings below, however, indicates that both the Medical Center and the Nursing Home were dealing with a continuum of the same injury. The testimony reflects that Ms. Johnson was dehydrated while in the Medical Center; was still dehydrated when she left the Medical Center, and continued to be dehydrated during her days at the Nursing Home's facility. The trial court, in allowing damages to be apportioned by the jury in accordance with *Fabre*, concluded on the basis of substantial competent evidence adduced at trial that there was only a single injury, and accordingly, that *D'Amario* did not apply. We think the trial judge got it right.[23]

Jackson was a wrongful death action. The Fifth District expressly recognized that because of the circumstances of concurrent causes resulting

in death there should be an apportionment of liability among tortfeasors distinguishing *D'Amario*.[24]

> The term "joint tortfeasors" is usually defined as two or more negligent entities whose conduct combines to produce a single injury. To be joint tortfeasors, each actor must have committed some wrong that results in an injury or damage to another. "Although there is but a single damage done, there are several wrongs." Even if two seemingly independent tortious acts do not "precisely coincide in time," the actors can reasonably be considered to be joint tortfeasors if the sequence of their tortious acts produces a single injury.
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> In the instant case, as we have noted, there is only one injury, that being the death of Ms. Johnson by malabsorption of liquids and consequent dehydration, and the jury saw fit to apportion the damages. Moreover, as we have earlier indicated, there was sufficient evidence produced, reflecting that the Medical Center and the attending physician at the Medical Center acted in concert with the Nursing Home to cause the single injury. Under these circumstances, we conclude that no error was committed by the trial judge in allowing an apportionment of the damages suffered by Ms. Johnson.[25]

In *Sta-Rite Industries v. Levey*, 909 So. 2d 901 (Fla. 3d DCA 2004), the Third District followed the Fifth District's decision in *Jackson* to hold the trial court committed reversible error when it ruled that *D'Amario* applied in the absence of successive accidents. The claim in *Levey* was for a catastrophic brain injury suffered when the minor plaintiff was caught in a pool drain. The alleged tortfeasors were a pool maintenance company and a pool manufacturer. The Third District held that what it labeled as "*D'Amario's* two accident ruling" did not apply when the injury was indivisible and, therefore, the *Fabre* apportionment rule must apply:

> That determination, based on the "two-accident ruling" and its consequences, cannot stand. This is for the simple reason that, despite the plaintiffs successful attempts below to divide the indivisible, Lorenzo's fate may be viewed only as stemming from a single uninterrupted series of events, to which all of the claimed negligent acts of all of the alleged negligent players contributed.
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> While the extent of the separate accidents – separate defenses holding of *D'Amario* has been roundly debated *see* Edward M. Ricci, Theodore J. Leopold and Benjamin Salzillo, *The Minority Gets It Right: The Florida Supreme Court Reinvigorates The Crashworthiness Doctrine in* D'Amario v. Ford, 78 FLA. B.J. 14 (June 2004); Larry M. Roth, *The Florida Supreme Court Needs A Second Look at Second Collision Cases*, 78 FLA. B.J. 29 (April 2004), there is no case or other authority which even suggests its applicability to a situation like this one in which neither logic nor common sense would permit an artificial division of the causation of the plaintiffs' damages into separate indistinguishable seconds-long intervals during all of which he remained in the same dangerous position.

Similarly, the *D'Amario* reasoning fails in almost all automobile accident cases. Motor vehicle crashworthiness events are not successive in the same way that an automobile accident and medical treatment of those accident injuries in an emergency room could involve obviously separate negligent incidents. As noted earlier, an injury or death in a motor vehicle crash occurs within 300 milliseconds (1/3 of a second) — faster than the eyelid moves in a blink.[26]

• *Amendment to F.S. §768.81 in 2006* — As a result of the legislature's adoption of a revised and readopted §768.81 in 2006, it became clear that the doctrine set out in *Fabre* applies to all strict liability and products liability cases that occur after April 26, 2006. The statute now provides in pertinent part:

> (3) In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability.
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> (a) In order to allocate any or all fault to a non party, a defendant must affirmatively plead the fault of a non-party....
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> (b) In order to allocate any or all fault to a non-party and include the named or unnamed party on the verdict form for purposes of apportioning damages, a defendant must prove at trial, by a preponderance of the evidence, the fault of the non-party in causing the plaintiffs injuries.
>
> APPLICABILITY —
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> (4) (a) This section applies...civil actions for damages based upon theories of negligence, strict liability, products liability.

The legislature could have excluded crashworthiness cases from this amendment, but did not. When language is clear, it should be interpreted by its plain meaning, and there is no authority for a court to construe or interpret the statute.[27]

Here, the meaning appears plain and, therefore, any application of *D'Amario* to cases involving accidents after April 2006 is arguably in conflict with this clear statute. Thus, the authors of this article conclude that in negligence and product liability causes of action arising after April 26, 2006, the Florida Supreme Court's decision in *Fabre* was legislatively reaffirmed and made applicable to all causes of action, including crashworthiness cases.

But since there has not been an appellate ruling on the effect of the statute since it was re-adopted, there is debate in Florida's trial courts about the continued application of *D'Amario*. This should be clarified with a clear statement by Florida appellate courts that *D'Amario* is no longer the law of Florida because the legislature revised and readopted F.S. §768.81 in 2006 without creating an exception for crashworthiness cases. The legislature should also reinforce its clear intent by an express statement that *D'Amario* is not applicable to any accidents which have occurred after April 26, 2006.

• D'Amario's *Minority Position Has Evaporated* — What has happened to the minority jurisdiction cases on which *D'Amario* relied since 2001?[28] Even then they were few in number. Florida is now an aberrational minority jurisdiction state, and pretty much holds a single finger in the hole of the dam.

D'Amario specifically relied upon and quoted from *Reed v. Chrysler Corp*, 449 N.W.2d 224 (Iowa 1992), but *Reed* was later overruled in *Jahn v. Hyundai Motor Co.*, 773 N.W.2d 550 (Iowa 2009). In overruling *Reed*, *Jahn* cited *D'Amario* as a minority case that "does not apply comparative fault principles or at least limit their application in the enhanced injury context."[29] Iowa specifically repudiated the Florida outlier position.

Cota v. Harley-Davidson, 684 P.2d 676 (Ariz. Ct. of App. 1984), was cited in *D'Amario*[30] as excluding evidence of an intoxicated plaintiff's actions in a crashworthiness case on the issue of comparative fault. But *Cota* was decided before the adoption of comparative fault in Arizona

effective 1988, and, therefore, was entirely irrelevant. In contrast, *Zuern v. Ford Motor Company*, 937 P.2d 676 (Ariz. Ct. of App. 1997), was decided after Arizona's adoption of a comparative fault statute similar to F.S. §786.81. *Zuern* was a crashworthiness case involving an allegedly defective seatback. The court held that the trial court did not err "in admitting evidence bearing on Ellison's (other driver's) fault, including evidence of his intoxication and criminal conviction."[31]

A federal district court in Hawaii, while recognizing the lead minority position represented by *D'Amario*, refused to adopt *D'Amario*'s rationale. In *Dannenfelzer v. Chrysler Corp.*, 370 F. Supp. 1091 (D. Haw. 2005), the court specifically rejected *D'Amario*'s holding that comparative fault was *not* applicable in a crashworthiness case. The Hawaii court stated:

> Thus, in keeping with the precedent of the Hawaii Supreme Court, the California Supreme Court, and the majority of other jurisdictions, the Court finds that Defendant may indeed assert a defense of comparative negligence to Plaintiffs negligence and strict liability claims regarding the injuries stemming from the "second collision." Having reached that conclusion, however, the Court notes that the Rules of Evidence still apply, and any evidence of negligence on the part of Plaintiff that is wholly irrelevant to the issue of the allegedly enhanced injuries would be properly excluded.
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> Determining which evidence of negligence is relevant to the causation of the enhanced injuries is a highly fact-specific inquiry, however. Indeed, this is precisely the difficulty that makes holdings such as *D'Amario*, which seek to broadly exclude evidence of comparative fault regarding the underlying collision from the lawsuit regarding the allegedly enhanced injuries, so problematic.[32]

Recently, the Supreme Court of Utah rejected the minority position in *Egbert v. Nissan Motor Co.*, 228 P.3d 737 (Ut. 2010), pointing out that *D'Amario*, "chose to ignore" the comparative fault statute. Likewise, the *Restatement Third of Torts* eschews *D'Amario's* minority position.[33]

Conclusion

The appellate courts of Florida should expressly recognize that *D'Amario* does not apply after April 2006. Further, the Florida Legislature should end *all* arguments about this by making a straight-forward statement that *D'Amario* no longer applies. All product liability cases would, therefore, be treated the same, and all who contributed to cause the same injury resulting in damages would be responsible for their own pro rata percentage of fault.

The expression by the legislature should be that it is the legislature's intent that F.S. §768.81 as revised and readopted in 2006 applies in crashworthiness cases.❑

[1] *See, e.g., Huddell v. Levin*, 537 F.2d 726 (3d Cir. 1976) (New Jersey law); *Fox v. Ford Motor Co.*, 575 F.2d 774 (10th Cir. 1978); *Mitchell v. Volkswagenwerk, A.G.*, 669 F. 2D 1199 (8th Cir. 1982); *Caiazzo v. Volkswagenwerk, A.G*, 647 F. 2d 241 (2d Cir. 1981).

[2] Tort Reform and Insurance Act of 1986, §2; 86-160, Laws of Florida; *Fabre v. Marin*, 623 So. 2d 1182, 1185 (Fla. 1993).

[3] *Fabre v. Marin*, 623 So. 2d 1182, 1185 (Fla. 1993).

[4] *D'Amario*, 806 So. 2d 428-429. *See D'Amario* decision by the Second D.C.A. which granted a new trial based upon prejudicial alcohol evidence before the jury. *Ford Motor Co. v. D'Amario*, 732 So. 2d 1143 (Fla. 2d D.C.A. 1993). Second D.C.A. reversed the trial court's post-verdict decision to grant a new trial. In other words, the Second D.C.A. agreed with the Third District's decision in *Kidron Inc. v. Carmona*, 665 So. 2d 289 (Fla. 3d D.C.A. 1995), and agreed with defendant Ford that apportionment was properly raised. However, the jury determined that no defect existed and, therefore, never even apportioned fault.

[5] *D'Amario*, 806 So. 2d at 434, 435, 441, 442.

[6] *Id.* at 442-443.

[7] *Id.* at 442.

[8] *Id.* at 435.

[9] FLA. STAT. §768.81(3).

[10] *D'Amario*, 806 So. 2d at 426-427.

[11] *Stahl v. Metropolitan Dade County*, 438 So. 2d 14 (Fla. 3d D.C.A. 1983).

[12] *See Standard Jury Instruction – Civil Cases (Reorganization of Civil Jury Instructions*, 2010WL 727521; *Gooding v. University Hospital Building*, 445 So. 2d 1015-1020 (Fla. 1984). *See also Lopez v. Florida Power & Light Co.*, 501 So. 2d 1339, 1342 (Fla. 3d D.C.A. 1987).

[13] *Fabre*, 623 So. 2d at 1185.

[14] Florida Standard Jury Instruction §5.1(c) (concurring cause: "if some other cause occurs at the same time as the negligence and the negligence contributes substantially to producing such [damage])."

[15] Decelerations that occur immediately after the initial impact can damage living tissue without the occupant striking any feature of the vehicle interior. These can be termed first-collision injuries. Brenner & Enz, *Classification of Information Generated in a Motor Vehicle Crash Sequence, printed in* SANCES, ET AL., MECHANISMS OF HEAD AND SPINE TRAUMA 99 (1986). *See* GOODMAN & CENTER FOR AUTO SAFETY, AUTOMOBILE DESIGN LIABILITY THIRD, §§1:4 and 1:8 (airbags deploy in 1/20th second faster than blink of eye); Panjabi, *et al., Biomechanics of Spinal Injuries, printed in* SANCES, ET AL., MECHANISMS OF HEAD AND SPINE TRUAMA 194-199 (1986)(spinal cord injuries occur within 100-200 miliseconds).

[16] *Hyundai Motor Co. v. Ferayorni*, 795 So. 2d 126 (Fla. 4th D.C.A. 2001).

[17] *Hyundai Motor Co. v. Ferayorni*, 842 So. 2d 905 (Fla. 4th D.C.A. 2003).

[18] Transcript of Legislative Workshop at 22-25 (March 4, 2010).

[19] *See West v. Caterpillar Co.*, 336 So. 2d 80 (1976) (adopting strict liability in Florida in accordance with RESTATEMENT (SECOND) TORTS).

[20] *D'Amario*, 806 So. 2d at 441-442.

[21] *Jackson v. York Hanover Nursing Center*, 876 So. 2d 8 (Fla. 5th D.C.A. 2004), *rev. den.*, 890 So. 2d 1115 (Fla. 2004),

[22] *Sta-Rite Industries v. Levey*, 909 So. 2d 906 (Fla. 3d D.C.A. 2004), *rev. den.*, 919 So. 2d 435 (Fla. 2005).

[23] *Jackson*, 876 So. 2d at 8.

[24] *Id.*

[25] *Id.* (citations omitted).

[26] *See* note 12.

[27] *Fla. Birth-related Neurological Injury Compensation v. Bayfront Medical Center*, 29 So. 3d 992, 997 (Fla. 2010); *Childers v. Cape Canaveral Hosp.*, 898 So. 2d 973 (Fla. 5th D.C.A. 2005).

[28] *D'Amario*, 806 So. 2d at 433-434 (minority case law position and reliance).

[29] *Jahn v. Hyundai Motor Co.*, 773 N.W.2d 550, 555 (Iowa 2009).

[30] *D'Amario*, 806 So. 2d at 443.

[31] *Zuern*, 937 P.2d at 682.

[32] *Dannenfelzer*, 370 F. Supp. 1091 (D. Haw. 2005).

[33] RESTATEMENT (THIRD) OF TORTS, Product Liability §17(b).

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