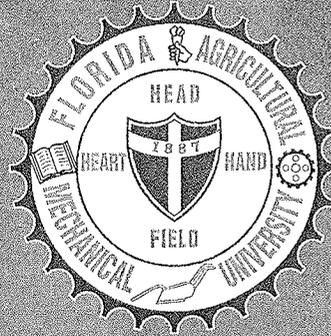


# FLORIDA A&M UNIVERSITY



## LAW REVIEW

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The Florida Supreme Court has allowed new Standard Civil Jury Instructions (“SCJI”)<sup>1</sup> recommended by its Committee on Civil Jury Instructions.<sup>2</sup> In allowing these new instructions, however, the Court chose to not actually give its seal of approval to the Instructions set out in 501.5.<sup>3</sup> Thematically, these SCJI deal with the tort law concept of “Other Contributing Causes of Damages.”<sup>4</sup>

At their core, these Instructions deal with apportionment by a jury, or not, of contributing fault causation once a tort has been committed.<sup>5</sup> For example, a tort resulting in injuries that may also cause an aggravation of an antecedent condition; a tort involving multiple events or causes coalescing to create one pool of damages; or an initiating tort which then results in a completely separate, subsequent negligence which creates greater harm beyond that first injury. This latter situation is what this article will address.

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1. In re Standard Jury Instructions in Civil Cases-Report No. 13-02, 135 So. 3d. 281 (Fla. 2014).

2. Comm. on Standard Jury Instructions (Civil), Report No. 13-02, at 3 (July 15, 2013). There was a dissenting view from certain committee members. *Id.* at 4-6. The vote was 14-6, with 2 abstentions for the new Instructions. *Id.* at 4.

3. *In re Standard Jury Instructions*, 135 So. 3d at 282 (“In doing so, we offer no opinion on the correctness of the instruction . . .”).

4. *Id.* at 281.

5. *Id.*

## INTRODUCTION

The recently promulgated SCJI in 501.5 all deal with complex matrices of variations in tort conditions and circumstances for which civil juries are to apportion fault specifically attributable to the tortfeasors responsible for each civil wrong.<sup>6</sup> That is, parsing out each tortfeasor's unreasonable actions, assigning degrees of responsibility, and answering the question, "Who is responsible for each part, or for a particular sum of the entire damages?"

The conceptual apportionment of fault in all these SCJI is fine. The new Instructions track current tort principles in statutory enactments and case law. However, the Supreme Court ignores a strong public policy established by the State's elected body favoring some type of apportionment of fault by allowing these new SCJI. The Instructions in 501.5 improperly provide that if a jury cannot apportion out various, separate causative actions, joint and several liability will apply by default.<sup>7</sup> Meaning that any one defendant sued by a plaintiff can be made to pay for everything!<sup>8</sup> The Court allowed release of these SCJI, which are antithetical to legislation that had already abolished joint and several liability. Statutory enactments to the opposite pole strongly pronounce that public policy requires pure fault apportionment based on separate responsibility and accountability, incontestably *contra* to the draconian imposition of joint and several liability.

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6. *Id.*

7. *See id.* at 282-83.

8. *Id.* at 282.

a. *Aggravation or activation of disease or defect:*

If you find that the (defendant(s)) caused a bodily injury, and that the injury resulted in [an aggravation of an existing disease or physical defect][or][activation of a latent disease or physical defect], you should attempt to decide what portion of (claimant's) condition resulted from the [aggravation][or][activation]. If you can make that determination, then you should award only those damages resulting from the [aggravation][or][activation]. However, if you cannot make that determination, or if it cannot be said that the condition would have existed apart from the injury, then you should award damages for the entire condition suffered by (claimant).

\* \* \*

b. *Subsequent injuries / multiple events:*

You have heard that (claimant) may have been injured in two events. If you decide that (claimant) was injured by (defendant) and was later injured by another event, then you should try to separate the damages caused by the two events and award (claimant) money only for those damages caused by (defendant). However, if you cannot separate some or all of the damages, you must award (claimant) any damages that you cannot separate as if they were caused by (defendant).

*In re Standard Jury Instructions*, 135 So. 3d at 282.

A full analysis of this throw back effect on non-apportionment of fault, *contra legem terrae*,<sup>9</sup> is beyond the scope of this article, but these misdirected SCJI highlight a true poster child for an apparent anomalous judicial conundrum: 501.5(c). Instruction 501.5(c) states:

c. Subsequent Injuries Caused by Medical Treatment:

If you find that (defendant(s)) caused [loss] [injury] [or] [damage] to (claimant), the (defendant(s) [is/are] also responsible for any additional [loss] [injury] [or] [damage] caused by medical care or treatment reasonably obtained by (claimant).<sup>10</sup>

In 501.5(c), there is *always* joint and several liability.

This particular Instruction is fundamentally grounded in the 1977 case of *Stuart v. Hertz Corp.*<sup>11</sup> By allowing 501.5(c) to be introduced, the Court has reinvigorated a thirty-seven-year-old decision. Reliance on *Stuart* most accurately illustrates the Court's apparent partial abandonment of pure apportionment of fault in tort actions. By this new Instruction, the Supreme Court also abandoned its long-standing common law ruling in *Fabre v. Marin*<sup>12</sup> and its progeny.<sup>13</sup> Further, in contradistinction to 501.5(c) are several public policy codifications by the Legislature ending, most recently, in Fla. Stat. § 768.81(b)(3),<sup>14</sup> which set forth, once and for all, the end of any tort liability but-for apportionment of fault.

#### I. *STUART V. HERTZ CORP.*: A WRECK OF A DECISION

*Stuart* was decided in 1977, when Jimmy Carter was President. It was a simple tort case. The central holding in *Stuart* was that an initial tortfeasor *would* be liable for any subsequent medical malpractice that may have aggravated injuries/damages occurring after the precipitating tort, yet not directly caused by that tort violator.<sup>15</sup>

9. "Against the law of the land." BLACK'S LAW DICTIONARY 352 (8th ed. 2004).

10. See *In re Standard Jury Instructions*, 135 So. 3d at 283.

11. 351 So. 2d 703 (Fla. 1977). The Supreme Court has been asked numerous times over the years whether *Stuart* is still good law. They have refused to answer. See *Nason v. Shafranski*, 33 So. 3d 117, 121 n.1 (Fla. 4th Dist. Ct. App. 2010); *Letzker v. Cephas*, 792 So. 2d 481, 482 (Fla. 4th Dist. Ct. App. 2001); *Letzker*, 792 So. 2d at 488-89 (Klein, J., dissenting) ("*Stuart* abrogated by the Act [ch. 768]").

12. 623 So. 2d 1182 (Fla. 1993).

13. See, e.g., *Nash v. Wells Fargo Guard Serv., Inc.*, 678 So. 2d 1262, 1263-64 (Fla. 1996) ("We agree and now hold that in order to include a nonparty on the verdict form pursuant to *Fabre*, the defendant must plead as an affirmative defense the negligence of the nonparty and specifically identify the nonparty."); *Wells v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 659 So. 2d 249 (Fla. 1995).

14. See FLA. STAT. § 768.81(2)-(3) (2011).

15. 351 So. 2d at 705-07.

In *Stuart*, the injured party was sent to the hospital after an accident.<sup>16</sup> While in the hospital, a doctor committed medical malpractice on plaintiff-patient, resulting in the initial harm being made much more serious.<sup>17</sup> The initial tortfeasor, Hertz, thinking they were not responsible or liable for the treatment administered by the doctor, brought a third party action for indemnification on this extra harm caused by the doctor's post-temporal negligence.<sup>18</sup> The subsequent malpractice aggravated an injury that was otherwise not there when the dust settled from the original tort episode.<sup>19</sup> Hertz wanted indemnification for those subsequent injuries they arguably did not cause—those which were the result of a physician's errant scalpel.<sup>20</sup> Florida's Supreme Court enunciated that the original tortfeasor could *not* bring a third party action for indemnification against those doctors to lessen their exposure to damages and stated, "We hold that such an action for indemnification may not be brought. To hold otherwise would alter traditional indemnity law by adopting a doctrine of partial equitable indemnification between active tortfeasors."<sup>21</sup>

Long before what current Justice Fred Lewis sardonically referred to as the so-called "alleged medical malpractice crisis,"<sup>22</sup> *Stuart* shackled an original tortfeasor with the weight of all damages flowing from that initial tort, even those created by unrelated, subsequent-in-time medical malpractice.<sup>23</sup> This legal pronouncement immunized healthcare providers from being accountable for their medical negligence on a plaintiff, contrary to present day standards and Florida's public policy, which has evolved since *Stuart's* 1977 holding.<sup>24</sup>

The formal reincarnation of *Stuart* via 501.5(c) consequentially permits the comprehensive medical malpractice statutory scheme to be bypassed.<sup>25</sup> *Stuart* established absolute liability on that initial tortfeasor for subsequent medical negligence, no matter what it was or

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16. *Id.* at 704.

17. *Id.* The initial auto accident injuries were orthopaedic. *Id.* At the hospital, the doctor severed plaintiff's carotid artery during surgery "causing a neurological disability." *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 706-07.

21. *Stuart*, 351 So. 2d at 705.

22. *Estate of McCall v. United States*, 134 So. 3d 894, 905 (Fla. 2014).

23. 351 So. 2d at 707. This, in effect, kept medical malpractice cases from being filed.

24. The *Medical Malpractice and Related Matters Statute*, oft amended, can be found at FLA. STAT. §§ 766.101-766.316 (2012).

25. *Cf.*, *Stuart*, 351 So. 2d at 707-08 (Boyd, J., dissenting). This is exactly what Justice Boyd implied in his *Stuart* dissent. In this type of situation, plaintiff should be suing directly for medical malpractice.

when it occurred.<sup>26</sup> If a tortfeasor put someone in the hospital because of original negligence, all subsequent harms would be imputed onto the original tortfeasor.<sup>27</sup> In a confounding legal non-sequitur proffered to support its holding, the *Stuart* panel essentially said that after a tortfeasor injures someone, thereby sending them for obviously-necessary medical attention, it naturally follows that doctors or hospitals can be expected to commit medical malpractice resultant in more serious injuries.<sup>28</sup> For this mishandled medical handiwork, that original tortfeasor is liable. *Stuart* infected the initiating tortfeasor with paying the cost of a presumed foreseeable, defined as reasonably anticipated, healthcare provider's botched treatment.<sup>29</sup> Stated as a corollary, a first come tortfeasor would buy, in less legal parlance, the entire "farm" of damages even if that negligent person had no direct involvement with the ensuing subsequent malpractice damages.

The jury in *Stuart* was precluded from separating out, or apportioning fault, between Hertz's liability and that of a doctor's hands doing damage to that particular plaintiff's previously healthy carotid artery, an incident far removed from the initial car accident involving non-incapacitating injuries.<sup>30</sup> The plaintiff in *Stuart* was rendered neurologically incapacitated by the medical care, an after-effect much more serious than the original bodily intrusion.<sup>31</sup>

The dissent in *Stuart* said there should be apportionment of the damages between those occurring prior to the injuries incurred through medical malpractice and those resulting therefrom.<sup>32</sup> Instead, the first tortfeasor, as well as the surgical instrument penetrating the carotid artery, was judicially established to be the risk payment of defendant Hertz for having the audacity to cause an accident in the first place.<sup>33</sup>

One obvious problem was that *Stuart*, then or since through the Supreme or other courts, never addressed at what point the intervening, yet subsequent medical malpractice eventually reached the pivot of being too far removed from the initial tort. This unaddressed issue left initial tortfeasors wondering how much time needed to pass before

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26. *See generally id.*

27. *Id.*

28. *Id.* at 706-07.

29. *See* BLACK'S LAW DICTIONARY 764, 1526 (10th ed. 2014) ("The quality of being reasonably anticipatable.").

30. *Stuart*, 351 So. 2d at 704.

31. *Id.*

32. *Id.* at 707 (Boyd, J., dissenting).

33. *Id.*

they could stop worrying about subsequent injuries: six months, one year, two years, or *ad infinitum*? There are cases following *Stuart* where its principle is applied despite some form of medical negligence, or a violation of community standards, occurring one or more years post the initial common law tortious conduct.<sup>34</sup>

As a consequence of the holding in *Stuart*, first order negligence became a joint tort with another who, at some later point in time, caused totally separate injury to a person due to necessary medical care necessitated by an accident. The original tortfeasor has to understand that, due to *Stuart*, healthcare providers are going to butcher their victim of original negligence. Thus, *but for* the negligence of an individual or an insured setting into motion an unrelated chain of tort events, all subsequent medical malpractice damages are bequeathed to that original tortfeasor. The errant scalpel of *Stuart* did not sever this linkage of causation.

## II. ANY WAY TO ESCAPE *STUART*?

Unfortunately, *Stuart* seems to provide no relief to the original tortfeasor from absolute joint and several liability.

One unstated rationale for *Stuart* is that an initial tortfeasor defendant, having committed a common law tort, may actually help keep medical malpractice insurance premiums lower by having to pay for the negligence of the administering doctor, nurse, or hospital. In *Stuart*, the implication was that the tortfeasor could separately sue the doctors and other medical providers in a completely different proceeding, maybe for contribution or indemnification.<sup>35</sup> Little public policy, or the practical consequences of the decision, were articulated in *Stuart*. Nearly four decades later, the Florida Supreme Court has still not given up their unstated stealth reasoning. The rationale may have been that the tortfeasor Hertz, or its insurance company, had "deep pockets" and could afford to pay for these subsequently enhanced mal-

34. See *Pedro v. Baber*, 83 So. 3d 912, 912-14 (Fla. 2d Dist. Ct. App. 2012) (involving treatment more than one year after initial accident).

35. See *Stuart*, 351 So. 2d at 706-07. There are a series of cases in which a defendant, stung by *Stuart*, was made to bear all the damages and did pursue later causes of action against the errant healthcare providers. See, e.g., *Walker v. Virginia Ins. Reciprocal*, 842 So. 2d 804, 806, 814 (Fla. 2003) (holding that a medical malpractice action brought for contribution by a defendant who paid in the underlying suit was subject to the complex requirements of Chapter 766, the medical malpractice statute); *Walt Disney World Co. v. Mem'l Hosp.*, 363 So. 2d 598, 600 (Fla. 4th Dist. Ct. App. 1978) (noting that Disney's claim for contribution was subject to medical malpractice mediation requirements).

practice damages, which were as unrelated to that car accident or a trip and fall, or whatever the original tort might be.

In the plaintiff-defendant personal injury or products liability context, “deep pockets” is a pejorative term, at least to defendants. A defendant’s deep pocket that had been robbed by *Stuart* may sometimes swallow hard, like Walt Disney World, and actually bring a separate lawsuit against those who commit medical malpractice to recapture their payment for subsequently made aggravated damages, as *Stuart* presupposes.<sup>36</sup>

The more likely scenario, due to litigation costs and unrecoverable attorney’s fees, is that the overpaying defendant would also have to comply with complexities of the medical malpractice statutory requirements and probably would not file that separate suit.<sup>37</sup> This would be a time-consuming, cumbersome, expensive, and precarious lawsuit. Arguably, most *Stuart* zapped defendants will not go to such extremes. Thus, the effect is that medically negligent culprits become inoculated from having to pay for their mistakes.

*Stuart* also makes possible a potential windfall to plaintiffs, because a particular plaintiff did not have to independently sue for medical malpractice. *Stuart*’s holding provides an easy alternative to avoid having to jump through legal hoops just to file a medical malpractice action.<sup>38</sup>

### III. THE INTERVENING “LIVING YEARS”

For forty years the Florida Supreme Court has seemingly chosen to ignore changing legal precepts, public policy, and the common law after *Stuart*.<sup>39</sup> With its 2014 re-affirmance of *Stuart* in 501.5(c), the Florida Supreme Court, intentionally or not, approved a judicial theorem long since abandoned. Yet, throughout this intervening time,

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36. See *Walt Disney World Co.*, 363 So. 2d at 600; see also *Walker*, 842 So. 2d at 806; *Underwriters at Lloyds v. City of Lauderdale Lakes*, 382 So. 2d 702, 704 (Fla. 1980) (discussing an action for subrogation by tortfeasor against subsequent malpractice).

37. The complex requirements imbedded in Chapter 766 of the Medical Malpractice Act apply to those situations where an underlying tortfeasor also pays for the subsequent medical malpractice, and then turns around to sue those healthcare providers for contribution because of the tortfeasor’s overpaid pro rata share. See *supra* note 35 and accompanying text; see also *Walker*, 842 So. 2d at 809-10 (noting that a contribution action is required to comply with complex requirements of Chapter 766 of the Medical Malpractice Act).

38. See FLA. STAT. §§ 766.101-766.316.

39. This refers to *Fabre* and changes to the apportionment of fault statutes which unequivocally now require apportionment of fault, even in subsequent enhancement of injuries occurring in crashworthiness cases. FLA. STAT. § 768.81(3) (2011).

the Supreme Court also began to embrace apportionment of fault principles *in contra* to *Stuart*.

Prior to *Stuart* in 1977, the Supreme Court first birthed Florida's pure comparative negligence rule, instead of unforgiving contributory negligence, in *Hoffman v. Jones*.<sup>40</sup> Under the pure comparative negligence rule, a plaintiff's possible negligence did not preclude him or her from tort recovery.<sup>41</sup> A plaintiff could now be ninety-nine percent at fault themselves and still recover one percent of jury found damages. The overarching and unstated rule was that, in a fault based tort system, all parties were responsible for their pro-rata harm caused on the plaintiff, even if the plaintiff was partially at fault.<sup>42</sup> Pure comparative negligence would eventually essentially end joint and several liability.

This comparative negligence theory was further established in common law under *Fabre v. Marin*.<sup>43</sup> Therein, a tortfeasor defendant could, with evidentiary proof and identification, place both parties and non-parties on a verdict form even if one of them had already settled with a plaintiff.<sup>44</sup> The jury would be given a specialized verdict form to "apportion" fault for one ultimate set of damages, including plaintiff's own degree of responsibility.<sup>45</sup> The trial judge would then assess attribution for overall damages based upon those apportioned liability percentages and enter judgment accordingly.<sup>46</sup> This holding embraces the concept of judicial equity. If one committed no foul, then they paid, in practice and theory, for no harm. Otherwise, everyone involved in causing that foul would share in the manifested harm.

Successive statutory enactments used *Fabre* as the launching pad to eradicate joint and several liability. Yet joint and several liability, despite being now completely eviscerated by statute, somehow

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40. Compare *Hoffman v. Jones*, 280 So. 2d 431, 437 (Fla. 1973) (adopting pure comparative negligence in Florida), with *Louisville & N.R. Co. v. Yniestra*, 21 Fla. 700 (1886) (contributory negligence barred any plaintiff recovery).

41. *Hoffman*, 280 So. 2d at 437.

42. *Id.*

43. 623 So. 2d 1182 (Fla. 1993). See *Salazar v. Helicopter Structural & Maint., Inc.*, 986 So. 2d 620, 622 n.1 (Fla. 2007) (describing a *Fabre* defendant as a non-party "whom a defendant asserts is wholly or partially responsible for the negligence alleged.").

44. See *Fabre*, 623 So. 2d at 1186 n.3.

45. However, a judgment could not be entered against a *Fabre* defendant who was a non-party. See *Claudio v. Regalado*, 116 So. 3d 451, 456 (Fla. 2d Dist. Ct. App. 2013). The *Fabre* defendant was not a party to the suit, and thus not under the jurisdiction of the court, so no judgment could be entered against him or her because of due process concerns. *Id.* *Fabre* fault simply reduced the proportion at fault and damages to the actual defendants in a lawsuit.

46. *Id.*

survived through *Stuart*, and its SCJI permitted by the Supreme Court.<sup>47</sup>

#### IV. JOINT AND SEVERAL LIABILITY: "LIVE AND LET DIE"

Historically, the concept of joint and several liability goes back centuries.<sup>48</sup> Florida adopted the concept early in the twentieth century,<sup>49</sup> though it remains bewildering to even the most astute legal minds.<sup>50</sup> *Joint and several* means, literally and pragmatically, that one deep pocket pays for everything. Between two tortfeasors whose actions cause a single harm, the one with the most money can be made to pay for all the plaintiff's damages. For example, if both defendants B and C are attributed fifty percent of the fault, C would then pay only fifty percent of the apportioned damages. Plaintiff A could not squeeze the full measure of their damages from either B or C, the latter which illustrates joint and several liability. With joint and several, however, plaintiff A can go after defendant C for one hundred percent of the damages, even if C may only have contributed one percent of the total harm. Theoretically, C would be able to sue the other tortfeasor. However, this is not practical in the real world, because C was likely targeted as the party with the most money, whereas B might not have any.

To the Florida Legislature, beholden to voters, all of this seemed unfair. Even to a First Amendment secularized Florida Supreme Court, as conceptually recognized in *Fabre*, these types of

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47. Since, under *Stuart*, the subsequent medical malpractice perpetrator was not a joint tortfeasor, joint and several liability should not even apply. See *Stuart*, 351 So. 2d at 705 ("The parties causing injuries here were not joint tortfeasors but distinct and independent tortfeasors"); *Acadia Partners, L.P. v. Tompkins*, 759 So. 2d 732, 736 (Fla. 5th Cir. Ct. App. 2000) ("Joint and several liability among multiple tortfeasors exists when the tortfeasors, acting in concert or through independent acts, produce a *single injury*") (emphasis added).

48. Joint and several liability is at least traceable to the late 1700s. See *Hill v. Goodchild*, 98 Eng. Reprints 465, 5 Burr. 2790 (K.B. 1771) (Mansfield, J.); see also William L. Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413, 418-19 & nn. 35-38 (1937).

49. See *Louisville & N.R. Co. v. Allen*, 65 So. 8, 11-13 (1914) (noting that joint and several liability was judicially created); *Stanley v. Powers*, 166 So. 843 (Fla. 1936).

50. See, e.g., Stephanie Arma Kraft, Note, *Modification of the Doctrine of Joint and Several Liability: Who Bears the Risk?*, 11 Nova L.J. 165 (1986), available at <http://heinonline.org/HOL/LandingPage?handle=hein.journals/novalr11&div=20&id=&page=>; Michael S. Hooker & Guy P. McConnell, *Joint & Several Liability in Florida: Are Reports of its Demise Greatly Exaggerated?*, 80 FLA. B.J. 11 (2006); *Walt Disney World Co. v. Wood*, 515 So. 2d 198, 201-02 (Fla. 1987) (exemplifying the unfairness of joint and several liability as Disney was found only one percent at fault, but paid for other defendants).

results did not seem equitable either.<sup>51</sup> Thus, public policy over the years became an irreversible march toward completely abolishing joint and several liability. But it was not a war easily won.

Historically, that first major skirmish ended with the Legislature, in 1986, only partially restricting joint and several liability from non-economic damages in its first modern day tort reform effort.<sup>52</sup> Then, in 1999, through Florida Statute Section 768.81(3), the Legislature adopted a modified joint and several liability matrix which somewhat lessened the death grip the law had on anything contrary to apportionment of fault. However, this was an extremely complex statutory formulation having different percentages of fault activating a modified joint and several liability sliding scale, but then only as to economic damages.<sup>53</sup> This form of joint and several liability applied only to actual or compensatory damages,<sup>54</sup> but did for sure abolish joint and several liability as to non-economic or discretionary damages.<sup>55</sup> Joint and several liability still clung to some kind of existence. However, this equation became very difficult to apply in actual trial cases.

In 2006, the Legislature finally abolished joint and several liability once and for all in favor of total pure apportionment of fault.<sup>56</sup> Finally, in 2011, the Legislature reaffirmed that joint and several liability had not been brought back to life.<sup>57</sup> It was seriously dead and buried.

#### V. STUART: AN ANACHRONISTIC ABERRATION OF THE LAW, BUT A SOLUTION FOR IT?

The Florida Supreme Court's resurrection of *Stuart v. Hertz Corp.* brings back joint and several liability, despite being expressly

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51. See *Fabre*, 623 So. 2d at 1186-87.

52. FLA. STAT. § 768.31 (1986) (eliminating joint and several liability for economic damages, except when plaintiffs' fault exceeded defendant, or non-economic damages did not exceed \$25,000).

53. FLA. STAT. § 768.81(3)-(6) (1999).

54. "Actual damages", BLACK'S LAW DICTIONARY 471 (10th ed. 2014) ("An amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses. – Also termed compensatory damages; tangible damages; real damages."). *E.g.*, past and future lost wages as well as past and future medical expenses.

55. "Discretionary damages", BLACK'S LAW DICTIONARY 472 (10th ed. 2014) ("Damages (such as mental anguish or pain and suffering) that are not precisely measurable but are determined by the subjective judgment of a jury"); "Non-economic damages", BLACK'S LAW DICTIONARY 473 (10th ed. 2014) (referencing non-pecuniary damages which are "[d]amages that cannot be measured in money"). *E.g.*, emotional distress, loss of capacity for enjoyment of life, and pain and suffering.

56. FLA. STAT. § 768.81 (2006).

57. FLA. STAT. § 768.81(3) (2011).

contrary to Section 768.81(3) of the Florida statutes and years of public policy. The other issue that SCJI 501.5 raises is that, in cases of a subsequent, antecedent-tortfeasor combining to create a plaintiff's damages when the prior or subsequent wrong cannot be apportioned, either tortfeasor can then be held liable for 100% of the damages—except for *Stuart*, where the subsequent tort is medical malpractice. As to this latter phenomenon, the original tortfeasor pays all the damages because it is foreseeable that hurting someone will necessitate medical care. Medical malpractice is, then, this foreseeable consequence of sending—through a non-intentional tort—an injured person to the hospital, or off to seek some kind of medical attention.

What could possibly be the rationale of the Supreme Court, having already applied apportionment of fault principles prior to 501.5(c), unequivocally ignoring their own case law and legislation? This query has nothing to do with indemnification because, due to *Houdaille Indus., Inc. v. Edwards*, the Court held joint tortfeasors could not turn around and separately sue for indemnification for recovery on subsequent medical malpractice damages paid.<sup>58</sup> This is due to the lack of special relationship between a tortfeasor and the malpractitioner.<sup>59</sup> Absent the special relationship, defendant is not technically, vicariously, derivatively or constructively liable, according to *Houdaille*; therefore, contribution may be the only option left.<sup>60</sup>

There should not be any *Stuart* standard instruction as 501.5(c). Instead, the best option is to simply give the jury a verdict form that has a *Fabre* malpractice defendant or defendants listed on it. The jury can then apportion out any subsequent medical malpractice damages occurring after the original tort. After all, a defendant pleading as an affirmative defense medical malpractice causing aggravation or enhancement of damages is no different than having to apportion out the same separation of damages for any non-medical *Fabre* defendant. If there is medical malpractice, let the plaintiff directly sue the healthcare providers instead. There are special statutory provisions for such causes of action.<sup>61</sup>

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58. 374 So. 2d 490 (Fla. 1979).

59. *Id.* at 493 (criticizing active-passive terminology).

60. Although, as former Justice Charles Wells has commented, "contribution" is really no longer viable. Charles T. Wells & Allen Winsor, *Apportionment from Hoffman v. Jones Through the 2011 Legislative Session: Perfecting the Equation of Liability with Fault*, 34 TRIAL ADVOC. Q. 29 (2012).

61. See, e.g., FLA. STAT. § 766.104 (2008) (regarding pre-suit screening) and § 766.203 (2004) ("Presuit Investigation of medical negligence claims and defenses by prospective parties.").

If subsequent medical malpractice is committed after a separate, distinct tort why should Wal-Mart, Publix, Disney, Busch Gardens, or even the average negligent driver in an intersectional collision have to pay for these later medical malpractice damages? Subsequent malpractice tortfeasors are not joint tortfeasors anyway.<sup>62</sup> Therefore, not being joint tortfeasors means there cannot be, as a matter of law, joint and several liability.<sup>63</sup> The *Stuart* instruction abrogates the entire medical malpractice statutory scheme. This is because, in a regular tort case, the plaintiff has only to prove simple negligence, a much less onerous burden of proof than is required for a medical malpractice case,<sup>64</sup> and in the former, there is no damages cap.<sup>65</sup>

The *Stuart* subsequent negligent healthcare provider essentially escapes unpunished despite his or her breach of duty and violation of community standards of reasonable care, which proximately causes these identifiable separate injuries. Yet *Stuart*, for its rationale, quotes the following from a 1932 case:

Where one who has suffered personal injuries by reason of the negligence of another exercises reasonable care in securing the services of a competent physician or surgeon, and in following his advice and instructions, and his injuries are thereafter aggravated or increased by the negligence, mistake, or lack of skill of such physician or surgeon, the law regards the negligence of the wrongdoer in causing the original injury as the proximate cause of the damages flowing from the subsequent negligent or unskillful treatment thereof, and holds him liable therefor.<sup>66</sup>

Thus, *Stuart* relies on now discarded indemnity concepts of "active and passive tortfeasors."<sup>67</sup> *Stuart* and the new 501.5(c) SCJI based upon it derive much of their reasoning from that 1932 case, *J. Ray Arnold Corp. v. Richardson*.<sup>68</sup> Some have criticized *Stuart's* use of *Richard-*

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62. See Beth Bates Holliday, J.D., *Common-Law Principles Regarding Joint and Several Liability – In General*, in 32A FLA. JUR. 2D JOINT AND SEVERAL TORTFEASORS § 1 (2015) ("Joint tortfeasors are defined as those who act together in committing a wrong, or acts, if independent of each other, unite in causing a *single* injury.") (emphasis added).

63. See FLA. STAT. § 768.81(3) (2011).

64. See FLA. STAT. § 766.102.

65. *Contra McCall*, 134 So. 3d at 916 (overruling on constitutional grounds some of the medical malpractice damages caps).

66. See *Stuart*, 351 So. 2d at 707 (quoting *J. Ray Arnold Corp. v. Richardson*, 141 So. 133, 135 (Fla. 1932)).

67. *Houdaille*, 374 So. 2d at 493.

68. *Richardson*, 141 So. at 135.

son's elocution as being taken out of context.<sup>69</sup> Paradoxically, *Richardson* helped *Stuart* conclude the original tortfeasor is not a joint or concurrent tortfeasor with creators of the subsequent medical malpractice injuries. Yet, *Stuart* still imposes joint and several liability where joint tortfeasors now does not exist. This Black Letter Law error should have killed off the case long ago.

As such, the Supreme Court in SCJI 501.5(c) relies on a fatally archaic legal concept to resuscitate joint and several liability despite the latter being legislatively abolished. *Stuart* is certainly not a decisional paragon of *stare decisis* which should be surviving today.

Although not directly the purpose of this Article, *Stuart* also creates a vacuum in causation law by creating absolute liability favoring plaintiffs' and non-necessity to prove medical care and reasonableness of medical expenses in personal injury cases.<sup>70</sup> This issue involving *Stuart* was also bantered about at the Committee level.<sup>71</sup> *Stuart* has caused numerous headaches for defense lawyers, preventing them from challenging either the necessity of the medical treatment in their attempt to break the causative liability chain or trying to preclude tortfeasor one from paying either some or all medical expenses.<sup>72</sup> In order to apportion liability and damages once *Fabre v. Marin* came along, appellate courts still blocked any *Stuart* outflanking maneuver when a defendant directly challenged the subsequent malpractice.<sup>73</sup> *Stuart* even prohibits a direct challenge solely to the reasonableness of Plaintiff's medical bills as damages flowing from Defendant's initial harm.<sup>74</sup> The effect, in essence, is that each time a defense lawyer raises these points, it is determined to be only a camouflage effort of subterfuge to eliminate damages caused by medical malpractice, and not to the original tort.<sup>75</sup>

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69. See Curtright C. Truitt & Michael P. Vernik, *Stuart v. Hertz: What Have We Done?*, 33 TRIAL ADVOC. Q. 16, 17 (2014).

70. 351 So. 2d at 707-08.

71. See *In re Standard Jury Instructions*, 135 So. 3d at 281-82.

72. See *Stuart*, 351 So. 2d at 707.

73. See, e.g., *Dungan v. Ford*, 632 So. 2d 159, 163-64 (Fla. 1st Dist. Ct. App. 1994) (reversing a verdict for the defendant where the court found the trial judge allowed the defendant to try a malpractice claim in the main action).

74. See *Pedro*, 83 So. 3d at 914, 916 (noting that while the term malpractice was avoided, a *Stuart* instruction was necessary because expert testimony, paired with closing arguments, called into question the care provided by a subsequent tortfeasor medical provider).

75. See *Tucker v. Korpita*, 77 So. 3d 716, 719 (Fla. 4th Dist. Ct. App. 2011) (holding that, since questioning went beyond just advisability of treatment, a *Stuart* instruction was required).

In 2001, a different group of Supreme Court Justices drove *Stuart* all the way into the infield of discussing motor vehicle crashworthiness law.<sup>76</sup> That Court, a generation removed from *Stuart*, used it to analogize the ephemeral second collision enhanced damages in a motor vehicle crash not caused by the initial accident as being nothing more than a subsequent tort—such as sending a tortfeasor’s victim to the hospital where aggravated or enhanced (the latter a crashworthiness maxim) injuries are precipitated by the healthcare system through malpractice. Just like in a crashworthiness case, the subsequent medical negligence does not create joint tortfeasors.<sup>77</sup> That, as to crashworthiness, is a far cry, from a timeline standpoint, from sending someone to the hospital or doctor *subsequent* to some first tort, like a slip and fall, where days or weeks later the subsequent chain of initial liability continues to flow causatively when the medical malpractice eventually occurs. Crashworthiness-enhanced injuries in a car crash, as an inapposite postulate, happen faster than the blink of an eye.<sup>78</sup> It has taken a decade for legislation to conclusively overrule the Supreme Court’s paradigm of crashworthiness liability and impose only pure apportionment of fault principles to second collision or enhanced injury cases.<sup>79</sup>

#### CONCLUSION: OH THE SORDID MESS!

Looking back on its four decades of viability, *Stuart* has wreaked continuing havoc on its “long and winding road.” To a non-medical malpractice attorney, such as this author, *Stuart* immediately materializes as insulating plaintiffs’ attorneys from having to prove a more difficult legal wrong, i.e., medical malpractice. The Florida Supreme Court decision in *Stuart* essentially involves a party who seeks medical care for bodily harm, after injury by a tortfeasor, and is subsequently injured, collecting entirely from the first perpetrator, and thus creates the working assumption that healthcare providers should be expected to commit malpractice on that patient! Does that not give an implied license for the doctor to be careless and unaccountable?

Beyond this, however, *Stuart* is being criticized for reviving joint and several liability, which, unquestionably, is no longer in existence in Florida. Additionally, the Florida Supreme Court continues to

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76. See *D’Amario v. Ford Motor Co.*, 806 So. 2d 424, 435-36 (Fla. 2001).

77. *Id.*

78. See Larry M. Roth, *Florida’s Motor Vehicle Crashworthiness Enhance Injury Doctrine: Wanted Dead or . . .*, 18 BARRY L. REV. 389, 415-19 (2013).

79. See FLA. STAT § 768.81(3) (2011).

perpetuate a reversal of Legislative enactments with SCJI 501.5(a) and (b), "Other Constitution Cases of Damages." These Instructions all have the same ultimate flaw. If a jury cannot apportion out aggravation of a pre-existing condition or, as noted, subsequent or "multiple events," then one defendant and one defendant alone must shoulder the entire panoply of damages; ergo, joint and several liability. SCJI 501.5(c), based on *Stuart*, does not even allow a jury to attempt to dissect or attribute other damages.

But what is a *Stuart* type of defendant to do? He or she may no longer have a right to contribution under Florida law for a separate recoverable lawsuit,<sup>80</sup> and indemnification is not appropriate, either, in a separate action. Instead, a *Stuart* type defendant is left with the harsh inequities of joint and several liability. Apportionment, on the other hand, is not an exact science—it is more like the bubble gum and rubber band ingenuity which brought home Apollo 13 from disaster. It is a give and take, a bundle of compromises. Perhaps the jury simply liked one lawyer better than the other? The key is that the jury is otherwise free, based upon the evidence, to apportion fault as they choose. How else can one otherwise explain some of the pro-rata percentages of fault at which juries arrive, i.e., seventy percent to one party, four and a half percent to another, zero percent to plaintiff?<sup>81</sup> Whether the Supreme Court likes it or not, apportionment of fault happens now in every applicable tort case. Why should *Stuart* be any different?

When expert opinions, closing arguments, and just plain common sense of the jury cannot aid in attributing percentages to all possible parties, then the trial judge, after at least one *Allen* charge,<sup>82</sup> should simply declare a mistrial. Even for a *Stuart* type situation, this will not happen any more often than it does in any other tort cases involving apportionment. The contaminated run-off from *Stuart* must be blocked. The Supreme Court has thus far refused to do so; despite certification to the Court several times, *Stuart v. Hertz Corp.* is still good law in light of the 1986 Tort Reform, subsequent legislative enactments of 1999 and 2006, and the evolving case law on fault based apportionment.<sup>83</sup>

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80. FLA. STAT. § 768.81(3)-(6) (1999).

81. *Healthcare Staffing Solutions, Inc. v. Wilkinson*, 86 So. 3d 519, 520 (Fla. 1st Dist. Ct. App. 2012).

82. See *Allen v. United States*, 164 U.S. 492 (1896); *Schneider v. State*, 152 So. 2d 731 (Fla. 1963); SCJI 801.3 (referring to procedures for when a jury is deadlocked).

83. *Nason*, 33 So. 3d at 121 n.1; *Caccavella v. Silerman*, 814 So. 2d 1145 (Fla. 4th Dist. Ct. App. 2002); *Letzker*, 792 So. 2d at 488 (holding that *Stuart* is at odds with Chapter 768, but not answering whether *Stuart* is still viable); *Letzker*, 792 So. 2d at 488-89 (Klein, J., dissenting) ("*Stuart* [has been] abrogated by [Chapter 768]").

So the Legislature, again, must step in, as that is how judicially created joint and several liability was eliminated. Section 768.81 can be amended to include specific application of *Stuart's* subsequent medical malpractice in a regular tortfeasor situation for apportionment of fault. As noted, *Stuart* involves no joint tort resulting in a single injury.<sup>84</sup> The legislation can specifically call out *Stuart* to state that a subsequent medical malpractice perpetrator can, as a non-party, be on the verdict form for apportionment of fault under section 768.31, like in *Fabré*. This is similar to the 2011 legislation, in which the legislative branch broke the misapplication of crashworthiness law to permit apportionment of fault.<sup>85</sup>

Additionally, the medical malpractice statute<sup>86</sup> should commensurately be amended to exclude an already cumbersome recoupment action by a non-joint tortfeasor who bears the *Stuart* yoke of subsequent medical malpractice, and to provide restrictions to avoid double recovery by the plaintiff. Chapter 766 can be further amended, if *Stuart* remains viable, so that a plaintiff can file a notice with the circuit court that would toll the limitations period until the underlying tort action is completed. Then, if necessary, the plaintiff has the time to sue the medical malpracticioners too, with provisions for set-offs of any sums recovered because of *Stuart*.

Of course, all this assumes the Supreme Court will not, finally, dump the *Stuart* case. Such recourse would be the easiest solution. Although none of these others are bullet proof suggestions, they are a start, and at best, the anachronism of *Stuart* will be reconfigured. There is no overpowering argument that a *Stuart* situation cannot be handled by a *Fabre* apportionment of fault evidentiary determination. One would have to think a jury, like in *Stuart*, does not have the wherewithal to apportion a number to the fault of a negligently severed carotid artery. To believe differently would be an affront to the jury system. Whereas, on one hand, trial judges laud juries for their sacrifices and community service, the Supreme Court must think them imbecilic to not be able to layer through fault to tally up the bottom line to 100%, even inclusive of the subsequent medical malpractice.

If any of this is ignored, it is an irresponsible cop-out for the reincarnation of joint and several liability. If the legal system cannot

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84. See *D'Amrio*, 806 So. 2d at 435-36. The Supreme Court has specifically stated *Stuart*, with its subsequent medical malpractice, does not create joint tortfeasors. Thus, if parties are not joint tortfeasors, there cannot be joint and several liability. See FLA. STAT. § 768.81(3).

85. See Roth, *supra* note 78, at 421-25.

86. FLA. STAT. § 766.

do better than, say, at least the 1700's in terms of a legal doctrine, then maybe we have a lot more to worry about legally and politically than what percentages to apportion to negligent or liable parties in a lawsuit.

There is that one further disconnect with 501.5(c). The Supreme Court does not endorse 501.5. Their Opinion permits these Instructions by saying that the instructions are not the Court's, nor does the Court endorse them.<sup>87</sup> The result is a new Standard Civil Instruction on "complex" issues of the law,<sup>88</sup> which the Supreme Court treats as a pariah, giving them no legitimacy.

This may be a nice judicial nuance, as experienced trial lawyers know a trial judge is *always* going to give the Standard Instruction, as the presumption is that they come with the "Good Housekeeping" seal of the Supreme Court. They are a safe, non-reversible bet, and this will be no different for these newly promulgated edicts of the Law in 501.5.

Certainly, in all due respect, it is anathema for the Supreme Court to disown these Instructions. If they are wrong or inadequate, the Court should reject them, sending them back to Committee like they did a few years ago on the "crashworthiness" proposed Instructions.<sup>89</sup> To give these new Instructions the appearance of approval is wrong. As a consequence, at least to the Author, since at least one of these new Instructions—501.5(c)—is absolutely incongruent, they will and should be challenged.

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87. See *In re Standard Jury Instructions*, 135 So. 3d at 281.

88. *Id.* ("There is no need for a specific instruction for this complex legal subject.").

89. The Court rejected most of the Committee's product liability proposed instructions, including those on crashworthiness. *In re Standard Jury Instructions in Civil Cases - Report*. 09-10, 91 So. 3d 785 (Fla. 2012).