

STORAGE NAME: h0491.jo.doc
DATE: March 28, 2001

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIAL OVERSIGHT
ANALYSIS**

BILL #: HB 491

RELATING TO: Comparative Fault/Negligence Cases

SPONSOR(S): Representatives Baker, Kottkamp, and others

TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) JUDICIAL OVERSIGHT
- (2) BUSINESS REGULATION
- (3) SMARTER GOVERNMENT
- (4)
- (5)

I. SUMMARY:

HB 491 amends section 768.81(4)(a), F.S., to include negligence actions based on intentional torts within the definition of "negligence cases" in that statute. The bill states that intentional torts include, but are not limited to, criminal conduct. Under this bill, a negligence action based upon an intentional tort would be governed by s. 768.81, F.S., and damages would be apportioned by fault rather than by joint and several liability. The bill also amends section 768.81(4)(b), F.S., to remove the language stating that the section does not apply to actions based on intentional torts.

The bill takes effect on July 1, 2001.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Section 768.81, Florida Statutes, is Florida's comparative fault statute. The statute requires the court to enter judgment against a party in appropriate civil actions on the basis of fault rather than on the basis of joint and several liability. In cases where the statute is applicable, the court is required to enter judgment on the basis of each party's percentage of fault and not on the basis of joint and several liability. See s. 768.81(3), F.S.

Under contributory negligence, any fault on the part of the plaintiff barred recovery.¹ The court receded from the doctrine of contributory negligence in Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973), and made clear that joint and several liability would apply in Florida. Under joint and several liability, each defendant is responsible for all of the plaintiff's damages caused by all defendants, regardless of the extent of each defendant's fault in causing the accident.² For example, in Walt Disney World v. Wood, 515 So. 2d 198 (Fla. 1987), one defendant was found 85% liable for an accident, co-defendant Disney was found 1% liable, and the plaintiff was found 14% liable. The court found that, under joint and several liability, Disney was liable for 86% of the plaintiff's damages even though Disney was only 1% at fault.³ The court declined to abolish joint and several liability in Walt Disney World, stating that such a decision should be made by the Legislature.⁴

Section 768.81, Florida Statutes, requires the court to enter judgment based on fault of the parties rather than joint and several liability in negligence cases. Section 761.81(4)(a), F.S., defines "negligence" cases as including "civil actions for damages based upon theories of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories." Section 761.81(4)(b), F.S., states that the comparative fault statute does not apply to actions "based on an intentional tort."

In Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993), the court addressed how to apply section 768.81, F.S., when not all tortfeasors are parties to the lawsuit. In Fabre, the plaintiff was a passenger in a vehicle driven by her husband when the vehicle was involved in an accident with another vehicle.⁵

¹ See Fabre v. Marin, 623 So. 2d 1182, 1184 (Fla. 1993).

² See Fabre, 623 So. 2d at 1184.

³ See Walt Disney World, 515 So. 2d at 198-202.

⁴ See Walt Disney World, 515 So. 2d at 202.

⁵ See Fabre, 623 So. 2d at 1183.

The jury found the plaintiff's husband (who was not a party to the lawsuit) and the driver of the other vehicle each fifty percent at fault.⁶ The trial court refused to apply the comparative fault statute and ruled that the other driver was liable, under joint and several liability, for all of the plaintiff's damages.⁷ The Supreme Court held that was error. The court held that section 768.81, F.S., required the trial court to impose liability on a defendant equal only to that defendant's percentage of fault:

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.⁸

The court explained that by enacting section 768.81, F.S., the legislature eliminated joint and several liability and decided that for purposes of noneconomic damages, a plaintiff must take each defendant as he or she finds them.⁹ If a defendant is insolvent, the judgment of liability of another defendant is not increased.¹⁰ The statute requires the same result in a case where a potential defendant cannot be joined in a lawsuit.¹¹ Based on that holding, the court reduced the award of noneconomic damages by fifty percent to reflect the other driver's degree of fault.¹²

Section 768.81, F.S., does not apply to actions "based on intentional torts." In Merrill Crossings Associates v. McDonald, 705 So. 2d 560 (Fla. 1997), the court addressed the question of what kinds of actions qualify as actions based on intentional tort in section 768.81. In Merrill Crossings, the plaintiff was shot and injured by an unknown criminal in a Wal-Mart parking lot.¹³ The plaintiff sued for failure to employ reasonable security measures and the jury found Wal-Mart seventy-five percent negligent and Merrill Crossings (the owner of the shopping center) twenty-five percent negligent.¹⁴ By a certified question, the Florida Supreme Court was asked to determine whether an action alleging negligence by "failing to employ reasonable security measures, with said omission resulting in an intentional, criminal act being perpetrated upon the plaintiff by a non-party" was an "action based on an intentional tort."¹⁵ The court held that the action in that case was based on an intentional tort and, therefore, the comparative fault statute did not apply.¹⁶

C. EFFECT OF PROPOSED CHANGES:

The bill amends section 768.81(4)(a), F.S., to include negligence actions based on intentional torts within the definition of "negligence cases" in that statute. The bill states that intentional torts include, but are not limited to, criminal conduct. Under this bill, a negligence action based upon an intentional tort would be governed by s. 768.81, F.S., and damages would be apportioned by fault rather than by joint and several liability. The bill also amends section 768.81(4)(b), F.S., to remove the language stating that the section does not apply to actions based on intentional torts.

This would have the effect of expanding the Fabre rule and eliminating joint and several liability in cases based upon intentional torts. It would permit damages to be apportioned to nonparty tortfeasors. For example, in a case such as Merrill Crossings, which was based on an intentional

⁶ See Fabre, 623 So. 2d at 1183.

⁷ See Fabre, 623 So. 2d at 1184.

⁸ Fabre, 623 So. 2d at 1185.

⁹ See Fabre, 623 So. 2d at 1186.

¹⁰ See Fabre, 623 So. 2d at 1186.

¹¹ See Fabre, 623 So. 2d at 1186.

¹² See Fabre, 623 So. 2d at 1187.

¹³ Merrill Crossings Associates v. McDonald, 705 So. 2d 560, 561 (Fla. 1997).

¹⁴ Merrill Crossings, 705 So. 2d at 561.

¹⁵ Merrill Crossings, 705 So. 2d at 561.

¹⁶ Merrill Crossings, 705 So. 2d at 563.

tort, the jury would have to apportion fault between Merrill's Crossing, Wal-Mart, and the unknown criminal. The plaintiff would only be able to recover from Merrill's Crossing and Wal-Mart based on their respective percentages of fault and would not be able to recover the percentage of damages caused by the unknown criminal.¹⁷

The bill takes effect July 1, 2001.

D. SECTION-BY-SECTION ANALYSIS:

See Section II.C. Effect of Proposed Changes.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate. The bill may have the effect of preventing monetary recovery in certain civil actions where recovery would be possible under current law. It may also reduce the liability to businesses for civil actions based on intentional torts.

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require counties or municipalities to spend funds or to take an action require the expenditure of funds.

¹⁷ Section 768.81(3), F.S., sets forth a formula that governs when joint and several liability applies and provides rules for pleadings in order to allocate fault to nonparty tortfeasors. This bill does not change those sections.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Litigation reform legislation is often challenged as a violation of the Supreme Court's exclusive power to adopt practice and procedure in the courts. See Art. V, s. 2, Fla. Const. This bill does not appear to make rules of court or mandate court procedure. While it applies s. 768.81, F.S., to actions based on intentional torts, the courts still have the power to create rules of procedure or standard jury instructions to implement the legislation.

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

In 1999, the Legislature substantially revised the negligence statute by passing chapter 99-225, Laws of Florida. The revision included substantial changes to s. 768.81, F.S. In Florida Consumer Action Network v. Bush, Case No. 99-6689 (Fla. 2d Cir. Ct. February 9, 2001), the court held that chapter 99-225 violates the Florida Constitution's single subject requirement. However, chapter 99-225 did not amend sections 968.81(4)(a) and 968.81(4)(b), F.S., the two sections affected by this bill. This bill can still take effect if chapter 99-225 is ultimately held invalid.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

Staff Director:

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Lynne Overton