The Florida Senate

PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Judiciary Committee

BILL:	CS/SB 1558
INTRODUCER:	Judiciary Committee and Senator Ring
SUBJECT:	Comparative Fault/Apportionment
DATE:	April 19, 2007 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Maclure	JU	**Fav/CS**
2.			CM	
3.			JA	
4.				
5.				
6.				

I. Summary:

This bill limits the ability of a defendant in a negligence action to have a jury apportion fault to a nonparty on a jury verdict form. Under this bill, a defendant must join a nonparty at fault for a plaintiff's damages as a defendant to the lawsuit or prove that the nonparty cannot be joined.

As a result of the bill, plaintiffs will have less incentive to sue all persons at fault for the plaintiff's injuries. Moreover, the cost of investigation and joining other parties may be transferred from the plaintiff to the defendant.

This bill substantially amends section 768.81, Florida Statutes.

II. Present Situation:

Under existing law, a defendant in a negligence action may assert as an affirmative defense that a nonparty caused or partially caused a plaintiff's injuries.[1] If the defendant proves the fault of a nonparty at trial by a preponderance of the evidence, the jury may apportion fault to the nonparty on the jury verdict form.[2] However, nonparties apportioned fault on a verdict form are not liable to the plaintiff.

[1] Section 768.81(3)(a), F.S.
[2] Section 768.81(3)(b), F.S.

Impetus for the Authority to Allocate Fault to a Nonparty

Whether fault may be apportioned to a nonparty in a negligence action was an issue that arose out of legislation in response to *Disney v. Wood*.[3] The facts of *Disney* were as follows:

> Aloysia Wood was injured in November 1971 at the grand prix attraction at Walt Disney World (Disney), when her fiancé, Daniel Wood, rammed from the rear the vehicle which she was driving. Aloysia Wood filed suit against Disney, and Disney sought contribution from Daniel Wood. After trial, the jury returned a verdict finding Aloysia Wood 14% at fault, Daniel Wood 85% at fault, and Disney 1% at fault.[4]

The Florida Supreme Court held that, under the doctrine of joint and several liability, Disney was liable for 86 percent of the damages.[5] However, the Supreme Court stated that the viability of joint and several liability should be decided by the Legislature.[6]

At common law, the doctrine of joint and several liability applied when the negligent acts of several parties acting in concert or individually produced a single injury.[7] These injuries were deemed to be indivisible.[8] Each liable party for the injury was individually liable for the full amount of damages. As such, a solvent defendant was liable for damages caused by others.[9]

Initial Limitation on Joint and Several Liability

In response to *Disney*, the Legislature limited the application of joint and several liability by enacting s. 768.81(3), F.S. (Supp. 1986). That statute required courts to "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 . . . ."[10] However, the Legislature also expressly preserved joint and several liability in certain circumstances.[11] In 2006, the Legislature generally repealed the application of joint and several liability for negligence actions.[12]

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[3] Disney v. Wood, 489 So. 2d 61 (Fla. 4th DCA 1986), *aff'd*, 515 So. 2d 198 (Fla. 1987); Y.H. Investments, Inc., v. Godales, 690 So. 2d 1273, 1276 (Fla. 1997) (recognizing the adoption of s. 768.81, F.S., subsequent to the district court decision in *Disney*).
[4] *Disney*, 515 So. 2d at 199.
[5] *Id.* at 202.
[6] *Id.*
[7] Smith v. Dep't of Ins., 507 So. 2d 1080, 1091 (Fla. 1987).
[8] Hudson v. Weiland, 8 So. 2d 37, 38 (Fla. 1942).
[9] *Disney*, 489 So. 2d at 62.
[10] Ch. 86-160, § 60, at 755, Laws of Fla. (creating s. 768.81, F.S. (Supp. 1986)).
[11] The Legislature preserved joint and several liability for economic damages for defendants whose fault equaled or exceeded the plaintiff. *Id.* (creating s. 768.81(3), F.S. (Supp. 1986)). Joint and several liability for economic and non-economic damages was also preserved in cases in which the total amount of damages did not exceed $25,000. *Id.* at 756 (creating s. 768.81(5), F.S. (Supp. 1986)).
[12] Ch. 2006-6, § 1, at 190 Laws of Fla.

Fabre v. Marin; Interpretation of the Word "Party"

In *Fabre v. Marin*, Mrs. Marin was injured while riding as a passenger in a car driven by her husband.[13] Mrs. Marin sued the Fabres claiming that Mrs. Fabre negligently changed lanes in front of the Marins, causing the Marins' car to swerve into a guardrail. At trial, the Fabres claimed that Mr. Marin caused the accident. The jury found Mr. Marin and Mrs. Fabre both 50 percent at fault. The issue addressed on appeal was whether the Fabres were financially responsible for the fault attributed to Mr. Marin, a nonparty.

To decide the issue, both the Third District Court of Appeal and the Florida Supreme Court analyzed the meaning of the term "party" in s. 768.81(3), F.S. (Supp. 1988).[14] That statute required courts to "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 . . . ." Both courts stated that the word "'party' may be interpreted as referring to: 1) persons involved in an accident; 2) defendants in a lawsuit; or 3) all litigants in the lawsuit."[15]

The district court concluded that a court must enter a judgment against "liable parties."[16] The district court reasoned that it lacked jurisdiction to enter a judgment against a nonparty. The district court further believed that the Legislature did not intend to deprive a fault-free plaintiff of recovery.[17]

The Supreme Court concluded, however, that the term "party" meant all the parties to the accident.[18] The court reasoned that "the only means of determining a party's percentage of fault is to compare that party's percentage to all of the other entities who contributed to the accident, regardless of whether they have been or could have been joined as defendants."[19] Thus, through s. 768.81(3), F.S., the:

> legislature decided that . . . a plaintiff should take each defendant as he or she finds them. If a defendant is insolvent, the judgment of liability of another defendant is not increased. The statute requires the same result where a potential defendant is not or cannot be joined as a party to the lawsuit.[20]

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[13] Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993). See Messmer v. Teacher's Ins. Co., 588 So. 2d 610 (Fla. 5th DCA 1991), for additional discussion of the allocation of fault to a nonparty.
[14] Fabre v. Marin, 597 So. 2d 883, 885 (Fla. 3d DCA 1992); *Fabre*, 623 So. 2d at 1184.
[15] *Id.*
[16] *Fabre*, 597 So. 2d at 885.
[17] *Id.*
[18] *Fabre*, 623 So. 2d at 1185.
[19] *Id.*
[20] *Id.* at 1186. The Supreme Court *Fabre* opinion also quoted the following statement by the Kansas Supreme Court.

> There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental agency and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the codefendant to pay more than his fair share of the loss.

Id. at 1187 (quoting Brown v. Keill, 580 P.2d 867, 874 (Kan. 1978)).

In accordance with *Fabre*, juries were required to apportion fault on a jury verdict form among all the parties to the accident, including nonparties to the litigation. These nonparties are commonly known as "*Fabre* defendants."

Procedure and Proof Required to Apportion Fault to a Nonparty

A defendant must take several steps in order to permit a jury to apportion fault to a nonparty. In *Nash v. Wells Fargo Guard Services, Inc.*, the Florida Supreme Court explained these steps as follows.

> [I]n 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. The defendant may move to amend pleadings to assert the negligence of a nonparty subject to the requirements of Florida Rule of Civil Procedure 1.190. However, notice prior to trial is necessary because the assertion that . . . damages should be apportioned against a nonparty may affect both the presentation of the case and the trial court's rulings on evidentiary issues.
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> In addition to the pleading requirement, the defendant has the burden of presenting at trial that the nonparty's fault contributed to the accident in order to include the nonparty's name on the jury verdict. [Moreover,]without evidence of the nonparty defendant's negligence, the named defendant has "not satisfied the foundation necessary for a jury to receive jury instructions and a verdict form to decide the case pursuant to section 768.81, Florida Statutes (1991) and *Fabre*."
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> If the pleading and proof requirements are met, a jury instruction should be given regarding the apportionment of fault and the nonparty should be included in the appropriate section of the verdict form.[21]

In 1999, the Legislature amended s. 768.81(3), F.S., to codify the holdings of the Supreme Court in *Nash* and *Fabre*.[22]

An amendment to a defendant's pleading to assert the fault of a nonparty must give the plaintiff adequate time to prepare for the new defense at trial.[23] If the assertion of the fault of a nonparty is untimely, a trial court may disallow the addition of a *Fabre* defendant.[24]

Penalty for Unsupported Claims or Defenses

Under s. 57.105, F.S., a party and the party's attorney may be ordered to pay attorney's fees to the prevailing party for asserting unsupported claims or defenses. However, a party can avoid sanctions by withdrawing the claim or defense within 21 days of service of a motion for attorney's fees.

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[21] Nash v. Wells Fargo Guard Services, Inc., 678 So. 2d 1262, 1264 (Fla. 1996) (citations omitted). The *Nash* Court explained in a footnote that the defendant asserting a *Fabre* defense has the burden to prove the fault of the nonparty by a preponderance of the evidence. *Id.* at 1264 n1.

[22] Ch. 99-225, § 27, at 1420, Laws of Fla. (creating s. 768.81(3)(d) and (e), F.S. (1999)).

[23] Bogosian v. State Farm Mutual Auto. Ins. Co., 817 So. 2d 968, 970-971 (Fla. 3d DCA 2002).

[24] *Id.* at 971; Hendry v. Zelaya, 841 So. 2d 572, 574 (Fla. 3d DCA 2003).

Section 57.105, F.S., appears to permit a plaintiff to recover attorney's fees from a defendant that makes an unsupported *Fabre* defense. The statute will permit a defendant to recover attorney's fees from a plaintiff that claims, without support, that the defendant caused the plaintiff's injuries.

For example, in *Yakavonis v. Dolphin Petroleum, Inc.*, a pedestrian brought a negligence action against a convenience store for injuries from a fall on the sidewalk outside of the store.[25] The convenience store asserted a *Fabre* defense alleging that its contractor may be at fault for the plaintiff's injuries.[26] Afterward, the plaintiff amended the complaint to add the contractor as a defendant.[27]

During a deposition of the plaintiff's expert, the expert testified that he had "no evidence" indicating that the contractor was negligent.[28] As a result, the contractor filed a motion for attorney's fees under s. 57.105, F.S. The plaintiff conceded that the contractor was made a defendant because the contractor was named as a *Fabre* defendant by the convenience store.[29]

The appeals court held that the assertion of a *Fabre* defense by the convenience store did not "relieve [the plaintiff] from doing her own investigation" to determine the contractor's liability.[30] As a result, the appeals court upheld the award of attorney's fees against the plaintiff.[31]

Accusations Against Nonparties

If a false or defamatory accusation is made by a witness or party in any judicial proceeding, the accused person generally has no recourse.

No Right to Intervene

In a medical malpractice action, an expert witness for a defendant doctor asserted in a deposition that another doctor, Dr. Kissoon, was liable for the death of the patient.[32] Dr. Kissoon attempted to intervene in the suit to protect his reputation and career as a physician.[33] The court would not permit Dr. Kissoon to intervene because he did not have an interest in the outcome of the underlying malpractice suit.[34] The court explained that, as a nonparty, Dr. Kissoon could not be held liable, investigated, or prevented from practicing medicine as a direct result of the judgment.[35] Additionally, despite the allegation of the expert witness, Dr. Kissoon was not a *Fabre* defendant.[36]

[25] Yakavonis v. Dolphin Petroleum, Inc., 934 So. 2d 615, 617 (Fla. 4th DCA 2006)
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at 618.
[30] *Id.* at 619.
[31] *Id.* at 620.
[32] Kissoon v. Araujo, 849 So. 2d 426, 428 (Fla. 1st DCA 2003)
[33] *Id.*
[34] *Id.* at 429.
[35] *Id.* at 430.
[36] *Id.* at 428 n2.

Immunity

Under existing law, a person is immune from civil liability for statements made in connection with a judicial proceeding.[37]

> By virtue of this immunity, defamatory statements made in the course of judicial proceedings by parties, witnesses and counsel are absolutely privileged, no matter how false or malicious those statements might be, provided the statements are relevant to the subject of inquiry. Torts such as perjury, libel, slander, and other actions based on statements made in connection with a judicial proceeding are not actionable.[38]

"The reason for the [immunity] is that although it may bar recovery for bona fide injuries, the chilling effect on free testimony and access to the courts if such suits were allowed would severely hamper our adversary system."[39]

III. Effect of Proposed Changes:

This bill limits the ability of a defendant in a negligence action to have a jury apportion fault to a nonparty on a jury verdict form. Under this bill, a defendant generally must join a nonparty at fault for a plaintiff's damages as a defendant to the lawsuit or prove that the nonparty cannot be joined.

The bill provides that fault in a negligence action may be apportioned among:

- the plaintiff;
- "those parties to the action who may be held legally liable";
- Persons who settle with the plaintiff;
- Persons not subject to the jurisdiction of the court;
- Persons who are completely immune from suit;
- Persons whom the defendant is not able to identify after reasonable inquiry; and
- Persons whom the defendant, despite the exercise or reasonable diligence, was unable to join due to the expiration of a statute of limitations or statute of repose.

Legally Liable Parties

The bill requires fault in a negligence action to be apportioned to "those parties to the action who may be held legally liable." It is unclear whether the quoted phrase will cause a defendant to pay the liability of another party to the lawsuit. It seems possible that the phase may make a defendant liable for damages that exceed the limitation on the collectability of judgments against the state or its agencies or subdivisions under s. 768.28, F.S. That section provides that the state and its agencies or subdivisions are not required to pay more than $100,000 per person or $200,000 per incident in negligence actions.

[37] Fullerton v. Fla. Medical Assn., Inc., 938 So. 2d 587, 592 (Fla. 1st DCA 2006)
[38] Fariello v. Gavin, 873 So. 2d 1243, 1245 (Fla. 5th DCA 2004) (citations omitted).
[39] Wright v. Yurko, 446 So. 2d 1162, 1164 (Fla. 5th DCA 1984).

Strategic Implications

Under the bill, a defendant who fails to join to a lawsuit nonparties at fault for a plaintiff's injury will have to pay for the liability that would have been apportioned to the nonparty under existing law. As a result, a plaintiff will have less incentive to sue all persons at fault for the plaintiff's injuries. Thus, the costs of investigation and joining other parties may be transferred from the plaintiff to the defendant.

Effective Date

The bill provides an effective date of July 1, 2007, and applies to causes of action accruing on or after that date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Defendants may bear the costs that are currently borne by plaintiffs. These costs will result from investigating other parties to an accident and naming them as defendants.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.