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Committee on Judiciary

APPORTIONMENT OF FAULT OF NONPARTIES IN NEGLIGENCE ACTIONS

SUMMARY

Following the Florida Supreme Court decision in *Fabre v. Marin* in 1993, a defendant in a negligence action may assert the fault of a nonparty as an affirmative defense. If the defendant proves the fault of a nonparty at trial, the jury may apportion fault to the nonparty on the jury verdict form.

In Florida, the legal community continues to debate the allocation of fault to nonparties in negligence actions. On one side, some practitioners assert that the *Fabre* doctrine unduly prejudices a plaintiff and impedes judicial economy while increasing litigation costs. Others argue that eliminating or limiting the application of the *Fabre* doctrine will transfer the costs and burden of joining responsible parties to defendants, as well as undermine the premise of equating liability with fault. A variety of options are available to the Legislature if it wishes to address the allocation of fault to nonparties.

BACKGROUND

Abolition of Joint and Several Liability

At common law, the doctrine of joint and several liability applied when the negligent acts of multiple parties acting in concert or individually produced an indivisible injury.[1] Under joint and several liability, each party is deemed individually liable for the full amount of damages suffered by a plaintiff. The sometimes harsh result derived from the application of joint and several liability was illustrated in the case of *Disney v. Wood*.[2]

In response to the result in *Disney*, the Legislature enacted s. 768.81(3), F.S. (Supp. 1986). The 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 . . . joint and several liability. . . .[3]

However, the Legislature preserved the application of joint and several liability under certain circumstances. In 2006, following the culmination of additional reforms, the Legislature generally repealed the application of joint and several liability for negligence actions.[4] It amended s. 768.81, F.S., to provide, subject to limited exceptions, for apportionment of damages in negligence cases according to each party's percentage of fault, rather than under joint and several liability.

Allocation of Fault to Nonparties

Entwined in the evolution and eventual abolition of joint and several liability is the contentious issue of apportionment of fault to nonparties. For various legal and strategic reasons, each tortfeasor causing harm to a claimant may not be named or remain as a defendant in a lawsuit due to: settlement, immunity, insolvency, inability to obtain jurisdiction over the party, or inability to locate or identify the person.[5] As a result, litigants debate whether jurors should consider a nonparty's liability in their allocation of fault.

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[1] *Smith v. Department of Insurance*, 507 So. 2d 1080, 1091 (Fla. 1987).

[2] *Disney v. Wood*, 515 So. 2d 198 (Fla. 1987). In *Disney*, Ms. Wood was injured while visiting a Walt Disney World attraction when her fiancé slammed into her vehicle from behind. At trial, the jury returned a verdict finding Ms. Wood 14 percent at fault, her fiancé 85 percent a fault, and Disney 1 percent at fault. Applying joint and several liability, the Florida Supreme Court held that Disney was liable for 86 percent of the damages.

[3] Chapter 86-160, § 60, at 755, Laws of Fla.

[4] Chapter 2006-6, § 1, at 190, Laws of Fla.

[5] One frequent example occurs in the product liability context when an employer responsible for maintaining safety of employees is immune from suit under the workers' compensation statute. Victor E. Schwartz, *Keeping the Blindfold Off: Juries Should Allocate Liability Among All Who Are at Fault*, p. 3 (2007) (issue paper, on file with Committee on Judiciary).

Prior to the enactment of s. 768.81, F.S., Florida case law dictated that a jury was unable to consider the fault of a nonparty.[6] The impetus for the apportionment of fault to nonparties was the Fifth District Court of Appeal's first interpretation of s. 768.81, F.S., in *Messmer v. Teacher's Insurance Company*.[7]

In *Messmer*, the plaintiff was a passenger in her husband's vehicle when it collided with an uninsured motorist. Messmer sued her uninsured motorist insurance carrier for economic and noneconomic damages. An arbitrator attributed 80 percent of fault to Messmer's husband, a nonparty, and 20 percent of fault to the uninsured motorist. The insurance carrier paid all of Messmer's economic damages, and only 20 percent of her noneconomic damages. The Fifth District Court of Appeal upheld the trial court's decision that the insurance carrier had satisfied its liability to Messmer notwithstanding the fact that only 20 percent of noneconomic damages were paid.

The *Messmer* court opined that the language of s. 768.81, F.S., indicates that a "party's percentage of the total fault of all participants in the accident is the operative percentage to be considered."[8] Furthermore, the court concluded that, even if the statute were deemed ambiguous, the Legislature clearly intended to implement a system of equating fault with liability.[9]

The *Fabre* Doctrine

Unlike *Messmer*, the Third District Court of Appeal (DCA) ruled a nonparty should not be considered in the apportionment of fault. In *Fabre v. Marin*, Mrs. Marin was injured while a passenger in a car operated by her husband.[10] Mrs. Marin sued the Fabres alleging that Mrs. Fabre improperly changed lanes in front of the Marins, causing the Marins' car to hit a guardrail. The Fabres claimed that Mr. Marin caused the accident. The jury determined that Mr. Marin and Mrs. Fabre were both 50 percent at fault. The district court concluded that a court must enter a judgment against "liable parties." The court stated that it lacked jurisdiction to enter a judgment against a nonparty, and reasoned that the Legislature did not intend to deprive a fault-free plaintiff of recovery. Mrs. Fabre appealed, questioning whether the Fabres were financially responsible for the fault attributed to Mr. Marin, a nonparty.

Based upon the conflict with *Messmer*, the Florida Supreme Court reviewed the *Fabre* decision.[11] The court first analyzed the meaning of the term "party" in s. 768.81(3), F.S. (Supp.1988). Section 768.81(3), F.S., 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" (emphasis added). In contrast to the Third DCA, the Supreme Court concluded that the term "party" meant all the parties to the accident.

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."[12] Citing s. 768.81(3), F.S., the court recognized that:

> 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.[13]

As a result of the *Fabre* decision, juries are allowed to apportion fault on a jury verdict form among all the parties to the accident, including nonparties to the litigation. Hence, these nonparties are commonly referred to as "*Fabre* defendants."

Legislative Efforts Relating to the *Fabre* Doctrine

Since *Fabre* and its progeny, there have been numerous legislative efforts to revise the application of the

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[6] Bryan Aylstock, *Phantom Tortfeasors: Parties for the Jury to Consider in Its Apportionment of Fault?* 45 FLA. L. REV. 733, 734 (1993).
[7] *Messmer v. Teacher's Ins. Co.*, 588 So. 2d 610 (Fla. 5th DCA 1991).
[8] *Id.* at 611.
[9] *Id.* at 612.
[10] *Fabre v. Marin*, 597 So. 2d 883 (Fla. 3d DCA 1992).
[11] *Fabre v. Marin*, 623 So. 2d 1182, 1184 (Fla. 1993).
[12] *Id.* at 1185.
[13] *Id.* at 1186. In *Fabre*, the Supreme Court also followed the reasoning of 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." *Brown v. Keill*, 580 P.2d 867, 874 (Kan. 1978).

doctrine. Most recently, in the 2007 Regular Session, measures were introduced that sought to limit the scope of the doctrine. Committee Substitute for Senate Bill 1558 included categories of nonparties that could be added to the verdict form: (1) settled or discharged parties; (2) a party not subject to the jurisdiction of the court; (3) immune parties; (4) an unknown party; and (5) a party who could not be joined because the statute of limitations or statute of repose had expired. The bill further provided that the defendant "has the right to join as an additional party any person who is or may be liable to the plaintiff for all or part of the plaintiff's claim against a defendant."[14] The bill died in the Senate Committee on Commerce. A similar bill, House Bill 733, as amended, died in the Safety & Security Council during the 2007 Regular Session.

Due to these prior legislative efforts, this report analyzes Florida law related to the *Fabre* doctrine, identifies how other states apportion fault allocated to nonparties, and evaluates the advantages and disadvantages of the various apportionment methods.

METHODOLOGY

Committee staff reviewed information on the apportionment of fault in other states, reviewed scholarly literature, communicated with experts on apportionment of fault, and communicated with interested parties.

FINDINGS

Requisite Procedure and Proof

A defendant must follow certain protocol in order to allow a jury to consider the fault of a nonparty. Under *Nash v. Wells Fargo Guard Services, Inc.*, a defendant must plead as an affirmative defense the negligence of the nonparty and specifically identify the nonparty, if the identity is known.[15]

Generally, defendants 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, because the apportionment of fault to nonparties may affect both the presentation of the case and other strategic decisions, as well as the trial court's rulings on evidentiary issues, reasonable notice prior to trial is necessary.[16]

In addition to the pleading requirement, the defendant has the burden of proving by a preponderance of evidence at trial that the nonparty's fault contributed to the accident in order to include the nonparty's name on the verdict form.[17] Without the presentation of evidence sufficient to establish the nonparty'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*."[18]

If the pleading and proof requirements are met, a jury instruction should be given regarding apportionment of fault, and the nonparty should be included in the appropriate section of the verdict form.[19]

In 1999, the Legislature amended s. 768.81(3), F.S., to codify the holdings of the Supreme Court in *Fabre* and *Nash*.[20] Post *Fabre* and *Nash*, the statute now requires that 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.[21] In the event the assertion of the fault of a nonparty is untimely, a trial court may preclude the addition of a *Fabre* defendant on the verdict form.[22]

The *Fabre* doctrine also affects post-verdict practice. Prior to the abolition of joint and several liability, if settling tortfeasors were absent from the verdict form, a defendant would enjoy a post-verdict setoff for economic damages paid in the prior settlements. Any payment of damages that were considered joint and several by one tortfeasor could have been considered payment of a claim for which others might have been liable.[23] Now that joint and several liability is no longer applicable in most negligence cases, a setoff for

[14] Committee Substitute for Senate Bill 1558 (2007 Regular Session).
[15] *Nash v. Wells Fargo Guard Serv., Inc.*, 678 So. 2d 1262, 1264 (Fla. 1996).
[16] *Bogosian v. State Farm Mutual Auto. Ins. Co.*, 817 So. 2d 968, 970 (Fla. 3d DCA 2002).
[17] *Nash*, 678 So. 2d at 1264, n.1.
[18] *W.R. Grace & Co.-Conn. v. Dougherty*, 636 So. 2d 746, 748 (Fla. 1994).
[19] *Nash*, 678 So. 2d at 1264.
[20] Chapter 99-225, § 27, at 1420, Laws of Fla.
[21] *Bogosian*, 817 So. 2d at 970-71.
[22] *Id.* at 971; *Hendry v. Zelaya*, 841 So. 2d 572, 574 (Fla. 3d DCA 2003).
[23] Scott H. Michaud, Brian S. Fox, *Apportionment of Damages and Setoff: Life After Wells v. Tallahassee Memorial*, 69-DEC FLA. B.J. 67, 69 (1995).

economic damages may not be a viable option for defendants.[24]

The "*Fabre* Fix" Debate

Subsequent to the *Fabre* decision and the 1999 amendments to s. 768.81, F.S., including the procedural prerequisites to the assertion of a *Fabre* defense, there have been numerous efforts to limit the ability of a defendant in a negligence action to have a jury apportion fault to a nonparty. Over the past decade, such efforts have evolved into a quest for what some call a "*Fabre* fix."

Proponents of the "*Fabre* fix" argue that the defense enables defendants to escape accountability by pointing the finger at individuals or entities not named in a lawsuit. They also assert that accusations against nonparties deprive those individuals of an opportunity to defend themselves in court.[25] Moreover, those supporting the "*Fabre* fix" argue that false accusations drive up court costs and thwart judicial economy.

In contrast, opponents of the "*Fabre* fix" argue that the apportionment of fault to nonparties ensures that jury awards are fair by comparing a party's percentage of fault to all entities that contributed to an accident or injury, regardless of whether they were or could have been joined as defendants. Opponents further assert that any changes to the *Fabre* doctrine would be premature due to the relatively recent repeal of joint and several liability, and would, in effect, undermine the basic principles of comparative fault. Finally, opponents argue that any changes would unfairly shift the costs of suit, as well as the burden of proof, from plaintiffs to defendants in civil actions.

Other jurisdictions, as well as the National Conference of Commissioners on Uniform State Laws, have adopted a variety of approaches to the apportionment of fault to nonparties in negligence actions. These apportionment statutes run the gamet from excluding nonparties from a verdict form altogether, to the most broad consideration of nonparty fault.

Uniform Apportionment of Tort Responsibility Act

The states' apportionment statutes are rarely in accord. In response, the National Conference of Commissioners on Uniform State Laws sought to bring these developments together into one uniform act that "reconciles" the pivotal questions not resolved in most states by drafting the Uniform Apportionment of Tort Responsibility Act ("the Act").[26]

The Act is designed to allocate financial responsibility on a modified comparative fault basis among multiple parties liable for negligent or willful misconduct, including the misconduct of injured parties. Under the Act, if the court determines that the several share for which any party may be deemed liable is not reasonably collectible, the court is required to reallocate the uncollectible share among the other parties and released persons in accordance with their allocated percentage of responsibility.[27] Ultimately, the Commissioners chose to compare fault only among those that are actually parties to the lawsuit, unless the nonparty would have been a party to the litigation had the claimant not released the person from liability.

Although the Act does not encompass the allocation of fault to nonparties, the Commissioners note that the Act may be modified to include nonparties without calling for substantial revisions. Accordingly, the Commissioners included a definition of "responsible nonparty" to be utilized by those jurisdictions that sanction the allocation of fault to nonparties.

A Comment to the Act defines "responsible nonparty" as "a person that has been sufficiently identified to permit service of process on or discovery from the person and that would be responsible for all or part of a claimant's personal injury or harm to property had the person been made a party to an action for personal injury

[24] *Id.* Similarly, the abolition of joint and several liability has retracted a defendant's ability to seek contribution from other responsible tortfeasors. Some practitioners note that a defendant's ability to join a third party under Florida Rule of Civil Procedure 1.180 is limited to those rare instances where an enforceable indemnification or subrogation relationship is legally in place.

[25] 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 decedent. *Kissoon v. Araujo*, 849 So. 2d 426 (Fla. 1st DCA 2003). Dr. Kissoon attempted to intervene in the suit to defend his reputation. However, because he did not have a justiciable interest in the suit, the court precluded Dr. Kissoon's intervention.

[26] UNIFORM APPORTIONMENT OF TORT RESPONSIBILITY ACT, Summary, The National Conference of Commissioners on Uniform State Laws, *available at* www.nccusl.org/Update/uniformact_summaries/uniformacts-s-uatra.asp.

[27] UNIFORM APPORTIONMENT OF TORT RESPONSIBILITY ACT, § 5(b) (2003).

or harm to property."[28] Absent from the definition of "responsible nonparty," however, is a person immune from liability. Although the Act does contain a suggested addition to the definition of "responsible nonparty" in the event a jurisdiction elects to include immune parties in apportionment of fault, its absence from the initial definition indicates the Commissioners' reluctance to embrace the apportionment of fault to immune nonparties.[29]

Unlike the Act, the Restatement (Third) of Torts connects the consideration of a nonparty's fault to the allocation of fault.[30] The Restatement suggests that the "failure to consider the negligence of all tortfeasors, whether parties or not, prejudices the joined defendants who are thus required to bear a greater portion of the plaintiff's loss than attributable to their fault."[31] When parties are only severally liable for noneconomic damages, the Restatement Third indicates that a jury may allocate fault among the parties, settling parties, and "other identified persons."[32]

Approaches of Other Jurisdictions

Most states, such as Florida, have abolished joint and several liability and allow the inclusion of a nonparty on a verdict form. To date, 28 states permit this allocation; 18 states and the District of Columbia do not permit the allocation of fault to nonparties; and in 4 states, the law is unclear.

Of those states that do allow nonparties to be included on verdict forms, there is a broad spectrum of procedures in place to facilitate the apportionment of fault to nonparties. The following states have either chosen to preclude the apportionment of fault to nonparties altogether or in limited circumstances, or have employed a unique statutory framework for the allocation of fault to nonparties. This sample of apportionment statutes does not represent an exhaustive compilation of possible apportionment options available to the Legislature.

Connecticut: Although Connecticut initially embraced consideration of nonparty fault, it now rejects the inclusion of nonparties on the verdict form unless that party settled or was otherwise discharged from any liability. Connecticut enacted tort reform in response to its concerns with joint and several liability.[33] Under its initial tort reform, the jury could consider the negligence of any other person, whether or not that person was a party to the action.[34]

One year later, the Connecticut Legislature amended the tort recovery provision to alter the class of individuals whose negligence could be considered in apportioning fault in negligence actions.[35] The class of negligent individuals was changed from any "person" to any "party" and those individuals who were released or discharged from all liability.[36] Additionally, the legislature included a provision that allowed defendants to join persons who might have been negligent, but were not named as defendants by the plaintiff.[37]

In determining whether to allow the jury to apportion fault to a driver involved in an automobile accident who was not named as a defendant in the lawsuit, the Supreme Court of Connecticut concluded that:

> [The legislative history] demonstrates that the legislature, in enacting Tort Reform II, intended to limit the universe of negligence to be considered to only particular, identifiable persons. If a defendant wished to broaden the universe of negligence to be considered in any given case, the legislature placed the burden upon him to implead that nonparty. . . .[38]

Consequently, nonparties are not automatically included in the jury's determination of fault, and the onus is on defendants to join any nonparties, excluding those parties settling or discharged prior to trial.

According to practitioners, the majority of *Fabre* defendants included on verdict forms in Florida courts

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[28] *Id.* at Comment to §2.

[29] In the Comment to §2, the Act provides that "[i]f a jurisdiction chooses to do so, the definition [of 'responsible nonparty'] would need to be modified, which could be done by adding the following sentence: 'The term is deemed to include an immune person other than an employer under [insert cross reference to workers' compensation statute proving immunity to employers as to tort actions by employees for work place injuries.].'"

[30] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § B19, Rptrs. Note d (2000).

[31] Schwartz, *supra* note 5, p. 5 (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, 475-76 (5th ed. 1984)).

[32] *Id.* (citing RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § E19(b)).

[33] *Donner v. Kearse*, 662 A.2d 1269, 1274 (Conn. 1995).

[34] *Id.* at 1274.

[35] *Id.*

[36] CONN. GEN STAT. ANN. § 52-572h(c), (d), (f), (n).

[37] CONN. GEN STAT. ANN. § 52-102.

[38] *Donner*, 662 A.2d at 1275.

are parties that were originally named as defendants, but later settled during the course of the suit. Provided the requisite notice provisions are satisfied, these parties are often included on the verdict form with little or no objection by plaintiffs. One evident advantage of Connecticut's statutory scheme is that it encompasses the category of nonparties most often finding its way onto verdict forms in real practice in Florida.

Texas: Texas allows the apportionment of fault to nonparties in negligence actions.[39] A party may seek to designate a nonparty as a "responsible third party" by filing a motion for leave to include that individual or entity on or before 60 days prior to trial, unless good cause for a later filing is adequately demonstrated.[40]

One recurring complaint from plaintiff attorneys is that defendants often couch *Fabre* affirmative defenses in vague language when this defense is pleaded, or fail to disclose the existence of a *Fabre* defense until the eve of trial. Although s. 768.81, F.S., requires a defendant to affirmatively plead the fault of a nonparty in its initial pleading, leave to amend affirmative defenses is often liberally granted by trial courts.[41] While defense practitioners in Florida indicate that there is no strategic advantage to withholding the identity of a *Fabre* defendant until the eleventh hour, plaintiff practitioners complain that defendants fail to assert an affirmative defense alleging the existence of *Fabre* defendants, or provide ambiguous answers to discovery requests directed toward ferreting out the existence of *Fabre* defendants. For example, a defendant's initial answer often includes an affirmative defense that contains some variation of the following language:

> Defendant Doe affirmatively asserts the right to include on the verdict form other third parties not named in the Complaint, as well as any parties currently named as Defendants in this matter, based at this time solely upon the allegations contained in the Plaintiff's Complaint, on the authority of *Fabre v. Marin* and *Nash v. Wells Fargo Guard Services, Inc.*

Plaintiff practitioners further assert that it is often not until late in the litigation upon the conclusion of discovery that any detailed information relating to the *Fabre* defendant is offered by defendants.

The defense bar counters that the identity of the *Fabre* defendant is often not known until after reasonable discovery and investigation. Furthermore, they assert that trial judges liberally grant continuances when a *Fabre* defendant is discovered on the eve of trial. Finally, defense practitioners indicate that recourse, such as a motion to dismiss or compel, or a motion to strike, is available to claimants for those scenarios in which affirmative defenses are crafted in vague language. In practice, trial courts are more likely to require the defendant to state a *Fabre* defense with more specificity, than they are to require the plaintiff to provide a more definite statement of the original claim.

Providing a definitive deadline, like Texas, in which defendants are allowed to assert the *Fabre* defense could alleviate some complexities associated with the timing of the defense. However, including a deadline may also interfere with the defense when a defendant truly does not discover the existence of a *Fabre* defendant until late in the suit. Also, a rigid timeline may become problematic when certain defendants settle on the eve of trial, unless exceptions are included for settled or discharged parties.

The Texas statute is unique from other state apportionment statutes in that it includes a "saving" provision that allows a claimant to join responsible third parties, even though such joinder would otherwise be barred by the applicable statute of limitations. A claimant has 60 days to join a responsible third party after the nonparty is designated by a defendant.[42]

One complaint voiced by plaintiff attorneys in Florida is that, in medical malpractice suits, claims are almost always filed toward the end of the two-year statute of limitation. Therefore, due to the delay in disclosure of potential *Fabre* defendants, plaintiffs often miss the opportunity to join those *Fabre* defendants because the statute of limitations has run. Through a definitive deadline for the pleading of *Fabre* defenses, coupled with the saving provision for the joinder of "responsible third parties," Texas has attempted to alleviate this potential prejudice against plaintiffs.

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[39] TEX. CIV. PRAC. & REM. § 33.003.

[40] TEX. CIV. PRAC. & REM. § 33.004.

[41] Section 768.81(3)(a), F.S., provides that a defendant must, "absent a showing of good cause, identify the nonparty, if known, or describe the nonparty as specifically as practicable, either by motion or in the initial responsive pleading when defenses are first presented, subject to amendment any time before trial in accordance with the Florida Rules of Civil Procedure."

[42] *Russell v. Wendy's Int'l, Inc*., 219 S.W.3d 629, 635 (Tex. App. 2007) (citing TEX. CIV. PRAC. & REM. § 33.004(e)).

***Utah*:** Under the Utah Liability Reform Act, all those whose fault could contribute to a plaintiff's damages may be considered in determining fault.[43] The Utah comparative fault statute allows the fact finder to allocate a percentage of fault to each defendant, to any person immune from suit, and to a nonparty, provided that the defendant timely files "a description of the factual and legal basis on which fault can be allocated" together with information identifying the nonparty, to the extent known.[44]

Unlike other state apportionment statutes, the Utah Legislature included a provision addressing instances in which a defendant alleges fault of a phantom driver in a motor vehicle accident. The Utah statute expressly states that "the existence of the vehicle shall be proven by clear and convincing evidence which may consist solely of one person's testimony."[45]

In Florida, a defendant must prove the fault of a nonparty at trial by a "preponderance of the evidence."[46] The apportionment of fault to the absent tortfeasor may serve as a catalyst for strategic and procedural problems for plaintiffs when absent tortfeasors are involved. For example, not only must a plaintiff establish a prima facie case against the named defendants, but he or she also must predict the probability that a defendant could seek to convince the jury that an absent tortfeasor was primarily at fault.[47] Apportionment of fault to an absent tortfeasor may also affect the settlement dynamic. Plaintiffs may be reluctant to settle with defendants because to do so would require plaintiffs to defend an empty chair.

Including a more stringent standard of proof for phantom tortfeasors in automobile accidents may not be a preferable approach. It is uncertain what rationale would support parceling out a particular class of nonparties for a more stringent standard of proof. From discussions with practitioners, it does not appear that phantom tortfeasors are included on a verdict form more often than immune parties or parties that are beyond the jurisdiction of the court. Moreover, the clear and convincing standard of proof is often reserved for those actions or proceedings "of sufficient gravity and magnitude to warrant a standard of proof greater than a mere preponderance of the evidence."[48]

***Colorado*:** As part of its tort reform package in 1986, the Colorado Legislature enacted the Colorado Pro Rata Liability Statute ("Pro Rata Statute").[49] The Pro Rata Statute mandates that the trier of fact must apportion responsibility for damages among defendants, plaintiffs, and responsible nonparties.[50]

The Pro Rata Statute allows the following "responsible nonparties" to be included on the verdict form: (1) immune governmental entities; (2) immune employers under the Workers' Compensation Act; (3) unknown persons (e.g. "phantom tortfeasors"); (4) persons protected or discharged by bankruptcy; (5) persons outside the court's jurisdiction; (6) persons protected by the Good Samaritan Statute; (7) unlocatable persons; and (8) persons whose liability is barred by the statute of limitations.[51]

These categories are similar to the nonparties included in the Florida House and Senate bills from the 2007 Regular Session. In Colorado, the statute suggests that settling or discharged parties are automatically designated as responsible nonparties on the verdict form without the need for a formal pleading.[52]

Under the Pro Rata Statute, defendants must designate any responsible nonparties prior to 90 days from the "commencement" of the suit.[53] One commentator notes that courts should liberally grant extensions of time to designate nonparties as justice requires.[54] The defendant must offer the nonparty's name and last-known address, or the "best identification of such nonparty which is possible under the circumstances," along with a statement detailing the basis of the nonparty's fault.[55]

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[43] *Tietz v. Blackner*, 157 F.R.D. 510, 511 (D. Utah 1994).
[44] UTAH CODE ANN. §§ 78-27-38(4)(a) and 78-27-41(4).
[45] UTAH CODE ANN. § 78-27-38(4)(a).
[46] *Nash*, 678 So. 2d at 1264, n.1.
[47] Aylstock, *supra* note 6, at 741.
[48] *Ferris v. Turlington*, 510 So. 2d 292, 294 (Fla. 1987).

[49] Robert E. Benson, *Application of the Pro Rata Liability, Comparative Negligence and Contribution Statutes*, 23 COLO. LAW. 1717, 1717 (1994).
[50] *Id.*
[51] *Id.* at 1720.
[52] COLO. REV. STAT. ANN. § 13-21-111.5(3)(b). However, in *Montoya v. Grease Monkey Holding Corp.*, 883 P.2d 486 (Colo. App. 1994), a defendant did not seek apportionment of fault among the settling parties until after the trial. The court held that a waiver occurred and refused to apportion fault to the settling parties.
[53] COLO. REV. STAT. ANN. § 13-21-111.5(3)(b).
[54] Benson, *supra* note 49, at 1722.
[55] COLO. REV. STAT. ANN. 13-21-111.5(3)(b). Colorado courts have recognized that: ". . . a designation of nonparties must give a plaintiff sufficient notice of the nonparties' conduct so that a plaintiff can prepare to address it . . . . At the very least, the designation must set forth facts sufficient to permit a plaintiff to identify the

The Pro Rata Statute expressly incorporates Colorado's sanction statutes addressing frivolous or vexatious actions. Sanctions could be awarded in the event a defendant failed to conduct a reasonable investigation prior to designating the responsibility of a nonparty as a defense.[56] Although an award of attorney fees is available in Florida as a sanction under s. 57.105, F.S., for assertions of a frivolous or vexatious *Fabre* defense, the frequency of such awards is unknown.[57] In order to remind litigants that this sanction provision is available, the Legislature could specifically reference it in the apportionment of fault statute.

Another concern resonating among the plaintiffs' bar in medical malpractice actions is that defendants are allowed to allege fault of other medical professionals without the burden of satisfying the pre-suit requirements set forth in s. 766.106, F.S. The Colorado Legislature addressed a similar concern by requiring defendants attempting to designate a licensed health care professional as a nonparty to meet the certificate of review requirements of the Colorado Medical Malpractice Act.[58] Therefore, a defendant seeking to designate a responsible nonparty in a medical malpractice action must present a certificate of review executed by the attorney for the party stating that the attorney has "consulted a person who has expertise in the area of the alleged negligent conduct," and that after review of the known facts and medial records or other materials, the expert has concluded that the filing of the claim, counterclaim, or cross claim "does not lack substantial justification."[59]

In Florida, plaintiffs often include a request for the identity of any *Fabre* defendants with the Notice of Intent to file a medical malpractice claim. However, at the pre-suit stage, defendants are rarely aware of all potential tortfeasors. Accordingly, information relating to possible *Fabre* defendants usually is not disclosed until the conclusion of the pre-suit screening period and after a lawsuit has actually been filed.

Alleging that defendants enjoy the unrestrained discretion to point the finger at a nonparty doctor, the plaintiffs' bar may argue that defendants should be required to satisfy the same procedures set forth in s. 766.106, F.S., that plaintiffs are required to meet. Again, practitioners recount that the majority of *Fabre* defendants – even in the medical malpractice context – are settled parties. These settled parties were likely named defendants and have already participated in the pre-suit screening process. A provision requiring pre-suit screening for *Fabre* defendants, such as the one adopted in Colorado, may impede the judicial process and prove to be an unnecessary step to address nonparty concerns in the medical malpractice context.

RECOMMENDATIONS

A review of the Uniform Apportionment of Tort Responsibility Act and other states' apportionment of fault statutes illustrates several options for the Legislature to consider when examining the current status of apportionment of fault to nonparties in Florida. These options include:

- Make no revisions to the statute governing apportionment of fault.
- Delineate specific categories of nonparties to be included on the verdict form.
- Include a specific timeframe for the assertion of the *Fabre* defense and provide plaintiffs with a window of time to join parties despite the expiration of the statute of limitations.
- Enact a specific sanction provision or specify that the sanctions available in Chapter 57, F.S., apply to the assertion of frivolous *Fabre* defenses.
- Require defendants to comply with the notice requirements for medical malpractice actions in Chapter 766, F.S., when including health care professionals as *Fabre* defendants.
- Include a clear and convincing evidence standard for phantom drivers in automobile accident suits.

As noted in the "Findings" section of this report, each option presents issues that the Legislature may wish to consider in its evaluation.

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transaction or occurrence which leads to the nonparty's fault." Benson, *supra* note 49, at 1722 (quoting *FDIC v. Isham*, 782 F. Supp. 524, 530 (D. Colo. 1992)).

[56] *Id.* at 1721-22.

[57] Section 57.105(1), F.S., allows an award of attorney fees as a sanction against a party or the party's attorney that knew or should have known a defense "(a) [w]as not supported by the material facts necessary to establish the claim or defense; or (b) [w]ould not be supported by the application of then-existing law to those material facts."

[58] COLO REV. STAT. ANN. § 13-21-111.5(3)(b).

[59] COLO. REV. STAT. ANN. § 13-20-602(3)(a). The statute also provides that the certificate of review must be filed within 60 days of the filing of the complaint, counterclaim, or cross claim, unless the court determines that a longer period is necessary. COLO. REV. STAT. ANN § 13-20-602(1)(a).