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DATE: March 4, 1998

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CIVIL JUSTICE & CLAIMS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: HB 3879

RELATING TO: Negligence

SPONSOR(S): Committee on Civil Justice and Claims

COMPANION BILL(S): None

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

(1) CIVIL JUSTICE & CLAIMS YEAS 9 NAYS 0

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I. SUMMARY:

This bill is one of several bills produced as a result of extensive hearings conducted by the Committee on Civil Justice and Claims between September 15, 1997 and February 17, 1998. These hearings dealt with many aspects of the tort system and focused, in particular, upon the impact of tort litigation on small businesses.

This bill amends s. 768.76, F.S., by redefining the term "collateral sources" to include compensation received or payable under workers' compensation.

This bill abolishes the doctrine of joint and several liability for all economic damages which exceed \$250,000. In addition, it strikes subsection (5) of s. 768.81, F.S., which applies joint and several liability to all actions for \$25,000 or less. This change equalizes the application of joint and several liability to all cases in which economic damages do not exceed \$250,000. Currently, when damages exceed \$25,000, joint and several liability only applies to economic damages in cases where the fault of the defendant exceeds that of the claimant.

Finally, this bill states that, under certain circumstances, a workers' compensation employer shall not be listed on the verdict form. This means that, when apportioning fault, the finder of fact may not consider the fault of a workers' compensation employer and must instead apportion fault only among those tortfeasors listed on the verdict form.

This bill will not result in any taxes, fees, or spending increases.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

1. **Historical Context** - Until 1973, Florida's tort system operated under a contributory negligence system. Contributory negligence prohibited a plaintiff from obtaining an award of damages if the plaintiff in any way contributed to the injury. If the plaintiff were only one-percent at fault, the doctrine of contributory negligence barred any recovery. The impact of this doctrine was offset by another doctrine--joint and several liability. Joint and several liability provides that each defendant who contributes to causing the plaintiff's damages is liable for the full amount, regardless of the defendant's actual percentage of fault. In addition, other doctrines such as "last clear chance" and "gross, willful, and wanton negligence" evolved to ameliorate the absolute character of contributory negligence. In Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), the Florida Supreme Court abolished the doctrine of contributory negligence. According to the court:

The injustice which occurs when a plaintiff suffers severe injuries as the result of an accident for which he is only slightly responsible, and is thereby denied any damages, is readily apparent. The rule of contributory negligence is a harsh one which either places the burden of a loss for which two are responsible upon only one party or relegates to Lady Luck the determination of the damages for which each of two negligent parties will be liable. Id. at 437.

The dissent in Hoffman cautioned, "If such a fundamental change is to be made in the law, then such modification should be made by the legislature where proposed change will be considered by legislative committees in public hearings . . . and should not be made by judicial fiat." Id. at 443 (Roberts, J., dissenting).

2. **Comparative Fault** - In Hoffman the Florida Supreme Court replaced the doctrine of contributory negligence with the doctrine of comparative fault. The court reasoned that comparative fault was a "more equitable system" of loss distribution. Id. at 437. "When the negligence of more than one person contributes to the occurrence of an accident," the court observed, "each should pay the proportion of the total damages he has cause the other party." Id. Under the doctrine of comparative fault, a jury must apportion fault among all negligent parties and must award total damages according to the proportionate fault of each party. The plaintiff's damages, in other words, are diminished by the plaintiff's own percentage of fault. The doctrine of comparative fault, however, does not prevent a plaintiff from collecting damages as a result of fault attributable to the plaintiff. If a jury awards \$100,000 in damages and finds that the plaintiff and defendant are both 50 percent at fault, the defendant would be liable for \$50,000. Under a "pure" comparative fault system, such as that which exists in Florida, a plaintiff can recover damages even if the plaintiff is 99 percent responsible for causing the harm.

Several judicial decisions have explored the reach of the comparative fault doctrine. In Standard Havens Products, Inc. v. Benitez, 648 So.2d 1192 (Fla. 1994), the Florida Supreme Court held that product misuse did not operate to bar a product liability claim, but went to the issue of comparative fault. Product misuse, the court concluded, reduces the plaintiff's recovery in proportion to the plaintiff's own fault. Similarly, in Insurance Co. of North America v. Pasakarnis, 451 So.2d 447 (Fla. 1984), the Florida Supreme Court held that evidence of failure to wear a seat belt may be considered by a jury when assessing the plaintiff's damages under

comparative fault principles. See also Ridley v. Safety Kleen Corp., 693 So.2d 934 (Fla. 1996) rehearing denied (Mar. 27, 1997).

3. **Joint and Several Liability** - The concept of comparative fault becomes more complex with the introduction of joint tortfeasors. These types of situations require the application of joint and several liability. Under joint and several liability, the liability is "joint" in that all defendants may be joined in the action to vindicate a single harm and it is "several" in that each defendant is individually liable for all damages. It is "joint *and* several," because no defendant escapes liability until the plaintiff's damages are completely paid. For example, if a jury awards \$100,000 to the plaintiff and finds that defendant A is 40 percent at fault and defendant B is 60 percent at fault, the plaintiff may look to either defendant for the full \$100,000.

The doctrine of joint and several liability was developed before the introduction of comparative fault. Carried over into the comparative fault context, the doctrine led to some results which generated widespread criticism. In Walt Disney World Co. v. Wood, 690 So.2d 1273 (Fla. 1987), the Florida Supreme Court applied joint and several liability in a personal injury action brought against a theme park. The jury determined that the theme park was only one percent at fault for causing the plaintiff's injuries. By contrast, the jury attributed 85 percent of the fault to the plaintiff's fiancé and 14 percent of the fault to the plaintiff herself. The court nevertheless held that, under a theory of joint and several liability, 86 percent of the damages could be assessed against the theme park. The Wood case was decided prior to the enactment of s. 768.81(3), F.S., which eliminates joint and several liability under certain circumstances. However, within statutory confines, the doctrines of comparative negligence and joint and several liability continue to coexist under Florida Law.

- a. **Statutory Scheme** - Until 1986, strict joint and several liability applied to all damages suffered by a plaintiff. In 1986, the Florida Legislature adopted the Tort Reform and Insurance Act of 1986, Chapter 86-160, Laws of Florida. The Tort Reform and Insurance Act of 1986 restricted application of the doctrine of joint and several liability. Section 768.81(3), F.S., requires a bifurcated calculation of damages.
 - (1) **Economic Damages** - Joint and several liability continues to apply to economic damages. Each defendant remains fully responsible for the total amount of economic damages sustained by the plaintiff. One caveat should be noted. If the fault attributed to the defendant is equal to or less than the fault attributed to the plaintiff, then joint and several does not apply.
 - (2) **Noneconomic Damages** - Non-economic damages are determined under the principle of comparative negligence. Noneconomic damages include pain and suffering, inconvenience, mental anguish, and loss of capacity for enjoyment of life.
 - (3) **Damages under \$25,000** - Notwithstanding the arrangement outlined above, s. 768.81(5), F.S., continues to apply joint and several liability to all actions in which damages (both economic and noneconomic) do not exceed \$25,000.

- b. **Judicial Interpretation** - The Florida Supreme Court, in Fabre v. Marin, 623 So.2d 1182 (Fla. 1993), rendered a significant decision construing the interplay of joint and several liability with comparative fault. In a personal injury action arising from an automobile accident, the court held that a motorist who was 50 percent at fault for causing the plaintiff's injuries could only be held liable for 50 percent of the plaintiff's noneconomic damages under s. 768.81(3), F.S. "[W]e believe that the legislature intended that damages be apportioned among all participants to the accident. . . . This Court has already noted that the act disfavors joint and several liability to such a degree that it survives only in those limited situations where it is expressly retained." Id. at 1185 (citation omitted). The court determined that the fault of persons who were not defendants (in this case the husband of the injured motorist who enjoyed interspousal immunity) should be measured against the fault of persons who were party to the suit. Thus, "parties" in the context of s. 768.81(3), F.S., were defined by the court as all of the entities who contributed to the accident, including "phantom defendants" not amenable to suit.

Additionally, in Nash v. Wells Fargo Guard Services, Inc., 678 So.2d 1262 (Fla. 1996) rehearing denied (Aug. 28, 1996), the Florida Supreme Court held that, in order to include a nonparty on the verdict form for apportioning noneconomic damages, the defendant must plead the nonparty's negligence as an affirmative defense before trial and must demonstrate such negligence at trial. In addition, the court determined that, for purposes of apportioning noneconomic damages, a defendant cannot rely upon the vicarious liability of a nonparty to establish the nonparty's negligence.

Recently, a series of cases have limited the holding of Fabre by refusing to apportion fault between negligent and intentional tortfeasors. In Wal-mart Stores, Inc. v. McDonald, 676 So.2d 12 (Fla. 1st DCA 1996), the First District Court of Appeal held that the omission of a criminal assailant from the verdict form was proper, as s. 768.81, F.S., did not contemplate or intend a comparison of negligent acts to criminal, intentional acts. See also Wal-Mart Stores, Inc. v. Coker, 1997 WL 338839 (Fla. 1st DCA 1997); Slawson v. Fast Food Enterprises, 671 So.2d 255 (Fla. 4th DCA 1995).

4. **Workers' Compensation** - During the period preceding World War I, virtually every state instituted a workers' compensation program. Workers' compensation displaced the tort system as a damage recovery system for injuries sustained on the job. Workers' compensation is a system of absolute liability, irrespective of fault or lack thereof on the part of the employer. Traditional tort defenses do not apply. However, under a workers' compensation scheme, the employer as well as the employee receives some benefits. In most cases, workers' compensation provides the exclusive remedy against the employer for on-the-job injuries. In addition, workers' compensation eliminates many of the transactional costs associated with the tort system and restricts the scope of damages obtainable against the employer. For an employee to receive payments under workers' compensation, the employee's injury must arise out of and in the course of employment. Compensation is measured purely by economic loss, which generally includes medical costs and lost salary due to the employee's inability to work. Workers' compensation is addressed under ch. 440, F.S.

- a. **Workers' Compensation Employers under Fabre** - The Supreme Court's decision in Fabre v. Marin, has been extended to include "phantom defendants" in the workers' compensation context. In Allied-Signal, Inc. v. Fox, 623 So.2d 1180 (Fla. 1993), the Florida Supreme Court held that, in a suit by a worker against a fan manufacturer for injuries, sustained while the worker was servicing the fan, the comparative fault of the workers' employer should be considered. Specifically, the court held that the employer should be included on the verdict form even though the employer was immune from liability under workers' compensation law.

- b. **Workers' Compensation Payments as Collateral Sources**
 - (1) **Collateral Sources Generally** - At common law, a tortfeasor was liable for the entirety of damages caused to the plaintiff, regardless of whether the plaintiff received payments from some other source. This arrangement has been changed by legislature to require the consideration of collateral sources when calculating damages. The recognition of collateral sources reduces the award payable by the defendant by the amount of benefits received by the claimant from other sources.

 - (2) **Section 768.76, F.S.** - Section 768.76, F.S. sets forth recognized collateral sources of indemnity; however, s. 768.76(1), F.S. notes that "there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists." Section 768.76, F.S. then defines collateral sources as payments made under: (1) The United States Social Security Act, except Title XVIII and Title XIX; any federal, state, or local income disability act; or any other public programs providing medical expenses, disability payments, or other similar benefits, except those prohibited by federal law and those expressly excluded by law as collateral sources; (2) Any health, sickness, or income disability insurance; automobile accident insurance that provides health benefits or income disability coverage; and any other similar insurance benefits, except life insurance benefits available to the claimant, whether purchased by her or him or provided by others; (3) Any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services; and (4) Any contractual or voluntary wage continuation plan provided by employers or by any other system intended to provide wages during a period of disability. Paragraph (b) then provides: "Notwithstanding any other provision of this section, benefits received under . . . the Workers' Compensation Law . . . shall not be considered a collateral source."

B. EFFECT OF PROPOSED CHANGES:

1. **Treats Workers' Compensation Payments as Collateral Sources** - This bill amends s. 768.76, F.S., by redefining the term "collateral sources" to include compensation received or payable under workers' compensation.

2. **Restricts Application of Joint and Several Liability** - This bill abolishes the doctrine of joint and several liability for economic damages which exceed \$250,000. This represents a significant change to current law. In addition, the bill strikes

subsection (5) of s. 768.81, F.S., which applies joint and several liability to all actions for \$25,000 or less. This change equalizes the application of joint and several liability to all cases, as long as economic damages do not exceed \$250,000.

3. **Removes Workers' Compensation Employers from Verdict** - Finally, this bill states that, under certain circumstances, a workers' compensation employer shall not be listed on the verdict form. This means that, when apportioning fault, the finder of fact may not consider the fault of a workers' compensation employer and must instead apportion the blame only among those tortfeasors listed on the verdict form.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

- a. Does the bill create, increase or reduce, either directly or indirectly:

- (1) any authority to make rules or adjudicate disputes?

N/A

- (2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

N/A

- (3) any entitlement to a government service or benefit?

N/A

- b. If an agency or program is eliminated or reduced:

- (1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

- (2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

Yes. In many cases, this bill would reduce the liability of defendants in civil actions. For economic damages which exceed \$250,000, each defendant would be liable for an amount which corresponds with that defendant's percentage of fault.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

N/A

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

- (1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Amends ss. 768.76 and 768.81, F.S.

E. SECTION-BY-SECTION RESEARCH:

Section 1 Amends s. 768.76, F.S.; includes payments received under workers' compensation within the definition of collateral sources.

Section 2 Amends s. 768.81, F.S.; strikes provision requiring the application of joint and several liability to all actions in which damages do not exceed \$25,000; provides that a workers' compensation employer shall not be considered a party or listed on the verdict form with respect to job-related injuries; establishes that payments received under workers' compensation shall be considered collateral sources; provides that joint and several liability shall not apply to economic damages which exceed \$250,000.

Section 3 Establishes an effective date of October 1 of the year in which enacted.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

This bill would reduce the ability of some claimants to recover noneconomic and economic damages in cases under \$25,000. In addition, when economic damages exceed \$250,000, this bill would eliminate the ability of claimants to recover damages from a single defendant, which exceed that defendant's percentage of fault. In cases which involve multiple defendants, where some defendants are financially destitute or otherwise not amenable to suit, this bill could limit recovery.

2. Direct Private Sector Benefits:

This bill would free certain defendants from paying damages which are disproportionate to their percentage of fault. It would take away some of the risks inherent in defending against a lawsuit.

3. Effects on Competition, Private Enterprise and Employment Markets:

Any reduction in the risks posed by civil litigation could attract new business to the state and could enhance the competitiveness of businesses already operating in the state.

D. FISCAL COMMENTS:

None.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

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

B. REDUCTION OF REVENUE RAISING AUTHORITY:

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

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

This bill would not reduce the percentage of a state tax shared with counties or municipalities. Therefore, it would not contravene the requirements of Article VII, Section 18, of the state constitution.

V. COMMENTS:

Key Issues - This subsection uses a question format to stimulate debate about the joint resolution under review.

1. **Question Presented** - *Whether the Legislature should narrow the scope of joint and several liability, eliminate the allocation of fault on verdict forms to employers who carry workers' compensation, and define collateral sources to include payments under workers' compensation.*

2. Other Policy Considerations:

a. Should joint and several be expanded, preserved, narrowed, or eliminated? Does the compensation of injured parties justify the imposition of full damages upon defendants who are only partially or minimally responsible for causing the harm? Should some alternative method of loss allocation be adopted?

b. Should the fault of "phantom defendants," who are not amenable to suit, be considered when assessing damages against defendants, as required under Fabre v. Marin?

c. Is there a reason for eliminating employers who are covered by workers' compensation from comparative fault determinations? Would the removal of workers' compensation employers from the verdict form be fair to other defendants in the suit? What would the potential effects be on plaintiffs and on calculations by finders of fact?

d. What are the administrative implications of redefining collateral sources to include payments under workers compensation?

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

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VII. SIGNATURES:

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