HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 733 Apportionment of Damages
SPONSOR(S): Needelman
TIED BILLS: **IDEN./SIM. BILLS:** SB 1558

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Committee on Constitution & Civil Law	5 Y, 3 N	Thomas	Birtman
2) Safety & Security Council			
3) Policy & Budget Council			
4)			
5)			

SUMMARY ANALYSIS

The bill amends the comparative fault statute, s. 768.81, F.S., to provide that the apportionment of fault, and therefore, the apportionment of damages, in a civil negligence lawsuit may only be made against those parties named in the civil proceeding.

The bill provides legislative findings and intent.

The bill does not appear to have a fiscal impact on state or local governments.

The bill becomes effective on July 1, 2007.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote personal responsibility -- The bill may affect personal accountability for injurious behavior.

B. EFFECT OF PROPOSED CHANGES:

Background

Prior to 1973, a plaintiff who was partially at fault for an accident or other cause of damages to the plaintiff was barred from recovering damages under the doctrine of contributory negligence. The basis of the doctrine was that the plaintiff's negligence "unites with the defendant's negligence in constituting the sole and single indivisible proximate negligence cause of the damage sued for."[1] The historical purpose of the contributory negligence rule was "to protect the essential growth of industries, particularly transportation."[2] However, in 1973, the courts determined that the doctrine of contributory negligence was too harsh on partially-at-fault plaintiffs.[3] As a result, the Court replaced the doctrine of contributory negligence with the doctrine of comparative negligence.[4] Under the doctrine of comparative negligence, a plaintiff who is partially at fault may recover damages proportionate with the negligence of a defendant.

The doctrine of joint and several liability may apply to either the doctrine of contributory negligence or the doctrine of comparative fault. Joint and several liability may be defined as:

> Liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion. Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from nonpaying parties.[5]

The doctrine of joint and several liability was adopted by the Florida Supreme Court in 1914.[6] As such, one defendant could be held financially responsible for all damages caused by others, including insolvent defendants, persons immune from suit, and non-parties. 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] The Florida Supreme Court described the logic and history of the doctrine of joint and several liability as follows:

> Originally, joint and several liability applied when the defendants acted in concert, the act of one being considered the act of all, and each was therefore liable for the entire loss sustained by the plaintiff. The doctrine was later expanded by eliminating the requirement that the parties act in concert and allowing joint and several liability to apply

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[1] *Sears, Roebuck & Co. v. Geiger*, 167 So. 658, 660 (Fla. 1936).
[2] *Hoffman v. Jones*, 280 So.2d 431, 437 (Fla. 1973) (citing Institute of Judicial Administration, Comparative Negligence - 1954 Supplement, at page 2).
[3] *Id.*
[4] *Id.*
[5] BLACK'S LAW DICTIONARY (8th ed. 2004).
[6] *Y.H. Investments v. Godales*, 690 So.2d 1273, fn. 6 (Fla. 1997). The case in which joint and several liability was adopted was *Louisville & Nashville Railroad Co. v. Allen*, 65 So. 8 (Fla. 1914).
[7] *Smith v. Department of Insurance*, 507 So.2d 1080, 1091 (Fla. 1987).
[8] *Hudson v. Weiland*, 8 So.2d 37, 38 (Fla. 1942).
[9] *Disney v. Wood*, 489 So.2d 61, 62 (Fla. 4th DCA 1986).

> when separate independent acts of negligence combined to produce a single injury. *See* Louisville and Nashville Railroad Co. v. Allen, 67 Fla. 257, 65 So. 8 (1914). The doctrine was based on the assumption that injuries were indivisible and there was no means available to apportion fault.[10]

The Legislature enacted the first version of the comparative fault statute, s. 768.81, F.S., in 1986 to limit the application of joint and several liability.[11] Under that version of the statute, the doctrine of joint and several liability generally no longer applied to noneconomic damages (pain and suffering, etc.), meaning that a defendant usually was only liable for his or her share of noneconomic damages. The doctrine of joint and several liability remained applicable to economic damages (lost income and medical bills, etc.) when a defendant's fault equaled or exceeded that of the plaintiff. In 2006, the Legislature removed the remaining vestiges of joint and several liability from this statute.[12]

Under amendments adopted to this statute in 1999, defendants were authorized to plead that a non-party was at fault for an accident to reduce the defendant's own liability.[13] In such cases, a trier of fact would have the opportunity to allocate fault to a non-party on a verdict form. This authorization to attribute fault to a nonparty appears to be the codification of the Supreme Court's holding in Fabre v. Marin.[14] In Fabre, the Florida Supreme Court was called upon to interpret the definition of "party" within the comparative fault statute. At that time, the apportionment language in the statute read:

> (3) APPORTIONMENT OF DAMAGES.-In cases to which this section applies, the court shall 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; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.[15]

The Fabre Court held that the term "party" as used in the statute included all parties "regardless of whether they have been or could have been joined as defendants."[16]

Current Comparative Fault Statute

Today, s. 768.81, F.S., addresses comparative fault in certain negligence cases. The section provides that any contributory fault that can be attributed to the plaintiff "diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery."[17]

APPLICABILITY - Paragraph 768.81(4)(a), F.S., provides that the section applies to negligence cases and 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." Paragraph 768.81(4)(b), F.S., provides that the section does not apply to "any action brought by any person to recover actual economic damages resulting from pollution, to any action based upon an intentional tort, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by chapter 403

[10] *Smith v. Department of Insurance*, 507 So.2d 1080, 1091 (Fla. 1987).
[11] Sections 60 and 65, ch. 86-160, L.O.F. In 1887, the Legislature enacted a statute providing for comparative negligence in railroad accidents. *Hoffman*, 280 So.2d at 437. The statute was later held found to be unconstitutional because it was not a statute of general application. *Id.* In 1943, the Legislature enacted another comparative fault statute, but it was vetoed by the Governor. *Id.* at 437-438.
[12] Chapter 2006-06, L.O.F.
[13] Section 27, ch. 99-225, L.O.F.
[14] 623 So. 2d 1182 (Fla. 1993).
[15] Section 768.81(3), F.S. (Supp. 1988).
[16] *Fabre v. Marin*, 623 So.2d 1182, 1185 (Fla. 1993).
[17] Section 768.81(2), F.S.

(environmental control),[18] chapter 498 (land sales practices),[19] chapter 517 (securities transactions),[20] chapter 542 (combinations restricting trade or commerce),[21] or chapter 895 (offenses concerning racketeering and illegal debts).[22]

Economic Damages – the term "economic damages" is defined as "past lost income and future lost income reduced to present value; medical and funeral expenses; lost support and services; replacement value of lost personal property; loss of appraised fair market value of real property; costs of construction repairs, including labor, overhead, and profit; and any other economic loss which would not have occurred but for the injury giving rise to the cause of action."[23] This section does not provide a definition of "noneconomic damages," however, a definition is provided under ch. 766, F.S., relating to medical malpractice matters.[24] Under that definition, the term is defined to mean "nonfinancial losses that would not have occurred but for the injury giving rise to the cause of action, including pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other nonfinancial losses to the extent the claimant is entitled to recover such damages under general law, including the Wrongful Death Act."[25]

Apportionment of Damages – under this section, damages are to be apportioned by a court "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."[26] In order for any fault to be allocated to a nonparty, the defendant "must affirmatively plead the fault of a nonparty and, 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."[27] In order for any fault to be allocated to a nonparty and to include the nonparty on the verdict form "for purposes of apportioning damages, a defendant must prove at trial, by a preponderance of the evidence, the fault of the nonparty in causing the plaintiff's injuries."[28]

Finally, this section provides that in any civil action "arising out of medical malpractice, whether in contract or tort, when an apportionment of damages pursuant to this section is attributed to a teaching hospital as defined in s. 408.07,[29] the court shall enter judgment against the teaching hospital on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability."[30]

Effect of Bill

The bill provides legislative findings and intent to include the following:

- that frivolous accusations against nonparties deny justice to victims;

[18] See s. 403.141(2), F.S.
[19] See ss 498.049(5) and 498.061(3), F.S.
[20] See subsections 517.211(1) and (2), F.S.
[21] No reference to joint and several liability is readily apparent in this chapter.
[22] No reference to joint and several liability is readily apparent in this chapter.
[23] Section 768.81(1), F.S.
[24] Section 766.202(8), F.S.
[25] *Id.*
[26] Section 768.81(3), F.S.
[27] Section 768.81(3)(a), F.S.
[28] Section 768.81(3)(b), F.S.
[29] Section 408.07(45), F.S. reads: "Teaching hospital" means any Florida hospital officially affiliated with an accredited Florida medical school which exhibits activity in the area of graduate medical education as reflected by at least seven different graduate medical education programs accredited by the Accreditation Council for Graduate Medical Education or the Council on Postdoctoral Training of the American Osteopathic Association and the presence of 100 or more full-time equivalent resident physicians. The Director of the Agency for Health Care Administration shall be responsible for determining which hospitals meet this definition.
[30] Section 768.81(5), F.S.

- that frivolous accusations against nonparties add unnecessarily to the expense and complexity of legal actions; and

- the intent of the Legislature is to curtail the incidence of such accusations by requiring the trier of fact to apportion the total fault for the occurrence giving rise to a legal proceeding only among the claimant and those defendants to the action who may be held legally liable.

The bill amends s. 768.81, F.S., to provide that the trier of fact in a civil action covered by the section, whether it is a jury or a judge, must "apportion the total fault for the occurrence giving rise to the legal proceeding only among the claimant and those defendants to the action who may be held legally liable..." The bill additionally deletes the existing language in paragraphs 768.81(3)(a) and (b), F.S., discussed above, relating to the allocation of fault to nonparties. This will limit the apportionment of fault, and therefore, the apportionment of damages, to only those parties named in the civil proceeding.

C. SECTION DIRECTORY:

Section 1 provides legislative findings and intent.

Section 2 amends s. 768.81, F.S., relating to comparative fault in any civil action for damages as the result of negligence.

Section 3 provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may affect personal accountability of individuals and entities for injurious behavior.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raises revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill becomes effective on July 1, 2007. Because this is a substantive change to the law, it probably cannot be applied retroactively. This issue may be litigated if not clarified to apply only to causes of action that accrue on or after the effective date.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On March 14, 2007, the Committee on Constitution and Civil Law adopted one amendment and reported the bill favorably as amended. The amendment removed the entire body of the bill and inserted new language that:

- Removes Section 1 of the bill relating to Legislative findings and intent;
- Provides that the apportionment of fault, and therefore, the apportionment of damages, in a civil negligence lawsuit may only be made against:
    - the claimant;
    - those defendants to the action who may be held legally liable;
    - any persons whom the trier of fact finds would have been liable to the claimant had they not been discharged from liability pursuant to a release, covenant not to sue, covenant not to execute a judgment, or similar agreement between the person subject to liability and the claimant;
    - a nonparty that cannot be made a party to the proceeding because the nonparty is not subject to the jurisdiction of the court;
    - a nonparty that cannot be made a party to the proceeding because the nonparty is immune from suit, and, but for the nonparty's immunity, the nonparty otherwise could be held liable for the damages sought by the claimant or claimants from the moving defendant; or
    - a nonparty upon whom the defendant was unable to serve process because such nonparty could not be sufficiently identified after reasonable inquiry by the defendant, and the defendant proves at trial by a preponderance of the evidence the fault of the nonparty in causing the plaintiffs injuries.
- Provides that a defendant may join as a co-defendant any person who may be liable for the plaintiff's claim;

- Deletes existing provisions providing for allocation of fault to nonparties;
- Provides Legislative intent regarding comity and respect to the constitutional prerogatives of Florida's judiciary; and
- Provides that the bill applies to actions accruing on or after the effective date of the bill.