The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Fiscal Policy

BILL: SB 588

INTRODUCER: Senator Yarborough

SUBJECT: Alcohol or Drug Defense

DATE: January 17, 2024 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Collazo	Cibula	JU	**Favorable**
2.	Collazo	Yeatman	FP	**Pre-meeting**
3.			RC	

I. Summary:

SB 588 repeals s. 768.36, F.S., known as the alcohol or drug defense. The statute establishes a defense to liability for negligence on the grounds that the plaintiff was more than 50 percent at fault for his or her own harm because he or she was under the influence of alcohol or drugs.

In 2023, the Legislature enacted many changes to the laws governing negligence lawsuits. One of these changes replaced the state's pure comparative negligence system with a modified comparative negligence system. Under the state's modified comparative negligence system, a plaintiff cannot recover damages in most negligence actions if he or she is more than 50 percent at fault for his or her own harm.

Because state law now bars recovery if the plaintiff is more than 50 percent at fault for his or her harm *regardless of reason* (due to the changes enacted in 2023) – the so-called alcohol or drug defense, which similarly bars recovery if the plaintiff is more than 50 percent at fault *and also* under the influence of alcohol or drugs, is subsumed by the state's adoption of modified comparative negligence and therefore no longer necessary.

The bill takes effect on July 1, 2024.

II. Present Situation:

Recent Changes to Comparative Negligence in Florida

In 2023, the Legislature enacted numerous changes to the laws governing negligence lawsuits.[1] Among many other significant changes, the Legislature replaced the state's pure comparative negligence system with a modified comparative negligence system.[2] In order to understand how

[1] *See generally* ch. 2023-15, Laws of Fla.

[2] Chapter 2023-15, s. 9, Laws of Fla.. (codified at s. 768.81, F.S.).

these comparative negligence systems compare, one must first understand the concepts of joint and several liability, contributory negligence, and comparative negligence.

Joint and Several Liability

Traditionally, when multiple defendants contributed to a plaintiff's injury, the doctrine of "joint and several liability" required any one of the defendants to pay the full amount of the plaintiff's damages.[3] This was true even where the defendants did not act in concert but instead each committed a separate and independent act, and then the acts combined to cause an injury to the plaintiff. For example, if defendants A, B, and C, while driving their vehicles, each contributed to an accident that caused a plaintiff damages of $100,000, with A being 40 percent at fault, B being 59 percent at fault, and C being 1percent at fault, the plaintiff could recover the full $100,000 from the plaintiff's choice of any of the three defendants.

Contributory Negligence

Under the common law, a plaintiff who was found to be in any way at fault for his or her own injury was completely barred from recovering any damages from the defendant.[4] This doctrine, known as "contributory negligence," prohibited any recovery by the plaintiff, even if the plaintiff had only barely contributed to his or her own injuries. The doctrine rested on a "policy of making the personal interests of each party depend upon his own care and prudence."[5] However, over time, most United States jurisdictions began to believe the doctrine of contributory negligence was too harsh and began to change their approaches.

Comparative Negligence

In 1886, the Florida Supreme Court adopted the contributory negligence approach;[6] and in 1914, the Court acknowledged its acceptance of the doctrine of joint and several liability.[7] In 1973, the Florida Supreme Court, in *Hoffman v. Jones*,[8] changed the state to a "pure comparative negligence" jurisdiction, deciding that the traditional contributory negligence approach was "almost universally regarded as unjust and inequitable."[9] As a result, under the pure comparative negligence approach, juries would now decide the percentage of fault contributed by each party in an accident, and then the damages would be apportioned accordingly.[10]

In 1986, the Legislature passed the Tort Reform and Insurance Act ("Act"), which essentially codified *Hoffman* and further committed Florida to the comparative negligence approach.[11] Within the same Act, the Legislature also substantially limited the application of the doctrine of

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[3] *See Louisville & Nashville R.R. Co. v. Allen,* 65 So. 8, 12 (Fla. 1914) ("Where ... separate and independent acts of negligence of several combine to produce directly a single injury, each is responsible for the entire result ...").
[4] *See Hoffman v. Jones,* 280 So. 2d 431 (Fla. 1973).
[5] Kevin J. Grehan, *Comparative Negligence,* 81 COLUM. L. REV. 1668, note 3 (quoting W. Prosser, *The Law of Torts* s. 64, at 418 (4th ed. 1971)).
[6] *Louisville & Nashville R.R. Co. v. Yniestra,* 21 Fla. 700 (1886).
[7] *Allen,* 65 So. at 12.
[8] 280 So. 2d 431 (Fla. 1973).
[9] *Id.* at 436.
[10] *See id.* at 438 (providing that "[i]f plaintiff and defendant are both at fault, the former may recover, but the amount of his recovery may be only such proportion of the entire damages plaintiff sustained as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant").
[11] Chapter 86-160, s. 60, Laws of Fla. (codified at s. 768.81(2), F.S.).

joint and several liability in negligence actions.[12] Joint and several liability was repealed for the purposes of most negligence actions in 2006.[13]

As a result, after 2006 until the 2023 changes, the state was a "pure comparative negligence jurisdiction" without the doctrine of joint and several liability.[14] In other words, a jury in a typical negligence action would decide each party's percentage of fault; and the court, in its final judgment, would apportion damages based on the jury's fault determination.[15] For example:

- If the plaintiff is 40 percent at fault for an accident causing the plaintiff $100,000 in damages and the defendant is 60 percent at fault in such accident, the defendant is liable for 60 percent of the plaintiff's damages – that is, $60,000.
- If the plaintiff is 70 percent at fault for an accident causing the plaintiff $100,000 in damages and the defendant is 30 percent at fault in such accident, the defendant is liable for 30 percent of the plaintiff's damages – that is, $30,000.

Modified Comparative Negligence

Following the changes enacted in 2023, Florida is no longer a "pure" comparative negligence jurisdiction, but a "modified" comparative negligence jurisdiction. With the exception of personal injury or wrongful death actions arising out of medical negligence pursuant to the medical malpractice statute,[16] any party found to be greater than 50 percent at fault for his or her own harm may not recover any damages.[17]

Accordingly, a jury in a typical Florida negligence action now decides each party's percentage of fault; and the court, in its final judgment, apportions damages based on the jury's fault determination *but only if* the plaintiff is not found to be more than 50 percent at fault for his or her own harm.

Under this approach, if the plaintiff is found to be more than 50 percent at fault for his or her own harm, then the plaintiff may not recover damages from any defendant. For example:

- If the plaintiff is 51 percent and the defendant is 49 percent at fault for an accident causing the plaintiff $100,000 in damages, the plaintiff recovers nothing.
- If the plaintiff and the defendant are each 50 percent at fault for such accident, the defendant is liable for 50 percent of the plaintiff's damages – that is, $50,000.

Notably, Florida joined 23 other states by adopting this form of modified comparative negligence, where a plaintiff recovers nothing if he or she is more than 50 percent at fault for his or her own harm.[18]

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[12] Chapter 86-160, s. 60, Laws of Fla. (codified at s. 768.81(3), F.S.).
[13] Chapter 2006-6, s. 1, Laws of Fla. (codified at s. 768.81(3), F.S.).
[14] Section 768.81(3), F.S. ("In a negligence action, 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").
[15] *See* Fla. Sup. Ct. Std. Jury Instr. 501.4 (Comparative Negligence, Non-Party Fault and Multiple Defendants), https://www.floridabar.org/rules/florida-standard-jury-instructions/civil-jury-instructions/civil-instructions/#500 (last visited Dec. 18, 2023).
[16] Chapter 766, F.S.
[17] Section 768.81(6), F.S.
[18] Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Vermont, West Virginia,

Alcohol or Drug Defense

Even though the 2023 legislation adopted modified comparative negligence, where a plaintiff recovers nothing if he or she is more than 50 percent at fault for his or her own harm, it did not repeal the so-called "alcohol or drug defense" statute.[19]

The statute provides that in any civil action, a plaintiff may not recover any damages for loss or injury to person or property if the trier of fact finds that, at the time when the plaintiff was injured:

- The plaintiff was under the influence of any alcoholic beverage or drug to the extent that his or her normal faculties were impaired, or the plaintiff had a blood or breath alcohol level of 0.08 percent or higher; and
- As a result of the influence of such alcoholic beverage or drug, the plaintiff was more than 50 percent at fault for his or her own harm.[20]

For purposes of this statute, the term:

- "Alcoholic beverage" means distilled spirits and any beverage that contains 0.5 percent or more alcohol by volume as determined in accordance with the Beverage Law.[21]
- "Drug" means any chemical substance identified in s. 877.111, F.S., which is the criminal statute identifying certain harmful chemical substances, the inhalation, ingestion, possession, sale, purchase, or transfer of which is punishable by law; or chapter 893, F.S., which identifies controlled substances.[22] However, the term does not include any drug or medication obtained pursuant to a prescription which was taken in accordance with the prescription,[23] or any medication that is authorized under state or federal law for general distribution and use without a prescription in treating human diseases, ailments, or injuries and that was taken in the recommended dosage.

III. Effect of Proposed Changes:

The bill repeals s. 768.36, F.S., known as the alcohol or drug defense. The statute establishes a defense to liability for negligence on the grounds that the plaintiff was more than 50 percent at fault for his or her own harm because he or she was under the influence of alcohol or drugs.

Wisconsin, and Wyoming. *See* Forbes Advisor, *What Is Comparative Negligence?,* Mar. 8, 2023, https://www.forbes.com/advisor/legal/personal-injury/comparative-negligence/ (identifying these 23 states as 51 percent rule modified comparative negligence states).

[19] Section 768.36, F.S.

[20] Section 768.36(2), F.S.

[21] Section 768.36(1)(a), F.S.; *see also* s. 561.01(4)(b), F.S. (providing that "[t]he percentage of alcohol by volume shall be determined by measuring the volume of the standard ethyl alcohol in the beverage and comparing it with the volume of the remainder of the ingredients as though said remainder ingredients were distilled water"); *see also* s. 561.01(6), F.S. (defining the "Beverage Law" to mean chapters 561, 562, 563, 564, 565, 567, and 568, F.S.).

[22] Section 768.36(1)(b), F.S.

[23] A "prescription" includes any order for drugs or medicinal supplies which is written or transmitted by any means of communication by a licensed practitioner authorized by the laws of Florida to prescribe such drugs or medicinal supplies, it issued in good faith and in the course of professional practice, is intended to be dispensed by a person authorized by the laws of Florida to do so, and meets the requirements of s. 893.04, F.S. (regulating pharmacists and practitioners). Section 893.02(24), F.S.

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IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill repeals section 768.36 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.