DETANGLING THE INTERPLAY BETWEEN JOINT TORGTEASORS AND COMPARATIVE FAULT, THE FABRE AND EMPTY CHAIR DEFENSES, AND STUART v. HERTZ

by Jason Odom

The interplay between the concepts of joint tortfeasors and comparative fault, the Fabre and Empty Chair defenses, and the exception to the common law on intervening cause set forth in the Florida Supreme Court's opinion in Stuart v. Hertz can be confusing and difficult to apply. This article will hopefully clear up that confusion and give some pointers to improve your practice.

Who Are Joint Tortfeasors?
The term "joint tortfeasors" is defined as "[t]hose who act together in committing wrong, or whose acts if independent of each other, unite in causing a single injury." Specialty Hosp.-Gainesville, Inc. v. Barth, 277 So. 3d 201 (Fla. 1st DCA 2019); accord, Coccavella v. Silverman, 814 So. 2d 1145 (Fla. 4th DCA 2002). The key factor to joint tortfeasor status is that no matter how many tortfeasors are involved, they all united in causing a single injury to the plaintiff.

Example 1: Johnny is going 90 mph in a 30 mph zone down a two-lane road. Susie is stopped ahead on the shoulder of the road, but her car is slightly sticking out into Johnny's lane of travel. As Johnny approaches, he sees Susie's car and swerves to avoid Susie and in doing so hits Victor's car causing serious injuries.

In this scenario, Johnny is negligent for going 90 mph and swerving into Victor, but Susie is potentially negligent for leaving her car in Johnny's lane of travel. Therefore, Johnny and Susie are joint tortfeasors in that together, they acted negligently in causing a single injury to Victor.

Now, who is responsible for payment of a judgment in Victor's favor when more than one person is at fault, and in what amount do each of them pay?

The answer has changed over the years. At common law, each tortfeasor was jointly and severally responsible for all reasonably foreseeable consequences of his or her actions. See. Cole v. Leach, 405 So. 2d 449 (Fla. 4th DCA 1981). In other words, Florida common law allowed a plaintiff to collect the entire judgment from, say Johnny, one of the two joint tortfeasors in Example 1. The perceived unfairness of joint and several liability caught the attention of the Florida Legislature, and in 1987 Florida partially abolished joint and several liability in negligence actions by passage of §768.81, Fla. Stat. Originally, the statute abolished joint and several liability for only non-economic damages (pain and suffering) but retained it in part for economic damages (medical expenses). However, in 2006, the statute was amended to abolish joint and several liability as to economic damages.

The statute now reads, in part: "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 joint and several liability." This concept is known as comparative fault and that is how it is most often referred to in the case law, but in reality, it is a system that requires the jury to apportion liability between two or more potentially responsible parties.

Back to our example. Under current law, Johnny and Susie, as joint tortfeasors, would both be on the verdict form, the jury would apportion liability, if any, against them, and then Johnny and Susie would be responsible for only their respective proportional share of the jury's determination of Victor's damages.

A quick word about setoff. While the topic of setoff is generally outside the purview of this article, it is worth mentioning that the elimination of joint and several liability was significant to the law of setoff. Specifically, prior to §768.81, there were several Florida statutes that potentially imposed a setoff when a plaintiff settled with one defendant but not the other(s). However, after §768.81 abolished joint and several liability as to non-economic damages, the Florida Supreme Court held in Wells v. Talkhouse Mental Retal. Ctr., 659 So. 2d 249 (Fla. 1995) that Florida's setoff statutes did not apply to non-economic damages in cases where §768.81 controlled. The Court reasoned that, under §768.81, each defendant was responsible for only their proportional share of non-economic damages; therefore, a setoff was not necessary because the apportionment of damages resolved the policy reason for a setoff. Following the 2006 amendment to §768.81 eliminating joint and several liability as to economic damages, courts apply Wells to hold...
a serf was not available for economic damages as well as noneconomic damages. See, e.g., Port Charlotte HMA, LLC v Suarez, 210 So. 3d 187 (Fla. 2d DCA 2016).

As you can see, knowing who is, and who is not, a joint tortfeasor is important in a personal injury case because that determination will have a demonstrable effect on, not just your verdict, but who is responsible for payment and in what amount. (A quick note about pleading negligence. If you plead that two or more defendants are joint tortfeasors, you will likely be struck with that decision at trial when it comes to who is on the verdict form. This may be a simple decision in an ordinary automobile negligence case, but it can be a more difficult decision to make when it comes to other claims, such as the Stuart v Hertes exception, discussed below.)

The Fabre Defense, and its Evil Stepbrother, the Empty Chair

The Fabre Defense

A few years after $768,81 was enacted, the Florida Supreme Court decided Fabre v Martin, 623 So. 2d 1182 (Fla. 1993). In Fabre, the Court was asked whether apportionment under $768,81 applied to all responsible persons in an automobile crash, including those not named as parties. The Court held that $768,81 applied to the named defendant(s) and also to any other person or entity whose negligence caused some or all of plaintiff's damages. To use the Fabre defense, a defendant must plead the identity of the unnamed party (if practical to do so) and prove by ordinary negligence standards the liability of the unnamed party. The defendant(s), as well as the unnamed responsible Fabre party, are listed on the verdict form and the jury apportions fault between them. As explained above, the jury's apportionment of liability between all persons/entities, whether named in the lawsuit or not, determines each person's share of liability.

The Empty Chair Defense

Why is the defendant talking about an "empty chair" in opening statement? Who is supposed to be sitting in this empty chair? These are questions you don't want to be asking yourself while listening to the defendant's opening statement. Imagine you get to trial, and the defendant announces it has dropped its Fabre defense. Your first thought is, well, that's one less issue to worry about in trial. But then you realize that the defendant can just claim that some other nonparty is wholly responsible for your client's injuries without pleading a Fabre defense.

The empty chair defense can be used when the defendant intends to argue that plaintiff's injury was due to the negligence of a nonparty to the lawsuit. That sounds like Fabre, right? Be careful, the empty chair defense is not Fabre because "unlike a Fabre defendant, this nonparty [empty chair] is not on the verdict form and there is no apportionment of fault." Victor v Rios, 893 So. 2d 690, 694 (Fla. 5th DCA 2005). A true "empty chair" defense is really a causation defense in that the empty chair refers to "some non-party" who is "the sole legal cause of the harm alleged." See, e.g., Vila v Philip Morris USA Inc., 215 So. 3d 82, 86 (Fla. 3rd DCA 2016) (cigarette manufacturer presented valid empty chair defense that plaintiff's cancer was caused by another, nonparty, manufacturer of cigarettes); Phillips v Guarnieri, 785 So. 2d 705, 707 n.4 (Fla. 4th DCA 2001) (new trial awarded based on the trial court's preventing the defense from making an empty chair argument, implicitly holding that a defendant does not have to affirmatively plead a Fabre defense in order to claim at trial that a nonparty is an "empty chair" because it is the sole legal cause of the harm alleged) (Emphasis added).

The continued viability of the empty chair defense in the aftermath of Fabre is puzzling, because a Fabre defense is based on the theory that a nonparty caused some or all of the plaintiff's injuries. This seemingly includes everything the empty chair defense includes, except that with the empty chair defense the defendant can avoid pleading the defense and therefore hide its use until trial. That sort of trial by ambush has been repeatedly condemned by Florida courts in other contexts, but for whatever reason has been endorsed in this circumstance under the guise of a valid (non-affirmative) defense. However, while the defendant may be able to raise an empty chair defense, that does not mean the defendant can violate other well-established rules, such as the inadmissibility of settlement agreements. Keep in mind, often times when a person is absent from trial it is because of a settlement. Florida courts have held certain "empty chair" arguments improper because they imply a third-party settlement. See, e.g., Ricks v Lopez, 822 So. 2d 502 (Fla. 2002) (new trial awarded because defense counsel suggested that the jury ask why a third party was not a defendant, in violation of a court order in limine against revealing a settlement); Vacinich, supra (argument suggesting a settlement with a third party was improper, regardless of whether defendant had a valid empty chair or Fabre defense).

Stuart v Hertes: An Exception to the Common Law That Has Survived, For Now?

Under traditional negligence principles, a tortfeasor is responsible for all reasonably foreseeable consequences of his or her actions, Calo, supra, but an independent, unforeseeable intervening force may serve to break the causal link and extinguish liability. Typically, the question of whether an intervening cause is reasonably foreseeable is for the jury, but it has long been the law in Florida that when a negligent party injures another causing him to seek medical treatment, negligence in the administration of that treatment is foreseeable and will not serve to break the chain of causation. J. Ray Arnold Lumber Corp. v Richardson, 141 So. 133 (Fla. 1932). In Stuart v Hertes, 351 So. 2d 703 (Fla. 1977), the Florida Supreme Court reiterated this rule, as follows:

Where one who has suffered personal injuries by reason of the negligence of another exercises reasonable care in securing the services of a competent physician or surgeon, and in following his advice and instructions, his injuries are thereby aggravated or increased by the negligence, mistake, or lack of skill of such physician or surgeon, the law regards the negligence of the wrongdoer in causing the original injury as the proximate cause of the damages flowing from the subsequent negligent or unskilled treatment thereof, and holds him liable therefor.

Id. at 707 (quotations omitted); See also, Letzer v Cephas, 792 So. 2d 481, 485 (Fla. 4th DCA 2001); Corcos, supra.

So how does this work? Let’s remove Susie from Example 1 above, where Johnny and Susie combine to cause Victor’s injuries.

Example 2: Victor goes to ABC Hospital for treatment for injuries caused by Johnny in the car crash and Victor is seen by Dr. Sawbones. Victor is bleeding from a laceration on his head and reports no memory of the crash. Dr. Sawbones fails to order an MRI of Victor’s head, and instead diagnoses Victor with a cervical sprain and sends him home. Victor dies the next day from a skull fracture that could have been successfully treated if timely discovered.

Victor files suit against Johnny and Dr. Sawbones. Are Johnny and Dr. Sawbones joint tortfeasors, such that $768.81, Fla. Stat, requires that liability be apportioned between them? If Victor did not sue Dr. Sawbones, could Johnny add Dr. Sawbones to the verdict form as a Fabre defendant? The answer to both questions is “no.” Johnny would be deemed the initial tortfeasor and Dr. Sawbones the subsequent tortfeasor. Florida law is clear that Johnny is liable only for his negligence in causing Victor’s injuries, but also for Victor’s death due to the subsequent negligence of Dr. Sawbones. See Barth, 277 So. 3d at 212-214 (hospital was not entitled to comparative fault defense against long-term care facility, where expert testimony failed to establish causation of injury); Beverly Enterprises-Florida, Inc. v. McVey, 739 So. 2d 616 (Fla. 2d DCA 1999) (trial court erred in adding VA hospital to verdict form as Fabre defendant, because it was a subsequent, not joint, tortfeasor under Stuart v. Hertz; Association for Retarded Citizens-Volusia, Inc. v. Fletcher, 741 So. 2d 520 (Fla. 5th DCA 1999) ($ 768.81 only applies to joint tortfeasors; not to medical providers who subsequently aggravate the injury).  

The Stuart v. Hertz Settlement Trap

There is an important settlement trap to be aware of under the Stuart v. Hertz scenario.

Specifically, when settling with the initial tortfeasor and not the subsequent tortfeasor, plaintiff must expressly and unambiguously carve out any claim and damages she may have against a subsequent tortfeasor, otherwise, the claim against the subsequent tortfeasor will be deemed barred. Franticek v. University of Miami, 76 So. 3d 360 (Fla. 3d DCA 2011); Bona v. Rodrigues, 891 So. 2d 1205 (Fla. 4th DCA 2005); Rooks v. Pulman, 541 So. 2d 673 (Fla. 5th DCA 1989).

In Franticek, the Court did a great job explaining this issue. Specifically, plaintiff entered the hospital to give birth. During delivery, her blood pressure spiked, she suffered a brain bleed, and was put on life support. While on life support, an agent from the University of Miami (UM) began to participate in plaintiff’s care, declared her brain dead, and ordered her removed from life support. Plaintiff sued a nurse and hospital as initial tortfeasors and settled that case. The settlement between plaintiff and the initial tortfeasors stated that they would be “released from any and all claims … arising from any act or occurrence … arising out of or resulting from the incidents occurring at” the hospital. Plaintiff then sued the UM as a subsequent tortfeasor and UM moved for summary judgment arguing plaintiff’s settlement with the initial tortfeasors settled all claims of negligence, including those of the UM. The Third DCA agreed. The Court noted that plaintiff’s claim failed because the settlement did not clearly express that (1) plaintiff was not receiving compensation from the nurse or hospital for injuries resulting from subsequent negligence of the UM and (2) plaintiff reserved her cause of action against the UM.

There is an easy fix to this problem. Remember, the initial tortfeasor is responsible for even those damages caused by the subsequent tortfeasor, so be sure to carve out your settlement with the initial tortfeasor all claims and damages against the subsequent tortfeasor.  

Practice Points

- In automobile cases, include all responsible parties in the lawsuit, unless not appropriate under the facts or for strategy reasons, such as all vehicle owners (husband and wife, if both are owners) in addition to the at-fault driver. A married couple may have separate insurance or joint assets that may be immune from collection if your judgment is not against both individuals. Having all the potential responsible parties in the case will also provide you with some creative proposal for settlement strategies, such as serving one against the vehicle owner, but not the at-fault driver, that may put pressure on the carrier to settle.
- Conduct discovery, and update discovery, on any Fabre or empty chair defense. Use the standard interrogatory at Fla. R. Civ. P. Appendix I, Form 2, No. 8. When you depose the defendant(s), explore in detail all the facts they contend support these defenses, including the specific evidence of the alleged negligence of any non-party. Often, you will find that these defenses are pled by the defense attorney, but the defendant will either admit no one else was at fault for the crash or fail to give any testimony in support of the defense.
- The Fabre defense must be timely raised, prior to trial, to avoid unfair prejudice. See, Bogosian v. State Farm Mutual Automobile Insurance Co., 817 So. 2d 968 (Fla. 3d DCA 2002); Mazz v. Wells Fargo Guard Services, Inc., 678 So. 2d 1262 (Fla. 1996) (notice prior to trial is necessary because whether damages should be apportioned against a non-party may affect the presentation of evidence and the court’s evidentiary rulings). Arguably, an empty chair defense must also be raised prior to trial, and certainly disclosed if asked about in discovery.
- The Stuart v. Hertz exception presents some unique opportunities to collect full damages; however, be careful when settling with the initial tortfeasor to make sure you carve out and preserve all claims and damages against the subsequent tortfeasor.
The abolition of joint and several liability—in favor of comparative fault—applies only to claims for damages based upon negligence, strict liability, product liability, professional malpractice and like theories. It does not apply to intentional torts, such as fraud, or claims for which joint and several liability has been retained by statute. See §768.81(4), Fla. Stat. See also, e.g., T & S Frame, Handicap Accessibility, Inc. v. Wind Indus. Marine & Repair, Inc., 11 So. 3d 411, 412 (Fla. 2d DCA 2009) (recognizing that joint and several liability was eliminated in §768.81(4)).

Prior to §768.81, Fla. Stat., seff was generally governed by §§768.041, 46.015, and 768.31, Fla. Stat. These statutes were designed to prevent a plaintiff from recovering duplicate compensation for identical damages from joint tortfeasors. See Convisco v. Smith, Inc. ex rel. Bank of Am., N.A., 163 So. 3d 505 (Fla. 4th DCA 2015). The key requirement of these statutes is whether plaintiff is seeking the same damages against joint tortfeasors. Compare, Cohen v. Richter, 667 So. 2d 899 (Fla. 4th DCA 1996) (seff was proper) with Gordon v. Roundburg, 654 So. 2d 643 (Fla. 5th DCA 1995) (seff was not proper).

The net result is that there should not be a seff when §768.81 applies. See Will v. Smith, supra. Importantly, there is no seff even if the plaintiff settled with one defendant for an amount that exceeded that defendant's proportional share of responsibility substantially determined by the jury. Will v. Smith, supra. Let's use Example 1 above. Plaintiff settles with Johnny for $50,000 and the case goes to trial against Sue. The jury finds Johnny 80 percent liable and Sue 20 percent liable, and awards $50,000 in total damages. The court will enter judgment against Sue for $10,000 (20% of $50,000). Sue is not entitled to a seff for the $50,000 paid to Johnny, even though plaintiff will collect $60,000 in total, which exceeds the amount awarded by the jury.

Machado v. Will, 954 So. 2d 1262 (Fla. 1st DCA 2007).

An empty chair is not an affirmative defense, and thus it does not have to be pled in the defendant's answer and affirmative defenses. Vila, 215 So. 3d at 86.

After passage of §768.81, some courts have questioned whether Stuart v. Hertz is still good law. See, Letter, 792 So. 2d at 484-485 (J. Klein, concurring opinion). However, the courts in Letter, Plotter, and Bars, have all held that Stuart v. Hertz was not overruled by §768.81.


The Stuart v. Hertz exception is overwhelming pled, when applicable, in automobile negligence cases. However, the exception is also applicable when the initial and subsequent tortfeasors are both physicians. See Letter, 792 So. 2d at 485; Bars, 277 So. 3d at 214. There are significant strategic considerations involved when Stuart v. Hertz applies in the context of a medical malpractice case. For example, insurance coverage could force the plaintiff into suing both all responsible parties. Moreover, concern over the jury being more upset with the subsequent tortfeasor negligence could require you to sue him or her as well, but remember, the main thrust of the exception is that the initial tortfeasor cannot compel apportionment of liability between him or her and the subsequent tortfeasor. Because the issue of whether two responsible parties are joint tortfeasors is ordinarily a question for the jury, the trial court may allow the jury to apportion liability to protect the verdict in the event the appellate court later determines on appeal that Stuart v. Hertz did not apply. Letter, 792 So. 2d at 485 (In medical malpractice case, trial court did not err in giving the Stuart v. Hertz instruction, but jury should also have been instructed to determine whether the two physicians were joint tortfeasors).

Issues involving subrogation or contribution between multiple (not joint) tortfeasors are beyond the scope of this article.

Generally, whether two or more negligent parties are joint tortfeasors is often a question of fact for the jury. Letter, 792 So. 2d at 486. Fla. Stat. 768.54, 55, 56. 57.

The applicability of a seff in this scenario is beyond the scope of this article.

If your law firm has a client with a mass tort case, contact the law firm of Levin Papantonio to discuss a referral or co-counsel relationship.

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