

March 17, 2011

If signed into law, the statute would overrule a 2001 Florida Supreme Court decision prohibiting juries from apportioning the fault of one who caused a car crash against the alleged fault of a manufacturer in supposedly producing an uncrashworthy vehicle.

Background

Since 2001, vehicle products liability crashworthiness cases in Florida have been governed by our Supreme Court's decision in *D'Amario v. Ford Motor Co.*, 806 So.2d 424 (Fla. 2001). In *D'Amario*, a child was injured as a passenger in a Ford vehicle which struck a tree because the driver was intoxicated and speeding. *Id.* at 42. The *D'Amario* plaintiff carefully alleged he was not demanding Ford pay damages for the injuries sustained in the initial car crash, but only those sustained during the post-collision fire, purportedly due to a defective fuel relay switch. *Id.* Despite the crashworthiness defect theory, the *D'Amario* trial court instructed the jury they could, if appropriate, compare any fault of Ford with that of the driver pursuant to *Fabre v. Marin*, 623 So.2d 1182 (Fla. 1993) (a jury finding for the plaintiff must apportion a percentage of fault to all entities – including plaintiff or non-parties – whose negligence combined to cause the injury). The *D'Amario* jury returned a verdict for Ford. *Id.*

D'Amario Doctrine

Upon the culmination of the appeal, the Florida Supreme Court reversed the trial court in *D'Amario*, ruling instead:

- *Fabre v. Marin* and the principles of comparative fault as to the underlying car crash (the so-called "first collision") do not ordinarily apply in a products liability crashworthiness case; and
- the introduction of evidence of the fault in causing the "first collision" is improper because it confuses the jury; focusing their attention on the conduct giving rise to the crash rather than whether injuries were "enhanced" by a defect in the vehicle's crashworthiness. See *id.* at 440-42.

Use by the Plaintiffs' Bar

In the subsequent ten years, *D'Amario* has been cited by the plaintiffs' bar to (a) keep the person responsible for the underlying car crash off the verdict form no matter how reckless their wrongdoing and, (b) exclude evidence – despite its relevance on other grounds – from ever being heard by the jury if also useful in comparing the fault of another with that of a manufacturer in purportedly producing an uncrashworthy vehicle.

Legislative Abrogation of the D'Amario Doctrine

On March 16, 2011, the Florida Senate passed the following bill to abrogate *D'Amario* via changes to Florida's comparative fault statute, § 768.81. This bill will now go to the House for approval and is fully expected to pass in this final form. Florida's new Governor is expected to sign this bill into law because it was a platform of his campaign. Highlighted in **bold** below, are those items the Legislature has added to § 768.81 to overturn *D'Amario*:

Be It Enacted by the Legislature of the State of Florida:

Section 768.81, Florida Statutes, is amended to read:

768.81 Comparative fault.—

Section

(1) DEFINITIONS.—As used in this section, the term:

(a) "Accident" means the events and actions that relate to the incident as well as those events and actions that relate to an alleged defect or injuries, including enhanced injuries.

(d) "Products liability action" means a civil action based upon a theory of strict liability, negligence, breach of warranty, nuisance, or similar theories for damages caused by the manufacture, construction, design, formulation, installation, preparation, or assembly of a product. The term includes an action alleging that injuries received by a claimant in an accident were greater than the injuries the claimant would have received but for a defective product. The substance of an action, not the conclusory terms used by a party, determines whether an action is a products liability action.

(2) EFFECT OF CONTRIBUTORY FAULT.—In a negligence action, contributory fault chargeable to the claimant 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.

(3) APPORTIONMENT OF DAMAGES.—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 63 joint and several liability.

(a) In order to allocate any or all fault to a nonparty, a 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.

(b) In a products liability action alleging that injuries received by a claimant in an accident were enhanced by a defective product, the trier of fact shall consider the fault of all persons who contributed to the accident when apportioning fault between or among them. The jury shall be appropriately instructed by the trial judge on the apportionment of fault in products liability actions where there are allegations that the injuries received by the claimant in an accident were enhanced by a defective product. The rules of evidence apply to these actions.

(4) APPLICABILITY.— This 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, chapter 498, chapter 517, chapter 542, or chapter 895.

(5) MEDICAL MALPRACTICE.—Notwithstanding anything in law to the contrary, in an action for damages for personal injury or wrongful death arising out of medical malpractice, whether in contract or tort, if an apportionment of damages pursuant to this section is attributed to a teaching hospital as defined in s. 408.07, 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.

Section 2.

The Legislature intends that this act be applied retroactively and overrule *D'Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2001), which adopted what the Florida Supreme Court acknowledged to be a minority view. That minority view fails to apportion fault for damages consistent with Florida's statutory comparative fault system, codified in s. 768.81, Florida Statutes, and leads to inequitable and unfair results, regardless of the damages sought in the litigation. The Legislature finds that, in a products liability action as defined in this act, fault should be apportioned among all responsible persons.

Section 3.

This act is remedial in nature and applies retroactively. The Legislature finds that the retroactive application of this act does not unconstitutionally impair vested rights. Rather, the law affects only remedies, permitting recovery against all tortfeasors while lessening the ultimate liability of each consistent with this state's statutory comparative fault system, codified in s. 768.81, Florida 130 Statutes. In all cases, the Legislature intends that this act be construed consistent with the due process provisions of the State Constitution and the Constitution of the United States.

Section 4.

This act shall take effect upon becoming a law.