Trial Law TIPS

Roy D. Wasson's
TIP #47

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Keeping Non-Parties Off the Verdict Form Under *Fabre*

Introduction

Defendants often attempt to reduce their own liability by pointing the finger at trial to non-parties they claim contributed to the Plaintiff's accident and injuries. Sometimes such attempts are made without the fault of non-parties being pled as an affirmative defense. Such a tactic is improper as the law requires that the fault of non-parties be pled in the Answer. A similar tactic frequently used by defense counsel is to plead affirmative defenses which purport to raise the unexplained negligence of some unnamed non-party. Those defenses are legally insufficient. A bare allegation that some unidentified person contributed in some unspecified manner to the Plaintiff's damages is will not entitle the defense to put on

evidence at trial in an effort to reduce the named Defendant's percentage of negligence.

The Supreme Court allowed the fault of non-parties to reduce the recovery against named defendants in *Fabre v. Marin*, 597 So. 2d 883 (Fla. 1992). But there are pleading and proof requirements the defendant must meet. Unless those are met, the plaintiff should move for summary judgment on the *Fabre* defense. If on the eve of the trial, you learn that the defendant plans to blame a non-party, file a motion in limine to prevent the issue from being mentioned before the jury. This "Tip" will provide you with the legal support.

Defendant's Pleading Burden Under *Fabre*

Even if the defendant's attorney has made it known in discovery or otherwise that he or she intends to ask for non-parties to go on the verdict form, it is error to permit such a request where the *Fabre* defense was not pled in the Answer. "For a non-party to be included on a jury verdict form, however, the defendant must ***plead*** the non-party's negligence as an affirmative defense." *Basel v.McFarland & Sons, Inc.*, 815 So. 2d 687, 691 & n.1 (Fla. 5th DCA 2002)(emphasis added). *Accord, D'Angelo v. Fitzmaurice*, 863 So. 2d 311 (Fla. Nov. 26, 2003).

There are two important elements within that pleading requirement. In *Nash v. Wells Fargo Guard Service, Inc.* 678 So. 2d 1262 (Fla. 1996), the Florida Supreme Court held "that in order to include a non-party on the verdict form pursuant to *Fabre*, the defendant must plead as an affirmative defense [1] ***the negligence of the non-party*** and [2] ***specifically identify*** the non-party." *Id.* at 1264 (emphasis added). Further, the conduct which allegedly was negligent must be pled with allegations of ultimate facts, not just a conclusion that the non-party was negligent in some unexplained way.

Defendants are not excused from these pleading requirements even in cases where they argue that the Plaintiff was on notice of the existence of an expert witness who has cast blame on a non-party, or there is knowledge of other, unpled proof of the fault of a non-party. Actual knowledge by the plaintiff is not a substitute for assertion of the defense in the defendant's Answer.

The case of *Bogosian v. State Farm Mut. Auto. Ins. Co.*, 817 So. 2d 968 (Fla. 3d DCA 1998) is the best example of just how important is this pleading requirement.

In *Bogosian,* over the plaintiff's objection that the *Fabre* defense had not been pled, the defendant called Ken Bynum, an expert who originally had been retained by the ***plaintiff*** to establish the fault of D.O.T., a former defendant who had settled with the plaintiff and been dropped from the case. The trial court allowed Mr. Bynum to testify, but on appeal the judgment in defendant's favor was reversed. The Court held:

> The trial court overruled plaintiff's objections and allowed State Farm to proceed. The court accepted State Farm's argument that plaintiff was already very familiar with Bynum's opinions regarding the D.O.T.'s negligence, since Bynum was originally plaintiff's expert. The D.O.T. was placed on the verdict form as a Fabre defendant. The jury returned a verdict finding D.O.T. 70% at fault for the accident, and the phantom driver 30%. Plaintiff has appealed.
>
> We respectfully disagree with the trial court and conclude that the plaintiff's objections were well taken. The Florida Supreme Court has held that:
>
> > In order to include a nonparty on the verdict form pursuant to Fabre, the defendant ***must plead as an affirmative defense the negligence of the nonparty and specifically identify the nonparty.*** The defendant may move to amend pleadings to assert the negligence of a nonparty subject to the requirements of Florida Rule of Civil Procedure 1.190. However, notice prior to trial is necessary because the assertion that noneconomic damages should be apportioned against a nonparty may affect both the presentation of the case and the trial court's rulings on evidentiary issues.

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> *Nash v. Wells Fargo Guard Servs., Inc.*, 678 So. 2d 1262, 1264 (Fla. 1996) (emphasis added). State Farm failed to comply with these mandatory requirements. . . .
>
> It is true that plaintiff was thoroughly familiar with Mr. Bynum's opinions regarding D.O.T.'s negligence. However the prejudice to plaintiff arises because, ***in the absence of a pleading creating fair notice, plaintiff had no opportunity to plan a defense or gather evidence and witnesses*** in opposition to State Farm's position.

Bogosian, supra, 817 So. 2d at 970-71(emphasis in original).

Plaintiffs should move for summary judgment or seek an order *in limine* precluding defendants from alluding to the alleged fault of any non-party not identified specifically in the Answer. That was the holding of the court in *Thomas v. Daniel*, 736 So. 2d 100 (Fla. 1st DCA 1999).

Thomas, the driver, and Daniel, the passenger, were traveling in a truck when Thomas struck a large rock in the road. The impact caused the vehicle to rise up on its right-hand side wheels, hit the median, and slide across the road. Daniel was injured, and sued Thomas for causing his injuries. Thomas attempted to raise a third-party liability defense. ***Although Thomas claimed that he had suspicions of certain third parties who might share in the responsibility*** for causing the accident by virtue of either depositing the rock in the road or failing to remove the rock from the road in a timely manner, ***he never specifically identified those parties.*** Relying upon *Nash v. Wells, Fargo Guard Service, Inc.*, 678 So. 2d 1262 (Fla. 1996), the trial court struck the third-party liability defense before trial due to Thomas's failure to specifically identify any third parties. . . .

> Thomas asserts that, based upon *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993), the trial court erred by striking his third-party liability defense. *Fabre*, however, has been clarified by subsequent case law which requires that, to include a nonparty on a verdict form, ***defendants seeking to raise third-party liability must not only plead the nonparty's negligence as an affirmative defense, but must also specifically identify the nonparty*** and prove the nonparty's fault in causing the accident.

Id. at 100-101(emphasis added). *Accord, e.g., Snoozy v. United States Gypsum Co.,* 695 So. 2d 767 (Fla. 3d DCA 1997)(reversing a judgment which had been reduced by25% following trial in which the Defendant failed to plead and prove the identity of any non-party whose fault contributed to the Plaintiff's injuries, but had convinced the trial court to allow it to argue the fault of unidentified "non-party 'others").

Hold the defendant to the same sort of pleading requirement that they seek to impose on you by way of a motion to dismiss. Even if you lose, the issue will be preserved for appeal.

Untimely Motions to Plead *Fabre* Defense

Where a named defendant makes a timely motion to allege the fault of a non-party, and that defendant discovers evidence which supports such a defense, it can inher to the benefit of the plaintiff sometimes by providing the plaintiff with an opportunity to add the *Fabre* defendant as a real defendant. That benefit is largely illusory in most cases, however, where the *Fabre* defendant lacks insurance and is uncollectable even if a verdict is returned against it. Therefore, it usually is preferable to defeat a defendant's motion for leave to amend its affirmative defenses to plead the *Fabre* defense. That can be done successfully in the situation where the defense is untimely raised, after the statute of limitations has expired.

Where the statute of limitations has run prior to an affirmative defense being raised, the Plaintiff will be prejudiced by being precluded from adding a new claim or party to the lawsuit based on that new affirmative defense. Plaintiffs who are

prejudiced by a defendant's delay in seeking leave to amend may have luck opposing the amendment using an estoppel argument.

The doctrine of equitable estoppel applies to prevent a defendant from asserting an affirmative defense when the defendant has "lulled the [plaintiff] into a disadvantageous legal position." *Florida Dept. of Health & Rehab. Services v. S.A.P.*, 835 So. 2d 1091 (Fla. 2002)(applying equitable estoppel to preclude statute of limitations defense).

The Fifth DCA addressed the issue of prejudice in raising a defense after the statute of limitations has run. In *Florida Hospital Waterman v. Stoll*, 835 So. 2d 271 (Fla. 5th DCA 2003) the court held that, under the facts of that case, the defendant waived a defense by failing to raise it before the statute of limitations had run.

In *Stoll*, the defense was the failure to comply with medical malpractice presuit requirements before the statute of limitations ran. The plaintiff could have cured the defects before the statute ran if the defendant had raised the issue earlier. Therefore, the court held they were prejudiced by the defendant's failure to timely raise the defense. *See also, Hendry v. Zelaya*, 841 So. 2d 572 (Fla. 3d DCA 2003), in which the Third District affirmed the trial court's refusal to allow the defendant to belatedly name as a *Fabre* defendant the city, stating: "Assuming *arguendo* that the City even had a duty to provide off-duty officers, Hendry knew well before the fateful incident that the City could not provide as many officers as he had requested. Therefore, ***if he was going to assert negligence on the part of the City, he knew sufficient facts at the time he filed his answer to plead that Miami Beach was a* Fabre *defendant.*"** *Id.* at 574 (emphasis added).

To maximize the chance that the trial court will find the defendant is estopped from raising the *Fabre* defense, be prepared to demonstrate to the judge that the defendant knew about the non-party in question much earlier in the case and could have amended prior to the expiration of the statute of limitations.

Fabre Defendants Must Be Joint Tortfeasors To Go On Verdict

Finally on the pleading issue, note that the mere naming in the Answer of persons who may have contributed to the plaintiff's injuries does not necessarily entitle the defendant to argue the negligence of those non-parties and place them on the verdict form, even if the identity and the facts constituting the negligence of those non-parties is pled. Some non-parties, like subsequent treating physicians, cannot be placed on the verdict form because they are ***successive*** tortfeasors, and not ***joint*** tortfeasors.

One court has noted as follows: "[S]ection 768.81, Florida Statutes (1993), and *Fabre* are limited to incidents involving joint tort-feasors." *Beverly Enterprises-Florida, Inc. v. McVey,* 739 So. 2d 646 (Fla. 2d DCA 1999)("The V.A. Hospital is not a joint tort-feasor with Beverly, but rather is a subsequent or successive independent tort-feasor. See *Stuart v. Hertz Corp*. . . . Therefore, McVey was entitled to recover the entirety of his damages from Beverly, the initial tort-feasor"). *See also J.R. Brooks & Son, Inc. v. Quiroz*, 707 So. 2d 861 (Fla. 3d DCA 1998).

Defendants Must Have Evidence of Non-Parties' Negligence

Even where the defendant's affirmative defense sufficiently pleads the identity of one or more non-party joint tortfeasors and sufficiently alleges facts which would constitute that non-party's negligence, summary judgment should be granted to the plaintiff on that affirmative defense where there is no ***evidence*** in the record of such non-party's negligence. The controlling case law which has developed since the Supreme Court's decision in *Fabre* "requires that, to include a non-party on a verdict form, defendants seeking to raise third-party liability must not only plead the non-party's negligence as an affirmative defense, but must also specifically identify the non-party and ***prove the non-party's fault in causing the accident."*** *Thomas v. Daniel,* 736 So. 2d 100, 101 (Fla. 1st DCA 1999)(emphasis added).

A defendant who alleges the fault of a non-party must do more than simply establish that the non-party performed some acts which resulted factually in contributing to the accident. Such a defendant pleading the fault of non-parties must establish evidence

that the non-party's involvement in the accident was a result of actionable negligence. The mere occurrence of the accident is not enough, and even a causal connection between the non-party's actions and the accident is not enough. There must be proof of conduct which was unreasonable.

In *Clark v. Polk County,* 753 So. 2d 138 (Fla. 2d DCA 2000), the defendant in a traffic collision case pled the negligence of non-parties in knocking down a stop sign which the defendant ran prior to the collision which injured the plaintiff. In reversing the judgment in favor of the defendant after the trial court allowed the non-party to be placed on the verdict form, the Second District noted that the defendant had failed in its burden of establishing negligence on the part of the non-party, as opposed to proving the simple fact of the stop sign being run over. The court held:

> The County proved only that a motorist drove over the stop sign. Its evidence left open the question of why—did the motorist act tortuously? Or was he or she forced off the road by another vehicle? Or did he or she swerve to avoid striking a person, animal or object in the road? Without evidence on those questions, there simply is no *Fabre* issue for the jury to consider.

Id. at 143.

Send out discovery and move for summary judgment where the defendant has produced no evidence of conduct which would amount to actionable negligence on the part of any non-party. Bare argument of defense counsel that certain act occurred and was negligent is not enough. To be entitled to present a *Fabre* defense to the jury, a defendant must "satisfy his burden of presenting ***competent substantial evidence*** to establish the fault of the nonparty." *Gonzalez v. Veloso*, 702 So. 2d 1366, 1367 (Fla. 3d DCA 1997)(emphasis added).

Conclusion

Let's stop the defense practice of pointing the finger at unindentified *Fabre* defendants without timely pleading that defense and based on no evidence of actionable negligence. Make the defense shoulder its burden of pleading and proof. And remember to . . .

Keep Tryin!

Roy

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