IN THE SUPREME COURT OF FLORIDA

IN RE: REPORT AND RECOMMENDATIONS OF THE WORKGROUP ON IMPROVED RESOLUTION OF CIVIL CASES
_____/

NO. SC22-122

COMMENTS OF HAWKINS PARNELL & YOUNG LLP

My firm, Hawkins Parnell & Young LLP, represents defendants in litigation before the Florida courts, including asbestos litigation and other toxic-tort litigation. We applaud the efforts of the Workgroup on Improved Resolution of Civil Cases, and believe that many of the suggested rule revisions and additions in its Report and Recommendations (hereinafter, "Workgroup Report") will serve to expedite litigation in civil cases before the Florida state courts and improve the civil justice system. Nevertheless, we have concerns about several of the Workgroup's recommendations, and believe that some of the suggested revisions and additions to the rules are seriously flawed: Some of the recommended revisions and additions to the rules are unnecessary; some are overly complex; some will have unintended consequences (including increased litigation over procedural matters and sanctions); and some have the potential to trample parties' rights and lead to unjust outcomes.

Rules 1.160 and 1.161

A. Complexity Problem

We commend the Workgroup's effort to bring more structure to motions practice. Several of the comments filed to date argue that the Workgroup's proposals for Rules of Civil Procedure 1.160 and 1.161 are too complex, however, and these complaints are not without merit. The proposed amendments may be a little overengineered, as evidenced by the fact that the Workgroup believed it necessary to include a flow chart to explain them. If the Court agrees with the commentators who argue that the proposed Rules 1.160 and 1.161 are too complex, however, we request that the Court revise the proposed rules to make them simpler rather than scrap them altogether.

B. Meet and Confer Requirement

We request that the Court make two modifications to Workgroup's recommended meet-and-confer requirement for motions in the proposed amended version of Rule 1.160.

First, we request that motions filed as an initial response to a complaint (such as motions to dismiss) be exempted from the meet-and-confer requirement. Not uncommonly, there are delays between

the time of service and the time defense counsel receives the complaint from the client (especially if the defendant has to find and retain counsel first). Given that the initial response to the complaint is due twenty days after service, defense counsel may not have time to meet and confer with opposing counsel before the response must be filed. Therefore, we request that the meet-and-confer requirement be dropped for such motions or that it be deferred to some point after the motion's filing. For example, the parties could be required to meet and confer before the motion is set for hearing (or formally submitted for decision without hearing).

Second, we agree with other commentators that parties be allowed to conduct the meet-and-confer via email. We know from experience that many issues can be resolved through email, and arranging time for busy attorneys to meet and confer in person or over the telephone can be difficult.

C. Deeming Motions Abandoned

We oppose the Workgroup's proposed Rule 1.160(k), regarding abandonment of motions, as currently drafted. Subsection (k)(1) of this proposed rule is unreasonable given the short deadline for scheduling a hearing on a motion (five days from the filing and service

of the motion) and the likelihood that the scheduling party will frequently be unable within this short period to obtain available hearing dates from the trial court and coordinate with the opposing party to agree on one of the available dates. We also oppose Subsection (k)(2) of this proposed rule, which would penalize a movant for a trial court's failure to meet its ten-day deadline to summarily rule on a motion pursuant to proposed Rule 1.160(j)(2).

Rule 1.190

We strongly object to the Workgroup's proposed new subsection (b) to Florida Rule of Civil Procedure 1.190 as written. The proposed new subsection lacks justification, will be unfair to defendants, and will result in needless litigation. Moreover, it is inconsistent with the comparative-fault statute, Florida Statute § 768.81. The Court should reject this proposed new subsection or rewrite it to address its serious flaws.

The Workgroup's proposed new Rule 1.190(b) adds a deadline for a defendant to amend its answer to identify *Fabre* defendants and, for the first time, seeks to impose a requirement that *existing parties* to a lawsuit be identified as *Fabre* defendants:

(b) Amending Affirmative Defenses Involving Comparative Fault.

(1) Any motion to amend seeking to plead the fault of a party or nonparty must

(A) be timely in accordance with the Florida Rules of Civil Procedure, the case management order, and other orders of the court; and

(B) absent a showing of good cause and no prejudice to the other parties or the court, be brought within 15 days of when the party seeking to amend knew or reasonably should have known, with the exercise of due diligence, of the party's or nonparty's alleged fault.

(2) In order to allocate any or all fault to another party or a nonparty, a party seeking to amend must

(A) affirmatively plead the fault of the party or nonparty in accordance with rule 1.140 and other applicable rules and decisional law; and

(B) absent a showing of good cause, identify the party or nonparty, if known, or describe the nonparty as specifically as practicable by motion with the proposed defense attached to the motion.

(Workgroup Report, Appendix 1 at 128, Appendix 2 at 16.) Even though this is a significant change to Rule 1.190 and the *Fabre* requirements, the Workgroup Report does not include any reasoning or justification for this amendment or consider the potential problems that it will cause.

A. The 15-Day Limit Will Lead to Wasteful Litigation

The proposed rule's first problem is the deadline for a party to move to amend its answer to identify a new *Fabre* defendant, *i.e.,* "15 days of when the party seeking to amend *knew or reasonably should have known, with the exercise of due diligence, of the party's or nonparty's alleged fault."* (Emphasis added.) This provision is an invitation to unnecessary, time-wasting, and obstructionist litigation. It will lead to endless litigation over the issue of when a party "knew or reasonably should have known" of the *Fabre* defendant's alleged fault and the meaning of "due diligence" in this context. This unnecessary litigation will waste the trial courts' time and other limited resources.

Furthermore, the fifteen-day time limit is unreasonable and unnecessary. It will likely lead to defendants filing numerous motions to amend over the course of a lawsuit, unnecessarily wasting the trial court's limited time. Rather than amending its answer once or twice during a lawsuit to identify additional *Fabre* defendants, a party will have to move to amend every time it discovers any

information indicating that a nonparty might be at fault.[1] This may not be a significant problem in the typical auto accident case, but it will be in lawsuits involving injuries for which numerous parties and nonparties may share responsibility, such as asbestos and other toxic tort cases.

Moreover, the proposed fifteen-day time limit ignores the realities of discovery in such cases. Very often, depositions in such cases continue for several days due to the number of defendants the plaintiffs sue and the long work histories that must be covered in questioning. In addition, it is not uncommon for a deposition to be interrupted for weeks or even months due to lack of sufficient time or factors such as the plaintiff's health. Many times, however, the potential liability of a party or nonparty cannot be properly assessed until the deposition is complete. For example, testimony early in a deposition might indicate that a nonparty (or party) may share responsibility for the plaintiff's injury, but later testimony might establish that the nonparty (or party) is not liable. If the deposition is interrupted for weeks or months before it is completed, however,

[1] Or, as discussed in Section B, *infra*, the fault of an existing party.

the proposed fifteen-day time limit would require the defendants to move to amend their answers for *Fabre* purposes before the exculpatory testimony occurs.

Similar situations will also arise in other forms of discovery and investigation. A defendant may obtain information indicating that a nonparty *might* be a fault, but further discovery and investigation may be necessary to evaluate whether there is a meritorious basis for adding that nonparty to the answer as a *Fabre* defendant. Due to the fifteen-day limit, however, the defendant would not have time to conduct this further discovery and investigation before its time to amend expires, and thus it would have file a motion to amend to protect its rights. If subsequent discovery and investigation reveals that there is no basis for finding the nonparty liable, the motion to amend will end up being an unnecessary waste of time and resources. By that point, however, the waste will already be *fait accompli.*

As other commentators have noted, moreover, the Workgroup did not recommend a reciprocal requirement that a plaintiff be required to amend the complaint to add a new defendant within fifteen days of when the plaintiff "knew or reasonably should have

known, with the exercise of due diligence," of that new defendant's fault.[2] This discrepancy is unfair and unjustified, and is another indication that the Workgroup's recommended revisions to Rule 1.190 were not sufficiently considered.

Furthermore, adding a deadline for Fabre amendments to Rule 1.190 is unnecessary because the Workgroup's revised version of Rule 1.200 provides that a proposed case management order must include a deadline for amending answers to identify additional *Fabre* defendants. Proposed amended Florida Rule of Civil Procedure 1.200(e)(3)(D)(i) (Workgroup Report, Appendix 1 at 134-35, Appendix 2 at 30.)

B. There Is No Need to Identify Existing Parties

One of the Workgroup's most befuddling proposed amendments is the requirement that a defendant amend its answer to identify other, existing parties to the lawsuit for purposes of apportionment. This proposed requirement is unnecessary, unwarranted, and inconsistent with the comparative-fault statute, Florida Statute

[2] *See, e.g.,* the comments of judges of the Eighth Judicial Circuit (filed April 28, 2022) at Exhibit A.

§ 768.81. That statute only requires a party to identify *nonparties* for apportionment purposes:

> 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.

Fla. Stat. § 768.81(a)1. As the legislature apparently recognized, there is no reason to identify an existing party for apportionment purposes given that the party is already before the trial court and its liability is already at issue. The purpose of Subsection 768.81(a)1 is to provide the other parties notice of the potential liability of a nonparty and to identify that nonparty to the extent practicable so that the parties may be prepared to litigate the issue of the nonparty's liability at trial. *See Nash v. Wells Fargo Guard Servs.,* 678 So. 2d 1262, 1264 (Fla. 1996) (establishing pleading requirement later codified in Fla. Stat. § 768.81(a)1). If a party is already before the court, however, there is no need to provide such notice. The other parties already know that that party's liability is at issue. If this requirement is adopted, moreover, defendants might respond by

simply naming every other party to the case as a *Fabre* defendant, which would render this proposed new requirement pointless. The only result would be a trap for the unwary who follow the dictates of the statute to identify nonparties but do not catch the addition to the statute that the Workgroup recommends.[3]

For this reason and the others discussed above, we request that the Court reject the Workgroup's proposed new version of Rule 1.190(b) or rewrite it to address its serious flaws.

Rule 1.440

We strongly object to the Workgroup's proposal that a trial court be authorized advance a trial date on the calendar without the consent of all parties:

> Upon a party's notice or upon the court's own initiative, if the court finds the action ready to be set for a trial period earlier than the projected trial period specified in the case management order entered under rule 1.200 or rule 1.201, the court may enter an order fixing an earlier trial period.

[3] That is, effectively, what the Workgroup is proposing: amending the comparative-fault statute by way of an amendment to a rule of civil procedure. Although this Court has authority over matters of procedure, the issue of whether changing the statute's requirements in this way is proper deserves more consideration than the Workgroup Report gives it (*i.e.,* none).

Proposed amended Florida Rule of Civil Procedure 1.440(c)(1) (Workgroup Report, Appendix 1 at 173-74, Appendix 2 at 121-22.) Parties and their counsel need to be able to rely on set trial dates for scheduling purposes. For example, busy expert witnesses need to be scheduled well in advance, and they may not be able to accommodate a trial period suddenly advanced on the calendar. Furthermore, many of our clients rely on busy trial counsel who likewise have scheduling issues. Moreover, this proposal creates opportunities for mischief by parties who need less time for trial preparation and may seek to exploit this provision as an opportunity to put their opponents at a disadvantage. Therefore, we request that this proposal be modified to require the consent of all parties before a trial court may advance a trial to an earlier date.

Rule 1.460

Many commentators have already discussed at length the problems with the Workgroup's proposed revisions to Florida Rule of Civil Procedure 1.460, and we will not repeat their efforts here. We agree with the commentators who have argued that the proposed revisions strip too much discretion from trial judges and go too far in limiting the grounds on which a continuance may be granted.

Sanctions Rules

We agree with commentators who have argued that the Workgroup has gone overboard in revising rules on sanctions and adding new ones.[4] The proposed revisions and additions will likely lead to the filing of many more sanctions motions for tactical reasons. This will hinder, rather than facilitate, the timely resolution of cases. The federal courts' experience with Federal Rule of Civil Procedure 11 in the 1980s and early 1990s illustrates the problems that arise with excessive litigation over sanctions.

[4] *See, e.g.,* Comments of the Florida Defense Lawyers Association (filed May 16, 2022) at Section I.A.

CONCLUSION

We thank the Court for this opportunity to comment on the Report and Recommendations of the Workgroup on Improved Resolution of Civil Cases.

Respectfully submitted this 1st day of June, 2022.

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CERTIFICATE OF SERVICE

Pursuant to Fla. R. Jud. Admin. 2.140(b)(6) and 2.140(d), I HEREBY CERTIFY that a true and correct copy of the within and foregoing COMMENTS OF HAWKINS PARNELL & YOUNG LLP has been served on the Chair of the Workgroup on Improved Resolution of Civil Cases, the Chair of the Florida Bar's Civil Procedure Rules Committee, the Chair of the Bar's Rules of General Practice and Judicial Administration Committee, and the Florida Bar staff liaison.

This 1st day of June, 2022.

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CERTIFICATE OF FONT AND WORD COUNT COMPLIANCE

I HEREBY CERTIFY that the within and foregoing COMMENTS OF HAWKINS PARNELL & YOUNG LLP, which is written in Bookman Old Style 14-point font, complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b). The number of words is 2,439, excluding the caption, the certificates of service and compliance, and the signature block.

This 1st day of June, 2022.

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