IN THE SUPREME COURT OF FLORIDA
Case No. SC22-122

IN RE: AMENDMENTS TO THE
FLORIDA RULES OF CIVIL
PROCEDURE
_____/

COMMENT OF MATTHEW J. CONIGLIARO REGARDING COMPARATIVE FAULT DEFENSES AND INITIAL DISCLOSURES

The Court has requested comments regarding proposed changes to the Florida Rules of Civil Procedure contained in the Judicial Management Council's Final Report of the Workgroup on Improved Resolution of Civil Cases. To date, the Court has received dozens of comments, nearly all of which both commend the Workgroup for its efforts and criticize the recommendations in small or large part. The praise is well earned, but many of the criticisms are well stated.

This Comment reflects a practitioner's views. In the spirit of efficiency, it will immediately focus on two significant proposals that have received insufficient attention in the commenting process—proposed changes regarding comparative fault defenses and initial disclosures. This Comment concludes with briefly stated general recommendations.

Proposed Rule 1.190(b)

Proposed subdivision (b) to rule 1.190 is new. It addresses affirmative defenses involving "fault of a party or nonparty." Parts of the proposed language would be useful additions to the rules of civil procedure, and the Court should adopt them. Other parts, however, reflect bad policy from a rulemaking perspective and are arguably inconsistent with both Florida's comparative fault statute and the Florida Constitution. The Court should not adopt them.

Useful Aspects of Proposed Rule 1.190

The proposed amendment's useful aspects concern the need to plead the fault and identity of nonparties. In *Nash v. Wells Fargo Guard Servs., Inc.*, 678 So. 2d 1262, 1264 (Fla. 1996), this Court held that "the defendant must plead as an affirmative defense the negligence of the nonparty and specifically identify the nonparty." The Court reached that holding when section 768.81(3) referred only to "parties," with no mention of "nonparties." *See* § 768.81(3), Fla. Stat. (1986). Three years later, the Legislature amended the statute to add language regarding when and how nonparties must be identified. *See* Ch. 99-225, Laws of Fla., §§ 27, 36 (1999) (adopting § 768.81(3)(d)-(e) (eff. Oct. 1, 1999). Today, that language states:

> 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.

§ 768.81(3)(a)1., Fla. Stat.

Given the statutory right to apportion fault to nonparties, and the potential separation of powers concerns with a legislative prescription of pleading requirements, it would be both helpful to litigants and respectful to the Legislature for the rules to make clear, consistent with section 768.81(3)(a)1., that a party seeking to apportion fault to a nonparty must plead the nonparty's fault and either identify the nonparty if known or describe the nonparty to the extent practicable.

Problematic Aspects of Proposed Rule 1.190

The proposed language, however, extends the rule's scope in two additional and problematic respects. The Court should reject these additional aspects of the proposed amendments.

First, the proposed language includes a 15-day timing requirement otherwise unknown in Florida law. Proposed subdivision (b)(1) states:

> (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.

As this language shows, the proposed new timing requirement is found in proposed subdivision (b)(1)(B). It would require a party seeking leave to amend to assert a comparative fault defense to bring the motion to amend within 15 days of when the party "knew or reasonably should have known" of the alleged fault or face the burdens of showing good cause and a lack of prejudice to other parties.

Proposed subdivision (b)(1)(A) appears intended simply to confirm that the 15-day requirement would stand apart from the case management order, other orders entered by the trial court, and other provisions of the Florida Rules of Civil Procedure. In fact, subdivision

(a) of rule 1.190 has long required that "[l]eave of court [to amend the pleadings] shall be given freely when justice so requires," and case law has long held that a trial court abuses its discretion when it denies leave to amend unless the privilege has been abused, there is prejudice to the opposing party, or amendment would be futile. *E.g.*, *Sun Valley Homeowners, Inc. v. Am. Land Lease, Inc.*, 927 So. 2d 259, 262-63 (Fla. 2d DCA 2006) (Canady, J.); *Gerber Trade Fin., Inc. v. Bayou Dock Seafood Co.*, 917 So. 2d 964, 968 (Fla. 3d DCA 2005); *Life Gen. Sec. Ins. Co. v. Horal*, 667 So. 2d 967, 969 (Fla. 4th DCA 1996); *Gate Lands Co. v. Old Ponte Vedra Beach Condominium*, 715 So. 2d 1132, 1135 (Fla. 5th DCA 1998); *Bill Williams Air Conditioning & Heating, Inc. v. Haymarket Cooperative Bank*, 592 So. 2d 302, 305 (Fla. 1st DCA 1991); *see also Bryant v. State*, 901 So. 2d 810, 818 (Fla. 2005) (citing authorities re leave to amend). As these authorities show, the existence of prejudice to an opposing party has long been a potential issue whenever a party requests leave to amend.

What is wholly new would be the requirement that leave be sought within 15 days of when the defendant knew or should have known of the defense unless the defendant can show good cause for taking longer to bring the motion. No comparable limitation exists

anywhere in Florida law. In a typical tort case, the plaintiff has—as a matter of right—two years (for medical malpractice) or four years (for most other torts) to bring a claim from its accrual, *see* § 95.11(3)-(4), Fla. Stat., and then 120 or more days to perfect service of process, *see* Fla. R. Civ. P. 1.070(j), and then the plaintiff may amend once as a matter of right before a responsive pleading is served, *see* Fla. R. Civ. P. 1.190(a), but a defendant seeking to amend an answer would have only 15 days to plead a comparative fault defense from when the defendant knew or should have known of it or be forced to make showings of good cause and a lack of prejudice. Such a requirement could be challenged as violating the Florida Constitution's separation of powers or equal protection provisions through the judicial creation of what amounts to a limitations provision for a specific category of claim or defense. No similar 15-day limitation exists for any other defense—or, with respect to plaintiffs, for any claim.

Section 768.81(3)(a)1. speaks to this issue. It requires the defense to be pled "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." That language recognizes a party's ability to seek leave

to amend its pleadings "any time before trial" and implies deference to the judiciary's general rules regarding amendments. Nothing in that statutory text, however, authorizes the judiciary to legislate a limitations period solely for these defenses or create special pleading requirements unique to them.

Beyond the matter of authority, the proposed time limitation for comparative fault defenses would unnecessarily expand, and not reduce, litigation. Case management orders routinely include deadlines for pleading amendments, and proposed rule 1.200(e)(3)(D)(i)(10) would specifically require case management orders to address deadlines for amending affirmative defenses regarding so-called "*Fabre* defendants." There is no need for an additional 15-day rule that simply invites additional litigation. Indeed, how would a trial court go about finding when a defendant "knew or should have known" of a particular comparative fault defense? An evidentiary hearing? What if the requisite knowledge existed at or before the time of initial service? Also, such knowledge may often be acquired through counsel, during the litigation, which raises the specter of privilege problems.

The existing legal framework for amending pleadings is sufficient to address the timing of motions to amend affirmative defenses regarding comparative fault. To the extent concerns exist with delayed efforts to amend, the proposed amendment to rule 1.200 to require case management orders to contain deadlines for amending *Fabre* defenses should alleviate any problems.

As a result, the proposed timing requirement raises substantial issues regarding both authority and policy. The Court should avoid such concerns by not adopting the proposed timing requirement.

The second problematic aspect of the proposed rule concerns its application to the allocation of fault among *parties*. From the time this Court abandoned contributory negligence in favor of apportioning fault comparatively, a plaintiff's contributory fault has been correctly viewed as an affirmative defense to be proved by the defendant. *See Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973). Defendants routinely plead a plaintiff's contributory fault (sometimes labeled comparative fault), and, by statute, such fault, when proved, reduces the plaintiff's recovery in any "negligence action." § 768.81(2).

But the comparative fault of *another defendant* is a separate issue, and one that is separately addressed by section 768.81, which provides that "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." § 768.81(3) (emphasis added). There is no statutory requirement that any defendant plead or prove a co-defendant's fault for such apportionment to occur. The plaintiff bears the burden of proving each defendant's fault, and the jury apportions fault as appropriate. Thus, as a practical matter, defendants generally do not plead or undertake to prove the negligence of their co-defendants.

The proposed amendments, however, suggest that defendants must plead and prove the fault of their co-defendants for apportionment to occur. Whereas section 768.81(3)(a) requires a defendant to plead and prove a nonparty's fault "[i]n order to allocate any or all fault to a nonparty," the proposed rule requires pleading and proof "[i]n order to allocate any or all fault to another party or a nonparty . . . ." The proposal simply inserts "another party" into the statutory language and might be read to require defendants to plead and prove other defendants' fault for apportionment to occur. That

is inconsistent with section 768.81 and may lead to unnecessary litigation over the necessity, substance, and timing of affirmative defenses regarding co-defendants' fault.

Accordingly, the Court should not adopt the proposed amendment to the extent its language references another "party." Instead, the Court should simply utilize the term "comparative fault," which would capture a defendant's assertion of a plaintiff's fault or a nonparty's fault without suggesting that defendants need to plead and prove their co-defendants' fault to obtain apportionment.

Recommended Revision

As stated at the outset of this discussion, the proposed amendment to rule 1.190 contains useful language, and the Workgroup's efforts in this regard should lead to improvements in the rule and in litigation, albeit without the timing and party problems discussed above. Accordingly, the following is a recommended revision of the Workgroup's proposal that accounts for the concerns raised above:

(b) Amending Affirmative Defenses Involving Comparative Fault. Any proposed amendment seeking to plead comparative fault must

(1) affirmatively plead fault in accordance with rule 1.140 and other applicable rules and decisional law; and

(2) with respect to a nonparty, identify the nonparty, if known, or, upon a showing of good cause, describe the nonparty as specifically as practicable.

Notably, this recommended language shifts much of the subdivision's focus from the contents of the motion (as the Workgroup's language proposes) to the contents of the proposed amendment, except for any good cause showing, so the details prescribed by section 768.81(3) are ultimately contained in the pleadings, not just in a motion to amend the pleadings.

Proposed Rule 1.280(a)(1)(B)

Proposed subdivision (a) to rule 1.280 is new. It largely copies the federal civil procedure rule for initial disclosures, although the federal rules long ago defined the scope of discovery as extending to any matter, not privileged, relevant to "any party's claims and defenses," *see* Fed. R. Civ. P. 26(b)(1), whereas the Workgroup proposes retaining Florida's far more expansive definition that captures any matter, not privileged, relevant to "the subject matter

of the pending action," *see* Fla. R. Civ. P. 1.280(b)(1). The chief problem with the proposed amendment, however, is not that it ignores the more cabined scope of discovery under the federal rules while importing the federal standard for initial disclosures. The chief problem is that the proposed amendments make a critical and extraordinary departure from the federal standard for initial disclosures.

Specifically, the federal standard requires the disclosure of "a copy—*or a description by category and location*—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment." Fed. R. Civ. P. 26(a)(1)(A)(ii). The Workgroup's proposal eliminates the emphasized language, which shifts the requirement from optionally disclosing descriptions and locations to full-blown production of what amounts to all disclosable documents relevant to the subject matter of a case. That is an extraordinary demand to be met at any time, let alone within 45 days of service. It will create (1) unprecedented costs at the inception of cases, and (2) tremendous noncompliance issues that, particularly under the

proposed sanctions amendments, could create sanctions problems for parties and counsel alike. In all probability, both sets of problems will occur.

Reviewing the comments submitted to date, it is somewhat surprising that certain commenters have not addressed this point. Perhaps the reason lies in the varied complexities surrounding different practice areas, and the types of cases most often seen in various parts of the state. In case types that are relatively simple, where relatively few individualized issues arise from case to case, this requirement may not seem terribly daunting. However, as cases become more complex and closer to unique, with more individualized and significant issues, and more documents addressing those issues, then regardless of whether one is (or represents) a plaintiff or defendant, the disclosure problems created by this requirement border on, if not simply become, insurmountable. If the Court is to adopt an initial disclosure requirement, then the Court is encouraged to utilize the description option set forth in Federal Rule of Civil Procedure 26(a)(1)(A)(ii). To do otherwise will have detrimental effects on Florida state court litigants and their counsel.

General Comments on Rules 1.160, 1.161, and 1.460

The Court has already received many comments focusing on the proposed amendments to existing rules 1.160 and 1.460 and newly proposed rule 1.161. Those proposals set forth a complex set of procedures to govern the processes by which trial courts consider motions, hold hearings, and continue trials. Practitioners, organizations, and trial judges have been critical of the proposals as micromanaging these areas and eliminating important discretion necessary for trial courts to administer justice in individual cases.

Some points bear additional emphasis. First, regarding motion practice, the proposed procedures are sufficiently complex that law offices (not to mention trial courts) are likely to face personnel problems if these measures are adopted in full. Managing motion practice without violating the proposed rules could become a full-time endeavor in many offices. That would come at great costs (financially and in terms of retention) to small and large offices and could be expected to rattle the legal field if not implemented over time.

Second, the proposal to eliminate in large measure trial courts' discretion to manage continuances on a case-by-case basis does too much too fast. Measures that allow trial judges to retain flexibility

can surely serve as a starting point for the reforms the Workgroup desires, without forcing parties and courts into immutable schedules that cannot accommodate the realities of scheduling and evolving circumstances. That this Court twice extended the comment period regarding the Workgroup's proposals is just a small example of how courts need flexibility.

Conclusion

The Workgroup deserves gratitude and appreciation for its efforts. Its proposals, however, should be modified to address legitimate and substantial concerns regarding trial court litigation. The work is not yet complete.

Respectfully submitted,

/s/ *Matthew J. Conigliaro*
Matthew J. Conigliaro
Florida Bar No. 63525
Carlton Fields, P.A.
4221 W. Boy Scout Blvd., Suite 1000
Tampa, Florida 33607
813-229-4254
Email: mconigliaro@carltonfields.com
devans@carltonfields.com
tpaecf@cfdom.net

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2022, a copy of this document was filed through the Florida Courts e-Filing Portal and thereby served by email as indicated on the following as well as all counsel of record:

Chief Judge Robert Morris
Second District Court of Appeal,
P.O. Box 327, Lakeland, FL 33802

Tina White
OSCA Staff Liaison to the Workgroup
500 South Duval Street
Tallahassee, Florida 32399
whitet@flcourts.org

/s/ *Matthew J. Conigliaro*
Matthew J. Conigliaro
Florida Bar No. 63525