

FABRE AND THE PHANTOM DEFENDANT

Ever since Fabre v Marin, 623 So.2d 1182 (Fla. 1993), the Courts have been chipping away at the Supreme Court's holding that tortfeasors who are not joined in an action may nevertheless be included on the verdict form. Nash v Wells Fargo Guard Services, Inc., 678 So.2d 1262 (Fla. 1996) held that a defendant who wishes to have the jury apportion fault with a nonparty has the burden to both plead and prove its entitlement to that benefit. In that case the Supreme Court held that a defendant must not only plead the nonparty's negligence as an affirmative defense but must "specifically identify the nonparty." 678 So.2d at 1264.

In the case of Clark v Polk County, 25 F.L.W. D354 (Fla. 2nd DCA, Feb. 9, 2000) Judge Northcutt reviews most of the post-Fabre decisions and gives an analysis as to whether or not the above-quoted language from Nash precludes a phantom defendant from being included on the verdict form.

In the Clark case the Plaintiff sought damages against the defendant County for failing to resurrect a stop sign which had been apparently knocked down by an unknown driver. There was no evidence of the identity of the driver but tell tale tire marks crossing over the sheared stop sign left an inference that some driver caused the destruction of the sign. The plaintiff was a victim of an accident, when a truck went through the now uncontrolled intersection resulting

in a collision with the vehicle in which plaintiff was a passenger, thus inflicting her complained of injuries. The circuit court allowed the unknown tortfeasor to be put on the verdict form notwithstanding the inability of the county to identify the driver. The Second District decided the case in favor of the plaintiff reversing the trial court on other grounds but the opinion reflects an analysis of the issue.

In Thomas v Daniel, 736 So.2d 100 (Fla. 1st DCA 1999), the First District took the above-quoted language from Nash literally. There the plaintiff was injured when he struck a large rock left in the road. The defendant pleaded the responsibility of the person who deposited the rock or failed to remove it in a timely manner as a Fabre defendant. The Fifth District, citing the above-quoted language from Nash, struck the defense because of the failure of the defendant to specifically identify the individual who dropped the rock.

In Clark, supra, the Second District points out that there are numerous cases in which various Courts have decided cases where the defendant could not identify a phantom Fabre defendant. Judge Northcutt opined that if the law required the identity of such a phantom defendant as a pre-condition to being included on the verdict form, surely one of these Courts would have so held rather than go the more circuitous route of deciding the cases on other grounds. Cases on point include Merrill Crossings Assoc. v McDonald, 705 So.2d 560 (Fla. 1997) in which the Supreme Court held that an intentional

tortfeasor would not be included on the jury verdict form. Nothing in that opinion discusses the lack of identity of the assailant. In the same way Jones v Budget Rent-A-Car Systems, Inc., 723 So.2d 401 (Fla. 3rd DCA 1999) and Hasburgh v WJA Realty, 697 So.2d 219 (Fla. 4th DCA 1997), both were decided on issues other than the identity of the nonparty tortfeasor. Once again, one would assume that if Nash were to be taken literally, there would have been no reason to go beyond the lack of identity of the nonparty in deciding any of those cases.

The Second District in Clark chose not to give an answer to this question. It decided the case on the failure of the County to prove the nature of the alleged negligence of the phantom driver. The Court pointed out that there are myriad reasons which would be nonnegligent which could have caused the phantom driver to strike the stop sign. The driver could have been forced off the road or swerved to avoid another vehicle, person, animal or object. The burden being upon the defendant County to establish the negligence of the nonparty Fabre defendant, the mere inference of negligence was not enough. W.R. Grace & Co.-Conn v Dougherty, 636 So.2d 746 (Fla. 2nd DCA 1994).

Only the First District apparently has held that a defendant's failure to identify a nonparty precludes that party's inclusion as a Fabre defendant on the verdict form. A more reasoned approach intimated by the Second District in

Clark is that the defendant has the burden of pleading and proving negligence of an identifiable although nameless tortfeasor. If the defendant satisfies its burden by identifying specific tortious acts by a specific person, the fact that that person's name is unknown should not prevent their inclusion on the verdict form.

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