SUBSEQUENT TORTFEASORS AND FABRE
by Ted Babbitt

A recent decision of the Second District is extremely important in considering who goes on the jury verdict form and who does not under Fla. Stat. 768.81. Beverly Enterprises-Florida, Inc. v McVey, 24 F.L.W. D1840 (Fla. 2nd DCA, July 21, 1999) arose out of a nursing home action brought as a result of the death of a resident. According to the complaint, the decedent received various injuries over an extended period while a resident of a nursing home. He was transferred out of the nursing home because of his ill health and eventually died at a V.A. Hospital. The nursing home asserted in its affirmative defense that the injuries which caused the death resulted from the negligence of the V.A. Hospital and presented evidence to that effect at the trial. Over the plaintiff's objection, the Court permitted the jury to determine this issue. As a consequence, the jury concluded that the V.A. hospital was 61% responsible for the plaintiff's injuries and the trial court reduced the verdict accordingly. The appellate court reversed, concluding that it was error to place the hospital on the verdict form because the hospital did not constitute a joint tortfeasor under Fla. Stat. 768.81.

When the Supreme Court decided Fabre v Marin, 623 So.2d 1182 (Fla. 1993), receded from in part on other grounds in Wells v Tallahassee Memorial Regional Medical Center, Inc., 659 So.2d 249 (Fla. 1995), it changed the way personal injury cases were tried in Florida. It also created an enormous number of unanswered questions. Legions of cases have been decided as to who does and does not go on

the verdict form. Part of the problem is the uncertain language the Supreme Court used in interpreting Fla. Stat. 768.81.

> We are convinced that section 768.81 was enacted to replace joint and several liability with a system that requires each party to pay for noneconomic damages only in proportion to the percentage of fault by which that defendant contributed to the accident.

What constitutes an "accident?" What constitutes a "party?" Who is and is not an joint tortfeasor?" The Beverly-Enterprise case, supra, gives a clue to the answer to some of these questions.

In Stuart v Hertz Corp., 351 So.2d 703 (Fla. 1977), the Supreme Court confirmed the law of Florida that when a plaintiff is injured by a tortfeasor and then obtains medical care from a subsequent treating physician who also negligently injures the plaintiff, the original tortfeasor is responsible for all of plaintiff's damages including those caused by the subsequent treater. The original tortfeasor having created the circumstances by which the plaintiff receives medical treatment is responsible not only for the injuries created by his own negligence but for injuries which naturally flow from the original injury.

In the Beverly Enterprises case under discussion, plaintiff's death was actually caused by the treatment at the V.A. hospital but the Court concluded that the nursing home, as the original tortfeasor, was responsible for that death because it created the

circumstances under which plaintiff's decedent received that treatment. The Court held:

> Thus, section 768.81, Florida Statutes (1993), and *Fabre* are limited to incidents involving joint tortfeasors. *See J.R. Brooks & Son, Inc. v Quiroz,* 707 So.2d 861 (Fla. 3rd DCA 1998). The V.A. Hospital is not a joint tortfeasor with Beverly, but rather is a subsequent or successive independent tortfeasor. *See Stuart v Hertz Corp.,* 351 So.2d 703 (Fla. 1977). Therefore, McVey was entitled to recover the entirety of his damages from Beverly, the initial tortfeasor. *See Keith v B.E.W. Ins. Group, Inc.,* 595 So.2d 178 (Fla. 2nd DCA 1992).

This is an extremely important decision. It applies not only to subsequent treating physicians but to subsequent tortfeasors of any kind. Plaintiffs who receive an initial injury and then are reinjured in a subsequent accident or whose injuries are aggravated or enhanced by some subsequent incident may be able to utilize this case as authority for the proposition that the individuals or entities which caused the aggravation or subsequent injury cannot be placed on the jury verdict form as a Fabre defendant because they simply are not joint tortfeasors. The logic of that position is compelling based upon this short but important decision.

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