NORTH CAROLINA CONSIDERS CHANGE FROM CONTRIBUTORY NEGLIGENCE TO COMPARATIVE FAULT

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North Carolina is one of only five jurisdictions that retain the doctrine of contributory negligence, along with Alabama, Maryland, Virginia, and the District of Columbia. In those five jurisdictions, a plaintiff whose own negligence contributes even one percent to his injury is barred from recovering any damages against potential defendants. The other 46 jurisdictions have departed from the harshness of contributory negligence by adopting some form of comparative fault in which damages are allocated among the plaintiff and defendants according to their respective fault. North Carolina’s legislators are currently considering the implementation of comparative fault.

In March 2009, both of North Carolina’s General Assembly bodies introduced bills (House Bill 813 and Senate Bill 679) recommending the adoption of the Uniform Apportionment of Tort Responsibility Act (UATRA). The National Conference of Commissioners on Uniform State Laws drafted the UATRA in 2002 in an attempt to create a uniform comparative fault model. If North Carolina adopts UATRA, it will be the first state to do so, and the proposed legislation would revolutionize North Carolina tort law by ending contributory negligence, adopting comparative fault, and modifying joint and several liability. This alert will briefly highlight five effects of a change from contributory negligence to comparative fault.

1. Under North Carolina’s traditional rule of contributory negligence, the harsh reality is that one percent negligence by the plaintiff is a complete bar to recovery. Conversely, in thirteen states, “Pure” comparative fault bars recovery only if the plaintiff is 100 percent at fault. In a “Pure” jurisdiction, if damages total $100 and the plaintiff is 99 percent at fault, the plaintiff can still collect $1. The remaining 33 states have adopted a “modified” comparative fault, which bars recovery if the plaintiff’s fault exceeds a certain threshold. In 21 states, recovery is barred if plaintiff’s fault is “greater than” 50 percent. In 12 states, recovery is barred if plaintiff’s fault is “equal to or greater than” 50 percent. The North Carolina bills propose to bar recovery when the plaintiff’s fault is “greater than” 50 percent.

2. As do the other contributory negligence jurisdictions, North Carolina currently has a joint and several liability system, where the plaintiff can recover all damages awarded from any liable defendant, even if that defendant was only partly at fault. Similar to most states that have adopted comparative fault, the North Carolina bills propose the elimination of joint and several liability so that defendants are liable only for the percentage of

1. House Bill 813 – Primary Sponsors: Rick Glazier (D), John Blust (R), Deborah Ross (D), and Bonner Stiller (R), and Co-Sponsors: Bill Faison (D), Pricey Harrison (D), Marvin Lucas (D), and Nick Mackey (D)
2. Senate Bill 679 – Primary Sponsor: Peter Brunstetter (R), and Co-Sponsors: Daniel Clodfelter (D), Fletcher Hartsell, Jr. (R), John Snow (D), Josh Stein (D), and Richard Stevens (R).
3. The UATRA drafters included North Carolina Court of Appeals Judge James A. Wynn, Jr.
4. “Pure” Comparative Fault jurisdictions include Alaska, Arizona, California, Florida, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, New York, Rhode Island, South Dakota, and Washington.
6. Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, Nebraska, North Dakota, Oklahoma, Tennessee, Utah, and West Virginia.
7. Comparative fault states retaining joint and several liability: Delaware, Maine, Massachusetts, and Rhode Island.
damages proportionate to the fault attributed. Nevertheless, most comparative fault jurisdictions do recognize some exceptions to the general rule of several liability, and the exceptions proposed in the North Carolina bills include: 1) parties acting in concert or with intent to cause harm, 2) a party fails to prevent another from intentionally causing harm, and 3) if a party is found liable for the act of another (i.e. vicarious liability or respondeat superior).

3. Due to the right to collect all damages from one co-defendant, North Carolina plaintiffs are not currently concerned with the insolvency of a co-defendant, but if joint and several liability is abolished, plaintiffs will bear the full burden of co-defendant insolvency in a “Pure” several liability system. For example, with “Pure” several liability, if an insolvent defendant is 80 percent at fault and the solvent defendant is 20 percent at fault, the plaintiff will recover only 20 percent of the damages. The North Carolina bills attempt to address this inequity by shifting the risk of a co-defendant’s insolvency from the plaintiff to the solvent co-defendants. The bills provide that the plaintiff may move the court to determine whether a co-defendant’s share is collectible. If a share is not reasonably collectible, the North Carolina court will reallocate the uncollectible share to the solvent parties, including the plaintiff and any released parties, based on each parties’ relative fault. When the plaintiff is not at fault, reallocation is essentially a system of joint and several liability.

4. The parties included in the allocation of damages vary throughout the comparative fault jurisdictions. At the pro-defendant end of the spectrum, where allocation is among parties and non-parties, defendants may be able to diminish their liability by shifting the blame to alleged tortfeasors who are unnamed. Conversely, at the pro-plaintiff end, where allocation is confined to parties, the defendant, not the plaintiff, has the burden of joining the third party or pursuing the non-party for contribution. The North Carolina bills attempt an equitable allocation by allocating fault among the current parties and released parties.

5. As with co-defendant insolvency, North Carolina plaintiffs are not currently concerned with how prior settlements impact recovery. Under the current joint and several system, a settlement amount is simply deducted from the total amount awarded at trial. For example, if plaintiff settles with defendant-1 for $10, proceeds to trial against defendant-2, and obtains a verdict for $100 in which the jury apportioned 50 percent fault to each defendant, the plaintiff can collect $90 from defendant-2, recovering $100. However, under North Carolina’s proposed comparative fault system which includes released parties when considering the allocation of damages, a settlement with one co-defendant could be detrimental to a plaintiff’s recovery at trial. In the above scenario where plaintiff settles with defendant-1 for $10 and obtains a verdict for $100 in which the jury apportioned 50 percent fault to each defendant, the plaintiff can only collect $50 from defendant-2, recovering just $60.

If adopted, House Bill 813 and Senate Bill 679 will dramatically alter tort litigation in North Carolina and end the doctrine of contributory negligence in this state. House Bill 813 was referred to the Judiciary I committee on March 26, 2009, and Senate Bill 679 was referred to the Judiciary I committee on March 19, 2009. If ratified, the new law would apply to all actions originally filed on or after January 1, 2010.