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March 13, 2008

Senator Andrew J. McDonald
Senator Michael P. Lawlor
Co-Chairs, Senate Judiciary Committee
300 Capitol Avenue, Hartford, CT 06106.

Dear Senators:

I am a Vice President of the Connecticut Defense Lawyers Association, a statewide organization of over 250 attorneys primarily engaged in the representation of defendants in civil actions. I authored the *amicus curiae* brief on behalf of the CDLA in the 2007 Viera v. Cohen decision of the Supreme Court. I strongly support Raised Bill No. 640 which would allow the liability of a defendant against whom a plaintiff has withdrawn to be apportioned with remaining defendants.

In 1986 and 1987 this legislature took decisive steps to eliminate what it considered to be the inequitable consequences of the common law "joint and several" doctrine in what were called, respectively, Tort Reform I and Tort Reform II. The "joint and several" doctrine provided that a plaintiff could select which of any defendant whose negligence contributed to the plaintiff's injuries would bear the burden of paying the entire amount of the plaintiff's damages. Thus a defendant who was only 1% at fault would be liable, entirely at the plaintiff's discretion, to pay all of the damages. Through Tort Reform I and II the legislature ameliorated the harsh effect of "joint and several" liability wherein the plaintiff could collect the entirety of the judgment from the richest defendant or from the defendant with the deepest pocket¹ by pursuing a framework in which each defendant was responsible only for his or her percentage of liability.

Since the original legislation in 1986 the legislature has calibrated the overall statutory scheme by enacting changes to Genl. Stat.s §52-572h in 1988 (P.A. 88-364, § 69); 1999 (P.A. 99-69, § 1) and in 1995 by providing for a definitive method to secure apportionment through the passage of Genl. Stat.s §52-102b. These changes have been designed to insure the efficient administration of a system of tort recovery in which a defendant bears only proportional responsibility for a plaintiff's damages, that is, that a defendant pays only that portion of a plaintiff's damages that reflects the degree of fault imputed to them by a jury.

¹ Viera v. Cohen, 283 Conn. 412, 422 (2007)

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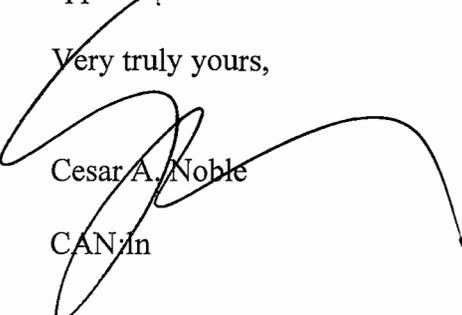
The Supreme Courts' decision in Viera illuminates a remaining "legislative gap," as the Court called it, which renders ineffective the complex statutory scheme designed to obtain proportional responsibility. With few exceptions the current framework permits apportionment of liability only among parties to the law suit. Genl. Stat.s §52-572h(c) Genl. Stat.s §52-102b permits a defendant to bring in a non-party by serving an apportionment complaint against that non-party whom the plaintiff elected not to sue. This, however, can be done only if the apportionment complaint is brought within 120 days of the return date of the original complaint. §52-102b(c) and §52-572h(n) provide for the consideration of non-parties' negligence only if the plaintiff has settled with or released that person.

The Supreme Court in Viera held that the statutory scheme does not take into consideration a case in which the plaintiff originally sues a party and then simply withdraws against that party, after the 120 day mandatory period, without settling or releasing any claims that a plaintiff may have against them. Such a "withdrawal motivated by trial strategy", as it was described by the dissenting opinion in Viera, circumvents the entire rationale of Tort Reform I and II and results in a reversion to the infirmity inherent under the old "joint and several" liability doctrine. Now, as before, a plaintiff may, entirely within his or her discretion, select which defendant among liable defendants will pay all of their damages.

I do not believe that the act would create an unworkable procedural scheme that forces plaintiff's to unwilling litigate claims of weak liability which in turn would require marginal and costly litigation. In the first instance there no obligation is imposed on a plaintiff to initially sue any party that they think is not liable. If a defendant apportions into the case such a party the plaintiff still retains the right not to directly sue that party. As Justice Palmer wrote in his dissent in Viera, this argument "fails to explain how permitting a plaintiff to withdraw an action against some but not all of the defendants, many years into the proceedings, appreciably further a legislative policy of avoiding 'marginal and costly litigation.'" Viera v. Cohen, 283 Conn. at 471.

Raised Bill No. 640 felicitously fills the gap surely unintended by this body and I strongly support the Bill. I presume to point out that the amendments to Genl. Stat.s §52-102b should also be reflected in §52-572h(n) as the latter statute, although complimented by the former, is the primary vehicle by which apportionment is effected.

Very truly yours,



Cesar A. Noble

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