CONNECTICUT TRIAL LAWYERS ASSOCIATION

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Raised Bill 1073
Public Hearing: 3-4-11

TO: MEMBERS OF THE JUDICIARY COMMITTEE
FROM: CONNECTICUT TRIAL LAWYERS ASSOCIATION (CTLA)
DATE: MARCH 4, 2011

RE: OPPOSITION TO RAISED BILL 1073

The Connecticut Trial Lawyer's Association ("CTLA") respectfully opposes Raised Bill Number 1073, "An Act Concerning Apportionment Complaints". The CTLA respectfully submits that this proposed legislation creates an unjust and unworkable procedural scheme, forces plaintiffs to unwillingly litigate claims of weak liability, thereby fostering marginal and costly litigation, and lastly serves to abrogate the plaintiff's absolute right to withdraw a claim against any party prior to the commencement of evidence as permitted by Connecticut General Statute § 52-80.

I. Background – Applicable Statutes and Relevant Caselaw

A. *C.G.S. § 52-572h*

Historically, Connecticut adhered to the common law doctrine of joint and several liability. Pursuant to that doctrine, any defendant could be held liable for the entirety of the damages claimed by the plaintiff, regardless of the percentage of fault attributed to that defendant.

As part of the "Tort Reform" legislation of 1986 and 1987, Connecticut adopted the doctrine of proportionality by enacting Connecticut General Statute § 52-572h. That statute requires a jury, at the conclusion of a trial, to determine each defendant's percentage of negligence for the damages claimed. Significantly, negligence can only be apportioned to parties to the action, or to "settled or released persons". A jury is not entitled to apportion any percentage of negligence to a party against whom the plaintiff has withdrawn, or against a person who is not a party to the action.

These apportionment provisions were adopted in 1987 as part of the Tort Reform II legislation which was passed to remedy the unworkable consequences of the Tort Reform I legislation. Under Tort Reform I, liability was apportioned to all persons, even persons who were not a party to the action. The undesired practical effect of Tort Reform I was that plaintiffs were required to unwillingly litigate claims of weak liability against any potentially culpable party, thereby fostering marginal and costly litigation in our courts. The current apportionment statute, as amended by the Tort Reform II legislation, corrected these unintended consequences by limiting apportionment to only parties and settled and released persons.

B. *C.G.S. § 52-80*

Also relevant to the issues at hand is Connecticut General Statute § 52-80. Connecticut General Statute § 52-80 affords to the plaintiff an unfettered and absolute right to withdraw any claim against any defendant at any time in the action, provided that it is withdrawn before the commencement of a hearing on the merits.

C. *C.G.S. § 52-102b and Conn. Prac. Bk. § 10-10*

The Connecticut General Statutes and the Connecticut Practice Book also provide significant procedural mechanisms to the defendant for purposes of ensuring the doctrine of proportionality. First, pursuant to the apportionment statute, C.G.S. § 52-102b, a defendant may add a person to an action, not named in the original Complaint, by filing an Apportionment Complaint against that person within 120

days of the plaintiff's return date. That person, who is then referred to as an apportionment defendant, is a party for all purposes, including apportionment purposes under § 52-572h. Likewise, if a defendant intends to assert a claim against a codefendant who is already a party to the action, Connecticut Practice Book § 10-10 provides a procedural mechanism whereby one defendant may file a cross claim against another defendant, thereby ensuring that the defendant remains in the action as a cross claim defendant, even if the plaintiff withdraws the first party claim against that defendant. Thus, while defendants may choose not to cross claim against codefendants because of appearance and trial strategy concerns, nevertheless, the procedural mechanism does exist for one defendant to ensure that if the plaintiff does withdraw against another defendant, that withdrawn defendant remains in the action by virtue of the cross claim.

D. *Viera v. Cohen, et al., 283 Conn. 412 (2006)*

Lastly, in the recent case of *Viera v. Cohen*, 283 Conn. 412 (2006), the Connecticut Supreme Court confirmed that a party against whom the plaintiff has withdrawn does not constitute a party for purposes of apportionment. Likewise, the party against whom the plaintiff has withdrawn does not constitute a settled or released person, as said terms are used within Connecticut General Statute § 52-572h. Accordingly, a jury is not permitted to apportion liability to a party against whom the plaintiff has withdrawn.

II. Discussion

A. *The proposed legislation resurrects the unworkable consequences of Tort Reform I, forcing plaintiffs to unwillingly pursue marginal litigation, and preventing withdrawals of claims against non-culpable defendants.*

In order to properly protect the interests of a victim injured by the negligence or wrongdoing of another, an attorney frequently is required to name several defendants at the commencement of the action in order to ensure that no rights are lost through the expiration of the statute of limitations. As the attorney conducts discovery, the factual circumstances underlying the claim are clarified and defined, and a determination is made as to which of the original defendants are the culpable parties. At this juncture, the attorney has an ethical obligation to release the defendants whom he or she believes are not liable by withdrawing the Complaint as to those defendants. In this regard, litigation is streamlined, and parties are released from litigation, thereby limiting defense costs, shortening jury selection and trials, and reducing the burden on our Courts.

In the *Viera* case cited above, the plaintiff had initially brought suit against three groups of defendants. The plaintiff withdrew the action as to Waterbury Hospital several months before trial. Likewise, the plaintiff withdrew as to the defendant Cohen more than a month before the commencement of trial. Thus, at the time of trial, there was only one defendant. This is a typical example of a medical malpractice case which was originated against three defendants, but where only one defendant was ultimately present at the time of trial.

The proposed legislation would force a plaintiff to keep all defendants in the litigation through the time of trial. The plaintiff could not withdraw against a defendant for fear that a jury would apportion liability to a withdrawn defendant, thereby preventing the victim from receiving full compensation for his injuries. Many actions, such as medical malpractice actions, can involve several weeks of jury selection, as well as several weeks of evidence, leading to the regrettable conclusion that a marginal defendant would be required to incur extensive litigation costs, even where the plaintiff does not want to pursue the litigation against that defendant. This result would be a consequence of the proposed litigation, if defendants were allowed to apportion liability to defendants against whom the plaintiff had withdrawn.

B. *The defendants are fully and adequately protected by the current statutory and procedural scheme.*

At first blush, it may appear that defendants are left without recourse when a plaintiff withdraws a claim against a co-defendant shortly before the commencement of trial. Defendants no doubt will argue that the 120 day period under the apportionment statute has typically expired at the time of the withdrawal and therefore, the defendant is left without any procedural mechanism by which to apportion liability to the party against whom the plaintiff has withdrawn.

Upon closer analysis, however, the defendants' argument fails scrutiny. Very simply, the defendants do have the procedural mechanism necessary to ensure that a co-defendant remains a party to the litigation, even after the plaintiff withdraws a first party complaint against that defendant. Specifically, Connecticut Practice Book § 10-10 specifically provides that a defendant may file a cross claim against any other defendant, who the first defendant feels is culpable for the subject claim. Defendants rarely take advantage of this procedural mechanism for reasons of appearance and trial strategy. They prefer to present a unified front in defending against the plaintiff's claims, thereby deriving a perceived advantage from their unity.

However, in view of such strategic decisions, defendants should not be heard to complain, under circumstances where the plaintiff chooses to withdraw against one defendant. This is because, in the first instance, defendants knowingly and deliberately choose not to file a cross claim against co-defendants. If a cross claim had been filed, that codefendant, as to whom a withdrawal was filed by the plaintiff would remain a defendant to the action.

C. *The proposed legislation simply is not necessary.*

Setting aside the procedural arguments, in very basic terms, the proposed legislation simply is not necessary. The plaintiff derives no benefit from filing a withdrawal against a defendant, if the plaintiff deems that the defendant bears any responsibility for the subject case. Very simply, the plaintiff would not abandon meritorious claims. In this regard, it is important to distinguish between a withdrawal, whereby the plaintiff voluntarily withdrawals the action without any compensation, and a settlement and a release, whereby the defendant actually pays money to the plaintiff in return for the withdrawal of the action. Under the latter situation, the apportionment statute specifically provides for the apportionment of negligence to the settled or released party.

D. *The proposed legislation creates an unworkable procedural mechanism.*

Pursuant to the proposed legislation, a defendant would not be required to file an Apportionment Complaint, a Notice of Apportionment, or any other pleading against a party against whom the plaintiff has withdrawn. Nevertheless, the proposed legislation indicates that a jury would be entitled to apportion liability against that withdrawn party. Such a scheme creates an unworkable mechanism for the Court. Very simply, the Complaint or Cross Complaint defines the nature of the claim, and creates parameters by which evidence is admitted during the course of the trial. Likewise, the Complaint or the Cross Complaint also provides the road map by which the Judge charges the jury at the conclusion of the case.

Under the proposed legislation, the jury would be asked to apportion liability to a party against whom no pleading has been asserted. Accordingly, it would be impossible for a trial judge to determine what evidence can or cannot be admitted against that party, given that no pleading has been filed against that party. Likewise, presumably no experts have been disclosed against that party by the co-defendant seeking apportionment. How would a plaintiff defend against such claims? Presumably, in view of the withdrawal, the plaintiff would believe that the party had no liability and would disagree with the codefendants attempts to apportion liability to that party. In short, allowing a jury to apportion liability to a withdrawn party, without any of the other necessary and appropriate procedural mechanisms in place, such as a proper pleading defining the claim, or the proper disclosure of experts, would create an unfair, unworkable, and unjust system, depriving the trial court of the necessary means to adjudicate the claims, and unfairly disadvantaging the plaintiff.

III. Conclusion

In conclusion, for all of the foregoing reasons, the CTLA respectfully submits that the proposed legislation has serious substantive and procedural flaws, and should not be passed. From the standpoint of both public policy and trial practice and procedure, the proposed legislation would create an unworkable morass.

If a defendant truly believes that a codefendant is responsible for the claims of the plaintiff, then there are mechanisms in place whereby the codefendant can present a cross claim against that defendant, thereby ensuring that the defendant is present at the time of jury apportionment. The CTLA would be willing to discuss with any group or organization proposed revisions to the current statutes to make the cross claim provisions of the Practice Book more accessible to the defendants. In this regard, any concerns that the defense bar currently has subsequent to the *Viera* decision would be addressed.

WE RESPECTFULLY URGE YOU TO DEFEAT RAISED BILL 1073. Thank you.