

**IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA**

CASE NO. CACE24005465 DIVISION: 05 JUDGE: Bidwill, Martin J. (05)

Honore Anderson

Plaintiff(s) / Petitioner(s)

v.

GREGORY TONY, as Sheriff of Broward County

Defendant(s) / Respondent(s)

**ORDER GRANTING MOTION TO STRIKE AFFIRMATIVE DEFENSE NUMBER 2, IN
PART**

THIS CAUSE has come before the Court upon the Plaintiff's Motion to Strike Defendant Gregory Tony's Affirmative Defense Number 2.

This case involves a lawsuit arising out of an automobile accident which occurred on February 6, 2023, wherein it is alleged Plaintiff sustained injuries. In Florida's recent Tort Reform Legislation, HB 837 was enacted into law, becoming effective on March 24, 2023. Plaintiff filed his lawsuit on April 19, 2024. The text of HB 837 specifically states that, "Except as otherwise expressly provided in this act, this act shall apply to all causes of action filed after the effective date of this act." The plaintiff's lawsuit was filed after the effective date of the new statute and the defendant seeks to assert protections provided for within this new law.

Plaintiff seeks to strike Defendant's Affirmative Defense Number 2, to wit:

As his second affirmative defense, Defendant pleads comparative fault under Fla. Stat. 768.81 and otherwise under law. Plaintiff Anderson Honore caused the subject accident. He failed to yield to Deputy Lester, who had deployed his emergency sirens and lights at the time of the subject accident. As Plaintiff was the negligent party, any damages awarded herein should be apportioned in accordance with the terms of the statute and based upon the fault of any and all persons or entities who are or may be at fault for the Plaintiff's damages, if any. Plaintiff's recovery must be reduced and/or barred in accord with Florida's comparative fault law, as Plaintiff caused the subject accident by failing to yield to an emergency vehicle. Furthermore, Plaintiff was

more than 50% at fault for the subject accident and due to this negligence is unable to recover any damages whatsoever under Fla. Stat. § 768.81(6).

The defendant seeks in the final sentence of Affirmative Defense 2 (as well as with certain language in the second to last sentence) to rely on the portion of HB 837 codified at Fla. Stat. §768.81(6), which now serves to bar recovery for negligence where the plaintiff is found to be more than 50% at fault. The plaintiff seeks to strike this contributory negligence type defense on the ground that application of the defense to a cause of action which accrued prior to its enactment would be unconstitutional.

In analyzing the plaintiff's contention, this Court applies the Florida Supreme Court's well established two-part test to determine whether a statute can be applied retroactively. First, this court must determine whether the legislature intended for the statute to apply retroactively. Second, if the legislature expresses a clear intention to apply the statute retroactively, this court must then determine whether it would be unconstitutional to apply the statute that way. *Am. Optical Corp. v. Spiewak*, 73 So. 3d 120, 130 (Fla. 2011); *Menendez v. Progressive Express Ins. Co., Inc.*, 35 So. 3d 873, 877 (Fla. 2010). As the Florida Supreme Court noted in *Menendez*, "even where the Legislature has expressly stated that a statute will have retroactive application, this Court will reject such an application if the statute impairs a vested right, creates a new obligation, or imposes a new penalty." *Id.* "The statute must pass both parts of this test to be applied retroactively." *Fitchner v. LifeSouth Cmty. Blood Ctrs.*, 88 So. 3d 269, 279 (Fla. 1st DCA 2012). Thus, statutes are presumed to operate prospectively because retroactive operation of statutes can implicate due process concerns. *Metro. Dade Cnty. v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 499 (Fla. 1999); *Hassen v. State Farm Mut. Auto. Ins. Co.*, 674 So. 2d 106, 108 (Fla. 1996). Here, the plain language of the statute announced an intention to apply the statute to all causes of action filed after its effective date. Indeed, in prior rulings, the undersigned has rejected efforts to apply the new law to lawsuits filed before the effective date. The present motion raises a slightly different issue, as the lawsuit was filed after the effective date, but the plaintiff's cause of action accrued prior to the law's effective date.

Irrespective of the legislature's plain intent to have the new statute apply to lawsuits like this

filed after the statute's effective date, the statute cannot be applied here if doing so would violate the plaintiff's constitutional rights. After complete consideration, the Court finds that is what would occur if the new law were to be applied, and the Court finds, therefore, that the second prong of the *Spiewak* and *Menendez* two-part test cannot be satisfied. More specifically, in this case, Plaintiff's cause of action accrued on February 6, 2023, prior to the enactment of HB 837. As such, the plaintiff had a vested property right in this cause of action. The United States Supreme Court has clearly held that a cause of action is "a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). Similarly, the Florida Supreme Court has explained that "[o]nce [a defense] has accrued, it is protected as a property interest just as the plaintiff's right to commence an action is a valid and protected property interest." *Wiley v. Roof*, 641 So.2d 66, 68 (Fla.1994); *see also R.A.M. of South Fla., Inc. v. WCI Communities, Inc.*, 869 So.2d 1210, 1220 (Fla. 2d DCA 2004) ("[O]nce a cause of action has accrued, the right to pursue that cause of action is generally considered a vested right.").

Article I, section 2 of the Florida Constitution guarantees to all persons the right to acquire, possess, and protect property. Section 9 of the same Article provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, § 9, Fla. Const. Florida Courts will not apply a statute retroactively if it "impairs vested rights, creates new obligations, or imposes new penalties." *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 61 (Fla.1995); *see also McCord v. Smith*, 43 So.2d 704, 708–09 (Fla.1949) (noting that a retroactive provision of legislation is invalid where it adversely affects or destroys vested rights).

Here, the bar on recovery announced in the new Fla. Stat. §768.81(6) is unquestionably a substantive change. The law modified Florida tort law from a pure comparative fault model, where a plaintiff's own negligence reduces the damage award proportionally even if the plaintiff is more than 50% at fault, to the new law which completely bars any claim where the plaintiff is more than 50% at fault. Before the enactment of the law, this plaintiff could recover even if more than 50% at fault; after enactment of the law, this plaintiff cannot recover if more than 50% at fault. Such a change is

substantive. Accordingly, here, since Plaintiff's cause of action accrued before HB 837's enactment, the plaintiff already had a vested right in his cause of action, and application of the new §768.81(6) would substantially impair his vested rights, create new obligations, and impose new penalties. As such, application of §768.81(6) in this case would be unconstitutional.

Accordingly, having considered the motion and the record, it is hereby ORDERED and ADJUDGED that the Plaintiff's Motion to Strike Defendant Gregory Tony's Affirmative Defense Number 2 is GRANTED in part. The final sentence of Affirmative Defense 2, and the portion of the second to last sentence of Affirmative Defense 2 seeking to claim the plaintiff is "barred" from recovery are STRICKEN. The Court declines to strike the remaining portion of Affirmative Defense 2, as the defense asserts the viable defense of pure comparative fault to allow for the reduction of any damage award based upon the apportionment of fault between the plaintiff and the defendant.

DONE AND ORDERED in Chambers at Broward County, Florida on 25th day of January, 2025.


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Hon. Martin Bidwill
CIRCUIT COURT JUDGE
Electronically Signed by Martin Bidwill

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