

FLORIDA'S TORT REFORM ACT: KEEPING FAITH  
WITH THE PROMISE OF *HOFFMAN V. JONES*

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I. INTRODUCTION

Tort law addresses an elemental question: When is a citizen liable for the physical harm he accidentally causes?<sup>1</sup> The answer lies in the confluence of competing policy considerations, including the need to compensate injured victims, promote personal responsibility, encourage socially and economically productive conduct, and discourage irresponsible conduct. An overarching imperative is that the civil justice system, and the judiciary in general, be perceived as fair and responsive to common sense.

Early on, American common law adopted a fault-based tort system to accommodate the competing interests inherent in this area of

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1. See CHARLES O. GREGORY ET AL., *CASES AND MATERIALS ON TORTS* 47 (3d ed. 1977).

law. In 1843, a New York Superior Court judge described tort law's underpinnings in this way:

No case or principle can be found, or, if found, can be maintained, subjecting an individual to liability for an act done without fault on his part. All the cases concede that an injury arising from inevitable accident, or, which in law or reason is the same thing, from an act that ordinary human care and foresight are not able to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility.<sup>2</sup>

Equating liability with fault is a form of rough social justice where injured victims are compensated, but innocent actors are not victimized by liability they did not cause.

Unless my act is of a nature to threaten others, unless under the circumstances a prudent man would have foreseen the possibility of harm, it is no more justifiable to make me indemnify my neighbor against the consequences, than to make me do the same thing if I had fallen upon him in a fit, or to compel me to ensure him against lightning.<sup>3</sup>

Florida fully embraced fault-based tort compensation as early as 1899.<sup>4</sup> In the 1973 *Hoffman v. Jones* decision,<sup>5</sup> the Florida Supreme Court confirmed the primacy of a fault-based system: "In the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault."<sup>6</sup> The supreme court reaffirmed the *Hoffman* decision in *Fabre v. Marin*,<sup>7</sup> holding that "[t]here is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss."<sup>8</sup>

Historical anomalies and the intercession of competing judicial philosophies have eroded the core principles of a fault-based system and moved Florida away from the *Hoffman* ideal. The illicit union of joint and several liability with pure comparative fault<sup>9</sup> has resulted in instances where a plaintiff can receive damages even if ninety-nine percent at fault for his own injuries; yet, a defendant might well have to pay more than his fair share of a loss. The adoption of strict

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2. *Id.* at 73 (quoting Nelson, J., in *Laidlaw v. Sage*, 25 N.Y.S. 955, 958 (1893)).

3. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 96 (1881).

4. *See Florida Cent. & Penninsular R.R. Co. v. Foxworth*, 25 So. 338 (Fla. 1899) (holding, in part, that a widow may recover damages for the death of her husband caused by a railroad company's wrongful act).

5. 280 So. 2d 431 (Fla. 1973).

6. *Id.* at 438.

7. 623 So. 2d 1182 (Fla. 1993).

8. *Id.* at 1187 (quoting *Brown v. Keill*, 580 P.2d 867, 874 (Kan. 1978)).

9. *See* FLA. STAT. § 768.81(3) (1999), *amended by* the Tort Reform Act effective Oct. 1, 1999, ch. 99-225, § 27, 1999 Fla. Laws 1400, 1419.

product liability,<sup>10</sup> without a statute of repose, has meant that a seller of a product in Florida can be held liable for injuries arising from a product manufactured and first distributed fifty years ago without any proof of fault. Similarly, the absolute liability of an innocent automobile owner for damages caused by a driver has supplanted fault-based compensation with a distorted form of social welfare compensation without the efficiencies or fairness of no-fault insurance.<sup>11</sup>

Florida's Tort Reform Act<sup>12</sup> keeps faith with the spirit of *Hoffman v. Jones* that liability should equate with fault. The Tort Reform Act restores balance to a system that at times discourages productive conduct and encourages antisocial conduct. Moreover, the Act reaffirms Florida's adherence to the intrinsic fairness of fault-based tort compensation.

This Article demonstrates that the Florida Tort Reform Act is constitutional in every respect. The Act assiduously conforms to the Florida and Federal Constitutions and a generation of Florida Supreme Court precedent. After three years of intensive fact-finding and spirited legislative debate,<sup>13</sup> the Florida Legislature concluded that the Tort Reform Act will have a positive impact on Florida's economy; citizen productivity;<sup>14</sup> cost and availability of liability in-

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10. See *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976) (adopting a strict liability cause of action and holding that retailers and manufacturers can be held strictly liable for injuries suffered by a remote user of a product if the product was found to be "unreasonably dangerous").

11. See generally George L. Priest, *The Modern Expansion of Tort Liability: Its Sources, Its Effects, and Its Reform*, 5 J. ECON. PERSPS. 31, 35 (1991).

12. Ch. 99-225, 1999 Fla. Laws 1400.

13. See Fla. H.R. Comm. on Judiciary, HB 775 (1999) Staff Analysis (final June 2, 1999) (on file with comm.) [hereinafter HB 775 Staff Analysis].

Representative Tom Warner, Repub., Stuart, former Chair of the House Committee on Civil Justice & Claims, began hearings on tort reform in September, 1997. The 1998 Legislature passed tort reform legislation, which Governor Lawton Chiles later vetoed.

During tort reform debates during the 1999 Legislative Session, the Legislature reviewed, among other things, research from Stanford University and reports compiled by Yale law professor George Priest and economist Hank Fishkind to draft the Tort Reform Act. See THOMAS J. CAMPBELL ET AL., *LIABILITY REFORMS' CAUSES AND ECONOMIC IMPACTS: SOME EMPIRICAL EVIDENCE* 27 (Center for Econ. Policy Research, Stanford University, 1994) (analyzing the economic performance of industries in states with tort reform legislation to determine that tort reform increases economic productivity) (on file with author); see also HENRY H. FISHKIND, *EXECUTIVE SUMMARY: ECONOMIC EFFECTS OF TORT REFORM ON FLORIDA'S ECONOMY* (1997); George L. Priest, *Products Liability Law and the Accident Rate*, in *LIABILITY: PERSPECTIVES AND POLICY* 184 (1997).

14. See CAMPBELL ET AL., *supra* note 13 (concluding that tort reform, which reduces liability, increases economic productivity and improves the overall economy); HB 775 Staff Analysis, *supra* note 13, at 20-21 ("[The legislation] could also enhance the success and growth of small business in Florida, the source of most new employment. In addition, business cost savings should enhance the affordability of goods and services for all Floridians.").

insurance<sup>15</sup> and the development of new, safer products.<sup>16</sup> The legislature further concluded that the Tort Reform Act would enhance public safety while demanding personal responsibility and would ensure fair and just compensation for accident victims.<sup>17</sup>

In Part II, this Article discusses the complementary roles of the legislature and judiciary in adapting tort law to meet the needs of all Florida citizens. Part III explains the vital role of the stare decisis doctrine in the Florida Supreme Court's ultimate determination as to the constitutionality of the Act. Part IV illuminates the constitutional underpinnings of each of the major reforms adopted by the Florida Legislature. Finally, this Article concludes that the Tort Reform Act is a constitutionally valid reform package that provides common sense, predictability, and balance to Florida's civil justice system.

## II. THE COMPLEMENTARY ROLES OF THE LEGISLATURE AND THE JUDICIARY IN CREATING TORT LAW

Florida's tort system is a product of cooperation and respect between the judiciary and the legislature. Traditionally, the judiciary has deferred to the legislature to make the policy choices underlying the civil justice system.

The lawmaking function is the chief legislative power. This function involves the exercise of discretion as to the contents of a statute, its policy or what it shall be. . . . The judicial branch is constitutionally forbidden from exercising any powers appertaining to the legislative branch and will not suggest a solution to this sensitive problem.<sup>18</sup>

Thus, in *Walt Disney World v. Wood*,<sup>19</sup> the Florida Supreme Court declined to abolish joint and several liability, concluding that the legislature could more effectively determine whether the state's public policy required a change.<sup>20</sup>

15. See generally *Smith v. Department of Ins.*, 507 So. 2d 1080 (Fla. 1987) (discussing the relationship between tort reform and the cost and availability of commercial liability insurance).

16. See Victor E. Schwartz et al., *Illinois Tort Law: A Rich History of Cooperation and Respect Between the Courts and the Legislature*, 28 LOY. U. CHI. L.J. 745, 746 (1997) (discussing the fact that effective tort law removes truly defective products from the marketplace).

17. See HB 775 Staff Analysis, *supra* note 13, at 21; see also Schwartz et al., *supra* note 16, at 745 (discussing the practical effects of tort law).

18. *State v. Barquet*, 262 So. 2d 431, 433 (Fla. 1972) (citations omitted); see also *State v. Ashley*, 701 So. 2d 338, 343 (Fla. 1997); *Hamilton v. State*, 366 So. 2d 8, 10 (Fla. 1978); *Moore v. State*, 343 So. 2d 601, 603-04 (Fla. 1977); *Adams v. Sutton*, 212 So. 2d 1, 3 (Fla. 1968); *McNayr v. Kelly*, 184 So. 2d 428, 430 n.6 (Fla. 1966).

19. 515 So. 2d 198 (Fla. 1987).

20. See *id.* at 202. The Florida Supreme Court has consistently recognized that policy decisions belong with the legislature. "[A]t the heart of the issue lies a policy question

On occasion, however, when many years of "great social upheaval" compel it, the court will adopt new tort law concepts, as it did when it moved Florida closer to a true fault-based system in *Hoffman v. Jones*.<sup>21</sup>

The noblest example of comity between the branches of government in fashioning Florida's civil justice system is found in the adoption of the FLORIDA EVIDENCE CODE.<sup>22</sup> Prompted by the formulation of a new federal evidence code and lingering inequities in Florida's code, the Florida Legislature adopted a new code in 1976.<sup>23</sup> Opponents challenged its constitutionality, arguing that it encroached on the Florida Supreme Court's rulemaking authority.<sup>24</sup> The issue was difficult, because evidence rules have both procedural and substantive components to them.<sup>25</sup> Rather than ignore and negate the substantive policy choices made by the legislature, the court avoided the constitutional clash by adopting the changes as rules of procedure.<sup>26</sup>

The Tort Reform Act provides that if any legislative provision is procedural, the Court should construe those provisions as requests for rule changes rather than legislative mandates.<sup>27</sup> Florida's citizens and the civil justice system have benefited from this cooperative spirit between the judicial and legislative branches.

#### A. Tort Compensation and the Legislative Process

Tort law has a profound impact on the state's social, moral, and economic fabric.<sup>28</sup> Courts and commentators agree that the legislative process is best suited to analyze and create comprehensive reform in tort compensation.<sup>29</sup> "How society chooses to compensate its tort vic-

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which calls for a delicate balancing of societal needs and individual concerns more appropriately accomplished by the legislature." *State v. Powell*, 497 So. 2d 1188, 1194 (Fla. 1986).

21. 280 So. 2d 431, 435-36 (Fla. 1973) (recognizing that many years of "great social upheaval" in the tort arena required the court to abandon the doctrine of contributory negligence in favor of comparative negligence).

22. The FLORIDA EVIDENCE CODE is codified in chapter 90, *Florida Statutes* (1999).

23. See Act effective July 1, 1977, ch. 76-237, 1976 Fla. Laws 556.

24. See *In Re Florida Evidence Code*, 372 So. 2d 1369, 1369 (Fla. 1979).

25. See *id.*

26. See *id.* at 1369-70.

27. See ch. 99-225, § 34, 1999 Fla. Laws 1400, 1428:

It is the intent of this act and the Legislature to accord the utmost comity and respect to the constitutional prerogative of Florida's Judiciary, and nothing in this act should be construed as any effort to impinge upon those prerogatives. To that end, . . . the Legislature hereby declares its intent that any such provision be construed as a request for rule change. . . . and not as a mandatory legislative directive.

28. See HB 775 Staff Analysis, *supra* note 13, at 21; see also CAMPBELL ET AL., *supra* note 13; Schwartz et al., *supra* note 16, at 746 (discussing the profound impacts that tort law has on society).

29. See *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("Legislative bodies have broad scope to experiment with economic problems."); see also FLA. CONST. art. III (discussing the

tims is a matter of public policy, shaped by interested parties on all sides of the issue.”<sup>30</sup> The legislature provides the only governmental forum sufficiently broad-based, inclusive, and well-staffed to analyze, discuss, and accommodate the many complex issues involved in such a debate.<sup>31</sup>

The Florida Legislature relied upon these institutional strengths in passing the Tort Reform Act. Legislators gathered mountains of information from a broad range of sources, entertained comments from a diverse group of citizens and interests, reviewed cumulative data and surveys, and decided to experiment with new ideas to improve the tort system.<sup>32</sup> Furthermore, the legislature conducted its reform work in the public arena—subject to public scrutiny—lending legitimacy and fairness to the process.<sup>33</sup>

### B. *The Incremental Nature of Judge-Made Law*

As the Florida Supreme Court has noted, “of the three branches of government, the judiciary is the least capable of receiving public input and resolving broad public policy questions based on a societal

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scope of the legislative power); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423-25 (1952) (stating that legislatures have constitutional authority to experiment with new techniques in “business, economic, and social affairs”); *State v. Ashley*, 701 So. 2d 338, 343 (Fla. 1997) (noting that “the making of social policy is a matter within the purview of the legislature.”); Schwartz et al., *supra* note 16, at 750-53 (“The rationale for legislative pre-eminence in deciding public policy relates to the inherent strengths of the legislative process.”); Victor E. Schwartz et al., *Who Should Make America’s Tort Law: Courts or Legislatures?*, in ORIGINAL PAPERS SERIES 13 (Washington Legal Found. ed. 1997) (“Broad and complex tort policy issues . . . are more appropriately left to legislatures, because of their ability to hear from a wide array of witnesses and create prospective rules of law.”) [hereinafter Schwartz et al., *America’s Tort Law*].

30. John E. Muench & Robert M. Dow, Jr., *When Judicial Activism Trumps Tort Reform: The Illinois Experience*, in CRITICAL LEGAL ISSUES: WORKING PAPER SERIES NO. 85, 14 (Wash. Legal Found. 1998); see also *McNayr v. Kelly*, 184 So. 2d 428, 430 n.6 (Fla. 1966) (“Historically, the Legislature draws the fine lines between lawful and unlawful conduct and between acts which are the basis for actions for damages.”) Florida’s legislature was the first to create the state’s tort law. See Schwartz et al., *America’s Tort Law*, *supra* note 29, at 3:

Legislatures, not courts, were the first to create state tort law. . . . [L]egislators *delegated* to state courts the authority to develop the English Common Law in accordance with the “public policy” of the state [via legislation known as a “reception statute”] . . . . Early state legislatures delegated the task of developing tort law to state judiciaries [through these reception statutes].

Florida’s reception statute is codified at section 2.01, *Florida Statutes* (1999).

31. See Schwartz et al., *supra* note 16, at 750-53; Schwartz et al., *America’s Tort Law*, *supra* note 29, at 13; see also *State v. Ashley*, 701 So. 2d 338, 343 (Fla. 1997) (Harding, J., concurring) (indicating that policy, social, and moral issues are for legislative, not judicial, determination); *State v. Powell*, 497 So. 2d 1188, 1194 (Fla. 1986) (discussing the legislature’s primary role in policy decisions).

32. See HB 775 Staff Analysis, *supra* note 13, at 21.

33. See Schwartz et al., *supra* note 16, at 751-53; Schwartz et al., *America’s Tort Law*, *supra* note 29, at 7-10.

consensus."<sup>34</sup> Courts make decisions based on the individual facts of a case and fashion a remedy to address particular litigants' needs.<sup>35</sup> The judiciary's role in creating policy is usually incremental, filling in the interstices of common-law principles or legislative acts. Absent great social upheaval or overwhelming need, the judiciary leaves substantive civil justice reform to the legislature.<sup>36</sup>

Accordingly, courts usually defer to legislative policy decisions, especially those affecting economic and business affairs like those underlying the Tort Reform Act.<sup>37</sup>

Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation.

. . . .

. . . We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.<sup>38</sup>

Florida courts have followed this deferential standard when asked to review legislation.<sup>39</sup> The judiciary presumes that legislative enactments are valid, and courts will construe statutes to avoid conflict

34. *Ashley*, 701 So. 2d at 343.

35. See Schwartz et al., *supra* note 16, at 751-53; see also Richard Pierce, *Institutional Aspects of Tort Reform*, 73 CAL. L. REV. 917, 922-31 (1985) (discussing limitations imposed on the judiciary's ability to adequately reform the tort litigation system); Schwartz et al., *America's Tort Law*, *supra* note 29, at 7-10, 13-14.

36. See *Walt Disney World v. Wood*, 515 So. 2d 198, 202 (Fla. 1987).

37. See, e.g., *id.* (deferring to the legislature's determination regarding the apportionment of damages under joint and several liability); *Day-Brite Lighting, Inc., v. Missouri* 342 U.S. 421, 425 (1952) (holding that courts should leave "debatable issues as respects business, economic, and social affairs" to legislative determination).

38. *Ferguson v. Skrupa*, 372 U.S. 726, 729-30 (1963); see also Kahn v. Shevin, 416 U.S. 351, 356 n.10 (1974). One commentator summarizes the policy as follows:

When the legislature has declared, by law, the public policy of the State, the judicial department must remain silent, and if a modification or change of such policy is desired, "the law-making department must be applied to, and not the judiciary, whose function is to declare the law but not to make it."

Schwartz et al., *America's Tort Law*, *supra* note 29, at 13-14, 25-26 (quoting *Roanoke Agency, Inc. v. Edgar*, 461 N.E.2d 1365, 1371 (Ill. 1984)).

39. See, e.g., *Hamilton v. State*, 366 So. 2d 8, 10 (Fla. 1978) ("The Legislature has a great deal of discretion in determining what measures are necessary for the public's protection, and this court will not, and may not, substitute its judgment for that of the Legislature insofar as the wisdom or policy of the act is concerned."); *Moore v. State*, 343 So. 2d 601 (Fla. 1977) (holding that courts are precluded from interjecting personal opinions regarding a statute's efficacy or wisdom); *State v. Barquet*, 262 So. 2d 431, 437-38 (Fla. 1972) (stating that courts should defer to the legislature on social and moral issues); *Ball v. Branch*, 16 So. 2d 524, 525 (Fla. 1944) ("Courts are never permitted to strike down an act of the Legislature because it fails to square with their individual social or economic theories or what they deem to be sound public policy."); *Barnes v. B.K. Credit Serv., Inc.*, 461 So. 2d 217, 219 (Fla. 1st DCA 1985) (holding that courts cannot substitute judicial judgment for the legislature's determination as to wisdom of a statute).

with the state and federal constitutions.<sup>40</sup> For example, Florida courts have deferred to legislative determinations regarding the viability of joint and several liability in Florida's comparative negligence system,<sup>41</sup> capping non-economic damages in medical malpractice actions,<sup>42</sup> recognizing a right to punitive damages,<sup>43</sup> and abrogating affirmative defenses.<sup>44</sup>

In 1996, the Florida Supreme Court noted that "the legislature must have the freedom to craft causes of action to meet society's changing needs."<sup>45</sup> The Tort Reform Act is the thoughtful product of that constitutional prerogative. The policy choices reflected in the Act are appropriately subject to public debate; but, the right of the legislature to make those choices and the deference to be accorded them are clear.

### III. THE RULE OF STARE DECISIS

While the 1999 Florida Legislature had the duty of evaluating the wisdom and policies of tort reform, the Florida Supreme Court will ultimately be responsible for determining the constitutionality of the Tort Reform Act.<sup>46</sup> Such a review will not be the Court's first constitutional examination of tort reform issues.<sup>47</sup> As a result, the Court's precedents in this area will play a significant role in review of this legislation.

40. See, e.g., *State v. Bales*, 343 So. 2d 9, 11 (Fla. 1977) ("If any state of facts, known or to be assumed, justify the law, the court's power of inquiry ends."); *McElrath v. Burley*, 707 So. 2d 836, 838-39 (Fla. 1st DCA 1985) ("Whenever reasonably possible and consistent with the protection of constitutional rights, courts will construe statutes in such a manner as to avoid conflict with the constitution.")

41. See, e.g., *Walt Disney World v. Wood*, 515 So. 2d 198, 202 (Fla. 1987); *Smith v. Department of Ins.*, 507 So. 2d 1080, 1091 (Fla. 1987).

42. See *University of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993).

43. See *Gordon v. State*, 608 So. 2d 800 (Fla. 1992).

44. See *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239, 1250-52 (Fla. 1996).

45. *Id.* at 1257.

46. See *Ferguson v. Skrupa*, 372 U.S. 729, 730 (1963) ("The criterion of constitutionality is not whether we believe the law to be for the public good."); see also *Adams v. Sutton*, 212 So. 2d 1, 3 (Fla. 1968) ("[T]he limits [sic] of the court's authority is to measure the validity of the legislative enactment by the requirements of the controlling law."); *Ball v. Branch*, 16 So. 2d 524, 525 (Fla. 1944) ("[C]onstitutional validity must turn on the application of well settled rules of interpretation and not on the philosophy or predilection of judges as to what the law ought to be.")

47. See, e.g., *Associated Indus. of Fla., Inc.*, 678 So. 2d at 1239 (reviewing the constitutionality of the 1994 amendments to the Medicaid Third-Party Liability Act); *Echarte*, 618 So. 2d at 189 (reviewing statutes providing caps on non-economic damages in medical malpractice claims); *Gordon*, 608 So. 2d at 800 (reviewing punitive damages statutes); *Smith v. Department of Ins.*, 507 So. 2d 1080, 1080 (Fla. 1987) (reviewing the constitutionality of the Tort Reform and Insurance Act of 1986); *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657, 657 (Fla. 1985) (reviewing the constitutionality of a statute of repose for product liability actions).

The rule of stare decisis mandates that courts adhere to their own precedents.<sup>48</sup> At least four of the current Florida Supreme Court Justices have addressed stare decisis in recent years, illustrating the doctrine's continued importance.<sup>49</sup> "Respect for the rule of stare decisis impels us to follow the precedents we find to have governed this question for so long. This is especially true where the argument to change is persuasive but not overwhelming."<sup>50</sup>

Stare decisis is so vital to the judicial process that departure from it is appropriate only in limited circumstances.<sup>51</sup> Adhering to precedent provides stability and predictability to the process of judicial review and allows citizens to rely on developed legal principles.<sup>52</sup> Such considerations are particularly important in commercial and economic affairs where stability and precision are essential when plan-

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48. See John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 1-2 (1983) (discussing the interplay between stare decisis and the "Rule of Four" which the Supreme Court follows in processing its certiorari docket); see also *Flowers v. U.S.*, 764 F.2d 759, 761 (11th Cir. 1985) ("Stare decisis means that like facts will receive like treatment in a court of law."); *Forman v. Florida Land Holding Corp.*, 102 So. 2d 596, 598 (Fla. 1958) (holding that the purpose of stare decisis is "to maintain stability in the law").

49. See *Zakrzewski v. State*, 717 So. 2d 488, 496 n.5 (Fla. 1998) (Anstead, J., concurring in part and dissenting in part); *Blanco v. State*, 706 So. 2d 7, 12 (Fla. 1997) (Wells, J., dissenting); *Snyder v. Davis*, 699 So. 2d 999, 1007-08 (Fla. 1997) (Harding, J., dissenting); *State v. Schopp*, 653 So. 2d 1016, 1023 (Fla. 1995) (Harding, J., dissenting); *Perez v. State*, 620 So. 2d 1256, 1266-68 (Fla. 1993) (Shaw, J., dissenting). Before he retired, Justice Overton also wrote persuasively regarding the value of stare decisis. See *Perez*, 620 So. 2d at 1258-61 (describing stare decisis as an "essential part of our judicial system and philosophy of law").

50. *Zakrzewski*, 717 So. 2d at 496 n.5 (quoting *Old Plantation Corp. v. Maule Indus., Inc.*, 68 So. 2d 180, 183 (Fla. 1953)).

51. For example, departure from the rule is appropriate to vindicate other, overriding principles of law; to remedy continued injustice; or to keep the law current in light of significant intervening events that render prior decisions meaningless. See *Haag v. State*, 591 So. 2d 614, 618 (Fla. 1992) ("It is a rule [of law] that precedent *must* be followed *except* when departure is necessary to vindicate other principles of law or to remedy continued injustice.") (emphasis added); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992) (discussing the "prudential and pragmatic" issues the Supreme Court considers when applying the doctrine of stare decisis); *State v. Schopp*, 653 So. 2d 1016, 1023 (Fla. 1995) (Harding, J., dissenting) (stating that any change from prior law must be principled). Other considerations include the impact that overruling precedent will have on settled expectations of the law and the possibility of frustrating the public's confidence in well-established rules of law. See *Perez*, 620 So. 2d at 1259 (quoting Stevens, *supra* note 48, at 9); see also *Snyder*, 699 So. 2d at 1007-08 (Harding, J., dissenting); *Schopp*, 653 So. 2d at 1023 (Harding, J., dissenting) ("Where a rule of law has been adopted after reasoned consideration and then strictly followed over the course of years, the rule should not be abandoned without a change in the circumstances that justified its adoption.")

52. See *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("Adhering to precedent 'is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled . . . ."); *Morgagne v. States Marine Lines, Inc.*, 398 U.S. 375, 403-04, (1970) (discussing the "[v]ery weighty considerations [that] underlie the principle that courts should not lightly overrule past decisions" and concluding that predictability in the law is the "mainstay" of the doctrine); *Forman v. Florida Land Holding Corp.*, 102 So. 2d 596, 598 (Fla. 1958) (stating that stare decisis "is considered appropriate in most instances in order to produce consistency in the application of legal principles").

ning for the future.<sup>53</sup> Furthermore, *stare decisis* eliminates the need to re-litigate every aspect of every case, thereby promoting judicial efficiency.<sup>54</sup> The legislative and executive branches of government rely heavily on judicial precedent when performing their constitutional duties.<sup>55</sup>

#### IV. FLORIDA'S TORT REFORM ACT: PROVIDING BALANCE TO THE CIVIL JUSTICE SYSTEM

Florida's Tort Reform Act affects several aspects of the civil justice system and tort law. While the Act's many provisions provide necessary reform, the most significant aspects of this legislation address the following issues: a twelve-year statute of repose applicable to product liability actions,<sup>56</sup> a plaintiff's right to recover punitive damages,<sup>57</sup> joint and several liability,<sup>58</sup> the liability of non-party tortfeasors,<sup>59</sup> vicarious liability,<sup>60</sup> employer liability,<sup>61</sup> premises liability,<sup>62</sup> and various defenses.<sup>63</sup> The remainder of this Article demonstrates that each reform rests on rock-solid constitutional ground.

##### A. *Statute of Repose*<sup>64</sup>

Nothing is made to last forever. Yet, product manufacturers and sellers doing business in Florida have been subjected to perpetual liability for their products, even when those products have exceeded

53. See *Payne*, 501 U.S. at 828; see also *Stevens*, *supra* note 48, at 2 (discussing the stabilizing effect that *stare decisis* has on economic relationships).

54. See *Moragne*, 398 U.S. at 403.

55. See *Stevens*, *supra* note 48, at 2 (discussing the effect *stare decisis* has on the entire system of government). In fact, the 1999 Legislature relied on the Supreme Court's prior rulings on tort issues to draft language that addresses the Court's concerns regarding the civil justice system and tort reform. Therefore, the rule of *stare decisis* will play a fundamental role in the Florida Supreme Court's review of the Tort Reform Act's constitutionality.

56. See ch. 99-225, §§ 11, 12, 1999 Fla. Laws 1400, 1410 (amending FLA. STAT. § 95.031 (1997)).

57. See *id.* § 21, 1999 Fla. Laws at 1415 (amending FLA. STAT. § 768.725 (1997)); *id.* § 23, 1999 Fla. Laws at 1416-18 (amending FLA. STAT. § 768.73 (1997)); *id.* § 24, 1999 Fla. Laws at 1419 (to be codified at FLA. STAT. § 768.735).

58. See *id.* § 27, 1999 Fla. Laws at 1419 (amending FLA. STAT. § 768.81 (1997)).

59. See *id.*

60. See *id.* § 28, 1999 Fla. Laws at 1421 (amending FLA. STAT. § 324.021 (1997)).

61. See *id.* § 16, 1999 Fla. Laws at 1412 (amending FLA. STAT. § 768.096 (1997)).

62. See *id.* § 19, 1999 Fla. Laws at 1413-14 (amending FLA. STAT. § 768.075 (1997)); *id.* § 17, 1999 Fla. Laws at 1413 (amending FLA. STAT. § 768.095 (1997)); *id.* § 29, 1999 Fla. Laws at 1423 (to be codified at FLA. STAT. § 768.098).

63. See *id.* § 15, 1999 Fla. Laws at 1411-12 (to be codified at FLA. STAT. § 768.1256); *id.* § 20, 1999 Fla. Laws at 1415 (to be codified at FLA. STAT. § 768.36).

64. A statute of limitations and a statute of repose are fundamentally different. A statute of limitations "establish[es] a time limit within which action must be brought measured from the time of accrual of the cause of action," while a statute of repose "cut[s] off the right of action after a specified time measured from the delivery of a product." *Bauld v. J. A. Jones Constr. Co.*, 357 So. 2d 401, 402 (Fla. 1978).

their expected useful lives.<sup>65</sup> Since 1986, Florida plaintiffs have been permitted to sue product manufacturers and sellers for defective products even if those products were designed and manufactured many decades ago.<sup>66</sup> Additionally, in 1976, the Florida Supreme Court introduced strict liability as a cause of action in product liability cases, thereby abandoning traditional notions of fault and privity and expanding manufacturer and retailer liability.<sup>67</sup>

The Tort Reform Act resolves these inequities and introduces some common sense into Florida's product liability laws.<sup>68</sup> The legislature determined that Florida should join the growing number of states whose statutes of repose apply to product liability actions.<sup>69</sup> Recognizing technology's limits, the Tort Reform Act first creates a conclusive presumption that all products—with the exception of commercial aircraft, railroad equipment, vessels of more than 100 gross tons, and improvements to real property—have an expected

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65. See *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657, 659-60 (Fla. 1985) (discussing that a statute of repose protects manufacturers from perpetual liability).

66. The history of Florida's statute of repose began in 1974 when the Florida Legislature passed a twelve-year statute of repose. See *Mosher v. Speedstar Div. of AMCA Internat'l, Inc.*, 675 So. 2d 918, 920 (Fla. 1996) (discussing the history of former FLA. STAT. § 95.031(2)). In 1980, however, the Florida Supreme Court declared the statute unconstitutional. See *Battilla v. Allis Chalmers Mfg. Co.*, 392 So. 2d 874, 874 (Fla. 1980). In 1985, the Court receded from *Battilla* and held that the statute of repose was constitutional. See *Pullum*, 476 So. 2d at 659-60. In 1986, the Florida Legislature responded by repealing the statute of repose despite the court's determination of constitutionality less than one year earlier. See *Mosher*, 675 So. 2d at 920; see also *Doe v. Shands Teaching Hosp. and Clinics, Inc.*, 614 So. 2d 1170, 1171 (Fla. 1st DCA 1993) (discussing the history of the statute of repose as applicable to product liability actions in Florida).

67. See *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 87 (Fla. 1976) (adopting a strict liability cause of action and holding that manufacturers can be held strictly liable for injuries suffered by a remote user of a product if the product was found to be "unreasonably dangerous").

68. See ch. 99-225, §§ 11, 12, 1999 Fla. Laws 1400, 1410 (amending FLA. STAT. § 95.031(2) (1997)). Interestingly, Florida already has a statute of repose, which is applicable to actions based on injuries caused by improvements to real property. See FLA. STAT. § 95.11(3)(c) (1999); see also FLA. STAT. § 95.11(4)(b) (1999) (providing a statute of repose in medical malpractice actions); FLA. STAT. § 95.031(2)(a) (1999) (providing a statute of repose in fraud actions).

69. Many states have traditional statutes of repose. See, e.g., CONN. GEN. STAT. § 52-577a(a) (1998); GA. CODE ANN. § 51-1-11(b)(2) (1998); ILL. COMP. STAT. § 5/13-213(b) (West 1998); IND. CODE § 34-20-3-1 (1999); IOWA CODE § 614.1(2A) (1998); NEB. REV. STAT. § 25-224(2) (1998); N.C. GEN. STAT. §§ 1-50(a)(6); 1-52(16) (1997); N.D. CENT. CODE § 28-01.3-08(1) (1997); OR. REV. STAT. § 30.905(1) (1997); TEX. CIV. PRAC. & REM. CODE ANN. § 16.012(b) (West 1997).

Many states have statutes of repose that employ presumptions and/or "useful life" analysis. See, e.g., COLO. REV. STAT. § 13-21-403(3) (1997); IDAHO CODE § 6-1303(2) (1997); KAN. STAT. ANN. § 60-3303 (1997); KY. REV. STAT. ANN. § 411.310(1) (West 1998); MICH. COMP. LAWS § 600.5805(9) (1998); MINN. STAT. § 604.03(1) (Michie 1998); TENN. CODE ANN. § 29-28-103(a) (1997); WASH. REV. CODE § 7.72.060(2) (1998).

Although Arkansas does not have a statute of repose, the *Arkansas Code* states that a consumer's use of a product beyond its anticipated life, where the consumer knew or should have known the anticipated life of the product, may be considered as evidence of the consumer's fault. See ARK. CODE ANN. § 16-116-105(c) (Michie 1997).

useful life of ten years or less.<sup>70</sup> With this presumption in place, the Act creates a statute of repose that bars all actions for injuries caused by a product when those injuries occur more than twelve years after the product left the manufacturer.<sup>71</sup> Accordingly, plaintiffs must file suit during the expected useful life of the product, plus two years.<sup>72</sup> If a manufacturer expressly warrants that a particular product has an expected useful life of more than ten years, then the statute of repose bars all actions for injuries occurring after the warranted useful life has expired or twelve years after the product has left the manufacturer's hands, whichever is later.<sup>73</sup>

The Florida Legislature drafted this statute of repose narrowly to protect the constitutional rights of plaintiffs and manufacturers alike. For example, the legislature heeded the Florida Supreme Court's ruling in *Diamond v. E.R. Squibb and Sons, Inc.*<sup>74</sup> and its progeny<sup>75</sup> by enacting an exception for injuries that occur during the repose period but do not manifest themselves until after the repose period has expired.<sup>76</sup> In *Diamond*, the plaintiff alleged that she began developing cancerous and pre-cancerous conditions during puberty that were linked to her ingestion of the drug known as diethylstilbestrol (DES) while she was still a fetus.<sup>77</sup> The Florida Supreme Court held that due to the delay between the mother's ingestion of the drug during pregnancy and the manifestation of the daughter's injuries during puberty, DES and similar cases—asbestos cases,<sup>78</sup> for example—required special treatment under a statute of repose.<sup>79</sup> To ensure fairness for plaintiffs like the one in *Diamond*, the legislature explicitly created an exception to the repose period addressing these special circumstances.

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70. See ch. 99-225, § 11, 1999 Fla. Laws 1400, 1410 (amending FLA. STAT. § 95.031 (1997)).

71. See *id.* Statutes of repose “cut off the right of action after a specified time measured from the delivery of a product . . . They do so regardless of the time of the accrual of the cause of action or of notice of the invasion of a legal right.” *Bauld v. J.A. Jones Const. Co.*, 357 So. 2d 401, 402 (Fla. 1978); see also *Kush v. Lloyd*, 616 So. 2d 415, 421-22 (Fla. 1992); *Firestone Tire & Rubber Co. v. Acosta*, 612 So. 2d 1361, 1363 (Fla. 1992); *Universal Eng'g Corp. v. Perez*, 451 So. 2d 463, 465 (Fla. 1984).

72. See ch. 99-225, § 11, 1999 Fla. Laws 1400, 1410.

73. See *id.*

74. 97 So. 2d 671 (Fla. 1981).

75. See, e.g., *Pulmosan Safety Equip. Corp. v. Barnes*, No. SC94544, 2000 WL 4960 (Fla. Jan. 6, 2000); *Owens-Corning Fiberglass Corp. v. Corcoran*, 679 So. 2d 291 (Fla. 3d DCA 1996).

76. See ch. 99-225, § 11, 1999 Fla. Laws 1400, 1411.

77. 397 So. 2d at 671.

78. See *Owens-Corning Fiberglass Corp.*, 679 So. 2d at 294 (noting that injuries related to asbestos exposure are directly analogous to injuries caused by exposure to DES).

79. See *Diamond*, 379 So. 2d at 672; see also *Owens-Corning Fiberglass Corp.*, 679 So. 2d at 293 (discussing the import of the court's holding in *Diamond*) (citations omitted).

Furthermore, the Act does not bar actions for injuries caused by improper product maintenance or product misuse,<sup>80</sup> nor does it protect a manufacturer from liability if the manufacturer took affirmative steps to conceal known defects from consumers.<sup>81</sup> Finally, the legislature had the foresight to draft a savings clause, thereby ensuring that the Act does not apply to any causes of action until July 1, 2003.<sup>82</sup> Plaintiffs with causes of action accruing after the repose period expired in their cases but before the effective date of the statute of repose may still bring suit until July 1, 2003, as long as the statute of limitations has not expired.<sup>83</sup>

The Florida Supreme Court has continuously recognized that statutes of repose are "a valid legislative means to restrict or limit causes of action in order to achieve certain public interests."<sup>84</sup> Indeed, Florida's courts have expended substantial judicial effort reviewing the constitutionality of statutes of repose applicable to injuries caused by improvements to real property,<sup>85</sup> medical malpractice,<sup>86</sup> and defective products.<sup>87</sup> Typically, plaintiffs challenge the validity of these statutes based on the "access to courts" provision in the Florida Constitution, which states that "the courts shall be open to every

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80. See ch. 99-225, § 11, 1999 Fla. Laws 1400, 1410.

81. See *id.*

82. See *id.* § 12, 1999 Fla. Laws at 1411.

83. See *id.*

84. Carr v. Broward County, 541 So. 2d 92, 95 (Fla. 1989); see also Pullum v. Cincinnati, Inc., 476 So. 2d 657, 660 (Fla. 1985); Sabal Chase Homeowners Ass'n Inc. v. Walt Disney World Co., 726 So. 2d 796, 798 n.2 (Fla. 3d DCA 1999) (quoting Carr, 541 So. 2d at 95). Many other states have declared statutes of repose constitutional. See Taylor v. Raymond Corp., 909 F.2d 225, 227 (7th Cir. 1990); Pitts v. Unarco Indus., Inc., 712 F.2d 276, 279 (7th Cir. 1983); Love v. Whirlpool Corp., 449 S.E.2d 602, 607 (Ga. 1994); Radke v. H.C. Davis Sons' Mfg. Co., 486 N.W.2d 204, 206 (Neb. 1992); Mercado v. Baker, 792 P.2d 342, 343 (Idaho 1990); Sealey v. Hicks, 788 P.2d 435, 438-40 (Or. 1990); Anderson v. M.W. Kellogg Co., 766 P.2d 637, 645 (Colo. 1988) (en banc); Zapata v. Burns, 542 A.2d 700, 709 (Conn. 1988); Jones v. Five Star Eng'g, Inc., 717 S.W. 2d 882, 883 (Tenn. 1986); Tetterton v. Long Mfg. Co., 332 S.E.2d 67, 71-72 (N.C. 1985).

85. See Overland Constr. Co., v. Sirmons, 369 So. 2d 572 (Fla. 1979); Bauld v. J. A. Jones Constr. Co., 357 So. 2d 401, 401 (Fla. 1978); Department of Transp. v. Echeverri, 736 So. 2d 791 (Fla. 3d DCA 1999); Sabal Chase Homeowners Ass'n Inc., 726 So. 2d at 799; American Liberty Ins. Co. v. West and Conyers, Architects and Eng'rs, 491 So. 2d 573 (Fla. 2d DCA 1986) (construing the constitutionality of FLA. STAT. § 95.11(3)(c)).

86. See Damiano v. McDaniel, 689 So. 2d 1059 (Fla. 1997); Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992); University of Miami v. Bogorff, 583 So. 2d 1000 (Fla. 1991); Carr, 541 So. 2d at 95; Doe v. Shands Teaching Hosp. and Clinics, Inc., 614 So. 2d 1170 (Fla. 1st DCA 1993).

87. See Melendez v. Dreis and Krump Mfg. Co., 515 So. 2d 735 (Fla. 1987); Pullum, 476 So. 2d at 657; Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla. 1980); Purk v. Federal Press Co., 387 So. 2d 354 (Fla. 1980); American Liberty Ins. Co., 491 So. 2d at 575 (construing FLA. STAT. § 95.031(2)).

person for redress of an injury, and justice shall be administered without sale, denial, or delay.”<sup>88</sup>

The legislature may restrict a litigant’s access to courts as long as a sufficient public necessity justifies the restriction.<sup>89</sup> In *Pullum v. Cincinnati, Inc.*,<sup>90</sup> the Florida Supreme Court recognized at least two public necessities that justify upholding a statute of repose regarding product liability actions. The court noted that the introduction of strict liability in the product liability arena removes traditional notions of fault and privity from product liability cases, thereby broadening the scope of manufacturers’ and sellers’ liability.<sup>91</sup> The court also recognized that subjecting manufacturers to perpetual liability for outdated products places an undue burden on manufacturers, justifying a restriction on access to courts.<sup>92</sup> Notably, Florida courts, including the Florida Supreme Court, have reaffirmed that these issues alone constitute valid public necessities justifying a statute of repose applicable to product liability actions.<sup>93</sup>

In addition to these well-established public necessities, empirical evidence also exists indicating that statutes of repose encourage manufacturers to develop newer, safer products because manufacturers will no longer fear perpetual liability for their innovations.<sup>94</sup>

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88. FLA. CONST. art. I, § 21. “This constitutional mandate, which has appeared in every revision of the state constitution since 1838, has no counterpart in the federal constitution and derives its scope and meaning solely from Florida case law.” *Overland Constr. Co.*, 369 So. 2d at 573 (citations omitted). Approximately thirty-four other states have similar provisions in their constitutions. See Janice Sue Wang, *State Constitutional Remedy Provisions and Article I, Section 10 of the Washington State Constitution: The Possibility of Greater Judicial Protection of Established Tort Causes of Action and Remedies*, 64 WASH. L. REV. 203, 204 (1989).

89. See *Damiano*, 689 So. 2d at 1060; *Kush*, 616 So. 2d at 421-22; *Carr*, 541 So. 2d at 95; *Pullum*, 476 So. 2d at 660. These recent Florida Supreme Court cases, which analyze the constitutionality of statutes of repose in light of Article I, Section 21, implicitly recede from a strict application of the “overpowering public necessity” analysis first introduced in *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973).

90. 476 So. 2d at 659-60. Importantly, when the Legislature enacted the statute of repose at issue in *Pullum*, there were no legislative findings of emergency or immediate need for the statute. See Act effective, January 1, 1975, ch. 74-382, 1974 Fla. Laws 1207, 1208. Nevertheless, the Florida Supreme Court ruled the statute unconstitutional. See *Pullum*, 476 So. 2d at 660.

91. See *Pullum*, 476 So. 2d at 659-60. This expansion of manufacturer liability was a significant change in circumstances, causing the court to recede from *Battilla*. 392 So. 2d at 874; see also *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 86-89 (Fla. 1976) (adopting a strict liability cause of action in a product liability context and holding that retailers and manufacturers can be held liable for injuries suffered by a remote user of a product if the product was found to be “unreasonably dangerous”); *supra* Part II and accompanying notes (discussing circumstances in which a court can recede from the stare decisis doctrine).

92. See *Pullum*, 476 So. 2d at 659-60.

93. See *Carr*, 541 So. 2d at 95; see also *Doe v. Shands Teaching Hosp. and Clinics, Inc.*, 614 So. 2d 1170, 1171 (Fla. 1st DCA 1993).

94. See BROOKINGS INSTITUTION, *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 492 (Peter W. Huber & Robert E. Litan eds., 1991):

Undoubtedly, the need to promote innovation and competition in the marketplace constitutes reasonable grounds for limiting access to courts. Finally, the statute of repose will make litigation more efficient and cost effective by circumventing the typical problems that arise with litigating stale claims, such as deceased witnesses and spoliated evidence caused by the passage of time.

The statute of repose under constitutional scrutiny in *Pullum* was not as narrowly tailored as the Tort Reform Act. Indeed, the statute at issue in *Pullum* did not recognize that different products have different useful life spans, nor did it provide exceptions for a manufacturer's fraudulent concealment or for "*Diamond* plaintiffs."<sup>95</sup> Despite its broad application, the supreme court found the statute constitutional.<sup>96</sup> Accordingly, the current Florida Supreme Court should have no difficulty affirming the *Pullum* decision and should hold that the Tort Reform Act's statute of repose constitutes a reasonable legislative determination that Florida must provide a fair playing field for consumers, manufacturers, and sellers alike.<sup>97</sup>

The statute of repose in the Tort Reform Act provides a reasonable amount of time—at least twelve years—for consumers to file suit against manufacturers and sellers of allegedly defective products.<sup>98</sup> The Act also represents a reasonable legislative determination that establishing outer limits for manufacturers' and sellers' expanded liability is necessary to maintain balance in Florida's civil justice system.

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When the sun never sets on the possibility of litigation, each improvement in method, material, or design can establish a new standard against which all of your earlier undertakings, of no matter what vintage, will be judged. Finding a way to do better today immediately invites an indictment of what you did less well yesterday or twenty years ago. In that way innovation and the willingness to develop new and better products is first discouraged and then stifled.

(citations omitted).

95. See *supra* Part IV.A. (discussing the provisions in the Tort Reform Act pertaining to the statute of repose).

96. The court held that the statute of repose did not violate the "access to courts" provision or equal protection provisions of the Florida Constitution. See *Pullum*, 476 So. 2d at 659-60.

97. In *Kush v. Lloyd*, the supreme court explicitly held that the statute of repose applicable to medical malpractice actions is constitutional:

[T]he medical malpractice statute of repose represents a legislative determination that there must be an outer limit beyond which medical malpractice suits may not be instituted. In creating a statute of repose . . . the legislature attempted to balance the rights of injured persons against the exposure of health care providers to liability for endless periods of time.

616 So. 2d 415, 421-22 (Fla. 1992); see also *Damiano v. McDaniel*, 689 So. 2d 1059, 1060-61 (Fla. 1997).

98. See ch. 99-225, § 11, 1999 Fla. Laws 1400, 1410 (amending FLA. STAT. § 95.031 (1997)).

### B. Punitive Damages

In no other area of tort law is constitutional jurisprudence more pervasive or well established than in the area of punitive damages. The right to punitive damages is a creature of legislative will; punitive damages can be modified, limited, or abolished altogether if the legislature deems it appropriate.<sup>99</sup>

[Plaintiffs have] no cognizable, protect[ed] right to the recovery of punitive damages at all. Unlike the right to compensatory damages, the allowance of punitive damages is based entirely upon considerations of public policy. Accordingly, it is clear that the very existence of an inchoate claim for punitive damages is subject to the plenary authority of the ultimate policy-maker under our system, the legislature. In the exercise of that discretion, it may place conditions upon such a recovery or even abolish it altogether. . . . It cannot, then, be said that the denial of punitive damages has unconstitutionally impaired any property rights of [plaintiffs].<sup>100</sup>

In the Tort Reform Act, the Florida Legislature once again exercised its plenary authority and modified a plaintiff's ability to receive punitive damages in Florida.<sup>101</sup> First, the legislature clarified the level of conduct that gives rise to liability for punitive damages.<sup>102</sup> The Tort Reform Act requires plaintiffs to prove by clear and con-

99. See *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994) (clarifying the circumstances that distinguish whether a statute operates prospectively or retroactively); *Gordon v. State*, 608 So. 2d 800, 801 (Fla. 1992) (holding that a statute limiting a plaintiff's right to punitive damages does not violate the plaintiff's "right to a trial by jury, does not constitute a tax on judgments, does not deny equal protection and is not a special law"); *Smith v. Department of Ins.*, 507 So. 2d 1080, 1092 n.10 (Fla. 1987) (discussing whether an insurance statute met the Florida Constitution's single subject requirement). As the court stated in *Alamo*, "[t]he establishment or elimination of [a claim for punitive damages] is clearly a substantive, rather than procedural, decision of the legislature because such a decision does, in fact, grant or eliminate a right or entitlement." 632 So. 2d at 1358.

100. *Gordon*, 608 So. 2d at 801-02 (citing the district court decisions in *Gordon v. State*, 585 So. 2d 1033, 1035-36 (Fla. 3d. DCA 1991) and *Ross v. Gore*, 48 So. 2d 412, 414 (Fla. 1950)) (citations omitted).

101. See ch. 99-225, § 21, 1999 Fla. Laws 1400, 1415 (to be codified at FLA. STAT. § 768.725); *id.* § 22, 1999 Fla. Laws at 1416 (amending FLA. STAT. § 768.72 (1997)); *id.* § 23, 1999 Fla. Laws at 1416-18 (amending FLA. STAT. § 768.73 (1997)); *id.* § 24, 1999 Fla. Laws at 1418 (to be codified at FLA. STAT. § 768.735); *id.* § 25, 1999 Fla. Laws at 1419 (to be codified at FLA. STAT. § 768.736); *id.* § 26, 1999 Fla. Laws at 1419 (to be codified at FLA. STAT. § 768.737).

102. Prior to the enactment of the Tort Reform Act, plaintiffs had to prove that defendants engaged in fraudulent, malicious, deliberately violent or oppressive conduct, or acted with such gross negligence as to indicate a wanton disregard for the rights of others in order to be entitled to punitive damages. See *W.R. Grace & Co.—Conn. v. Waters*, 638 So. 2d 502, 503 (Fla. 1994); see also *Campbell v. Government Employees Ins. Co.*, 306 So. 2d 525, 532 (Fla. 1974) (quoting *Dr. P. Phillips & Sons v. Kilgore*, 12 So. 2d 465, 467 (Fla. 1943) (holding that punitive damages were available for conduct committed with "malice, moral turpitude, [or] wantonness")). This standard was, at best, fuzzy and, at worst, incomprehensible.

vincing evidence that the defendant was personally guilty of intentional misconduct or gross negligence.<sup>103</sup> Once they have proven that they are entitled to punitive damages, plaintiffs must only prove the amount of the damages by the "greater weight of the evidence."<sup>104</sup> This legislation limits, under certain circumstances, the amount of punitive damages that plaintiffs may receive.<sup>105</sup> Another significant aspect of the Tort Reform Act is its restriction on repetitive punitive damage awards for a single course of conduct.<sup>106</sup> These repetitive awards effectively punish a defendant time and time again for the same conduct, thereby threatening to deplete resources in Florida.<sup>107</sup> As one commentator noted: "Repetitive and unrestrained punitive liability for a single course of conduct threatens aggregate punishment that is, by any sensible standard, excessive and unfair."<sup>108</sup> In 1994, the Florida Supreme Court recognized the potential for these abuses and noted that legislative reform was the proper vehicle for change in this area of tort law.<sup>109</sup> As a result, the Florida Legislature attempted to re-establish equity in tort litigation by restricting repetitive punitive damage awards.<sup>110</sup>

In fact, the legislature did not have to search long for reasons to amend Florida's law in its entirety with regard to punitive damages. As U.S. Supreme Court Justice Sandra Day O'Connor has noted, an

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103. Ch. 99-225 § 21, 1999 Fla. Laws 1400, 1415 (to be codified at FLA. STAT. § 768.725); *id.* § 22, 1999 Fla. Laws at 1416 (amending FLA. STAT. § 768.72 (1997)). This legislation defines "intentional misconduct" as conduct the defendant knew was wrongful and had high probability that it would result in injury or damage to the plaintiff but intentionally pursued it anyway. *Id.* The term "gross negligence" is defined as conduct "so reckless or wanting in care that it constitute[s] a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct." *Id.*

104. Ch. 99-225, § 21, 1999 Fla. Laws 1400, 1415 (to be codified at FLA. STAT. § 768.725).

105. Many other jurisdictions place caps on punitive damages. *See, e.g.*, ALASKA STAT. § 09.17.020 (Michie 1998); CONN. GEN. STAT. § 52-240b (1999); GA. CODE ANN. § 51-12-5.1 (1999); 735 ILL. COMP. STAT. ANN. § 5/2-1115.05 (West 1999); IND. CODE § 34-51-3-4 (1999); KAN. STAT. ANN. § 60-3701 (1998); NEV. REV. STAT. § 42.005 (1997); N.J. STAT. ANN. § 2A:15-5.14 (West 1999); N.C. GEN. STAT. § 1D-25 (1997); OKLA. STAT. ANN. tit. 23, § 9.1 (West 1999); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (West 1997); VA. CODE ANN. § 8.01-38.1 (Michie 1999).

Several jurisdictions completely prohibit punitive damages. *See, e.g.*, LA. CIV. CODE ANN. art. 3546 (West 1994); N.H. REV. STAT. ANN. § 507:16 (1998); MICH. CT. RULES OF 1985, Rule 2.114 (1999).

106. *See* ch. 99-225, § 23, 1999 Fla. Laws 1400, 1417 (amending FLA. STAT. § 768.73 (1997)).

107. *See* John Calvin Jefferies, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986); *see also* *Punitive Damages: Hearings on S.B. 671 and S.B. 672 Before the Comm. on the Judiciary United States Senate*, 104th Cong. 95-96 (1995) (statement of Victor E. Schwartz, American Tort Reform Association).

108. Jefferies, *supra* note 107, at 140.

109. *See* *W.R. Grace & Co.-Conn. v. Waters*, 638 So. 2d 502, 505 (Fla. 1994) (arguing that legislative reform was the best possible solution to this troublesome dilemma).

110. *See* ch. 99-225, § 23, 1999 Fla. Laws 1400, 1417 (amending FLA. STAT. § 768.73 (1997)).

“explosion” in the size of punitive damage awards has occurred throughout the country.<sup>111</sup> The fact that juries award punitive damages relatively infrequently is of no consequence. The mere threat of punitive damages inflates the cost of settlement and undermines notions of fairness and judicial efficiency. Even worse, the imposition of excessive awards threatens to remove safe products from the market and deter innovation in the marketplace.<sup>112</sup> Undeniably, punitive awards have become so erratic and dangerous that the U.S. Supreme Court, which typically avoids interfering in state law issues, has issued several recent opinions attempting to give the states some guidance in resolving these problems.<sup>113</sup>

Because the system has run wild, the Florida Legislature exercised its constitutional authority and made difficult policy decisions limiting punitive damages in tort law and has, therefore, begun to restore balance and fairness to Florida’s civil justice system.<sup>114</sup>

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111. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 61 (1991) (O’Connor, J., dissenting).

112. See *Development in the Law: Jury Determination of Punitive Damages*, 110 HARV. L. REV. 1513, 1514-15 (1997):

Potential chilling effect on the research and development of new products, excessive and socially wasteful precautions by potential defendants, deterrence of socially desirable activities, removal of useful products from the market, and manifest individual injustice and violations of constitutional liberties. Importantly, these harms . . . can result from the mere perception by potential defendants that punitive damages are imposed excessively or indiscriminately.

(citations omitted); see also Cass R. Sunstein, et al., *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071 (1998) (discussing the sources of arbitrariness and unpredictability in punitive damage awards).

113. See, e.g., *BMW of North Am., Inc. v. Gore*, 517 U.S. 559 (1996) (holding that an award of two million dollars in punitive damages was grossly excessive in light of a low level of reprehensible conduct); *Honda Motor Co., v. Oberg*, 512 U.S. 415 (1994) (discussing that unfettered rights to punitive damages may violate due process); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) (discussing “grossly excessive” punitive damages awards); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (discussing due process notions in relation to punitive damages); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (discussing judicial review of punitive damage awards).

114. The Tort Reform Act also revises the common-law threshold for holding an employer vicariously liable for punitive damages based on the tortious acts of its employees. To impose vicarious liability on an employer under the Act, the plaintiff must prove by clear and convincing evidence that the employee is personally guilty of intentional misconduct or gross negligence and that the employer knowingly participated in or ratified such conduct or engaged in gross negligence that contributed to the injury. See ch. 99-225, § 22, 1999 Fla. Laws 1400, 1416 (amending FLA. STAT. § 768.72 (1997)). This revises the standard of vicarious liability for punitive damages articulated by the Florida Supreme Court. See *Schropp v. Crown Eurocars, Inc.*, 654 So. 2d 1158, 1160 (Fla. 1995) (holding that, at common law, an employee’s acts must be willful and wanton and an employer’s acts must only be negligent in order to impose punitive liability vicariously on an employer).

### C. Florida's System for Apportioning Fault

The promise of *Hoffman v. Jones*, that "the most equitable result that can ever be reached by a court is the equation of liability with fault,"<sup>115</sup> remains unrealized. The legislature's 1986 adoption of comparative fault<sup>116</sup> and the Florida Supreme Court's decision in *Fabre v. Marin*<sup>117</sup> moved Florida closer to *Hoffman's* goal, but inequities remain. A plaintiff who is ninety-nine percent at fault for his own injuries can sue for and recover damages, while some defendants are still forced to pay for more than their proportionate share of a loss. Such results erode public confidence in the fairness of the civil justice system.

The Tort Reform Act takes a modest step forward in the quest for a true, fault-based tort system. It scales back, but does not abolish, the remnants of joint and several liability, and it conclusively establishes that *Fabre* correctly reflects legislative intent.<sup>118</sup> The supreme court held such reforms constitutional over twelve years ago in *Smith v. Department of Insurance*.<sup>119</sup>

#### 1. Joint and Several Liability

The doctrine of joint and several liability is a remnant of contributory negligence, providing that each co-defendant is liable for the entire damage to the plaintiff regardless of the percentage of fault actually attributable to each defendant.<sup>120</sup> Because this doctrine directly contravenes *Hoffman's* ideal of equating liability with fault, in 1986, the Florida Legislature abrogated joint and several liability as it applied to non-economic damages in cases where the total damages exceeded \$25,000.<sup>121</sup> The Florida Supreme Court upheld this statu-

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115. 280 So. 2d 431, 438 (Fla. 1973).

116. See Act effective July 1, 1986, ch. 86-160, § 60, 1986 Fla. Laws 695, 755 (codified at FLA. STAT. § 768.81 (1999)); *id.* § 65, 1986 Fla. Laws at 760.

117. 623 So. 2d 1182 (Fla. 1993).

118. See ch. 99-225, § 27, 1999 Fla. Laws 1400, 1419.

119. 507 So. 2d 1080, 1090-92 (Fla. 1987).

120. See *id.* at 1090-91 ("The doctrine was based on the assumption that injuries were indivisible and there was no means available to apportion fault."); *Agency for Health Care Admin. v. Associated Ind. of Fla.*, 678 So. 2d 1239, 1257 (Fla. 1996). Joint and several liability "allows a claimant to recover all damages from one of multiple defendants even though that particular defendant may be the least responsible defendant in the cause." *Fabre v. Marin*, 623 So. 2d 1182, 1184 (Fla. 1993) (citing *Louisville & N.R.R. v. Allen*, 65 So. 8 (1914)) ("In the case of . . . [joint and several liability] all negligent defendants were held responsible for the total of the plaintiff's damages regardless of the extent of each defendant's fault in causing the accident.").

121. See Act effective July 1, 1986, ch. 86-160, § 60, 1986 Fla. Laws 755 (codified at FLA. STAT. § 768.81(3),(5) (Supp. 1999)). See also *Y.H. Invs., Inc. v. Godales*, 690 So. 2d 1273, 1276 (Fla. 1997) (discussing the history of the comparative fault statute).

Other jurisdictions have limited or abolished the application of joint and several liability. See, e.g., ALASKA STAT. § 09.17.080(d) (Michie 1999); ARIZ. REV. STAT. § 12-2506(D) (1999);

tory elimination of joint and several liability, endorsing the legislature's policy decisions:

The asserted justification for legislative modification of joint and several liability is that the underlying basis for the doctrine no longer exists . . . [I]n accordance with the philosophy of *Hoffman*, the principles of fairness require the elimination of joint and several liability by making each party's liability dependent on his degree of fault—not on the solvency of his codefendants—and that fairness requires at least a modification of joint and several liability in order to balance the system.<sup>122</sup>

The underlying purpose of joint and several liability is to determine "who should pay the damages caused by an insolvent tortfeasor."<sup>123</sup> In 1986, the legislature answered that question with respect to non-economic damages. The Tort Reform Act limits the application of joint and several liability for economic damages, and, therefore, links a party's responsibility *to pay for* actual damages to the party's responsibility for *causing* the actual damages.<sup>124</sup> Indeed, under the Act, the less a defendant contributes to the harm, the less the defendant will be jointly and severally liable for the damages.<sup>125</sup>

As the Florida Supreme Court held in *Walt Disney World Co. v. Wood*<sup>126</sup> and reaffirmed as recently as 1997,<sup>127</sup> "the viability of the doctrine [of joint and several liability] is a matter which should best be decided by the legislature."<sup>128</sup> The legislature has decided that joint and several liability has a limited role in Florida's civil justice system. The Tort Reform Act's limitations on joint and several liability is another example of the judiciary and the legislature working together to attain the *Hoffman* ideal.

## 2. *Non-Party Tortfeasors: Codifying Fabre v. Marin*

A fundamental element of the Tort Reform Act is the legislature's codification and reaffirmation of the wisdom of the court's decision in *Fabre*.<sup>129</sup> After the court adopted comparative negligence in *Hoffman*

COLO. REV. STAT. § 13-21-111.5(1),(4); CONN. GEN. STAT. § 52-57h(g) (1999); GA. CODE ANN. §§ 51-12-30, 51-12-31 (1999); IDAHO CODE § 6-803(3), (5)-(7) (1999).

122. *Smith*, 507 So. 2d at 1091 (holding that the legislative modification to joint and several liability did not violate due process, equal protection, or right of access to the court).

123. *Id.*

124. See ch. 99-225, § 27, 1999 Fla. Laws 1400, 1419-20 (amending FLA. STAT. § 768.81 (1997)).

125. See *id.*

126. 515 So. 2d 198 (Fla. 1987).

127. See *Y.H. Invs., Inc. v. Godales*, 690 So. 2d 1273, 1275 (declining to consider "the abrogation of joint and several liability in deference to legislative attention to these issues.>").

128. *Walt Disney World v. Wood*, 515 So. 2d 198, 202 (Fla. 1987).

129. See ch. 99-225, § 27, 1999 Fla. Laws 1400, 1419-20.

*v. Jones*, the legislature followed suit and enacted the comparative negligence statute in 1986.<sup>130</sup> Courts and litigants alike, however, struggled with whether the statute required courts and juries to apportion liability to non-party tortfeasors.<sup>131</sup> By 1993, Florida's district courts had reached contradictory conclusions regarding the meaning of this provision and its intended purpose in a comparative negligence system.<sup>132</sup> The *Fabre* decision, however, resolved the conflict.<sup>133</sup>

The plaintiff in *Fabre* was injured in an automobile accident while riding as a passenger in a car driven by her husband.<sup>134</sup> Ultimately, the jury found that the defendant and the plaintiff's husband were each fifty percent liable for the plaintiff's damages.<sup>135</sup> The doctrine of interspousal tort immunity, however, barred the plaintiff from recovering any damages from her husband.<sup>136</sup> As a result, the trial court apportioned one hundred percent of the damages against the defendant, despite the fact that the jury determined that the defendant was only responsible for fifty percent.<sup>137</sup>

Relying on both the plain language and the legislative intent of the comparative fault statute, the supreme court reversed.<sup>138</sup> "Clearly, the only means of determining a party's percentage of fault is to compare that party's percentage to all of the other entities who contributed to the accident, regardless of whether they have been or could have been joined as defendants."<sup>139</sup>

The court determined that the legislature intended to create a system requiring each party to pay "only in proportion to the percentage of fault by which that defendant contributed to the accident."<sup>140</sup> Under *Fabre*, Florida defendants are entitled to have juries

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130. See Act effective July 1, 1986, ch. 86-160, § 60, 1986 Fla. Laws 695, 755 (codified at FLA. STAT. § 768.81(3)); see also ch. 86-160, § 65, 1986 Fla. Laws 695, 760.

131. The language in the statute, however, is clear:

APPORTIONMENT OF DAMAGES.—In cases to which this section applies, the court shall enter judgment against *each party* liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability . . . .

FLA. STAT. § 768.81(3) (1997) (emphasis added).

132. Compare *Messmer v. Teacher's Ins. Co.*, 588 So. 2d 610 (Fla. 5th DCA 1991) (holding that the comparative negligence statute permitted defendants to list non-party tortfeasors on the verdict form) with *Fabre v. Marin*, 597 So. 2d 883 (Fla. 3d DCA 1992) (holding that the comparative negligence statute did not permit defendants to list non-party tortfeasors on the verdict form).

133. 623 So. 2d 1182 (Fla. 1993).

134. See *id.* at 1183.

135. See *id.*

136. See *id.* at 1184 (discussing the appellate court's rejection of the doctrine of interspousal tort immunity).

137. See *id.*

138. See *id.* at 1185-87.

139. *Id.* at 1185.

140. *Id.*

apportion liability to all tortfeasors involved in an accident—regardless of whether those tortfeasors are named parties in the suit.

In 1996, in *Nash v. Wells Fargo Guard Services, Inc.*,<sup>141</sup> the court refined *Fabre* and held that in order to include a nonparty on the verdict form, defendants must plead the nonparty's negligence as an affirmative defense and identify the nonparty specifically.<sup>142</sup> The court also held that the defendant has the burden to prove "that the nonparty's fault contributed to the accident in order to include the nonparty's name on the jury verdict [form]."<sup>143</sup>

*Fabre* moved Florida jurisprudence toward the more just and predictable civil justice system envisioned in *Hoffman*. The Tort Reform Act's codification of *Fabre*, as refined by *Nash*, simply reinforces the common sense notions that liability should be equated with fault and that a defendant should not have to pay more than his fair share of the liability.

Despite its rational underpinnings, critics have attacked *Fabre*, arguing that the decision "represents a policy decision that losses resulting from unknown or uninsured tortfeasors should be borne by the injured plaintiff, even when that plaintiff may totally be free from any fault or wrongdoing."<sup>144</sup> As the *Fabre* Court itself noted, however, such policy decisions are within the legislature's constitutional authority:

[T]he legislature decided that for purposes of non-economic damages a plaintiff should take each defendant as he or she finds them. If a defendant is insolvent, the judgment of liability of another defendant is not increased. The statute requires the same result where a potential defendant is not or cannot be joined as a party to the lawsuit.<sup>145</sup>

Furthermore, *Fabre* and its codification are consistent with the goals expressed in *Hoffman*: to create a tort litigation system that equates liability with fault. The Tort Reform Act is the definitive reaffirmation of *Fabre* and the true legislative intent behind the 1986 comparative fault statute: to require a complete allocation of fault among wrongdoers whether or not they are a party to the suit.

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141. 678 So. 2d 1262 (Fla. 1996).

142. *See id.* at 1264.

143. *Id.*

144. *See* John F. Romano & Rodney G. Romano, *Fabre v. Marin: Its Effect on Tort Law—July 1, 1994 to Present*, 20 NOVA L. REV. 495, 512 (1995) (arguing that *Fabre* is "abhorrent to the fundamentals of our system of justice").

145. *Fabre*, 623 So. 2d at 1186; *see also supra* Part I (discussing why the legislature is better suited to address the public policy issues surrounding reforms to the civil justice system).

*D. Vicarious Liability of Automobile Owners and Lessors*

Florida law subjects owners and lessors of automobiles to virtually absolute liability when lessees and other permissive users commit tortious acts while operating automobiles entrusted to them. Certainly, Florida is an anomaly in this area of tort law because it adheres to the far-reaching "dangerous instrumentality doctrine."<sup>146</sup> This doctrine, first articulated in 1920, states:

One who authorizes and permits an instrumentality that is peculiarly dangerous in its operation to be used by another on the public highway is liable in damages for injuries to third persons caused by the negligent operation of such instrumentality on the highway by one so authorized by the owner.<sup>147</sup>

Florida courts have applied this doctrine to impose vicarious liability on owners of automobiles, golf carts,<sup>148</sup> firearms,<sup>149</sup> forklifts<sup>150</sup> and other products.<sup>151</sup> Like other forms of vicarious liability, this doctrine imposes expansive liability based solely on owner and lessor status rather than actual fault. Despite the fact that this doctrine has no place in this modern era of tort law, where liability is equated with fault, courts have been reluctant to limit it.<sup>152</sup> The Florida judiciary's tenacious reliance on this notion of vicarious liability is unique in the country: "Only the Courts of Florida have gone the length of saying that an automobile is a 'dangerous instrumentality'

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146. See, e.g., *Hertz Corp. v. Jackson*, 617 So. 2d 1051, 1053 (Fla. 1993); *Kraemer v. General Motors Acceptance Corp.*, 572 So. 2d 1363, 1365 (Fla. 1990) ("The dangerous instrumentality doctrine is unique to Florida and has been applied with very few exceptions.") (citations omitted).

147. *Southern Cotton Oil Co. v. Anderson*, 86 So. 629, 638 (Fla. 1920); see also *Ady v. American Honda Fin. Corp.*, 675 So. 2d 577, 580 (Fla. 1996); *Hertz Corp.*, 617 So. 2d at 1053; *Raynor v. De la Nuez*, 574 So. 2d 1091, 1094 (Fla. 1991); *Kraemer*, 572 So. 2d at 1365:

The dangerous instrumentality doctrine seeks to provide greater financial responsibility to pay for the carnage on our roads. It is premised upon the theory that the one who originates the danger by entrusting the automobile to another is in the best position to make certain that there will be adequate resources with which to pay the damages caused by its negligent operation.

148. See *Meister v. Fisher*, 462 So. 2d 1071 (Fla. 1984) (applying the dangerous instrumentality doctrine to golf carts).

149. See *Kitchen v. K-Mart Corp.*, 697 So. 2d 1200 (Fla. 1997) (holding that a firearm is a dangerous instrumentality).

150. See *Harding v. Allen-Laux, Inc.*, 559 So. 2d 107 (Fla. 2d DCA 1990) (holding that a forklift is a dangerous instrumentality).

151. See *Eagle Stevedores, Inc. v. Thomas*, 145 So. 2d 551 (Fla. 3d DCA 1962) (holding that a tow-motor is a dangerous instrumentality).

152. See *Hertz Corp.*, 617 So. 2d at 1053; *Kraemer*, 572 So. 2d at 1365 (Fla. 1990). But see *Hoffman v. Jones*, 280 So. 2d 431, 438 (Fla. 1973); see also FLA. STAT. § 768.81 (1997) (codifying comparative negligence).

for which the owner remains responsible when it is negligently driven by another.”<sup>153</sup>

Recently, however, the Florida Supreme Court undermined the logic of the dangerous instrumentality doctrine. In *Kitchen v. K-Mart Corp.*,<sup>154</sup> the court adopted the independent tort of negligent entrustment whereby an owner or lessor may be liable for injuries to third parties if the owner or lessor negligently leases or loans a dangerous instrumentality to an individual who poses foreseeable risks to third parties.<sup>155</sup> By adopting this tort, which imposes direct liability, the court weakened the premise that owners and lessors must be vicariously liable for the actions of another person.

The Florida Legislature has not hesitated to limit the scope of the dangerous instrumentality doctrine in light of cases like *Hoffman v. Jones*, which require that liability be linked with actual fault.<sup>156</sup> In 1986, the Florida Legislature eliminated the liability of long-term automobile lessors under the dangerous instrumentality doctrine, as long as these lessors satisfied specific conditions regarding insurance coverage for the leased automobile.<sup>157</sup> Importantly, the Florida Supreme Court upheld the exception as constitutional in *Abdala v. World Omni Leasing, Inc.*<sup>158</sup> In fact, the court held that “[l]imiting the liability of one vicariously liable does not equate to denial of access to court. . . . The legislature can determine the circumstances permitting vicarious liability without violating” the access to courts provision in the Florida Constitution<sup>159</sup> Furthermore, the court also held that this legislatively created exception to the dangerous instrumentality doctrine does not violate notions of equal protection and due process, finding that the legislature had a rational basis for the legislation.<sup>160</sup>

In light of this legislative and judicial precedent, the Florida Legislature further restricted the harsh effects of the dangerous instrumentality doctrine in the Tort Reform Act by limiting the financial

153. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 524 (5th ed. 1984).

154. 697 So. 2d 1200 (Fla. 1997).

155. *See id.* at 1208.

156. 280 So. 2d at 438 (“In the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault.”).

157. *See* FLA. STAT. § 324.021(9)(b) (1997); *see also Kraemer* 572 So. 2d at 1366-67 (discussing the legislative intent behind this exception to the dangerous instrumentality doctrine).

158. 583 So. 2d 330 (Fla. 1991).

159. *Id.* at 333.

160. The court stated:

The legislative history behind the statute indicates that the legislature recognized that leases for a period in excess of one year are actually an alternative method of financing the purchase of a motor vehicle to take advantage of certain tax considerations . . . . Thus, there is a rational basis for the legislation.

*Id.* at 334.

liability of lessors in short-term leases and of owners who lend their cars to permitted users.<sup>161</sup> By reducing owners' and lessors' vicarious liability, the legislature merely adhered to the notion in *Hoffman*: "In the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault."<sup>162</sup>

The Tort Reform Act is narrowly tailored and does not limit the doctrine of negligent entrustment as articulated in *Kitchen*.<sup>163</sup> In fact, the Act explicitly states that this legislation in no way affects causes of action based on the independent liability of motor vehicle owners and lessors who negligently lease or loan a dangerous instrumentality to an individual who poses foreseeable risks to third parties.<sup>164</sup> The Tort Reform Act is thus a natural extension of the movement toward limiting, if not abrogating, the dangerous instrumentality doctrine in Florida. As the Florida Supreme Court noted in *Abdala*, limiting vicarious liability in this manner is well within the legislature's constitutional authority and, therefore, is deserving of deferential judicial review.<sup>165</sup>

### E. Employer Liability

Several sections of the Tort Reform Act address the extent of an employer's liability for the tortious acts of its employees.<sup>166</sup> These provisions represent a reasonable legislative determination that the scope of an employer's responsibility for its employees' acts must have a logical nexus to the employer's level of knowledge about its employees and its control over those employees' activities. In fact, these provisions are essentially statutory codifications of evolving case law in this expanding area of tort law.

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161. See ch. 99-225, § 28, 1999 Fla. Laws 1400, 1421-22 (amending FLA. STAT. § 324.012(9) (1997)).

162. *Hoffman v. Jones*, 280 So. 2d 431, 438 (Fla. 1993).

163. *Kitchen v. K-Mart Corp.*, 697 So. 2d 1200, 1204-08 (Fla. 1997) (determining liability for a firearm seller when the seller knows the purchaser and recognizes that the purchaser is intoxicated).

164. See ch. 99-225, § 28, 1999 Fla. Laws 1400, 1421-22.

165. See 583 So. 2d at 333-34.

166. See ch. 99-225, § 16, 1999 Fla. Laws 1400, 1412-13 (to be codified at FLA. STAT. § 768.096); *id.* § 17, 1999 Fla. Laws at 1413 (amending FLA. STAT. § 768.095 (1997)); *id.* § 29, Fla. Laws at 1423 (to be codified at FLA. STAT. § 768.098).

Section 17 of the Tort Reform Act addresses a recently-evolved cause of action for negligent employment referral. In response to this expansion of employer liability, the Act provides an employer immunity from civil liability if the employer discloses information about a former or current employee to a prospective employer unless the plaintiff can show by clear and convincing evidence that the employer knowingly provided false information or violated any civil right of the employee under chapter 760, *Florida Statutes*. This provision in the Act is consistent with the overall legislative purpose—to provide balance to the civil justice system. Indeed, this provision encourages employers to share information regarding employees without the threat of litigation.

### 1. Negligent Hiring

In Florida, the *respondeat superior* doctrine holds employers liable for the torts of their employees if those employees are acting within the scope of their employment at the time they commit the tortious act.<sup>167</sup> While this form of vicarious liability “reflects a policy decision that a business should bear the cost of risks associated with its business activities,”<sup>168</sup> Florida law also imposes liability on employers for their employees’ torts even when the employees are acting outside the scope of employment at the time they commit the tortious act.<sup>169</sup> Indeed, this form of employer liability is not linked to an employee’s job performance but, instead, is “grounded on negligence of the [employer] in knowingly keeping a dangerous [employee] on the premises which [the employer] knew or should have known was dangerous and incompetent and liable to do harm.”<sup>170</sup> In other words, employers may be held independently liable for negligently hiring an employee who poses a foreseeable risk to other individuals.<sup>171</sup>

Florida courts have struggled with defining the parameters of an employer’s liability based on negligent hiring. In fact, the First and Second District Courts of Appeal have acknowledged the “intolerable and unfair burden” resulting from imposing liability on an employer when no liability exists under *respondeat superior*.<sup>172</sup> These courts have demanded rational boundaries limiting such liability;<sup>173</sup> establishing appropriate boundaries, however, has been difficult.<sup>174</sup>

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167. See *Stinson v. Prevatt*, 94 So. 656 (Fla. 1922); see also *Mercury Motors Express, Inc. v. Smith*, 393 So. 2d 545 (Fla. 1981).

168. HB 775 Staff Analysis, *supra* note 13, at 6.

169. See, e.g., *Island City Flying Serv. v. General Elec. Credit Corp.*, 585 So. 2d 274, 276-77 (Fla. 1991); *Tallahassee Furniture Co. v. Harrison*, 583 So. 2d 744, 750-55 (Fla. 1st DCA 1991); *Garcia v. Duffy*, 492 So. 2d 435, 437-41 (Fla. 2d DCA 1986); *Abbott v. Payne*, 457 So. 2d 1156, 1157 (Fla. 4th DCA 1984); *Williams v. Feather Sound, Inc.*, 386 So. 2d 1238, 1239-41 (Fla. 2d DCA 1980).

170. *Mallory v. O’Neil*, 69 So. 2d 313, 315 (Fla. 1954); see also *Tallahassee Furniture Co.*, 583 So. 2d at 750.

171. See *Island City Flying Serv.*, 585 So. 2d at 276 (“Most jurisdictions, including Florida, recognize that independent of the doctrine of respondeat superior, an employer is liable for the willful tort of his employee committed against a third person if he knew or should have known that the employee was a threat to others.”) (citing *Williams*, 386 So. 2d at 1239-40); see also *Garcia*, 492 So. 2d at 438 (“Negligent hiring occurs when, prior to the time the employee is actually hired, the employer knew or should have known of the employee’s unfitness.”).

172. *Garcia*, 492 So. 2d at 439. Without restrictions on liability for negligent hiring, “an employer would be an absolute guarantor and strictly liable for any acts committed by his employee against any person under any circumstances. Such unrestricted liability would be an intolerable and unfair burden on employers.” *Id.*; see also *Tallahassee Furniture Co.*, 583 So. 2d at 750-51.

173. See *Garcia*, 492 So. 2d at 439; *Tallahassee Furniture Co.*, 583 So. 2d at 750-51.

174. See *Island City Flying Serv.*, 585 So. 2d at 276; see also *Williams*, 386 So. 2d at 1240 (“The rule [regarding an employer’s duty to hire safe employees] in Florida is not altogether clear.”).

In negligent hiring cases, courts have imposed the traditional standard of care found in all negligence actions: a duty to act reasonably under the circumstances in order to avoid foreseeable risks.<sup>175</sup> Inherent in this analysis is the scope of an employer's duty to perform a background investigation on potential employees to determine whether those individuals pose a foreseeable threat to others.<sup>176</sup> For example, in *Island City Flying Service v. General Electric Credit Corporation*,<sup>177</sup> the Florida Supreme Court indicated that a reasonable investigation of a prospective employee's background, focusing on any nexus between an employee's prior bad acts and the type of work the employee would be assigned, would relieve the employer of liability for negligent hiring if the employee committed an intentional tort.<sup>178</sup>

The Florida Legislature effectively codified this case law with the Tort Reform Act and provided uniform limits on employers' liability for negligent hiring.<sup>179</sup> The Act creates a presumption that an employer acts reasonably and, as a result, is not liable for negligent hiring when the employer conducts a background investigation, which does not reveal any adverse information about the prospective employee.<sup>180</sup> This legislation is narrowly tailored and is limited to cases when an employee commits an intentional tort.<sup>181</sup> Furthermore, the legislation is specific regarding the scope of the background investigation and requires employers to conduct a criminal background check, contact references and former employers, have a prospective employee complete a job application (including questions concerning previous criminal convictions and status as a defendant in inten-

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175. See *Island City Flying Serv.*, 585 So. 2d at 277; *Tallahassee Furniture Co.*, 583 So. 2d at 750; *Williams*, 386 So. 2d at 1240 (noting that the employer "had a duty to make a reasonable inquiry about [the employee's] background"). The Second District Court stated:

We believe that the [employer's] duty is best described as a legal duty, arising out of the relationship between the employment in question and the particular plaintiff, owed to a plaintiff who is within the zone of foreseeable risks created by the employment. Once it is established that the employer owed a duty to the particular plaintiff, . . . the test is whether the employer exercised the level of care[,]which, under all the circumstances, the reasonably prudent man would exercise in choosing or retaining an employee for the particular duties to be performed.

*Garcia*, 492 So. 2d at 440 (citations omitted).

176. See *Island City Flying Serv.*, 585 So. 2d at 276-77; see also *Tallahassee Furniture Co.*, 583 So. 2d at 751; *Garcia*, 492 So. 2d at 438, 440-41; *Abbott v. Payne*, 457 So. 2d 1156, 1157 (Fla. 4th DCA 1984); *Williams*, 386 So. 2d at 1240-41.

177. 585 So. 2d 274 (Fla. 1991).

178. See *id.* at 277. Florida courts, however, have declined to rule that employers are required to perform criminal background checks in order to be relieved of liability for negligent hiring. See *Williams*, 386 So. 2d at 1240 n.8.

179. See ch. 99-225, § 16, 1999 Fla. Laws 1400, 1412-13 (to be codified at FLA. STAT. § 768.096).

180. See *id.*

181. See *id.*

tional tort actions), check the employee's driver's license record (if relevant to the work to be assigned), and interview the prospective employee.<sup>182</sup> Finally, this provision merely raises a presumption and considers that different circumstances may require different conduct by employers. As a result, plaintiffs still have the opportunity to prove that an employer acted unreasonably, and juries still may conclude that an employer was negligent in hiring particular employees.

This provision in the Tort Reform Act merely constitutes a codification of the well-reasoned proposition that expanding employer liability to acts committed outside the scope of an employee's job description must have limits. This provision is narrowly tailored, traces judicial precedent, and is another example of the cooperative efforts of the legislature and the judiciary to provide balance to Florida's civil justice system.

## 2. *Employee Leasing*

As noted above, the *respondeat superior* doctrine imposes broad liability on employers:

An employer is vicariously liable for *compensatory* damages resulting from the negligent acts of employees committed within the scope of their employment even if the employer is without fault. This is based upon the long-recognized public policy that victims injured by the negligence of employees acting within the scope of their employment should be compensated even though it means placing vicarious liability on an innocent employer.<sup>183</sup>

This doctrine, which links an employer's liability to its control over an employee's acts, becomes confusing when one employer lends or leases an employee to another employer, thereby relinquishing some level of control over that employee. To solve this legal conundrum, Florida courts recognize the well-established "borrowed servant doctrine."<sup>184</sup> This judicially created doctrine states that an employer who lends his employee to another may be relieved of *respondeat superior* liability only if that other employer assumes complete control of the servant.<sup>185</sup> Shifting liability from one employer to an-

182. *See id.*

183. *Mercury Motors Express, Inc. v. Smith*, 393 So. 2d 545, 549 (Fla. 1981); *see also Abraham v. U.S.*, 932 F.2d 900, 902-03 (11th Cir. 1991) (discussing the Florida Supreme Court's liberal treatment of employer liability).

184. *See, e.g., Abraham*, 932 F.2d at 902-03; *Halifax Paving, Inc. v. Scott & Jobalia Constr. Co.*, 565 So. 2d 1346, 1347 (Fla. 1990); *Postal Tel. & Cable Co. v. Doyle*, 167 So. 358, 360 (Fla. 1936).

185. The Florida Supreme Court stated:

It is competent for a principal to loan or farm out his servant to a third party, and if such third party has complete dominion over the servant, and directs his conduct at all times, he will be held responsible for his derelictions even though

other is difficult, however, because the law recognizes the presumption that a borrowed servant remains under the control of his general employer.<sup>186</sup> Therefore, these general employers must overcome the presumption of retained control to avoid *respondeat superior* liability.

The borrowed servant doctrine is important in today's marketplace where the practice of leasing employees is so common that, in 1991, the Florida Legislature established regulations to monitor employee-leasing company practices.<sup>187</sup> In fact, this legislation recognizes the importance of an employer's control over a leased employee by defining a leasing company as one that "assigns its employees to a client and allocates the direction of and control over the leased employees."<sup>188</sup>

In conjunction with this established body of law, the Tort Reform Act contains a provision which, in essence, tracks the borrowed servant doctrine and establishes clear criteria to determine when liability for a leased employee shifts from one employer to another.<sup>189</sup> Under this provision, an employer will avoid liability for the tortious acts of a jointly-employed employee if the employer (1) "did not authorize or direct the tortious action;"<sup>190</sup> (2) "did not have actual knowledge of the tortious conduct and fail to take appropriate action;"<sup>191</sup> (3) "did not have actual control over the day-to-day job duties of the . . . employee . . . or actual control over the portion of the job site at which or from which the tortious conduct arose . . . and that said control was assigned to the other employer;"<sup>192</sup> (4) "is expressly absolved . . . of control over the day-to-day job duties of the" employee by the written joint employment agreement;<sup>193</sup> and (5) "did not fail to take appropriate action" upon being notified of the employee's tortious act.<sup>194</sup> Furthermore, this provision removes any presumption regarding which employer has actual control over a leased employee, thereby making the law fairer for all employers.<sup>195</sup>

This provision essentially constitutes a codification of the borrowed servant doctrine and provides some clear guidelines regarding

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the principal is paying his salary; but this rule does not hold good if the principal in any way withholds control over him.

*Postal*, 167 So. at 360; see also *Abraham*, 932 F.2d at 902-03 (quoting *Postal Telegraph & Cable Co.*, 167 So. at 360); *Halifax Paving, Inc.*, 565 So. 2d at 1347.

186. See *Abraham*, 932 F.2d at 903 (stating that an inference exists that a borrowed servant remains in the general employ of his original employer).

187. See Act effective Jan. 1, 1992, ch. 91-93, 1991 Fla. Laws 688 (codified at FLA. STAT. §§ 468.520-.535 (1997)) (establishing regulations for employee-leasing companies).

188. FLA. STAT. § 468.520(4) (1997).

189. See ch. 99-225, § 29, 1999 Fla. Laws 1400, 1423.

190. FLA. STAT. § 768.098(1)(a) (1999).

191. *Id.* § 768.098(1)(b).

192. *Id.* § 768.098(1)(c).

193. *Id.* § 768.098(1)(d).

194. *Id.* § 768.098(1)(e).

195. See *id.* § 768.098(1).

an employer's ability to shift *respondeat superior* liability to another employer. Indeed, this codification builds on judicial notions of equating liability with fault and clarifies the law regarding control over leased employees so that employers and businesses may operate as efficiently and economically as possible.

#### F. The "Trespasser" Defense

Since at least 1973, the Florida Supreme Court has recognized that "a property owner is entitled to some privacy upon his own premises and should not be bound to those who choose to avail themselves of it at will."<sup>196</sup> Based on this simple notion of private property rights, Florida courts have struggled to protect property owners from sweeping liability for injuries that occur to others who are on the owner's property.<sup>197</sup> Premises liability, however, has proven to be a "troublesome" area of tort law because a property owner's duty of care differs depending on the owner's relationship to the person visiting the property.<sup>198</sup> In fact, the Florida Supreme Court recognized the need for "guidelines [that] the jury can apply to the facts in arriving at a just verdict."<sup>199</sup>

In order to define the scope of a landowner's duty and the ensuing degree of liability to visitors on his property, Florida's courts have created several classifications of visitors.<sup>200</sup> In *Wood v. Camp*,<sup>201</sup> the Florida Supreme Court noted that "the distinction of 'invited' and 'uninvited' visitor is the fairest line of demarcation" in determining the criterion for the duty owed.<sup>202</sup> Based on this distinction, the Tort Reform Act evinces the legislature's intent to build on the Court's logical determinations regarding a landowner's liability to trespassers.<sup>203</sup>

Under the Tort Reform Act, a property owner's only duty to an undiscovered trespasser is to avoid intentionally harming the trespasser.<sup>204</sup> If the property owner discovers the presence of the tres-

196. *Wood v. Camp*, 284 So. 2d 691, 696 (Fla. 1973).

197. *See id.*

198. *See id.* at 694 ("There is a valid distinction in the duty of care . . . because it is the *relationship* established between persons which must be the criterion for the duty owed."); *see also Post v. Lunney*, 261 So. 2d 146, 147 (Fla. 1972).

199. *Wood*, 284 So. 2d at 695.

200. *See St. Petersburg Coca-Cola Bottling Co. v. Cuccinello*, 44 So. 2d 670, 676 (Fla. 1950); *see also Wood*, 284 So. 2d at 693-96; *Post*, 261 So. 2d at 147-48 (classifying visitors as invitees, trespassers, and licensees).

201. 284 So. 2d 691 (Fla. 1973).

202. *Id.* at 694.

203. *See* ch. 99-225, § 19, 1999 Fla. Laws 1400, 1414 (amending FLA. STAT. § 768.075 (1997)).

204. *See id.*; *see also Martinello v. B & P USA, Inc.*, 566 So. 2d 761, 763 (Fla. 1990); *Wood*, 284 So. 2d at 693-94. As the court stated in *Hix v. Billen*:

passer, then the property owner's duty is to avoid intentionally harming the trespasser as well as to warn him of any known dangers.<sup>205</sup> Thus, the property owner's discovery of the interloper elevates the landowner's duty to a trespasser. As long as landowners perform these duties, trespassers may not recover for any injuries that occur while they are trespassing.

The Tort Reform Act retains the "attractive nuisance doctrine."<sup>206</sup> This doctrine is an exception to a landowner's general duty to trespassers, and its purpose is to protect trespassing children who are incapable of making reasonable judgments about the dangers encountered on a premises.<sup>207</sup> Even under the Act, trespassing children may recover against a landowner if they are able to satisfy the elements of the doctrine.

In *Abdin v. Fischer*,<sup>208</sup> the Florida Supreme Court upheld the constitutionality of a statute that limited a property owner's liability.<sup>209</sup> The court explicitly held that the legislature has constitutional authority to codify the common-law duty of care that property owners owe certain classes of visitors.<sup>210</sup> In fact, the court went even further and held that the legislature may modify these common-law standards of care without violating the Florida Constitution, noting that "legislative action that alters standards of care need only be reasonable to be upheld."<sup>211</sup>

The purpose of the limits on a landowner's duty to trespassers is to equate liability with fault. As the court has noted, a landowner has no duty to anticipate a trespasser's presence and, thus, has no duty to protect a trespasser's safety unless the landowner discovers the trespasser's presence.<sup>212</sup> Recognizing that a trespasser assumes the

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The real reason which gave rise to the limited liability to a trespasser . . . is not because his injury upon defendant's premises is of any less concern as an injury, but because his presence is not likely to be anticipated, so that the owner or occupier owes him no duty to take precautions toward his safety beyond that of avoiding willful injury and if his presence be discovered, to give warning of any known dangerous condition not open to ordinary observation by the . . . trespasser.

284 So. 2d 209, 210 (Fla. 1973); see also *Rodriguez v. Brutus*, 702 So. 2d 1302, 1303 (Fla. 3d DCA 1997); *Potts v. Johnson*, 654 So. 2d 596, 600 (Fla. 3d DCA 1995).

205. See ch. 99-225, § 19, 1999 Fla. Laws 1400, 1415; see also *Martinello*, 566 So. 2d at 763; *Hix*, 284 So. 2d at 210-11; *Wood*, 284 So. 2d at 693-94; *Dyals v. Hodges*, 659 So. 2d 482, 484 (Fla. 1st DCA 1995); *Bishop v. First Nat'l Bank of Fla.*, 609 So. 2d 722, 725 (Fla. 5th DCA 1992).

206. See ch. 99-225, § 19, 1999 Fla. Laws 1415.

207. See *Martinello*, 566 So. 2d at 762 (discussing the public policy issues supporting the attractive nuisance doctrine).

208. 374 So. 2d 1379 (Fla. 1979).

209. See *id.* at 1381.

210. See *id.* at 1380-81.

211. *Id.* at 1381 (relying on Florida Supreme Court precedent).

212. See *Hix v. Billen*, 284 So. 2d 209, 210-11 (Fla. 1973) (citing *Wood v. Camp*, 284 So. 2d 691, 693-94 (Fla. 1987)).

risk of injury by entering another person's property, the Act limits a trespasser's ability to recover for any injuries occurring during the trespass.<sup>213</sup> Because this is a reasonable legislative determination based on judicial precedent, this provision of the Act is constitutional.<sup>214</sup>

### G. The "Government Rules" Defense

Before manufacturers can place their products in the stream of commerce, they must comply with a wide array of state and federal regulations that require products to meet certain minimum safety specifications.<sup>215</sup> The importance of complying with these safety regulations is reflected in Florida law, which holds that evidence of a manufacturer's or seller's failure to comply with industry standards is evidence that the manufacturer or seller was negligent.<sup>216</sup> Similarly, Florida case law recognizes that proof of a manufacturer's compliance with industry standards is evidence that no defect existed.<sup>217</sup> The Tort Reform Act represents a reasonable legislative determination that the existing case law fails to adequately promote compliance with these safety standards.

Florida case law does not create any presumptions that allow the jury to link evidence of compliance—or a lack thereof—with the existence of a defect. As a result, the status quo does not fully protect consumers *or* manufacturers and sellers. In fact, without a presumption linking manufacturers' non-liability to their compliance with safety standards, manufacturers are effectively subject to a jury's whim and caprice regarding the appropriate safety standards in product manufacturing. As one commentator notes:

There is an inherent illogic about giving little practical weight to compliance with safety standards promulgated by an expert agency intended to avoid unreasonable risk of injury or death and yet permitting a jury question simply because a claimant's witness

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213. See ch. 99-225, § 19, 1999 Fla. Laws 1414-15.

214. See *Abdin*, 374 So. 2d at 1380-81.

215. See, e.g., Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334(b) (Supp. III 1997); Flammable Fabrics Act, 15 U.S.C. §§ 1192-93, 1203 (Supp. III 1997); Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136v (Supp. III 1997); National Traffic and Motor Vehicle Safety Act, 49 U.S.C. § 30103(b) (Supp. III 1997); Food, Drug, and Cosmetics Act, 21 U.S.C. § 360k (Supp. III 1997); Occupational Safety and Health Act, 29 U.S.C. § 667 (Supp. IV 1998).

216. See *Jackson v. H.L. Bouton Co.*, 630 So. 2d 1173, 1175 (Fla. 1st DCA 1994); see also *Seaboard Coast Line R.R. Co. v. Clark*, 491 So. 2d 1196, 1198 (Fla. 4th DCA 1986); *St. Louis-San Francisco Ry. Co. v. White*, 369 So. 2d 1007, 1011 (Fla. 1st DCA 1979) (holding that a violation of industry standard concerning placement and operation of railroad crossing gates was evidence of negligence).

217. See, e.g., *Jackson*, 630 So. 2d at 1175 (holding that manufacturer's compliance with industry standards constitutes evidence that the product is not defective).

opined that the complying product was 'unreasonably dangerous' regarding some aspect of performance covered by the standard.<sup>218</sup>

The Tort Reform Act, however, reflects the Florida Legislature's determination to join a growing number of jurisdictions that have decided to legislate greater balance into their civil justice systems.<sup>219</sup> While creating a rebuttable presumption in favor of consumers, the Act also creates a rebuttable presumption in favor of manufacturers. If the product and its components complied with applicable federal and state regulations at the time of sale or delivery, if compliance with those standards was required to sell or distribute the product, and if the alleged injury is of the type that such standards are designed to prevent, then manufacturers and sellers are entitled to a rebuttable presumption that no defect existed and that no liability attaches for the damages allegedly caused by the product.<sup>220</sup>

Although this presumption was the subject of extensive legislative debate, the constitutionality of such statutory presumptions is beyond question. The Florida Supreme Court has previously upheld the constitutionality of statutory presumptions.<sup>221</sup> In *Straughn v. K & K Land Management*, the court held that a statutory presumption is constitutional if a rational connection exists between the fact that is presumed and the fact that is to be proven.<sup>222</sup> *Straughn* also requires that the party against whom the presumption arises be given a reasonable opportunity to rebut the presumption.<sup>223</sup>

Compliance with safety standards and the extent of a manufacturer's liability for its product are intertwined. Indeed, the underlying purpose of safety standards is to protect consumers from the inevitable dangers of unsafe products. The Tort Reform Act guarantees that plaintiffs will have a reasonable opportunity to refute this presumption. The Act clearly states that the presumption is rebuttable, not conclusive.<sup>224</sup> Even with this presumption in place, plaintiffs may still offer evidence and the jury may still determine that a product is

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218. Christopher Scott D'Angelo, *Effect of Compliance or Noncompliance with Applicable Governmental Product Safety Regulations on Determination of Product Defects*, 36 S. TEX. L. REV. 453, 455 (1995) (quoting MICHAEL HOENIG, PRODUCTS LIABILITY: SUBSTANTIVE, PROCEDURAL, AND POLICY ISSUES 16 (1993)).

219. Some states consider a manufacturer's compliance with government standards as evidence of no liability or product defect. See ARK. CODE ANN. § 16-116-105(a) (Michie 1987); ARIZ. REV. STAT. ANN. § 12-683(1) (West 1992); WASH. REV. CODE § 7.72.050(1) (1992). Some states incorporate the rebuttable presumption defense. See, e.g., COLO. REV. STAT. § 13-21-403(1) (1997); IND. CODE § 34-20-5-1 (1999); KAN. STAT. ANN. § 60-3304(a) (1994); KY. REV. STAT. ANN. § 411.310(2) (Michie 1995); N.J. STAT. ANN. § 2A:58C-4 (West 1987); TENN. CODE ANN. § 29-28-104 (1998); N.D. CENT. CODE § 28-01.3-09 (1999) UTAH CODE ANN. § 78-15-6(3) (1999).

220. See ch. 99-225, § 15, 1999 Fla. Laws 1412 (to be codified at FLA. STAT. § 768.1256).

221. See *Straughn v. K & K Land Management*, 326 So. 2d 421 (Fla. 1976).

222. See *id.* at 424.

223. See *id.* ("[T]here must be a right to rebut in a fair manner.").

224. See ch. 99-225, § 15, 1999 Fla. Laws 1412.

defective, and that a manufacturer or seller is liable for injuries caused by the defect. This presumption, therefore, meets the *Straughn* standards of constitutionality.

In addition to challenging the overall constitutionality of this presumption, critics might argue that creating this rebuttable presumption in favor of manufacturers effectively creates another element that plaintiffs must prove to prevail in a product liability suit. The legislature, however, has merely provided jurors with an opportunity to give manufacturers and sellers the benefit of the doubt when proof exists that their products comply with the relevant safety standards.<sup>225</sup> The jury remains absolutely free to discard this presumption in its deliberations.

Well-established Florida Supreme Court precedent recognizes that the Florida Legislature has the constitutional authority to change the nature of a cause of action without trampling litigants' rights.<sup>226</sup> For example, in *Abdin v. Fischer*,<sup>227</sup> the court explicitly held that a legislative modification to a property owner's duty of care to trespassers does not in any way violate the a parties' access to courts.<sup>228</sup> Similarly, the court held that the legislature may abrogate certain affirmative defenses without violating any constitutional provisions.<sup>229</sup> As the court stated in *Estate of Roberts v. Roberts*:

[Plaintiff's] argument that she has been denied access to the courts is based upon a false premise. The legislature has not abolished the wife's right to sue; it has only altered one of the elements that the court may consider in determining the validity of [her claim] . . . The right to [seek redress] . . . still exists.<sup>230</sup>

In accordance with this vast precedent permitting legislative modification to causes of action, the legislature's determination to create a rebuttable presumption in favor of manufacturers and sellers in product liability cases does not, in any way, violate consumers' constitutional rights to seek redress for allegedly defective products. Instead, this legislation merely levels the playing field.

225. *See id.*

226. *See* *Eller v. Shova*, 630 So. 2d 537, 542 (Fla. 1993) (upholding the legislature's determination to raise the degree of negligence necessary to maintain a workers' compensation claim); *see also* *Estate of Roberts v. Roberts*, 388 So. 2d 216, 217 (Fla. 1980) (upholding a statute that waives full disclosure for antenuptial agreement); *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973) (approving the decision in *McMillan v. Nelson*, 5 So. 2d 867 (Fla. 1942), that the legislature may change the degree of negligence necessary for a passenger to sue a driver for tortious conduct).

227. 374 So. 2d 1379 (Fla. 1979).

228. *See id.* at 1380-81.

229. *See* *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239, 1253 (Fla. 1996).

230. *Estate of Roberts*, 388 So. 2d at 217.

Finally, critics will likely argue that creating a presumption in favor of manufacturers and sellers effectively removes the issue of liability from the jury. This argument, however, is disingenuous. If a presumption in favor of a manufacturer removes the issue from jury deliberations, then a presumption in favor of a plaintiff will just as surely remove the issue from the jury.

In reality, these presumptions do not diminish the jury's capacity to weigh the evidence. Instead, the jury has the opportunity to determine that no defect existed in light of evidence that the manufacturer complied with government rules.<sup>231</sup> In fact, after hearing evidence of compliance, the jury may still find that the product was defective. By creating this rebuttable presumption linking safety standard compliance to a manufacturer's non-liability, the Tort Reform Act ultimately fosters uniformity and predictability in the application of safety standards and further injects some common sense into Florida's product liability laws.

#### *H. The "Alcohol and Drug" Defense*

Both the legislature and judiciary recognize the importance of protecting all Floridians from the harms caused by drug and alcohol abuse. For example, driving under the influence of drugs or alcohol is a criminal offense in Florida,<sup>232</sup> and the legislature continues to enact progressively harsher drunk driving laws.<sup>233</sup> Similarly, Florida courts may assess punitive damages against drunk drivers in order to discourage reckless disregard for public safety.<sup>234</sup> As another deterrent, courts admit the results of blood alcohol tests (regardless of the reason they were taken) in civil trials to determine the extent of a plaintiff's comparative negligence in causing injury.<sup>235</sup> The courts have also ratified a jury instruction that uses driving under the influence as a measure of a plaintiff's comparative negligence.<sup>236</sup> Finally, the negligent entrustment doctrine allows a party injured by an intoxi-

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231. See ch. 99-225, § 15, 1999 Fla. Laws 1400, 1412 (to be codified at FLA. STAT. § 768.1256).

232. See FLA. STAT. § 316.193 (1999).

233. In 1993, the Florida Legislature amended section 316.193, *Florida Statutes*, to reduce legally permissible blood alcohol levels from .10% to .08%. See Act effective Jan. 1, 1994, ch. 93-124, § 1, 1993 Fla. Laws 640, 640 (amending FLA. STAT. § 316.193 (Supp. 1992)).

234. See, e.g., *Ingram v. Pettit*, 340 So. 2d 922, 925 (Fla. 1976); *Alexander v. Alterman Transp. Lines, Inc.*, 387 So. 2d 422, 425 (Fla. 1st DCA 1980) (holding that punitive damages may be appropriately assessed against an intoxicated driver).

235. See *Brackin v. Boles*, 452 So. 2d 540, 542 (Fla. 1984); *Thunderbird Drive-In Theatre, Inc. v. Reed*, 571 So. 2d 1341, 1345 (Fla. 4th DCA 1990); *Grant v. Brown*, 429 So. 2d 1229, 1231 (Fla. 5th DCA 1983).

236. See, e.g., *Pinellas County v. Bettis*, 659 So. 2d 1365, 1366-67 (Fla. 2d DCA 1995); *Eden v. Food Fair Stores, Inc.*, 330 So. 2d 540, 542 (Fla. 3d DCA 1976); *Williams v. Groover*, 244 So. 2d 474, 474-75 (Fla. 4th DCA 1971).

cated person to sue the owner of a dangerous instrumentality for negligently entrusting that instrumentality to an obviously impaired person.<sup>237</sup>

Despite all of these measures to equate liability with fault, Florida's civil justice system still allows a drunk driver, who is primarily responsible for his own injuries, to collect damages if another person was partially responsible for the injuries.<sup>238</sup> The Tort Reform Act remedies in part this gross inequity and instills some common sense into Florida's tort law.

The Tort Reform Act prohibits a plaintiff from recovering damages for personal injury or property damage if, at the time of injury, the plaintiff's faculties were impaired by drugs or alcohol and, as a result of that drug or alcohol influence, the plaintiff was more than fifty percent at fault for his own harm.<sup>239</sup> This provision simply reiterates the notion expressed in other legislative and judicial policies that people who abuse drugs and alcohol should not benefit from their own wrongdoing.<sup>240</sup>

As former Chief Justice Alan Sundberg once noted: "There can be no question that drunk drivers endanger the lives of citizens of our state. But the legislature can and has dealt with this problem through enactment of criminal statutes. The legislature is the appropriate body to assert the public policy of Florida in this regard."<sup>241</sup> By creating this alcohol and drug defense in the Tort Reform Act, the legislature has exercised its constitutional authority to once again proclaim Florida's public policy against drug and alcohol abuse.

## V. CONCLUSION

We return to the two core issues in this debate: (1) the type of civil justice system that will best serve Florida citizens and (2) the role the Florida Legislature should play in making that choice.

In answering the first, the legislature and the Florida Supreme Court have declared, repeatedly and in unison, that a tort system equating liability with fault is preferable to a no-fault system of compensation.<sup>242</sup> In *Hoffman v. Jones*<sup>243</sup> the Florida Supreme Court found

237. See *Kitchen v. K-Mart Corp.*, 697 So. 2d 1200, 1207-08 (Fla. 1997) (holding that selling a gun to an obviously intoxicated person may invoke liability for injuries caused by that intoxicated person).

238. See *Livingston v. Smalley Transp. Co.*, 603 So. 2d 526, 527-28 (Fla. 3d DCA 1992) (holding that an intoxicated plaintiff found 50% negligent may receive judgment for \$350,000 after the court reduces the jury award).

239. See ch. 99-225, § 20, 1999 Fla. Laws 1415.

240. See *supra* Part IV.H. (discussing legislative and judicial policies that punish the abuse of drugs and alcohol).

241. *Ingram v. Pettit*, 340 So. 2d 922, 927 (Fla. 1976) (Sundberg, J., dissenting).

242. Of course, a fault-based system can never guarantee full compensation in every case because not all tortfeasors have insurance or personal resources. A no-fault system might well provide more efficient compensation to claimants; however, in exchange for

that equating liability with fault is "a more equitable system of determining liability and a more socially desirable method of loss distribution."<sup>244</sup> Any no-fault-based doctrine, whether contributory negligence or joint and several liability, contravenes basic notions of fair play:

The rule of contributory negligence is a harsh one which either places the burden of a loss for which two are responsible upon only one party or relegates to lady luck the determination of the damages for which each of two negligent parties will be liable. When the negligence of more than one person contributes to the occurrence of an accident, each should pay the proportion of the total damages he has caused the other party.<sup>245</sup>

In 1986, the legislature further assured the primacy of fault-based compensation by adopting the Tort Reform and Insurance Act of 1986.<sup>246</sup> The court approved those actions in 1993 by confirming that "liability is to be determined on the basis of the percentage of fault of each participant to the accident and not on the basis of solvency or amenability to suit of other potential defendants."<sup>247</sup> The Tort Reform Act inches Florida closer to that ideal.

In answering the second question, the legislature plays an essential and primary role in making the type of public policy choices underlying the Tort Reform Act. Three years of fact finding, public input, and intense debate yielded a product more faithful to *Hoffman* ideals than existed before. The legislature created the Act, however, only after careful scrutiny and adherence to other Florida Supreme Court decisions, such as *Pullum*,<sup>248</sup> *Smith*,<sup>249</sup> *Walt Disney World*,<sup>250</sup> *Diamond*,<sup>251</sup> *Gordon*,<sup>252</sup> *Abdala*,<sup>253</sup> *Abdin*,<sup>254</sup> *Fabre*.<sup>255</sup>

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quick, guaranteed compensation, claimants must abandon their right to sue. See FLA. STAT. ch. 440 (1999) (giving claimants a right to receive workers' compensation in lieu of suing for damages); FLA. STAT. §§ 627.730-.7405 (1999) (providing for medical, surgical, funeral, and disability insurance benefits without regard to fault). But, on the other hand, liability for a claimant's damages would often be imposed on one who did nothing wrong. The argument is largely academic, ironically, because the opponents of tort reform vehemently oppose no-fault-based tort systems. Simply put, plaintiffs' lawyers will not agree to limits on lawsuits, even if such limits might mean greater or more efficient compensation for claimants.

243. 280 So. 2d 431 (Fla. 1973).

244. *Id.* at 437.

245. *Id.*

246. See Act effective July 1, 1986, ch. 86-160, 1986 Fla. Laws 695.

247. *Fabre v. Marin*, 623 So. 2d 1182, 1186 (Fla. 1993).

248. *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657 (Fla. 1985).

249. *Smith v. DOI*, 507 So. 2d 1080 (Fla. 1987).

250. *Walt Disney World v. Wood*, 515 So. 2d 198 (Fla. 1987).

251. *Diamond v. E.R. Squibb and Sons, Inc.*, 397 So. 2d 671 (Fla. 1981).

252. *Gordon v. State*, 608 So. 2d 800 (Fla. 1992).

253. *Abdala v. World Omni Leasing, Inc.*, 583 So. 2d 330 (Fla. 1991).

254. *Abdin v. Fischer*, 374 So. 2d 1379 (Fla. 1979).

255. *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993).

At the heart of this debate “lies a policy question which calls for a delicate balancing of societal needs and individual concerns more appropriately accomplished by the Legislature.”<sup>256</sup> The legislature made those difficult decisions in this Act, but only after careful and sober regard for its own constitutional limitations. Florida’s Tort Reform Act is both constitutional and a model of respect for the coordinate branches of Florida government.

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256. *State v. Powell*, 497 So. 2d 1188, 1194 (Fla. 1986).