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HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIARY
ANALYSIS

BILL #: HB 775 (PCB JUD 99-01)

RELATING TO: Civil Actions (Litigation Reform)

SPONSOR(S): Committee on Judiciary and Rep. Byrd

COMPANION BILL(S): SB 236, SB 374, SB 376, and SB 378

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

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I. SUMMARY:

HB 775 proposes comprehensive modifications to Florida's civil justice system. It incorporates several provisions from the 1998 Report issued by the Conference Committee on Litigation Reform (CS/SB 874, 2nd eng., passed by the Legislature and vetoed by Governor Chiles following the 1998 session).

Some major provisions of HB 775:

- Increase juror participation in civil trials;
- Provide for alternative dispute resolution and expedited procedures;
- Authorize new sanctions to deter frivolous claims, frivolous defenses, and unreasonable delays;
- Create a 12-year statute of repose for products liability actions;
- Create a narrow "government rules" defense giving some defendants a rebuttable presumption that a product is not defective;
- Limit the liability of commercial property owners for third person criminal acts, if the owners take specified security measures;
- Revise the duties property owners owe to certain types of trespassers;
- Modify the burden of proof, revise conditions affecting recovery, and reconfigure the caps related to punitive damages;
- Restrict repetitive punitive damage claims under certain circumstances;
- Place a $200,000 cap on economic damages recoverable through joint and several liability;
- Limit the vicarious liability of certain motor vehicle owners or rental companies for damages due to the operation of the vehicle by an operator or lessee;

The overall fiscal impact of this bill is uncertain. It may spur economic development but could slightly increase reliance on some government services.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Alternative Dispute Resolution and Expedited Court Proceedings

Chapter 44, F.S., provides that courts may refer all or any part of a filed civil action to mediation. Mediation is a process in which a neutral third party facilitates the resolution of a dispute between two or more parties. The mediator does not render a decision. Instead, the decision-making authority rests with the parties. Mediation is always non-binding. The law also provides that upon motion or request of a party, a court shall not refer certain domestic relations cases for mediation.

Chapter 44, F.S., also provides for arbitration. Arbitration is a process in which a neutral third party (or panel of arbiters) considers the facts and arguments presented by the parties. The arbitrator renders a decision that may be binding or non-binding. Courts may refer any civil action filed in circuit or county court to non-binding arbitration. The arbitration decision is presented to the parties in writing. This decision is final if a request for a trial de novo is not filed within the time provided by the rules promulgated by the Supreme Court. The party who files for a trial de novo may be liable for legal fees and court costs of the other party if the judgment at trial is not more favorable than the arbitration decision. Two or more parties may elect to submit their controversy to voluntary binding arbitration either under Chapter 44 or through private contract.

Generally, rules adopted by the Florida Supreme Court govern procedure in all Florida courts. Article V, Section 2(a), Fla. Const. Rule 2.085, Florida Rules of Judicial Administration, governs general timelines for conducting trial and appellate court proceedings. The rule provides that civil jury trials should be conducted within 18 months after filing, and civil non-jury trials should be conducted within 12 months after filing. Civil cases not completed within these time periods are reported on a quarterly basis to the Chief Justice of the Florida Supreme Court. No civil rule provides for speedy trial resolution analogous to the criminal speedy trial rule, Rule 3.191, Florida Rules of Criminal Procedure.

Attorney's Fees

Under most circumstances, each party to a civil action pays its own attorney's fees. The private contract between attorney and client governs such fees subject to the Rules of Professional Conduct (Rules Regulating the Florida Bar, Ch. 4). Contingency fees are allowed in Florida in certain fields of the law and certain requirements must be met for the fee to be permitted. The Florida Supreme Court limits contingency fees depending upon a what stage of the proceedings a matter concludes. Numerous statutes, and some court rules, provide, in certain circumstances, for an award of attorney fees in favor of a prevailing party. Statutes, rules, and case law govern the amount of the fee awarded in such cases.

Economic and Non-Economic Damages

Compensatory damages reimburse the actual losses sustained by a plaintiff. They restore the injured party to the position it occupied prior to the defendant's misconduct. Compensatory damages can be subdivided into economic and noneconomic damages. Economic damages include lost wages, medical costs, and property destruction. "Non-economic damages" encompasses pain and suffering, mental anguish, inconvenience,

physical impairment, disfigurement, loss of capacity for enjoyment of life, and other non-pecuniary losses. Awards are subject to court review, however. Section 768.74, F.S., which governs negligence actions, provides criteria for a court to apply in deciding whether to add to an insufficient award, or reduce an excessive award.

In the Tort Reform Act of 1986, the Legislature imposed a $450,000 cap on damages for non-economic losses. In Smith v. Dept. of Insurance, 507 So.2d 1080 (Fla. 1987), the Florida Supreme Court held that the cap violated Section 21, Article I, of the Florida Constitution, which provides a right of access to the courts to seek redress of injuries. The Court said legislative restrictions on the right of access to the courts are impermissible unless: (1) the statute provides a reasonable alternative remedy or commensurate benefit; or (2) the Legislature demonstrates an overriding public necessity for the abolishment of the right, and no alternative method exists for meeting such public necessity.

Comparative Fault and Joint & Several Liability

In 1986, the Florida Legislature codified the doctrine of comparative fault, first adopted by the Florida Supreme Court in 1973 in Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). This doctrine replaced the doctrine of contributory negligence. Under contributory negligence, any fault on the part of plaintiff barred recovery, the Court found to be an unjust and harsh rule which "either placed the burden of a loss for which two were responsible upon only one party or relegated to Lady Luck the determination of the damages for which each of two negligent parties will be liable". Id at 437.

Under comparative fault, each party is responsible in proportion to its own fault. The Court reasoned comparative fault was a "more equitable system" of loss distribution. Id at 437.

The reach of comparative fault has been explored in Standard Havers Products, Inc. v. Benitez, 548 So.2d 1192 (Fla. 1994), in which the Supreme Court held that product misuse did not operate to bar a product liability claim, but went to the issue of comparative fault. Product misuse, the Court determined, reduces the plaintiff's recovery in proportion to plaintiff's own fault. The Court has also found that evidence of failure to wear a seat belt may be considered by a jury when assessing the plaintiff's damages under comparative fault principles. Insurance Co. of North America v. Pasakanvia 451 So.2d 447 (Fla. 1984). See also Ridley v. Safety Kleen Corp. 693 So.2d 934 (Fla. 1996) rehearing denied.

The concept of comparative fault becomes more complex, when applied to joint tortfeasors under joint and several liability. Section 768.81, F.S., provides for concurrent application of comparative fault and joint and several liability. Under the present statute, the court enters a judgment in negligence cases based upon each party's percentage of fault. The doctrine of joint and several liability applies to economic damages if a party's percentage of fault equals or exceeds that of the claimant. Joint and several liability makes each defendant a guarantor of the obligation of all defendants. The statute precludes joint and several liability for non-economic damages (i.e. pain and suffering, etc.) with one exception: joint and several liability applies to all damages in cases where the total amount of damages (economic and non-economic) is $25,000 or less.

In a significant decision construing the interrelationship between the doctrines of joint and several liability and comparative fault, the Florida Supreme Court ruled in Fabre v. Marin, 623 So.2d 1182 (Fla.1993), that a defendant could apportion fault to "phantom defendants." Specifically, the court held that fault must be apportioned among all responsible entities

whether or not they were joined as defendants in the lawsuit. In Nash v. Wells Fargo Guard Services, Inc., 678 So.2d 1262 (Fla.1996), the Court clarified that, in order for a non-party to be included on a jury verdict form, the defendant must plead the non-party's negligence as an affirmative defense and identify the non-party. In addition, the defendant bears the burden of presenting evidence that the non-party's negligence contributed to the claimant's injuries. Some legal commentators have expressed concern that the Fabre and Nash decisions have resulted in defendants bringing all potentially liable actors into lawsuits, some of whom might otherwise not have been named because it is likely they would have little or no liability.

The holding of Fabre has been limited by the Florida Supreme Court's refusal to apportion fault between negligent and intentional tortfeasors. In Merrill Crossing Associates v. McDonald, 705 So.2d 560 (Fla. 1997), rehearing denied. The Supreme Court held that s. 768.81(4)(b), F.S., which requires judgment against each party in negligence cases be based on comparative fault rather than joint and several liability, not be permitted to reduce the liability of negligent tortfeasors when the intentional criminal conduct of another tortfeasor was a foreseeable result of their negligence. The statute is restricted to negligence actions and excludes all actions from s. 768.81, F.S., where the claim is based on an intentional tort.

Compliance with Government Rules and Statutory Standards in Products Liability Actions

A plaintiff may bring a product liability action on any of three theories: negligence, breach of warranty, or strict liability. The general standard of care which applies to negligence actions is reasonable care under the circumstances. For actions based upon breach of warranty, a manufacturer's duties depend upon the performance levels promised in the warranty. Under some circumstances, however, the manufacturer's duties may be defined by implied warranties of merchantability or limited warranties or fitness for a particular purpose. Strict product liability in tort requires that when the product left the seller's control, it was in a "defective condition unreasonably dangerous to the user or consumer," that it reached the plaintiff without any substantial change in its condition, and that the defect resulted in damages to the plaintiff.

Violation of statutes or rules aimed at preventing the type of harm visited upon the plaintiff can be construed as "negligence per se." deJesus v. Seaboard Coast Line R.R. Co., 281 So.2d 198 (Fla. 1973). In other words, where the standard of care is defined by a statute, failure to adhere to the standards encompassed by the statute constitutes negligence as a matter of law. It should be noted, though, that if the violation of the rule or statute was not the proximate or contributing cause of the plaintiff's injury, then proof of the violation of the statute becomes irrelevant. See Periera v. Florida Power & Light Co., 680 So.2d 617 (Fla. 4th DCA 1996). The Restatement (Second) of Torts provides:

> s. 286. WHEN STANDARD OF CONDUCT DEFINED BY LEGISLATION OR REGULATION WILL BE ADOPTED.--The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose if found to be exclusively or in part
> (a) to protect a class of person which includes the one whose interest is invaded, and
> (b) to protect the particular interest which is invaded, and
> (c) to protect that interest against the kind of harm which has resulted, and
> (d) to protect that interest against the particular hazard from which the harm results.

Government rules and statutes generally set minimum safety guidelines for the protection of the public. While violations of such provisions may lead to a finding of negligence per se, the manufacturer or seller is not insulated from liability by following government rules and regulations. Even where the product meets applicable regulations, courts must still resolve questions related to whether the cost savings and utility of the product outweigh the risk inherent in its design or, whether the product meets the reasonable expectations of consumers. Courts have allowed juries to consider evidence of compliance with government rules and statute, customary practices, industry standards, and advances when assessing the scientific liability of a manufacturer or seller. Moreover, it is the risk reasonably to be perceived by the introduction and sale of a product which delineates the manufacturer's obligation to produce a reasonably safe product. In a product liability case, therefore, a manufacturer's compliance with government rules and standards is rarely determinative. Instead, the trier of fact weighs the utility of the product, the risk reasonably perceived by introduction of the product, and the reasonable expectation of the product by the public.

In many situations, no guidelines apply, or those that do apply are not specifically tailored to prevent the type of harm sustained by the plaintiff.

Punitive Damages

The courts will sustain an award of punitive damages only if the acts complained of were committed with malice, moral turpitude, wantonness, willfulness, outrageous aggravation, or reckless indifference to the rights of others. Intentional misconduct is not necessarily required. However, the misconduct:

> [M]ust be of a gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to the consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them. Ten Associates v. Brunson, 492 So.2d 1149, 1150 (Fla. 3d DCA 1986)(citations omitted).

Pursuant to s. 768.72, F.S., a claim for punitive damages is not allowed unless evidence proffered or in the record provides a reasonable basis for recovery of punitive damages. Until a 1995 Florida Supreme Court ruling, Globe Newspaper Co. v. King, 658 So.2d 518 (Fla. 1995), the District Courts of Appeal held conflicting positions on the issue of whether an appellate court could review a trial judge's finding that a plaintiff had met the evidentiary standard for punitive damages contained in s. 768.72, F.S. In Globe, the Florida Supreme Court held that common law certiorari is not available to review the sufficiency of the evidence before a judgment is rendered because the harm to the defendant is not irreparable. The court determined, however, that certiorari is available to resolve whether the trial court complied with procedural aspects of the statute.

Section 768.73, F.S., limits the amount of punitive damages that can be awarded in a civil action based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability, or breach of warranty. In these causes of action, punitive damages may not exceed three times the amount of compensatory damages awarded unless the claimant demonstrates by clear and convincing evidence that the award is not excessive in light of the facts developed at trial. Currently, Florida law does not limit the

amount of punitive damages that can be awarded in a civil action for intentional torts such as defamation or assault.

Currently, the full amount of punitive damage awards is payable to the claimant. Formerly, s. 768.73, F.S., required the division of punitive damage awards between the claimant and the state. If the claim was a result of personal injury or wrongful death, the state's share of any punitive damages was payable to the Public Medical Assistance Trust Fund. For awards based on any other claims, the state's share of the punitive damages award was payable to the General Revenue Fund. On July 1, 1995, the provision which required a split of punitive damage awards was repealed pursuant to Chapter 92-85, s. 3, L.O.F.

The Florida Supreme Court, in Gordon v. State, 608 So.2d 800 (Fla.1992), upheld the constitutionality of dividing the punitive damage award between the state and the claimant. The Florida Supreme Court determined:

> 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....The right to have punitive damages assessed is not property; and it is the general rule that, until a judgment is rendered, there is no vested right in a claim for punitive damages. It cannot, then, be said that the denial of punitive damages has unconstitutionally impaired any property rights of the appellant....The statute under attack here bears a rational relationship to legitimate legislative objectives: to allot to the public weal a portion of damages designed to deter future harm to the public and to discourage punitive damage claims by making them less remunerative to the claimant and the claimant's attorney.

Id. at 801-802 (citations omitted).[1]

Several nuances within the litigation process may affect whether punitive damages are actually awarded. First, many cases settle before trial. Settlement agreements rarely provide for or apportion punitive damages. Second, counsel may withdraw a client's plea for punitive damages just before the jury goes out. This situation would permit the trier of fact to consider the conduct giving rise to punitive damages, but would result in the removal of punitive damages from the verdict form. Third, a case may settle in the appellate stage, after the jury has rendered an award of punitive damages. Again, such settlement agreements generally do not address punitive damages awards.

Recent litigation on asbestos liability and other "mass torts" has raised the issue of whether a defendant can be subject to repetitive punitive damages awards in different trials stemming from the same conduct. In W. R. Grace & Co. v. Waters, 638 So.2d 502 (Fla. 1994), the Florida Supreme Court held that a defendant could be subject to multiple punitive

[1] While the statute directed the splitting of punitive damage awards was in force, 179 cases involved an award of punitive damages. Punitive damages awarded totaled nearly $130 million, of which about $58.7 million was collectible by the state. Collections were made in 70 of the 179 cases in the total amount of about $8.8 million. A 1995 *curiam* Florida Supreme Court opinion held that s. 768.83, F.S., did not govern punitive damages awarded in private arbitration, even if the award is enforced in state courts. Mile v. Prudential-Bach. Securities, Inc., 656 So.2d 470 (1995) (certified question from the Eleventh Circuit Court of Appeals).

damages awards for the same conduct. The defendants in W. R. Grace argued that, in the context of the asbestos litigation which had been brought against them, the public policy behind punitive damages had already been served. Punitive damages awards had previously been entered against them in other jurisdictions for the same conduct. The Florida Supreme Court relied on the unanimous position of other Florida state appellate courts and federal courts that had considered the issue and held that previous punitive damages awards did not insulate a defendant from future punitive damages awards. However, the court agreed with the defendants that evidence of other punitive damages awards could prejudice a jury's deliberations concerning liability. Therefore, the court held that upon motion of a defendant, the determination of whether punitive damages should be awarded could be separated from the rest of the trial.

Statutes of Limitation and Statutes of Repose

Statutes of limitation are generally shorter than statutes of repose. They involve less finality and are procedural in nature. They restrict only the remedy available to a particular plaintiff and do not operate as a limitation upon the underlying substantive right of action. Courts view statutes of limitation as affirmative defenses that the opponent of a claim must assert and prove in order to receive the protection offered under the statute. If the opponent of a claim fails to plead that the statute of limitations has expired, the defense is waived, and the claim may proceed through the courts. Statutes of limitation are predicated on public policy designed to encourage plaintiffs to assert their cause of action with reasonable diligence while witnesses are available and while memories of events are fresh. Statutes of limitation also shield defendants against the need to defend stale claims. Statutes of limitation usually run from the time at which a cause of action accrues. Currently, s. 95.11, F.S., provides a four-year statute of limitation for product liability actions.

Statutes of repose are generally longer and involve a greater degree of finality than statutes of limitation. Courts construe a cause of action rescinded by a statute of repose as if the right to sue never existed in the first place. Statutes of repose permanently lay a cause of action to rest and deprive the court of the power to hear the plaintiff's claim. According to the Florida Supreme Court:

> Rather than establishing a time limit within which action must be brought, measured from the time of accrual of the cause of action, these provisions cut off the right of action after a specified time measured from the delivery of a product or the completion of work. 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 Construction Co., 357 So.2d 401, 402 (Fla. 1978).

Statutes of repose rest upon public purposes which override the claimant’s need for relief from long past conduct. Words of finality, such as "in no event shall an action be commenced more than 12 years after the incident out of which the cause of action accrued," indicate that the Legislature intended to create a statute of repose.

Currently, in Florida, no statute of repose restricts suits for injuries caused by defective products. This means that plaintiffs can bring an action for product liability 25 or even 50 years after the product was manufactured or sold.

Vicarious Liability

Vicarious liability is a long-standing, common law doctrine imposing indirect legal responsibility on non-tortfeasors. The nature of the relationship, whether it be employer-employee, principal-agent, or motor vehicle owner/operator, makes one party liable for the negligent acts of the other. The doctrine reflects a policy decision that a business should bear the cost of risks associated with its business activities.

Employers can be held vicariously liable for the torts of employees who are acting within the scope of employment. Principals, by contrast, generally cannot be held vicariously liable for the acts of independent contractors. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995); Williams v. Fort Pierce Tribune and Claims Center, 667 So.2d 174 (Fla. 1995); Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956); Buitrago v. Rohr, 672 So.2d 646 (Fla. 4th DCA 1996); Alexander v. Morton, 595 So.2d 1015 (Fla. 2d DCA 1992); Kane Furniture Corp. v. Miranda, 506 So.2d 1061 (Fla. 2d DCA 1987). Several exceptions allow the imposition of vicarious liability against principals under limited circumstances. See e.g., Midyette v. Madison, 559 So.2d 1129 (Fla. 1990)(holding that the property owner could be held vicariously liable for the negligence of an independent contractor who had engaged in inherently dangerous activities); Insinga v. Bell, 543 So.2d 209 (Fla. 1989)(holding that the corporate negligence doctrine imposed a duty on hospitals to choose and retain competent medical practitioners, irrespective of the status of such practitioners as independent contractors). The courts will independently assess the relationship between the entities to determine whether the relationship is one of principal/ independent contractor or employer/ employee. St. Johns & H.R. Co. v. Shalley, 14 So. 890 (Fla. 1894); Mumby v. Bowden, 6 So. 453 (Fla. 1889). If the supervising entity exerts considerable day-to-day control over the details of the work performed by the subordinate entity, courts will deem the relationship to be that of employer/employee, even if the parties themselves categorize their relationship as one of principal/ independent contractor. Carroll v. Kencher, Inc., 491 So.2d 1311 (Fla. 4th DCA 1986).

Employers may be held vicariously liable for the tortious conduct of employees which occurs within the scope and course of employment. Rabideau v. State, 409 So.2d 1045 (Fla. 1982); Saudi Arabian Airlines Corp. v. Dunn, 438 So.2d 116 (Fla. 1st DCA 1983); Stinson v. Prevatt, 94 So. 656 (Fla. 1922). The main complexity which arises in this area of law is delineating the scope of employment. In Foremost Dairies of the South v. Godwin, 26 So.2d 773 (Fla. 1946), rehearing denied (Sept. 14, 1946), the Florida Supreme Court held that an employer was not liable for damages sustained in a collision involving an automobile owned by an employee. The collision took place while employee was driving to work. The court noted that employer contributions for maintenance of the automobile did not place any ownership interest in the employer, so as to make the employer liable under the dangerous instrumentalities doctrine.

In Schropp v. Crown Eurocars, Inc., 654 So.2d 1158 (Fla. 1995), the Florida Supreme Court held that a corporation may be held liable for punitive damages based upon the conduct of a managing agent, or may be found vicariously liable for punitive damages for wanton and willful conduct by an employee, if the plaintiff establishes some negligence by the corporation. In assigning responsibility for punitive damages, principals are often relieved of liability because their agents' intentional torts fall outside the scope of employment. Florida, however, holds employers liable for punitive damages if the employee's conduct warrants punitive damages and a managing officer, director or primary owner commits some negligent act or omission contributing to the injury. See Mercury Motors, supra. In Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981), the Florida Supreme Court determined that a corporate employer could not be held vicariously liable for punitive

damages for the willful and wanton misconduct of its employee, where the plaintiff failed to allege any fault on the part of the corporate employer.

Premises Liability

Premises liability involves the liability of property holders to persons who enter upon property with or without the property holder's permission. Premises liability constitutes a significant portion of tort cases heard in Florida courts and throughout the nation. The United States Department of Justice, in 1992, estimated that premises liability accounted for 16.6 percent of all civil jury trials that take place in state courts.

Premises liability can be divided into two general categories. First, premises liability refers to actions arising from injuries caused by a condition on the property. When persons who go upon the property are injured by such preexisting conditions, the property owner's duty is defined by the status of the injured party. Second, premises liability involves harms, inflicted upon visitors to the property, by the intentional criminal acts of third parties. Under these circumstances, the liability of the property owner turns upon the foreseeability of the incident, the obligation of the property owner to maintain a reasonably safe premises, and whether adequate security measures were provided.

Duty to Protect Against Third Person Criminal Acts

When examining premises liability stemming from third party intentional acts, the court has employed a sliding scale format. The greater the foreseeability of a criminal attack, the higher the duty of the property holder to provide security. This framework/arrangement has left some property holders with no clear indication of what they must do to avoid liability.

Florida courts have discussed the element of foreseeability in several recent decisions. Because crime is present to some degree in many locations throughout the state, the recent trend has been to find that criminal attacks are foreseeable under most circumstances. To support such a determination, courts have allowed the finder of fact to consider the occurrence of other criminal incidents that took place on the property or within the community. An examination of the cases reveals no established pattern in the types of incidents that might support a finding of foreseeability. It is not clear what degree of factual similarity is required between other criminal activity and the incident giving rise to the action for damages. For example, would a single drug arrest in the neighborhood be sufficient to make a stabbing foreseeable? What if the drug arrest took place six months earlier? Would foreseeability be established if the drug arrest occurred more than five blocks away from the property where the stabbing occurred?

Numerous cases have discussed the element of foreseeability in connection with premises liability for criminal attacks by third persons. In Hardy v. Pier 99 Motor Inn, 664 So.2d 1095 (Fla. 1st DCA 1995), the First District Court of Appeal held that the trial court erred by granting summary judgment to a hotel in a case involving a criminal attack and stabbing in the hotel parking lot. According to the court, although there had not been any prior violent assaults on the premises, other incidents of criminal activity on or near the premises created a material issue of fact involving the foreseeability of the attack. The dissent cautioned, “In truth, a decision such as today’s imposes absolute liability upon [the hotel]. . . . The courts have lowered the bar to such an extent in this type of case that a commercial premises owner . . . is a virtual insurer of the safety of its business invitees.” Id. at 1099 (Kahn, J., dissenting). Similarly, the Fourth District Court of Appeal, in Larochelle v. Water & Way Ltd., 589 So.2d 976 (Fla. 4th DCA 1991), held that a landlord could be held liable for a sexual battery committed against a tenant, because the landlord was on notice of danger to tenants by virtue of other crimes committed within a four to twelve block radius

and as a result of unsavory conduct that occurred in another apartment unit. See also Holiday Inns, Inc. v. Shelburne, 576 So.2d 322 (Fla. 4th DCA 1991); Odice v. Pearson, 549 So.2d 705 (Fla. 4th DCA 1989); Paterson v. Deeb, 472 So.2d 1210 (Fla. 1st DCA 1985). In some older decisions, Florida courts were less willing to find foreseeability. See Hall v. Billy Jack's, Inc., 458 So.2d 760 (Fla. 1984); Reichenbach v. Days Inn of America, Inc., 401 So.2d 1366 (Fla. 5th DCA 1981).

In other cases, Florida courts have discussed the adequacy of various security arrangements. See generally Orlando Executive Park, Inc. v. P.D.R., 402 So.2d 442 (Fla. 5th DCA 1981). These cases, taken as a whole, provide little guidance concerning what types of security measures would be sufficient to avoid liability.

In U.S. Security Services Corp. v. Ramada Inn, Inc., 665 So.2d 268 (Fla. 3d DCA 1995), the Third District Court of Appeal held that, in a case involving a criminal attack against an invitee of a hotel, the hotel had a non-delegable duty to provide a reasonably safe premises and, therefore, the hotel was vicariously liable for any negligence of the firm it had hired to provide security services. The Fifth District Court of Appeal, in National Property Investors, II, Ltd. v. Attardo, 639 So.2d 691 (Fla. 5th DCA 1994), held that the trial court properly dismissed third-party action against a convenience store, where an abductor followed the victim from the parking lot of the convenience store to an apartment complex where the assault took place. The court noted, "Apparently the security at [the convenience store]. . . was sufficient to protect its patron so long as she remained there. No court has yet extended the liability of landholders beyond this point." Id. at 692. But, in Gutierrez v. Dade County School Bd., 604 So.2d 852 (Fla. 3d DCA 1992), the Third District Court of Appeal held that a student, who was shot and injured by an assailant while exiting a school parking lot, was entitled to maintain a cause of action against the school board even though the incident took place off school property. The court noted that the duty to maintain reasonably safe premises extends to approaches and entrances to the property.

Duty to Warn/Maintain/Inspect

A property holder's duty to a person who is present on the premises is guided by the status of the person. Did the person come onto the property at the invitation of the property owner or was the person a trespasser? Was the injured party a child who was lured onto the property by what the law has defined as an attractive nuisance? Several types of entrants include:

- "Public Invitees" are owed the highest degree of care from property owners. Public invitees are persons who enter property that is held open to the public by design or through the conduct of the property holder. Formerly, the "economic benefit test" was used to determine whether an entrant was a public invitee. This standard no longer applies. Persons may be classified as invitees even if they do not bestow any sort of economic benefit upon the property holder. Examples of public invitees include store customers, delivery persons, employees, amusement park guests, restaurant and bar patrons, business visitors, museum visitors, and persons passing through airports and train stations. The property holder owes three duties to public invitees: (1) the duty to keep property in reasonably safe condition, (2) the duty to warn of concealed dangers which are known or should be known to the property holder, and which the invitee cannot discover through the exercise of due care, and (3) the duty to refrain from wanton negligence or willful misconduct. The duty to keep property in reasonably safe

condition may require periodic inspections of the property as well as the duty to provide security to prevent intentional torts by third parties.

- "Licensees by Invitation" are persons who enter upon property, for their own pleasure or convenience, at the express or reasonably implied invitation of the property occupier. This category was created by the Florida Supreme Court in Wood v. Camp, 284 So.2d 691 (Fla. 1973), and is unique to Florida. It requires some sort of personal relationship aspect and generally applies to party guests and social visitors. The duties owed by a property holder to licensees by invitation are identical to those owed to public invitees.

- "Emergency Entrants," are police or firefighters who enter property during the discharge of duties for which they were summoned to the property. These entrants come under what is commonly known as "the firefighter's rule.". The property holder owes such persons: (1) the duty to refrain from wanton negligence or willful misconduct, and (2) the duty to warn of dangerous conditions, known to the property holder, when the danger is not open to ordinary observation.

- "Uninvited Licensees" are persons who choose to go upon property for their own convenience. Their presence is neither sought nor prohibited, but is merely tolerated by the property holder. Included within this category might be sales persons or persons soliciting contributions for various causes. The duties owed by property holder to uninvited licensees are the same as those owed to emergency entrants: (1) the duty to refrain from wanton negligence or willful misconduct, and (2) the duty to warn of dangerous conditions, known to the property holder, when the danger is not open to ordinary observation.

- "Discovered Trespassers" are persons who enter property without permission or privilege under circumstances where the property holder has actual or constructive notice of the presence of the intruder. Constructive notice may be established where the property holder is aware of a worn path through the woods, tire marks showing the intermittent passage of vehicles, the remains of campfires, the presence of litter, or other evidence of repeated intrusions. The property holder owes discovered trespassers two duties: (1) the duty to refrain from wanton negligence or willful misconduct, and (2) the duty to warn of dangerous conditions, known to the property holder, when the danger is not open to ordinary observation. This arrangement places a slightly greater burden on the property holder than the requirements established in most other states. Most jurisdictions only require notification of *artificial* dangerous conditions, which are hidden to others, but which are known to the property holder.

- "Undiscovered Trespassers", are persons who enter property without permission or privilege and without the knowledge of the property holder. The only duty owed to undiscovered trespassers is to refrain from inflicting wanton or willful injury.

- The attractive nuisance doctrine applies to "Child Trespassers" (no fixed age limit) who are lured onto the property by the structure or condition that injures them and, who, because of their youth, are unable to appreciate the risks involved. In past decisions, the courts have applied the attractive nuisance doctrine to children who trespass upon property to swim in a pool, pond, or open pit; play upon a construction site or excavation; climb upon dirt piles, mineral heaps, debris, or trees; or use playground or sporting equipment. Under the attractive nuisance doctrine, the property holder has a duty to protect from known dangerous conditions, where the property holder knows or

should know that children frequent the area, and where the expense of eliminating the danger is slight compared with the magnitude of the risk.

B. EFFECT OF PROPOSED CHANGES:

HB 775 makes wide-ranging and substantial modifications to procedural and substantive components of the civil justice system in Florida. These charges are detailed in the section-by-section analysis below. Through its principal provisions, the bill:

- Provides for an expanded role for juries during civil trials, including the ability to pose questions, take notes, and keep notebooks in certain trials;
- Requires court-ordered mediation for all civil cases, when requested by one party, with limited exceptions;
- Expands the availability of sanctions for legal arguments which are frivolous or that unreasonably delay litigation;
- Authorizes alternative trial resolution or expedited trials in certain cases;
- Establishes a 12-year statute of repose in product liability cases;
- Limits the vicarious liability of certain motor vehicle owners and rental companies for damages caused by the operation of the vehicle by a person other than the owner, provided there is no negligence or intentional misconduct on the owner's or the rental company's part, with a raised limits in cases of uninsured or underinsured operators;
- Provides for limited premises liability for convenience businesses;
- Provides for immunity from liability for negligence in actions for injury to trespassers on real property or injury to a person who is committing or attempting to commit a crime;
- Creates a rebuttable presumption that a product is not defective or unreasonably dangerous if the product complies with relevant, applicable state or federal government standards or requirements;
- Requires "clear and convincing evidence" to prove liability for punitive damages, although the "greater weight of the evidence" burden applies to the determination of the amount of damages;
- Eliminates the application of joint and several liability to non-economic damages where damages are less than $25,000, and specifies that joint and several liability will only apply only up to $200,000 of the total of economic damages when a party's fault exceeds the claimant's fault;
- Includes intentional torts within the scope of the joint and several liability limitation.
- Clarifies the application of the offer of judgment statute involving multiple parties; describes effect of subsequent offers of judgment and requires reasonable offers to recover attorney fees;

- Imposes conditions for recovery of expert witness fees as a taxable cost; and
- Provides a limitation on vicarious liability for parties to joint employment arrangements.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

The bill reduces the authority of courts to award punitive damages and to adjudicate some personal injury disputes.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

The bill creates new responsibilities for the judicial system relating to mediation, greater jury involvement and alternative trial procedures.

(3) any entitlement to a government service or benefit?

The right to bring some claims to court may be reduced.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

N/A

b. Does the bill require or authorize an increase in any fees?

The bill may increase or shift the costs of some alternative court proceedings through the mandatory mediation and expert witness cost regulations in the bill.

c. Does the bill reduce total taxes, both rates and revenues?

N/A

d. Does the bill reduce total fees, both rates and revenues?

N/A

e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

The bill expands to sanctions for frivolous claims, frivolous defenses and tactics which aim to delay litigation. The bill reduces the ability of some trespassers to bring actions for personal injuries. The bill exempts intoxicated tortfeasors from limitations on punitive damages. The bill eliminates limitations on punitive damages where the tortfeasor acts intentionally. The bill reduces the number of cases where punitive damages might be awarded to plaintiffs.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

A party requesting mandatory mediation may be required to pay the cost of the mediation process. Parties seeking voluntary trial resolution must compensate the trial resolution judge. Convenience business owners would bear the costs of security measures taken to secure the presumption of non-liability for crimes of third parties.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

The bill reduces the damages for which some property owners may be liable for negligent or faultless conduct. The bill eliminates punitive damages for corporations and other legal entities where the managers, officers, directors or the owners acted with culpability below that of gross negligence. The bill gives parties statutory alternatives to all trials.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

The bill may increase the obligations of families to care for dependent tort victims by reducing recoveries available through the civil justice system.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

This bill substantially amends the following sections of the Florida Statutes: 44.102, 44.104, 57.071, 57.105, 95.031, 324.021, 768.075, 768.72, 768.73, 768.77, 768.78, 768.79, and 768.81. The bill also creates the following sections: 40.50, 768.0705, 768.1256, 768.725, 768.736. The bill also repeals the following subsections: 768.77(2) and 768.81(5).

E. SECTION-BY-SECTION ANALYSIS:

A section-by-section description follows:

Section 1 creates s. 40.50, F.S., to provide new rights for and responsibilities of jurors in civil cases. The section requires courts to provide detailed preliminary instructions to jurors, furnish notebooks to jurors in trials likely to exceed 5 days, permit jurors to take notes, and allow jurors to submit written questions to witnesses (subject to review and approval by the court). This section also permits the court to give final instructions to the jury before closing arguments to enable the jurors to apply the law to the facts in appropriate cases.

Section 2 amends s. 44.102(2), F.S., relating to court-ordered mediation, to mandate that all civil actions for monetary damages be referred to mediation, upon request of a party, unless such actions fall within certain exceptions. The exceptions are actions between landlord and tenant not involving personal injury claims, actions for debt collection, actions for medical malpractice, actions governed by the Florida Small Claims Rules, actions the court determines should be referred to non-binding arbitration, and those actions for which the parties have agreed to binding arbitration. In all cases for which mediation is not mandatory under the proposed changes, the court would retain the current statutory discretion to refer those cases to mediation under s. 44.102, F.S.

Section 3 amends s. 44.104, F.S., to allow parties to a civil action in which no constitutional issues are raised to agree to a voluntary trial resolution. The parties must select and compensate the trial resolution judge. The trial resolution judge must be a member in good standing of The Florida Bar for the preceding 5 years (the same qualifications Florida places on a circuit court or county court judge).

Currently, s. 44.104, F.S., allows voluntary binding arbitration with three arbitrators. The new alternative would follow the same process in many respects. The decision by a trial resolution judge, however, would be subject to slightly less review by the circuit court, presumably due to the higher legal qualifications of the trial resolution judge. Decisions in either case can be filed as judgments of the circuit court.

This provision gives the trial resolution judge authority to administer oaths and conduct the proceedings in accordance with the Florida Rules of Civil Procedure, and to issue enforceable subpoenas. A party may enforce a judgment obtained in a voluntary trial resolution by filing a petition for enforcement in circuit court. A party may appeal to the appropriate appellate court but review of factual findings is not allowed. The “harmless error doctrine” shall apply in all such appeals. The bill does not specify what the standard of

review will be. However, no further review will be allowed of a judgment unless a constitutional issue is raised. (The presence of competent substantial evidence to support the findings is a standard of review for most appellate cases.)

Voluntary trial resolution would not be available in actions involving child custody, visitation, or child support or in any dispute involving the rights of a party not participating in a voluntary trial resolution.

Section 4 amends s. 57.105, F.S., relating to the award of attorney's fees in frivolous (or unfounded) lawsuits. This section revises the standard for an award of attorney's fees which currently based requires a showing of the complete absence of a justiciable issue of law or fact. The new standard for an award of attorney's fees, upon the court's initiative or motion of a party, will be whether the losing party or the losing party's attorney knew or should have known that the claim or defense at the time it was initially presented or at any time before trial, was not supported by material facts or by the application of then-existing law. This section retains the good faith exception (modified slightly to apply to the new standard) for the losing party's attorney if the attorney acted in good faith based on his or her client's representations as to material facts. In addition, sanctions for attorney's fees will not apply if the claim or defense is determined to have been made "as a good-faith argument for the extension, modification, or reversal of existing law or the establishment of new law, with a reasonable expectation of success." The language relating to the nature of the arguments comes from Rule 11, F.R.Civ.P.

This section also expands the court's authority to award damages as punishment for protracted litigation if the moving party proves by a preponderance of evidence that any actions were taken for the primary purpose of unreasonable delay. The new authority supplements existing powers and remedies.

Section 5 amends subsections (3), (5), and (7) of s. 768.79, F.S., relating to offer and demand for judgment. This section requires an offer of judgment to specify to whom the offer is made and the terms of the offer in cases involving multiple parties. A subsequent offer to a party would automatically void a previous offer to that party. This section additionally requires the court to determine whether an offer was reasonable before awarding costs and fees.

Section 6 amends s. 57.071, F.S., relating to taxable costs in civil proceedings, to condition the recovery of expert witness fees as taxable costs to a prevailing party. The prevailing party must file a written notice within 30 days after entry of an order setting the trial date, setting out the expertise and experience of the witness, the subjects upon which the expert is expected to testify, and an estimate of expert witness total fees by flat hourly rate. The party retaining the expert witness must also furnish each opposing party a written report signed by the expert witness which summarizes the opinions expressed, the factual basis, the authorities relied upon for such opinions. The report must be filed at least 10 days prior to the discovery deadline, 45 days prior to trial, or as otherwise determined by the court.

Section 7 creates an optional expedited civil trial procedure. Upon joint motion of the parties with approval of the court, the court is authorized to conduct an expedited civil trial. For purposes of the expedited trial where two or more plaintiffs or defendants have a unity of interest such as a husband and wife, the parties shall be considered one party. Unless otherwise ordered by the court or agreed to by the parties, discovery must be completed within 60 days of the order granting the motion for expedited trial. The court must determine

the number of depositions required. The trial, whether jury or non-jury, must be conducted within 30 days after discovery ends. Jury selection is limited to 1 hour. Case presentation by each party is limited to 3 hours each. The trial is limited to 1 day. Verified expert witness reports and excerpts from depositions, including video depositions, may be introduced in lieu of live testimony regardless of availability of expert witness or deponent. The case must be tried within 30 days after the discovery cut-off, unless such schedule would pose an unreasonable burden on the court.

Section 8 amends s. 768.77, F.S., relating to itemized verdicts. The amendment removes the requirements that the trier of fact itemize and calculate on the verdict form economic damages before and after reduction to present value. It also removes the requirement that the trier of fact specify the period of time for which future damages are intended to provide compensation. The trier of fact would still be required to itemize damages as to economic and non-economic losses, and to itemize punitive damages when awarded.

Section 9 amends s. 768.78, F.S., relating to alternative methods of payment of damage awards, to conform the provisions of the alternative payment statute with the elimination of the itemization of future economic losses by the trier of fact as amended in s. 768.77, F.S. The term “trier of fact” is replaced with the term “the court” as the specific trier of fact to make the determination of whether an award includes future economic losses exceeding $250,000, for purposes of alternative methods of payment of damage awards. This modification allows the court to ensure that the allocation of future economic damages conforms with the evidence and the verdict.

Section 10 amends s. 95.031, F.S., to create a 12-year statute of repose for product liability actions, including actions for wrongful death or other claims for personal injury or property damages caused by a product. The new statute of repose bars any action based on products liability when the exposure to or use of a product occurred more than 12 years after the date of delivery of the completed product to the original purchaser or lessee, regardless of the date on which the facts giving rise to the cause of action were or should have been discovered. The repose will not apply where a claimant was exposed to or used the product within the 12 year period, but an injury caused by such exposure did not manifest itself until after the expiration of the period.

The 12 year period will be tolled where the manufacturer is shown to have actual knowledge that the product at issue in the litigation was defective and intentionally concealed the defect. “Actual knowledge” is defined to mean that the manufacturer’s officers, directors, or managing agents acknowledged or actually knew that the risks and dangers of the product outweighed its benefits in such a way as to render the product unreasonably dangerous. “Concealment” is defined to mean that the manufacturer’s officers, directors, or managing agents to affirmative steps to conceal substantially probative proof of a defect relating to the issue at trial. This section requires that a claim of concealment be based on substantial factual and legal support, and requires that the claim be plead with specificity. The repose period will not be tolled where the federal government issues public warnings about or bans a product.

Section 11 creates a savings clause to allow products liability actions that would not have otherwise been barred, but for the new statute of repose to be brought before July 1, 2003, or otherwise be subject to the new 12-year statute of repose.

Section 12 creates s. 768.1256, F.S., to provide for a "governmental rules defense" in product liability actions. This section provides a manufacturer or seller with a rebuttable presumption that a product is not defective or unreasonably dangerous and the manufacturer or seller is not liable under limited conditions. At the time the product was sold or delivered to the initial purchaser or user the aspect of the product that allegedly caused the harm must have been in compliance with applicable federal or state product design, construction, or safety standards. The standards must be relevant to the event causing the harm. The standards must be designed to prevent the type of harm that allegedly occurred. And compliance must be required to sell or distribute the product. Non-compliance with the applicable standards or lack of agency approval, however, does not raise a statutory presumption of liability. Non-compliance, however, usually constitutes negligence per se. The term "product" is not defined and would likely include drugs or medical devices approved by the Federal Food and Drug Administration (FDA).

Section 13 creates s. 768.0705, F.S., imposes limits on premises liability for convenience businesses. The owner or operator of a convenience business would gain a presumption against liability if the business implements security measures set out in ss. 812.173 and 812.174, F.S. At the same time, the failure to implement the security measures set out in ss. 812.173 and 812.174, F.S., will not create a presumption of liability and no inference may be drawn from such failure.

Section 14 amends s. 768.075, F.S., to expand the immunity of property owners from liability to trespassers. This provision precludes *all* civil or criminal trespassers under the influence of drugs or alcohol from recovering damages. The elements of trespass must still be proved by the property owner. This section also lowers the blood-alcohol threshold from 0.10 percent or higher to 0.08 percent or higher. The immunity does not apply if the property owner engaged in gross negligence or intentional misconduct.

New subsection (2) bars any recovery by trespassers except as provided in subsection (3). New subsection (3) defines the terms "implied invitation," "discovered trespasser," and "undiscovered trespasser." This subsection also delineates the duties owed by property owners to different categories of trespassers. Under this subsection, a property owner is not liable to an undiscovered trespasser if the property owner refrains from intentional misconduct. The property owner has no duty to warn undiscovered trespassers of dangerous conditions. A property owner is not liable to a discovered trespasser if the property owner refrains from gross negligence or intentional misconduct and warns the discovered trespasser of dangerous conditions which were known to the property owner but were not readily observable by others.

This section expressly provides that it does not alter the common law doctrine of attractive nuisance.

Finally, this section provides that a property owner is not liable for civil damages for negligent conduct resulting in death, injury, or damage to a person who is injured while attempting to commit or who is committing a felony on the property.

Section 15 creates s. 768.725, F.S., raising the burden of proof for punitive damages in civil actions from "preponderance of evidence". The "greater weight of the evidence" burden of proof applies to the determination of the amount of punitive damages.

Section 16 amends s. 768.72, F.S., relating to claims for punitive damages. This section adds subsection (2) to raise the common law standard of culpability required to hold a defendant liable for punitive damages. A defendant may only be liable for punitive damages if the plaintiff proves by clear and convincing evidence that the defendant was guilty of intentional misconduct or gross negligence. The term "intentional misconduct" is defined as conduct the defendant knew was wrongful and had a high probability that it would result in injury or damage to the claimant but intentionally pursued it anyway. The term "gross negligence" is defined as conduct so reckless or wanting in care that it constitutes a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

Subsection (3) revises the common law threshold for holding an employer vicariously liable for punitive damages. This section specifies the criteria necessary to hold an employer, principal, corporation, or other legal entity liable for punitive damages based on the conduct of an employee or agent. The employee's conduct must rise to the level of gross negligence or intentional misconduct, and either: a) the employer, principal, corporation or other legal entity actively and knowingly participated in such conduct, b) the officers, directors, or managers knowingly condoned, ratified, or consented to such conduct; or c) the employer, principal, corporation, or other legal entity, acting through officers, directors or managers, engaged in gross negligence contributing to the damages.

Section 17 amends s. 768.73, F.S., relating to caps on punitive damages, to revise the current cap set at three times the amount of compensatory damages. This section imposes a cap of $250,000 in punitive damages for judgments of $50,000 or less in compensatory damages, and a cap of three times the amount of compensatory damages or $250,000, whichever is higher, for judgments of more $50,000 in compensatory damages. This section eliminates the presumption that an award exceeding the cap is excessive. However, for punitive damages to exceed the cap, the claimant must prove by clear and convincing evidence that the defendant engaged in intentional misconduct. This standard comports with the existing requirement that the award would not be excessive in light of the facts and circumstances of the case.

This section also restricts multiple awards of punitive damages. The same defendant in any civil action may avoid subsequent punitive damages if that defendant can establish that punitive damages have previously been awarded against the defendant in any state or federal court for harm from the same act or course of conduct for which claimant seeks damages.

However, subsequent punitive damages may be awarded if the court determines by clear and convincing evidence that the amount of prior awards was insufficient to punish the defendant's behavior. The wrongdoer's cessation of the wrongful conduct may be considered in making this determination. If a subsequent award is permitted, the finder of fact will determine the total punitive damages appropriate to punish the conduct. The court will then enter judgment for that amount LESS any prior awards paid.

The section also clarifies that any contingent attorney fees on punitive damages are to be calculated based upon the final judgment, not the total punitive damages determined to be appropriate.

The amendments in this section apply to civil actions pending on October 1, 1999, in which the initial trial or retrial of the action has not commenced and to all civil actions commenced on or after that date.

Section 18 creates s. 768.736, F.S. It prohibits ss. 768.725 and 768.73, F.S., from allowing the recovery of punitive damages by any defendant who, at the time of the act or omission was under the influence of any alcoholic beverage or drug to the extent that the defendant's normal faculties were impaired, or who had a blood or breath alcohol level of 0.08 percent or higher. This would mean that the increased burden of proof and limitation on punitive damages set forth in the previous section would not apply.

Section 19 amends s. 768.81, F.S., relating to comparative fault and apportionment of damages. This section eliminates automatic application of joint and several liability for actions with total damages of $25,000 or less. It eliminates joint and several liability for all non-economic damages. This section will apply to negligence cases as well as cases founded upon intentional torts including criminal conduct. Actions to recover economic damages resulting from pollution or in actions governed by chapters 403, 498, 517, 542, or 895, F.S., are exempted.

Subsection (3) is amended to provide a cap of $200,000, on that portion of the economic damages for which joint and several liability would apply. It provides that the doctrine of comparative fault will be applied to the remainder of the economic damages, if any, based on the defendant's percentage of fault, and that a claimant is not entitled to recover more from the defendant(s) than the total amount awarded to that claimant.

This section also in part codifies, Fabre and Nash, requiring a defendant who identifies a non-party to be at fault to affirmatively plead that defense, and absent a showing of good cause, identify that non-party. Additionally, in order to include the non-party on the verdict form, the defendant must prove the non-party's fault in causing the claimant's injuries by a preponderance of the evidence.

Section 20 amends s. 324.021, F.S., relating to the financial responsibility of an operator or owner of a motor vehicle. This section limits the vicarious liability of a motor vehicle owner or a rental company that rents or leases motor vehicles. Subsection (9)(b)2. provides that unless there is a showing of negligence or intentional misconduct on part of a motor vehicle owner or rental company that rents or leases motor vehicles for a period less than 1 year, the vicarious liability of the lessor to a third party for injury or damage to a third party due to the operation of the vehicle by an operator or lessee is limited to $100,000 per person and $300,000 per occurrence for bodily injury and $50,000 for property damage. If the lessee or operator of the motor vehicle is uninsured or has less than $500,000 combined property and bodily injury liability insurance, then the lessor is liable for an additional $500,000 in economic damages which shall be reduced by amounts actually recovered from the operator or insurance of the lessee or operator.

Subsection (9)(b)3. is added to apply the same vicarious liability limitations to owners (who are natural persons) who lend their motor vehicles to permissive users. Subsection (9)(c) is added to exclude owners of motor vehicles that are used for commercial activity, other than rental companies that rent or lease motor vehicles, from the limits on vicarious liability in subsections (9)(b)2. and (9)(b)3. The term "rental company" is defined to include an entity that is engaged in the business of renting or leasing motor vehicles to the general public and rents or leases a majority of its vehicles to persons with no direct or indirect affiliation

with the rental company, and a motor vehicle dealer that provides temporary replacement vehicles to its customers for up to 10 days.

This section limits damages awardable under Florida's common law dangerous instrumentality doctrine, which currently allows a motor vehicle owner to be held liable for injuries caused by the negligence of anyone entrusted to use the motor vehicle.

Section 21 creates a new limitation on liability for parties to joint employment arrangements. This section provides that a party to a joint employment arrangement shall not be liable for the tortious acts of shared employees of another party to the arrangement if that party exercised control over the job site from which the tortious acts arose or otherwise authorized or directed the shared employee to take action resulting in damages or injury. As a condition on this limitation, one of the parties to the joint employment arrangement must be found to have exercised control over the job site from which the tortious acts arose or otherwise authorized or directed the shared employee to take action resulting in damages or injury. This section defines "joint employment" as the situation where two separate persons share or codetermine the matters governing the essential terms and conditions of the employment of their shared employees.

This section does not clarify whether a party to a joint employment arrangement will be liable for its own negligence, nor does it define the boundaries of "joint employment" in a way that will clearly spell out what situations will be covered by the limitation on liability.

Section 22 provides a severability clause.

Section 23 provides that the act shall take effect October 1, 1999.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

The PCB would reduce the case load of the courts by restricting certain actions. The bill would slightly decrease the liability of state agencies for trespassers or crime victims injured on public property. It could slightly increase the cost of public health care in a few cases where compensation for injuries is reduced.

3. Long Run Effects Other Than Normal Growth:

Business decisions resulting from this legislation should enhance growth.

4. Total Revenues and Expenditures:

   It is not possible to determine the net fiscal impact on the state, if any.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

   N/A

2. Recurring Effects:

   The bill would slightly decrease the liability of local governments for respect to trespassers or crime victims injured on public property.

3. Long Run Effects Other Than Normal Growth:

   *N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

   The bill shifts some costs of medical care from liability insurers, manufacturers and property owners to accident victims.

   A reduction in the ability of plaintiffs to collect punitive damages could diminish the incentives for businesses to provide safe products and services. At the same time, such limits could serve as disincentives to innovation.

2. Direct Private Sector Benefits:

   The bill may reduce the costs of liability insurance and self-insurance in the private economy. A reduction in civil litigation may attract more business investments in Florida. It could also enhance the success and growth of small business in Florida, the source of most new employment.

   Providing businesses with incentive to enhanced security on commercial property could reduce crime. In addition, a reduction in the liability costs for owners of real property may result in greater private sector productivity.

3. Effects on Competition, Private Enterprise and Employment Markets:

   Any reduction in the cost of doing business in Florida should make Florida businesses more competitive, more profitable and expand employment in the state.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill would not reduce the percentage of a state tax shared with counties or municipalities. Therefore, it would not contravene the requirements of Article VII, Section 18, of the state constitution.

V. COMMENTS:

Some Policy Arguments Advanced by Opponents and Proponents of Litigation Reform:

1. General

Opponents: Statistics show that the number of civil filings in state courts have remained fairly consistent over the past decade. Per capita filings have actually declined. Florida's civil justice system, moreover, has already undergone two substantial overhauls. Consequently, opponents of reform argue that Florida does not need litigation reform.

Proponents: While per capita civil filings have remained relatively constant, the number of civil filings continues to rise. During the 1970s and early 1980s, the tort system experienced a litigation explosion, with a tremendous surge in civil filings. As a result of this growth proponents of litigation reform urge, the civil justice system has reached a point of saturation. In addition, cases filed have grown in cost, duration, unpredictability, and complexity of issues , a trend not reflected in case filing statistics.

Opponents: The business climate in Florida is already favorable to business, opponents of litigation reform observe. Industries are profiting and businesses are relocating within state. The Legislature they argue should not attempt to protect businesses from liability when no real problem exists.

Proponents: Other states have passed comprehensive litigation reform packages, note proponents of litigation reform. If Florida seeks to remain competitive, both nationally and internationally, Florida must offer similar reforms. In addition, litigation expenses affect the

cost of products and services. This "tort tax," according to those who favor litigation reform, hurts Florida consumers.

Opponents: Some opponents of litigation reform argue that the primary purposes of the tort system are to compensate victims and to deter wrongful conduct. Governor Chiles, veto message of CS/SB 874 stated, "Our system of civil justice has two primary purposes: to redress wrongs, and to correct harmful behavior for the protection of our citizens." These goals are undermined by limiting the ability of citizens to collect damages. Only by holding wrongdoers responsible, opponents of litigation reform urge, can the civil justice system ensure the safety of its citizens and expose dangerous products and practices.

Proponents: Proponents of tort reform assert that the current civil justice system adequately serves neither of the purposes cited by opponents of tort reform. In its attempt to redress wrongs, the civil justice system wastes resources and keeps innocent victims waiting to receive compensation. The tort system deters misbehavior, moreover, only to the extent that it provides a clear and predictable way that individuals can avoid liability. Unfortunately, existing rules are largely incomprehensible. They frequently conflict and often demand conduct beyond the capacity of the affected parties. Some proponents of litigation reform also argue that the tort system should advance a variety of purposes beyond compensation and deterrence, such as encouraging dispute resolutions, preserving economic resources, and promoting personal responsibility.

2. Product Liability Statute of Repose

Opponents: According to opponents of litigation reform, the bill's 12-year repose period would create an insurmountable barrier, preventing recovery by those injured by dangerous products. Many products, they note, have life expectancies which exceed this 12-year period. Governor Chiles, in his veto message on CS/HB 874 stated:

> In this past week alone, the Federal Aviation Administration grounded scores of Boeing 737 airliners to check for what may be manufacturing defects in wiring that could result in fires or explosions. Through news accounts we learned that a large number of these jets have been in service for 20 years and longer. These commercial airliners are designed to last much longer than 12 years, but undiscovered manufacturing defects can reveal themselves many years after manufacture . . . . But under this bill, if a manufacturing defect is not discovered and a plane crashes in Florida as a direct result of the defect, the injured passengers or the families of the victims could not recover damages from the manufacturer if the airliner is more than 12 years old.

Proponents: Florida currently does not have a statute of repose for actions on product liability. Therefore, proponents of litigation reform note, manufacturers can be subjected to liability for products which may have been produced 25, 50, or 100 years ago. When assessing liability under such circumstances, the jury would be forced to peer backward through years of innovation, applying current attitudes toward safety to decisions made in a different era by persons who are no longer available to defend their actions. Product manufacturers are exposed to perpetual liability, despite the fact that more restrictive time limitations apply to prosecutions for most crimes and civil actions for fraud.

With respect to airplane crashes and other accidents involving products more than 12 years old, plaintiffs may recover under a variety of theories other than "product defect." Victims of an airplane crash could sue for negligent maintenance, negligent repair, negligent operation, or numerous other theories.

3. Joint and Several Liability

Opponents: Opponents of litigation reform urge that joint and several liability ensures that the victims of wrongful conduct are compensated, and that taxpayers are not forced to foot the bill for injuries resulting from tortious conduct. Governor Chiles, in his veto message concerning CS/SB 874 states that "While sometimes this process results in unfairness to a particular defendant, we have long recognized that it is important to fully and fairly compensate an innocent victim and to apportion damages among those who committed the wrongful act."

Proponents: Those who favor litigation reform indicate that joint and several liability could result in a defendant who only is one percent at fault paying the entirety of a massive award. Not only is this arrangement unfair, they urge, but it has the potential to bankrupt small businesses and to send jobs to other states or foreign countries. Joint and several liability undermines the predictability of the civil justice system and unfairly punishes those with financial resources.

4. Punitive Damages

Opponents: Punitive damages are imposed to punish a defendant for wrongful conduct. Opponents of litigation reform argue that any reduction in the ability of plaintiffs to recover punitive damages will reduce the ability of the tort system to deter dangerous behavior.

Proponents. Before the state can impose punishment on a criminal defendant, however, it must prove guilt "beyond a reasonable doubt." Yet, in a civil action, to punish a defendant with punitive damages, the plaintiff only needs to prove its case by a "preponderance of the evidence." The purpose of punitive damages, proponents of litigation reform point out, is not to reimburse an injured plaintiff for damages suffered as economic and noneconomic damages fully compensate such plaintiffs. Punitive damages represent a windfall to the plaintiff. They add to the uncertainty inherent in Florida's legal lottery.

5. Separation of Powers

The separations of powers doctrine forbids one branch of government from usurping the functions of another. Article II, Section 3, Fla. Const. Whereas the Legislature has authority to create substantive law, the Florida Supreme Court has authority to promulgate court rules of practice and procedure. *See* Article V, Section.2(a), Fla. Const. The Legislature can repeal the court rules by a 2/3 vote. *See* Article V, Section.2(a), Fla. Const.. It can not, however, enact law that amends or supersedes existing court rules. *See* Market v. Johnston, 367 So.2d 1003 (Fla. 1978).

What constitutes practice and procedure versus substantive law has been decided by the courts on a case-by-case basis. Generally substantive laws create, define and regulate rights. Court rules of practice and procedure prescribe the method or process by which a party seeks to enforce or obtain redress. *See* Haven Federal Savings & Loan Assoc., 579 So.2d 730 (Fla. 1991).

The courts tend to find certain types of provisions unconstitutional such as those regarding timing and sequence of court procedures, creating expedited proceedings, issuing mandates to the courts to perform certain functions, and attempting to supersede or modify existing rules of court or intrude in areas of practice and procedure. HB 775 contains a number of some provisions could involve matters of judicial practice and procedure. If the court were to strike any of these provisions, it would not invalidate the bill as a whole.

However, over the years, the courts have shown some willingness to adopt a "procedural" statute as a court rule, particularly when the court finds the legislative intent or underlying legislative policy to be beneficial to the justice system. In this situation, the court will typically invalidate the procedural as constitutionally infirm and then adopt the substance of the invalid section as a court rule. TGI Friday's, Inc. V. Dvorak, 663 So.2d 606 (Fla. 1995); Timmons v. Combs, 608 So.2d 1 (Fla. 1992). Under Florida Rule of Judicial Administration 2.130(a), the courts can also adopt the substance of an invalid section as an emergency rule of procedure based on a recognition of the importance of providing a procedural vehicle or otherwise recognizing the usefulness of the policy sought to be asserted by the Legislature. *See* Fla.R.Civ.P. 1.222 (emergency rule adoption of statutory provisions governing Mobile Homeowners' Association).

6. Access to the Courts

Article I, Section 21 of the Florida Constitution states: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." As a general rule, statutes of limitation and statutes of repose do not infringe upon the right of access to the courts. See Carr v. Broward County, 541 So.2d 92 (Fla. 1989); Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985). In Damiano v. McDaniel, M.D., 689 So.2d 1059 (Fla. 1997), the Florida Supreme Court found that the medical malpractice statute of repose did not violate the right of access to the courts, even though the plaintiff's injury did not manifest itself within the statutory four-year period following the incident which caused the injury. However, the Florida Supreme Court has occasionally invalidated statutes of limitation and repose as violative of the open courts provision, particularly in cases where such restrictions operated to deprive injured plaintiffs of a meaningful forum or remedy. Batilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1980); Overland Construction Co., Inc. v. Sirmons, 369 So.2d 572 (Fla. 1979). In Diamond v. E. R. Squibb and Sons, Inc., 397 So.2d 671 (Fla. 1981), the Florida Supreme Court construed a 12-year statute of repose for products liability actions (no longer in effect), and carved out an exception for the drug diethylstilbestrol (DES). DES caused injuries that remained latent for many years after the drug was ingested. By the time the injuries became apparent, the 12-year statute of repose had expired. The court held that applying the statute to DES cases would violate Article I, section 21 of the State Constitution, which guarantees access to the courts for redress of injuries. When the Florida Supreme Court later upheld the constitutionality of the statute of repose in general, it preserved the exception for DES cases. See Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985). In a recent case construing the old statute of repose, the Third District Court of Appeal relied on Diamond to create a similar exception for asbestos cases. Owens-Corning Fiberglass Corp. v. Corcoran, 679 so.2d 691 (Fla. 3d DCA 1996). In other instances, judicial decisions have narrowed statutes of limitations and repose based upon retroactive or due process concerns, E.g., Wiley v. Roof, 641 So.2d 66 (Fla. 1994).

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

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