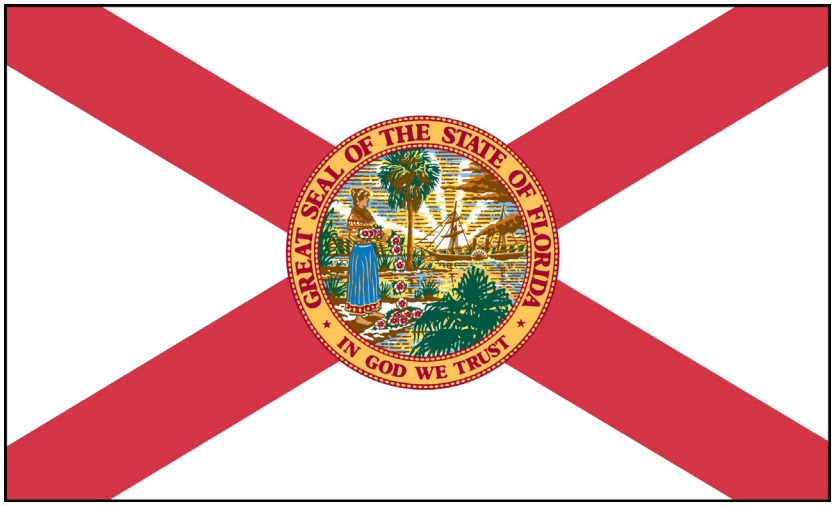
The "Activist" Journey of The Florida Supreme Court



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Note to the Reader: This study of the Florida Supreme Court was prepared as a result of several controversial rulings by the Court in recent years. The cases discussed here provide an alarming insight of how judicial activism can undermine legislative intent and compromise the separation of powers inherent in our constitutional form of government. Readers are encouraged to freely reference the analyses in articles or speeches or other presentations. The opinions and conclusions reached by the author are shared by the American Justice Partnership.

The American Justice Partnership is a national organization dedicated to achieving legal reform in the states. AJP's mission is to educate the American people about the perils of lawsuit abuse and the impact of judicial activism on our institutions and daily lives.

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Introduction

The term "activist" is used frequently today to refer to judges and courts. Conservatives call liberal judges activists. Liberals call conservative judges activists. It is clear than neither end of the political spectrum considers it a flattering term.

What does it really mean to be a judicial activist? What are the characteristics of an activist judge or court?

Most agree that an activist court is one that tends to *write new* law rather than *interpret existing* law. Judicial activism manifests itself in many ways. For example, it occurs when a court demonstrates an aggressive willingness to infer public policy when the statute does not make that policy choice clear. Similarly, an activist court frequently expands traditional common law principles to new situations without first deferring to the legislature to address the emerging issues.

To better define an activist court, it is helpful to examine the court's decisions as they relate to certain legal indicators. In this paper, we focus on five indicators, or signposts, indicative of an activist court. If *any* of these indicators properly describe a court or its decisions, the court is, by definition, an activist one.

1. Prompt reaction by the legislature repudiating a court decision and restating the law as written.
2. Unpredictable and inconsistent outcomes when dealing with similar legal principles.
3. Repudiating its own precedent[1] and shopping in other state or international courts to:
   - Find jurisdictions that support its preferred outcome, or
   - Determine the majority view and minority view….and then adopt the minority view!
4. Insert non-existent words or ignore the written words in a statute or contract to secure the court's preferred outcome.
5. Use vague or general constitutional language to defeat the clear will of the voters or acts of the legislature.

1 This is not to suggest that repudiating precedent is itself activism. If a prior case was based on flawed reasoning, it is appropriate to overturn it. However, if a court ignores precedent simply because they believe they have a better approach or to reflect the changing times, this court is taking an activist stance.

The presence of any of the above indicators is evidence that a Court is departing from the role envisioned for the judiciary by the founding fathers. Generally it is venturing more and more into the legislative arena, and is indeed making new law rather than interpreting the law as currently written. Unfortunately, the presence of these characteristics also allows the judiciary to be manipulated by litigants (or judges themselves) who prefer a certain policy or outcome that cannot be achieved through the legislative process.

A review of recent Florida Supreme Court decisions illustrates the presence of not just one or two of these indicators, but all of them….and repeatedly. By definition, the current Florida Supreme Court is an activist court, the majority of its justices, activist judges.

The Florida Supreme Court: A Brief Overview.[2]

The Florida Supreme Court is comprised of seven justices. Since the Florida Constitution was amended in the 1970's, Florida's Supreme Court Justices have been selected through a merit retention system. This system requires that the Governor fill any supreme court vacancy by appointing a person from a list of three to six names submitted by a Judicial Nominating Commission. Once appointed, the people of Florida vote on whether the appointed justices should remain in office.[3] If retained, the justice serves a six-year term before again facing a retention vote. If not retained, the Judicial Nominating Commission forwards additional names to the Governor for a new appointment. Since this system was implemented, no justice has ever lost a retention vote.

Current members of the Florida Supreme Court include: Chief Justice R. Fred Lewis and Justices Charles T. Wells, Harry Lee Anstead, Barbara Pariente, Peggy A. Quince, Raoul G. Cantero, and Kenneth B. Bell. Justices Pariente, Wells, Anstead and Lewis were appointed by Governor Lawton Chiles. Justice Quince was a joint appointment by former Governor Chiles and current Governor Jeb Bush; and Justices Cantero and Bell were appointed by Governor Bush. Of the seven members, three (Pariente, Lewis, and Quince) will face a retention vote in November of 2006.

The Proper Role of the Court

The Florida State Constitution establishes the authority for each branch of government. It vests the state's judicial authority in a supreme court, district courts of appeal, circuit courts and county courts,[4] and the legislative authority in the legislative branch.[5]

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2 General information regarding the Florida Supreme Court can be found on the court's official website at www.floridasupremecourt.org.

3 New justices face their first merit retention vote in the first general election that occurs more than one year after their appointment.

4 Art. V, § 1, Fla. Const.

5 "The legislative power of the state shall be vested in a legislature of the State of Florida, consisting of a senate composed of one senator elected from each senatorial district and a house of representatives composed of one member elected from each representative

The constitution states that each branch of government is responsible for its own powers, and should not infringe upon the authority of another branch.[6]

This "separation of powers" doctrine is a fundamental principle of our democracy, both at the state and national level.[7] However, of late, the lines between the branches of government and the power reserved for each have become blurred. The most aggressive blurring involves the judiciary encroaching upon the legislative branch's power to make laws and determine state policy. It occurs when the judiciary begins *making* law, rather than *interpreting* or *applying* the laws enacted by the legislature. Some call it judicial activism; others refer to it as legislating from the bench. Whatever it is called, it is clearly not the role intended by the founding fathers.

Judicial Activism in Florida

Nowhere is this pattern of judicial activism more prevalent than in the State of Florida. Examples of the Florida Supreme Court making law can be found as early as 30 years ago, but over the past six to eight years, the court has increasingly ventured into areas commonly considered to be within the exclusive purview of the legislature.

This paper identifies important examples where this court has overstepped its proper role. (By no means does this represent an exhaustive list.) Each decision represents yet another example of the Florida Supreme Court's tendencies toward judicial activism. We set the stage with two older cases (1973 and 1987). We then focus on decisions over the past 6 years, each of which exhibit one or more of the activist indicators noted above. Finally, we conclude by discussing the importance of the separation of powers and why making law is best left to the legislature, rather than the judiciary.

district." art. III, § 1, Fla. Const.

6 "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." art. II, § 3, Fla. Const.

7 Justice B.K. Roberts explained the Florida separation of powers doctrine in 1973: "The sovereign powers of this State are divided into three coordinate branches of government – legislative, judicial and executive – by the Constitution of Florida, Article II, Section 3. Our Constitution specifically prohibits a person belonging to one of such branches from exercising any powers 'appertaining to either of the other branches unless expressly provided herein.' This Court has been diligent in preserving and maintaining the doctrine of separation of powers, which doctrine was imbedded in both the state and federal constitutions at the threshold of constitutional democracy in this country, *and under which doctrine the judiciary has no power to make statutory law*." Hoffman v. Jones, 280 So.2d 431, 441 (Roberts, J., dissenting) (emphasis added).

I. Setting the Stage

Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). (The adoption of comparative negligence over contributory negligence by judicial fiat.)

Over 30 years ago, in *Hoffman v. Jone*s, the Florida Supreme Court started its "activist journey" vis-à-vis negligence by adopting comparative negligence over the common law principles of contributory negligence. In *Hoffman*, the court concluded that the rule of contributory negligence was "imported into the law by judges."[8] Therefore, it stood to reason that the courts should be able to discard the "harsh and inequitable" rule.

In arriving at this judicial solution, the court noted that the Legislature had twice attempted to discard the contributory negligence rule by statute, but failed. The first attempt was declared unconstitutional by the Florida Supreme Court because it applied only to the railroads, *i.e.,* it was not of general application. The second time, the legislature succeeding in passing a statute of general application, but was unable to override the Governor's veto. The court observed that "since that 'defeat,' the Legislature had done little to discard the contributory negligence rule, *perhaps because it considers the problem to be a judicial one*." (emphasis added)

> *Since we definitely consider the problem to be a judicial one,* we feel the time has come for this Court to join what seems to be a trend toward *almost universal adoption*[9] of comparative negligence. A primary function of a court is to see that legal conflicts are equitably resolved. 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. Comparative negligence does this more completely than contributory negligence, and we would be shirking our duty if we did not adopt the better doctrine.
>
> Therefore, we now hold that a plaintiff in an action based on negligence will no longer be denied any recovery because of his contributory negligence.[10] (emphasis added).

As further support for their policy shift, the majority noted: comparative negligence is "a more socially desirable method of loss distribution;" the court should reexamine prior positions "in light of current 'social and economic customs' and modern 'conceptions of right and justice;'" and finally that the initial justification for establishing [contributory negligence] is no longer valid" (to protect the growth of industry), when "modern economic and social customs… favor the individual and not industry." (cita-

8 *Hoffman, supra.* at 436.

9 At the time this case was written, only 16 of 50 states had actually adopted any form of comparative negligence.

10 *Supra* at 436.

tions omitted.) But the court did not stop by merely examining the laws of other states. They also looked internationally, noting that England and Canada had abolished contributory negligence, and that some form of comparative negligence existed in Austria, France, Germany, Portugal, Switzerland, Italy, China, Japan, Persia, Poland, Russia, Siam and Turkey. In so doing, the justices failed to realize that they had taken an oath to uphold the law and constitution of the *State of Florida*, not those of other states, and certainly not Siam or any other country!

What's the problem, you ask. Isn't it better to have a fault-based tort system? Isn't it far more equitable that an injured party be able to recover some compensation if they were only minimally at fault? It isn't that the *policy* set forth in *Hoffman* is wrong. Many agree that comparative negligence, or the apportionment of money damages according to fault, is better public policy.[11] However, as Justice Roberts pointed out in his dissent, the important question is "whether this Court is empowered to reject and replace the established doctrine of contributory negligence by judicial decree."[12] In other words, it is not a question of whether or not the law should be changed, but *who* should make the change. Justice Roberts rightfully concluded

> such modification *should be made by the legislature where [the] proposed change will be considered by legislative committees in public hearing where the general public may have an opportunity to be heard and should not be made by judicial fiat*. Such an excursion into the field of legislative jurisdiction weakens the concept of separation of powers and our tripartite system of government.[13]

The fact that six justices came up with a solution favored by the public does not make their action any less activist in nature. Stumbling upon the right policy is not enough. When examining whether or not a court takes an activist stance, one looks to the process involved in reaching a decision, not just the decision itself. The bottom line is that the Florida Supreme Court moved the State of Florida from a contributory negligence state to a comparative negligence state on its own. It legislated from the bench, achieving a solution they preferred – rather than one written into the law by the Legislature.

Walt Disney World Co. v. Wood, 515 So.2d 198 (Fla. 1987) (*Selective* Restraint: The Court refuses to judicially abolish joint and several liability.)

In this case, the driver of a bumper car, who was injured when her car was struck by another car driven by her fiancé, sued Disney and its insurer. The jury returned a verdict finding plaintiff driver 14% at fault, her fiancé 85% at fault, and Disney 1% at fault. However under the doctrine of joint and several liability, the lower court entered judg-

11 *See generally*, George N. Meros, Jr. & Chanta G. Hundley, *Florida's Tort Reform Act: Keeping Faith with the Promise of* Hoffman v. Jones, Fla. St. U. L. Rev., Vol 27, p. 461 (2000).

12 *Id.* at 440 (Roberts, J., dissenting).

13 *Id.* at 443.

ment against Disney for 86% of the damages!

The majority opinion in *Disney* acknowledged that joint and several liability is a judicially created doctrine. The court identified the issue as whether the doctrine of joint and several liability should be replaced with one in which the liability of the codefendants is apportioned according to each defendant's respective fault, *i.e.,* the same standard used in comparative negligence. The court also noted that since the adoption of comparative negligence, the doctrine of joint and several liability had been eliminated by statute in some states, and by the judiciary in others. In Florida, though the legislature had substantially modified the doctrine as part of a tort reform package, it did not abolish it completely. The opinion concluded, "In view of the public policy considerations bearing on this issue, this Court believes that the viability of the doctrine is a matter which should best be decided by the legislature."[14]

In his dissent, Chief Justice McDonald complained that although the majority opinion may make social sense, it defied legal logic. "It would be a mismatch of legal concepts to have a separation theory for plaintiffs and a joint liability responsibility for defendants." [15]

Justice Overton, in a separate dissent, likewise pointed out the hypocrisy in the court's restraint:

> To say it is proper for this Court to change the contributory negligence doctrine to comparative negligence by court decision, and then say the judicially established companion doctrine of joint and several liability should be left to the legislature, is both an abdication of our responsibility to address judicially established legal principles and, in this instance, hypocritical.[16]

What was happening in this case? Did the court suddenly become an advocate of the separation of powers doctrine? Was this truly an exercise of judicial restraint, or was something else behind the majority opinion? The true rationale may be found in Chief Justice McDonald's dissent: "Those who argue for favoring the plaintiff merely because he or she is the plaintiff have lost sight of the paramount goal of comparative negligence."[17]

As a result of the *Disney* ruling, the Legislature enacted section 768.81(3) as part of the Tort Reform and Insurance Act of 1986, chapter 86-160, Laws of Florida. This section states that "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 sev-

14 *Disney, supra* at 202.

15 *Id.* at 202 (McDonald, C.J., dissenting).

16 *Id*. at 206 (Overton, J., dissenting).

17 *Id.* at 206 (McDonald, C.J., dissenting).

eral liability." This illustrates the proper interplay between the legislative and judicial branches. Though the judiciary may identify a problem such as the one faced in *Disney*, it should exercise restraint in formulating a judicial solution. The Legislature can then react, hold hearings, gather input from the citizenry and enact legislation to resolve the issue at hand.

II. Recent Activist Decisions of the Florida Supreme Court

Armstrong v. Harris, 773 So.2d 7 (Fla. 2000). **(**By adding an "accuracy requirement" to the Florida Constitution, the Florida Supreme Court declared a constitutional amendment passed by 72.8% of the voting public unconstitutional!)

- Activist Indicator # 4 – Insert non-existent words or ignore the written words in a statute or contract to secure its preferred outcome.
- Activist Indicator # 5 - Use vague or general constitutional language to defeat the clear will of the voters or acts of the legislature.

(Majority: Shaw, Harding, Anstead, and Pariente, JJ.; Dissent: Wells, C.J., and Lewis and Quince, JJ.)

In 1998, the Florida Legislature proposed a constitutional amendment relating to the state's death penalty statute.[18] As required by law, the title of the constitutional amendment, along with a summary of its provisions, was placed on the November 1998 statewide general election ballot. It passed easily, having received the support of 72.8% of those voting. Following the vote, a group of citizens brought suit against the state, alleging that the ballot title and summary of the proposed constitutional amendment were inaccurate.

In September 2000, the Florida Supreme Court released a 4-3 opinion finding that the ballot title and summary violated the "accuracy requirement" of article XI, section 5, of the Florida Constitution.[19] The "purpose of this requirement is above reproach – it is to ensure that each voter will cast a ballot based on the full truth."[20] (emphasis in the original). The court effectively accused the Legislature of "clearly and conclusively" misleading the voters. Because of the "inaccurate" title and summary, the court found the constitutional amendment proposed by the Legislature and passed by a significant majority of the electorate unconstitutional. Needless to say, this stirred resentment among Floridians at large, and was not met with enthusiasm in the legislative halls in Tallahassee.

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18 This amendment would have allowed the state to use lethal injections in death penalty cases, in the event that a court rules that the use of Florida's electric chair was unconstitutional.

19 As noted later Chief Justice Wells said in his dissent that "language to support this is simply nonexistent in the express language of article XI, section 5." *Armstrong*, supra at 27 (Wells, C.J., dissenting).

20 *Id.* at 21.

There were three dissenting opinions in this case, each illustrating different, but legitimate questions. Chief Justice Wells questioned whether the Florida Constitution granted the court the power to strike from the Constitution an amendment proposed by the Legislature and approved by the voters based on a *conclusion* that the amendment's ballot title and summary were misleading.[21] The Chief Justice noted that the Legislature carefully followed the procedure set forth in the constitution for proposing a constitutional amendment. As such, "I read no basis in the Constitution … to find that this Court has the power to strike this amendment."[22] He found the court's action contrary to the separation of powers requirements of article II, section 3 of the Florida Constitution, noting that there is no constitutional authority for a judicial veto of a legislatively proposed amendment, just as there is no gubernatorial veto of such an amendment.

Chief Justice Wells also argued that the only way the majority could support their position was by writing into article XI, section 5, an "accuracy requirement" and then using this judicially-created requirement as a basis to review legislatively-proposed amendments to the Constitution. The problem is that "*language to support this is simply nonexistent in the express language of article XI, section 5*…. [S]ince the Constitution does not expressly give the Court this power, I must conclude that the Court should not assume it by implication."[23]

Justice Lewis' dissent brought to light another area of deep concern: that the judicial system was being used inappropriately by the plaintiffs in this case. Justice Lewis wrote,

> Once again, the judicial system is being asked not only to intervene in a matter that addresses the intent and understanding of Florida voters in connection with the performance of the most basic function in the democratic process, but in so doing, to invalidate the result of a vote after the citizens of Florida have already exercised their franchise and voiced a decision.
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> . . . .
>
> I must note that this is at least the third occasion within a very short period of time that a request, with very unquestionable timing, to invalidate action taken by voters has been submitted to this Court for resolution.[24]

21 Even the majority admitted that the Florida Constitution only expressly authorizes judicial review of amendments proposed by citizen initiative. *Id*. at 13, n. 18.

22 *Id.* at 26 (Wells, C.J., dissenting).

23 *Id.* at 30.

24 *Id.* at 31 (Lewis, J., dissenting). Frankly, the situation noted by Justice Lewis is happening not only in Florida, but across the country. With a trend toward more conservative legislatures in many states, certain special interest groups who are no longer able to achieve their goals legislatively turn to the courts. If they find a particular law

Justice Quince didn't question the majority's approach – she simply thought they were wrong. She would have held that the ballot title and summary were not misleading, noting that this provision was the same type previously approved by Floridians when they voted on the search and seizure provision of the Florida Constitution.

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Delgado v. State, 776 So.2d 233 (Fla. 2000). (Adding the word "surreptitiously" to the burglary statute resulting in the setting aside of two murder convictions.)

- Activist Indicator # 1 - Prompt reaction by the legislature repudiating a court decision and restating the law as written.
- Activist Indicator # 3 - Repudiating its own precedent and shopping in other state or international courts to find jurisdictions that support its preferred outcome.
- Activist Indicator # 4 - Insert non-existent words or ignore the written words in a statute or contract to secure its preferred outcome.

(Majority: Shaw, Harding, Anstead, and Pariente, JJ.; Dissent: Wells, C.J. and Lewis and Quince, JJ.)

The defendant in this case was convicted of two counts of first-degree murder and one count of armed burglary; he was sentenced to death under Florida's felony murder statute. Ignoring Florida precedent, the supreme court held that the phrase "remaining in" found in the burglary statute is limited to situations where the defendant "surreptitiously" remained. As a result, the two murder convictions were set aside because there was no burglary as redefined by the court. The case was remanded for a new trial.

In a stinging dissent, Chief Justice Wells, joined by Justices Lewis and Quince, characterized the majority's holding as follows: "The majority recognizes that this issue is one of statutory interpretation. Since [they] cannot reach [their] result through the acceptance of the plain language of the statute, the majority resorts to writing a change in the statute by inserting the word 'surreptitiously.'"[25] The dissent accused the majority of looking to the State of New York, and a dissenting opinion in Alabama, rather than relying on Florida precedent.[26] Chief Justice Wells urged the Legislature to immediately review the majority's findings, and state whether or not they agreed with it.

As urged by the dissent, the Legislature reviewed the decision in *Delgado* and found that it was decided contrary to legislative intent, and the case law relating to this statute

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distasteful, they contrive a case to get the issue before a sympathetic judge, and ask the court to change or affect it. Unfortunately, we are seeing more and more activist judges who are willing to oblige!

25 *Delgado, supra* at 242 (Wells, J., dissenting).

26 *Id., referring to* People v. Gaines, 74 N.Y.2d 358, 547 N.Y.S.2d 620, 546 N.E.2d 913 (1989) and Davis v. State, 737 So.2d 480 (Ala. 1999).

prior to the issuance of *Delgado*. The Legislature nullified *Delgado*'s finding, noting it was the intent of the Legislature that the burglary statute be construed with pre-*Delgado* precedent,[27] *i.e.*, there is no requirement that the "remaining in" be "surreptitious."

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D'Amario v. Ford Motor Company, 806 So.2d 424 (2001) (joined with ***General Motors Corporation v. Nash***) (Comparative negligence applies in product liability cases, yet *not* in crashworthiness cases.)

- Activist Indicator # 2 – Unpredictable and inconsistent outcomes when dealing with similar legal principles.
- Activist Indicator # 3 - Repudiating its own precedent and shopping in other state or international courts to determine the majority view and minority view….and then adopt the minority view!

(Majority: Shaw, Anstead, Pariente, Lewis, and Quince, JJ.; Dissent: Wells, C.J. and Harding, J.)

In *D'Amario*, a passenger brought a crashworthiness action against Ford arising out of a single car accident in which the allegedly intoxicated driver was speeding, lost control, and hit a tree. Subsequent to the crash, a fire started in the engine area and an explosion occurred, severely injuring the plaintiff. Plaintiff alleged that a faulty relay switch caused the explosion. He sought recovery only for the injuries suffered due to the explosion, not the injuries sustained as a result of the initial collision with the tree.

Nash involved a 2-car accident in which a car approaching the Nash vehicle from the opposite direction crossed over the center line and crashed into Nash's car. The driver of the first car was intoxicated. Nash died as a result of striking her head on the metal post separating the windshield from the driver's door. The two children in her car survived the accident. Nash's estate filed suit against GM alleging a failure of the vehicle's seatbelt, and that GM was strictly liable for a design defect which had been discovered in the seatbelt of her model of car.

The juries in both *D'Amario* and *Nash* concluded that the manufacturers were not liable as they were not the cause of the accident.

The Florida Supreme Court *had previously held that comparative negligence rules apply in product liability cases* since its adoption of strict liability.[28] However, the court distinguished the instant cases, maintaining that the issue of whether comparative fault would apply in "enhanced injury" cases was one of first impression. Consequently, the court again looked to other jurisdictions. The majority view holds that the fault of the plaintiff or a third party in causing the initial accident is a defense in a crashworthiness

27 § 810.015, Fla. Stat. (2000).

28 Standard Havens Products v. Benitez, 648 So.2d 1192 (Fla. 1994).

case brought against the product manufacturer.[29] The minority view rejects application of comparative fault by imposing liability against automobile manufacturers for secondary injuries caused by a design defect. In light of many of the Florida Supreme Court's rulings in 2000 – 2001, it came as no surprise that the *D'Amario* court found the minority view more consistent with the principles of tort law and comparative fault as it then existed in Florida.

The court held that the trial courts in both cases erred by allowing the intoxication of the drivers causing the accidents to be introduced into evidence, concluding that such evidence was unduly prejudicial to the plaintiff, and would confuse the jury by focusing on the cause of the accident rather than the cause of the enhanced injuries.

The dissenting opinions again argued that the court had gone too far. "We have uniformly held that comparative negligence does apply in the products liability area since the adoption of strict liability,"[30] wrote Chief Justice Wells in his dissent.

> *Our tort law has historically recognized the fact that there may be more than one proximate cause of an injury. Jurors have had no difficulty in apportioning fault equitably between multiple parties where negligent conduct is the proximate cause of injuries*. The existence of other proximate causes for an injury does not relieve a plaintiff driver …from responsibility of his own conduct which proximately caused him injury. Further, I can discern no policy reason why, in an enhanced injury case, the rule should be any different. Public policy seeks to deter not only manufacturers from producing a defective product but to encourage those who use the product to do so in a responsible manner.
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> Under plaintiff's theory, a jury would be instructed that it should not consider the negligence of the plaintiff in causing the accident. Rather the jury would be instructed to simply determine what injuries the plaintiff sustained over and above what he probably would have sustained had no defect existed and then award the plaintiff damages for the enhancement.
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> However, this approach ignores the well established rule of proximate cause. It is obvious that the negligence of a plaintiff

29 The majority view reasons that the "fault of the person causing the accident that created the circumstances in which the second accident [injury] occurred should be compared with the role of the automobile manufacturer's negligence in designing a defective product in assessing total responsibility for the claimant's injuries." *D'Amario, supra* at 431 (citations omitted).

30 *Id.* at 442 (Wells, C.J., dissenting).

> who causes the initial collision is one of the proximate causes of all the injuries he sustained, whether limited to those the original collision would have produced, or including those enhanced by a defective product in the second collision.[31] (emphasis in original)

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Owens v. Publix Supermarkets, Inc., 802 So.2d 315 (Fla. 2001). (joined with ***Soriano v. B&B Cash Grocery Stores, Inc.***) (superseded by statute) (The wholesale rewriting of Florida's premises liability law, without regard to precedent or the legislature.)

- Activist Indicator # 1 – Prompt reaction by the legislature repudiating a court decision and restating the law as written.
- Activist Indicator # 3 - Repudiating its own precedent and shopping in other state or international courts to find jurisdictions that support its preferred outcome.

(Majority: Pariente, Shaw, Anstead, and Quince, JJ.; Concurring in result only: Wells, C.J. and Harding and Lewis, JJ.), (Wells, C.J. - disagreeing with the court's 'mode of operation' discussion; Harding and Lewis, JJ. - pointing out that the majority went too far and rewrote Florida law)

In each of these joined cases, the plaintiff slipped on a "discolored" piece of banana. In each instance, the trial court entered a directed verdict[32] in favor of the defendant, concluding that the evidence presented was insufficient to show active or constructive notice to the proprietor that the banana had been on the floor for a significant period of time. Both appellate courts determined that the aging condition of the banana alone was insufficient to overturn the directed verdicts.

The initial discussion in the supreme court's majority opinion signals their preference in this case. In 2001, it was well-settled Florida law that in cases of injury due to transitory foreign substances on a business premises floor, the burden was on the plaintiff to prove that the proprietor had actual or constructive notice of the substance. In *Owens*, the court noted that "with case law making notice of the dangerous condition the linchpin of liability, an injured person's ability to establish constructive notice is often dependent on the fortuitous circumstance of the observed condition of the substance."[33] Clearly, the court was not pleased with the outlook for plaintiff recoveries if forced to apply Florida precedent.

Again, the majority surveyed other jurisdictions, noting that in contrast to the focus

31 *Id.* at 445, *quoting* Meekins v. Ford Motor Co., 699 A.2d 339 (Del.Super.Ct.1997).

32 A directed verdict is a "ruling by a trial judge taking a case from the jury because the evidence will permit only one reasonable verdict." Black's Law Dictionary, p. 1592, 8th Edition (2004).

33 *Owens* at 323.

on the constructive notice issue in Florida's premises liability law, courts elsewhere had approaches altering the traditional rules of premises liability. The majority found the justifications put forth in other jurisdictions more persuasive. For example, in Kansas, "the modern status of the traditional principle [of premises liability] includes 'a broad trend toward liberalizing the rules restricting recovery by one injured on the premises of another.' "[34] In Washington, "…modern techniques of merchandising necessitate some modification of the traditional rules of liability."[35] And, finally, the New Jersey Supreme Court concluded, "Overall the fair probability is that defendant did less than its duty demanded, in one respect or another. At least the probability is sufficient to permit such an inference in the absence of evidence that defendant did all that a reasonably prudent man would do in the light of the risk of injury his operation entailed."[36] In short, the court found that application of the rules in selected other jurisdictions was sufficient for them to rewrite Florida law.

Though all justices agreed with reversing the directed verdict, only four actually joined the majority opinion.[37] In his concurring opinion (agreeing only that the directed verdicts were erroneous), Justice Harding summed up the court's actions: "the majority's discussion regarding 'the shortcomings of traditional premises liability' is supervenient and not necessary to the resolution of these cases. By doing as such, the majority *goes too far* in deciding the case at hand and *essentially rewrites Florida's law regarding slip-and-fall cases*."[38] (emphasis added).

As a result of the Court's decision in this case, the Legislature was once again compelled to reassert its authority to *make* Florida law. One year following the *Owens* decision, the Legislature enacted legislation specifically stating that in claims of negligence involving transitory foreign objects or substances, the burden is on the claimant.[39]

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Chicone v. State, 684 So.2d 736 (Fla. 1996) and ***Scott v. State***, 808 So.2d 166 (Fla. 2002). (Adding "guilty knowledge" as an element of the offenses of possession of cocaine and drug paraphernalia.)

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34 Jackson v. K-Mart Corp., 251 Kan 700, 840 P.2d 463, 467 (1992).

35 Pimentel v. Roundup Co., 100 Wash.2d 39, 666 P.2d 888, 892 (1983).

36 Wollerman v. Grand Union Stores, 47 N.J. 426, 221 A.2d 513, 514-515 (1966).

37 The concurring justices felt there was sufficient evidence of the deteriorated condition of the banana to allow the jury to make a factual determination as to whether the dangerous condition resulted from the store's failure to properly maintain or inspect the floors. Thus, they found the trial court judge erred by not letting the jury make the determination.

38 *Owens, supra* at 334. (Harding, J., concurring in result only).

39 § 768.0710, Fla. Stat. (2002).

- Activist Indicator # 1 - Prompt reaction by the legislature repudiating a court decision and restating the law as written.
- Activist Indicator # 4 - Insert non-existent words or ignore the written words in a statute or contract to secure its preferred outcome.

Chicone Vote: (Majority: Kogan, C.J., Anstead, Overton, Shaw, Grimes, and Harding, JJ.; Recused: Wells, J.)
Scott Vote: (Majority: Quince, Shaw, Anstead, Pariente, and Lewis, JJ.; Dissent: Harding, J. and Wells, C.J.)

In *Chicone v. State*, the defendant was charged and convicted of possession of cocaine and drug paraphernalia. On appeal, he argued the State must prove (and include in the jury instructions) that the substance he possessed was known to him to be cocaine, and that the object was known to him to be drug paraphernalia. The district court held he was not entitled to this instruction, nor was the State required to prove it as an element of the crime.

In *Scott v. State,* the defendant was charged with possession of contraband in a correctional facility. Even though the defendant never said he lacked knowledge of the illicit nature of the substance, his attorney, citing *Chicone*, requested that it be included in the jury instructions and proven by the State. The trial judge opted instead to use the standard jury instruction, and the defendant was convicted as charged.

In both cases, the Florida Supreme Court held the State must prove *guilty knowledge* to establish the defendant's possession of a controlled substance or paraphernalia. In other words, the State must prove that the defendant knew the items within his possession were illegal, and that the jury must be so instructed.

This is yet another example of the court writing language into a criminal statute. The statute actually read as follows: "It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner…."[40] In examining the actual and unambiguous language of the statute, *knowledge* of whether the substance is illegal or not is simply not found anywhere.

Though Chief Justice Wells was recused from participating in *Chicone*, he made his viewpoint known through his dissent in *Scott*. He argued that *Chicone* was "internally conflicted on the vital question of whether the Court or the Legislature defines elements of crimes."[41] He noted that although *Chicone* initially stated that "the legislature is vested with the authority to define the elements of the crime,"[42] it later states that "by

40 § 893.13(6)(a). Fla. Stat. (1995).

41 *Scott, supra* at 172-173 (Wells, C.J., dissenting).

42 *Id.* at 173.

statutory construction we find that guilty knowledge is an element of the crimes…"[43] He failed to see why "it is for the Legislature to define elements of crimes but, when the Legislature does not include an element, that this Court corrects the Legislature's definition by writing the element into the crime."[44] Chief Justice Wells suggests that guilty knowledge be considered an affirmative defense, as argued by the State in *Chicone*. He closed by urging the Legislature to amend the statute to say that possession of contraband gives rise to a presumption of knowledge.

Again the Legislature stepped in, finding that both *Scott* and *Chicone* "were contrary to legislative intent," and that "knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter. Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of this chapter."[45]

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Clay Electric Cooperative, Inc. v. Johnson, 873 So.2d 1182 (Fla. 2003). (Recognizing a new legal duty where one has never been recognized before…and refusing to consider public policy consequences in doing so.)

- Activist Indicator # 1 – Prompt reaction by the legislature repudiating a court decision and restating the law as written.
- Activist Indicator # 4 - Insert non-existent words or ignore the written words in a statute or contract to secure its preferred outcome.

(Majority: Anstead, C.J., Shaw, Pariente, Lewis, and Quince, JJ.; Dissent: Cantero and Wells, JJ.)

In this case, a 14-year-old boy was struck and killed by a truck in an area with an inoperative streetlight. He was found by his grandmother. The grandmother and the boy's estate filed suit against the truck driver, the truck's owner, and the streetlight maintenance company (Clay Electric). The trial court granted summary judgment in favor of Clay Electric because under Florida precedent, it did not have a legally recognized obligation to maintain the subject light *for the benefit of the decedent.*

The Florida Supreme Court, however, found that Clay Electric[46] *did* owe the plaintiffs (*i.e.*, members of the general public) a specific, legally recognized duty to act with due care in maintaining the streetlights. In so finding, the court relied not upon the terms of Clay Electric's contract as required under Florida precedent,[47] but rather on

43 *Id.*

44 *Id.*

45 § 893.101, Fla. Stat. (2002).

46 Clay Electric is a rural electric cooperative that contracted with the Jacksonville Electric Authority to maintain the streetlights in question.

47 *Id.* at 1201 (Cantero, J., dissenting). The dissent pointed out that the two major cases relied upon by the majority actually looked to the contracts between the parties to find

the "foreseeability" of the accident, and a questionable application of the "undertaker's doctrine." As noted by the dissent, this decision places Florida in the "overwhelming minority among states that have considered this issue."[48]

In a well-reasoned dissent, Justice Cantero appropriately argues that Florida precedent requires that the court first look at the contract between the parties. "As has been the law of this state for nearly a hundred years, for a utility to assume a duty to the public arising from a contract with a municipality, the contract must specifically establish an intent to compensate the public in the event of fault."[49] Thus, whether there is a duty to the public depends on the contract's terms. In the contract in question there was no such language. Further, "as other states almost universally hold, the maintenance of streetlights is a benefit….The withholding of a benefit breaches no duty."[50]

Finally, it is critical that the public policy implications of this case be mentioned. In response to whether or not their decision might open a floodgate of litigation, resulting in huge increases in utility costs, the majority simply states this is a policy consideration for the legislature. How cavalier to impose a new duty and then say that it's up to the Legislature to work out any public policy concerns. As pointed out by Justice Cantero, the Florida Supreme Court had previously "recognized that whether to impose a duty in tort is quintessentially a policy decision."[51] Citing numerous cases from other jurisdictions, as well as prior Florida cases, supporting this proposition, Justice Cantero asserted that the refusal by the majority to consider the public policy consequences (*i.e.*, increases in utility costs) was not only inexplicable, but an abdication of the court's duty. Finally, the majority's language is so expansive that many believe it could lead to increased liability on the part of many service providers in the State of Florida.

There is no doubt that this accident was tragic. However, the result reached by the Florida Supreme Court is yet another example of its misapplication of current law and precedent to reach a desired result. Not surprisingly, the Florida Legislature responded by passing legislation which will set common-sense limitations on the duties and responsibilities of a utility company in situations such as these.[52]

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a duty. These cases were "predicated upon special language in the Tampa Waterworks' contracts which does not exist here. 'The contract of the water company is the measure of its duty to the property owner.' " *quoting* Arenado v. Florida Power & Light Co., 541 So.2d 612 (Fla. 1989).

48 *Id.* at 1196 (Cantero, J., dissenting). (citing cases from Massachusetts, California, Georgia, Louisiana, Maryland, New York, Ohio, Utah, Pennsylvania, Rhode Island, as well as several federal district courts.)

49 *Id.* at 1201, *citing* Muge v. Tampa Waterworks Co., 57 Fla. 243, 49 So. 556 (1909).

50 *Id.* at 1198.

51 *Id.* at 1202 (Cantero, J., dissenting).

52 HB 135 was passed in both houses of the Legislature and was signed into law by Governor Jeb Bush on June 21, 2005.

Breaux v. City of Miami Beach (joined with *Poleyeff v. City of Miami Beach*), 889 So.2d 1059 (Fla. 2005) (Exposing local governmental units to greater tort liability through the expansion of prior Florida court decisions.)

- Activist Indicator # 2 - Unpredictable and inconsistent outcomes when dealing with similar legal principles.

(Majority: Pariente, C.J., and Anstead, Lewis, and Quince, JJ.; Dissent: Wells, Cantero, and Bell, JJ.)

This is another example of the Florida Supreme Court expanding precedent well beyond the original case to reach a desired result. In fact, the expansion in this case not only conflicts with the court's "long-standing precedent [with] respect to sovereign immunity,"[53] but will also "have serious adverse consequences for the State, county and municipal beach areas of Florida."[54]

In these combined cases, two people (one person trying to rescue the other) were overcome by rip currents and drowned when swimming in the Atlantic Ocean adjacent to the 29th Street beach area of the City of Miami Beach. Both estates brought suit against the hotels in which they were staying, the concessionaire who rented beach chairs and umbrellas, and the City of Miami Beach. The trial court dismissed the suits against everyone but the City of Miami Beach. Subsequently, the trial court granted the City's motion for summary judgment finding that the City was immune from suit (sovereign immunity). On appeal, the district court affirmed the summary judgment, relying not on sovereign immunity, but rather held the city had no duty to warn the decedents of naturally occurring rip currents because it didn't control the area or undertake a responsibility to do so.

The Florida Supreme Court disagreed with both lower courts. In remanding the case for a new trial, the supreme court held that when a municipality operates a beach as a swimming area, it has a duty to exercise reasonable care under the circumstances to those foreseeable users of that swimming area. To bolster their position that the City "operated a swimming area," the court noted there were public restrooms, showers, water fountains, parking and a beach concessionaire from which the City derived benefits.

The dissent was quick to point out that the precedents relied upon by the majority involved situations in which cities *affirmatively decided to control and operate swimming areas.* However, in the instant case, the City of Miami Beach had made no such decision. In fact, they had specifically decided *not* to operate a swimming facility at the 29th Street beach area – hence, the absence of a lifeguard. Further, the City had not changed or improved the ocean or ocean bottom in this area, and the restrooms had been there for nearly 50 years (having been built when much of the shoreline was unimproved). The

53 Breaux, supra at 1069 (Wells, J., dissenting).

54 *Id.*

City had simply decided to leave the entire beach area open to the public. The dissent would have found much differently:

> Rather than exposing Florida's governmental entities where our beaches are located to tort liability, this Court should respect that ocean and gulf waters adjacent to these beaches are filled with natural dangers which are controlled only by nature and that these dangers are simply inherent in the use of these waters. There are sharks, barracudas, stingrays, jelly fish, undertows, riptides, sandbars, coral reefs, lightning, and literally thousands of other natural dangers. Courts in other states with extensive beaches have recognized that there can be no tort recovery against the government from injuries caused by these natural transitory dangers in the ocean.[55]

The dissent questions the long term consequences of this decision. Will the State of Florida and other governmental entities be forced to place "no swimming" signs up and down the coasts of Florida? Will cities begin to restrict public access to beaches because they cannot adequately protect users against natural hazards of the ocean or gulf? Will public restrooms and concessions be closed if there is not a lifeguard stationed nearby? All of these are legitimate concerns given the majority's refusal to consider precedent and long-term public policy implications.

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Aguilera v. Inservices, Inc., 905 So.2d 84 (Fla. 2005) (Ignoring the exclusivity of the Workers' Compensation Act by establishing a new tort action for improper claims handling by a workers' compensation carrier.)

- Activist Indicator # 2 - Unpredictable and inconsistent outcomes when dealing with similar legal principles.

(Majority: Pariente, C.J. and Anstead, Lewis and Quince, JJ.; Dissent: Wells, Cantero and Bell, JJ.)

This case is one of the most blatant examples of the judicial activism by the Florida Supreme Court. Not only is the substantive holding activist in nature, but so too is the way in which the court took jurisdiction in the case.

The facts are lengthy and graphic, but the most salient points are covered below. Aguilera was injured in a work-related forklift accident. His workers' compensation insurance carrier, Inservices, referred him to a clinic where he was treated and eventually released back to work with restrictions. Subsequently, Inservices denied numerous requests for examination, treatment and even surgery. Throughout this process, Aguilera failed to seek any of the emergency relief available under the Worker's Compensation Act, though represented by an attorney for virtually the entire time. Instead, after

55 *Id.* at 1072.

his surgery was finally authorized, he filed suit against Inservices seeking damages for common law bad faith and breach of contract for intentional infliction of emotional distress.

The trial court ruled in favor of Aguilera, concluding that the conduct of Inservices had escalated to the point that a viable cause of action based in tort had been presented. The district court disagreed, holding that based on the statute and prior court decisions, Inservices was immune from allegations directly arising out of the claims process.

In a 4-3 decision, the Florida Supreme Court quashed the district court's decision. In a departure from precedent, it held that an employee's intentional tort claim against a carrier need not be totally separate from the claims process for a tort claim to fall outside statutory immunity under the workers' compensation law. The three remaining justices dissented on both procedural and substantive legal grounds. Procedurally, the dissent argued that the court did not have authority to accept jurisdiction in this case. Substantively, the dissent argued that the exclusivity provisions of the Workers' Compensation Act bar an independent tort claim arising directly out of a claims handling dispute.

Although procedural issues frequently interest only lawyers and judges, the process by which the court accepted jurisdiction in this case demands review. The Florida Constitution gives the supreme court authority to review a district court decision when it "expressly and directly conflicts with a decision…of the supreme court on the same question of law."[56] Historically, this has also required "substantially the same controlling facts"[57] Further, the conflict must "appear within the four corners of the *majority decision*. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction."[58] The court is not permitted to review a decision "merely because we might personally disagree with the so-called 'justice of the case' as announced by the court below."[59]

The case cited by the majority in accepting jurisdiction involved neither the same question of law nor substantially the same controlling facts. Why then would the majority take the case? Based on the activist history of this court, it is not implausible to believe they did so simply because they disagreed with the "justice of the case" below. They were appalled by the conduct of Inservices and prepared to right any injustice done Aguilera. Thus, although prior cases specifically cautioned against such an action, it is clear that the majority felt they knew better.

Having accepted jurisdiction, the majority now had to dole out its own brand of justice. They did so by making new law. The court held that Aguilera could maintain his

56 Art. V, § 3(b)(3), Fla. Const.

57 Aguilera, *supra* at 100 (Wells, J., dissenting) *quoting* Florida Power & Light Co. v. Bell, 113 So. 2d 697 (Fla. 1959).

58 *Id*. at 101, *citing* Reaves v. State, 485 So.2d 829 (Fla. 1986).

59 *Id.* at 100, *quoting* Mancini v. State, 312 So.2d 732, 733 (Fla. 1975).

suit because workers' compensation is not the exclusive remedy even when the allegations arise directly out of the claims handling process.

To fully appreciate the importance of this case, one must understand the genesis of the workers' compensation system. Prior to workers' compensation, employees had to sue in the usual way, and because of traditional tort rules were almost always unable to recover. Because of tangled common law doctrines, they were frequently left without any remedies. The workers' compensation system requires "a mutual renunciation of common-law rights and defenses by employers and employees alike." § 440.015, Fla. Stat. (2000). In return, the employer provides workers' compensation insurance and employees regularly recover benefits for work-place injuries.

> The Act was intended to be the sole remedy for workers' compensation injuries and . . . it contains remedies specifically designed for unfortunate cases like Aguilera's where a claimant's attempts to obtain proper medical care for work-related injuries are thwarted by a carrier. The Act does not ignore the reality that claimants will encounter problems with carriers and the Act provides remedies. . . . [To allow Aguilera to ignore these remedies] imprudently erodes the vitally important doctrine of exclusivity.[60]

The majority virtually ignored the fact that Aguilera failed to seek any of the emergency relief available under the workers' compensation statute – relief which was meant to assist injured employees in cases such as this.

This case will undoubtedly have a dramatic effect on the workers' compensation system. It chips away at the very foundation of a system which has efficiently provided benefits to employees for many years. It is yet another example an activist court allowing a tort cause of action to arise out of a contract dispute.

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Bush v. Holmes, 919 So.2d 392 (Fla. 2006), (By creating a new constitutional mandate, the Court held invalid a scholarship program allowing students in chronically failing public schools an opportunity to either attend a better performing public school or receive a voucher to attend a private school.)

- Activist Indicator # 5 - Use vague or general constitutional language to defeat the clear will of the voters or acts of the legislature.

(Majority: Pariente, C.J., and Wells, Anstead, Lewis, and Quince, JJ.; Dissent: Bell and Cantero, JJ.)

At the close of 2005, it seemed unlikely that the Florida Supreme Court could put forth any example of judicial activism more blatant than those described on the preceding pages. However, such a notion was firmly laid to rest when the Court handed

60 *Id.* at 104 (Bell, J. dissenting).

down its decision in *Bush v. Holmes* in January 2006.

At issue was Florida's Opportunity Scholarship Program (OSP), a program allowing students living in chronically failing public school districts to either transfer to a better performing public school or receive a voucher which would allow them to attend a private school.[61] A coalition led by the former president of the state's teachers' union challenged the program as unconstitutional under both the U.S. and Florida Constitutions.[62] Before the case reached the Florida Supreme Court, the U.S. Supreme Court ruled that an Ohio voucher program, very similar to Florida's did not violate the Establishment Clause of the U.S. Constitution.

With the establishment clause argument out of the way, the Florida Supreme Court was left to determine the validity of the program under the Florida Constitution. The Court based its decision on article IX, section 1a which provides:

> The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.[63]

In construing this provision, the court in a 5-2 decision held that the OSP was invalid because the public school system is the "exclusive means set out in the constitution for the Legislature to make adequate provision for the education of children." This came as quite a surprise to court-watchers considering that there is no such express language or reasonable implication found anywhere in Florida's constitution.

In announcing this court-created exclusivity provision, the Court again ignored settled Florida precedent setting forth the fundamental principles of state constitutional jurisprudence. These principles include a presumption of constitutionality of any legislative enactment. In fact, Florida precedent states that every doubt must be resolved in favor of the constitutionality of a provision, and should not be held invalid unless it is unconstitutional beyond a reasonable doubt.

The majority gave lip-service to settled rules of constitutional interpretation, but stopped there. They proceeded to go out of their way to avoid the plain, unambiguous

61 About 730 students statewide received vouchers under the OSP.

62 the Establishment Clause of the U.S. Constitution, and article 1, section 3 and article IX, section 1 of the Florida Constitution. The trial court found that the OSP was violative article IX, section 1.

63 Article IX, section 1a, Florida Constitution.

language of Florida's Constitution, and instead embarked on yet another activist adventure of creating new law.

There is no doubt that the Florida Constitution requires that the state provide for a uniform system of free public schools. But there is nothing in the Constitution to support the majority's contention that this is the only method by which the state can provide an adequate education for its children.

As pointed out by Justice Bell in his dissent, "the mandate is to make adequate provision for a public school system. The text does not provide that the government's provision for education shall be "by" or "through" a system of free public schools. Without language of exclusion or preclusion, there is no support for the majority's finding that public schools are the exclusive means by or through which the government may fulfill its duty to make adequate provision for the education of every child in Florida."

Justice Bell continues "if the people of Florida had wanted to mandate this exclusivity, they could have easily written article IX to include such a proscription" as has been done in ten other state constitutions. In fact, a proposal precluding education vouchers was presented to the Constitution Revision Commission, but was never accepted. Nor was it addressed in the 1998 constitutional amendments despite the fact that the voucher debate was in full swing.

The idea that the majority of the Florida Supreme Court now read such a mandate into the Florida Constitution is without support. It represents the most recent example of the majority setting policy which defeats the will of the citizens of Florida as passed by the legislature.

III. Why is the Separation of Powers Doctrine So Important in Modern Democracies?

Again, the authority for each branch of government is established by the Constitution. Simply put, the legislative branch makes the laws, the judiciary interprets the laws, and the executive branch enforces the laws. But so what if the courts, rather than the legislature, write law and set policy? Isn't that just the checks and balances of government at work? Aren't they just different parts of the government working on behalf of the public? Absolutely not. Not only does the Constitution prohibit this, but the organizational and operational characteristics of each branch make them much better suited to deal with the powers reserved for them.

The Legislature

Consider the way in which the legislative branch operates. People run for the legislature and are elected in large part because of their views on public policy issues. The Legislature looks at the "big picture," anticipating the needs of the citizenry as a whole. Because the laws they pass apply to everyone, they generally get input from many as sources as possible without the restrictive rules of evidence required in the courts. They examine not only how the legislation would affect a particular group or geographic area, but also how it fits with the over all public policy goals of the state – now, and in the future.

The Legislature has unique tools to gain the proper amount and mix of information before passing any legislation. They have a committee structure which allows members to gain expertise in particular areas. In addition, staff members are assigned not only to individual legislators, but also to specific committees. Again, this allows for a degree of specialization and in-depth understanding of issues and the people they affect in any given subject area.

Legislative committees also hold public hearings, seeking information from those on all sides of any issue, including those who will be affected by the legislation (*e.g.*, patients and their families), and professionals who work with the subject area on a day-to-day basis (*e.g.*, doctors, hospitals, insurers). Hearings take place in Tallahassee, and if need be, throughout the state, in an effort to make sure that the voices of all Floridians are heard. Legislators encourage their constituents to contact them with their thoughts, recommendations, etc. And because of the sunshine laws, the public is invited to watch their legislators in action almost every step of the way.

The press too is on hand – reporting daily on the progress of individual bills, the arguments being made, amendments being offered, etc. Campaign promises are compared with daily votes; discrepancies passed along to the public. Prior to final passage, bills are once more debated in public on the floor of the House or Senate. This entire process, from the idea to the bill mark-up to committee hearings to final passage happens not once, but twice – once in the House and once in the Senate. But it's still not over. Before becoming law, there's one more hurdle - the bill must also have the Gover-

nor's signature. Finally, a law is born.

If after all of the public debate and input, people are still not satisfied with the actions of their legislator, there is recourse for the public – they can register their disapproval at the ballot box, and vote the person out of office.

The Judiciary

The operation of the Judiciary could not be more different. Unlike members of the legislature, judges are elected without an eye to their policy beliefs. In fact, judicial candidates are not allowed to voice their policy beliefs during a campaign.

The way in which an issue reaches the judiciary is also very different. A person or group cannot bring an issue or controversy before the court just because they are interested in it, or even passionate about it. To bring a case before the judiciary, one must have standing.[64] It follows that once in court, the case involves only those parties directly named as litigants.[65] Though the outcome of any given case may ultimately affect many people, only those who are parties to the suit will have an opportunity to address the court and witnesses in the case.[66] Input is limited to the briefs and oral arguments made by each party. There are no public hearings or public debate. Only the trial at the lower court level and oral arguments at the appellate levels are public. Once oral arguments are made, all discussions relative to a case are conducted in private, behind closed doors – not with members of the public, but with law clerks and other judges.

Judges are also limited to the information contained in the court record from lower court proceedings. There are no independent fact finding missions to fill in critical facts that may be missing from the court record.[67] Constituents don't continually call and write to urge the judges to vote one way or the other. No further input is allowed. Generally those outside the judicial hierarchy don't even know when a particular issue is being discussed.

And then….well, then all is quiet. For a month, maybe two, more likely five or six. And then, suddenly, an opinion is quietly issued. It is only after the opinion is issued that the public finally knows how each justice "voted." But by then, unless it's a political "hot-button" issue, everyone has most likely forgotten what the case is all about. Maybe an interested newspaper reporter will pick up the story, but for the most part, there is no public scrutiny, and frequently no accountability.

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64 Standing is "a party's right to make a legal claim or seek judicial enforcement of a right or duty." Black's Law Dictionary, p.1442, 8th Edition (2004).

65 However, there are instances in which one person or a smaller group of people are authorized to represent a larger group, *i.e.*, a class action lawsuit.

66 Individuals who have a strong interest in the outcome of a lawsuit, but who are not actual parties, may file an amicus brief with the court in which they provide arguments supporting their position.

67 A court can, however, request that a person or group, not party to the lawsuit, file an amicus brief to provide their input on certain points of law.

Perhaps even more important than the different processes utilized by the legislative and judicial branches in passing legislation or handing down a decision, is the effect of each on the public at large, or in the case of the judiciary, the effect on the parties before the court. As noted above, laws passed by the legislature generally have significant public attention both before, at the time of, and after passage. Through the press and the legislators themselves, people are put on notice as to the effect of the new law. Plans can be made accordingly. The legislation is prospective in nature.

Contrast this with many court decisions. Court decisions are retrospective in nature, *i.e.*, the Court is "judging" someone on past conduct. This is increasingly problematic in situations where the Court makes new law, rather than applying the laws as written by the legislature. Suddenly, a company or individual whose actions were perfectly legal at the time they occurred, can be held liable because a Court decided to follow the "modern trends" found in another state or country.

Similarly, when people exercise their freedom to contract, it is the agreement which establishes the "law" between them. Each party agrees that the contract itself will be the basis of the duty and/or liability to the other party to the contract. When a court intervenes and changes the agreement, perhaps on such a flimsy basis as that changing times demand that the party be held to a higher standard, one of the parties, and perhaps both are treated unfairly because the risks or burdens have been increased and the innocent party suffers even though it did everything the contract required!

This discussion of the operations of the Court and the Legislature is not meant to degrade the approach taken by either branch. It is meant to rationally illustrate why *making* laws is best suited to the legislative process, rather than the courts.

Conclusion

One need only review the decisions discussed above to understand how the Florida Supreme Court has overstepped the powers contemplated for the judiciary by the founding fathers. In this handful of cases alone, the Court has written law without the benefit of public input, debate or scrutiny. Instead, in just the last six years, we have witnessed the Florida Supreme Court:

- Declare unconstitutional a constitutional amendment unanimously proposed by the Florida Legislature and passed by 72.8% of the Florida electorate. (4-3)
- Add language to the burglary statute, resulting in the setting aside of two murder convictions, and making it more difficult to prosecute felons. (4-3)
- Determine that the intoxication of drivers causing automobile accidents cannot be considered in determining fault in crashworthiness cases. (4-3)
- Shift the burden of proof in premises slip and fall cases from the plaintiff to the defendant. (4-3)

- Add an element to a crime making it more difficult to prosecute and convict people of possession of drugs and drug paraphernalia. (5-2)
- Disregard the terms of a private contract as well as Florida precedent, and recognize liability where there had been none before. In so doing, they risk increased utility costs for every Florida citizen. (4-3)
- Find that municipalities and other governmental units can be held liable for drowning (and other injuries) resulting from natural occurrences (*e.g.,* riptides) even though they did not intend to operate a swimming area in the location. (4-3)
- Find that the workers' compensation is no longer the exclusive remedy for allegations arising directly out of the claims handling process. (4-3)
- Create a new constitutional mandate, thus holding invalid a scholarship program allowing students in chronically failing public schools an opportunity to either attend a better performing public school, or receive a voucher to attend a private school. (5-2)

All of these examples are activist opinions that have far-reaching public policy implications. All would have benefited from public input, debate and scrutiny. In other words, each would have been better left to legislative resolution. Some also would have been benefited from more serious consideration of Florida precedent. The bottom line is that all would have been decided differently had the court exercised judicial restraint.

Except for two 5-2 decisions, each of the cases noted above had only four justices join the majority opinion. In other words, if there was just one more justice willing to follow the letter of the law, and to exercise judicial restraint, all of the decisions would have had a different outcome. The three justices facing retention votes in 2006 are solidly in the activist majority camp, and it is unlikely that any of them will become a champion of judicial restraint in the future – or even supportive of it. Thus, unless there is a change, the activist journey of the Florida Supreme Court is sure to continue.

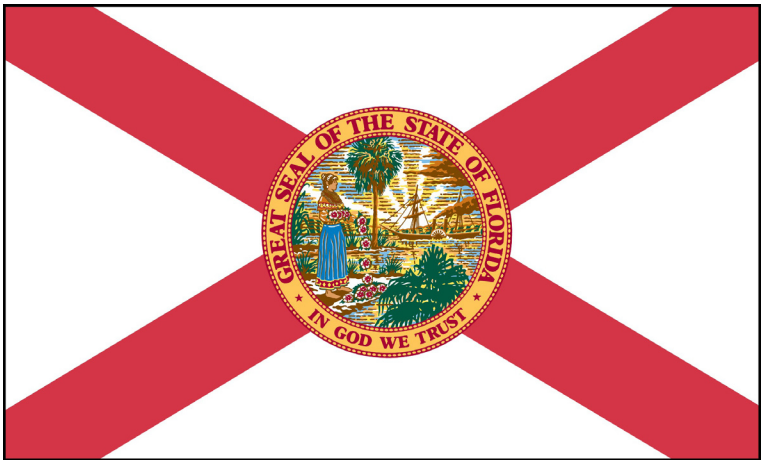
Appendix: Positions of Current Justices on Key Decisions over Past 6 Years

"**A**": **Activist –** voted for expanding or making law;
"**C**": **Conservative –** exercised judicial restraint

	Anstead	Bell	Cantero	Lewis*	Pariente*	Quince*	Wells
Armstrong v. Harris (2000)[1]	A	n/a**	n/a	C	A	C	C
Delgado v. State (2000)[2]	A	n/a	n/a	C	A	C	C
D'Amario v. Ford Motor Co. (2001)[3]	A	n/a	n/a	A	A	A	C
Owens v. Publix Supermarkets, Inc. (2001)[4]	A	n/a	n/a	C	A	A	C
Scott v. State (2002)[5]	A	n/a	n/a	A	A	A	C
Clay Electric Cooperative, Inc. v. Johnson (2003)[6]	A	n/a	C	A	A	A	C
Breaux v. City of Miami Beach (2005)[7]	A	C	C	A	A	A	C
Aguilera v. Inservices, Inc. (2005)[8]	A	C	C	A	A	A	C
Bush v. Holmes (2006)[9]	A	C	C	A	A	A	A

* Facing retention election in 2006.
** n/a indicates the justice was not on the court, or did not participate in the opinion.

1. Declared unconstitutional a constitutional amendment unanimously proposed by the Florida Legislature and passed by 72.8% of the Florida electorate.
2. Added language to the burglary statute, resulting in the setting aside of two murder convictions, and making it more difficult to prosecute felons.
3. Determined that the intoxication of drivers causing automobile accidents cannot be considered in determining fault in crashworthiness cases.
4. Shifted the burden of proof in premises slip and fall cases from the plaintiff to the defendant.
5. Added a new element to a crime making it more difficult to prosecute and convict people of possession of drugs and drug paraphernalia.
6. Disregarded the terms of a private contract as well as Florida precedent, and recognize liability where there had been none before. In so doing, they risk increased utility costs for every Florida citizen.
7. Found that municipalities and other governmental units can be held liable for drowning (and other injuries) resulting from natural occurrences (e.g., riptides) even though they did not intend to operate a swimming area in the location.
8. Found that the workers' compensation is no longer the exclusive remedy for allegations arising directly out of the claims handling process.
9. Created a new constitutional mandate, thus holding unconstitutional the Opportunity Scholarship Program which allowed students in chronically failing public schools an opportunity to either attend a better performing public school, or receive a voucher to attend a private school.



The "Activist" Journey of The Florida Supreme Court

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