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Volume 53 | Issue 2

Note

2005

Ohio's New Modified Joint and Several Liability Laws: A Fair Compromise for Competing Parties and Public Policy Interests

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Recommended Citation

Note, Ohio's New Modified Joint and Several Liability Laws: A Fair Compromise for Competing Parties and Public Policy Interests, 53 Clev. St. L. Rev. 333 (2005-2006)

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OHIO’S NEW MODIFIED JOINT AND SEVERAL LIABILITY
LAW: A FAIR COMPROMISE FOR COMPETING PARTIES AND
PUBLIC POLICY INTERESTS

I. INTRODUCTION 333

II. HISTORY OF JOINT AND SEVERAL LIABILITY DOCTRINE 335

A. *Its Origin*..... 335

B. *In Ohio* 337

III. CONSTITUTIONAL CHALLENGES TO VARIOUS TORT
REFORM MEASURES..... 340

A. *The Right to Trial by Jury*..... 342

B. *Equal Protection Clause* 343

C. *Due Process* 346

IV. POLICY ARGUMENTS AGAINST A PURE FORM OF JOINT
AND SEVERAL LIABILITY 348

A. *Joint and Several Liability in a Comparative
Fault System*..... 348

B. *Joint and Several Liability in a Growing
Economy and “Sue Happy” Society* 354

V. CONCLUSION..... 357

I. INTRODUCTION

Imagine that you and your spouse own a small commercial office building.¹ You hire a contractor to perform repairs to the building’s exterior. During the job, an employee of the contractor comes in direct contact with an electrical wire and the employee is severely injured. It is later discovered that the equipment the employee was using at the time of the accident was not insulated, which contributed to the injury. The employee sues you and the manufacturer of the equipment for his injuries and is awarded 2.5 million dollars for his claim. The jury finds the manufacturer of the equipment sixty percent responsible, and you ten percent for failing to warn of the wires. It also finds the plaintiff thirty percent comparatively negligent for his own injuries. Unfortunately, the manufacturer has no insurance coverage and files for bankruptcy. Although your negligence was minimal in comparison to the plaintiff and codefendant, the law allows the plaintiff to recover seventy percent² of the entire award from you. Your insurance pays your policy limit of one million and you are required to pay the remaining verdict of \$750,000. As a result of the economic hardship, you lose your business and your home.

¹The fictional scenario was supplied by the author to demonstrate a possible outcome in a jurisdiction that applies a pure form of joint and several liability.

²Seventy percent of the award represents the entire verdict against all defendants less the plaintiff’s percentage of negligence.

Does this scenario seem fair? Why should you be required to pay seventy percent of the verdict when a court of law has found you to be only ten percent responsible? More importantly, why should you have to pay the majority of the verdict when the plaintiff himself contributed to his injuries to a greater extent than you did? This is an example of what can happen in a jurisdiction that applies a pure form of joint and several liability. It presents an unfair situation where a plaintiff can collect a full jury award from one of multiple defendants even though that defendant may be as little as one percent responsible.

The Ohio General Assembly recently passed legislation modifying Ohio's joint and several liability laws in tort actions.³ Prior to this enactment, which took effect on April 8, 2003,⁴ Ohio applied a pure form of joint and several liability in which a joint tortfeasor, who is even one percent at fault for a loss, may be obligated to pay all economic and non-economic damages to a plaintiff.⁵ The law now provides for a modified form in which joint and several liability is abolished in regard to a plaintiff's non-economic damages.⁶ Joint and several liability still applies to economic damages,⁷ but only after a threshold percentage of liability is met.⁸ Therefore, a plaintiff can only collect the relative percentage of his or her non-economic damages⁹ that correspond to the percentage of liability found against that defendant. However, a plaintiff may still be able to collect the entire amount of his or her economic damages from a defendant, but only when that defendant is found to be more than fifty percent responsible.¹⁰

The outcome of the above mentioned scenario would be different when analyzed under Ohio's new law. Under Ohio's modified form of joint and several liability, the plaintiff would only be permitted to collect up to ten percent of his economic and

³See Am. Sub. S.B. 120, 124th Leg., Reg. Sess. (Ohio 2003).

⁴*Id.*

⁵The Ohio Legislature had previously enacted a modified version of joint and several liability as part of the 1996 tort reform package. See Am. Sub. H.B. 350, 121st Leg., Reg. Sess. (Ohio 1996). However, in 1999, the entire tort reform package was eventually ruled unconstitutional and Ohio returned to applying joint and several liability in its pure form. See *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999).

⁶See Am. Sub. S.B. 120, 124th Leg., Reg. Sess. (Ohio 2003). According to the Ohio Revised Code, a "non-economic loss" includes: "[H]arm that results from an injury, death, or loss to person that is subject of a tort action, including, but not limited to, pain and suffering; loss of society, consortium, companionship, care assistance, counsel, instruction, training, or education; mental anguish, and any other intangible loss." OHIO REV. CODE ANN. § 2307.011 (C) (F) (West Supp. 2003).

⁷See Am. Sub. S.B. 120, 124th Leg., Reg. Sess. (Ohio 2003). According to the Ohio Revised Code, an "economic loss" includes: "All wages, salaries, or other compensation lost as a result of an injury, death, or loss to a person or property that is a subject of a tort action. . . All expenditures for medical care or treatment, rehabilitation services Any other expenditures incurred as a result of an injury, death, or loss to person or property that is a subject of a tort action." OHIO REV. CODE ANN. § 2307.011 (C) (F) (West Supp. 2003).

⁸See Am. Sub. S.B. 120, 124th Leg., Reg. Sess. (Ohio 2003).

⁹See *id.*

¹⁰*Id.*

non-economic damages from you, representing the percentage for which the jury found you liable. However, had the jury found you or any collectable defendant to be more than fifty percent responsible, joint and several liability would be applicable to you or that defendant, but only in regard to the plaintiff's economic damages.¹¹

This Note contends that if Ohio insists on retaining some form of joint and several liability, the recently adopted modified version is a desirable alternative to returning to the pure form.¹² As compared to the pure form, the modified version promotes a more balanced tort system and represents a fair compromise to the competing interests of both plaintiffs and defendants. Part II of this Note reviews the history of joint and several liability and examines Ohio's application of this legal doctrine. Part III looks at prior constitutional challenges to various tort reform measures, and analyzes these challenges in light of Ohio's new law. It presents the likely parallel attacks against the constitutionality of the modified form of joint and several liability and provides insights as to how the new law will pass constitutional muster in the face of such challenges. Part IV examines policy arguments against a pure form of joint and several liability. It demonstrates how, as compared to the pure form, Ohio's new joint and several liability laws are more in accord with comparative negligence standards and how they help foster a growing economy. Finally, Part V concludes by advocating for the modified form of joint and several liability and proposes that Ohio's new laws will minimize the disparities and inadequacies that exist when joint and several liability is applied in its pure form.¹³

II. HISTORY OF JOINT AND SEVERAL LIABILITY DOCTRINE

A. *Its Origin*

Joint and several liability arises when multiple defendants are found liable for the same tort.¹⁴ It comes into play when one defendant is found partially liable and there are other culpable parties who are unavailable, uninsured, insolvent, or not sued.¹⁵ The doctrine originally was applied at English common law in cases where multiple

¹¹The fictional scenario was supplied by the author to demonstrate the difference in outcomes when applying a pure form of joint and several liability versus applying Ohio's new modified form. Other states have totally done away with joint and several liability and make no distinction between economic and non-economic damages. If this were the case in this scenario, no matter what percentage the defendant was faulted to pay, that defendant would only have to pay the corresponding percentage of both the plaintiff's economic and non-economic damages.

¹²Along with defending the modified form of joint and several liability, the author will also discuss points in favor of abolishing joint and several liability all together. However, a detailed argument in favor of total abolishment of joint and several liability is beyond the scope of this Note.

¹³Although this Note mentions various tort reform measures, it will not attempt to go into depth on the fairness or constitutionality of other reform provisions. The author will primarily focus on joint and several liability laws.

¹⁴See Paul Bargren, *Joint and Several Liability: Protection for Plaintiffs*, 1994 WIS. L. REV. 453 (1994) (detailing historical and background information pertaining to joint and several liability).

¹⁵*Id.*

defendants acted “in concert”¹⁶ or breached a common duty.¹⁷ Joint and several liability was later extended in the United States to apply to concurrent torts where multiple defendants committed independent torts that caused one indivisible injury to a plaintiff, regardless of a “concert of action.”¹⁸ The rationale for allowing a plaintiff to recover one hundred percent of his or her injuries from one defendant was based on practicality.¹⁹ The modern form of joint and several liability allows that “two or more tortfeasors may be subject to liability for the same harm and may be sued by the plaintiff, together or separately.”²⁰ A plaintiff can recover once, either completely from one of the tortfeasors, or in part from each.²¹ Therefore, a defendant can be held jointly or severally liable for an injury in which his negligence was a proximate cause, and just because another tortfeasor is immune from suit does not relieve him of his liability for a plaintiff’s indivisible injury.²² This occurs irrespective of the percentage of fault found against that defendant.²³

There are competing opinions about the fairness of joint and several liability as well as compelling arguments for both sides. Supporters of the joint and several liability doctrine argue that it upholds the compensatory goal of our tort system by allowing plaintiffs to be fully and adequately made whole.²⁴ Supporters also argue that defendants are in a better position of bearing and spreading the cost of unavailable defendants’ liability than injured plaintiffs, and that abolishing this rule would shield responsible defendants while preventing innocent plaintiffs from being fully compensated.²⁵

Opponents of the doctrine propose that a pure form of joint and several liability weakens the deterrence goal of our tort system by placing full responsibility on a single defendant, even though that defendant took reasonable means to prevent injury to the plaintiff.²⁶ Others argue that joint and several liability encourages abusive litigation practices because it allows plaintiffs to sue any defendant who may be only marginally responsible, yet able to pay the full verdict in the event the plaintiff is able to establish merely one percent liability against them.²⁷ Therefore, a

¹⁶Also referred to as a “shared tort,” where multiple tortfeasors act together in breaching one common duty, causing injury to a plaintiff. *Id.* at 455.

¹⁷*Id.*; see also Han-Duck Lee, *An Empirical Study of the Effects of Tort Reforms on the Rate of Tort Filings* 28 (1992).

¹⁸Bargen, *supra* note 14, at 455; Lee, *supra* note 17, at 29.

¹⁹See Frank J. Vandall, *Articles: A Critique of the Restatement (Third), Apportionment as it Affects Joint and Several Liability*, 49 EMORY L.J. 565, 566 (2000).

²⁰VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 741 (Carolina Academic Press) (1994).

²¹*Id.*

²²*Id.*

²³*Id.*

²⁴Lee, *supra* note 17, at 29.

²⁵*Id.* at 29-30.

²⁶*Id.* at 30.

²⁷*Id.*

“deep pocket” defendant who has minimal liability may be hit hard in order to compensate for other negligent defendants who are unable to pay their share.²⁸ Also, joint and several liability arguably increases litigation costs because each party must pay defense costs in order to prove their proper share of liability among multiple defendants.²⁹ Finally, some opponents believe that, in jurisdictions that apply joint and several liability, the uncertainty in the outcome of trials is increased, thus reducing insurance availability and increasing insurance costs.³⁰

Although, under certain circumstances, there are persuasive arguments to apply joint and several liability, these arguments are far outweighed by the need to limit or abolish joint and several liability, as illustrated by viewing the history of the doctrine and the unfairness that it has presented in our legal system.

B. In Ohio

There has been an ongoing battle in Ohio since the late 1980's between the General Assembly and the Ohio Supreme Court over various tort reform issues.³¹ Ohio's Senate and House of Representatives passed a massive tort reform bill, which was signed into law by former Governor George Voinovich on October 28, 1996, and took effect on January 27, 1997.³² This comprehensive bill contained numerous provisions affecting the access to judicial relief including limitations on non-economic and punitive damage awards; a medical claims statute of repose, product liability and improvements to real property; offsets for collateral benefits; and modification of joint and several liability.³³ Like the recent enactment of Am. Sub. S.B. 120,³⁴ the 1996 tort reform Act applied a modified version of joint and several liability by abrogating it for non-economic damages and applying it for economic damages, but only when a defendant is found to be more than fifty percent at fault.³⁵

The constitutionality of the 1996 reform effort was challenged on November 20, 1997, when the Ohio Academy of Trial Lawyers and the AFL-CIO filed suit against six Ohio Court of Common Pleas judges.³⁶ By 1999, the Ohio Supreme Court struck down the entire bill in its ruling in *State ex rel. Ohio Acad. Of Trial Lawyers v. Sheward*.³⁷ The court held the bill unconstitutional *in toto*³⁸ and found that the

²⁸*Id.*

²⁹Lee, *supra* note 17, at 30.

³⁰*Id.* at 30-31.

³¹See Jonathon Tracy, Ohio *ex rel.* Ohio Academy of Trial Lawyers v. Sheward: *The End Must Justify the Means*, 27 N. KY. L. REV. 883 (2000).

³²See Am. Sub. H.B. 350, 21st Leg., Reg. Sess. (Ohio 1996).

³³*Id.*

³⁴See Am. Sub. S.B. 120, 124th Leg., Reg. Sess. (Ohio 2003).

³⁵See Am. Sub. H.B. 350, 21st Leg., Reg. Sess. (Ohio 1996).

³⁶See *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1068 (Ohio 1999).

³⁷*Id.* The date of the ruling was August 16, 1999. *Id.*

³⁸*Id.* at 1111.

legislature's enactment violated judicial authority.³⁹ The court found that the plaintiffs had standing to bring the action,⁴⁰ and the main thrust of the court's decision was that the bill violated the one-subject rule of Ohio's Constitution.⁴¹ The court also reviewed the constitutionality of only seven of the one hundred provisions within the bill. These provisions were discussed in light of state constitutional rights of equal protection, due process, and the right to trial by jury.⁴²

After the ruling in *Sheward*, Ohio returned to applying a pure form of joint and several liability⁴³ up until the recent 2003 enactment when the Ohio rules governing contributory fault and joint and several liability were again revised.⁴⁴ Because of the recent enactment, existing Ohio statutes involving joint and several liability, contribution, contributory negligence, and assumption of risks were repealed,⁴⁵ and many new statutes were added.⁴⁶ Ohio's new law brings back the modified form of joint and several liability. A defendant now can be held jointly and severally liable for a loss with respect to only economic damages, and the rule applies only to the defendant who is: (a) found to be more than fifty percent liable for a plaintiff's injury or loss,⁴⁷ or (b) found to have committed an intentional tort.⁴⁸ For non-economic damages, a liable defendant is now made to pay only his proportionate share, no matter what percentage of negligence is allocated to him.⁴⁹ Therefore, if a defendant is found fifty percent or less responsible he or she is only required to pay the corresponding percentage of both economic and non-economic damages.

Ohio's new laws require that the trier of fact specify the percentage of tortious conduct attributable to: (a) the plaintiff; (b) the defendants from whom plaintiff is seeking recovery; and (c) parties from whom the plaintiff is not seeking recovery.⁵⁰

³⁹*Id.* at 1105-06.

⁴⁰*Id.* at 1084-85.

⁴¹*Id.* at 1111. The Ohio Constitution states that, "[N]o bill shall contain more than one subject, which shall be clearly expressed in its title." OHIO CONST. art. II § 15(d). *See State ex rel. Ohio AFL-CIO v. Voinovich*, 631 N.E.2d 582 (Ohio 1994).

⁴²*See Sheward*, 715 N.E.2d 1062; OHIO CONST. art. I §§ 2, 5, 16.

⁴³*See Sheward*, 715 N.E.2d 1062.

⁴⁴*See* Am. Sub. S.B. 120, 124th Leg., Reg. Sess. (Ohio 2003).

⁴⁵OHIO REV. CODE ANN. §§ 2307.31-2307.33, 2315.19, 2315.20 (West Supp. 2003).

⁴⁶*Id.* §§ 2307.22-2307.23, 2315.42-2315.46, 2307.25-2307.28.

⁴⁷*Id.* § 2307.22 (a)(1).

⁴⁸*Id.* § 2307.22 (a)(3).

⁴⁹*Id.* § 2307.22 (c).

⁵⁰*Id.* § 2307.23.

The bill states:

(A) In determining the percentage of tortious conduct attributable to a party in a tort action . . . the court in a nonjury action shall make findings of fact, and the jury in a jury action shall return a general verdict accompanied by answers to interrogatories, that shall specify all of the following: (1) The percentage of tortious conduct that proximately caused the injury or loss to person or property or the wrongful death that is attributable to the plaintiff and to each party to the tort action from whom the

This is a major change from the prior law, which precluded evidence involving a non-named party and limited findings of negligence only against the parties before the court. The sum of the tortious conduct so determined must equal one hundred percent.⁵¹ Ohio now also permits defendants to use the plaintiff's comparative fault as a defense to product liability actions.⁵² This is true only as to an affirmative defense to contributory negligence, whereas express or implied assumption of risk remains a complete bar to recovery.⁵³ Furthermore, the new laws provide for a right of contribution⁵⁴ for defendants found jointly and severally liable as well as those defendants who were not a party to the original lawsuit.⁵⁵

Although under the pure form of joint and several liability plaintiffs were more likely to receive full compensation, it was often at the expense of a victim defendant who was pulled into litigation for the sole purpose of satisfying a large verdict.⁵⁶ Thus, Ohio's modified joint and several liability laws are more fair than the

plaintiff seeks recovery in this action; (2) The percentage of tortious conduct that proximately caused the injury or loss to person or property or the wrongful death that is attributable to each person from whom the plaintiff does not seek recovery from this action.

Id.

⁵¹*Id.* The statute states, "[t]he sum of the percentages of tortious conduct as determined pursuant to division (A) of this section shall equal one hundred per cent." *Id.*

⁵²*Id.* §§ 2315.42-2315.43. The bill states:

Contributory negligence or other contributory tortious conduct may be asserted as an affirmative defense to a product liability claim. Contributory negligence or other contributory tortious conduct of a plaintiff does not bar the plaintiff from recovering damages that have directly and proximately resulted from the tortious conduct of one or more other persons, if the contributory negligence or other contributory tortious conduct of the plaintiff was not greater than the combined tortious conduct of all other persons from whom the plaintiff seeks recovery and of all other persons from whom the plaintiff does not seek recovery in this action.

Id.

⁵³*Id.* §§ 2315.42(b). The bill states:

If express or implied assumption of the risk is asserted as an affirmative defense to a product liability claim and if it is determined that the plaintiff expressly or impliedly assumed a risk and that the express or implied assumption of the risk was a direct and proximate cause of harm for which the plaintiff seeks to recover damages, the express or implied assumption of the risk is a complete bar to the recovery of those damages.

Id.

⁵⁴The bill states:

If one or more persons are jointly and severally liable in tort for the same injury or loss...there may be a right of contribution even though judgment has not been recovered against all or any of them. The right of contribution exists only in favor of a tortfeasor who has paid more than that tortfeasor's proportionate share of the common liability, and that tortfeasor's total recovery is limited to the amount paid by that tortfeasor in excess of that tortfeasor's proportionate share.

Id. § 2307.25(a).

⁵⁵*Id.* § 2307.225.

⁵⁶Pat O'Callahan, *Sticker Shock: Torts and Retorts; Physicians Work to Limit Malpractice Awards While Plaintiff's Attorneys Defend*, THE NEWS TRIB., Jan. 18, 2004, at B08.

previously applied pure form because they do not subject defendants to pay for non-economic damages in which they are not responsible, yet the laws still allow plaintiffs to recover in full for their out-of-pocket expenses.⁵⁷

III. CONSTITUTIONAL CHALLENGES TO VARIOUS TORT REFORM MEASURES

The Ohio Supreme Court has taken an active role in tort reform legislation over the past two decades by striking down tort reform provisions based on allegations of constitutional infringements.⁵⁸ Although the constitutionality of the modified form of joint and several liability was not specifically discussed in *Sheward*,⁵⁹ it will, undoubtedly be challenged at some point.

In *Sheward*, the plaintiffs claimed that several portions of the 1996 tort reform bill violated certain provisions of the Ohio Constitution.⁶⁰ Because case law existed, which had previously struck down certain provisions of the bill, the General Assembly allegedly tried to usurp the court's constitutional authority by violating the separation of powers provisions of the Ohio Constitution in not recognizing prior holdings of the court.⁶¹ Ohio case law, however, is scarce in specifically analyzing the constitutionality of a modified form of joint and several liability. Therefore, the separation of powers approach is not likely to be the approach used in any future attacks on Ohio's current joint and several liability laws.

Ohio's new law should survive constitutional attack under the "single subject" rule, which only allows an act to be brought forth under one subject.⁶² The majority in *Sheward* found that the 1996 tort reform Act covered a multitude of subjects that included "eighteen different titles, thirty-eight different chapters, and over one hundred different sections of the Revised Code."⁶³ The test used by the court was to determine whether the topics "share a common purpose or relationship."⁶⁴ The court found that the Act did not meet this threshold, therefore it did not comply with the

⁵⁷"The notion that someone can be as little as one percent at fault but yet made to pay [one hundred] percent of costs defies any common sense of fairness. Ohio must join 33 states who have reformed their joint and several liability laws to reflect proportionate liability." *Regarding Apportionment of Liability in Civil Actions. Second Hearing on SB 120 Before the House Civil & Commercial Law Committee* (2002) (statement of Ty Pine, National Federation of Independent Businesses), at http://han2.hannah.com/htbin/f.com/oh_ban_124%3ASB120.notes (last visited February 2004).

⁵⁸See Stephen J. Werber, *Emerging Issues in State Constitutional Law: Ohio Tort Reform Versus the Ohio Constitution*, 69 TEMP. L. REV. 1155-57 (1996); Tracy, *supra* note 31, at 833.

⁵⁹See *Sheward*, 715 N.E.2d 1062.

⁶⁰*Id.*

⁶¹*Id.*

⁶²*Id.* at 1098.

⁶³*Sheward*, 715 N.E.2d at 1099.

⁶⁴*Id.* The court looked to see whether the topics of the Act "unite to form a single subject" and did not find this to be the case. *Id.* It stated that, "Am. Sub. H.B. No. 350 attempts to combine the wearing of seat belts with employment discrimination claims, class actions arising from the sale of securities . . . recall notifications, . . . [to] actions by a roller skater with supporting affidavits in a medical claim . . . and so on." *Id.* at 1100.

“single-subject” rule.⁶⁵ Ohio’s General Assembly however, brought forth Ohio’s current legislation under a single subject, discussing only joint and several liability and related doctrines of liability apportionment.⁶⁶ Therefore, because Ohio’s recent enactment deals with only one subject, it should not be found to violate the “single-subject” rule.

The modified form of joint and several liability passes the “single-subject” test, thus is not, in itself, unconstitutional. Had it not been for the “sledgehammer”⁶⁷ effect in *Sheward*, the provision modifying joint and several liability would have withstood constitutional scrutiny. The *Sheward* court even noted that it only addressed a few of the provisions in the 1996 reform bill, and they considered their review of a few provisions in that bill⁶⁸ to be limited and “not to be construed as either a rejection or acceptance of those claims not herein considered.”⁶⁹ Prior to *Sheward*, one commentator stated, “[T]he only proposals [of the 1996 tort reform bill] that are truly oppressive and worthy of constitutional attack are those relating to the statutes of repose, and, perhaps, the ceilings on non-economic loss and punitive damages.”⁷⁰ In 2000, another author stated: “[A] significant number of provisions [in the 1996 tort reform bill] most likely would have survived constitutional scrutiny.”⁷¹

The next section of this Note analyzes three provisions of the Ohio Constitution that have been utilized in challenging various tort reform measures in Ohio as well as other states. These provisions are: the right to trial by jury, equal protection of the law, and the right to due process. Arguments used in these prior attacks will be examined as possible rationale for future attacks on Ohio’s modified joint and several liability laws. The Note presents arguments to show how the new law will withstand such attacks.⁷²

⁶⁵See generally *Sheward*.

⁶⁶See Am. Sub. S.B. 120, 124th Leg., Reg. Sess. (Ohio 2003).

⁶⁷Stephen J. Werber, *Ohio: A Microcosm of Tort Reform Versus State Constitutional Mandates*, 32 RUTGERS L.J. 4 1045, 1061 (2001). Werber concedes that although there were certain provisions in the 1996 Tort Reform Act that were unconstitutional, not a single section ever took effect. *Id.* He states that, “This sledgehammer approach, however, leaves the door open to a well-crafted series of Acts that could force the court to address each on its own constitutional merit . . . [and] [m]any provisions [of the Tort Reform Act], if enacted within the confines of a single subject, should pass constitutional muster.” *Id.*

⁶⁸*Sheward*, 715 N.E.2d at 1102.

⁶⁹*Id.*

⁷⁰Werber, *supra* note 58, at 1158.

⁷¹Recent Cases: State Tort Reform-Ohio Supreme Court Strikes Down State General Assembly’s Tort Reform Initiative, 113 HARV. L. REV. 804 (2004).

⁷²There is little Ohio case law in existence that discusses the constitutionality of abolishing or modifying joint and several liability. Therefore, the author will pull from other states’ case law as well as other tort reform measures previously challenged in Ohio to support the author’s contentions.

A. The Right to Trial by Jury

When joint and several liability is applied, thereby increasing the liability of a defendant above the percentage allocated by the fact finder, that defendant has arguably been denied his or her right to trial by jury. Challenges to Ohio's modified joint and several liability laws may attempt to look to The Right to Trial clause of Ohio's Constitution if attempts to bring back the pure form are made. The Ohio Constitution states, "[T]he right of trial by jury shall be inviolate . . ."⁷³ This means that the right to trial by jury cannot be denied to *any* party involved in civil tort litigation. This right is "fundamental, substantive, and included within it, 'is the right to have a jury determine all questions of fact, including the amount of damages to which the plaintiff is entitled.'"⁷⁴ This fundamental right of trial by jury clearly supports total abolition of joint and several liability. Therefore, arguing a defendant's right to trial would be even more persuasive in defending the modified form of joint and several liability.

Those who oppose a modified form of joint and several liability⁷⁵ may attempt to use similar constitutional arguments, to those previously used in challenging general or non-economic damage caps, in attempts to bring back the pure form. In looking at general damage caps, limiting recovery to \$200,000,⁷⁶ the *Sheward* court looked at previous Ohio cases and interpreted them to hold that caps on general damages were unconstitutional because the right to trial by jury includes the right to have the jury determine the amount of damages to be awarded.⁷⁷ Challengers may claim that abolishing joint and several liability for non-economic damages limits the damages owed to an injured plaintiff and is equivalent to placing a cap on a plaintiff's general damages. However, returning to a pure form violates the defendant's parallel right to trial by jury.⁷⁸

⁷³OHIO CONST. art. I § 5.

⁷⁴Werber, *supra* note 58, at 1191 (quoting *Galayda v. Lake Hosp. Sys.*, 644 N.E.2d 298, 301 (Ohio 1994)) (holding that a statute that allowed periodic payments of judgments violated the right to trial by jury because this reduced the value of the award determined by the jury). Werber also refers to another Ohio case in support of this argument: *Jeanne v. Hawkes Hosp. of Mt. Carmel*, 598 N.E.2d 1174, 1180 (Ohio Ct. App. 1991) (reiterating that the right to a jury trial is a substantive right which may not be abridged). *Id.*

⁷⁵The author is referring to those who oppose the modified form of joint and several liability as those who wish to retain the pure form. However, not all persons who oppose the modified form of joint and several liability wish to bring back the pure form. Some opponents to the modified form feel that joint and several liability should be totally abolished. Therefore, those who argue total abolition may not support the modified version constitutionally and may want to strike down the modified version as a way to gain total abolition.

⁷⁶*See State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1091 (Ohio 1999).

⁷⁷*Id.* at 1092. The court reviewed the rulings of *Morris v. Savoy*, 576 N.E.2d 765 (Ohio 1991) (finding limits to general damage awards violated the due course of law provision of the Ohio Constitution). *See id.* at 1091-92; *see also* OHIO CONST. art. I § 16.

⁷⁸Abolishing joint and several liability for both economic and non-economic damages adds even more support to this counter argument.

According to Justice Sweeney in *Morris v. Savoy*, “inviolable,” means “free from substantial impairment.”⁷⁹ This provision does not distinguish between plaintiffs and defendants.⁸⁰ Justice Sweeney acknowledged that included within the right to trial by jury is not only the right to have a jury determine issues of fact, but also to assess the damages.⁸¹ One Ohio scholar agrees with this reasoning and contends⁸² that when joint and several liability is applied, and a defendant is made to pay more than his proportionate share of the damages allocated by a jury, his or her right to trial by jury is violated.⁸³ Changing the percentage established by a jury as to how much that defendant is to pay, in effect, changes the jury verdict.⁸⁴

There exists an equally strong argument to retaining Ohio’s modified form of joint and several liability if attempts are made to return to the pure form. “Just as a cap cannot constitutionally lower a jury determination, a rule that increases that determination as to any party cannot withstand identical constitutional scrutiny.”⁸⁵ In applying joint and several liability to an entire jury award against only one of multiple co-defendants, the verdict against that one defendant becomes severely altered.⁸⁶ These arguments show strong support for retaining the modified form of joint and several liability, and if challenged under Ohio’s Right to Trial by Jury provision, the new joint and several liability laws should be upheld.

B. Equal Protection Clause

The Equal Protection Clause of Ohio’s Constitution⁸⁷ may also be looked to if Ohio’s joint and several liability laws are challenged. It states:

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.⁸⁸

⁷⁹See *Morris v. Savoy*, 576 N.E.2d 765, 779 (Ohio 1991).

⁸⁰Werber, *supra* note 58, at 1192. “If the jury determines that defendant “A” owes 60% of a \$100,000 economic loss, the legislature has no right to increase the obligation from \$60,000 to \$100,000 no matter how laudable its objectives. What the General Assembly has not recognized is that defendants, not just plaintiffs, have a vested right in jury verdicts.” *Id.*

⁸¹*Morris*, 576 N.E.2d at 779.

⁸²Stephen J. Werber, Remarks at Cleveland-Marshall College of Law Faculty Speaker Series, *Tort Reform: State and Federal Constitutional Concerns* (Nov. 19, 2003).

⁸³*Id.*

⁸⁴*Id.*

⁸⁵Werber, *supra* note 67, at 1069.

⁸⁶A jury verdict against one of multiple co-defendants is less altered with the modified form of joint and several liability because it only applies to economic damage. Therefore, a verdict would be altered even less and would be more consistent with the juror’s intentions if joint and several liability is not applied at all.

⁸⁷OHIO CONST. art. I § 2.

⁸⁸*Id.*

Equal protection arguments usually involve allegations that a person or persons who fall under a certain statutory classification are denied a right that others, who are similarly situated, are not.⁸⁹ In looking at the Equal Protection Clause to determine whether a statutory classification is constitutional, courts apply one of three levels of scrutiny.⁹⁰ The first and least stringent form is the “rational basis” test, which looks to see whether the classification created by the statute has some reasonable relationship to a legitimate legislative objective.⁹¹ The second, is categorized as an intermediate test often called the “heightened scrutiny” or “means-end scrutiny” test, which looks to determine whether a classification “substantially furthers a legitimate legislative purpose.”⁹² The third and most rigorous level is the “strict scrutiny” test, which determines whether the classification is narrowly tailored and necessary to meet a compelling state interest.⁹³ The rational basis test is the standard that most tort reform laws are and should be judged under.⁹⁴

In *Morris*, the Supreme Court of Ohio applied the appropriate “rational basis” test to determine whether an Ohio statute, which placed a cap of \$200,000 on general damage awards in medical malpractice claims, was constitutional.⁹⁵ The Court declared that in challenging the constitutionality of a law under the Equal Protection Clause, one must demonstrate that either: (a) there was no rational basis for the creation of the class itself, or (b) that the people within the class were being treated unfairly in furthering the legitimate governmental interest.⁹⁶ Although the court found a distinction in treatment between those within and those outside the class, the court failed to find the statute unconstitutional on equal protection grounds.⁹⁷ In applying the “rational basis” test, the court declared that it would uphold a statutory classification as long as the classification is rationally related to a legitimate

⁸⁹*Bair v. Peck*, 811 P.2d 1176, 1182 (Kan. 1991).

⁹⁰*Id.*

⁹¹*Id.* The “rational basis” test only subjects a statute to “minimal scrutiny and will be upheld so long as the classifications made are rationally related to a legitimate state interest.” *Lucas v. United States*, 757 S.W.2d 687, slip op. at 8 (Tex. Filed Sept. 21, 1988) (Phillips, T., dissenting).

⁹²*Id.* This test is also referred to as the middle-tier, or “means scrutiny” and “is applied when a statute burdens a sensitive, but not a suspect, class or impinges on an important, but not a fundamental, right.” *Lucas v. United States*, 757 S.W.2d 687, slip op. at 7-8 (Tex. Filed Sept. 21, 1988) (Phillips, T., dissenting) (claiming that the non-economic cap on damages did not violate any provision of the Texas Constitution and, furthermore, that the “cap operates to limit the liability of each defendant rather than the recovery of the plaintiff”). *Id.* at 1.

⁹³*Id.* at 7-8 (Phillips, J., dissenting). The “strict scrutiny” test is normally applied to laws that “burdens an inherently suspect class or affects a fundamental liberty right.” *Id.* at 7 (Phillips, J., dissenting).

⁹⁴*Lucas v. United States*, 757 S.W.2d 687, slip op. at 12 (Tex. filed Sept. 21, 1988) (Phillips, J., dissenting).

⁹⁵*Morris v. Savoy*, 576 N.E.2d 765, 771 (Ohio 1991).

⁹⁶*Id.*

⁹⁷*Id.* at 772.

governmental purpose.⁹⁸ However, it stated that it is up to the legislature to decide whether a statute is constitutional and that the court “does not inquire whether...[the] statute is wise or desirable.”⁹⁹ Therefore, based on the *Morris* decision, the Equal Protection Clause isn't likely to support a successful challenge to Ohio's modified joint and several liability laws.

Case law from other states will assist in defending the constitutionality of Ohio's modified form of joint and several liability. For instance, an Arizona Court of Appeals also applied the “rational basis” test in *Church v. Rawson Drug & Sundry Co.*¹⁰⁰ to uphold an Arizona statute, which abolished joint and several liability.¹⁰¹ The case arose out of an injury that the plaintiff sustained while unloading containers of merchandise at work.¹⁰² She sued the distributor, Rawson, alleging its employees had negligently stacked the merchandise on pallets, which caused the containers to fall on her.¹⁰³ The trial court found in favor of the plaintiff and awarded her \$52,625.50.¹⁰⁴ The jury apportioned fault equally among the plaintiff, her employer and Rawson. However, because an Arizona statute made her employer immune from suit due to the fact that the plaintiff had already received workers' compensation benefits, the plaintiff was only allowed to collect one-third of her damages from Rawson, amounting to \$17,541.83.¹⁰⁵ At the time of this lawsuit, Arizona's joint and several liability statute stated that each defendant could be held liable only for the amount of damages allocated to that defendant, and that joint and several liability is to be applied only when two defendants are acting in concert, “when one party is an agent of another, or when a cause of action relates to hazardous wastes or substances.”¹⁰⁶

The plaintiff argued that doing away with joint and several liability denied her equal protection under Arizona's Constitution because the law discriminated against certain classes of plaintiffs.¹⁰⁷ She argued that without joint and several liability, some plaintiffs would not receive full recovery when the defendants are insolvent or immune from suit, while other plaintiffs who file suit against able-paying defendants, would receive full recovery.¹⁰⁸ The court rejected these arguments, and found that the statute met the rational basis test.¹⁰⁹ The court stated that laws will be deemed

⁹⁸*Id.* at 781.

⁹⁹*Id.* at 772.

¹⁰⁰*Church v. Rawson Drug & Sundry Co.*, No. 1 CA-CV 90-0357, 1992 Ariz. App. LEXIS 276, at *344 (Ariz. Ct. App. Oct. 1, 1992).

¹⁰¹*Id.*

¹⁰²*Id.* at *344.

¹⁰³*Id.*

¹⁰⁴*Id.*

¹⁰⁵*Id.* at *344-55.

¹⁰⁶*Id.* at *345.

¹⁰⁷*Id.* at *348.

¹⁰⁸*Id.* at *351.

constitutional and legislation will be upheld when the statute is found to be rationally related to a legitimate government purpose.”¹¹⁰

If judicial attempts to bring back a pure form of joint and several liability are made in Ohio, challengers of Ohio’s current joint and several liability laws will likely use a similar approach as the plaintiff in *Church* by claiming that without applying a pure form of joint and several liability, plaintiffs who have no choice but to sue insolvent or uncollectible defendants will be treated differently than similarly situated plaintiffs who are able to sue able-paying defendants. Arguably, the treatment will be different, in that one class of plaintiffs will be able to collect the entire verdict,¹¹¹ while another class will not.¹¹² However, as in *Church*, Ohio’s legislative enactment will also be upheld under “rational basis” scrutiny and the same reasoning that the *Church* court used in evaluating Arizona’s statute in abolishing joint and several liability will also be applicable to Ohio’s laws, which only partially abolishes joint and several liability.

C. Due Process

As previously expressed, future challenges to Ohio’s modified joint and several liability laws may look to *Morris* in trying to bring back the pure form of joint and several liability. The “due course of law” provision of the Ohio Constitution is considered to be the equivalent of the Due Process Clause of the United States Constitution.¹¹³ It states, “All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay”¹¹⁴ The review of due process claims is similar to that of equal protection claims.¹¹⁵ “The

¹⁰⁹*Id.* at *350. The *Church* court held that in looking at The Equal Protection Clause, the correct standard of review was the rational basis test. *Id.* The court also relied on language by the Supreme Court of Kansas in a 1978 case, which commented on the abolition of joint and several liability in stating, “[T]here is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them.” *Id.* (citing *Brown v. Keill*, 580 P.2d 867, 874 (Kan. 1978)).

¹¹⁰*Id.* It can be argued that the General Assembly’s purpose in modifying Ohio’s joint and several liability laws are likely to be similar to that of the Arizona’s legislature. Therefore, if challenges are made to change Ohio’s joint and several liability laws, Ohio’s courts will most likely find that Ohio’s joint and several liability laws, in creating two classifications, serve a legitimate government purpose and are rationally related to that purpose.

¹¹¹Under a pure form of joint and several liability, a classification of plaintiffs are created who can collect an entire full verdict from any able paying defendant, who is at least one percent responsible, for both economic and non-economic damages.

¹¹²Under the current, modified form of joint and several liability, another classification of plaintiffs are created who can only collect from an able paying defendant for the full cost of economic damages, but only if that defendant is more than fifty percent at fault. In regards to non-economic damages, those plaintiffs can only collect that portion of the verdict that the defendant is responsible for.

¹¹³*Id.* at 780.

¹¹⁴OHIO CONST. art. I § 16.

Due Process Clause protects liberty and property interests while the Equal Protection Clause protects against discriminatory classifications.”¹¹⁶

Though the majority in *Morris* found the Act that limited general damages did not violate the Equal Protection Clause, it did find it to violate Ohio’s Due Process Clause.¹¹⁷ The court observed that the Act was created with the legislative intent of reducing rising medical malpractice insurance rates, but it found no evidence to show a rational relationship between malpractice insurance rates and general damage awards over \$200,000.¹¹⁸ The court found it to be unconstitutional because the law did not “bear a real and substantial relation to public health or welfare and further because it is unreasonable and arbitrary” to impose the cost of the legislature’s intended outcome on those “most severely injured by medical malpractice.”¹¹⁹

Although *Morris* found general damage caps in medical malpractice cases to violate Ohio’s Due Process Clause, the *Church* court did *not* find that an Arizona statute, which abolished joint and several liability, infringed upon its state’s Due Process Clause.¹²⁰ The *Church* court noted three objectives that the Arizona legislature had in mind when creating a statute that abolished joint and several liability.¹²¹ The court determined that the legislature’s purpose in abrogating joint and several liability was based on the following reasons: (a) it was consistent with the state’s pure comparative negligence standards in which a plaintiff’s recovery is reduced by the degree of fault that the plaintiff contributed to his or her own injury; (b) it was “more fair to impose liability according to fault, rather than to have one who is marginally at fault pay all of the damages”; and (c) by protecting defendants from paying more than their share of fault, implementation of the statute is an attempt to “alleviate a perceived crisis caused by rising insurance rates.”¹²²

The plaintiff argued that the statute abolishing joint and several liability did not further the legislature’s interest in a rational way and that the statute did not allow for a fair apportionment of liability.¹²³ Although the court recognized the plaintiff’s argument that there may be other ways of “achieving the goal of fairness in this area,” it did not agree that the method the legislature used was irrational.¹²⁴ The court found that even if there are some differences in the classifications created by a statute, “it is not unconstitutional if it rests on some reasonable basis.”¹²⁵ Therefore,

¹¹⁵*Church v. Rawson Drug & Sundry Co.*, No. 1 CA-CV 90-0357, 1992 Ariz. App. LEXIS 276, at *348 (Ariz. Ct. App. Oct. 1, 1992).

¹¹⁶*Id.*

¹¹⁷*Morris v. Savoy*, 576 N.E.2d 765, 691, 772 (Ohio 1991).

¹¹⁸*Id.* at 770.

¹¹⁹*Id.* at 771.

¹²⁰*Church*, 1992 Ariz. App. LEXIS 276, at *344.

¹²¹*Id.* at *350.

¹²²*Id.*

¹²³*Id.*

¹²⁴*Id.* at *350-51.

¹²⁵*Id.*

it was determined that the statute abolishing joint and several liability did bear a rational relationship to the legislature's intent and the law was upheld.¹²⁶

It is likely that Ohio's purpose in enacting the current legislation is conceivably the same or, at least, similar to that of the Arizona legislature in *Church*. Therefore, if the *Church* court found that the statute abolishing joint and several liability was constitutional under the Due Process Clause, any challenges to Ohio's modified joint and several liability laws should also be upheld under the Due Process Clause because the classifications created by Ohio's laws are rationally related to the Ohio General Assembly's intent.

Challenges to legislation are not just grounded in case law and constitutional attacks. Public policy and fairness arguments are both highly effective approaches used in challenging and defending laws. The next two sections examine joint and several liability laws in modern day society and conclude that the doctrine is not conducive to our modern day judicial system.

IV. POLICY ARGUMENTS AGAINST A PURE FORM OF JOINT AND SEVERAL LIABILITY

A. *Joint and Several Liability in a Comparative Fault System*

The doctrine of joint and several liability does not comport with current Ohio comparative fault standards.¹²⁷ The fairness arguments that formed the rationale behind abandoning contributory negligence standards serve as the same arguments for abandoning the pure form of joint and several liability.¹²⁸ According to one commentator, "The very basis of comparative negligence is that the relative fault of individual actors can be determined and that each actor should be held responsible for that degree of fault."¹²⁹ It is just as unfair for a plaintiff who is five percent at fault to recover nothing as it is for a defendant who is five percent at fault to pay the entire verdict, especially when the plaintiff's liability is greater than that of the defendant.¹³⁰

At early common law, the doctrine of contributory negligence was a complete bar to recovery when plaintiffs were found negligent for their own injuries, even if that negligence was slight as compared to that of the defendants.¹³¹ Eventually, due to the harshness of contributory negligence, courts have since moved to a comparative

¹²⁶*See id.*

¹²⁷"The contributory fault of a person does not bar the person as plaintiff from recovering damages that have directly and proximately resulted from the tortious conduct of one or more other persons, if the contributory fault of the plaintiff was not greater than the combined tortious conduct of all other persons from whom the plaintiff seeks recovery in this action and of all other persons from whom the plaintiff does not seek recovery in this action." OHIO REV. CODE ANN. § 2315.33 (West Supp. 2003).

¹²⁸*See* John Scott Hickman, *Efficiency, Fairness, and Common Sense: The Case for One Action as to Percentage of Fault in Comparative Negligence Jurisdictions That Have Abolished or Modified Joint and Several Liability*, 48 VAND. L. REV. 739, 746 (1995).

¹²⁹*Id.*

¹³⁰*Id.*

¹³¹*Id.* at 742.

negligence standard.¹³² By 1995, forty-six states had adopted a comparative negligence standard, which allows plaintiffs to recover damages against defendants who are proportionately responsible, even when the plaintiff also contributes to the loss.¹³³ Following the adoption of comparative negligence by a small number of courts, most state legislatures codified the doctrine during active tort reform legislation in the 1980s.¹³⁴ Many states enacted comparative fault systems but did not clearly define how such systems would be integrated in determining damages.¹³⁵ One of the issues that arose in adopting comparative fault was whether or not to modify or abolish the doctrine of joint and several liability.¹³⁶ By 1995, state legislatures had stepped in, and thirty-four out of the forty-five comparative fault states had used legislative action to amend their laws regarding joint and several liability.¹³⁷

There are various kinds of comparative fault, all of which allow a plaintiff who is partially responsible to recover only damages that are appropriately reduced by the plaintiff's own negligence.¹³⁸ Under a pure form of comparative fault,¹³⁹ a plaintiff can recover damages regardless of the percentage of the loss for which he or she is found to be liable, including when his or her fault is found to be more than that of a defendant or multiple defendants.¹⁴⁰ There are two kinds of modified comparative fault systems. One allows a plaintiff to recover damages only when that plaintiff's fault is less than that of the defendant(s).¹⁴¹ The other allows the plaintiff to recover only when that plaintiff's fault is not greater than that of the defendant(s).¹⁴² For example, under the first, "less than," version, a plaintiff can only collect from a single defendant if that plaintiff is found to be forty-nine percent or less responsible. Under the second "not greater than" version, a plaintiff can only collect if that plaintiff is found to be fifty percent or less responsible for his own injuries. Ohio applies the "not greater than" modified standard in which a plaintiff is barred from recovery if the factfinder assigns the plaintiff a percentage of responsibility greater

¹³²*Id.*

¹³³*Id.*

¹³⁴*Id.*

¹³⁵*Id.*

¹³⁶*Id.*

¹³⁷*Id.* at 744. "[There is] [n]o legislature [that] has reversed a state supreme court decision instituting comparative negligence. Rather, the legislatures have stepped in and codified the principle in question, allowing for a more efficient and uniform implementation." *Id.* at 743.

¹³⁸Cornelius J. Peck, *Article: Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability*, 62 WASH. L. REV. 233, 237 (1987).

¹³⁹The "pure form" here is referring to a kind of comparative fault and is not to be confused with a "pure form" of joint and several liability that is discussed throughout the Note. They represent two separate and distinct concepts.

¹⁴⁰RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 7 cmt. n and rptrs. note to cmt. n (Proposed Final Draft 1999).

¹⁴¹*Id.*

¹⁴²*Id.*

than that of the defendant.¹⁴³ For example, if an Ohio jury finds a plaintiff's negligence contributed fifty percent towards his or her own injury, that plaintiff can still recover fifty percent of his or her damages from the tortfeasor(s). However, if a plaintiff's own negligence contributed fifty-one percent or greater, that plaintiff is barred from recovery.

In *Bartlett v. New Mexico Welding Supply*,¹⁴⁴ a New Mexico court of appeals determined that joint and several liability could not be retained in their state because it applied a pure comparative negligence standard.¹⁴⁵ *Bartlett* was an automobile accident case involving three vehicles, one of which was being driven by an unknown driver.¹⁴⁶ Because one of the drivers was unknown, the plaintiff could only sue the one known driver for her injuries.¹⁴⁷ The jury found the known defendant to be only thirty percent responsible for the plaintiff's injuries and the unknown driver to be seventy percent responsible.¹⁴⁸ The plaintiff was awarded \$100,000 for her injuries.¹⁴⁹ The court held that in its comparative negligence jurisdiction, a concurrent tortfeasor will not be held liable for the entire verdict caused by other tortfeasors.¹⁵⁰

The plaintiff in *Bartlett* gave two reasons why joint and several liability should be retained under a comparative negligence system, both of which the court rejected.¹⁵¹ The first was that the jury should not be able to apportion damages among separate defendants because there is only one wrong, causing one indivisible injury.¹⁵² The court held that this "unity" concept is obsolete because it is based on common law rules of pleading and joinder that no longer exist.¹⁵³ The second reason the plaintiff presented in arguing why joint and several liability should be retained was that a plaintiff should not have to bear the risk of not being fully compensated.¹⁵⁴ The court also rejected that argument and stated that, "Between one plaintiff and one defendant, the plaintiff bears the risk of the defendant being insolvent; on what basis does the risk shift if there are two defendants, and one is in solvent?"¹⁵⁵ In other

¹⁴³The author is personally aware, having professional experience negotiating insurance settlements, that this is the type of modified comparative negligence standard used in Ohio.

¹⁴⁴*Bartlett v. New Mexico Welding Supply*, 646 P.2d 579, 586 (N.M. Ct. App. 1892).

¹⁴⁵*Id.* The court found that as a concurrent tortfeasor, the defendant would not be held liable based on joint and several liability.

¹⁴⁶*Id.* at 580.

¹⁴⁷*Id.*

¹⁴⁸*Id.*

¹⁴⁹*Id.*

¹⁵⁰*Id.* at 586. It was not disputed that the defendant and the unknown driver were concurrent tortfeasors. *Id.* at 581.

¹⁵¹*Id.* at 585.

¹⁵²*Id.*

¹⁵³*Id.*

¹⁵⁴*Id.*

¹⁵⁵*Id.*

words, a solvent defendant should not necessarily have to bear the risk when there happens to be an insolvent co-defendant. The court decided that joint and several liability could not be retained solely on the premise that the plaintiff should be favored over a defendant and, therefore, found the known defendant not responsible for the entire verdict that was caused by two separate individuals.¹⁵⁶

In Florida, the need for reform in apportionment law was also well illustrated in *Walt Disney World v. Wood*.¹⁵⁷ In *Disney World*, the plaintiff was injured while driving a "race car" on a "Grand Prix" attraction when her fiancé rammed into the rear of the vehicle that she was driving.¹⁵⁸ The jury found the plaintiff fourteen percent responsible, her fiancé eighty-five percent responsible and Disney only one percent at fault.¹⁵⁹ Because of the doctrine of spousal immunity, the plaintiff's husband¹⁶⁰ was not required to pay any of the judgment. Disney was made to pay eight-six percent of the verdict, approximately \$75,000, after being found only one percent responsible.¹⁶¹ Had Ohio's modified form of joint and several liability been applied in *Disney World*, Disney would have been made to pay one percent of plaintiff's damages,¹⁶² representing the percentage the jury held Disney responsible. Because Disney's percentage of liability did not meet the fifty percent threshold, joint and several liability would not have been applied for economic or non-economic damages.

Justice McDonald's convincing dissent in *Disney World* avowed that the doctrines of joint and several liability and comparative negligence are mutually inconsistent.¹⁶³ Due to this conflict, McDonald claimed that in a jurisdiction that applies comparative negligence, joint and several liability should not apply because each defendant should be held responsible for only the percentage of damages found to have been caused by that defendant.¹⁶⁴ He reasoned that comparative negligence standards enable the court to separate damages in relation to the harm caused and that the doctrine of joint and several liability "presumes the inability of the judiciary to divide fault among the parties."¹⁶⁵ Thus, the two doctrines cannot appropriately be applied together.

The majority in *Disney World* laid out the rationale for retaining joint and several liability when a comparative fault standard is applied.¹⁶⁶ One argument used was

¹⁵⁶*Id.* at 586.

¹⁵⁷*See* *Walt Disney World Co. v. Wood*, 515 So.2d 198 (Fla. 1987).

¹⁵⁸*Id.* at 199.

¹⁵⁹*Id.*

¹⁶⁰By the time that the lawsuit was filed, the plaintiff had married her fiancé. *Id.*

¹⁶¹*Id.*

¹⁶²The word "damages" refers to both economic and non-economic damages.

¹⁶³*Id.* at 202 (McDonald, C.J., dissenting).

¹⁶⁴*Id.* (McDonald, C.J., dissenting).

¹⁶⁵*Id.* (McDonald, C.J., dissenting). Justice McDonald states that, "It would be a mismatch of legal concepts to have a separation theory for the plaintiff and a joint liability responsibility for the defendants." *Id.* (McDonald, C.J., dissenting).

¹⁶⁶*Id.* at 201.

that a concurrent tortfeasor must still be held liable for a plaintiff's whole injury when his negligence is a proximate cause of that injury, regardless of the amount of liability assessed to him.¹⁶⁷ The court opined that merely apportioning fault among the parties does not turn an indivisible injury into a "divisible" injury when applying joint and several liability, because the negligence of one concurrent tortfeasor may be enough to cause the entire loss.¹⁶⁸ Justice McDonald confronted this reasoning by stating that the old common law theory of a "united cause of action" causing an indivisible injury, arose out of ancient pleading and joinder rules that no longer present an apportionment dilemma.¹⁶⁹ Therefore, the reasons which lie behind the inability to apportion fault are no longer present because it is an "illogical fiction" to say that fault can be apportioned under a pure comparative fault system, but causation cannot.¹⁷⁰

A second reason declared by the majority opinion in *Disney World* in support of retaining joint and several liability was that a plaintiff should not be forced to bear a portion of his or her damages when a defendant is unable to pay, especially when a plaintiff has not contributed to his injury in any way.¹⁷¹ Justice McDonald strongly disagreed and could not accept the injustice of shifting the risk to a solvent defendant instead of the plaintiff, simply because there are two defendants.¹⁷² McDonald quotes a Kansas Supreme Court decision, which states:

There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental agency and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or the agency, there is no compelling social policy which requires the codefendant to pay more than his fair share of the loss. The same is true if one of the defendants is wealthy and the other is not.¹⁷³

McDonald also commented that joint and several liability applies to all defendants, big and small.¹⁷⁴ Because it affects large corporations, small businesses, and individuals alike, the defendant is not always in the better position to spread the

¹⁶⁷*Id.*

¹⁶⁸*Id.*

¹⁶⁹*Id.* at 204 (McDonald, C.J., dissenting).

¹⁷⁰*Id.* at 205 (McDonald, C.J., dissenting).

¹⁷¹*Id.* at 201.

¹⁷²*Id.* at 205. (McDonald, C.J., dissenting). McDonald could not accept any social policy argument for Disney to have to pay one-hundred percent of the damage award just because the plaintiff chose to marry the other tortfeasor, whom the jury found to be eighty-six percent more at fault than Disney. *Id.* (McDonald, C.J., dissenting).

¹⁷³*Id.* (McDonald, C.J., dissenting) (quoting *Brown v. Keill*, 580 P.2d 867, 874 (Kan. 1978)).

¹⁷⁴*Id.* (McDonald, C.J., dissenting).

cost of an insolvent codefendant.¹⁷⁵ He declared that the plaintiff *necessarily* bears the risk of a defendant not being able to pay, *not* a defendant.¹⁷⁶

In the end, the *Disney* court could not say with certainty that joint and several liability should be abolished when a comparative negligence standard is applied, and held that in light of the public policy considerations surrounding the issues, this decision would best be left up to the legislature.¹⁷⁷ McDonald's powerful dissent however, demanded that when a plaintiff is found partially responsible for his own injuries, joint and several liability should be abrogated.¹⁷⁸ McDonald's viewpoint is in accord with the comparative fault doctrine in that each defendant should only be held responsible for the amount that he or she is found liable.¹⁷⁹ Therefore, the arguments that McDonald uses in support of total abolition of joint and several liability are equally valid in supporting the abrogation of joint and several liability being applied to non-economic damages in Ohio's modified form.

The concept behind joint and several liability is that there is a "unitary cause" of action and no apportionment of liability among defendants is necessary.¹⁸⁰ One of the original goals in applying joint and several liability was to assure that, for at least economic loss, the plaintiff would be made whole.¹⁸¹ Therefore, Ohio's apportionment requirement in negligence cases does not fit squarely with any form of joint and several liability.¹⁸² "Joint and several liability, where comparative assessments of fault have been made, contravenes the jury's assessment of damages by permitting a shifting of that assessment to the solvent party."¹⁸³ The *Church* court agreed that comparative negligence principles and the doctrine of joint and several liability cannot be applied together. It states:

The main principle of comparative negligence is that it is fair to divide damages between the parties who are at fault based on each party's degree of fault. . . . The theory which underlies the comparative negligence statute is the same theory upon with the statute abolishing joint and several liability is based. It is not so much that the statutes are consistent that is important, as it is the fact that abandonment of the concept of indivisible injury paved the way for the abolition of joint and several liability.¹⁸⁴

¹⁷⁵*Id.* at 202 (McDonald, C.J., dissenting).

¹⁷⁶*Id.* (McDonald, C.J., dissenting).

¹⁷⁷*Id.* at 202.

¹⁷⁸*Id.* at 206 (McDonald, C.J., dissenting).

¹⁷⁹*Id.* at 202 (McDonald, C.J., dissenting).

¹⁸⁰Werber, *supra* note 67, at 1069.

¹⁸¹*Id.*

¹⁸²*Id.*

¹⁸³*Id.*

¹⁸⁴*Church v. Rawson Drug & Sundry Co.*, No. 1 CA-CV 90-0357, 1992 Ariz. App. LEXIS 276, at *350 (Ariz. Ct. App. Oct. 1, 1992). One Ohio scholar also contends:

Competing objectives of wanting defendants to be held liable only for their proportionate share of total fault in which they contributed versus wanting injured plaintiffs to be awarded full compensation at any cost has been the driving force behind the controversy surrounding whether to retain joint and several liability in a comparative negligence world.¹⁸⁵ Because these “competing goals represent conflicting values,”¹⁸⁶ it is almost impossible to satisfy both objectives in any given system.¹⁸⁷ Abolishing joint and several liability, for both economic and non-economic damages, appears to be the most consistent solution in adhering to the purpose and goals that underlie a comparative fault system. However, situations will arise in which a strong and appropriate arguments to retain joint and several liability will surely surface.¹⁸⁸ Ohio’s modified joint and several liability laws present a fair and reasonable compromise to these competing interests and will withstand future challenges.

B. Joint and Several Liability in a Growing Economy and “Sue Happy” Society

It is apparent to most observers that our society has, in recent years, become increasingly litigious. A jurisdiction that applies joint and several liability, especially in its pure form, creates a legal environment, which arguably encourages litigants to file more frivolous lawsuits in hopes of establishing even a small percentage of liability against a ‘deep pocket’ defendant. The cost of tort liability has risen dramatically in the past three decades.¹⁸⁹ The continuous increase in

Both doctrines serve valid objectives. Their merger, however, presents a serious constitutional issue, which mandates the abolition of joint and several liability. There is no recognition of this potential in any reported Ohio decision. Decisions which have permitted joint and several liability to increase the payment made by a defendant, without regard to the jury finding of that defendant’s actual contribution to the harm, have generally focused on the need to protect victims and left the rights of contribution to be fought among the defendants. Many courts have determined that these doctrines are compatible and have upheld increased financial liability. Their decisions err in three respects: They ignore history, their logic is wrong, and they fail to recognize the magnitude of the harm done to the right to try by jury. This is a situation in which the sum of two good parts yields a negative result serving largely to impose an unfair burden on solvent defendants.

Werber, *supra* note 58, at 1189-90.

¹⁸⁵Hickman, *supra* note 128, at 744.

¹⁸⁶*Id.*

¹⁸⁷*Id.*

¹⁸⁸For example, when a severely injured plaintiff, who has not contributed to his or her injury, is unable to collect non-economic damages because the more culpable defendant is insolvent and the other defendants’ liability do not exceed the threshold necessary for joint and several liability to kick in.

¹⁸⁹George N. Meros, Jr., *Article: Toward a More Just and Predictable Civil Justice System*, 25 FLA. ST. U.L. REV. 141, 143 (1998). This article noted a survey which showed that “Florida’s small businesses—the economic engine of the state—are significantly intimidated by the mere threat of liability . . . [and that] the concern is so acute that Florida businesses would rather be subject to a tax audit or OSHA inspection than a liability suit.” *Id.* In addition, the survey also showed that close to 200 Florida businesses indicated that “they have

litigation costs, coupled with unpredictable outcomes of civil litigation, has become increasingly detrimental to American commerce.¹⁹⁰ For example, due to businesses' fears of exposure to high cost litigation, manufacturers are more hesitant and allow research and innovation to suffer in an attempt to assure the highest possible level of product uniformity.¹⁹¹ In addition, products that serve a social good have either not been under developed or withdrawn from the market.¹⁹² In turn, these effects have "deterred commercial innovation, and stifled economic productivity."¹⁹³

The President and CEO of the Ohio Chamber of Commerce has commented on the advantages of Ohio's new joint and several liability laws and suggested that under the old law the "business climate" in Ohio was adversely affected because of an unpredictable and unfair civil justice system.¹⁹⁴ He referred to studies showing that almost three out of every five small Ohio businesses had been involved in, or threatened by, at least one lawsuit.¹⁹⁵ He also reported that the combined cost of frivolous lawsuit filings is somewhere between \$1,200 and \$1,500 per Ohioan, per year, and a civil liability lawsuit is filed in Ohio once every seventeen minutes.¹⁹⁶ One source proposed that lawsuit abuse in Ohio has an impact on the citizens of the state and "threatens the state's economic competitiveness."¹⁹⁷ Joint and several liability negatively affects municipalities, but poses the same threat to private individuals and not-for-profit companies alike.¹⁹⁸

Returning to a pure form of joint and several liability would only perpetuate abusive litigation practices by encouraging plaintiffs to file "shotgun" lawsuits aimed at collecting full damages from any defendant with deep pockets, regardless of that

withheld, failed to develop, or refused to market products or services to limit exposure to liability suits." *Id.* at 144.

¹⁹⁰*Id.* at 143. The assistant general counsel to the U.S. Steel Corporation recently reported that under Ohio's previous pure form of joint and several liability, his company was defending in excess of 2,500 claims that were subject to the "incredibly illogical and unfair doctrine [of joint and several liability]." *Regarding Apportionment of Liability in Civil Actions. Second Hearing on SB 120 Before the House Civil & Commercial Law Committee* (2002) (statement of Richard Lerach, assistant general counsel, U.S. Steel Corporation), at http://han2.hannah.com/htbin/f.com/oh_ban_124%3ASB120.notes (last visited February 2004).

¹⁹¹*Id.*

¹⁹²*Id.*

¹⁹³*Id.*

¹⁹⁴Andy Doehrel, *Testimony and Letters-Proponent Testimony on SB 120 Before the House Civil & Commercial Law Committee* (2002), at <http://www.ohiochamber.com/governmental/testimonySB120.asp> (last visited October 2003).

¹⁹⁵*General Facts*, at http://www.omunileague.org/ohio_alliance_for_civil_justice.htm (last visited October 2003).

¹⁹⁶*Id.*

¹⁹⁷*Id.*

¹⁹⁸THE ACADEMY OF POLITICAL SCIENCE, *NEW DIRECTIONS IN LIABILITY LAW* 87 (Walter Olson ed., 1988).

particular defendant's degree of fault.¹⁹⁹ This increase in lawsuit filings would increase the cost of litigation for every citizen. Fostering this type of legal environment would eventually backfire against Ohioans by chilling efforts to continue commercial growth, especially for smaller businesses, which tend to be most vulnerable.²⁰⁰ Ohio's new joint and several liability laws require that plaintiff attorneys conduct more thorough investigations in determining precisely who is culpable.²⁰¹ More thorough investigations should lower the number of lawsuits filed for the sole purpose of nailing down at least one solvent defendant. These "off-the-cuff" lawsuits exert only undue pressure on the defendant and his or her insurance company to settle quickly in order to avoid being exposed to the entire verdict.²⁰²

The insurance industry is opposed to applying joint and several liability and has been outspoken in its criticism.²⁰³ Industry leaders claim that the doctrine makes insurance companies a "magnet for liability," while at the same time, making it extremely difficult for insurance companies to predict their degree of liability risk exposure.²⁰⁴ Predicting the magnitude of a given policyholder's "joint and several" liability is very difficult for insurers because determining their exposure involves having to factor in whether other parties to a lawsuit are going to be judgment proof and whether that insurer is going to have pay for insolvent defendants.²⁰⁵ This makes setting premium costs in a jurisdiction with joint and several liability much more problematic. Thus, in applying Ohio's laws, which partially do away with joint and several liability, the scope of this unpredictable exposure is reduced and, therefore, insurance carriers are able to set more appropriate premiums for consumers.

¹⁹⁹See Doehrel, *supra* note 194.

²⁰⁰*Id.* One Ohio representative gave proponent testimony for Am. Sub. S.B. 120 and stated,

[T]he civil justice system fosters a cancer in society. Namely, a litigation frenzy in which no one wants to assume individual responsibility. . . . [T]he present [pure form] law of joint and several liability defies all sense of fairness and promotes shotgun lawsuits. SB120 will help small businesses, one-fourth of which are being sued or threatened with a lawsuit at any given moment, often sued because they have insurance.

Regarding Apportionment of Liability in Civil Actions. Second Hearing on SB 120 Before the Senate Judiciary on Civil Justice (2001) (statement of Roger Geiger, state director of the National Federation of Independent Business-Ohio), at http://han2.hannah.com/htbin/f.com/oh_ban_124%3ASB120.notes (last visited February 2004).

²⁰¹*Id.*

²⁰²*Id.*

²⁰³THE ACADEMY OF POLITICAL SCIENCE, *supra* note 198, at 87.

²⁰⁴*Id.* at 63.

²⁰⁵*Id.* Various developments in "tort and insurance law" (including joint and several liability) has added "unpredictability to the calculations insurers must make in setting liability-insurance premiums." *Id.* "Since the aggregation of predictable risks is the essence of the insurance function, it is extremely probable that the market's instability during the crisis of 1985 and 1986—and a portion of the premium increases of that time—can be traced to [joint and several liability and other tort reform developments]." *Id.*

V. CONCLUSION

Since the Ohio General Assembly has not evidenced any intent to fully abolish joint and several liability, the modified form presents what this author feels to be a fair compromise between competing interests. Just as abolishing joint and several liability would leave some plaintiffs without full compensation, returning to the pure form would be equally and arguably more unfair and burdensome to defendants when they are made to pay a full verdict for which they were only marginally responsible. Although some may argue that inadequacies still exist under the modified form, there are actions that potential plaintiffs and defendants can take to protect themselves from the vulnerabilities of the proportionate standard. For example, individuals can purchase adequate uninsured motorist coverage, which would ensure full compensation to plaintiffs injured in auto accidents where the tortfeasor is uninsured or underinsured. Also, businesses and insurance companies can take a more active approach in the area of risk analysis and underwriting insurance policies to assure adequate coverage for defendants in situations where joint and several liability is triggered for a plaintiff's economic damages.²⁰⁶

In reviewing constitutional attacks to other tort reform measures, it is evident that the modified form of joint and several liability is a fair and constitutionally sound compromise. The new law allows plaintiffs to recover one hundred percent of their economic loss from a culpable defendant who contributed to at least fifty one percent of their injury, while shielding collectable defendants from having to "pick up the tab" for other culpable defendants who are unable to pay their portion of non-economic damages.

This proportionate standard is an appropriate resolution to the clash of competing interests between the General Assembly's objective of reforming Ohio's tort laws and the Plaintiff Bar's efforts to maximize their client's potential to collect a full verdict. Thirty-four states have either abolished or modified joint and several liability, and an additional four states have never adopted it.²⁰⁷ In upholding the modified joint and several liability laws, Ohio lawmakers and judges are demonstrating their belief in the need for and the importance of a fair and balanced tort system.²⁰⁸

²⁰⁶Shortly after the enactment of Am. Sub. S.B. 120, 124th Leg., Reg. Sess. (Ohio 2003), The Ohio Department of Insurance (ODI) issued guidelines to Ohio insurers regarding the impact of Ohio's new modified form of joint and several liability on future medical malpractice premiums. *Insurance Department Issues Med/Mal Guidelines*, HANNAH NEWS SERVICE, Apr. 25, 2003, available at http://www.ohcapcon.com/ipc/ipc.htm?hanart/20030425_HANNAH_4.htm (last visited Feb. 11, 2004). "ODI informed insurers that it expects the provisions to be immediately incorporated into rate filings and supporting documents. Compliance with the guidelines should help lower premiums for Ohio physicians." *Id.* The ODI is now requiring that all licensed insurers provide an overall rate analyses and show how an overall rate change is consistent with that analysis and must explain any expected changes in underwriting. *Id.* ODI concluded that modifying joint and several liability in Ohio will have an impact on medical malpractice rates. *Id.*

²⁰⁷*Policy Facts-Tort Reform Joint and Several Liability 124th General Assembly*, <http://www.ohiochamber.com/governmental/tortreform.asp> (last visited October 2003).

²⁰⁸According to one Ohio Senator, adopting the modified joint and several liability is "a rational common-sense approach to balancing the scales of justice." *Regarding Apportionment of Liability in Civil Actions. First Hearing on SB 120 Before the Senate*

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Judiciary on Civil Justice (2001) (statement of B. Johnson, Senator), at http://han2.hannah.com/htbin/f.com/oh_ban_124%3ASB120.notes (last visited February 2004).

²⁰⁹Expected J.D., December 2006. I would like to thank the *Cleveland State Law Review* for its continued support throughout the writing process and for pushing me to a higher level of legal education.