HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS

BILL #:	CS/HB 701 (SB 782)	**FINAL HOUSE FLOOR ACTION:**	
SPONSOR(S):	Civil Justice Subcommittee; Logan; Holder and others (Judiciary; Bennett)	114 **Y's**	0 **N's**
COMPANION BILLS:	CS/SB 782	**GOVERNOR'S ACTION:**	Approved

SUMMARY ANALYSIS

CS/HB 701 passed the House on March 5, 2012, and subsequently passed the Senate on March 8, 2012. The bill provides for an exception to the hearsay rule when the unavailability of a witness is caused by the opposing party's wrongful conduct.

Currently, a hearsay statement is not admissible in court unless an exception applies. Under Florida law, exceptions fall into two categories: those where the availability of the person who made the statement is irrelevant, and those where the person who made the statement must be unavailable to testify in court.

The Federal Rules of Evidence provide an exception to the hearsay rule when the unavailability of a witness is caused by the opposing party's wrongful conduct. Florida law does not provide such an exception. The bill creates a "forfeiture by wrongdoing" hearsay exception that mirrors the language in the Federal Rules of Evidence. Under the exception, a hearsay statement is admissible if the party against whom it is offered engaged in wrongdoing that caused the person who made the statement to be unavailable to testify.

The bill does not appear to have a fiscal impact on state or local governments.

The bill was approved by the Governor on April 27, 2012, ch. 2012-152, Laws of Florida. The bill is effective upon becoming law.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Current Situation

The Hearsay Rule

"Hearsay"[1] is a statement,[2] other than one made by the declarant[3] while testifying at trial or a hearing,[4] offered in evidence to prove the truth of the matter asserted.[5]

For example, a victim of domestic violence calls the police. When a police officer arrives, she tells him that "John Doe hit me." If the officer then testifies for the State at trial that he heard the victim say "John Doe hit me," the officer's testimony would be hearsay because "John Doe hit me" is:

- A statement;
- Made outside of the court proceeding; and
- Offered to prove the truth of what it asserts (i.e., that John Doe hit the victim).[6]

Current law provides that hearsay statements are not admissible at trial unless a statutory exception applies.[7] The reasoning behind excluding hearsay statements is that they are considered unreliable as probative evidence. There are many reasons for this unreliability, including: the statement is not made under oath; jurors cannot observe the demeanor of the declarant and judge the witness' credibility; and there is no opportunity to cross-examine the declarant and thereby test his or her credibility.[8]

Exceptions to the Hearsay Rule

Exceptions to the hearsay rule fall into two categories: those under s. 90.803, F.S., where the availability of the declarant is irrelevant, and those under s. 90.804, F.S., where the declarant must be unavailable to testify in court. Section 90.804, F.S., provides that a declarant is "unavailable" as a witness if the declarant:

- Is exempted by a ruling of a court on the ground of privilege from testifying concerning the subject matter of the declarant's statement (for example, a declarant is unavailable if the trial court sustains an assertion of the Fifth Amendment privilege against self-incrimination);[9]
- Persists in refusing to testify concerning the subject matter of the declarant's statement despite a court order to do so;
- Has suffered a lack of memory of the subject matter of his or her statement so as to destroy the declarant's effectiveness as a witness during the trial;

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[1] Section 90.801, F.S.
[2] A "statement" is either an oral or written assertion or nonverbal conduct of a person if it is intended by the person as an assertion. Section 90.801(1)(a), F.S. For example, the act of pointing to a suspect in a lineup in order to identify her is a "statement." *See* Fed. R. Evid. 801 Advisory Committee Note.
[3] The "declarant" is the person who made the statement. Section 90.801(1)(b), F.S.
[4] Often referred to simply as an "out-of-court statement."
[5] Section 90.801(1)(c), F.S. For example, testimony that the witness heard the declarant state "I saw the light turn red" is *not* hearsay if introduced to prove the declarant was conscious at the time she made the statement. It *would* be hearsay if offered to prove the light was in fact red.
[6] *Rodriguez v. State*, 9 So.3d 745, 745-46 (Fla. 2d DCA 2009).
[7] Section 90.802, F.S.
[8] *Lyles v. State*, 412 So.2d 458, 459 (Fla. 2d DCA 1982); *see also* Charles W. Ehrhardt, *Florida Evidence*, s. 801.1, 770 (2008 ed.).
[9] *Perry v. State*, 675 So.2d 976, 980 (Fla. 4th DCA 1996).

- Is unable to be present or to testify at the hearing because of death or because of then-existing physical or mental illness or infirmity; or
- Is absent from the hearing, and the proponent of a statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means.[10]

The section also provides that a witness is not unavailable if the party who seeks to admit the statement caused the unavailability by wrongful conduct.[11]

The party seeking to introduce a hearsay statement under the exception at s. 90.804, F.S., bears the burden of establishing that the declarant is unavailable as a witness. The trial judge makes the determination of such unavailability at a pretrial hearing.[12]

Forfeiture by Wrongdoing of the Opposing Party

The Federal Rules of Evidence, and the evidence laws of some other states, provide an exception to the hearsay rule when the unavailability of a witness is caused by the opposing party's wrongful conduct. The Federal Rules of Evidence provide that a statement by an unavailable witness is admissible if the statement is "offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability as a witness, and did so intending that result."[13] Several states have passed legislation adopting the Federal hearsay exception.[14] Florida does not have a forfeiture-by-wrongdoing exception.

Effect of the Bill

The bill creates a new hearsay exception under s. 90.804(2)(f), F.S., that adopts the language of the Federal Rules of Evidence's "forfeiture by wrongdoing" exception.[15] Under the exception, a statement offered against a party is admissible if that party wrongfully caused, or acquiesced in wrongfully causing, the declarant's unavailability as a witness, and did so intending that result.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

[10] Section 90.804, F.S.
[11] *Id*.
[12] *See Jones v. State*, 678 So.2d 309, 314 (Fla. 1996).
[13] Fed. R. Evid. 804(b)(6).
[14] *See, e.g.*: California (Cal. Evid. Code § 1350 (West 1995)); Delaware (Del. R. Evid. 804(b)(6)); Hawaii (Haw. R. Evid. 804(b)(7)); Louisiana (La. Code Evid. Ann. art. 804)); Michigan (Mich. R. Evid. 804(b)(6)); North Dakota (N.D. R. Evid. 804(b)(6)); Pennsylvania (Pa. R. Evid. 804(b)(6)); South Dakota (S.D. R. Evid. 804(b)(6)); Tennessee (Tenn. R. Evid. 804(b)(6)); Illinois (limited to domestic violence cases (725 Ill. Comp. Stat. Ann 5/115-10.2a (West 2004)).
[15] Fed. R. Evid. 804(b)(6).

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

   None.

D. FISCAL COMMENTS:

   None.