

By Senator McKay

26-933A-98

1 A bill to be entitled
2 An act relating to civil actions; creating s.
3 40.50, F.S.; specifying certain rights of
4 jurors; authorizing discussions among jurors;
5 authorizing jurors to take notes; authorizing
6 certain information to be provided to jurors;
7 authorizing jurors to submit written questions
8 to the court and to witnesses; amending s.
9 44.102, F.S.; requiring that the court require
10 mediation in certain actions for monetary
11 damages; requiring the completion of mediation
12 before trial is set in certain civil actions;
13 amending s. 57.105, F.S.; revising conditions
14 under which attorney's fees may be imposed
15 against a party and the party's attorney for
16 presenting unsupported claims or defenses;
17 entitling an opposing party to strike certain
18 claims or defenses raised by a party who has
19 been sanctioned in a specified number of
20 actions within a specified period for
21 presenting unsupported claims or defenses;
22 authorizing the court to impose additional
23 sanctions or requirements; authorizing damage
24 awards against a party who takes specified
25 actions for the purpose of delay; amending s.
26 90.803, F.S.; revising the requirements under
27 which former testimony may be allowed at trial
28 as an exception to the prohibition against
29 hearsay evidence; amending s. 95.031, F.S.;
30 limiting the period during which an action may
31 be brought for product liability; providing for

1 application; creating s. 768.096, F.S.;
2 providing an employer with a presumption
3 against negligent hiring under specified
4 conditions in an action for civil damages
5 resulting from an intentional tort committed by
6 an employee if the employer conducts a
7 preemployment background investigation;
8 prescribing the elements of such background
9 investigation; specifying that electing not to
10 complete the background investigation does not
11 constitute a failure to use reasonable care in
12 hiring an employee; amending s. 768.095, F.S.;
13 revising the conditions under which an employer
14 is immune from civil liability for disclosing
15 information regarding an employee to a
16 prospective employer; creating s. 768.098,
17 F.S.; providing that a business owner or
18 operator is immune from liability under certain
19 circumstances for an intentional tort by a
20 third party against an invitee; providing for
21 an exception; providing that, under certain
22 circumstances, a state agency or political
23 subdivision may be held liable to the same
24 extent as a private person for failure to
25 provide adequate security or police protection;
26 creating s. 768.36, F.S.; prohibiting a
27 plaintiff from recovering damages if the
28 plaintiff was more than a specified percentage
29 at fault due to the influence of an alcoholic
30 beverage or drugs; creating s. 768.725, F.S.;
31 providing for evidentiary standards for an

1 award of punitive damages; amending s. 768.73,
2 F.S.; requiring certain findings for, and
3 providing for reduction of, subsequent punitive
4 damage awards under specified circumstances;
5 requiring that a specified percentage of an
6 award for punitive damages be paid to the
7 state; requiring the Department of Banking and
8 Finance to collect the payments of such awards;
9 providing for attorney's fees for the claimant
10 to be based on the entire award of punitive
11 damages; creating s. 768.781, F.S.; providing
12 for terms in certain contracts for an
13 attorney's services; requiring that notice be
14 sent to each allegedly responsible party;
15 providing requirements for a presuit response
16 and settlement offer; amending s. 768.79, F.S.;
17 authorizing the court to consider whether a
18 proposal was reasonably rejected when
19 considering entitlement to and the amount of an
20 award of attorney's fees; repealing s.
21 768.81(5), F.S., relating to the applicability
22 of joint and several liability to actions in
23 which the total amount of damages does not
24 exceed a specified amount; providing
25 legislative findings and intent with respect to
26 the regulation of legal advertising; creating
27 s. 877.023, F.S.; regulating the content of
28 advertisements for legal services; providing a
29 penalty; specifying that the provisions do not
30 abrogate certain other laws, codes, ordinances,
31 rules, or penalties; requiring the clerk of

1 court to report certain information on
2 negligence cases to the Office of the State
3 Court Administrator; providing for
4 severability; providing an effective date.
5

6 Be It Enacted by the Legislature of the State of Florida:
7

8 Section 1. Section 40.50, Florida Statutes, is created
9 to read:

10 40.50 Juror Bill of Rights.--

11 (1) Judges, attorneys, and court staff shall make
12 every effort to assure that jurors in this state are:

13 (a) Informed of trial schedules that are then kept.

14 (b) Informed of the trial process and of the
15 applicable law in plain and clear language.

16 (c) Subject to the court's discretion and in
17 accordance with subsection (8), able to take notes during
18 trial and to ask questions of witnesses or the judge and to
19 have them answered as permitted by law.

20 (d) Told of the circumstances under which they may
21 discuss the evidence during the trial among themselves in the
22 jury room, while all are present, as long as they reserve
23 judgment about the outcome of the case until deliberations
24 commence.

25 (e) Entitled to have questions and requests that arise
26 or are made during deliberations as fully answered and met as
27 allowed by law.

28 (f) Able to express concerns, complaints, and
29 recommendations to courthouse authorities.

30 (g) Fairly compensated for jury service.
31

1 (2) Immediately after the jury is sworn, the court may
2 instruct the jury concerning its duties, its conduct, the
3 order of proceedings, the procedure for submitting written
4 questions of witnesses or of the court as set forth in
5 subsection (8), and the elementary legal principles that will
6 govern the proceeding.

7 (3) Jurors may be instructed that they will be
8 permitted to discuss the evidence among themselves in the jury
9 room during recesses from trial when all are present, as long
10 as they reserve judgment about the outcome of the case until
11 deliberations commence. Notwithstanding the foregoing, the
12 jurors' discussion of the evidence among themselves during
13 recesses may be limited or prohibited by the court for good
14 cause.

15 (4) The court may instruct that the jurors may take
16 notes regarding the evidence and keep the notes for the
17 purpose of refreshing their memory for use during recesses,
18 discussions, and deliberations. The court may provide
19 materials suitable for this purpose. The confidentiality of
20 the notes should be emphasized to the jurors. After the jury
21 has rendered its verdict, the notes shall be collected by the
22 bailiff or clerk, who shall promptly destroy them.

23 (5) The court may provide a notebook for each juror.
24 Notebooks may contain:

- 25 (a) A copy of the preliminary jury instructions;
26 (b) Jurors' notes;
27 (c) Witnesses' names, photographs, or biographies;
28 (d) Copies of key documents admitted into evidence and
29 an index of all exhibits in evidence;
30 (e) A glossary of technical terms; and
31 (f) A copy of the court's final instructions.

1
2 In its discretion, the court may authorize documents and
3 exhibits in evidence to be included in notebooks for use by
4 the jurors during trial to aid them in performing their
5 duties. The preliminary jury instructions should be removed,
6 discarded, and replaced by the final jury instructions before
7 the latter are read to the jury by the court.

8 (6) The court may permit jurors to have access to
9 their notes and notebooks during recesses, discussions, and
10 deliberations.

11 (7) The court may permit jurors to submit to the court
12 written questions directed to witnesses or to the court.
13 Opportunity shall be given to counsel to object to such
14 questions out of the presence of the jury. The court may
15 prohibit or limit the submission of questions to witnesses.

16 (8) The court may instruct the jury that any questions
17 directed to witnesses or the court must be in writing,
18 unsigned, and given to the bailiff. The court may further
19 instruct that, if a juror has a question for a witness or the
20 court, the juror should hand it to the bailiff during a
21 recess, or, if the witness is about to leave the witness
22 stand, the juror should signal to the bailiff. If the court
23 determines that the juror's questions call for admissible
24 evidence, the question may be asked by court or counsel in the
25 court's discretion. Such questions may be answered by
26 stipulation or other appropriate means, including, but not
27 limited to, additional testimony upon such terms and
28 limitations as the court prescribes. If the court determines
29 that the juror's question calls for inadmissible evidence, the
30 question may not be read or answered. If a juror's question is
31 rejected, the jury shall be told that trial rules do not

1 permit some questions to be asked and that the jurors should
2 not attach any significance to the failure to have their
3 question asked.

4 (9) The court has discretion to give final
5 instructions to the jury before closing arguments of counsel
6 instead of after, in order to enhance jurors' ability to apply
7 the applicable law to the facts. In that event, the court may
8 withhold giving the necessary procedural and housekeeping
9 instructions until after closing arguments.

10 Section 2. Section 44.102, Florida Statutes, is
11 amended to read:

12 44.102 Court-ordered mediation.--

13 (1) Court-ordered mediation shall be conducted
14 according to rules of practice and procedure adopted by the
15 Supreme Court.

16 (2) A court, under rules adopted by the Supreme Court:

17 (a) Must refer to mediation any filed civil action for
18 monetary damages, unless:

19 1. The action is a landlord and tenant dispute that
20 does not include a claim for personal injury.

21 2. The action is filed for the purpose of collecting a
22 debt.

23 3. The action is a claim of medical malpractice.

24 4. The action is governed by the Florida Small Claims

25 Rules.

26 5. The court determines that the action is proper for
27 referral to nonbinding arbitration under this chapter.

28 6. The parties have agreed to binding arbitration.

29 (b)(a) May refer to mediation all or any part of a
30 filed civil action for which mediation is not required under
31 this section.

1 (c)~~(b)~~ In circuits in which a family mediation program
2 has been established and upon a court finding of a dispute,
3 shall refer to mediation all or part of custody, visitation,
4 or other parental responsibility issues as defined in s.
5 61.13. Upon motion or request of a party, a court shall not
6 refer any case to mediation if it finds there has been a
7 history of domestic violence that would compromise the
8 mediation process.

9 (d)~~(c)~~ In circuits in which a dependency or in need of
10 services mediation program has been established, may refer to
11 mediation all or any portion of a matter relating to
12 dependency or to a child in need of services or a family in
13 need of services.

14 (3) Each party involved in a court-ordered mediation
15 proceeding has a privilege to refuse to disclose, and to
16 prevent any person present at the proceeding from disclosing,
17 communications made during such proceeding. All oral or
18 written communications in a mediation proceeding, other than
19 an executed settlement agreement, shall be exempt from the
20 requirements of chapter 119 and shall be confidential and
21 inadmissible as evidence in any subsequent legal proceeding,
22 unless all parties agree otherwise.

23 (4) There shall be no privilege and no restriction on
24 any disclosure of communications made confidential in
25 subsection (3) in relation to disciplinary proceedings filed
26 against mediators pursuant to s. 44.106 and court rules, to
27 the extent the communication is used for the purposes of such
28 proceedings. In such cases, the disclosure of an otherwise
29 privileged communication shall be used only for the internal
30 use of the body conducting the investigation. Prior to the
31 release of any disciplinary files to the public, all

1 references to otherwise privileged communications shall be
2 deleted from the record. When an otherwise confidential
3 communication is used in a mediator disciplinary proceeding,
4 such communication shall be inadmissible as evidence in any
5 subsequent legal proceeding. "Subsequent legal proceeding"
6 means any legal proceeding between the parties to the
7 mediation which follows the court-ordered mediation.

8 (5) The chief judge of each judicial circuit shall
9 maintain a list of mediators who have been certified by the
10 Supreme Court and who have registered for appointment in that
11 circuit.

12 (a) Whenever possible, qualified individuals who have
13 volunteered their time to serve as mediators shall be
14 appointed. If a mediation program is funded pursuant to s.
15 44.108, volunteer mediators shall be entitled to reimbursement
16 pursuant to s. 112.061 for all actual expenses necessitated by
17 service as a mediator.

18 (b) Nonvolunteer mediators shall be compensated
19 according to rules adopted by the Supreme Court. If a
20 mediation program is funded pursuant to s. 44.108, a mediator
21 may be compensated by the county or by the parties. When a
22 party has been declared indigent or insolvent, that party's
23 pro rata share of a mediator's compensation shall be paid by
24 the county at the rate set by administrative order of the
25 chief judge of the circuit.

26 (6)(a) When an action is referred to mediation by
27 court order, the time periods for responding to an offer of
28 settlement pursuant to s. 45.061, or to an offer or demand for
29 judgment pursuant to s. 768.79, respectively, shall be tolled
30 and trial may not be commenced until:

- 31 1. An impasse has been declared by the mediator; ~~or~~

1 2. The mediator has reported to the court that no
2 agreement was reached; or-

3 3. Only one party remains a viable litigant in the
4 action due to circumstances, including, but not limited to,
5 entry of a default.

6 (b) Sections 45.061 and 768.79 notwithstanding, an
7 offer of settlement or an offer or demand for judgment may be
8 made at any time after an impasse has been declared by the
9 mediator, or the mediator has reported that no agreement was
10 reached. An offer is deemed rejected as of commencement of
11 trial.

12 Section 3. Section 57.105, Florida Statutes, is
13 amended to read:

14 57.105 Attorney's fee; sanctions for raising unfounded
15 claims or defenses; damages for delay of litigation.--

16 (1) The court shall award a reasonable attorney's fee
17 to be paid to the prevailing party in equal amounts by the
18 losing party and the losing party's attorney in any civil
19 action in which the court finds that the losing party or the
20 losing party's attorney knew at the time a claim or defense
21 was presented:

22 (a) That the claim or defense was not supported by the
23 material facts necessary to establish the claim or defense; or

24 (b) That the application of then-existing law to those
25 material facts known to the losing party or losing party's
26 attorney would not support the claim or defense.~~there was a~~
27 ~~complete absence of a justiciable issue of either law or fact~~
28 ~~raised by the complaint or defense of the losing party;~~
29 ~~provided,~~

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1 However, ~~that~~ the losing party's attorney is not personally
2 responsible if he or she has acted in good faith, based on the
3 representations of his or her client as to the existence of
4 material facts. If the court awards fees to a claimant
5 pursuant to this subsection ~~finds that there was a complete~~
6 ~~absence of a justiciable issue of either law or fact raised by~~
7 ~~the defense~~, the court shall also award prejudgment interest.

8 (2) Subsection (1) shall not apply if the court
9 determines that the claim or defense was presented as a
10 good-faith attempt to change the then-existing law as it
11 applied to the facts the losing party or losing party's
12 attorney knew at the time the claim or defense was presented.

13 (3) If any plaintiff or defendant has been sanctioned
14 under subsection (1) in three or more actions within the 10
15 years immediately preceding the activity for which the
16 sanction is sought, then in any further litigation in which
17 that plaintiff or defendant is a party, whether or not related
18 to the actions in which the sanctions were imposed, the
19 opposing party is entitled to have the claims or defenses of
20 such plaintiff or defendant stricken unless such plaintiff or
21 defendant first makes a prima facie showing that the claims or
22 defenses are brought in good faith, applying then-existing law
23 or applying a good-faith attempt to change the then-existing
24 law, and supported by the material facts necessary to
25 establish the claim or defense. Furthermore, the court may
26 impose such additional sanctions or requirements as are just
27 and warranted under the circumstances of the particular case.

28 (4) In any civil proceeding in which the moving party
29 proves, by a preponderance of the evidence, that any action
30 taken by the opposing party, including, but not limited to,
31 the filing of any pleading or part thereof, the assertion of

1 or response to any discovery demand, the assertion of any
2 claim or defense, or the response to any request by any other
3 party, was taken primarily for the purpose of delay, the court
4 shall award damages to the moving party for the time
5 necessitated by the conduct in question. The absence of a
6 justiciable basis for the action taken is prima facie evidence
7 of such a purpose, but such a purpose may also be proved, in
8 proper cases, notwithstanding an objective justiciable basis
9 for the action taken.

10 (5)(2) If a contract contains a provision allowing
11 attorney's fees to a party when he or she is required to take
12 any action to enforce the contract, the court may also allow
13 reasonable attorney's fees to the other party when that party
14 prevails in any action, whether as plaintiff or defendant,
15 with respect to the contract. The subsection applies to any
16 contract entered into on or after October 1, 1988. This act
17 shall take effect October 1, 1988, and shall apply to
18 contracts entered into on said date or thereafter.

19 Section 4. Subsection (22) of section 90.803, Florida
20 Statutes, is amended to read:

21 90.803 Hearsay exceptions; availability of declarant
22 immaterial.--The provision of s. 90.802 to the contrary
23 notwithstanding, the following are not inadmissible as
24 evidence, even though the declarant is available as a witness:

25 (22) FORMER TESTIMONY.--Former testimony given by the
26 declarant which testimony was given as a witness at another
27 hearing of the same or a different proceeding, or in a
28 deposition taken in compliance with law in the course of the
29 same or another proceeding, if the party against whom the
30 testimony is now offered, or, in a civil action or proceeding,
31 a predecessor in interest, or a person with a similar

1 interest, had an opportunity and similar motive to develop the
2 testimony by direct examination, cross-examination, or
3 redirect examination, provided that the court finds that the
4 testimony is not inadmissible under s. 90.402 or s. 90.403 at
5 ~~a civil trial, when used in a retrial of said trial involving~~
6 ~~identical parties and the same facts.~~

7 Section 5. Subsection (2) of section 95.031, Florida
8 Statutes, is amended to read:

9 95.031 Computation of time.--Except as provided in
10 subsection (2) and in s. 95.051 and elsewhere in these
11 statutes, the time within which an action shall be begun under
12 any statute of limitations runs from the time the cause of
13 action accrues.

14 (2)(a) ~~Actions for products liability and fraud under~~
15 ~~s. 95.11(3) must be begun within the period prescribed in this~~
16 ~~chapter, with the period running from the time the facts~~
17 ~~giving rise to the cause of action were discovered or should~~
18 ~~have been discovered with the exercise of due diligence,~~
19 ~~instead of running from any date prescribed elsewhere in s.~~
20 ~~95.11(3), but in any event an action for fraud under s.~~
21 ~~95.11(3) must be begun within 12 years after the date of the~~
22 ~~commission of the alleged fraud, regardless of the date the~~
23 ~~fraud was or should have been discovered.~~

24 (b) An action for products liability under s. 95.11(3)
25 must be begun within the period prescribed in this chapter,
26 with the period running from the date that the facts giving
27 rise to the cause of action were discovered, or should have
28 been discovered with the exercise of due diligence, rather
29 than running from any other date prescribed elsewhere in s.
30 95.11(3), but, in any event, for a completed product delivered
31 to the original purchaser on or after October 1, 1998, an

1 action for products liability under s. 95.11(3) must be begun
2 within 12 years after the date of delivery of the completed
3 product to its original purchaser, regardless of the date that
4 the defect in the product was or should have been discovered.
5 However, the 12-year limitation on filing an action for
6 products liability does not apply if the manufacturer knew of
7 a defect in the product and concealed or attempted to conceal
8 this defect.

9 Section 6. Section 768.096, Florida Statutes, is
10 created to read:

11 768.096 Employer presumption against negligent
12 hiring.--

13 (1) In a civil action for the death of, or injury or
14 damage to, a third person caused by the intentional tort of an
15 employee, such employee's employer shall be presumed not to
16 have been negligent in hiring such employee if, before hiring
17 the employee, the employer conducted a background
18 investigation of the prospective employee and the
19 investigation did not reveal any information that reasonably
20 demonstrated the unsuitability of the prospective employee for
21 the particular work to be performed or for the employment in
22 general. A background investigation under this section must
23 include:

24 (a) Obtaining a criminal background investigation on
25 the prospective employee pursuant to subsection (2);

26 (b) Making a reasonable effort to contact references
27 and former employers of the prospective employee concerning
28 the suitability of the prospective employee for employment;

29 (c) Requiring the prospective employee to complete a
30 job application form that includes questions concerning
31 whether he or she has ever been convicted of a crime,

1 including details concerning the type of crime; the date of
2 conviction and the penalty imposed; and whether the
3 prospective employee has ever been a defendant in a civil
4 action for intentional tort, including the nature of the
5 intentional tort and the disposition of the action;

6 (d) Obtaining, with written authorization from the
7 prospective employee, a complete check of the driver's license
8 record of the prospective employee if such a check is relevant
9 to the work the employee will be performing and if the record
10 can reasonably be obtained; and

11 (e) Interviewing the prospective employee.

12 (2) To satisfy the criminal-background-investigation
13 requirement of this section, an employer must obtain a local
14 criminal records check through local law enforcement agencies,
15 a statewide criminal records check through the Department of
16 Law Enforcement, or a federal criminal records check through
17 the Federal Bureau of Investigation.

18 (3) The election by an employer not to conduct the
19 investigation specified in subsection (1) does not raise any
20 presumption that the employer failed to use reasonable care in
21 hiring an employee.

22 Section 7. Section 768.095, Florida Statutes, is
23 amended to read:

24 768.095 Employer immunity from liability; disclosure
25 of information regarding former or current employees.--An
26 employer who discloses information about a former or current
27 employee ~~employee's job performance~~ to a prospective employer
28 of the former or current employee upon request of the
29 prospective employer or of the former or current employee is
30 ~~presumed to be acting in good faith and, unless lack of good~~
31 ~~faith is shown by clear and convincing evidence, is immune~~

1 from civil liability for such disclosure or its consequences
2 ~~unless it is shown by clear and convincing evidence. For~~
3 ~~purposes of this section, the presumption of good faith is~~
4 ~~rebutted upon a showing~~ that the information disclosed by the
5 former or current employer was knowingly false ~~or deliberately~~
6 ~~misleading, was rendered with malicious purpose, or violated~~
7 any civil right of the former or current employee protected
8 under chapter 760.

9 Section 8. Section 768.098, Florida Statutes, is
10 created to read:

11 768.098 Immunity from liability for intentional torts
12 of a third person.--The owner or person in possession and
13 control of business premises, or an agent thereof, is not
14 liable for any civil damages for the death of, or injury or
15 damage to, an invitee on the premises which resulted from an
16 intentional tort committed by a third person who is not an
17 agent or employee of the owner or person in possession and
18 control of the premises. The immunity from liability under
19 this section does not apply if the conduct on the part of the
20 owner or a person in possession and control of the premises,
21 or agent thereof, demonstrated a reckless disregard for the
22 consequences so as to cause the injury to or death of an
23 invitee. As used in this section, the term "reckless
24 disregard" means conduct that the owner or person in
25 possession and control of the premises, or agent thereof, knew
26 or should have known would likely result in injury of or death
27 to an invitee. However, this section does not relieve the
28 owner or person in possession and control of the premises, or
29 agent thereof, from liability for the reasonably foreseeable
30 risk of harm to its invitees.

31

1 Section 9. A state agency or political subdivision may
2 be held liable in the same manner and to the same extent as a
3 private individual under like circumstances for failure to
4 provide adequate security or police protection when the death
5 of or injury or damage to a business invitee occurs on a
6 business premises under the jurisdiction of the state agency
7 or political subdivision and results from an intentional tort
8 committed by a person who is not a person or organization
9 owning or controlling an interest in the property or an agent
10 or employee of such person or organization.

11 Section 10. Section 768.36, Florida Statutes, is
12 created to read:

13 768.36 Alcohol or drug defense.--

14 (1) As used in this section, the term:

15 (a) "Alcoholic beverage" means distilled spirits and
16 any beverage that contains 0.5 percent or more alcohol by
17 volume as determined in accordance with s. 561.01(4)(b).

18 (b) "Drug" means any chemical substance set forth in
19 s. 877.111, or any substance controlled under chapter 893. The
20 term does not include any drug or medication obtained by the
21 plaintiff pursuant to a prescription, as defined in s. 893.02,
22 which was taken in accordance with the prescription, or any
23 medication that is authorized pursuant to state or federal law
24 for general distribution and use without a prescription in
25 treating human diseases, ailments, or injuries, and that was
26 taken in the recommended dosage.

27 (2) In any civil action, a plaintiff who, at the time
28 he or she was injured, was under the influence of any
29 alcoholic beverage or drug to the extent that the plaintiff's
30 normal faculties were impaired, or who had a blood or breath
31 alcohol level of 0.08 percent or higher, and, as a result of

1 the influence of such alcoholic beverage or drug, was more
2 than 50 percent at fault for such plaintiff's harm, may not
3 recover any damages for loss or injury to his or her person or
4 property.

5 Section 11. Section 768.725, Florida Statutes, is
6 created to read:

7 768.725 Punitive damages; burden of proof.--At trial,
8 the plaintiff must establish by clear and convincing evidence
9 its entitlement to an award of punitive damages. The greater
10 weight of the evidence burden of proof shall apply to the
11 determination regarding the amount of damages.

12 Section 12. Effective October 1, 1998, and applicable
13 to all civil actions pending on that date for which the
14 initial trial or retrial of the action has not commenced and
15 all civil actions commenced on or after that date, section
16 768.73, Florida Statutes, is amended to read:

17 768.73 Punitive damages; limitation.--

18 (1)(a) In any civil action based on negligence, strict
19 liability, products liability, misconduct in commercial
20 transactions, professional liability, or breach of warranty,
21 and involving willful, wanton, or gross misconduct, the
22 judgment for the total amount of punitive damages awarded to a
23 claimant may not exceed three times the amount of compensatory
24 damages awarded to each person entitled thereto by the trier
25 of fact, except as provided in paragraph (b). However, this
26 subsection does not apply to any class action.

27 (b) If any award for punitive damages exceeds the
28 limitation specified in paragraph (a), the award is presumed
29 to be excessive and the defendant is entitled to remittitur of
30 the amount in excess of the limitation unless the claimant
31 demonstrates to the court by clear and convincing evidence

1 that the award is not excessive in light of the facts and
2 circumstances which were presented to the trier of fact.

3 (c) This subsection is not intended to prohibit an
4 appropriate court from exercising its jurisdiction under s.
5 768.74 in determining the reasonableness of an award of
6 punitive damages that is less than three times the amount of
7 compensatory damages.

8 (2)(a) Except as provided in paragraph (b), punitive
9 damages shall not be awarded against a defendant in a tort
10 action if that defendant establishes, before trial, that
11 punitive damages have previously been awarded against that
12 defendant in any state or federal court in any action alleging
13 harm from the same act or single course of conduct for which
14 the claimant seeks compensatory damages. For purposes of a
15 tort action, the term "the same act or single course of
16 conduct" includes acts resulting in the same manufacturing
17 defects, acts resulting in the same defects in design, or
18 failure to warn of the same hazards, with respect to similar
19 units of a product.

20 (b) In subsequent tort actions involving the same act
21 or single course of conduct for which punitive damages have
22 already been awarded, if the court determines by clear and
23 convincing evidence that the amount of prior punitive damages
24 awarded was insufficient to punish that defendant's behavior,
25 the court may award subsequent punitive damages. In awarding
26 subsequent punitive damages, the court shall make specific
27 findings of fact in the record to support its conclusion. Any
28 subsequent punitive damage awards shall be reduced by the
29 amount of any earlier punitive damage awards rendered in state
30 or federal court.

31

1 (3) In any civil action, an award of punitive damages
2 is payable as follows:

3 (a) Sixty-five percent of the award is payable to the
4 claimant.

5 (b) If the cause of action was based on personal
6 injury or wrongful death, 35 percent of the award is payable
7 to the Public Medical Assistance Trust Fund; otherwise, 35
8 percent of the award is payable to the General Revenue Fund.

9 (4) The clerk of the court shall transmit a copy of
10 the jury verdict to the Treasurer by certified mail. In the
11 final judgment, the court shall order the percentages of the
12 award to be paid as provided in subsection (3).

13 (5) A settlement agreement entered into between the
14 original parties to the action after a verdict has been
15 returned must provide a proportionate share payable to the
16 fund specified in paragraph (3)(b). For purposes of this
17 subsection, a proportionate share is a 35-percent share of
18 that percentage of the settlement amount which the portion of
19 the verdict for punitive damages bears to the total amount
20 awarded for compensatory and punitive damages.

21 (6) The Department of Banking and Finance shall
22 collect or cause to be collected all payments due the state
23 under this section. Such payments shall be made to the
24 Comptroller and deposited in the appropriate fund specified in
25 subsection (3).

26 (7) If the full amount of punitive damages awarded
27 cannot be collected, the claimant and the other recipient
28 designated pursuant to paragraph (3)(b) are each entitled to a
29 proportional share of the punitive damages collected.

30 (8) The claimant attorney's fees, if payable from the
31 judgment, are, to the extent that the fees are based on the

1 punitive damages, calculated based on the entire judgment for
2 punitive damages, notwithstanding the provisions of subsection
3 (3). This subsection does not limit the payment of attorney's
4 fees based upon an award of damages other than punitive
5 damages.

6 (9)~~(2)~~ The jury may neither be instructed nor informed
7 as to the provisions of this section.

8 Section 13. Section 768.781, Florida Statutes, is
9 created to read:

10 768.781 Terms of contracts; presuit settlement
11 offer.--

12 (1) REQUIRED TERMS OF CONTRACTS.--For a negligence
13 case as defined in s. 768.81(4) and in order to be consistent
14 with public policy of this state and enforceable, a contract
15 for an attorney's services in pursuing recovery for another
16 must include provisions, whereby within 90 days following
17 retention, the attorney must send a claimant's notice by
18 certified mail to each allegedly responsible party,
19 containing:

20 (a) The name, address, age, marital status, and
21 occupation of the claimant or of the injured or deceased party
22 if the claimant is operating in a representative capacity;

23 (b) A brief description of how the injury occurred,
24 including the basis for claiming that the party to whom the
25 claim is addressed is at least partially responsible for
26 causing the injury;

27 (c) The names and, if known, the addresses, telephone
28 numbers, and occupations of all known witnesses to the injury;

29 (d) A description of the nature of the injury; the
30 names and addresses of all physicians, other health care
31 providers and hospitals, clinics, or other medical service

1 entities that provided medical care to the claimant or injured
2 party, including the date and nature of the service; and
3 copies of photographs in the claimant's possession or control
4 which relate to any injuries and damages sustained;

5 (e) Medical records involving the present injury, any
6 prior related injury, or any preexisting medical condition
7 which an allegedly responsible party would be able to
8 introduce into evidence in a trial, or, in lieu thereof, an
9 executed release allowing the allegedly responsible party to
10 obtain such records directly from the claimant's physicians,
11 health care providers, and entities that provided medical
12 care; and

13 (f) A list of any medical expenses, wages lost, or
14 other special damages allegedly suffered as a consequence of
15 the personal injury, and any relevant documentation thereof,
16 including records of earnings if a claimant is self-employed,
17 and employer records of earnings if a claimant is employed,
18 or, in lieu thereof, an executed release allowing the
19 responsible party to obtain such documentation.

20 (2) RESPONSE AND PRESUIT SETTLEMENT OFFER; TIME LIMITS
21 AND COMMUNICATION.--

22 (a) An allegedly responsible party shall issue a
23 written response or supplemental responses to the claimant and
24 his attorney within 90 days after receipt of the claimant's
25 notice.

26 (b) If an offer accompanies a response or supplemental
27 response pursuant to this section, the offer is open for
28 acceptance for a minimum of 30 days after the date it is
29 served upon claimant's attorney.

30 (c) If, within 30 days after receipt of a claimant's
31 notice, an allegedly responsible party notifies claimant's

1 attorney that it seeks to have a medical examination of
2 claimant and claimant is not made available for such
3 examination within 10 days after receipt of the request, the
4 90-day time period provided in paragraph (a) shall be extended
5 by 1 day for each day that the request is not honored after
6 the expiration of 10 days from the date of the request. Any
7 such extensions shall also include a further period of 10 days
8 after the date of the completion of the medical examination.

9 Section 14. Subsection (7) of section 768.79, Florida
10 Statutes, is amended to read:

11 768.79 Offer of judgment and demand for judgment.--

12 (7)(a) If a party is entitled to costs and fees
13 pursuant to the provisions of this section, the court may, in
14 its discretion, determine that an offer was not made in good
15 faith. In such case, the court may disallow an award of costs
16 and attorney's fees.

17 (b) When determining the entitlement to and
18 reasonableness of an award of attorney's fees pursuant to this
19 section, the court shall consider, along with all other
20 relevant criteria, the following additional factors:

21 1. The then apparent merit or lack of merit in the
22 claim.

23 2. The number and nature of offers made by the
24 parties.

25 3. The closeness of questions of fact and law at
26 issue.

27 4. Whether the proposal was reasonably rejected.

28 5.4. Whether the person making the offer had
29 unreasonably refused to furnish information necessary to
30 evaluate the reasonableness of such offer.

31

1 ~~6.5.~~ Whether the suit was in the nature of a test case
2 presenting questions of far-reaching importance affecting
3 nonparties.

4 ~~7.6.~~ The amount of the additional delay cost and
5 expense that the person making the offer reasonably would be
6 expected to incur if the litigation should be prolonged.

7 Section 15. Subsection (5) of section 768.81, Florida
8 Statutes, is repealed.

9 Section 16. The Legislature finds that it has a
10 substantial governmental interest in protecting the privacy,
11 well-being, and tranquility of the public against intrusive
12 elements of advertising by attorneys. The Legislature further
13 finds that its substantial interest extends to ensuring that
14 advertising by attorneys presents the public with complete and
15 accurate information necessary to make informed decisions
16 about employing the legal services of an attorney and to
17 ensuring that advertising does not reflect poorly upon the
18 legal profession, the legal system, or the administration of
19 justice. Research presented by The Florida Bar, and recognized
20 by the Supreme Court of the United States in Florida Bar v.
21 Went For It, Inc., 515 U.S. 618, demonstrates that members of
22 the public view elements of attorney advertising and
23 solicitation as being an intrusion on privacy and as
24 contributing to negative images of the legal profession. The
25 Florida Bar's research also demonstrates that electronic
26 advertising by attorneys does not provide the public with
27 useful and factual information with which to make informed
28 decisions about hiring an attorney. The Legislature finds that
29 television advertising diminishes the public's respect for the
30 fairness and integrity of the legal system. In light of these
31 findings, it is the intent of the Legislature to regulate

1 attorney advertising in a narrow but necessary fashion in
2 order to directly and materially advance the state's
3 governmental interest.

4 Section 17. Section 877.023, Florida Statutes, is
5 created to read:

6 877.023 Advertisement of legal services; penalty.--

7 (1) GENERAL PROVISIONS.--

8 (a) An advertisement for legal services must include
9 the following information:

10 1. The name of at least one lawyer or the lawyer
11 referral service responsible for the content of the
12 advertisement.

13 2. The location, by municipality, of one or more
14 bonafide office locations of the lawyer or lawyers who will
15 actually perform the services advertised. If the office is
16 located outside a municipality, the county in which the office
17 is located must be identified.

18 3. A statement of disclosure, printed or oral, that
19 the initiation or maintenance of a legal action that is
20 presented for an improper purpose, is frivolous, or is
21 unsupported by the evidence may result in the imposition of
22 sanctions by a court of law.

23 4. A statement of disclosure, printed or oral, whether
24 the lawyer whose services are being advertised or any lawyer
25 in the law firm whose services are being advertised has been
26 the subject of a disciplinary proceeding that resulted in
27 reprimand, suspension, or disbarment and that related to a
28 violation of the rules that regulate members of The Florida
29 Bar.

30 5. A statement of disclosure, printed or oral, which
31 encourages the public to contact The Florida Bar to determine

1 whether a lawyer is in good standing and to review public
2 records that relate to disciplinary actions against lawyers.

3 6. A statement of disclosure, printed or oral, which
4 states that individual results in a legal action may vary and
5 that past recoveries under similar factual or legal situations
6 are not necessarily indicative of the prospects for recovery
7 in the future.

8 7. A statement of disclosure, printed or oral, as to
9 whether the client will be liable for any expenses in addition
10 to the fee charged by the lawyer who provides the legal
11 services.

12 (b) An advertisement for legal services may not
13 include the following information:

14 1. Any misleading or deceptive factual statement.

15 2. Information that contains any reference to past
16 successes or results obtained by the lawyer or that is
17 otherwise likely to create an unjustified expectation about
18 results the lawyer can achieve.

19 3. Visual or verbal descriptions, depictions, or
20 portrayals of persons, things, or events that are not
21 objectively relevant to the selection of a lawyer or that are
22 deceptive, misleading, or manipulative.

23 4. Information that advertises for legal employment in
24 an area of practice in which the advertising lawyer or law
25 firm does not practice law.

26 5. Any statement that describes or characterizes the
27 quality of the lawyer's services.

28 (c) The following information may be included in an
29 advertisement:

30 1. The name of the lawyer or law firm, a listing of
31 lawyers associated with the firm, office locations and parking

1 arrangements, disability accommodations, telephone numbers,
2 office and telephone service hours, and a designation such as
3 "attorney" or "law firm."

4 2. The date of admission to The Florida Bar and any
5 other bars, years of experience practicing law, number of
6 lawyers in the advertising law firm, and a listing of federal
7 courts and jurisdictions other than those in this state where
8 the lawyer is licensed to practice.

9 3. Technical and professional licenses granted by the
10 state or other recognized licensing authorities and
11 educational degrees received, including dates and
12 institutions.

13 4. Foreign language ability.

14 5. Areas of law in which the lawyer practices.

15 6. Prepaid or group legal service plans in which the
16 lawyer participates.

17 7. Acceptance of credit cards.

18 8. Fee for initial consultation and fee schedule.

19 9. The name and geographic location of a lawyer or law
20 firm as a sponsor of a public service announcement or
21 charitable, civic, or community program or event.

22 10. Common salutary language, such as "best wishes,"
23 "good luck," "happy holidays," or "pleased to announce."

24 (2) ADVERTISING IN ELECTRONIC MEDIA.--

25 (a) An advertisement for legal services in the
26 electronic media may not contain information other than the
27 information required by paragraph (1)(a) and any of the
28 information authorized by paragraph (1)(c).

29 (b) The information must be articulated by a human
30 voice or voices, or on-screen text, with no background sound
31 other than instrumental music. A voice or image other than

1 that of a lawyer who is a member of the firm whose services
2 are being advertised may not be used in an advertisement in
3 the electronic media. A person who is not a member of the firm
4 whose services are being advertised may not appear on screen
5 or on radio. Visual images that may appear in a television
6 advertisement are limited to the advertising lawyer in front
7 of a background consisting of a solid color, a set of law
8 books in an unadorned bookcase, or the lawyer's own office
9 with no other office personnel shown. In an advertisement for
10 a lawyer referral service, a person may not speak or appear
11 who is not a lawyer who is a member of a law firm that
12 receives referrals from the service.

13 (3) PENALTY.--Any person who violates this section
14 commits a misdemeanor of the first degree, punishable as
15 provided in s. 775.082 or s. 775.083.

16 (4) SCOPE.--This section does not alter or abrogate
17 any other valid law, code, ordinance, rule, or penalty in
18 effect on October 1, 1998.

19 Section 18. Through the state case-reporting system,
20 the clerk of court shall report to the Office of the State
21 Courts Administrator information from each settlement or jury
22 verdict and final judgment in negligence cases as defined in
23 section 768.81(4), Florida Statutes, as the President of the
24 Senate and the Speaker of the House of Representatives deem
25 necessary from time to time. The information shall include,
26 but need not be limited to: the name of each plaintiff and
27 defendant; the verdict; the percentage of fault of each; the
28 amount of economic damages and noneconomic damages awarded to
29 each plaintiff and which damages are to be paid jointly and
30 severally by which defendants; and the amount of any punitive
31 damages to be paid by each defendant.

1 Section 19. If any provision of this act or the
2 application thereof to any person or circumstance is held
3 invalid, the invalidity does not affect other provisions or
4 applications of the act which can be given effect without the
5 invalid provision or application, and to this end the
6 provisions of this act are declared severable.

7 Section 20. This act shall take effect October 1,
8 1998.

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SENATE SUMMARY

Revises various laws governing civil litigation. Creates a Juror Bill of Rights. Provides that the court may allow members of a jury to take notes during trial and question witnesses or the judge. Requires that the court, with certain exceptions, require mediation for any civil action for monetary damages. Revises requirements for the court in awarding attorney's fees when it finds that an attorney has raised an unfounded claim or defense. Provides additional circumstances under which former testimony may be admissible at trial. Limits to 12 years the period within which a person may bring an action for products liability. Provides for a presumption that an employer is immune from liability for an intentional tort caused by an employee if, prior to employment, the employer has conducted a background investigation of the employee which has not revealed information demonstrating the unsuitability of the employee for employment. Provides that a business owner or operator is immune from liability for intentional torts committed by a third person, absent a finding of reckless disregard on the part of the owner or operator. Provides that a state agency or political subdivision may be held liable under certain circumstances for failing to provide adequate security or police protection. Prohibits a plaintiff from recovering any damages for loss or injury to his or her person or property if the plaintiff is more than 50 percent at fault due to the influence of alcohol or drugs. Requires that a claim for punitive damages be established by clear and convincing evidence. Prohibits an award for punitive damages if damages were previously awarded in an action that involved the same act or single course of conduct. Requires that 35 percent of an award of punitive damages, or 35 percent of any such award actually collected, be paid into the Public Medical Assistance Trust Fund or the General Revenue Fund. Provides that the claimant's attorney's fees in an award for punitive damages be based on the entire judgment. Provides requirements for pre-suit notice and settlement offers. Specifies information that must be included in any advertisement for legal services. Prohibits the inclusion of certain statements and information in legal advertising. Provides requirements for advertisements for legal services in the electronic media. Requires that the clerks of the courts report certain information to the Office of the State Courts Administrator at the request of the President of the Senate and the Speaker of the House of Representatives. (See bill for details.)