HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 837 Civil Remedies
SPONSOR(S): Civil Justice Subcommittee, Gregory and others
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 6 N, As CS	Jones	Jones
2) Judiciary Committee			

SUMMARY ANALYSIS

The main purpose of Florida's civil justice system is to properly and fairly redress the civil wrongs caused throughout the state, whether such wrongs be in the form of tortious conduct, breaches of contract, or other non-criminal harm for which the law provides a remedy. The civil justice system accomplishes this goal by providing a neutral court system empowered to decide the amount of monetary damages required to make each wronged person whole again. A functioning civil justice system, when it operates justly:

- Provides a fair and equitable forum to resolve disputes;
- Discourages persons from resorting to self-help methods to redress wrongs;
- Appropriately compensates legitimately harmed persons;
- Shifts losses to responsible parties;
- Provides incentives to prevent future harm; and
- Deters undesirable behavior.

CS/HB 837 makes the following changes to Florida's civil justice system:

- Changes Florida's comparative negligence system from a "pure" comparative negligence system to a "modified" comparative negligence system, so that a plaintiff who is more at fault for his or her own injuries than the defendant may not recover damages from the defendant.
- Provides uniform standards to assist juries in calculating the accurate value of medical damages in personal injury or wrongful death actions.
- Modifies Florida's "bad faith" framework to:
    - Allow an insurer to avoid third-party bad faith liability if the insurer tenders the lesser of the policy limits or the amount demanded by the claimant before a complaint is filed, or within 90 days after service of the complaint.
    - Clarify that negligence alone is not enough to demonstrate bad faith.
    - Require a claimant to act in good faith with respect to furnishing information, making demands, setting deadlines, and attempting to settle the insurance claim.
    - Allow an insurer, when there are multiple claimants in a single action, to limit the insurer's bad faith liability by paying the total amount of the policy limits at the outset.
- Provides that a contingency fee multiplier for an attorney fee award is appropriate only in a rare and exceptional circumstance, adopting the federal standard.
- Repeals Florida's one-way attorney fee provisions for insurance cases.
- Requires the trier of fact in certain negligent security actions to consider the fault of all persons who contributed to the injury.
- Reduces the statute of limitations for general negligence cases from 4 years to 2 years.

The bill may have a positive fiscal impact on state and local governments, and on private entities. The bill provides an effective date of July 1, 2023.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

The Civil Justice System in General

The main purpose of Florida's civil justice system is to properly and fairly redress the civil wrongs caused throughout the state, whether such wrongs be in the form of tortious conduct, breaches of contract, or other non-criminal harm for which the law provides a remedy. The civil justice system accomplishes this goal by providing a neutral court system empowered to decide the amount of monetary damages required to make each wronged person whole again. A functioning civil justice system, when it operates justly:

- Provides a fair and equitable forum to resolve disputes;
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- Appropriately compensates legitimately harmed persons;
- Shifts losses to responsible parties;
- Provides incentives to prevent future harm; and
- Deters undesirable behavior.[1]

Tort Law

One of the goals of the civil justice system is to redress tortious conduct, or "torts." A tort is a wrong for which the law provides a remedy. Torts are generally divided into two categories, as follows:

- An intentional tort, examples of which include an assault, a battery, or a false imprisonment.
- Negligence, which is a tort that is unintentionally committed. To prevail in a negligence lawsuit, the party seeking the remedy, the "plaintiff," must demonstrate that the:
    - Defendant had a legal duty of care requiring the defendant to conform to a certain standard of conduct for the protection of others, including the plaintiff, against unreasonable risks;
    - Defendant breached his or her duty of care by failing to conform to the required standard;
    - Defendant's breach caused the plaintiff to suffer an injury; and
    - Plaintiff suffered actual damage or loss resulting from such injury.[2]

Negligence

Duty of Care

The first of the four elements a plaintiff must show to prevail in a negligence action is that the defendant owed the plaintiff a "duty of care" to do something or refrain from doing something. The existence of a legal duty is a threshold requirement that, if satisfied, "merely opens the courthouse doors."[3] Whether a duty sufficient to support a negligence claim exists is a matter of law[4] determined by the court.[5] A duty may arise from various sources, including:

- Legislative enactments or administrative regulations;
- Judicial interpretations of such enactments or regulations;
- Other judicial precedent; and
- The general facts of the case.[6]

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[1] *Cf.* Am. Jur. 2d Torts s. 2.
[2] 6 *Florida Practice Series* s. 1.1; *see Barnett v. Dept. of Fin. Serv.*, 303 So. 3d 508 (Fla. 2020).
[3] *Kohl v. Kohl*, 149 So. 3d 127 (Fla. 4th DCA 2014).
[4] A matter of law is a matter determined by the court, unlike a matter of fact, which must be determined by the jury. Matters of law include issues regarding a law's application or interpretation, issues regarding what the relevant law is, and issues of fact reserved for judges to resolve. Legal Information Institute, *Question of Law*, https://www.law.cornell.edu/wex/question_of_law (last visited Feb. 13, 2023); Legal Information Institute, *Question of Fact*, https://www.law.cornell.edu/wex/Question_of_fact (last visited Feb. 13, 2023).
[5] *Kohl*, 149 So. 3d at 135; *Goldberg v. Fla. Power & Light Co.*, 899 So. 2d 1110.
[6] *Goldberg,* 899 So. 2d at 1105 (citing *Clay Elec. Co-op., Inc. v. Johnson*, 873 So. 2d 1182 (Fla. 2003)).

In determining whether a duty arises from the general facts of the case, courts look to whether the defendant's conduct foreseeably created a "zone of risk" that posed a general threat of harm to others—that is, whether there was a likelihood that the defendant's conduct would result in the type of injury suffered by the plaintiff.[7] Such zone of risk defines the scope of the defendant's legal duty, which is typically to either lessen the risk or ensure that sufficient precautions are taken to protect others from the harm the risk poses.[8] However, it is not enough that a risk merely exists or that a particular risk is foreseeable; rather, the defendant's conduct must create or control the risk before liability may be imposed.[9]

Breach of the Duty of Care

The second element a plaintiff must prove is that the defendant "breached," or failed to discharge, the duty of care. Whether a breach occurred is generally a matter of fact for the jury to determine.[10]

Causation

The third element a plaintiff must prove is that the defendant's breach of the duty of care "proximately caused" the plaintiff's injury. Whether or not proximate causation exists is generally a matter of fact for the jury to determine.[11] Florida follows the "more likely than not" standard in proving causation; thus, the inquiry for the factfinder is whether the defendant's negligence probably caused the plaintiff's injury.[12] In making such a determination, the factfinder must analyze whether the injury was a foreseeable consequence of the danger created by the defendant's negligent act or omission.[13] It is not required that the defendant's conduct must be the exclusive cause, or even the primary cause, of the plaintiff's injury suffered; instead, the plaintiff must only show that the defendant's conduct substantially caused the injury.[14]

Damages

The final element a plaintiff must show to prevail in a negligence action is that the plaintiff suffered some harm, or "damages." Actual damages, also called compensatory damages, are damages the plaintiff actually suffered as the result of the injury.[15] Juries award compensatory damages to compensate an injured person for a defendant's negligent acts.[16] Compensatory damages consist of both:

- "Economic damages," which typically consist of financial losses that can be easily quantified, such as lost wages, the cost to replace damaged property, or the cost of medical treatment; and
- "Non-economic damages," which typically consist of nonfinancial losses that cannot be easily quantified, such as pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, and loss of the capacity to enjoy life.[17]

In certain limited situations, a court may also award "punitive damages," the purpose of which is to punish a defendant for bad behavior and deter future bad conduct, rather than to compensate the plaintiff for a loss.[18]

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[7] *Kohl*, 149 So. 3d at 135 (citing *McCain v. Fla. Power Corp.*, 593 So. 2d 500 (Fla. 1992); *Whitt v. Silverman*, 788 So. 2d 210 (Fla. 2001)).
[8] *Kohl*, 149 So. 3d at 135; *Whitt*, 788 So. 2d at 217.
[9] *Bongiorno v. Americorp, Inc.*, 159 So. 3d 1027 (Fla. 5th DCA 2015) (citing *Demelus v. King Motor Co. of Fort Lauderdale*, 24 So. 3d 759 (Fla. 4th DCA 2009)).
[10] *Wallace v. Dean*, 3 So. 3d 1035 (Fla. 2009).
[11] *Sanders v. ERP Operating Ltd. P'ship*, 157 So. 3d 273 (Fla. 2015).
[12] *Ruiz v. Tenent Hialeah Healthsystem, Inc.*, 260 So. 3d 977 (Fla. 2018).
[13] *Id.* at 981-982.
[14] *Id.* at 982.
[15] *Birdsall v. Coolidge*, 93 U.S. 64 (1876).
[16] *St. Regis Paper Co. v. Watson*, 428 So. 2d 243 (Fla. 1983).
[17] *Cf.* s. 766.202(8), F.S.
[18] *See* ss. 768.72, 768.725, and 768.73, F.S. (providing standards and requirements for awarding punitive damages).

Comparative Negligence – Background

Doctrines of Joint & Several Liability and Contributory Negligence

Doctrine of Joint & Several Liability

Traditionally, when multiple defendants contributed to a plaintiff's injury, the doctrine of "joint and several liability" required any one of the defendants to pay the full amount of the plaintiff's damages.[19] This was true even where the defendants did not act in concert but instead each committed a separate and independent act, and then the acts combined to cause an injury to the plaintiff. For example, if defendants A, B, and C, while driving their vehicles, each contributed to an accident that caused a plaintiff damages of $100,000, with A being 40% at fault, B being 59% at fault, and C being 1% at fault, the plaintiff could recover the full $100,000 from his choice of any of the three defendants.

Doctrine of Contributory Negligence

Under the common law, a plaintiff who was found to be at fault for his or her own injury was completely barred from recovering any damages from the defendant.[20] This doctrine, known as "contributory negligence," prohibited any recovery by the plaintiff, even if the plaintiff had only barely contributed to his or her own injuries. However, over time, most United States jurisdictions began to believe the doctrine of contributory negligence was too harsh of a rule and began to change their approaches.

Joint & Several Liability, Contributory Negligence, and Comparative Negligence in Florida

In 1886, the Florida Supreme Court adopted the contributory negligence approach;[21] and in 1914, the Court acknowledged its acceptance of the doctrine of joint and several liability.[22]

However, in its 1973 *Hoffman v. Jones* decision, the Florida Supreme Court changed Florida to a "pure comparative negligence" jurisdiction, deciding that the traditional contributory negligence approach was "almost universally regarded as unjust and inequitable."[23] As a result, under the pure comparative negligence approach, juries would now decide the percentage of fault contributed by each party in an accident, and then the damages would be apportioned accordingly.[24]

In 1986, the Legislature passed the Tort Reform and Insurance Act ("Act"), which essentially codified *Hoffman* and further committed Florida to the comparative negligence approach.[25] Within the same Act, the Legislature also abolished the doctrine of joint and several liability in most negligence actions.[26]

As a result of the Act in its current form, Florida is a "pure comparative negligence jurisdiction" without the doctrine of joint and several liability.[27] In other words, a jury in a typical Florida negligence action decides each party's percentage of fault; and the court, in its final judgment, apportions damages based on the jury's fault determination.[28]

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[19] *See Louisville & Nashville R.R. Co. v. Allen*, 65 So. 8, 12 (Fla. 1914) ("Where . . . separate and independent acts of negligence of several combine to produce directly a single injury, each is responsible for the entire result . . . .").
[20] *See Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809).
[21] *Louisville & Nashville R.R. Co. v. Yniestra*, 21 Fla. 700 (1886) (citing *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809)).
[22] *Allen*, 65 So. at 12.
[23] *Hoffman v. Jones*, 280 So. 2d 431, 436 (Fla. 1973).
[24] *See id.* at 438 ("If plaintiff and defendant are both at fault, the former may recover, but the amount of his recovery may be only such proportion of the entire damages plaintiff sustained as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant").
[25] Ch. 86-160, s. 60, L.O.F. (codified at s. 768.81(2), F.S.).
[26] Ch. 86-160, s. 60, L.O.F. (codified at s. 768.81(3), F.S.).
[27] S. 768.81(3), F.S. ("In a negligence action, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability").
[28] *See* Fla. Sup. Ct. Std. Jury Instr. 501.4 (Comparative Negligence, Non-Party Fault and Multiple Defendants), https://www.floridabar.org/rules/florida-standard-jury-instructions/civil-jury-instructions/civil-instructions/#500 (last visited Feb. 13, 2023).

Comparative Negligence Approaches by United States Jurisdictions

Today, three different approaches for how a court should apportion damages in a negligence action when two or more defendants contribute to an injury generally exist, as follows:[29]

- Contributory negligence approach, followed by 4 states[30] and the District of Columbia. Under this traditional common law approach, if the plaintiff contributed to the accident in any way, the plaintiff recovers nothing. For example:
  - If the plaintiff is 1 percent at fault for an accident causing the plaintiff $100,000 in damages and the defendant is 99 percent at fault in such accident, the plaintiff recovers nothing.
  - If the plaintiff is zero percent and the defendant is 100 percent at fault in such accident, the plaintiff recovers 100 percent of his or her damages—that is, $100,000.
- Pure comparative negligence approach, followed by Florida and 11 other states.[31] Under this approach, the jury determines each party's percentage of fault and the court apportions damages accordingly. For example:
  - If the plaintiff is 40 percent at fault for an accident causing the plaintiff $100,000 in damages and the defendant is 60 percent at fault in such accident, the plaintiff recovers 60 percent of his or her damages—that is, $60,000.
  - If the plaintiff is 70 percent at fault for an accident causing the plaintiff $100,000 in damages and the defendant is 30 percent at fault in such accident, the plaintiff recovers 30 percent of his or her damages—that is, $30,000.
- Modified comparative negligence approach, followed by 34 states. Under this approach, the jury determines each party's percentage of fault, but the plaintiff recovers nothing if he or she was to blame for at least a certain percentage of the fault, with three sub-approaches:
  - In 10 states, the plaintiff recovers nothing if he or she was 50 percent or more at fault.[32] For example:
    - If the plaintiff is 50 percent at fault for an accident causing the plaintiff $100,000 in damages, the plaintiff recovers nothing.
    - If the plaintiff is 49 percent and the defendant is 51 percent at fault for such accident, the plaintiff recovers 51 percent of his or her damages—that is, $51,000.
  - In 23 states, the plaintiff recovers nothing if he or she was more than 50 percent at fault.[33] For example:
    - If the plaintiff is 51 percent and the defendant is 49 percent at fault for an accident causing the plaintiff $100,000 in damages, the plaintiff recovers nothing.
    - If the plaintiff and the defendant are each 50 percent at fault for such accident, the plaintiff recovers 50 percent of his or her damages—that is, $50,000.
  - In one state, the plaintiff recovers only if his or her conduct was "slightly" negligent and the defendant's conduct was "grossly negligent."

[29] LawInfo, *Comparative and Contributory Negligence Laws by State*, https://www.lawinfo.com/resources/personal-injury/comparative-and-contributory-negligence-laws-by-state.html (last visited Feb. 13, 2023).
[30] Alabama, Maryland, North Carolina, and Virginia. *See id.*
[31] Alaska, Arizona, California, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, New York, Rhode Island, and Washington state. *See id.*
[32] *Id.*
[33] *Id.*

Comparative Negligence – Effect of Proposed Changes

CS/HB 837 modifies Florida's damages apportionment standard from a pure comparative negligence approach to a modified comparative negligence approach. Under the bill, any party to a negligence action found to be more than 50 percent at fault for his or her own harm recovers no damages. For example, in an accident causing a plaintiff $100,000 in damages:

- If the defendant is fully at fault, the plaintiff recovers all of his damages—that is, $100,000.
- If the plaintiff is 49 percent at fault and the defendant is 51 percent at fault, the plaintiff recovers 51 percent of his damages—that is, $51,000.
- If the plaintiff and the defendant are each 50 percent at fault, the plaintiff recovers 50 percent of his damages—that is $50,000.
- If the plaintiff is more than 50 percent at fault for his own damages—meaning the defendant is less responsible than the plaintiff for the plaintiff's damages—the plaintiff recovers nothing.

Transparency in Damages – Background

Calculating Medical Damages

In a typical negligence action, the jury is responsible for determining the amount of damages to the plaintiff. In such action, the plaintiff may seek to inform the jury of the plaintiff's medical bills so that the jury can accurately calculate the amount of damages. This process of accurately computing damages can become difficult, however, in light of the standardlessness of the cost of a medical procedure or treatment.

A plaintiff may recover compensatory damages for past and future medical expenses, as well as for pain and suffering. A policy question that often arises is how a court should calculate medical damages and what evidence is admissible for the jury to hear in order to make such calculations. The original amount of a medical bill may bear little relationship to the amount actually paid by the patient (or the patient's insurer) and accepted by the provider as payment in full. Frequently, the "list price" for a billed medical service is greatly inflated from the price actually paid to the provider.

Some medical providers initially bill for services at an artificially high amount, but ultimately accept a lower amount as full satisfaction of the medical services rendered. Providers may also have significantly different rates for an identical procedure, based on their contracts with an insurer, an accepted standard Medicare or Medicaid rate, or a negotiated discounted amount.

If a jury is made aware only of the billed amount of medical charges, rather than the amount actually paid or the traditionally-accepted value for services in a similar market, the jury may award an inflated amount of damages. The potentially inflated billed amount may also cause the jury to perceive that the plaintiff's injuries are more severe than they actually are; and in turn, this perception may encourage the jury to over-award or inflate other damages, such as those awarded for pain and suffering and future medical costs.

Collateral Source Rule

Under Florida law, a "collateral source" is any payment made to a claimant or on a claimant's behalf by or pursuant to:

- The United States Social Security Act, except Title XVIII and Title XIX; any federal, state, or local income disability act; or any other public programs providing medical expenses, disability payments, or other similar benefits, except those prohibited by federal law and those expressly excluded by law as collateral sources.
- Any health, sickness, or income disability insurance; automobile accident insurance that provides health benefits or income disability coverage; and any other similar insurance benefits, except life insurance benefits available to the claimant, whether purchased by her or him or provided by others.
- Any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services.

- Any contractual or voluntary wage continuation plan provided by employers or by any other system intended to provide wages during a period of disability.[34]

At common law,[35] the collateral source rule did two things:

- First, the rule ensured that a plaintiff could recover the full amount of damages suffered in a personal injury tort case. Under the rule, a court was prohibited from reducing the damages a plaintiff received by the benefits of collateral sources. As such, a plaintiff could recover the full value of the medical services billed, regardless of the amount that was actually paid for the services.
- Second, the rule prohibited a defendant from introducing evidence of collateral sources at trial for fear that introduction of such evidence would confuse and mislead the jury.[36]

Legislative Modification of the Collateral Source Rule

In 1986, the Legislature enacted the Tort Reform and Insurance Act ("Act") which modified the first prong of the collateral source rule.[37] The Act created s. 768.76, F.S., which required a court to reduce the amount of damages awarded to a plaintiff from all collateral sources, except where a subrogation or reimbursement right exists.[38] For example, if a jury awards damages for past medical costs that were paid in full by the plaintiff's health insurer, a court must reduce that award after the trial to prevent the plaintiff from receiving a windfall.

Goble v. Froman, a 2005 Florida Supreme Court case,[39] demonstrates how courts apply the Act in a case involving past paid medical damages. In *Goble*, the plaintiff's medical providers billed him $574,554 for treatment. However, because his insurer had a preexisting fee schedule with the medical providers, the providers accepted $145,970, writing off more than $400,000. The plaintiff argued on appeal that the jury award of $574,554 should stand. The Second DCA disagreed, holding that the payments were collateral sources made on the claimant's behalf subject to setoff under s. 768.76, F.S. On appeal, the Florida Supreme Court agreed, finding that permitting a setoff for contractual discounts was consistent with the Legislature's intent to reduce litigation costs when insurers are required to pay damages in excess of what an injured party actually incurred.[40] Thus, the Act prevented the plaintiff from receiving a windfall of over $400,000 in "phantom damages."[41]

Even though the Act modified the first prong of the collateral source rule with respect to what damages a plaintiff could ultimately recover, the Act did not modify the second, evidentiary prong of the collateral source rule. Accordingly, a plaintiff may still introduce into evidence the full amount of his or her medical bills; but a defendant may be prohibited from introducing the amounts paid and accepted in full satisfaction of those bills.[42] As such, it is possible that the jury will not be accurately informed of the actual amounts that were paid and accepted for a plaintiff's medical care.[43]

If the jury is allowed to hear evidence of an inflated billed amount, it may ultimately make its calculation of medical damages based on that amount. And while that amount may later be set off by the court pursuant to the Act, the plaintiff may still unfairly benefit if the jury also awards an inflated award for future medical costs and non-economic damages, based upon the initial inflated billed amount. Although the compensatory damages for past medical costs are reduced by the court under the Act, the potentially inflated calculations for other damages are not reduced.

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[34] S. 768.76(2)(a), F.S.
[35] "Common law" refers to laws made by judicial decisions as opposed to laws found in statutes. *See* Black's Law Dictionary (11th ed. 2019).
[36] *Gormley v. GTE Prods. Corp.*, 587 So. 2d 455, 458 (Fla. 1991).
[37] Ch. 86-160, s. 55, L.O.F.
[38] S. 768.76(1), F.S.
[39] *Goble v. Frohman*, 901 So. 2d 830, 834 (Fla. 2005).
[40] *Goble v. Frohman*, 848 So. 2d 406, 409 (Fla. 2d DCA 2003).
[41] *See Goble*, 901 So. 2d at 834.
[42] Lance B. Stephan, *Sticker Shock: Florida Juries Still Awarding Phantom Damages*, 33 Trial Advoc. Q. 23 (Fall 2014).
[43] Instead of providing evidence of the amounts paid and accepted for the plaintiff's care, the defense must generally introduce evidence of the reasonable value of the medical care. See Instruction 501.2b., Fla. Std. Jury Instr. (Civ.).

Letters of Protection

A "letter of protection" is a written agreement between a plaintiff and a medical provider wherein the provider agrees to defer collection on the medical bill until the plaintiff recovers in a lawsuit; upon recovery from a lawsuit, the provider is then paid from the proceeds of the lawsuit.[44] As such, a letter of protection may give the plaintiff's medical provider a financial interest in the outcome of the litigation.[45] If there is no favorable recovery, the client may remain liable to pay the medical bills.[46]

Letters of protection have sometimes been criticized as reflecting inflated, inaccurate amounts for medical damages that are not reflective of the usual and customary billing practices in the medical community.[47] Letters of protection may be utilized as a mechanism to place excessive medical bills before a jury. Since a letter of protection is an agreement in which the provider agrees not to collect payment for services until litigation has ended, there may not yet be a "paid value" available to present to the jury for consideration. Because the court is not permitted under s. 768.76, F.S., to reduce an award for bills not yet paid, a letter of protection may essentially conceal the amount the provider would generally accept as satisfaction for services rendered, potentially inflating the total damages awarded.

Admissibility of Evidence Showing an Attorney Referred a Client for Medical Treatment

Florida's Evidence Code recognizes that certain communications are "privileged," and therefore may be confidential and not discoverable in a legal proceeding.[48] One of these such privileges is the lawyer-client privilege, which provides that a communication between lawyer and client is "confidential" if it is not intended to be disclosed to other persons except those to whom disclosure is in furtherance of the rendition of legal services to the client, and those reasonably necessary for the transmission of the communication.[49] The lawyer-client privilege does not apply to protect the communication when any of the following apply:

- The services of the lawyer were sought or obtained to enable anyone to commit or plan to commit a crime or fraud.
- A communication is relevant to an issue between parties who claim through the same deceased client.
- A communication is relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer, arising from the lawyer-client relationship.
- A communication is relevant to an issue concerning the intention or competence of a client executing an attested document to which the lawyer is an attesting witness, or concerning the execution or attestation of the document.
- A communication is relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest.[50]

In 2017, the Florida Supreme Court decided *Worley v. Central Florida YMCA*,[51] where the issue was whether a communication between an attorney and a client in which the attorney referred the client to a

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[44] *Cf. Broward Outpatient Med. Ctr., LLC v. Fenstersheib Law Group, P.A.*, 307 So. 3d 779, 780 (Fla. 4th DCA 2020) (quoting language from a letter of protection as follows: "[T]he attorney for the above [Plaintiff] (patient), does hereby agree to . . . withhold such sums from any settlement or judgment as may be necessary to adequately protect the above listed health care providers and to promptly pay such sums to them upon receipt of payment of any settlement or judgment without demand.").

[45] *See Carnival Corp. v. Jimenez*, 112 So. 3d 513, 520 (Fla. 2d DCA 2013) ("Undeniably, the existence of the letter of protection gave Dr. Smith a financial interest in the outcome of Ms. Jimenez's personal injury action").

[46] *See Smith v. Geico Cas. Co.*, 127 So. 3d 808, 812 n.2 (Fla. 2d DCA 2013) (quoting Caroline C. Pace, *Tort Recovery for Medicare Beneficiaries: Procedures, Pitfalls and Potential Values*, 49 Hous. Law 24, 27 (2012)).

[47] *Cf. Worley v. Central Fla. Young Men's Christian Ass'n, Inc.*, 228 So. 3d 18, 24 (Fla. 2017) ("[A] Sea Spine employee testified during depositions that at the time of Worley's treatment, its entire practice was based on patients treated pursuant to LOPs"); *id.* at 27 (Polston, J., dissenting) ("YMCA contends, and has throughout the litigation, that these providers' bills are grossly inflated and do not reflect usual and customary billing practices within the medical community. Worley concedes that YMCA has sufficient evidence to argue that the medical bills [from the treating physicians in this case] are unreasonable").

[48] *See, e.g.,* s. 90.5015, F.S. (journalist's privilege); s. 90.502, F.S. (lawyer-client privilege); s. 90.503, F.S. (psychotherapist-patient privilege); s. 90.504, F.S. (husband-wife privilege); s. 90.505, F.S. (privilege with respect to communications to clergy).

[49] S. 90.502(1)(c), F.S.

[50] S. 90.502(4), F.S.

[51] 228 So. 3d 18.

particular medical treatment provider was admissible in court. In that case, the plaintiff suffered an injury when she fell in the defendant's parking lot. She subsequently went to the emergency room, where she was advised to see a knee pain specialist. However, she did not go to a specialist immediately but instead began to seek legal representation, because according to her, she could not afford treatment. The plaintiff ultimately retained an attorney, and only after she retained this attorney did she seek medical care from a particular orthopedic institute and other specified providers. Afterwards, the attorney filed suit on the plaintiff's behalf against the defendant, seeking to recover damages, including the costs of her medical care from those medical providers.[52]

During the litigation discovery process, the attorneys for the defendant sought to discover the nature of the relationship between the plaintiff's law firm and the medical providers who treated the plaintiff's injuries. Specifically, at the first deposition, defense counsel asked the plaintiff whether she had been referred to her medical provider by her attorneys. Her attorneys objected to this line of questioning, arguing that such communications were protected by the lawyer-client privilege.

The Florida Supreme Court, by a 4-3 margin, agreed with the plaintiff, holding that "the question of whether a plaintiff's attorney referred him or her to a doctor for treatment is protected by the attorney-client privilege."[53] The Court concluded as follows:

> Even in cases where a plaintiff's medical bills appear to be inflated for the purposes of litigation, we do not believe that engaging in costly and time-consuming discovery to uncover a "cozy agreement" between the law firm and a treating physician is the appropriate response . . . Moreover, we worry that discovery orders such as the one in this case will inflate the costs of litigation to the point that some plaintiffs will be denied access to the courts, as attorneys will no longer be willing to advance these types of costs. Finally, attempting to discover this information requires the disclosure of materials that would otherwise be protected under the attorney-client privilege.[54]

Transparency in Damages – Effect of Proposed Changes

CS/HB 837 creates s. 768.0427, F.S., to establish a uniform process for the admissibility of evidence and the calculation of medical damages in personal injury or wrongful death actions. As such, the bill effectively modifies the collateral source rule to limit the introduction of evidence for medical damages. The bill seeks to ensure that a claimant is made whole after suffering injuries without allowing a windfall based on artificially or arbitrarily inflated medical list prices.

Definitions

The bill defines the following terms:

- "Factoring company" means a person who purchases a health care provider's accounts receivable at a discount below the invoice value of such accounts.
- "Health care coverage" means any third-party health care or disability services financing arrangement including, but not limited to, arrangements with entities certified or authorized under federal law or under the Florida Insurance Code; state or federal health care benefit programs; workers' compensation; and personal injury protection.
- "Health care provider" means any of the following professionals and entities, and professionals and entities similarly licensed in another jurisdiction:
    - A provider as defined in s. 408.803; and a licensed provider under chapter 394 or chapter 397, and its clinical and nonclinical staff providing inpatient or outpatient services.
    - A certified clinical laboratory.
    - A federally qualified health center as under federal law.
    - A health care practitioner.
    - A licensed health care professional.

[52] *Id.* at 20.
[53] *Id.* at 25.
[54] *Id.* at 26.

    - A home health aide.
    - A licensed continuing care facility.
    - A pharmacy.
- "Letter of protection" means any arrangement where a health care provider renders medical treatment in exchange for a promise of payment for the claimant's medical expenses from any judgment or settlement of a personal injury or wrongful death action.

Limitations on Admissible Evidence

The bill limits what evidence is allowed to be presented to the factfinder to prove the amount of damages for past or future medical care.

Past Paid Medical Bills

The bill restricts evidence of services that have already been satisfied to the amount actually paid for the services, regardless of the source of such payment. As such, if an insurer paid the full medical bill for past services, the amount paid by the insurer is the only amount admissible. The initial billed amount may not be presented as evidence.

Past Unpaid Medical Bills

Whether a particular piece of evidence is admissible to prove the amount to satisfy already incurred—but yet unpaid—medical bills is dependent on the type of health care coverage the claimant has, if any, as follows:

- Claimant has insurance: If the claimant has health care coverage, evidence of the amount the coverage is obligated to pay the provider for satisfaction of the medical services rendered plus the claimant's portion of medical expenses under the contract are admissible.
- Claimant has insurance but opts to use a letter of protection: If the claimant has health care coverage but forgoes the coverage and obtains medical treatment under a letter of protection (or otherwise does not submit charges to his or her insurer), evidence of the amount the health care coverage would pay under the contract plus the claimant's portion of medical expenses, had he or she obtained treatment pursuant to the health care coverage, is admissible.
- Claimant has no insurance: If the claimant does not have health care coverage, the Medicare reimbursement rate in effect at the time of the trial is admissible. If there is no applicable Medicare rate for the services in question, the admissible amount is 140% of the applicable state Medicaid rate.
- Claimant receives services under a letter of protection, and the bill is then transferred to a third party: If the claimant receives services pursuant to a letter of protection and the provider subsequently transfers the right to receive payment of the bill to a third party, evidence of the amount the third party agreed to pay the provider for the right to receive payment is admissible.

Future Medical Bills

Similarly, the bill provides uniform guidance for admissible evidence relating to damages for future medical treatments, based on whether the claimant has health care coverage or is eligible for health care coverage, as follows:

- Claimant has insurance or is eligible for insurance: If the claimant has health care coverage or is eligible for health care coverage, evidence of the amount for which the future charges could be satisfied by the coverage plus the petitioner's portion of medical expenses under the contract are admissible.
- Claimant has no insurance: If the claimant does not have health care coverage, evidence of the Medicare reimbursement rate in effect at the time of the trial for such future services is admissible. If there is no applicable Medicare rate for the future services in question, 140% of the applicable state Medicaid rate amount is admissible.

Disclosure of Contracts

The bill maintains protection from disclosure for individual contracts between providers and authorized commercial insurers or authorized health maintenance organizations. Therefore, such contracts are not subject to discovery or disclosure and are not admissible into evidence.

Required Disclosures When a Letter of Protection is Used

The bill also provides a procedure for the use of a letter of protection. If the petitioner obtains medical care under a letter of protection, the bill requires the claimant to disclose the following for the determination of damages:

- A copy of the letter of protection.
- All billings for the rendered medical expenses, which must be itemized and coded for the year services are rendered.
- If the provider sells the accounts receivable to a third party or factoring company, the name of the third party and the dollar amount for which the third party purchased the accounts.
- Whether the claimant had health care coverage at the time of treatment, and the identity of such coverage.
- Whether the claimant was referred for treatment under a letter of protection and, if so, the identity of the person who made the referral.

The bill amends s. 90.502(4), F.S., to provide that there is no lawyer-client privilege when a communication is relevant to the lawyer's act of referring the client for treatment by a health care provider. Essentially, this provision overturns the Florida Supreme Court's 4-3 decision in *Worley v. Central Florida YMCA*.[55]

Amount of Damages

The bill prohibits damages from including any inflated amounts above the amount actually paid for the satisfaction for services rendered. Further, the bill prohibits an award of damages from exceeding:

- The amount actually paid by or on behalf of the claimant to the provider;
- The amount necessary to satisfy charges for medical services that are owed or not yet satisfied at the time of trial; and
- The amount necessary to provide for any reasonable and necessary future medical treatment.

Duty of Good Faith by an Insurer – Background

Insurance, Generally

Insurance is a contract between an insurance company ("insurer") and the insurance policy's beneficiary ("the insured"), in which, for specified consideration called a "premium," the insurer agrees to pay the insured or third-party claimants for covered losses.[56] An insurer generally owes two significant contractual duties to its insured in exchange for premium payments: the duty to indemnify and the duty to defend.[57]

- The "duty to indemnify" refers to the insurer's obligation to issue payment to the insured on a valid claim.[58] For example, an insured may purchase a policy requiring the insurer to replace the insured's vehicle in the event of a car accident. If a covered accident then occurs, causing the insured's vehicle to be destroyed, the duty to indemnify requires the insurer to replace the insured's vehicle.
- The "duty to defend" refers to the insurer's duty to defend the insured in court against a third party with respect to a covered claim.[59] For example, an insured may purchase a liability policy in the event the insured causes a car accident and injuries a third party. If a covered accident

[55] *See Worley*, 228 So. 3d 18.
[56] 16 Williston on Contracts s. 49:103 (4th ed.).
[57] *Id.*
[58] *Id.*
[59] *Id.*

then occurs, causing injury to a third-party claimant who sues the insured, the duty to indemnify requires the insurer to defend the insured against the claimant's lawsuit.

Insurer's Common Law and Statutory Duties

Florida courts, in applying the common law, recognize that an insurer owes its insured a common law duty of good faith in negotiating settlements with third-party claimants.[60] There is also a statutory duty of good faith codified in s. 624.155, F.S. Under that provision, a statutory "bad faith" claim against an insurer arises where the insurer:

- Does not attempt in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured with due regard for the insured's interests;
- Makes claim payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made; or
- Fails to promptly settle a claim under one portion of the insurance policy's coverage, except as to liability coverage, when its obligation to settle the claim is reasonably clear, to influence settlements under other portions of the insurance policy's coverage.

Florida courts have interpreted an insurer's obligation to "act fairly" towards its insured, holding that when the insured's liability is clear and an excess judgment[61] is likely due to the resulting damage, the insurer has an affirmative duty to initiate settlement negotiations with third-party claimants.[62] If settlement fails, the insurer has the burden of showing that there was no realistic possibility of settling the claim within the policy limits.[63] However, failure to settle a claim, without more, does not necessarily mean that an insurer has acted in bad faith, as liability may be unclear or the damages may be minimal. Further, courts have generally indicated that merely negligently failing to settle a claim does not rise to the level of bad faith, though a jury may consider negligence in the larger context of whether bad faith occurred.[64]

Damages available under an insurance contract are only those up to the policy limits, while damages available in a bad faith claim may be much more lucrative, and may include:

- Damages the plaintiff incurred due to the insurer's bad faith conduct;[65]
- Compensation for emotional distress, in certain circumstances;[66] and
- Punitive damages where the insurer's bad faith conduct occurred with such frequency as to constitute a general business practice and such conduct was:
  - Willful, wanton, and malicious;
  - In reckless disregard for the rights of any insured; or
  - In reckless disregard for the rights of a beneficiary under a life insurance contract.[67]

First-Party vs. Third Party Bad Faith Claims

There are two general types of bad faith claims: "first-party" claims and "third-party" claims.

- A "first-party" bad faith claim is a claim filed by the insured against his or her own insurer; these claims typically involve allegations that the insurer improperly denied the insured coverage under the policy, underpaid a covered claim, or delayed payment without adequate justification.[68]
- A "third-party" bad faith claim arises when the insured is exposed to liability to a third party; such a claim, which may be brought by either the insured or the third party, typically arises when:

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[60] *Mut. Indemnity Co. v. Shaw,* 184 So. 852 (Fla. 1938).
[61] An "excess judgment" is a judgment in an amount over and above the insurance policy's coverage limits, which amount is paid out of the insured's own pocket.
[62] *Powell v. Prudential Prop. and Cas. Ins. Co.*, 584 So. 2d 12, 14 (Fla. 3d DCA 1991).
[63] *Id.* at 14.
[64] *See DeLaune v. Liberty Mut. Ins. Co.*, 314 So. 2d 601, 603 (Fla. 4th DCA 1975).
[65] S. 624.155(4), F.S.
[66] *Times Ins. Co., Inc. v. Burger*, 712 So. 2d 839 (Fla. 1998).
[67] S. 624.155(5), F.S.
[68] The Florida Senate, *Interim Report 2012-132: Insurance Bad Faith* (Nov. 2011), https://www.flsenate.gov/publishedcontent/session/2012/interimreports/2012-132ju.pdf (last visited Feb. 15, 2023).

- An insurer fails to settle in good faith a third party's claim against the insured within the policy limits;
- There is serious injury to the third-party claimant; and
- The policy limits are minimal, thus exposing the insured to an excess judgment.[69]

A first-party bad faith claim did not exist at common law, because any claim brought by the insured against the insurer would be brought as a matter of contract law.[70] Therefore, the only remedy for first-party bad faith is the statutory remedy provided by the Legislature in s. 624.155(1)(b), F.S.

By contrast, a third-party claim for bad faith did exist at common law; so when the Legislature created the statutory remedy in s. 624.155, it allowed an alternative avenue for a third-party bad faith claim. Therefore, a third-party bad faith claim may be brought either under the common law or pursuant to s. 624.155, F.S., while a first-party bad faith claim may only be brought pursuant to s. 624.155, F.S.

Bad Faith Claim Pre-Suit Notice Requirement

To bring a statutory bad faith claim under s. 624.155, F.S., whether first-party or third-party, a plaintiff must first give the insurer 60 days' written notice of the claim by filing a civil remedy notice ("CRN") with the Department of Financial Security ("DFS").[71] The insurer then has 60 days from receiving notice from DFS to either pay the damages or correct the circumstances giving rise to the bad faith claim, and the statutory cause of action does not accrue until the 60-day "cure" period has run without the insurer taking such steps.[72] Where the insurer timely pays the damages or otherwise corrects the circumstances giving rise to the bad faith claim, no statutory bad faith lawsuit may be brought.[73]

If a plaintiff brings a third-party common law bad faith claim, by contrast, there is no pre-suit notice requirement; thus, the insurer cannot avoid a third-party bad faith lawsuit by paying the damages or curing the circumstances giving rise to the bad faith claim within the statutory cure period.[74]

Filing a Bad Faith Claim

Generally, a bad faith cause of action does not accrue until a damages determination occurs.[75] This means that, in a first-party bad faith claim, the underlying action against the insurer must be resolved in favor of the insured before the bad faith lawsuit may be brought, because the insured cannot allege bad faith if it is not shown that the insurer should have paid the claim.[76]

However, in a third-party bad faith claim—which may be brought either by an insured who was found liable for an excess judgment or by a third-party claimant directly or through an assignment of the insured's right to sue—the cause of action is predicated on the insurer's failure to act "fairly and honestly toward its insured."[77] Thus, absent a stipulation by the parties allowing a bad faith lawsuit to be tried first, a third-party claimant generally cannot bring a bad faith lawsuit before an excess

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[69] *Id.*
[70] Before a first-party bad faith claim was recognized in statute, Florida courts rejected such claims because the insured is not exposed to liability. Thus, there is no fiduciary duty owed to the insured as there is when a third party is involved; rather, the duty owed to the insured is a contractual one arising from the insurance contract. *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005).
[71] S. 624.155(3)(a), F.S.
[72] S. 624.155(3)(c), F.S.; *Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co.,* 753 So. 2d 1278, 1284 (Fla. 2000).
[73] S. 624.155(3)(c), F.S.
[74] *Macola v. Gov. Employees Ins. Co.*, 953 So. 2d 451, 458 (Fla. 2007) (holding that an insurer's payment of the policy limits in response to the filing of a CRN does not preclude a third-party bad faith common law cause of action against the insurer).
[75] *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289, 1291 (Fla. 1991).
[76] *Id.*
[77] Florida courts have interpreted the statutory bad faith cause of action to authorize direct third-party-claimant suits against an insurer because the statute specifies that the remedy is available to "any party." *Powell v. Prudential Prop. & Cas. Ins. Co.*, 584 So. 2d 12 (Fla. 3d DCA 1991); *Thompson v. Commercial Union Ins. Co. of New York*, 250 So. 2d 259 (Fla. 1971); *State Farm Fire and Cas. Co. v. Zebrowski*, 706 So. 2d 275 (Fla. 1997); *Cunningham v. Standard Guar. Ins. Co.*, 630 So. 2d 179 (Fla. 1994).

judgment[78] is entered on the underlying claim.[79] This is because third-party claimant cannot otherwise prove that the insurer breached its duty to the insured.[80]

Indefiniteness About What Constitutes Bad Faith

In Florida, the question of whether the insurer has committed "bad faith" is generally a question for the jury, but Florida law does not define what conduct constitutes bad faith. In *Berges v. Infinity Ins. Co.*, the Florida Supreme Court noted that "the question of whether an insurer has acted in bad faith in handling claims against the insured is determined under the 'totality of the circumstances' standard . . . Each case is determined on its own facts and ordinarily the question of failure to act in good faith with due regard for the interests of the insured is for the jury."[81]

Three dissenting justices in the *Berges* case indicated that the problem with presuming that bad faith is a jury question is that a jury may be prejudiced in favor of a sympathetic injured person, regardless of whether the insurer actually committed bad faith, as follows:

> What the jury knows in these cases is that there is a tragically and grievously injured victim, that the insured had very low limits of insurance, and that if the jury finds against the insurer, then all of the victim's damages will be paid by the insurer. It is these very facts which are not allowed to be known by a jury in liability cases because of the known prejudicial influence these facts . . . have on jury verdicts.[82]

Following the *Berges* decision, courts have noted that "[u]ntil there is a substantial change in the statutory scheme or the rationale explained in the majority opinion [in *Berges*]…juries will continue to render verdicts regarding an insurer's alleged bad faith when the pertinent facts are in dispute."[83] In any event, the *Berges* decision made it more difficult for an insurer to resolve a third-party bad faith lawsuit through a motion for summary judgment, as such motions are decided by the court based on questions of law, and whether an insurer acted in bad faith is now, under *Berges*, almost always a question of fact.

Conduct of Insureds and Third-Party Claimants

While Florida's bad faith framework exists to help curb abuses and unfair practices committed by insurers to level the playing field for often less-sophisticated insureds,[84] some critics argue that the cause of action has "quickly . . . evolved into a litigation quandary that often misses its basic purpose," as the current system incentivizes plaintiffs' attorneys to regularly contrive situations designed to lead to a bad faith claim in order to obtain much larger settlements.[85] Some have argued that, because current law permits this kind of "set-up," there should be a reciprocal duty of good faith on the part of the insured or third-party claimant relating to claim settlement.[86] However, the Florida Supreme Court has noted that, although no such reciprocal duty exists, the plaintiff's conduct is relevant to whether there was a realistic settlement opportunity.[87]

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[78] The Eleventh Circuit Court of Appeals recently clarified that an excess judgment does not have to result from a jury verdict; it can also result from a consent judgment memorializing a settlement agreement that exposes the insured to damages exceeding his or her applicable policy limits. *McNamara, et al. v. Gov. Employees Ins. Co.*, 30 F.4th 1055 (11th Cir. 2022).
[79] *Thompson*, 250 So. 2d at 264; *Cunningham*, 630 So. 2d at 181-182.
[80] *Id.*
[81] 896 So. 2d at 668.
[82] *Id.* at 686, n. 12 (Wells, J., dissenting).
[83] *United Auto. Ins. Co. v. Estate of Levine ex rel. Howard*, 87 So. 3d 782, 788 (Fla. 3d DCA 2011).
[84] Victor E. Schwartz and Christopher E. Appel, *Common-Sense Construction of Unfair Claims Settlement Statutes: Restoring the Good Faith in Bad Faith*, 58 Am. U. L. Rev. 1477, 1479 (2009).
[85] For example, a plaintiff's attorney may act as though the plaintiff is willing to accept settlement for the policy limits by sending a detailed demand letter to the insurer but including in the demand letter conditions for accepting a policy limits settlement that the insurer is unlikely to be able to meet, thus setting the insurer up to fail. Alternatively, a plaintiff's attorney may send a vague and confusing demand letter and not respond to the insurer's requests for clarification, allowing the insurer's cure period to lapse. *Id.*
[86] Gwynne A. Young and Johanna W. Clark, *The Good Faith, Bad Faith, and Ugly Set-Up of Insurance Claims Settlement*, 85 Fla. B.J. 9, 10 (Feb. 2011).
[87] *Barry v. GEICO Gen. Ins. Co.*, 938 So. 2d 613, 618 (Fla. 4th DCA 2006); *DeLaune*, 314 So. 2d at 603.

In the same vein, a dissenting *Berges* justice warned that the Court "has the responsibility to reserve bad faith damages, which is limitless, court-created insurance, to egregious circumstances of delay and bad faith acts" and not allow claims resulting from "sophisticated legal strategies [which are] not the product of actual bad faith."[88]

Duty of Good Faith by an Insurer – Effect of Proposed Changes

CS/HB 837 amends s. 624.155, F.S., to provide a safe harbor within which an insurer may correct alleged bad faith acts and attempt to settle a claim in good faith. Specifically, the bill provides that an insurer is not liable for bad faith for failing to settle a liability insurance claim, whether the bad faith claim is brought under statute or the common law, if the insurer tenders the lesser of the policy limits or the amount demanded by the claimant either:

- Before a complaint asserting the underlying claim, accompanied by sufficient evidence to support the amount of the claim, is filed; or
- Within 90 days of service of such complaint on the insurer.

The bill also amends s. 624.155 to make the following provisions applicable to all bad faith claims:

- Mere negligence alone is insufficient to constitute bad faith.
- The insured, the third-party claimant, and any representative of the insured or the claimant have a duty to act in good faith in furnishing information about the claim, making demands of the insurer, setting deadlines, and attempting to settle the claim.[89]
- The trier of fact may consider whether the insured, the third-party claimant, or his or her representative did not act in good faith and, if so, reasonably reduce the damages awarded against the insurer.

Further, the bill specifies that, if two or more third-party claimants have competing claims arising out of a single occurrence, which in total may exceed the insured's available policy limits, the insurer does not commit bad faith by failing to pay all or any portion of the available limits to one or more of the third-party claimants if, within 90 days after receiving notice of the competing claims, the insurer either:

- Files an interpleader action[90] under the Florida Rules of Civil Procedure;[91] or
- Pursuant to binding arbitration, makes the entire amount of the policy limits available for payment to the competing third-party claimants before a qualified arbitrator selected by the insurer at the insurer's expense.[92]

Practically speaking, this interpleader provision lessens the likelihood that an insurer will be liable for bad faith in a case with multiple claimants if the insurer pays the full amount of the policy limits at the outset.

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[88] 896 So. 2d at 686 (Wells, J., dissenting).
[89] Under the bill, this duty does not create a separate cause of action.
[90] An interpleader action is an action initiated by the holder of property to determine the rights of two or more claimants to the property. This avoids the problem of the property holder being sued by the claimants separately. Legal Information Institute, *Interpleader*, https://www.law.cornell.edu/wex/interpleader#:~:text=A%20way%20for%20a%20holder,who%20actually%20owns%20the%20property. (last visited Feb. 24. 2023).
[91] If the trier of fact finds that the claims of the competing third-party claimants exceed the policy limits, the bill specifies that the third-party claimants are entitled to a prorated share of the policy limits as determined by the trier of fact. This does not alter or limit the insurer's duty to defend the insured.
[92] The bill specifies that the third-party claimants are entitled to a prorated share of the policy limits as determined by the arbitrator, who must consider the comparative fault, if any, of each third-party claimant, and the total likely outcome at trial based upon the total of the economic and non-economic damages submitted to the arbitrator for consideration. Further, a third-party claimant whose claim is resolved by the arbitrator must execute and deliver a general release to the insured party whose claim is resolved by the proceeding.

Contingency Fee Multiplier – Background

Historical Treatment of Attorney Fees

The traditional "English rule" entitled a prevailing party in civil litigation to attorney fees as a matter of right. However, Florida and a majority of other United States jurisdictions have adopted the "American rule," where each party bears its own attorney fees unless a "fee-shifting statute" provides an entitlement to fees. In Florida, several such fee-shifting statutes entitle the prevailing party or, more specifically, a particular prevailing claimant or plaintiff, to have his or her fees paid by the other party.[93]

Contingency Fees

A contingency fee is an attorney fee that is charged only if the lawsuit is successful or favorably settled out of court.[94] An attorney and a client may enter into a contingency fee contract, agreeing that the client will pay the attorney a fee only if the attorney successfully recovers for the client. The Florida Supreme Court, through its Rules Regulating the Florida Bar, allows contingency fee contracts but restricts their use.[95] Rule 4-1.5(f) prohibits contingency fees in criminal defense and certain family law proceedings.[96] The rule also requires a contingency fee agreement to:

- Be in writing.
- State the method by which the fee is to be determined.
- State whether expenses are to be deducted before or after the contingency fee is calculated.
- In certain types of cases, include other provisions ensuring the client is aware of the agreement's terms.[97]

Upon conclusion of a contingency fee case, the attorney must provide the client a written statement stating the outcome of the case, the amount remitted to the client, and how the attorney calculated the amount.[98]

Statutorily-Provided Attorney Fees

Several Florida and federal statutes state that a prevailing party in court proceedings is entitled to attorney fees as a matter of right.[99] These statutes are known as "fee-shifting statutes" and often entitle the prevailing party to a reasonable attorney fee, which must be paid by the other party. When a fee-shifting statute applies, the court must determine and calculate what constitutes a reasonable attorney fee.

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[93] *See, e.g.,* s. 400.023, F.S. (nursing home resident); s. 440.34, F.S. (claimant in a workers' compensation case in certain situations); s. 501.2105, F.S. (plaintiff in specified FDUTPA actions); ss. 626.9373 and 627.428, F.S. (prevailing insured party in a case brought against an insurer); s. 790.33, F.S. (plaintiff in a suit to enforce his or her firearm rights); *see also* 42 U.S.C. s. 1988(b) (federal fee-shifting statute for prevailing parties in actions to enforce certain civil rights statutes).
[94] *See* Black's Law Dictionary 338 (8th ed. 2004).
[95] R. Regulating Fla. Bar 4-1.5(f).
[96] R. Regulating Fla. Bar 4-1.5(f)(3).
[97] R. Regulating Fla. Bar 4-1.5(f)(1) and (4).
[98] R. Regulating Fla. Bar 4-1.5(f)(1).
[99] *See, e.g.,* s. 627.428, F.S. (providing that an insured who prevails against an insurer is entitled to "a reasonable sum" of attorney fees); s. 501.2105, F.S. (providing that the prevailing party in an action under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) is entitled to "a reasonable legal fee"); 42 U.S.C. s. 1988(b) (providing that a prevailing party seeking to enforce specified civil rights statutes may recover "a reasonable attorney's fee").

Lodestar Approach

In 1985, the Florida Supreme Court held that courts should calculate the amount of statutorily-authorized attorney fees under the "lodestar approach."[100] Under this approach, the first step is for the court to determine the number of hours reasonably expended by an attorney on the case. The second step requires the court to determine a reasonable hourly rate. The number of hours reasonably expended (determined in the first step), multiplied by the reasonable hourly rate (determined in the second step), produces the "lodestar amount," which is considered an objective basis for what the attorney fee amount should be.

Addition of a Contingency Fee Multiplier

In certain cases, the court may greatly increase the lodestar amount by applying a contingency fee multiplier, which essentially takes the lodestar amount and multiplies that amount by a factor of 1.5, 2.0, 2.5, or some other number.[101] The concept of the contingency fee multiplier arose from judicial interpretations of statutory authorization of attorney fees in particular cases,[102] but the Legislature has also expressly provided for use of a contingency fee multiplier in certain cases.[103] In a 1990 case, the Florida Supreme Court discussed three different types of cases and whether a contingency fee multiplier should be applied in each case, as follows:

- Public policy enforcement cases. These cases may involve discrimination, environmental issues, and consumer protection issues. In these cases, a contingency fee multiplier is usually inappropriate.
- Family law, eminent domain, estate, and trust cases. In these cases, a contingency fee multiplier is usually inappropriate.
- Tort and contract claims, including insurance cases. In these cases, a contingency fee multiplier may be applied if the plaintiff can demonstrate the following factors show a need for the multiplier:
    - Whether the relevant market requires a contingency fee multiplier to obtain counsel;
    - Whether the attorney can mitigate the risk of nonpayment; and
    - Whether any other factors established in *Rowe*[104] support the use of the multiplier.[105]

Further, in the same decision, the Court noted that the size of the contingency fee multiplier varies from 1.0 to 2.5 based on the likelihood of success at the outset of the case, as follows:

- 1.0 to 1.5, if the trial court determines that success was more likely than not at the outset
- 1.5 to 2.0, if the trial court determines that the likelihood of success was approximately even at the outset
- 2.0 to 2.5, if the trial court determines that success was unlikely at the outset.[106]

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[100] *Fla. Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985).

[101] The Court may also adjust the amount based on the results obtained by the attorney. *Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828, 830-31 (Fla. 1990). Contingency risk multipliers are also referred to as contingency fee multipliers.

[102] The rationale for applying a contingency risk multiplier to increase an attorney fee award is that plaintiffs and plaintiffs' attorneys generally do not recover any money unless they prevail. The attorney fee multiplier induces attorneys to take a risk on cases they might not otherwise take, allowing would-be plaintiffs to find attorneys willing to represent them.

[103] *See* s. 790.33(3)(f)1, F.S. (explicitly authorizing a contingency fee multiplier in certain cases relating to the preemption of firearm and ammunition regulation).

[104] The *Rowe* factors were based upon Disciplinary Rule 2-106(b) of the Florida Bar (which is now Rule of Professional Conduct 4-1.5), and were as follows:

- Time and labor required, novelty and difficulty of the question involved, and the skill and requisite to perform the legal service properly.
- Likelihood, if apparent to the client, that the acceptance of employment would preclude other employment by the lawyer.
- Fee customarily charged in the locality for similar legal services.
- Amount involved and results obtained.
- Time limitations imposed by the client and circumstances.
- Nature and length of the professional relationship with the client.
- Experience, reputation, and ability of the lawyer(s) providing services.
- Whether the fee is a fixed or contingency fee.

Rowe, 472 So. 2d at 1150–1151.

[105] *Quanstrom*, 555 So. 2d at 833-35.

[106] *Id.* at 834.

Therefore, an attorney is more likely to receive a higher contingency fee multiplier—and thus a higher attorney fee award—if he or she takes a case that at the outset seems unlikely to succeed.[107]

Federal Court Treatment of the Contingency Fee Multiplier

Part of the Florida Supreme Court's rationale for adopting the contingency fee multiplier framework in 1985 was that, at the time, it was being applied in federal courts.[108] However, in 1992, the U.S. Supreme Court decided *Burlington v. Dague*, in which it rejected the use of a contingency fee multiplier under certain federal fee-shifting statutes. *Dague* essentially signaled that the Supreme Court was closing the door on the contingency fee multiplier's use in most, if not all, federal cases.[109]

In 2010, in the case of *Perdue v. Kenny A. ex. rel. Winn,* a case involving a class action lawsuit filed on behalf of 3,000 children in the Georgia foster care system, the U.S. Supreme Court again addressed the contingency risk multiplier issue.[110] The plaintiffs argued in the underlying case that the foster care system in two counties was constitutionally deficient. The case went to mediation, and the parties entered a consent decree resolving all issues. Subsequently, the plaintiffs' attorneys sought attorney fees under 42 U.S.C. s. 1988.[111]

The federal district court calculated the fees using the lodestar approach, arriving at a $6 million figure, and then applied a 1.75 contingency fee multiplier, for a total attorney fee of $10.5 million. The district court justified the contingency fee multiplier by finding that the attorneys had:

- Advanced $1.7 million with no ongoing reimbursement.
- Worked on a contingency basis, and therefore were not guaranteed payment.
- Displayed a high degree of skill, commitment, dedication, and professionalism.
- Achieved extraordinary results.[112]

On review, the U.S. Supreme Court reversed the district court's calculation of attorney fees, remanding the case because the district court did not provide adequate justification for the 75 percent increase. The Court reiterated that "there is a strong presumption that the lodestar figure is reasonable," but that such presumption "may be overcome in those *rare circumstances* in which the lodestar does not adequately consider a factor that may properly be considered in determining a reasonable fee."[113] The Court also determined that a contingency fee multiplier may be applicable in "exceptional" circumstances.[114]

Thus, the *Perdue* Court determined that the application of contingency fee multipliers may sometimes be appropriate, while also issuing several warnings about contingency fee multipliers, as follows:

- When a trial court fails to give detailed explanations for why it applies a contingency fee multiplier, "widely disparate awards may be made, and awards may be influenced . . . by a judge's subjective opinion regarding particular attorneys or the importance of the case."[115]
- "[U]njustified enhancements that serve only to enrich attorneys are not consistent" with the aims of a statute that seek to compensate plaintiffs.[116]

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[107] The Legislature has statutorily provided that in very limited situations, a contingency fee multiplier is inappropriate. *See* s. 111.065(4)(c), F.S. (A "fee multiplier provision may not be used in any criminal prosecution defended under this subsection and the attorney's fees and costs awarded may not exceed $100,000"); s. 627.736(8)(c), F.S. ("[A]ttorney fees recovered [under Florida's Motor Vehicle No-Fault Law] . . . must be calculated without regard to a contingency risk multiplier"); *but see* s. 790.33, F.S. (in an action brought by a person against a government entity to enforce the provisions of the firearm preemption statute, reasonable attorney fees may include "a contingency fee multiplier . . . .").
[108] *See Rowe*, 472 So. 2d at 1146 ("[W]e . . . adopt the federal lodestar approach for computing reasonable attorney fees").
[109] *See City of Burlington v. Dague*, 112 S. Ct. 2638 (1992) ("Thus, enhancement for the contingency risk posed by each case would encourage meritorious claims to be brought, but only at the social cost of indiscriminately encouraging nonmeritorious claims to be brought as well . . . [W]e hold that enhancement for contingency is not permitted under the fee-shifting statutes at issue").
[110] *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662 (2010).
[111] 42 U.S.C. s. 1988(b) allows the court to award attorney fees to the prevailing party in certain civil rights actions.
[112] *Perdue*, 130 S. Ct. at 1670.
[113] *Id.* at 1673 (emphasis added).
[114] *Id.*
[115] *See id.* at 1676.
[116] *See id.*

- In many cases, attorney fees "are not paid by the individuals responsible for the constitutional or statutory violations on which the judgment is based . . . . Instead, the fees are paid . . . by state and local taxpayers," resulting in a diversion of funds from other government programs.[117]

Recent Florida Supreme Court Treatment of the Contingency Fee Multiplier

In 2017, the Florida Supreme Court rejected the U.S. Supreme Court's *Dague* decision, instead holding that the contingency fee multiplier in Florida courts is not subject to the "rare and exceptional circumstances" requirement.[118] The Court acknowledged that, based upon its decision to maintain the applicability of the contingency fee multiplier without the restrictions implemented by the *Dague* decision, Florida "separat[ed] from federal precedent in this area."[119]

Recent Legislative Sessions

During Special Session D in May of 2022, the Legislature passed CS/SB 2-D, which was signed into law by the Governor. The bill created a strong presumption that, in lawsuits arising under a residential or commercial property insurance policy, a lodestar fee is sufficient and reasonable; and that such presumption could only be rebutted in a rare and exceptional circumstance.[120] Subsequently, in December 2022, during Special Session A, the legislature passed SB 2-A, which was signed into law by the Governor. SB 2-A eliminated one-way attorney fees for property insurance cases, and in turn, removed the provision added during the May 2022 Special Session D relating to lodestar fees in such property insurance cases.[121]

Contingency Fee Multiplier – Effect of Proposed Changes

CS/HB 837 amends s. 57.104, F.S., to create a presumption that the lodestar fee is sufficient and reasonable in a case in which attorney fees are determined by or awarded by the court. A claimant may overcome this presumption only in a rare and exceptional circumstance, and only if he or she can demonstrate that he or she could not have otherwise reasonably retained competent counsel. Essentially, the bill brings Florida contingency fee multiplier law in line with the current federal standard.

One-Way Attorney Fees – Background

Historical Treatment of Attorney Fees

The traditional "English rule" entitled a prevailing party in civil litigation to attorney fees as a matter of right. However, Florida and a majority of other United States jurisdictions have adopted the "American rule," where each party bears its own attorney fees unless a "fee-shifting statute" provides an entitlement to fees. In Florida, several such fee-shifting statutes entitle the prevailing party or, more specifically, a particular prevailing claimant or plaintiff, to have his or her fees paid by the other party.[122]

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[117] *See id.* at 1677.
[118] *See Joyce v. Federated Nat'l Ins. Co.*, 228 So. 3d 1122 (Fla. 2017) ("[W]ith all due deference to the United States Supreme Court, we do not accept the *Dague* majority's rationale for rejecting contingency fee multipliers").
[119] *Id. at* 1132.
[120] Ch. 2022-268, s. 16, L.O.F.
[121] Ch. 2022-271, s. 17, L.O.F.
[122] *See, e.g.,* s. 400.023, F.S. (nursing home resident); s. 440.34, F.S. (claimant in a workers' compensation case in certain situations); s. 501.2105, F.S. (plaintiff in specified FDUTPA actions); ss. 626.9373 and 627.428, F.S. (prevailing insured party in a case brought against an insurer); s. 790.33, F.S. (plaintiff in a suit to enforce his or her firearm rights); *see also* 42 U.S.C. s. 1988(b) (federal fee-shifting statute for prevailing parties in actions to enforce certain civil rights statutes).

Florida's One-Way Attorney Fee Statute

Section 627.428, F.S., commonly known as Florida's "one-way attorney fee statute," generally provides that when an insured prevails in a legal action against an insurer, the insurer must pay the insured's attorney fees.[123] A related statute, s. 626.9373, F.S., contains a similar one-way attorney fee provision for situations where the insurer is a surplus lines insurer.

Although s. 627.428, F.S., generally applies to insurance cases, there are statutory provisions in Florida law that limit the application of this statute, as follows:

- The one-way statute does not apply in an uninsured motorist coverage dispute unless there is a dispute over whether the policy provides coverage for an uninsured motorist proven to be liable for the accident.[124]
- The one-way statute applies, but only in a limited manner, with respect to the Florida Motor Vehicle No-Fault Law.[125]
- The one-way statute applies to claims brought against the Florida Insurance Guaranty Association only if the association denies a covered claim or a portion thereof.[126]
- The one-way statute applies in certain sinkhole cases only if the policyholder obtains a judgment more favorable than the recommendation of the neutral evaluation process within the sinkhole dispute resolution statutes.[127]
- The one-way statute applies to claims brought against the Florida Workers' Compensation Insurance Guaranty Association only if the association denies a covered claim or a portion thereof.[128]
- The one-way statute does not apply in a suit arising under a residential or commercial property insurance policy.[129]

Other Jurisdictions

United States jurisdictions essentially fall into three categories with respect to the issue of one-way attorney fees awarded against insurers, as follows:

- In 6 jurisdictions, including Florida, an insured who prevails against an insurer is generally entitled to a one-way attorney fee.
- In 8 jurisdictions, an insured who sues an insurer is either not entitled to his or her attorney fees or, if the insured loses, the insured may be responsible for paying the insurer's attorney fees.
- In 37 jurisdictions, a insured who prevails against an insurer may recover an attorney fee in specified situations.
    - In 2 jurisdictions, there is a one-way attorney fee for the insured in property insurance cases only.
    - In 29 jurisdictions, there is a one-way attorney fee for the insured if the insurer committed bad faith or otherwise behaved improperly. Florida already has a separate provision entitling an insured to attorney fees and costs if the insured demonstrates that the insurer committed bad faith.[130]
    - In 6 jurisdictions, there is a one-way attorney fee in other limited situations (such as where a court decides to impose the fee or where the insured recovers a specified threshold amount).

[123] S. 627.428(1), F.S.
[124] S. 627.727(8), F.S.
[125] *See* s. 627.736(8), F.S.
[126] S. 631.70, F.S.
[127] S. 627.7074, F.S.
[128] S. 631.926, F.S.
[129] S. 627.428(1), F.S.; *see* ch. 2021-77, s. 9, L.O.F.; ch. 2022-268, s. 12, L.O.F.; ch. 2022-271, ss. 13 and 17, L.O.F.
[130] S. 624.155(4), F.S.

One-Way Attorney Fees – Effect of Proposed Changes

CS/HB 837 repeals ss. 626.9373 and 627.428, F.S., thereby eliminating Florida's one-way attorney fee provisions for insurance cases. Thus, the bill generally requires that each party bear its own attorney fees in an insurance dispute, pursuant to the "American Rule."

Statute of Limitations – Background

A statute of limitations is an absolute bar to the filing of a lawsuit after a date set by law. A statute of limitations specifies when such time period begins, how long the limitation period runs, and the circumstances by which the running of the statute may be "tolled," or suspended. A statute of limitations usually begins to run when a cause of action accrues, which generally, is when the harm occurs.

Section 95.11(3)(a), F.S., currently provides that general actions founded on negligence are subject to a four-year statute of limitations.

Statute of Limitations – Effect of Proposed Changes

CS/HB 837 amends s. 95.11, F.S., to reduce the statute of limitations for general negligence actions from four years to two years. This generally means that a plaintiff who fails to file a lawsuit within two years, rather than within four years, of the occurrence of negligence will be barred from filing the suit.

Premises Liability – Background

A premises liability claim is a personal injury claim (that is, a type of negligence claim) arising out of an injury suffered on the property of another due to an unsafe condition existing on such property.[131] Unlike ordinary negligence, which is based upon active negligence, a premises liability claim is based upon passive negligence; that is, a premises liability claim stems from the tortfeasor's failure to act to prevent harm to the injured party and not from any affirmative actions of the tortfeasor.[132] Common premises liability claims include slip and fall accidents, dog bites, trip or misstep accidents, and swimming pool accidents.

A premises liability claim may also involve negligent security allegations, in which a person injured by a third party's criminal acts (that is, a third party's intentional tort) on another's property attempts to hold the property owner liable for failing to provide adequate security measures on the property. To prevail on a negligent security claim, the plaintiff must prove that the:

- Plaintiff was lawfully present on the defendant's property;[133]
- Defendant had a duty to provide adequate security on the property but breached such duty;[134]
- Plaintiff was injured because of a third party's criminal act, which act was reasonably foreseeable to the defendant and would not have occurred but for the defendant's breach;[135] and

[131] *Nicholson v. Stonybrook Apts., LLC*, 154 So. 3d 490 (Fla. 4th DCA 2015).
[132] *Id.* at 494.
[133] The only duty a property owner owes to an undiscovered trespasser is to refrain from causing intentional harm, while the only duty he or she owes to a known trespasser is to refrain from committing gross negligence or intentional harm and to warn of known dangers that are not readily observable. *Nicholson*, 154 So. 3d 490.
[134] Generally, a property owner has no duty to protect another person from criminal acts committed by third parties on his or her property, but such a duty may arise where a special relationship exists between the property owner and the victim or between the property owner and the third party such that the property owner has a duty to control the third party's conduct. Special relationships recognized by Florida courts include landlord-tenant, hotel-guest, employer-employee, proprietor-patron, and school-student; all involve a person who has entered upon the property of another and in so doing lost a measure of control in providing for his or her own protection. *See, example Stevens v. Jefferson*, 436 So. 2d 33 (Fla. 1983); *see also D.M. ex rel. K.M. v. Publix Super Markets, Inc.*, 895 So. 2d 1114 (Fla. 4th DCA 2005); *see also Gross v. Fam. Servs. Agency, Inc.*, 716 So. 2d 337 (Fla. 4th DCA 1998); *see also Salerno v. Hart Fin. Corp.*,521 So. 2d 234 (Fla. 4th DCA 1988); Restatement 2d Torts s. 315; Frederic S. Zinober, *Litigating the Negligent Security Case: Who's In Control Here?*, 44 Stetson L. Rev. 289 (2015).
[135] Generally, a negligent person is not liable for the damages suffered by another when some separate force or action is an intervening cause of the harm, but where the intervening cause is foreseeable, the original negligent actor may still be held liable. Thus, a negligent security claim's success often hinges on the foreseeability of the crime committed, as property owners are not expected to prevent all possible crimes which may occur on their property. Whether or not a crime was foreseeable is a question of fact, but evidence of

- Plaintiff incurred actual damages.[136]

However, Florida law currently provides that the comparative negligence approach does not apply to an action based upon an intentional tort.[137] Thus, when apportioning fault in a negligent security claim, a jury may be unable to apportion fault to a criminal actor whose intentional conduct injured the plaintiff. This may result in an inequitable situation wherein a property owner found liable in a negligent security action has to pay the entirety of a plaintiff's damages, even though the intervening criminal act of a third party was the more direct cause of the plaintiff's harm.

Premises Liability – Effect of Proposed Changes

CS/HB 837 provides that, in a negligent security action brought by a person lawfully on commercial or real property who was injured by a third party's criminal act, the trier of fact must consider the fault of all persons who contributed to the injury.

Effective Date

The bill provides an effective date of July 1, 2023.

B. SECTION DIRECTORY:

Section 1: Amends s. 57.104, F.S., relating to computation of attorneys' fees.
Section 2: Amends s. 90.502, F.S., relating to lawyer-client privilege.
Section 3: Amends s. 95.11, F.S., relating to limitations other than for the recovery of real property.
Section 4: Amends s. 624.155, F.S., relating to civil remedy.
Section 5: Creates s. 768.0427, F.S., relating to admissibility of evidence to prove medical expenses in personal injury or wrongful death actions; disclosure of letters of protection; recovery of past and future medical expenses damages.
Section 6: Creates s. 768.0701, F.S., relating to premises liability for criminal acts of third parties.
Section 7: Amends s. 768.81, F.S., relating to comparative fault.
Section 8: Repeals s. 626.9373, F.S., relating to attorney fees.
Section 9: Repeals s. 627.428, F.S., relating to attorney fees.
Section 10: Amends s. 624.123, F.S., to conform that provision to changes made by the act.
Section 11: Amends s. 624.488, F.S., to conform that provision to changes made by the act.
Section 12: Amends s. 627.062, F.S., to conform that provision to changes made by the act.
Section 13: Amends s. 627.401, F.S., to conform that provision to changes made by the act.
Section 14: Amends s. 627.727, F.S., to conform that provision to changes made by the act.
Section 15: Amends s. 627.736, F.S., to conform that provision to changes made by the act.
Section 16: Amends s. 627.756, F.S., to conform that provision to changes made by the act.
Section 17: Amends s. 628.6016, F.S., to conform that provision to changes made by the act.
Section 18: Repeals s. 631.70, F.S., to conform to changes made by the act.
Section 19: Repeals s. 631.926, F.S., to conform to changes made by the act.
Section 20: Amends s. 475.01, F.S., to conform that provision to changes made by the act.
Section 21: Amends s. 475.611, F.S., to conform that provision to changes made by the act.
Section 22: Amends s. 517.191, F.S., to conform that provision to changes made by the act.
Section 23: Amends s. 627.441, F.S., to conform that provision to changes made by the act.
Section 24: Amends s. 632.638, F.S., to conform that provision to changes made by the act.
Section 25: Directs the Division of Law Revision to replace the phrase "the effective date of this act" with the date this act becomes law.
Section 26: Provides an effective date of July 1, 2023.

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foreseeability may include the crime rate in the premises' immediate area, whether similar crimes have previously been committed on the premises, and the nature of the property itself (in other words, is the property of a type that is likely to attract crime). *Stevens*, 436 So. 2d at 34-35; *Gibson v. Avis Rent-A-Car System, Inc.*, 386 So. 2d 520 (Fla. 1980); *Williams v. Office of Sec. & Intelligence, Inc.*, 509 So. 2d 1282 (Fla. 3d DCA 1987).

[136] *Globe Sec. Systems Co. v. Mayor's Jewelers, Inc.*, 458 So. 2d 828 (Fla. 3d DCA 1984).

[137] S. 768.81(4), F.S.; *Merrill Crossings Assocs. v. McDonald,* 705 So. 2d 560 (Fla. 1997).

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   See Fiscal Comments.

2. Expenditures:

   See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   See Fiscal Comments.

2. Expenditures:

   See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See Fiscal Comments.

D. FISCAL COMMENTS:

- Comparative Negligence. The bill eliminates the financial liability of a private entity, a State entity, and a local government entity in a situation where a plaintiff is more at fault for causing his or her own damages than the entity. However, the bill also eliminates the ability of a private entity, a State entity, and a local government entity to recover damages in a negligence action where such plaintiff is more at fault for his or her own damages than the defendant.

- Transparency in Damages. To the extent the bill lowers tort costs, the bill may indirectly lower the cost for certain insurance products, medical services, and other products and services. The bill may also reduce the recovery of plaintiffs in certain cases.

- Duty of Good Faith. The bill may reduce an insurer's liability for bad faith cases, which may indirectly result in lower costs for certain insurance products. The bill may also reduce the number of bad faith lawsuits, which may affect certain plaintiffs and their attorneys.

- Contingency Fee Multiplier. The bill's creation of a strong presumption that the "lodestar" amount is reasonable, only to be overcome in a "rare and exceptional circumstance," may reduce the amount of fees some attorneys recover. In turn, this may make it more difficult for clients to find attorneys willing to take more risky cases. In making the application of a contingency fee multiplier rarer, the bill may indirectly lower insurance rates as potential attorney fee awards become more predictable.

- One-Way Attorney Fees. The bill's elimination of one-way attorney fees in insurance cases may make it more difficult for clients to find attorneys willing to take their cases, as the bill reduces the likelihood that an attorney will be able to recover attorney fees directly from an insurer in many cases. However, in lowering the amount of money an insurer will be required to pay to opposing attorneys, the bill may indirectly lower the cost of insurance.

- Statute of Limitations. The bill may reduce the number of negligence lawsuits filed. By reducing the statute of limitations to two years, a plaintiff will be required to prepare his or her case and file it within two years, rather than four years, from the date of the negligent act.

- Premises Liability. The bill may reduce the financial liability of a property owner found liable for negligent security, because the jury would also have to consider the fault of the criminal actor who caused the victim's injury.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   The bill amends s. 90.502, F.S., a provision within the Florida Evidence Code. To ensure the separation of powers, the Legislature has the authority to enact substantive laws and the judiciary has the authority to create procedural rules. To the extent the bill touches on any procedural subjects, the Florida Supreme Court may decide to adopt such provisions.[138]

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On February 24, 2023, the Civil Justice Subcommittee adopted five amendments and reported the bill favorably as a committee substitute. The amendments:

- Changed the section of the bill relating to insurer bad faith to:
  - Restore the civil remedy notice provision to current law, so that it only applies to statutory bad faith claims.
  - Allow an insurer to avoid third-party bad faith liability if the insurer tenders the lesser of the policy limits or the amount demanded by the claimant before a complaint sufficiently asserting a claim is filed, or within 90 days after service of the complaint.
- Reduced the statute of limitations for general negligence cases from 4 years to 2 years.
- Required the trier of fact in a premises liability action brought by a person who was lawfully on the defendant's property and injured by a third party's criminal act to consider the fault of all persons who contributed to the injury.
- Made technical and clarifying changes.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

[138] *See In re Florida Evidence Code*, 372 So. 2d 1369 (1979).