Civil Justice & Claims Subcommittee

Wednesday, January 10, 2018
8:30 – 11:00 AM
404 HOB

Meeting Packet

Richard Corcoran
Speaker

Heather Fitzenhagen
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Civil Justice & Claims Subcommittee

Start Date and Time:	Wednesday, January 10, 2018 08:30 am
End Date and Time:	Wednesday, January 10, 2018 11:00 am
Location:	Sumner Hall (404 HOB)
Duration:	2.50 hrs

Consideration of the following bill(s):

HB 631 Possession of Real Property by Edwards-Walpole
HB 639 Equitable Distribution of Marital Assets and Liabilities by Perez
HB 759 Construction Defect Claims by Trumbull
HB 6017 Tobacco Settlement Agreement by Byrd
HB 6525 Relief/Marcus Button/Pasco County School Board by Byrd
HB 6537 Relief/Erin Joynt/Volusia County by Byrd

Pursuant to rule 7.11, the deadline for amendments to bills on the agenda by non-appointed members shall be 6:00 p.m., Tuesday, January 9, 2018.

By request of the Chair, all committee members are asked to have amendments to bills on the agenda submitted to staff by 6:00 p.m., Tuesday, January 9, 2018.

NOTICE FINALIZED on 01/08/2018 4:21PM by Ellerkamp.Donna

HB 631

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 631 Possession of Real Property
SPONSOR(S): Edwards-Walpole
TIED BILLS: None **IDEN./SIM. BILLS:** SB 804

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee		MacNamara	Bond
2) Judiciary Committee			

SUMMARY ANALYSIS

Ejectment is a cause of action to recover possession of property from a second person possessing it in hostility to the first person's rights. The parties to an ejection action are required to list the documents that they will rely on at trial. The bill modernizes the statute and requires that a party attach a copy of all documents that the party relies on to the party's initial pleading.

Unlawful entry, forcible entry, and unlawful detainer are also causes of action based on a party forcefully or unlawfully taking possession of another party's land or tenements without his or her consent. A party alleging unlawful entry, forcible entry or unlawful detainer is entitled to relief and damages in a summary proceeding. The bill:

- Creates statutory definitions for each cause of action consistent with the common law;
- Provides that the statutes governing these actions do not apply to certain residential tenancies or to the possession of real property related to a mobile home;
- Specifies the measure of damages and remedies available;
- Allows a court to determine questions of title in limited circumstances, provided that such determination is not binding on a future action for trespass, injury to real property, ejectment, or quiet title; and
- Provides special requirements for service of process in such actions.

The state generally owns the property under navigable waters up the mean high water mark, whereas upland landowners own the land down to such mean high water mark. Roughly speaking, the state owns the wet sand area while the dry sand areas are subject to private ownership. Most of the state's wet sand area is dedicated by the state for all to use for recreation. The term "customary use" refers to a general right of the public at large to possess and use certain dry sand areas also for recreational purposes. Where a customary use of a dry sand area is shown, the property owner may not use traditional causes of action like ejectment, unlawful entry, forcible entry, unlawful detainer, or trespass to stop such public use of the person's private land. The bill provides that a common law claim for customary use for the public use of private property may only be determined by a court of competent jurisdiction, on a parcel-by-parcel basis, by clear and convincing evidence.

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

The effective date of the bill is July 1, 2018.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Ejectment

"Ejectment" is an action at law for a person to recover possession of real property from a second person possessing it in hostility to the first person's right. Ejectment proceedings are governed by ch. 66, F.S. To be entitled to recover property in ejectment, the plaintiff must have a present right of possession to the property that is the subject of the action and must show that he or she has been ousted or deprived of possession by the defendant.[1] Although ch. 66, F.S., is silent as to which court has jurisdiction over ejectment actions, s. 26.012(2)(f), F.S., grants circuit courts exclusive original jurisdiction over such actions.

Current law provides that all parties to the action must, in their initial pleading (that is, in their complaint or answer), attach a statement setting forth chronologically the chain of title on which he or she will rely at trial.[2] For portions of the chain of title that are recorded, the party must state the names of the grantors and the grantees and the book and page of the record. For instruments in the chain of title that are unrecorded, the party is required to attach a copy of the instrument to their statement setting forth chain of title and the court may require the party to produce the original for inspection by the opposing party. Lastly, where a party relies on a claim or right without color of title, the statement must specify how and when the claim originated and the facts on which the claim is based.[3]

Ejectment: *Effect of Proposed Changes*

The bill amends s. 66.021, F.S., to make clear the circumstances under which an individual has a right of action of ejectment, provides that circuit courts have exclusive jurisdiction in an action of ejectment, and specifies that a plaintiff is not required to provide any presuit notice or demand to a defendant prior to filing suit.

With respect to the statement setting forth the chronological chain of title, the bill allows a party to provide the instrument number of a recorded instrument instead of providing the book and page number. Moreover, the bill removes the distinction between recorded instruments and unrecorded instruments for purposes of attachment. Under the bill, a party must attach any instrument, whether recorded or unrecorded, to the statement setting forth the chain of title.

Lastly, the bill provides that an action brought pursuant to s. 66.021, F.S., is cumulative to other existing remedies and does not limit other remedies that are available under current law.

Unlawful Entry, Forcible Entry, and Unlawful Detention

Section 82.01, F.S., entitled "'Unlawful entry and forcible entry' defined" states that "no person shall enter into any lands or tenements except when entry is given by law, nor shall any person, when entry is given by law, enter with strong hand or with multitude of people, but only in a peaceable, easy and open manner." Similarly, s. 82.02, F.S., provides that "[n]o person who enters without consent in a peaceable, easy and open manner into any lands or tenements shall hold them afterwards against the consent of the party entitled to possession." The possession protected is actual possession, as disclosed by some visible act or evidence of continuous control. Constructive or theoretical possession

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[1] *Davis v. Hinson*, 67 So.3d 1107 (Fla. 1st DCA 2011).
[2] s. 66.021(4), F.S.
[3] *Id.*

is an insufficient basis for suit.[4] Moreover, as stated in ss. 82.01 and 82.02, F.S., these actions do not apply to residential tenancies.

A party alleging unlawful entry, forcible entry, or unlawful detention is entitled to relief under the summary procedure statute, s. 51.011, F.S., if the action is instituted within three years from the date of entry. Under the summary procedure statute, the plaintiff's initial pleading must contain the matters required by the statute prescribing such procedure or, if none are so required, must state a cause of action. If no person can be found at the usual place of residence of defendant, summons may be served by posting a copy in a conspicuous place on the property described in the complaint and summons.[5] The defendant's answer must contain all defenses of law or fact and must be served within five days after the service of process.[6]

In actions under ch. 82, F.S., the trial court is not allowed to resolve or make determinations as to questions involving title. Rather, the court may only determine the right of possession and damages.[7] Section 82.071, F.S., provides that if the fact finder grants judgment for the plaintiff, damages are fixed at double the rental value of the premises from the time of the unlawful or wrongful holding. Additionally, the judgment must state that the plaintiff recover possession of the property described in the complaint, together with damages and costs, and award a writ of possession to be executed without delay and execution for the plaintiff's damages and costs.[8] Where judgment is entered for the defendant, current law requires the court to enter an order dismissing plaintiff's complaint and ordering that the defendant recover costs.

Lastly, current law provides that no judgment rendered either for plaintiff or defendant bars any action of trespass for injury to the property or ejectment between the same parties respecting the same property. Moreover, no verdict is conclusive of the facts therein found in any action of trespass or ejectment.[9]

Unlawful Entry, Forcible Entry, and Unlawful Detention: *Effect of Proposed Changes*

The bill amends portions of ch. 82, F.S., related to unlawful entry, forcible entry, and unlawful detention. The bill provides definitions for forcible entry, real property, record titleholder, unlawful detention, and unlawful entry. The definitions created by the bill are consistent with current law. Furthermore, the bill specifies that these actions do not apply to residential tenancies under part II of ch. 83, F.S., to the possession of mobile homes or recreational vehicles in a lodging park under ch. 513, F.S., or to mobile home tenancies in a mobile home park under ch. 723, F.S.[10]

The bill also amends ss. 82.03 and 82.04, F.S., related to remedies in such actions and adds additional language addressing a court's role in such proceedings. Specifically, the bill:

- Specifies that a party bringing an action pursuant to ch. 82, F.S., is not required to provide notice to a defendant prior to filing an action;
- Requires the court to award a plaintiff damages equal to double the reasonable rental value of the real property if it is determined that the entry or detention by the defendant was willful and knowingly wrongful;
- Allows the court to award a plaintiff other damages, including but not limited to, damages for waste;
- Allows the court to bifurcate actions for possession and damages;

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[4] *Goffin v. McCall*, 108 So. 556 (1926)
[5] s. 82.061, F.S.
[6] s. 51.011(1), F.S.
[7] s. 82.05, F.S.
[8] s. 82.091, F.S.
[9] s. 82.101, F.S.
[10] The eviction actions in those statutes appear to provide an adequate remedy.

- Requires the court to advance cause of actions brought pursuant to ch. 82, F.S., on the calendar; and
- Allows the court to determine questions of title in such actions, but only when it is necessary to determine a right of possession or determine the record titleholder.

Additionally, the bill expands the service of process requirements for parties instituting an action of unlawful entry, forcible entry, or unlawful detention. A plaintiff is required to attempt to obtain service as provided by law at least twice. If a plaintiff cannot effect service in those two attempts and the defendant does not have a residence in the county or no person 15 years of age or older is residing at the defendant's residence in the county, then the sheriff is required to serve the summons and complaint by posting it in a conspicuous place on the property. The minimum amount of time allowed between the two attempts to obtain service is six hours. Where a plaintiff intends to effect service solely through the posting in a conspicuous place on the property, the bill requires the plaintiff to additionally provide the clerk of court with copies of the summons and complain as well as two prestamped envelopes containing specific information.[11]

The bill amends s. 82.101, F.S., to provide that a judgment rendered pursuant to ch. 82, F.S., may be superseded, in whole or in part, by a subsequent judgment in an action for trespass for injury to the real property, ejectment, or quiet title involving the same parties and the same real property.

The bill repeals ss. 82.061, 82.071, 82.081, F.S., relating to service of process, damages, and trial evidence, respectively. The substance of those sections are addressed elsewhere in the bill and the forms are outdated. Lastly, the bill makes conforming changes to other portions of ch. 82, F.S.

Customary Use of Real Property

The common law public trust doctrine is embodied in Art. 10, s. 11 of the state's Constitution. Under that provision, title to the portion of lands beneath navigable waters up to the mean high water line is owned by the state and held in trust for all the people. The doctrine applies to all navigable waters, both freshwater and salt water.

The state's beaches include more land than what is set aside for the people under the public trust doctrine. The areas above the mean high water line are subject to private ownership.[12] Florida courts have recognized the public may acquire rights to the dry sand areas of privately owned portions of a beach through common law prescription, dedication, and custom. In 1974 in the case of *City of Daytona Beach v. Tona-Rama*,[13] the Florida Supreme Court found that:

> If the recreational use of the sandy area adjacent to the mean high tide has been ancient, reasonable, without interruption and free from dispute, such use as a matter of custom, should not be interfered with by the owner. However, the owner may make any use of his property which is consistent with such public use and not calculated to interfere with the exercise of the right of the public to enjoy the dry sand area as a recreational adjunct of the wet sand or foreshore area.

This is the general description of the customary use doctrine.

Application of the customary use doctrine was limited by the 2007 case of *Trepanier v. County of Volusia*.[14] The Volusia County beaches of Daytona Beach and New Smyrna Beach have a large width of firmly packed sands. On those beaches, custom and use has historically allowed automobiles to

[11] The bill's service of process requirements are similar to service of process in actions for possession of residential premises, under s. 48.183, F.S.
[12] s. 117.28(1), F.S.
[13] 294 So.2d 73 (Fla. 1974)
[14] 965 So.2d 276 (Fla. 5th DCA 2007)

drive and park on the beach. A county ordinance established a method for marking the travel and parking lanes that, due primarily to the effects of hurricanes, crept closer to beachfront homes over time. Homeowners challenged the county's lane markings, and the county argued in defense that customary use allowed for driving and parking on the beach. The Fifth DCA acknowledged the doctrine of customary use enunciated in *Tona-Rama*, but noted that the doctrine is based on the common law concept of prescriptive easement, which is based on the law of adverse possession. The court noted:

> Acquisition of rights by one in the lands of another, based on possession or use, is not favored in the law and the acquisition of such rights will be restricted. Any doubts as to the creation of the right must be resolved in favor of the owner.[15]

The Fifth DCA further held:

> While some may find it preferable that proof of these elements of custom be established for the entire state by judicial fiat in order to protect the right of public access to Florida's beaches, it appears to us that the acquisition of a right to use private property by custom is intensely local and anything but theoretical. "Custom" is inherently a source of law that emanates from long-term, open, obvious, and widely-accepted and widely-exercised practice. It is accordingly impossible precisely to define the geographic area of the beach for which evidence of a specific customary use must be shown, because it will depend on the particular geography and the particular custom at issue.[16]

Notably, the Fifth DCA has also held that a customary use determination "requires the courts to ascertain *in each case* the degree of customary and ancient use the beach has been subjected to . . . ."[17]

In addition to Florida state courts addressing the issue of customary use, in 2002, an opinion by the state Attorney General discussed the issue following an inquiry by the mayor of Destin and the Okaloosa Sheriff's Office.[18] In that opinion, the Attorney General made the three following findings:

1. The City may regulate in a reasonable manner the beach within its corporate limits to protect the public health, safety, and welfare. This regulation must have a rational relation to and be reasonably designed to accomplish a purpose necessary for the protection of the public. The city may not exercise its police power in an arbitrary, capricious, or unreasonable manner. Such regulation may be accomplished regardless of the ownership of this area, with the exception of state ownership, and without regard to whether the public has been expressly or impliedly allowed to use that area of the beach by a private property owner who may hold title to the property.
2. The right of a municipality to regulate and control dry sand beach property within its municipal boundaries is not dependent on the finding of the Florida Supreme Court in *City of Daytona Beach v. Tona-Rama, Inc.*
3. Private property owners who hold title to dry sand areas of the beach falling within the jurisdictional limits of the City may utilize local law enforcement for purposes of reporting incidents of trespass as they occur.[19]

In 2017, the United States District Court for the Northern District of Florida addressed the related issue of whether adopting a customary use ordinance was beyond the power of a county or municipality. Walton County in 2016 adopted an ordinance declaring the dry sand areas of the county subject to the customary use doctrine. Based on that finding, the ordinance prohibits signs, fencing and other

[15] *Id.* at 284, quoting *Downing v. Bird*, 100 So.2d 57, 64-65 (Fla.1958).
[16] *Id.* at 289.
[17] *Id.* at 288, quoting *Reynolds v. County of Volusia*, 659 So.2d 1186 (Fla. 5th DCA 1995)(emphasis added).
[18] 2002-38 Fla. Op. Att'y Gen., June 24, 2002.
[19] *Id.*

obstructions within the dry sand areas. The court ruled that the adoption of a customary use ordinance was within the power of the county. The court left open the question of whether an individual property owner may file an as-applied challenge to the ordinance as it affects his or her property rights.[20]

These court decisions and the Attorney General opinion illustrate that local officials, municipalities, and private property owners have struggled to determine the scope of local authority regarding customary use ordinances and determining who may affect the property rights of private property owners through the common law doctrine of customary use.

Customary Use of Real Property: *Effect of Proposed Changes*

The bill provides that a common law claim for customary use for the public use of private property may only be determined:

- By a court of competent jurisdiction;
- On a parcel-by-parcel basis; and
- By clear and convincing evidence.[21]

The effect of this language is that a county or municipality may not enact an ordinance establishing the public use of private property under the common law doctrine of customary use. Rather a customary use determination may only occur in a court case on a property-by-property basis.

B. SECTION DIRECTORY:

Section 1: Amends s. 66.021, F.S., relating to ejectment.
Section 2: Amends s. 82.01, F.S., relating to definitions.
Section 3: Amends s. 82.02, F.S., relating to applicability.
Section 4: Amends s. 82.03, F.S., relating to remedies.
Section 5: Renumbers s. 82.045, F.S., as s. 82.035, F.S., relating to remedies for unlawful detention by a transient occupant of residential property.
Section 6: Amends s. 82.04, F.S., relating to questions involved in proceedings.
Section 7: Amends s. 82.05, F.S., relating to service of process.
Section 8: Amends s. 82.091, F.S., relating to judgment and execution.
Section 9: Amends s. 82.101, F.S., relating to effect of judgment.
Section 10: Creating s. 704.09, F.S., relating to judicial determination of customary use.
Section 11: Repeals s. 82.061, F.S., relating to trial and evidence as to damages.
Section 12: Repeals s. 82.071, F.S., relating to trial and the form of verdict.
Section 13: Repeals s. 82.081, F.S., relating to judgment and execution.
Section 14: Provides an effective date of July 1, 2018.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

[20] *Alford, et al v. Walton County*, 3:16-cv-00362-MCR-CJK, Order dated November 22, 2017.

[21] "Clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue. Fla. Std. Jury Instr. (Civ.) 404.13.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to place any mandates on county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill repeals outdated forms of a final judgment for forcible entry, unlawful entry, and unlawful detainer. The Supreme Court has promulgated numerous forms pursuant to its rulemaking power, and has sufficient power and authority to enact in rule forms on this subject should the court elect to do so.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

1 A bill to be entitled
2 An act relating to the possession of real property;
3 amending s. 66.021, F.S.; authorizing a person with a
4 superior right to possession of real property to
5 recover possession by ejectment; declaring that
6 circuit courts have exclusive jurisdiction; providing
7 that a plaintiff is not required to provide any
8 presuit notice or demand to a defendant; requiring
9 that copies of instruments be attached to a complaint
10 or answer under certain circumstances; requiring a
11 statement to list certain details; providing for
12 construction; amending s. 82.01, F.S.; redefining the
13 terms "unlawful entry" and "forcible entry"; defining
14 the terms "real property," "record titleholder," and
15 "unlawful detention"; amending s. 82.02, F.S.;
16 exempting possession of real property under part II of
17 ch. 83, F.S., and under chs. 513 and 723, F.S.;
18 amending s. 82.03, F.S.; providing that a person
19 entitled to possession of real property has a cause of
20 action to regain possession from another person who
21 obtained possession of real property by forcible
22 entry, unlawful entry, or unlawful detainer; providing
23 that a person entitled to possession is not required
24 to give a defendant presuit notice; requiring the
25 court to award the plaintiff extra damages if a

26 defendant acted in a willful and knowingly wrongful
27 manner; authorizing bifurcation of actions for
28 possession and damages; requiring that an action be
29 brought by summary procedure; requiring the court to
30 advance the cause on the calendar; renumbering and
31 amending s. 82.045, F.S.; conforming provisions to
32 changes made by the act; amending s. 82.04, F.S.;
33 requiring that the court determine the right of
34 possession and damages; prohibiting the court from
35 determining question of title unless necessary;
36 amending s. 82.05, F.S.; requiring that the summons
37 and complaint be attached to the real property after
38 two unsuccessful attempts to serve a defendant;
39 requiring a plaintiff to provide the clerk of the
40 court with prestamped envelopes and additional copies
41 of the summons and complaint if the defendant is
42 served by attaching the summons and complaint to the
43 real property; requiring the clerk to immediately mail
44 copies of the summons and complaint and note the fact
45 of mailing in the docket; specifying that service is
46 effective on the date of posting or mailing; requiring
47 that 5 days elapse after the date of service before
48 the entry of a judgment; amending s. 82.091, F.S.;
49 providing requirements after a judgment is entered for
50 the plaintiff or the defendant; amending s. 82.101,

51 F.S.; adding quiet title to the types of future
52 actions for which a judgment is not conclusive as to
53 certain facts; providing that the judgment may be
54 superseded by a subsequent judgment; creating s.
55 704.09, F.S.; requiring that a claim of customary use
56 for the public use of private property be determined
57 by a court on a parcel-by-parcel basis; specifying a
58 standard of proof for such determinations; repealing
59 s. 82.061, F.S., relating to service of process;
60 repealing s. 82.071, F.S., relating to evidence at
61 trial as to damages; repealing s. 82.081, F.S.,
62 relating to trial verdict forms; providing an
63 effective date.
64
65 Be It Enacted by the Legislature of the State of Florida:
66
67 Section 1. Section 66.021, Florida Statutes, is amended to
68 read:
69 66.021 Ejectment ~~Procedure~~.—
70 (1) RIGHT OF ACTION.—A person with a superior right to
71 possession of real property may maintain an action of ejectment
72 to recover possession of the property.
73 (2) JURISDICTION.—Circuit courts have exclusive
74 jurisdiction in an action of ejectment.
75 (3) NOTICE.—A plaintiff may not be required to provide any

76 presuit notice or presuit demand to a defendant as a condition
77 to maintaining an action under this section.
78 (4)(1) LANDLORD NOT A DEFENDANT.—When it appears before
79 trial that a defendant in an action of ejectment is in
80 possession as a tenant and that his or her landlord is not a
81 party, the landlord must ~~shall~~ be made a party before further
82 proceeding unless otherwise ordered by the court.
83 (5)(2) DEFENSE MAY BE LIMITED.—A defendant in an action of
84 ejectment may limit his or her defense to a part of the property
85 mentioned in the complaint, describing such part with reasonable
86 certainty.
87 (6)(3) WRIT OF POSSESSION; EXECUTION TO BE JOINT OR
88 SEVERAL.—When plaintiff recovers in an action of ejectment, he
89 or she may have one writ for possession and for~~,~~ damages and
90 costs or, at his or her election ~~if the plaintiff elects~~, may
91 have separate writs for possession and for damages and costs.
92 (7)(4) CHAIN OF TITLE.—The ~~Plaintiff with his or her~~
93 complaint and the ~~defendant with his or her~~ answer must include
94 ~~shall serve~~ a statement setting forth, chronologically, the
95 chain of title upon which the party ~~on which he or she~~ will rely
96 at trial. Copies of each instrument identified in the statement
97 must be attached to the complaint or answer. ~~If any part of the~~
98 ~~chain of title is recorded,~~ The statement must include ~~shall set~~
99 ~~forth~~ the names of the grantors and the grantees, the date that
100 each instrument was recorded, and the book and page or the

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

101 instrument number for each recorded instrument ~~of the record~~
102 ~~thereof; if an unrecorded instrument is relied on, a copy shall~~
103 ~~be attached. The court may require the original to be submitted~~
104 ~~to the opposite party for inspection~~. If a ~~the~~ party relies on a
105 claim or right without color of title, the statement must ~~shall~~
106 specify how and when the claim originated and the facts on which
107 the claim is based. If defendant and plaintiff claim under a
108 common source, the statement need not deraign title before the
109 common source.
110 (8)~~(5)~~ TESTING SUFFICIENCY.—If either party seeks ~~wants~~ to
111 test the legal sufficiency of any instrument or court proceeding
112 in the chain of title of the opposite party, the party must
113 ~~shall~~ do so before trial by motion setting up his or her
114 objections with a copy of the instrument or court proceedings
115 attached. The motion must ~~shall~~ be disposed of before trial. If
116 either party determines that he or she will be unable to
117 maintain his or her claim by reason of the order, that party may
118 so state in the record and final judgment shall be entered for
119 the opposing ~~opposite~~ party.
120 (9) OPERATION.—This section is cumulative to other
121 existing remedies and may not be construed to limit other
122 remedies that are available under the laws of this state.
123 Section 2. Section 82.01, Florida Statutes, is amended to
124 read:
125 82.01 Definitions ~~"Unlawful entry and forcible entry"~~

126 ~~defined~~.—As used in this chapter, the term:
127 (1) "Forcible entry" means entering into and taking
128 possession of real property with force, in a manner that is not
129 peaceable, easy, or open, even if such entry is authorized by a
130 person entitled to possession of the real property and the
131 possession is only temporary or applies only to a portion of the
132 real property.
133 (2) "Real property" means land or any existing permanent
134 or temporary building or structure thereon, and any attachments
135 generally held out for the use of persons in possession of the
136 real property.
137 (3) "Record titleholder" means a person who holds title to
138 real property as evidenced by an instrument recorded in the
139 public records of the county in which the real property is
140 located.
141 (4) "Unlawful detention" means possessing real property,
142 even if the possession is temporary or applies only to a portion
143 of the real property, without the consent of a person entitled
144 to possession of the real property or after the withdrawal of
145 consent by such person.
146 (5) "Unlawful entry" means the entry into and possessing
147 of real property, even if the possession is temporary or for a
148 portion of the real property, when such entry is not authorized
149 by law or consented to by a person entitled to possession of the
150 real property ~~No person shall enter into any lands or tenements~~

151 ~~except when entry is given by law, nor shall any person, when~~
152 ~~entry is given by law, enter with strong hand or with multitude~~
153 ~~of people, but only in a peaceable, easy and open manner~~.
154 Section 3. Section 82.02, Florida Statutes, is amended to
155 read:
156 82.02 Applicability ~~"Unlawful entry and unlawful~~
157 ~~detention" defined~~.—
158 (1) This chapter does not apply to residential tenancies
159 under part II of chapter 83 ~~No person who enters without consent~~
160 ~~in a peaceable, easy and open manner into any lands or tenements~~
161 ~~shall hold them afterwards against the consent of the party~~
162 ~~entitled to possession~~.
163 (2) This chapter does not apply to the possession of real
164 property under chapter 513 or chapter 723 ~~This section shall not~~
165 ~~apply with regard to residential tenancies~~.
166 Section 4. Section 82.03, Florida Statutes, is amended to
167 read:
168 82.03 Remedies ~~Remedy for unlawful entry and forcible~~
169 ~~entry~~.—
170 (1) A person entitled to possession of real property,
171 including constructive possession by a record titleholder, has a
172 cause of action against a person who obtained possession of that
173 real property by forcible entry, unlawful entry, or unlawful
174 detention and may recover possession and damages. The person
175 entitled to possession is not required to notify the prospective

176 defendant before filing the action.
177 (2) If the court finds that the entry or detention by the
178 defendant is willful and knowingly wrongful, the court must
179 award the plaintiff damages equal to double the reasonable
180 rental value of the real property from the beginning of the
181 forcible entry, unlawful entry, or unlawful detention until
182 possession is delivered to the plaintiff. The plaintiff may also
183 recover other damages, including, but not limited to, damages
184 for waste.
185 (3) Actions for possession and damages may be bifurcated.
186 (4) All actions under this chapter must be brought by
187 summary procedure as provided in s. 51.011, and the court shall
188 advance the cause on the calendar ~~If any person enters or has~~
189 ~~entered into lands or tenements when entry is not given by law,~~
190 ~~or if any person enters or has entered into any lands or~~
191 ~~tenements with strong hand or with multitude of people, even~~
192 ~~when entry is given by law, the party turned out or deprived of~~
193 ~~possession by the unlawful or forcible entry, by whatever right~~
194 ~~or title the party held possession, or whatever estate the party~~
195 ~~held or claimed in the lands or tenements of which he or she was~~
196 ~~so dispossessed, is entitled to the summary procedure under s.~~
197 ~~51.011 within 3 years thereafter~~.
198 Section 5. Section 82.045, Florida Statutes, is renumbered
199 as section 82.035, Florida Statutes, and amended to read:
200 82.035 ~~82.045~~ Remedy for unlawful detention by a transient

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

201 occupant of residential property.—
202 (1) As used in this section, the term "transient occupant"
203 means a person whose residency in <u>real property</u> ~~a dwelling~~
204 intended for residential use has occurred for a brief length of
205 time, is not pursuant to a lease, and whose occupancy was
206 intended as transient in nature.
207 (a) Factors that establish that a person is a transient
208 occupant include, but are not limited to:
209 1. The person does not have an ownership interest,
210 financial interest, or leasehold interest in the property
211 entitling him or her to occupancy of the property.
212 2. The person does not have any property utility
213 subscriptions.
214 3. The person does not use the property address as an
215 address of record with any governmental agency, including, but
216 not limited to, the Department of Highway Safety and Motor
217 Vehicles or the supervisor of elections.
218 4. The person does not receive mail at the property.
219 5. The person pays minimal or no rent for his or her stay
220 at the property.
221 6. The person does not have a designated space of his or
222 her own, such as a room, at the property.
223 7. The person has minimal, if any, personal belongings at
224 the property.
225 8. The person has an apparent permanent residence

226 elsewhere.
227 (b) Minor contributions made for the purchase of household
228 goods, or minor contributions towards other household expenses,
229 do not establish residency.
230 (2) A transient occupant unlawfully detains a residential
231 property if the transient occupant remains in occupancy of the
232 residential property after the party entitled to possession of
233 the property has directed the transient occupant to leave.
234 (3) Any law enforcement officer may, upon receipt of a
235 sworn affidavit of the party entitled to possession that a
236 person who is a transient occupant is unlawfully detaining
237 residential property, direct a transient occupant to surrender
238 possession of residential property. The sworn affidavit must set
239 forth the facts, including the applicable factors listed in
240 paragraph (1)(a), which establish that a transient occupant is
241 unlawfully detaining residential property.
242 (a) A person who fails to comply with the direction of the
243 law enforcement officer to surrender possession or occupancy
244 violates s. 810.08. In any prosecution of a violation of s.
245 810.08 related to this section, whether the defendant was
246 properly classified as a transient occupant is not an element of
247 the offense, the state is not required to prove that the
248 defendant was in fact a transient occupant, and the defendant's
249 status as a permanent resident is not an affirmative defense.
250 (b) A person wrongfully removed pursuant to this

251 subsection has a cause of action for wrongful removal against
252 the person who requested the removal, and may recover injunctive
253 relief and compensatory damages. However, a wrongfully removed
254 person does not have a cause of action against the law
255 enforcement officer or the agency employing the law enforcement
256 officer absent a showing of bad faith by the law enforcement
257 officer.
258 (4) A party entitled to possession of real property a
259 dwelling has a cause of action for unlawful detainer against a
260 transient occupant pursuant to s. 82.03 s. 82.04. The party
261 entitled to possession is not required to notify the transient
262 occupant before filing the action. If the court finds that the
263 defendant is not a transient occupant but is instead a tenant of
264 residential property governed by part II of chapter 83, the
265 court may not dismiss the action without first allowing the
266 plaintiff to give the transient occupant the notice required by
267 that part and to thereafter amend the complaint to pursue
268 eviction under that part.
269 Section 6. Section 82.04, Florida Statutes, is amended to
270 read:
271 82.04 Questions involved in this proceeding Remedy for
272 unlawful detention.—The court shall determine only the right of
273 possession and any damages. Unless it is necessary to determine
274 the right of possession or the record titleholder, the court may
275 not determine the question of title.

276 ~~(1) If any person enters or has entered in a peaceable~~
277 ~~manner into any lands or tenements when the entry is lawful and~~
278 ~~after the expiration of the person's right continues to hold~~
279 ~~them against the consent of the party entitled to possession,~~
280 ~~the party so entitled to possession is entitled to the summary~~
281 ~~procedure under s. 51.011, at any time within 3 years after the~~
282 ~~possession has been withheld from the party against his or her~~
283 ~~consent.~~
284 ~~(2) This section shall not apply with regard to~~
285 ~~residential tenancies.~~
286 Section 7. Section 82.05, Florida Statutes, is amended to
287 read:
288 82.05 Service of process ~~Questions involved in this~~
289 ~~proceeding~~.—
290 (1) After at least two attempts to obtain service as
291 provided by law, if the defendant cannot be found in the county
292 in which the action is pending and either the defendant does not
293 have a usual place of abode in the county or there is no person
294 15 years of age or older residing at the defendant's usual place
295 of abode in the county, the sheriff must serve the summons and
296 complaint by attaching it to some conspicuous part of the real
297 property involved in the proceeding. The minimum amount of time
298 allowed between the two attempts to obtain service is 6 hours.
299 (2) If a plaintiff causes, or anticipates causing, a
300 defendant to be served with a summons and complaint solely by

301 attaching them to some conspicuous part of real property
302 involved in the proceeding, the plaintiff must provide the clerk
303 of the court with two additional copies of the summons and the
304 complaint and two prestamped envelopes addressed to the
305 defendant. One envelope must be addressed to the defendant's
306 residence, if known. The second envelope must be addressed to
307 the defendant's last known business address, if known. The clerk
308 of the court shall immediately mail the copies of the summons
309 and complaint by first-class mail, note the fact of mailing in
310 the docket, and file a certificate in the court file of the fact
311 and date of mailing. Service is effective on the date of posting
312 or mailing, whichever occurs later, and at least 5 days must
313 have elapsed after the date of service before a final judgment
314 for removal of the defendant may be entered No question of
315 title, but only right of possession and damages, is involved in
316 the action.
317 Section 8. Section 82.091, Florida Statutes, is amended to
318 read:
319 82.091 Judgment and execution.—
320 (1) If the court enters a judgment for the plaintiff, the
321 verdict is in favor of plaintiff, the court shall enter judgment
322 that plaintiff shall recover possession of the real property
323 that he or she is entitled to and described in the complaint
324 with his or her damages and costs. The court, and shall award a
325 writ of possession to be executed without delay and execution

326 for <u>the</u> plaintiff's damages and costs.
327 <u>(2)</u> If the <u>court enters a judgment for the defendant, the</u>
328 <u>court shall</u> ~~verdict is for defendant, the court shall enter~~
329 ~~judgment against plaintiff dismissing the complaint and~~ order
330 that <u>the</u> defendant recover costs.
331 Section 9. Section 82.101, Florida Statutes, is amended to
332 read:
333 82.101 Effect of judgment.—No judgment rendered either for
334 <u>the</u> plaintiff or <u>the</u> defendant bars any action of trespass for
335 injury to the <u>real</u> property or ejectment between the same
336 parties respecting the same <u>real</u> property. <u>A judgment is not</u>
337 <u>conclusive as to</u> ~~No verdict is conclusive of~~ the facts therein
338 ~~found~~ in any <u>future</u> action <u>for</u> ~~of~~ trespass<u>, ejectment, or quiet</u>
339 <u>title. A judgment rendered either for the plaintiff or the</u>
340 <u>defendant pursuant to this chapter may be superseded, in whole</u>
341 <u>or in part, by a subsequent judgment in an action for trespass</u>
342 <u>for injury to the real property, ejectment, or quiet title</u>
343 <u>involving the same parties with respect to the same real</u>
344 <u>property</u> ~~or ejectment~~.
345 Section 10. Section 704.09, Florida Statutes, is created
346 to read:
347 <u>704.09 Judicial determination; customary use.—A common law</u>
348 <u>claim of customary use for the public use of private property</u>
349 <u>shall only be determined by a court of competent jurisdiction,</u>
350 <u>on a parcel-by-parcel basis, and by clear and convincing</u>

351 evidence.

352 Section 11. Section 82.061, Florida Statutes, is repealed.

353 Section 12. Section 82.071, Florida Statutes, is repealed.

354 Section 13. Section 82.081, Florida Statutes, is repealed.

355 Section 14. This act shall take effect July 1, 2018.

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___ (Y/N)
ADOPTED AS AMENDED	___ (Y/N)
ADOPTED W/O OBJECTION	___ (Y/N)
FAILED TO ADOPT	___ (Y/N)
WITHDRAWN	___ (Y/N)
OTHER	___

1 Committee/Subcommittee hearing bill: Civil Justice & Claims
2 Subcommittee
3 Representative Edwards-Walpole offered the following:
4
5 **Amendment (with title amendment)**
6 Remove lines 347-351 and insert:
7 Section 10. Section 163.035, Florida Statutes, is created
8 to read:
9 163.035 Ordinances relating to customary use.—A
10 municipality, county, district, or other local government entity
11 shall not adopt or keep in effect an ordinance or rule which
12 finds, determines, relies on, or is based upon customary use of
13 any portion of a beach above the mean high-water line as defined
14 in s. 177.27, unless such ordinance or rule is expressly
15 authorized by general law, or unless a specific portion of a
16 beach above the mean high-water line has been determined by a

17 court, prior to the adoption of the ordinance or rule, to be
18 accessible to the public under the doctrine of customary use.
19 This section shall not apply to an ordinance adopted and
20 effective prior to January 1, 2016.
21 Section 11. Section 704.09, Florida Statutes, is created to
22 read:
23 704.09 Judicial determination of customary use.—A party
24 seeking to impose a common law customary use of real property in
25 a civil action must prove such customary use by a preponderance
26 of the evidence.
27
28 ---
29 **T I T L E A M E N D M E N T**
30 Remove lines 54-58 and insert:
31 superseded by a subsequent judgment; creating s. 163.035, F.S.;
32 prohibiting a local government from enacting or enforcing an
33 ordinance or rule based on the customary use of property;
34 providing an exception; creating s. 704.09, F.S.; establishing a
35 standard of proof applicable to a civil action that seeks to
36 impose a customary use of real property; repealing

HB 639

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 639 Equitable Distribution of Marital Assets and Liabilities
SPONSOR(S): Perez
TIED BILLS: None **IDEN./SIM. BILLS:** SB 676

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee		Tuszynski TD	Bond NB
2) Judiciary Committee			

SUMMARY ANALYSIS

In a proceeding for dissolution of marriage, one matter for the court to determine is distribution of assets and liabilities equitably between the parties. Passive appreciation of a nonmarital asset encumbered with a mortgage that was paid down with marital funds may be one such asset subject to equitable distribution. Case law establishes a method for determining the amount of passive appreciation that is subject to equitable distribution by dividing the amount of the mortgage at marriage by the fair market value of the asset at the same time and multiplying that by the passive appreciation of the asset during the marriage.

HB 639 establishes a statutory formula to calculate the marital portion of passive appreciation of a nonmarital asset subject to equitable distribution using the same basic methodology as case law but using the amount of mortgage principal pay down during the marriage instead of the amount of the mortgage at the time of marriage. The bill sets a limit on the value of the marital portion of the passive appreciation and allows a party to argue use of the formula would be inequitable under the facts of a specific case.

The bill also allows a court to require a party authorized to make installment payments to satisfy a judgment of equitable distribution to provide security and pay reasonable interest on those payments.

The bill does not appear to have any fiscal impact on state or local government.

The bill provides an effective date of July 1, 2018.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Equitable Distribution of Marital Assets and Liabilities

In a proceeding for dissolution of marriage, a court must determine what assets and liabilities are marital and distribute those assets and liabilities equitably between the parties.[1] Marital assets and liabilities include:[2]

- Assets acquired and liabilities incurred during the marriage, individually or jointly;
- The enhancement in value and appreciation of nonmarital assets resulting either from the efforts of either party or from the contribution of marital funds;
- Interspousal gifts;
- All vested and nonvested benefits, rights, and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs; and
- All real or personal property held or titled as tenants by the entireties, whether acquired prior to or during the marriage.

Passive Appreciation as a Marital Asset

Passive appreciation[3] of an unencumbered nonmarital asset is not subject to division in a proceeding for dissolution of marriage.[4] The statute does not address passive appreciation of an encumbered nonmarital asset when the mortgage was paid down with marital funds. The First District Court of Appeal, in *Stevens v. Stevens,*[5] addressed this issue directly for the first time in 1995, holding:

> "If an asset is financed entirely by borrowed money which marital funds repay, the entire asset should be included in the marital estate. In general, in the absence of improvements, the portion of the appreciated value of a separate asset which should be treated as a marital asset will be the same as the fraction calculated by dividing the indebtedness with which the asset was encumbered at the time of the marriage by the value of the asset at the time of the marriage."[6]

In 2010, the Fifth District Court of Appeal briefly adopted a different formula to calculate the marital share of passive appreciation.[7] In *Leider v. Leider*, the court calculated the marital share of passive appreciation as the total amount of mortgage principal reduction made with marital funds, divided by the amount of the unpaid mortgage principal balance at the time of marriage, multiplied by the amount of passive appreciation during the marriage. The *Leider* court withdrew the decision in light of the Florida Supreme Court's ruling in *Kaaa v. Kaaa.*[8]

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[1] S. 61.075, F.S.

[2] S. 61.075(6)(a), F.S.

[3] Appreciation of an asset due to market forces, without any active effort or marital labor for its acquisition, improvement, or maintenance

[4] Stevens v. Stevens, 651 So 2d 1306 (Fla. 1st DCA 1995); Dawn D. Nichols and Sean K. Ahmed, *Nonmarital Real Estate: Is the Appreciation Marital, Nonmarital, or a Combination of Both?*, 81 Fla. B.J. 75, 75 (Oct. 2007).

[5] *Stevens v. Stevens*, 651 So. 2d 1306 (Fla. 1st DCA 1995).

[6] Id. at 1307-08.

[7] *Leider v. Leider*, 48 So.3d 901 (Fla. 5th DCA 2010).

[8] *Kaaa v. Kaaa*,, 58 So. 3d 867,870 (Fla. 2010).

Kaaa v. Kaaa

In 2010, the Florida Supreme Court held that "passive appreciation of a nonmarital asset ... is properly considered a marital asset where marital funds or the efforts of either party contributed to the appreciation."[9] Payment of a mortgage for real property with marital funds subjects the passive appreciation in the value of the real property to equitable distribution.[10] The *Kaaa* court recognized that the marital portion of nonmarital property encumbered by a mortgage paid down with marital funds includes two components: (1) a portion of the enhancement value of the marital asset resulting from the contributions of the nonowner spouse and (2) a portion of the value of the passive appreciation of that asset that accrued during the marriage.[11] The Supreme Court provided a methodology for courts to use in determining the value of the passive appreciation of nonmarital real property to be equitably distributed.[12] Pursuant to the methodology, a court must determine: [13]

1. The overall current fair market value of the home;
2. Whether there has been passive appreciation in the home's value;
3. Whether the passive appreciation is a marital asset under s. 61.075(5)(a)2.,F.S.;[14]
4. The value of the passive appreciation that accrued during the marriage; and
5. How that value is to be allocated.

To determine how to allocate the passive appreciation, the Supreme Court adopted the formula from *Stevens* that multiplied a coverture fraction by the amount of passive appreciation of the asset at the time of the divorce. The coverture fraction is determined by dividing the amount of mortgage at the time of the marriage by the fair market value of the asset at the same time.

$$\frac{\text{Amount of Mortgage at Marriage}}{\text{Fair Market Value at Marriage}} \times \text{Amount of Passive Appreciation During Marriage}$$

Example of the *Kaaa* court's methodology:

Facts

• Fair market value of home at Marriage: $162,500
• Mortgage on home at Marriage: $125,000
• Fair market value of home at Divorce: $245,000
  o Appreciation: $82,500
    ▪ Passive: $78,000
    ▪ Active: $4,500

Application

• Mortgage at Marriage / Fair Market Value at Marriage = Coverture Fraction
  o $125,000 / $162,500 = .77
• Coverture Fraction x Passive appreciation = Passive Appreciation Considered a Marital Asset
  o .77 x $78,000 = $60,060
 	
$60,060 of the passive appreciation is a marital asset subject to equitable distribution.

[9] Id.
[10] Id. at 871.
[11] Id. at 871-872.
[12] Id. at 872.
[13] Id.
[14] This step must include findings of fact by the trial court that marital funds were used to pay the mortgage and that the nonowner spouse made contributions to the property. Moreover, the trial court must determine to what extent the contributions of the nonowner spouse affected the appreciation of the property.

Criticism of the Kaaa Formula

Some family law practitioners believe that the formula adopted by the Supreme Court in *Kaaa* is flawed because there is no relationship between the amount of marital funds utilized to pay down the mortgage during the marriage and the passive appreciation of the subject property.[15] They further argue that *Kaaa* is inconsistent with s. 61.075(6)(a)1.b., F.S., by requiring a nonowner spouse to have made contributions to the property as a prerequisite to sharing in the passive appreciation of the property.[16] Section 61.075(6)(a)1.b., F.S., states that marital assets and liabilities include "the enhancement in value and appreciation of nonmarital assets resulting either from the efforts of either party during the marriage ***or*** from the contribution to or expenditure thereon of marital funds or other forms of marital assets, or both."

Effect of Proposed Changes

HB 639 establishes a statutory formula for a trial court to use in determining the value of the marital portion of the passive appreciation of an encumbered nonmarital asset with a mortgage that has been paid down with marital funds. The formula calculates the value of the marital portion of passive appreciation subject to equitable distribution by determining the passive appreciation of the asset during the marriage and multiplying that by a "coverture fraction" to determine the portion of the passive appreciation during marriage that is a marital asset subject to equitable distribution.

The passive appreciation of the asset during marriage is determined by subtracting the gross value of the property on the date of the marriage or acquisition of the property, whichever is later, from the value of the property on the valuation date in the dissolution action, less any active appreciation or additional debts secured by the property during the marriage.

The coverture fraction is calculated by dividing the amount of mortgage principal paid from marital funds by the value of the real property on the date of marriage, the date of acquisition of the property, or the date the property was first encumbered by a mortgage on which principal was paid from marital funds, whichever is later.

The marital portion of passive appreciation subject to equitable distribution is determined by multiplying the coverture fraction by the passive appreciation of the property during the marriage.

$$\frac{\text{Total Reduction of Mortgage Principal by Marital Funds During Marriage}}{\text{Fair Market Value at marriage, date of acquisition, or date first encumbered, whichever is later}} \times \text{Amount of Passive Appreciation During Marriage}$$

[15] Meeting between Civil Justice & Claims Subcommittee staff and David Manz, former Chairman of Family Law Section, (10:15am - Dec. 6, 2017)
[16] Id.

Example of the proposed bill's methodology:

Facts

• Fair market value of home at Marriage: $162,500
• Mortgage on home at Marriage: $125,000
• Mortgage on home at Divorce: $59,000
  o Mortgage paydown: $66,000
• Fair market value of home at Divorce: $245,000
  o Appreciation of $82,500
    ▪ Passive: $78,000
    ▪ Active: $4,500

Application

• Mortgage Paydown / Fair Market Value at Marriage = Coverture Fraction
  o $66,000 / $162,500 = .405
• Coverture Fraction x Passive appreciation = Passive Appreciation considered a Marital Asset
  o .405 x $78,000 = $31,590
 	
$31,590 of the passive appreciation is a marital asset subject to equitable distribution.

The bill bars the marital portion of nonmarital real property from exceeding the total net equity of the property on the valuation date in the dissolution action. The bill also allows a party to argue that the formula would be inequitable and therefore should not apply to the particular circumstances of the case.

Additionally, the bill authorizes the court to require security and a reasonable rate of interest, or otherwise recognize the time value of money in an equitable distribution judgement or order requiring installment payments. The bill does not preclude the recipient of installment payments from taking action pursuant to ch. 55, F.S., to enforce the judgement.

The bill is effective July 1, 2018.

B. SECTION DIRECTORY:

Section 1: Amends s. 61.075, F.S.,related to equitable distribution of marital assets and liabilities.
Section 2: Provides an effective date of July 1, 2018.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

1 A bill to be entitled
2 An act relating to equitable distribution of marital
3 assets and liabilities; amending s. 61.075, F.S.;
4 redefining the term "marital assets and liabilities"
5 for purposes of equitable distribution in dissolution
6 of marriage actions; providing that the term includes
7 the paydown of principal of notes and mortgages
8 secured by nonmarital real property and certain
9 passive appreciation in such property under certain
10 circumstances; providing formulas and guidelines for
11 determining the amount of such passive appreciation;
12 authorizing the court to require security and interest
13 when installment payments are ordered in the division
14 of assets; providing applicability; providing an
15 effective date.
16
17 Be It Enacted by the Legislature of the State of Florida:
18
19 Section 1. Paragraph (a) of subsection (6) and subsection
20 (10) of section 61.075, Florida Statutes, are amended to read:
21 61.075 Equitable distribution of marital assets and
22 liabilities.—
23 (6) As used in this section:
24 (a)1. "Marital assets and liabilities" include:
25 a. Assets acquired and liabilities incurred during the

26 marriage, individually by either spouse or jointly by them.
27 b. The enhancement in value and appreciation of nonmarital
28 assets resulting ~~either~~ from the efforts of either party during
29 the marriage or from the contribution to or expenditure thereon
30 of marital funds or other forms of marital assets, or both.
31 c. The paydown of principal of a note and mortgage secured
32 by nonmarital real property and a portion of any passive
33 appreciation in the property, if the note and mortgage secured
34 by the property are paid down from marital funds during the
35 marriage. The portion of passive appreciation in the property
36 characterized as marital and subject to equitable distribution
37 is determined by multiplying a coverture fraction by the passive
38 appreciation in the property during the marriage.
39 (I) The passive appreciation is determined by subtracting
40 the gross value of the property on the date of the marriage or
41 the date of acquisition of the property, whichever is later,
42 from the value of the property on the valuation date in the
43 dissolution action, less any active appreciation of the property
44 during the marriage as described in sub-subparagraph b., and
45 less any additional encumbrances secured by the property during
46 the marriage in excess of the first note and mortgage on which
47 principal is paid from marital funds.
48 (II) The coverture fraction must consist of a numerator,
49 defined as the total payment of principal from marital funds of
50 all notes and mortgages secured by the property during the

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

51 marriage, and a denominator, defined as the value of the subject
52 real property on the date of the marriage, the date of
53 acquisition of the property, or the date the property was
54 encumbered by the first note and mortgage on which principal was
55 paid from marital funds, whichever is later.
56 (III) The passive appreciation must be multiplied by the
57 coverture fraction to determine the marital portion of the
58 passive appreciation of the property.
59 (IV) The total marital portion of the property consists of
60 the marital portion of the passive appreciation, the mortgage
61 principal paid during the marriage from marital funds, and any
62 active appreciation of the property during the marriage as
63 described in sub-subparagraph b., not to exceed the total net
64 equity in the property at the date of valuation.
65 (V) The court shall apply the formula specified in this
66 subparagraph unless a party shows circumstances sufficient to
67 establish that application of the formula would be inequitable
68 under the facts presented.
69 d.~~c.~~ Interspousal gifts during the marriage.
70 e.~~d.~~ All vested and nonvested benefits, rights, and funds
71 accrued during the marriage in retirement, pension, profit-
72 sharing, annuity, deferred compensation, and insurance plans and
73 programs.
74 2. All real property held by the parties as tenants by the
75 entireties, whether acquired prior to or during the marriage,

76 shall be presumed to be a marital asset. If, in any case, a
77 party makes a claim to the contrary, the burden of proof shall
78 be on the party asserting the claim that the subject property,
79 or some portion thereof, is nonmarital.
80 3. All personal property titled jointly by the parties as
81 tenants by the entireties, whether acquired prior to or during
82 the marriage, shall be presumed to be a marital asset. In the
83 event a party makes a claim to the contrary, the burden of proof
84 shall be on the party asserting the claim that the subject
85 property, or some portion thereof, is nonmarital.
86 4. The burden of proof to overcome the gift presumption
87 shall be by clear and convincing evidence.
88 (10)<u>(a)</u> To do equity between the parties, the court may,
89 in lieu of or to supplement, facilitate, or effectuate the
90 equitable division of marital assets and liabilities, order a
91 monetary payment in a lump sum or in installments paid over a
92 fixed period of time.
93 <u>(b) If installment payments are ordered, the court may</u>
94 <u>require security and a reasonable rate of interest or may</u>
95 <u>otherwise recognize the time value of the money to be paid in</u>
96 <u>the judgment or order.</u>
97 <u>(c) This subsection does not preclude the application of</u>
98 <u>chapter 55 to any subsequent default.</u>
99 Section 2. This act shall take effect July 1, 2018.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 759 Construction Defect Claims
SPONSOR(S): Trumbull
TIED BILLS: None **IDEN./SIM. BILLS:** SB 680

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee		MM MacNamara	Bond NB
2) Judiciary Committee			

SUMMARY ANALYSIS

Where a property owner alleges that there is a defect in construction or design work performed on the property, current law requires the owner to notify the contractor or design professional of the defect. The property owner must allow the contractor or design professional to inspect the alleged defect. After inspection, the contractor or design professional has the opportunity to offer to fix the problem, or pay damages, before suit is filed. The owner may not file suit until this pre-suit process is complete. The statute of limitations is tolled while the parties comply with these pre-suit requirements.

The bill changes the pre-suit process to:

- Require the property owner, an authorized representative of the property owner's business entity, or a representative acting on behalf of the individual property owner, to personally sign any notice of claim to be served on a party and any notice of acceptance or rejection of a settlement offer.
- Require a contractor or design professional recipient of a notice of claim to serve notice on any contractor, subcontractor or other party that he or she reasonably believes is responsible for each defect specified in the notice of claim.
- Require any consultants retained by the property owner for a construction defect claim to be physically present during any inspection to identify the location of the construction defect.
- Require a property owner, an authorized representative of the property owner's business entity, or a representative acting on behalf of the individual property owner, to serve a written request for mediation prior to rejecting any settlement offer.
- Provide a means for selection of a mediator.
- Add that the statute of limitations for a construction defect claim is also tolled for up to thirty days after mediation is waived or an impasse is declared.

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

The effective date of the bill is July 1, 2018.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Chapter 558, F.S., provides a method for resolving construction defect disputes before filing a lawsuit. In short, it provides for notice and an opportunity to repair. Before a property owner may file suit alleging a construction defect, the property owner is required to notify the contractor, subsontractor, supplier or design professional of the defect and to give that party the opportunity to examine the defect. If the party agrees that the defect exists, the party is given a reasonable opportunity to offer to repair the defect or make some other offer in settlement. Only if the parties are still in disagreement after the notice period can the matter may proceed to court. Similar methods for pre-suit notice with an opportunity for resolution are required in other forms of civil litigation, including medical negligence, claims against nursing homes, and eminent domain.[1]

Moreover, pursuant to s. 558.004(12), F.S., and except as specifically provided in ch. 558, F.S., the chapter does not:

- Bar or limit any rights, including the right of specific performance to the extent available in the absence of the chapter, any causes of action, or any theories on which liability may be based;
- Bar or limit any defense, or create any new defense; or
- Create any new rights, causes of action, or theories on which liability may be based.

The construction defect procedure applies to each alleged construction defect, but multiple defects may be included in one notice of claim. In addition, the initial list of defects may be amended by the claimant to identify additional or new construction defects as they become known. Only alleged construction defects that are noticed and for which the claimant has complied with the construction defect procedure may be addressed in a trial.

Current Law and Effect of Bill

Notice of Claim

Section 558.004(1), F.S., requires a claimant to provide pre-suit notice of an alleged construction defect to the contractor, subcontractor, supplier, or design professional at least 60 days before filing any action, or at least 120 days before filing an action involving an association representing more than 20 parcels. The notice of claim must describe in reasonable detail the nature of each construction defect and, if known, the damage or loss resulting from the defect. This requires the claimant, based upon at least a visual inspection, to identify the location of each defect in the notice.[2]

If the construction defect claim arises from work performed under a contract, the written notice of claim must be served on the person with whom the claimant contracted. The claimant must try to serve the notice of claim within 15 days after discovery of an alleged defect, but the failure to do so does not bar the filing of an action.[3]

Under s. 558.004(3), F.S., within 10 days after service of the notice of claim (within 30 days for a claim involving an association claimant), the claim recipient *has the option* to serve a copy of the notice of claim to each contractor, subcontractor, supplier, or design professional whom the claim recipient

[1] See s. 720.311, F.S., related to homeowners association disputes; ch. 766., F.S., related to medical negligence claims; s. 429.293(3), F.S., related to assisted care communities; s. 400.0233(3), related to nursing homes; and. s. 73.015. F.S.. related to eminent domain.
[2] s. 558.004(1)(b), F.S.
[3] s. 558.004(1)(c), F.S.

reasonably believes is responsible for each defect specified in the notice of claim (the subsequent claim recipient). The claim recipient must then identify the specific defect for which it believes the particular subsequent claim recipient is responsible.

The bill adds that a claimant, an authorized representative of the claimant's business entity if the claimant is a business entity, or a representative acting on behalf of the individual claimant with his or her knowledge, must personally sign any notice of claim served on a contractor, subcontractor, supplier, or design professional.

The bill also removes a claim recipient's discretion with respect to subsequently serving the notice of claim to additional parties. Rather, claim recipients are required to serve such notices on any contractor, subcontractor, supplier, or design professional that he or she reasonably believes is responsible for each defect specified in the notice of claim.

Reasonable Inspection

Under s. 558.004(2), F.S., within 30 days after service of the notice of claim (or within 50 days for a claim involving an association claimant), a person served with the notice of claim may inspect the property or each unit subject to the claim to assess each alleged construction defect. The claimant is also required to provide the claim recipient, its contractors, or its agents reasonable access to the property during normal working hours to inspect the property, to determine the nature and cause of each alleged construction defect, and determine the nature and extent of any repairs or replacements necessary to remedy each defect.

Claim recipients are required to reasonably coordinate the timing and manner of any and all inspections with the claimant to minimize the number of inspections. If mutually agreed, the inspection may include destructive testing under the terms as provided under s. 558.004(2), F.S.

The bill adds that the claimant and any consultants retained by the claimant with respect to the claim must be physically present during the inspection to identify the location of any alleged construction defects.

Settlement Offers and Mediation

Under s. 558.004(7), F.S., a claimant who receives a timely settlement offer must accept or reject the offer by serving written notice of acceptance or rejection on the person making the offer within 45 days after receiving the settlement offer. If a claimant initiates an action without first accepting or rejecting the offer, the court is required to stay the action upon timely motion until the claimant serves the required written response.

The bill adds that a written notice of acceptance or rejection of the offer must be personally signed by the claimant, an authorized representative of the claimant's business entity if the claimant is a business entity, or a representative acting on behalf of the individual claimant with his or her knowledge.

The bill further requires that, prior to rejecting a settlement offer, the claimant must serve a written demand for mediation on the party making the offer explaining why the claimant considers the offer inadequate. The 45 day time limit to respond to settlement offers under s. 558.004(7)(a), F.S., is tolled until the a waiver of the mediation or until an impasse is declared, whichever occurs earlier.

Moreover, unless mediation is waived in writing by the party making the offer, the bill requires that the parties meet with a mutually selected, certified circuit court mediator within 20 days after service of the demand for mediation. A mediator may extend mediation under the bill for good cause or upon stipulation of both parties. The party making the offer is responsible for the costs of mediation.

Lastly, the bill provides that if the parties do not mutually select, or are not able to agree on, an independent certified mediator, each party is required to select an independent certified mediator, and the selected mediators must then mutually select an independent certified mediator to conduct the mediation. Mediation must be conducted in the county where the subject property is located, at a mutually convenient date, time, and location to be selected by the mediator, unless otherwise agreed to by the parties.

Statute of Limitations

Service of a written notice of claim tolls the applicable statute of limitations for those persons covered by the construction defect procedure in ch. 558, F.S., (and any bond surety) until the later of:

- In most cases, ninety days after service of the notice of claim (120 days if an association); or
- Thirty days after the end of the repair period or payment period stated in the offer, if the claimant has accepted the offer. This time period may be extended by stipulation of the parties.

The bill adds that the applicable statute of limitations may be tolled until the later of the extension under current law or 30 days after the mediation is waived as provided for in the bill or an impasse is declared.

The effective date of the bill is July 1, 2018.

B. SECTION DIRECTORY:

Section 1: Amends s. 558.004, F.S., relating to notice and opportunity to repair.
Section 2: Provides an effective date of July 1, 2018.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

1 A bill to be entitled
2 An act relating to construction defect claims;
3 amending s. 558.004, F.S.; providing additional
4 requirements for notices of claim, inspections, and
5 notices of acceptance or rejection of settlement
6 offers; providing that an authorized representative of
7 a claimant may act on the behalf of the claimant if
8 the claimant is a business entity; prohibiting a
9 representative of the claimant from acting without the
10 claimant's knowledge if the claimant is an individual;
11 requiring, rather than authorizing, certain persons to
12 serve copies of notices of claim to certain
13 professionals; providing for mediation under certain
14 circumstances, subject to certain requirements;
15 revising provisions relating to tolling certain
16 statutes of limitations; providing an effective date.
17
18 Be It Enacted by the Legislature of the State of Florida:
19
20 Section 1. Paragraph (a) of subsection (1) and subsections
21 (2), (3), (7), and (10) of section 558.004, Florida Statutes,
22 are amended to read:
23 558.004 Notice and opportunity to repair.—
24 (1)(a) In actions brought alleging a construction defect,
25 the claimant shall, at least 60 days before filing any action,

26 or at least 120 days before filing an action involving an
27 association representing more than 20 parcels, serve written
28 notice of claim, personally signed by the claimant, on the
29 contractor, subcontractor, supplier, or design professional, as
30 applicable, which notice shall refer to this chapter. If the
31 construction defect claim arises from work performed under a
32 contract, the ~~written~~ notice of claim must be served on the
33 person with whom the claimant contracted. For purposes of this
34 section, if the claimant is a business entity, such as a
35 corporation, limited liability company, partnership, limited
36 partnership, proprietorship, firm, enterprise, franchise, or
37 association, an authorized representative of the claimant may
38 act on the behalf of the claimant. However, if a claimant is an
39 individual, a representative of the claimant may not act without
40 the claimant's knowledge.
41 (2) Within 30 days after service of the notice of claim,
42 or within 50 days after service of the notice of claim involving
43 an association representing more than 20 parcels, the person
44 served with the notice of claim under subsection (1) is entitled
45 to perform a reasonable inspection of the property or of each
46 unit subject to the claim to assess each alleged construction
47 defect. An association's right to access property for either
48 maintenance or repair includes the authority to grant access for
49 the inspection. The claimant shall provide the person served
50 with notice under subsection (1) and such person's contractors

51 or agents reasonable access to the property during normal
52 working hours to inspect the property to determine the nature
53 and cause of each alleged construction defect and the nature and
54 extent of any repairs or replacements necessary to remedy each
55 defect. The claimant and any consultants retained by the
56 claimant with respect to the claim must be physically present at
57 the inspection to identify the location of the alleged
58 construction defects. The person served with notice under
59 subsection (1) shall reasonably coordinate the timing and manner
60 of any and all inspections with the claimant to minimize the
61 number of inspections. The inspection may include destructive
62 testing by mutual agreement under the following reasonable terms
63 and conditions:
64 (a) If the person served with notice under subsection (1)
65 determines that destructive testing is necessary to determine
66 the nature and cause of the alleged defects, such person shall
67 notify the claimant in writing.
68 (b) The notice shall describe the destructive testing to
69 be performed, the person selected to do the testing, the
70 estimated anticipated damage and repairs to or restoration of
71 the property resulting from the testing, the estimated amount of
72 time necessary for the testing and to complete the repairs or
73 restoration, and the financial responsibility offered for
74 covering the costs of repairs or restoration.
75 (c) If the claimant promptly objects to the person

76 selected to perform the destructive testing, the person served
77 with notice under subsection (1) shall provide the claimant with
78 a list of three qualified persons from which the claimant may
79 select one such person to perform the testing. The person
80 selected to perform the testing shall operate as an agent or
81 subcontractor of the person served with notice under subsection
82 (1) and shall communicate with, submit any reports to, and be
83 solely responsible to the person served with notice.
84 (d) The testing shall be done at a mutually agreeable
85 time.
86 (e) The claimant or a representative of the claimant may
87 be present to observe the destructive testing.
88 (f) The destructive testing shall not render the property
89 uninhabitable.
90 (g) There shall be no construction lien rights under part
91 I of chapter 713 for the destructive testing caused by a person
92 served with notice under subsection (1) or for restoring the
93 area destructively tested to the condition existing <u>before</u> ~~prior~~
94 ~~to~~ testing, except to the extent the owner contracts for the
95 destructive testing or restoration.
96
97 If the claimant refuses to agree and thereafter permit
98 reasonable destructive testing, the claimant shall have no claim
99 for damages which could have been avoided or mitigated had
100 destructive testing been allowed when requested and had a

101 feasible remedy been promptly implemented.
102 (3) Within 10 days after service of the notice of claim,
103 or within 30 days after service of the notice of claim involving
104 an association representing more than 20 parcels, the person
105 served with notice under subsection (1) must ~~may~~ serve a copy of
106 the notice of claim to each contractor, subcontractor, supplier,
107 or design professional whom it reasonably believes is
108 responsible for each defect specified in the notice of claim and
109 shall note the specific defect for which it believes the
110 particular contractor, subcontractor, supplier, or design
111 professional is responsible. The notice described in this
112 subsection may not be construed as an admission of any kind.
113 Each such contractor, subcontractor, supplier, and design
114 professional may inspect the property as provided in subsection
115 (2).
116 (7)(a) A claimant who receives a timely settlement offer
117 must accept or reject the offer by serving written notice of
118 such acceptance or rejection, personally signed by the claimant,
119 on the person making the offer within 45 days after receiving
120 the settlement offer. If a claimant initiates an action without
121 first accepting or rejecting the offer, the court shall stay the
122 action upon timely motion until the claimant complies with this
123 subsection.
124 (b)1. Before rejecting the offer, the claimant shall serve
125 a written demand for mediation on the person making the offer.

126 The demand must explain why the claimant considers the offer
127 inadequate. Unless mediation is waived in writing by the person
128 making the offer, the parties must, within 20 days after service
129 of the demand for mediation, mutually select an independent
130 certified mediator and subsequently meet with the mediator to
131 attempt to resolve the dispute. If the parties do not mutually
132 select, or are not able to agree on, an independent certified
133 mediator within the specified period, each party must select an
134 independent certified mediator, and the selected mediators must
135 then mutually select an independent certified mediator to
136 conduct the mediation.
137 2. The mediation must take place in the county in which
138 the subject real property is located, at a mutually convenient
139 date, time, and location to be selected by the mediator, unless
140 otherwise agreed to by the parties. The mediator may extend the
141 date of the meeting for good cause shown by either party or upon
142 stipulation of both parties. The person making the offer bears
143 the costs of mediation. Mediation must be conducted by a
144 certified circuit court mediator, pursuant to the applicable
145 mediation rules of practice and procedures for circuit courts
146 adopted by the Florida Supreme Court and pursuant to the
147 Mediation Confidentiality and Privilege Act, unless otherwise
148 agreed to by the parties. The time for serving written notice
149 under paragraph (a) is tolled until the waiver of mediation by
150 the person making the offer or until the mediator declares an

151 impasse, whichever occurs earlier.
152 (10) A claimant's service of the written notice of claim
153 under subsection (1) tolls the applicable statute of limitations
154 relating to any person covered by this chapter and any bond
155 surety until the later of:
156 (a) Ninety days, or 120 days, as applicable, after service
157 of the notice of claim pursuant to subsection (1);
158 (b) Thirty days after the mediation conducted pursuant to
159 paragraph (7)(b) is declared to be at an impasse by the
160 mediator;
161 (c) Thirty days after waiver of the mediation by the
162 person making the offer pursuant to paragraph (7)(b); or
163 (d) (b) Thirty days after the end of the repair period or
164 payment period stated in the offer, if the claimant has accepted
165 the offer. By stipulation of the parties, the period may be
166 extended and the statute of limitations is tolled during the
167 extension.
168 Section 2. This act shall take effect July 1, 2018.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 6017 Tobacco Settlement Agreement
SPONSOR(S): Byrd
TIED BILLS: None **IDEN./SIM. BILLS:** SB 124

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee		MM MacNamara	Bond WB
2) Appropriations Committee			
3) Judiciary Committee			

SUMMARY ANALYSIS

In civil litigation, a successful party may initiate collection activities on a judgment entered by the trial court. An appeal does not restrict the right of the successful party to collect the judgment unless the court enters a stay of execution pending the appeal. A stay is automatically granted if the appealing party posts a bond or other surety in an amount equal to the judgment plus two years' interest, except as otherwise provided by law.

In 1997, the state and four large tobacco companies entered into a settlement agreement for all past, present, and future claims by the state. Current law caps the total required amount of all appeal bonds in civil actions filed by private individuals against one of those four companies at $200 million and requires that a stay entered by the lower tribunal remain in effect during the pendency of all review proceedings. In addition to the cap on appeal bonds for these companies, current law provides procedural rules related to changing or collecting the bonds and imposes reporting requirements on the companies and the Supreme Court in connection with these appeals.

This bill repeals the special appeal bond limit for appeals by any of the four settling tobacco companies. The bill also repeals the procedural rules and reporting requirements mandated under current law. Other appeal bond limits may apply.

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

The bill has an effective date of July 1, 2018.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The unsuccessful party may appeal any trial court judgment. An appeal does not restrict the right of the successful party to initiate collection activities on that judgment, referred to as "execution" on the judgment, unless the trial court enters a stay of execution pending the appeal. Stays of execution are governed by applicable law and by the Florida Rules of Appellate Procedure.[1] In the case of appeals of judgments for the payment of money, a stay of execution is conditioned on the posting of an appeal bond.

Appeal Bonds in General

Rule 9.310(b)(1) of the Florida Rules of Appellate Procedure provides that, if the judgment is solely for the payment of money, a party may obtain an automatic stay pending appeal by posting a good and sufficient bond (known as a supersedeas bond) equal to the principal amount of the judgment plus twice the statutory rate of interest.[2] A "supersedeas" is often defined as either a suspension of the power of the trial court to issue an execution on a judgment or decree from which an appeal has been taken or, if execution has issued, a prohibition emanating from the appellate court against further proceedings under the execution.[3]

The supersedeas bond required for an automatic stay of execution may be satisfied in the form of cash, deposited into the registry of the circuit court in the county where the judgment was entered,[4] or may be in the form of a surety bond that is posted with the court. Posting or depositing this security serves to protect the successful party from being adversely affected by the supersedeas or stay when a money judgment or decree is appealed. Specifically, if a judgment debtor loses the appeal, the cash or bond deposited or posted with the court is used to satisfy the judgment.

Following a decision by the intermediate appellate court, this stay is lifted. An unsuccessful appellant is required to demonstrate likelihood on the merits in the Supreme Court and irremediable harm should a stay pending review not be granted in order to obtain a supersedeas at the Supreme Court level.[5]

A court clerk is entitled to fees for examining bond certificates issued by surety companies, and also for receiving registry deposits which would occur if a party deposited cash as their form of security.[6] Court clerks ordinarily have discretion to deposit such cash receipts with their local depository institution, commingled with county funds, unless in a particular case a court enters a specific escrow order.

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[1] Fla. R. App. P. 9.310(a) to (f).

[2] As of January 1, 2018, the interest rate on judgments, set by the Chief Financial Officer pursuant to s. 55.03, F.S., is 5.53% per annum or 0.0151507% per day. See https://www.myfloridacfo.com/division/aa/vendors/. By way of comparison, the interest rate on judgments in 2003, when s. 569.23, F.S. was enacted, was 6% per annum. In 2009, when the statute was amended, the interest rate on judgments was 8% per annum.

[3] The term "supersedeas" though not used in the rule, is often used by the courts to refer to a stay pending review.

[4] Fla. R. App. P. 9.310(c)(1).

[5] See Fla. R. App. P. 9.310, Committee Notes; *See also State ex rel. Price v. McCord*, 380 So.2d 1037, 1039 (Fla. 1980) ("The effect of these rules is to make the decisions of the district courts of appeal presumptively final in money judgment (as well as most other) matters, subject to an applicant's showing that there is both a likelihood of success in the Supreme Court and irremediable harm by the denial of a stay pending review in that Court. Only upon such a showing will the stay entered by the trial court remain in effect to protect the applicant.")

[6] See s. 28.24(10)(a)(1-2), F.S. (Allowing the clerks of circuit courts to charge of a fee in an amount equal to 3% of the first $500 received plus 1.5% on each subsequent $100 received.). See also s. 28.231, F.S. (granting any state appellate or county or state trail court the power collect fees as the clerk of the circuit court.); s. 28.24(14), F.S. (provides for a fee of $3.50 for validating certificates or bonds).

Exceptions to Bond Requirement

Florida law has several exceptions to the appeal bond requirement found at Florida Rules of Appellate Procedure 9.310:

- Section 45.045(2), F.S., provides that a party seeking a stay of execution may move the court to reduce the amount of supersedeas bond required to obtain such stay on equitable grounds.

- Section 45.045(1), F.S., applies a $50 million bond cap, for each appellant, on all supersedeas bonds required in any civil action brought under any legal theory, regardless of the judgment appealed. This figure is adjusted for inflation, the cap is approximately $60 million presently.

- Section 768.733, F.S., applicable to class action lawsuits, sets a cap of the lessor of either the amount of the punitive damages judgment, plus twice the statutory interest rate or 10% of the appellant's net worth to stay execution pending appeals on punitive damages awards. In either instance, the bond required is capped at $100 million.

- Section 569.23, F.S., regarding certain tobacco lawsuits, discussed further infra.

Tobacco Lawsuits

In 1995, the state sued the "Big Four" tobacco companies (Phillip Morris, R.J. Reynolds, Brown and Williamson, and Lorillard), asserting various claims for monetary damages and injunctive relief.[7] The suit was resolved in 1997 through a settlement agreement, imposing both monetary and non-monetary sanctions on the tobacco companies. Under the terms of the agreement, the state was to receive $12.1 billion over 25 years along with 5.5% of the unadjusted amounts in perpetuity. Subsequent to the state's settlement, the Big Four and some other smaller tobacco producers settled with 46 states,[8] the District of Columbia, the Commonwealth of Puerto Rico and four U.S. territories, referred to as the Master Settlement Agreement ("MSA"). The total unadjusted cost of the state settlements ranges between $212 billion to $246 billion over the first 25 years, subject to numerous adjustments ranging from inflation to fluctuations in cigarette consumption and market share. From FY 2017-18 through FY 2025-26, the state estimates it will receive approximately $3.47 billion in its share of tobacco settlement payments under the agreement.[9]

In March of 2003, an Illinois trial court ordered Phillip Morris Inc. to post a $12 billion bond to file an appeal in a class-action tobacco lawsuit.[10] Following the court's ruling, there was speculation that Phillip Morris would not be financially able to post the bond, could default on its $2.6 billion obligation under the MSA,[11] and therefore might seek bankruptcy protection.[12] Phillip Morris filed a Request for Reduction of Bond and Stay of Enforcement of the Judgment. In response, a Brief of *Amici Curiae* was filed by the chief law enforcement officers of 37 jurisdictions urging the court to exercise its discretion to

[7] See *State of Fla. et al. v. Am. Tobacco Co., et al.*, Case No. 95-1466 AH (Fla. 15th Cir. Ct.).

[8] Like Florida, the states of Texas, Minnesota and Mississippi also entered into earlier individual settlement agreements.

[9] State of Florida Revenue Estimating Conference for Tobacco Settlement Payments, *Executive Summary* (8/10/2017)

[10] See *Price v. Phillip Morris, Inc.*, Cause No. 00-L-112 (Ill. 3d Cir. Ct. 2003) At issue in this class-action lawsuit was whether the defendant had violated the Illinois Consumer Fraud Act and the Uniform Deceptive Trade Practices Act in its manufacturing, promoting, marketing, distributing and selling Marlboro Lights and Cambridge Lights and allegedly declaring them safer for consumers than "regular" cigarettes. The court found in favor of the plaintiffs and awarded the sum of $7.1005 billion in compensatory damages. In addition, the court ordered the defendant to pay punitive damages in the amount of $3 billion to the State of Illinois. Enforcement could be stayed only if an appeal bond was presented and approved pursuant to Illinois court rule in the amount of $12 billion.

[11] Under the MSA, Phillip Morris' next payment following the judgment was due April 15, 2003.

[12] See, e.g., Associated Press, "Attorneys general ask to lower Phillip Morris bond," BRADENTON HERALD, April 8, 2003; Ameet Sachdev, "Phillip Morris appeals ruling: Seeks to subtract punitive damages of $3 billion," CHICAGO TRIBUNE, April 5, 2003; Editorial, "Legal trouble for tobacco," BOSTON HERALD, April 5, 2003; Sun-Times Springfield Bureau, "Thompson: Cap tobacco bond; Says $12 bil. appeal cost can hurt state," CHICAGO SUN-TIMES, March 26, 2003.

reduce the appeal bond so as not to interfere with the interests of the states in receipt of the settlement payments. The court in *Price* entered an order substantially reducing the appeal bond and no MSA payments were missed.

Engle Progeny Litigation

In 1994, a Florida resident, Howard Engle, filed a national class-action lawsuit against R.J. Reynolds Tobacco Co., and the other "Big Four" tobacco companies. The plaintiff smokers alleged that the tobacco companies had misled consumers about the dangers of their cigarettes. The class was later limited to Florida residents.[13]

In May 2000, a Florida jury found the companies liable for misleading consumers and awarded the plaintiffs $145 billion in damages, one of the largest jury awards ever in the U.S. The tobacco companies appealed and argued that the class of plaintiffs was too diverse and the punitive damage award was excessive. In 2003, the Florida Third District Court of Appeal agreed and reversed the judgment of punitive damages and decertified the class.[14]

On July 6, 2006, the Florida Supreme Court affirmed the reversal of the punitive damages and the decertification of the class, but it allowed former class members to file individual lawsuits.[15] The Florida Supreme Court also permitted the individual plaintiffs, known collectively as the "*Engle* progeny," to rely on the factual findings in the original lawsuit under the legal principal of *res judicata*.[16] As a result, the individual plaintiffs would not have to prove that the tobacco companies misled consumers, but would have to prove that they relied on those misleading representations and were harmed as a result.

Tobacco Lawsuits and Appeals Post-*Engle*

Section 569.23, F.S. was enacted in 2003[17] to require trial courts to automatically stay the execution of judgments entered in favor of class members during the pendency of civil appeals involving any of the four major tobacco companies that entered into the settlement agreement with the state in 2003 following the posting of the required supersedeas bond. The supersedeas bond required to stay the execution of judgment for appeals involving the four tobacco companies was capped at $100 million, collectively.

At the time the Supreme Court decertified the *Engle* class, an estimated 7,000 former members of the class could file individual lawsuits. According to records provided by the Supreme Court, approximately 3,000 individual trial court lawsuits filed by former class members are currently pending.[18]

Current Law on Appeal Bonds of Certain Tobacco Companies

In 2009, s. 569.23, F.S. was amended[19] to extend the application of the statute to include civil actions against the four major tobacco companies brought by persons who are members of the decertified *Engle* class.[20] This amendment increased the overall supersedeas bond cap to $200 million dollars, and placed a limit on the amount of each bond in actions filed by members of the decertified class.

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[13] *R.J. Reynolds Tobacco Co. v. Engle*, 672 So.2d 39 (Fla. 3d DCA 1996).
[14] *Liggett Group, Inc. v. Engle*, 853 So.2d 434 (Fla. 3d DCA 2003).
[15] *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), *cert. denied,* 552 U.S. 941 552 U.S. 941, 128 S. Ct. 96, 169 L. Ed. 2d 244 (2007).
[16] "*Res judicata*" refers to the legal concept that once a point in controversy has been legally determined by a court judgment, it cannot be contested again by the parties in the same action or in subsequent proceedings. *See* BLACK'S LAW DICTIONARY, FIFTH EDITION (1979).
[17] Ch. 2003-133, L.O.F. (SB 2826)
[18] Id.; See also What is the "Engle Progeny" Litigation?, Tobacco Control Legal Consortium, September 2015, available at: publichealthlawcenter.org/sites/default/files/resources/tclc-fs-engle-progeny-2015.pdf
[19] Ch. 2009-188, L.O.F. (SB 2198).
[20] Prior to the decertification, the class action suit would have been covered by the supersedeas bond cap in s. 569.23, F.S. However, the separate lawsuits were not covered by the statute, which meant that the tobacco companies would have had to post supersedeas bonds in accordance with state law and rules of court in any lawsuit filed by a former member of the class.

Specifically, it capped the total cumulative value of all security based upon or equal to the appellant's proportionate share of liability in all cases pending appeal plus twice the statutory rate of interest.[21] The amount of the security (or bond) required is based on the following chart:

Appeal Bond Caps		
TIER-Number of Judgments	Amount of Security per Judgment	Maximum Total Security
1-40	$5,000,000	$200,000,000
41-80	$2,500,000	$200,000,000
81-100	$2,000,000	$200,000,000
101-150	$1,333,333	$199,999,950
151-200	$1,000,000	$200,000,000
201-300	$ 666,667	$200,000,100
301-500	$ 400,000	$200,000,000
501-1,000	$ 200,000	$200,000,000
1,001-2,000	$ 100,000	$200,000,000
2,001-3,000	$ 66,667	$200,001,000

Additionally, "the trial courts shall automatically stay the execution of any judgment in any such actions during the pendency of all appeals or discretionary appellate reviews of such judgment in Florida courts."[22] As such, supersedeas bonds posted by these four companies act to stay the execution of monetary judgments during Supreme Court appellate review proceedings without having to show a likelihood of success on the merits and irremediable harm.

In a 2011 opinion the First District Court of Appeal determined that s. 569.23(3), F.S., may have a "broader application than the *Engle* progeny cases."[23] In other words, under the current language of the statute, the bond cap may potentially be applied to judgments entered against one of the big four tobacco companies in lawsuits filed by individuals who are not members of the decertified *Engle* class.

In addition to capping the supersedeas bonds in such actions, s. 569.23, F.S. mandates that all security be posted or deposited with the Clerk of the Supreme Court. As sole recipient of securities from the tobacco companies, the clerk must collect fees for receipt of security as authorized by law. All fees collected are to be deposited in the State Courts Revenue Trust Fund and the clerk is required to utilize the services of the Chief Financial Officer, as needed, for the custody and management of the security posted or deposited with the clerk.

The statute also provides rules for the payment of judgments following an appeal and procedural requirements for changing the amount of security required. Lastly, the statute imposes several reporting and record retention requirements on the tobacco companies and the Clerk of the Supreme Court with respect to these lawsuits and the amount of security posted or paid.[24] Section 569.23, F.S. was found constitutional in *R.J. Reynolds Tobacco Co., v. Hall*, 67 So. 3d 1084 (Fla. 1st DCA 2011).

Currently, there are 56 tobacco appeals pending in the state, totaling approximately $525 million in trial court judgments entered against the tobacco companies.[25] In these cases, the tobacco companies have collectively posted $265 million in bonds.[26] In all, roughly 100 appeals on judgments totaling over

[21] s. 569.23(3)(a)2, F.S.
[22] s. 569.23(3)(a)1, F.S. In contrast, supersedeas bonds posted pursuant to Fla. R. App. P. 9.310(e) only have the effect of staying monetary judgments during the initial appellate courts review. See FN. 5.
[23] *R.J. Reynolds Tobacco Co. v. Hall*, 67 So.3d 1084, 1092 (Fla. 1st DCA 2011).
[24] s. 569.23(3)(e), F.S.
[25] Data used for calculating total appeal bonds and judgments in such actions was provided by the Supreme Court and calculated by staff. The data for appeals bonds is located on the Court's website. See www.floridasupremecourt.org/clerk/bonds.shtml (Data provided is current as of 1/3/17).
[26] Id. In cases where a judgment is entered against multiple tobacco companies, each individual company will post a bond for all, or a portion of, the total judgment.

$1 billion have been filed by the tobacco companies since the Supreme Court decertified the *Engle* class in 2006.[27]

Effect of Repeal

This bill repeals the supersedeas bond cap that specifically limits the amount of the supersedeas bond the four major tobacco companies are required to post and thus requires them to post an appeal bond in accordance with the Florida Rules of Appellate Procedure, except as otherwise provided by law.

Furthermore, these bonds will no longer be required to be posted with the Clerk of the Supreme Court. Rather, bonds will be posted with or deposited in the registry of the clerk of court in the county where the judgment was entered. Also, while the remaining number of *Engle* progeny cases is declining, the statute may be applied to cases filed by individuals who were not members of the *Engle* class.[28] Therefore, the total number of tobacco cases affected by the repeal is unknown.

B. SECTION DIRECTORY:

Section 1 repeals s. 569.23, F.S., relating to tobacco settlement agreements.

Section 2 provides an effective date of July 1, 2018.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate fiscal impact on litigants filing suit against a tobacco company as well as the tobacco companies themselves. It appears that this bill may increase costs to tobacco companies for premiums required to post a surety bond and would correspondingly increase revenues to bonding companies.

[27] Id.

[28] See *R.J. Reynolds Tobacco Co. v. Hall*, 67 So.2d at 1092. ("Section 569.23(3)...was specifically intended to apply to the *Engle* litigation and, at the time of the passage, the scope of the statute's application was limited to that litigation. This is clear from the statute's legislative history. However, the statute is not limited to judgments entered in favor of *Engle* plaintiffs; it applies in any civil case against an FSA signatory brought by or on behalf of a member of a decertified class action.").

D. FISCAL COMMENTS:

The bill would reduce the workload for the Clerk of the Supreme Court by approximately five hours a month.[29]

Under current law, when an appeal bond is deposited with the clerk of a circuit court in the form of cash, clerks may collect a percentage of the cash deposit as a fee.[30] If, however, a surety bond is posted with the clerk, the clerk is entitled to a nominal flat fee.[31] As such, if any of the four tobacco companies satisfied their appeal bond obligations in the future by depositing cash with a clerk of court, the clerk of court would see an increase in revenue. However, since the amendments to s. 569.23, F.S., none of the tobacco companies have satisfied their appeal bond obligations by depositing cash with the Clerk of the Supreme Court, all have done so by posting a surety bond.[32]

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

[29] Office of the State Court Administrator 2017 Judicial Impact Statement for HB 6011 (2017 Session) (January 19, 2017).

[30] See s. 28.24(10)(a)(1-2), F.S. (Allowing the clerks of circuit courts to charge of a fee in an amount equal to 3% of the first $500 received plus 1.5% on each subsequent $100 received.)

[31] See s. 28.24(14), F.S. (Provides for a fee of $3.50 for validating certificates or bonds) and s. 28.24(19), F.S. (Provides for a fee of $8.50 for approving bonds).

[32] See fn 29.

1 A bill to be entitled
2 An act relating to a tobacco settlement agreement;
3 repealing s. 569.23, F.S., relating to security
4 requirements for tobacco settlement agreement
5 signatories, successors, parents, and affiliates;
6 providing an effective date.
7
8 Be It Enacted by the Legislature of the State of Florida:
9
10 Section 1. Section 569.23, Florida Statutes, is repealed.
11 Section 2. This act shall take effect July 1, 2018.

HB 6525

STORAGE NAME: h6525.CJC
DATE: 1/8/2018

January 8, 2018

SPECIAL MASTER'S FINAL REPORT

The Honorable Richard Corcoran
Speaker, The Florida House of Representatives
Suite 420, The Capitol
Tallahassee, Florida 32399-1300

Re: HB 6525 - Representative Byrd
Relief/Marcus Button/Pasco County School Board

THIS IS AN OPPOSED EXCESS JUDGMENT CLAIM FOR A TOTAL OF $1,507,364, BASED ON A JURY VERDICT AWARDING DAMAGES TO MARK, ROBIN, AND MARCUS BUTTON FOR THE DAMAGES CAUSED BY THE NEGLIGENCE OF A PASCO COUNTY SCHOOL BUS DRIVER. THE SCHOOL BOARD HAS PAID THE STATUTORY LIMIT PURSUANT TO SECTION 768.28, F.S.

FINDINGS OF FACT:

This matter arises out of a motor vehicle accident that occurred on September 22, 2006, in Pasco County, Florida, at the intersection of Meadow Pointe Boulevard and State Road 54. Meadow Pointe Boulevard runs north/south and dead ends into State Road 54, a straight, flat road which runs east/west. As the single eastbound lane of State Road 54 nears the intersection with Meadow Pointe Boulevard, it splits into two lanes—one for turning right at the intersection and one for continuing on straight through the intersection. Crucially, at the time of the accident, drivers on State Road 54 had the right-of-way at the intersection. Meadow Pointe Boulevard was controlled by a stop sign, while State Road 54 had no traffic controls.[1]

On the morning of September 22, 2006, Jessica Juettner, a student at Wesley Chapel High School, picked up 16-year-old Marcus Button, her fellow schoolmate, at his home around 7:00

[1] At some point after the accident, a traffic light was installed at the intersection.

a.m. to drive them both to school. Jessica sat in the driver's seat, and Marcus sat in the front passenger seat. At some point, Marcus told Jessica that he had forgotten some of his things and Jessica turned the car around to go back to Marcus's house.

As Jessica drove her Dodge Neon east on State Road 54, John Kinne, a Pasco County School Board bus driver,[2] driving a Pasco County school bus northbound on Meadow Pointe Boulevard, pulled up to the intersection. He stopped the bus at the stop sign, prepared to make a left-hand turn, and drove the school bus into the intersection, straight into Jessica's path. Jessica tried to brake to avoid hitting the school bus, but to no avail. Jessica's eastbound Neon collided with the school bus and slid underneath the bus, ultimately coming to rest facing the opposite direction it had been traveling. The Neon's driver-side and passenger-side airbags both deployed. The windshield of the Neon splintered and collapsed inward towards Jessica and Marcus. The dashboard was crushed, contorting and pinning Marcus's body inside the car.

A witness, William Fox, was in a large SUV waiting in line behind the school bus and saw the whole accident. Mr. Fox was the first person on the scene. He got out of his SUV and ran to the Neon immediately to help Jessica and Marcus, where he observed Marcus in the passenger seat pinned in, covered in glass, and bleeding from the head.

Mr. Fox testified in his deposition that the Neon was going a normal speed for the highway and that it was "incredible that the bus pulled out because there was absolutely no place for the car to go." Mr. Fox said he believed the Neon could not have done anything to avoid the accident.

Mr. Kinne, the bus driver, testified in his deposition that even though he looked both ways and saw several vehicles coming from his left traveling eastbound, it appeared they were making a right-hand turn at the intersection, and so he believed the intersection was clear. Mr. Kinne said he did not see the Neon until it was very close to his bus—too late to avoid the accident. Mr. Kinne was cited as a result of his fault on the roadway.

Marcus sustained facial and skull fractures, brain damage, and vision loss. He was airlifted to St. Joseph's Children's Hospital, where he recovered in a medically-induced coma. Marcus was later transferred to Tampa General Hospital for rehabilitation.

Marcus's injuries from the accident have been life-altering, causing him pain, discomfort, loss of sensory ability, and numerous visits to many different doctors and specialists.[3]

[2] Mr. Kinne testified that he began driving buses for the Pasco County School Board in August of 2006—that is, about a month before the accident occurred.
[3] Medicaid liens were imposed for care that Marcus received after the accident.

Marcus is legally blind in his right eye and has no sense of smell. Marcus continues to suffer from memory loss, headaches, and difficulty sleeping. He struggles to concentrate and stay on task.

There is conflicting evidence as to whether Marcus was wearing a seatbelt at the time of the accident. Claimants argue that Marcus was wearing a seatbelt, though at trial Claimants' own expert witness testified that he had no opinion as to whether Marcus was wearing a seatbelt. Respondent offered testimony indicating that Marcus was not wearing a seatbelt.

Respondent also argued at trial that the driver of the Neon, Jessica Juettner, was negligent. Respondent sought to elicit testimony regarding the lack of skid marks on the road to imply that Jessica was not paying attention to the road and thus did not have sufficient time to brake to avoid the collision.

At trial the jury, apparently believing Marcus was not wearing a seatbelt, allocated 15% of the fault to Marcus himself as a passenger and 20% of the fault to the driver, Jessica Juettner. After considering the arguments at the Special Master hearing, I see no reason to disturb the jury's apparent finding that Marcus was not wearing a seatbelt; and I find that the jury's allocation of 15% of the fault to Marcus and 20% of the fault to Jessica Juettner is reasonable and supported by the evidence.

LITIGATION HISTORY:

On July 9, 2009, Claimants filed an amended complaint against Respondent in the Sixth Judicial Circuit. The case went to a jury, which found damages of $455,225.92 for Mark and Robin Button[4] and $2,142,565.21 for Marcus Button. The jury apportioned fault as follows: 65% to Respondent Pasco County; 20% to Jessica Juettner, as the driver of the car in which Marcus was riding; and 15% to Marcus himself.

After reducing the total awards to account for the fault of other parties, the court entered a final judgment against Respondent in the amount of $289,396.85 for Mark and Robin Button and $1,380,967.39 for Marcus Button. Because Respondent had already paid $37,000 for property damages and to settle with Jessica Juettner, Respondent paid Claimants $163,000, the maximum amount remaining under the sovereign immunity cap of $200,000.

CLAIMANTS' POSITION:

Claimants argue Marcus has suffered a "multi-million dollar injury" and that Respondent caused the injury by negligently drawing its bus routes, by negligently allowing a poorly-trained bus driver to drive its bus, and by making a negligent left-hand turn without the right-of-way. Claimants object to the jury's allocation of fault to the driver of the car and also argue that Marcus was wearing his seatbelt.

[4] Of the amount of damages awarded to Marcus's parents, $105,225.92 was for medical expenses and $350,000 was for loss of consortium.

RESPONDENT'S POSITION:

Respondent strongly objects to the passage of this claim bill, arguing a lack of causation between the accident and the problems Marcus currently experiences. Respondent asserts that Marcus has always had poor grades and behavioral problems. Respondent also argues that the driver of the car in which Marcus was riding, Jessica Juettner, contributed to the accident by paying insufficient attention to the road.

Respondent requests that if the claim bill passes, payments should be structured and payable in equal amounts over a five-year period; and that reverter and discontinuation clauses should be added to provide for the possibilities of the death or criminal conviction of the Claimants.

CONCLUSIONS OF LAW:

Regardless of whether there is a jury verdict or settlement, every claim bill must be reviewed *de novo* in light of the elements of negligence.

Duty & Breach

It is clear that Respondent breached a duty to Claimants here. Under Florida law, a driver approaching an intersection with a stop sign must stop, and after stopping, must "yield the right of way to any vehicle" in the intersection or which is approaching so closely as to constitute a hazard.[5] Mr. Kinne, the driver of the county bus, owed a duty to the car in which Marcus was riding, as that car had no stop sign and enjoyed the right-of-way. Mr. Kinne breached his duty to Marcus Button when he proceeded through the intersection even though Mr. Kinne had a stop sign and did not have the right-of-way.

When Mr. Kinne breached this duty, he was driving a Pasco County school bus as a Pasco County employee on his bus route. Thus, Respondent is liable for Mr. Kinne's actions under the doctrine of respondeat superior.

Causation

The most hotly contested issue between the parties is whether the accident caused Marcus's health issues. Claimants argue that the accident caused or at least contributed to Marcus's problems; while Respondent counters that Marcus has always had those problems.

Jessica Juettner (the driver of the car and friend of Marcus) testified at trial that Marcus had changed after the accident. Specifically, she stated that after the accident, Marcus had "a completely different personality," looked different, was a lot skinnier, and had problems with his eye. She further testified that although Marcus used to be shy, after the accident Marcus became loud, began saying "the first thing that comes to his mind," and made inappropriate jokes.

---

[5] S. 316.123(2)(a), F.S.

I find that Claimants have carried their burden to prove causation. While it is apparent that Marcus has always had certain problems, the record reflects that Marcus sustained life-altering injuries as a result of the accident. These injuries have left Marcus worse off physically, mentally, and emotionally than he was before the accident.

Damages
A life care plan prepared for Marcus indicates future costs of care between $6,000,000 and $11,000,000 and that lost wages over the course of his life will be between $365,000 and $570,000.[6] Based on this life plan and other evidence in the record, I find that the total amount of $1,507,364 sought by Claimants is reasonable.

ATTORNEY'S/ LOBBYING FEES: Claimants' attorneys will limit their fees to 25 percent of any legislative award. Out of these fees, a lobbyist fee for 5% of the total award will be paid. Outstanding costs are $4,498.91.

COLLATERAL SOURCES: Jessica Juettner's liability insurance company paid $10,000 to Claimants after the accident, and Claimants' uninsured motorist insurance paid $100,000.

RESPONDENT'S ABILITY TO PAY: Respondent states that it is self-insured. There is a general liability fund set aside, but workers' compensation claims take up the vast majority of that fund. Respondent asserts that as of June 30, 2017, the balance of the fund was $560,111.42.

LEGISLATIVE HISTORY: This claim bill was first introduced in 2012 as HB 647. Most recently, 2016 HB 3505 was not heard in the Civil Justice and Claims Subcommittee; 2017 SB 54, which did not have a House companion, was not heard in any Senate committee.

SUGGESTED AMENDMENT: The section addressing the limitation on attorneys' fees should be amended to provide for specific fee amounts.

RECOMMENDATION: I recommend that House Bill 6525 be reported **FAVORABLY**.

Respectfully submitted,

JORDAN JONES

House Special Master

cc: Representative Byrd, House Sponsor
Senator Gibson, Senate Sponsor

[6] Additionally, on May 7, 2010, a federal Social Security Disability hearing officer found Marcus to be disabled according to Social Security regulations.

Miguel Oxamendi, Senate Special Master

1 A bill to be entitled
2 An act for the relief of Marcus Button by the Pasco
3 County School Board; providing an appropriation to
4 compensate Marcus Button for injuries sustained as a
5 result of the negligence of an employee of the Pasco
6 County School Board; providing an appropriation to
7 compensate Mark and Robin Button, as parents and
8 natural guardians of Marcus Button, for injuries and
9 damages sustained by Marcus Button; providing a
10 limitation on the payment of attorney fees; providing
11 an effective date.
12
13 WHEREAS, on the morning of September 22, 2006, Jessica
14 Juettner picked up 16-year-old Marcus Button at his home in
15 order to drive him to Wesley Chapel High School, where both were
16 students, and
17 WHEREAS, as Ms. Juettner drove her Dodge Neon west on State
18 Road 54, Mr. Button realized that he had left his wallet at
19 home, and Ms. Juettner turned her car around and headed back to
20 his home, and
21 WHEREAS, as Ms. Juettner approached Meadow Pointe
22 Boulevard, John E. Kinne, who was driving a 35-foot school bus
23 owned by the Pasco County School Board, pulled out in front of
24 her, and
25 WHEREAS, although Ms. Juettner slammed on the brakes, her

26 car struck the bus between the wheels and slipped underneath the
27 bus, and
28 WHEREAS, while Ms. Juettner suffered only minor injuries,
29 Mr. Button, who was riding in the front passenger seat,
30 sustained facial and skull fractures, brain damage, and vision
31 loss, and
32 WHEREAS, Mr. Kinne and his backup driver, Linda Bone, were
33 the only people on the bus and were not seriously injured, and
34 WHEREAS, Mr. Button was airlifted to St. Joseph's
35 Children's Hospital, where he spent 3 weeks recovering, and then
36 was transferred to Tampa General Hospital for rehabilitation for
37 an additional 6 weeks, and
38 WHEREAS, Mr. Button had to relearn how to walk and
39 currently cannot walk for any substantial length of time without
40 pain, lost most of the sight in his right eye, and suffered
41 facial fractures that left one side of his face higher than the
42 other, and
43 WHEREAS, in addition, Mr. Button can no longer smell, has
44 limited ability to taste, cannot feel textures and, as a result
45 of the brain damage he sustained in the crash, sees and hears
46 things that are not there, speaks with a British or a Southern
47 accent, and is paranoid, and
48 WHEREAS, Mr. Button returned home in November 2006, but his
49 mother, Robin Button, testified, "My son who woke up [in the
50 hospital] was not the same son I gave birth to. He was, but he

51 wasn't. It was him, his skin, but it wasn't him in his skin.
52 Different kid. The son I knew is gone. He died on that day," and
53 WHEREAS, as the operator of a school bus, Mr. Kinne had the
54 duty to drive the bus in a safe manner and in accordance with
55 state law but failed to do so, and
56 WHEREAS, Mr. Kinne was later cited for failing to yield the
57 right-of-way, and
58 WHEREAS, in 2007, Mr. Button's parents, Mark and Robin
59 Button, sued the Pasco County School Board for negligence, and,
60 during the subsequent trial, a pediatric rehabilitation doctor
61 and a neuropsychologist testified that Mr. Button will require
62 24-hour care, counseling, interventions, medical care, and
63 pharmaceuticals for the remainder of his life to cope with his
64 physical symptoms and control his psychotic and delusional
65 behavior; that he continues to suffer from memory loss; and that
66 he has trouble sleeping and struggles to concentrate and stay on
67 task, and
68 WHEREAS, an economist who testified at trial estimated that
69 Mr. Button's future care will cost between $6 million and $10
70 million and that his inability to work will result in the loss
71 of between $365,000 and $570,000 in wages over his lifetime, and
72 WHEREAS, a jury of five men and one woman apportioned
73 responsibility for the crash as follows: the Pasco County School
74 Board, 65 percent; Ms. Juettner, 20 percent; and Mr. Button, 10
75 percent, and

76 WHEREAS, the trial court ordered the Pasco County School
77 Board to pay final judgments of $1,380,967.39 and $289,396.85,
78 respectively, to Mr. Button and his parents, respectively, and
79 WHEREAS, the Pasco County School Board has paid $163,000 of
80 the statutory limit of $200,000 pursuant to s. 768.28, Florida
81 Statutes, applicable at the time the claim arose, to Mr. Button
82 and Mark and Robin Button, as parents and natural guardians of
83 Mr. Button, as compensation for the injuries and damages
84 incurred as a result of the accident, and
85 WHEREAS, the pro rata share of the statutory limit pursuant
86 to s. 768.28, Florida Statutes, paid to Mr. Button is
87 $134,752.10, but the balance of $1,246,215.29 remains unpaid,
88 and
89 WHEREAS, the pro rata share of the statutory limit pursuant
90 to s. 768.28, Florida Statutes, paid to Mark and Robin Button is
91 $28,247.90, but the balance of $261,148.95 remains unpaid, NOW,
92 THEREFORE,
93
94 Be It Enacted by the Legislature of the State of Florida:
95
96 Section 1. The facts stated in the preamble to this act
97 are found and declared to be true.
98 Section 2. The Pasco County School Board is authorized and
99 directed to appropriate from funds of the school board not
100 otherwise encumbered and to draw a warrant, payable to Marcus

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

101 Button, in the amount of $1,246,215.29, to compensate him for
102 injuries and damages sustained due to the negligence of an
103 employee of the school board.
104 Section 3. The Pasco County School Board is authorized and
105 directed to appropriate from funds of the school board not
106 otherwise encumbered and to draw a warrant, payable to Mark and
107 Robin Button, as parents and natural guardians of Mr. Button, in
108 the amount of $261,148.95, to compensate them for injuries and
109 damages sustained by Mr. Button as a result of the accident that
110 occurred on September 22, 2006, due to the negligence of an
111 employee of the Pasco County School Board.
112 Section 4. The amount paid by the Pasco County School
113 Board pursuant to s. 768.28, Florida Statutes, and the amounts
114 awarded under this act are intended to provide the sole
115 compensation for all present and future claims arising out of
116 the factual situation described in this act which resulted in
117 injuries sustained by Mr. Button. The total amount paid for
118 attorney fees may not exceed 25 percent of the total amounts
119 awarded under this act.
120 Section 5. This act shall take effect upon becoming a law.

GENERAL AFFIDAVIT FOR THE RELIEF OF MARCUS BUTTON, ROBIN BUTTON AND MARK BUTTON

PERSONALLY came and appeared before us, the undersigned Notaries, the within named J. Steele Olmstead, (Attorney) resident of Hillsborough County, State of Florida and Mark Pinto of the Fiorentino Group (lobbyist) who is a resident of St. Johns County, State of Florida, and makes this their **Statement** and **General Affidavit** upon oath and affirmation of belief and personal knowledge that the following matters, facts and things set forth are true and correct to the best of their respective knowledge:

1. The claimants have agreed to pay a maximum of 25% for Attorney's fees of any amount ordered by the Legislature, which includes the Lobbyist's compensation.

2. Five percent (5%) of the fees paid to the Attorney shall be paid to the lobbyist.

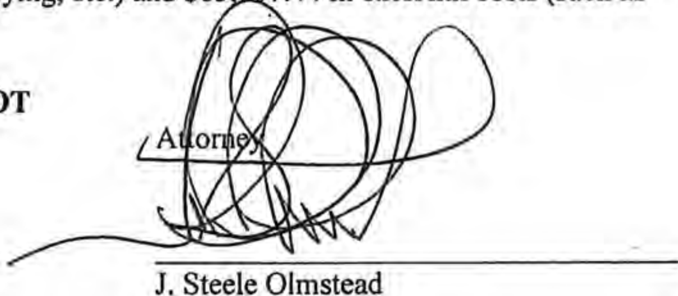
3. There are $4,498.91 in outstanding costs which will be paid from any amount that may be ordered by the Legislature.

4. The amount of $63,981.02 was paid for costs by the Attorney from the Statutory Cap payment. There were no costs paid from the Statutory Cap payment paid by the lobbying firm.

5. a. There are presently $105.19 in **internal** costs (expenses associated with overhead, copying, etc.) and $4,393.72 in **external** costs (such as expert witness fees) for the Attorney. There are no **internal** or **external** costs for the lobbying firm.

b. From the Statutory Cap amount paid, there were $310.58 in **internal** costs (expenses associated with the firm's overhead, copying, etc.) and $63,607.44 in **external** costs (such as expert witness).

FURTHER AFFIANTS SAYETH NOT



Attorney

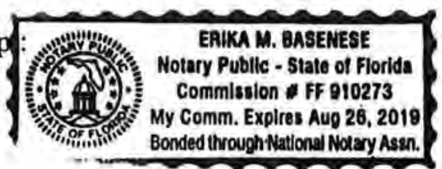
J. Steele Olmstead

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

The foregoing instrument was sworn and acknowledged before me this 1st day of August, 2017, by J. STEELE OLMSTEAD who is personally known to me.

Notary Public

Printed name
my comm. exp.:
comm. no.:

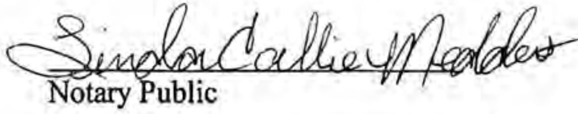


The Fiorentino Group, lobbyists

X ______________________
By

STATE OF FLORIDA
COUNTY OF DUVAL

The foregoing instrument was sworn and acknowledged before me this 6 day of October 6th, 2017, by Mark Pinto who is personally known to me. Florida Drivers License



Notary Public

LINDA CALLIE MEDDERS
Commission # GG 127463
Expires July 31, 2021
Bonded Thru Budget Notary Services

Linda Callie Medders
Printed name
my comm. exp.: July 31, 2021
comm. no.: #GG 127463

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___ (Y/N)
ADOPTED AS AMENDED	___ (Y/N)
ADOPTED W/O OBJECTION	___ (Y/N)
FAILED TO ADOPT	___ (Y/N)
WITHDRAWN	___ (Y/N)
OTHER	_____

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1 Committee/Subcommittee hearing bill: Civil Justice & Claims
2 Subcommittee
3 Representative Byrd offered the following:
4
5 **Amendment**
6 Remove lines 117-119 and insert:
7 injuries sustained by Mr. Button. Of the amount awarded under
8 this act, the total amount paid for attorney fees may not exceed
9 $301,472.85, the total amount paid for lobbying fees may not
10 exceed $75,368.21, and the total amount paid for costs and other
11 similar expenses relating to this claim may not exceed
12 $4,498.91.

STORAGE NAME: h6537.CJC
DATE: 1/8/2018

January 8, 2018

SPECIAL MASTER'S FINAL REPORT

The Honorable Richard Corcoran
Speaker, The Florida House of Representatives
Suite 420, The Capitol
Tallahassee, Florida 32399-1300

Re: HB 6537 - Representative Byrd
Relief/Erin Joynt/Volusia County

THIS IS A CONTESTED CLAIM FOR $1.895 MILLION AGAINST VOLUSIA COUNTY FOR INJURIES AND DAMAGES SUFFERED BY ERIN JOYNT WHEN A VOLUSIA COUNTY TRUCK DROVE OVER HER ON JULY 31, 2011.

FINDINGS OF FACT:

Erin Joynt ("Claimant"), while sunbathing on the beach on July 31, 2011, was run over by a Volusia County pickup truck. She suffered multiple facial fractures and a perforated ear drum. On April 5, 2012, Claimant filed suit against Volusia County ("Respondent"). A trial was held in June 2014, in which a jury returned a verdict for $2.6 million. On appeal, the Fifth District Court of Appeal reduced the verdict to $2 million because economic and medical damages were not supported by the evidence presented at trial. After an amended final judgment was entered on January 12, 2016, the County paid the remainder of the statutory cap of $85,000. Claimant seeks payment of the remainder of the amended final judgment in this claim bill.

On July 30, 2011, Claimant was on vacation with her husband and two children. They were traveling from their home in Wichita, Kansas to their final destination of Walt Disney World. On July 31, 2011, they arrived at Daytona Beach. Around 10 a.m., Claimant's husband and two children were playing in the water

while Claimant rested on the sand, lying on her stomach and sunbathing.

That same morning, Thomas Moderie, a Volusia County beach patrol employee, was driving a Volusia County F-150 pickup truck on the same beach. Mr. Moderie was driving north on the beach when a pedestrian flagged him down to report broken glass on the beach. Mr. Moderie initiated a U-turn, but instead of steering his truck to the left and utilizing the other designated lane for vehicle traffic on the beach, he steered his truck to the right, towards beach patrons. As a result, his truck's left front tire ran over Claimant's head and torso. According to the Florida Highway Patrol Crash Report, Mr. Moderie was not operating his vehicle in emergency mode at the time the collision occurred.

Claimant's eight-year-old daughter witnessed the truck run over her mother. Another beach patron ran to Claimant and rendered first aid as an ambulance was called to the scene. Claimant was taken to nearby Halifax Medical Center, where she spent the next six days recovering from her injuries.

As a result of being run over by Respondent's pickup truck, Claimant suffered multiple cranial and facial fractures, multiple rib fractures, hearing loss, vision problems, and permanent facial paralysis. In the months following the incident, Claimant underwent two procedures. First, she had her perforated eardrum reconstructed in her left ear on August 27, 2011, in Wichita, Kansas.[1] Second, on September 26, 2011, Claimant had a gold weight sewn into her right eyelid to aid her in closing the eye.

LITIGATION HISTORY:

Claimant, along with her husband and two children, filed suit against Volusia County in circuit court alleging negligence by Volusia County for the actions of Mr. Moderie. Part of the suit involved a loss of consortium claim by Claimant's husband and two children. Prior to trial, Claimant's husband settled with the County for $134,500 and the children's claims were settled for a total of $15,000; and Respondent admitted liability and solely contested damages. The trial began on June 23, 2014, and lasted four days. Claimant presented evidence of the cost of her ongoing care, such as her deficient hearing ability that could eventually require a hearing aid. Claimant also presented evidence that she might not be able to continue her employment as a paraeducator, assisting elementary age students in reading. On June 27, 2014, the jury returned a verdict for $2,600,000, broken down as follows:

- $500,000 for past pain and suffering;
- $1,500,000 for future pain and suffering;
- $500,000 for diminished earning capacity; and
- $100,000 for future medical expenses.

[1] This procedure involved grafting a posterior superior tympanic membrane perforation and a placement of an ossicular prosthesis.

Respondent appealed, challenging only the portion of the judgment awarding damages for lost earning capacity and future medical expenses. Respondent argued that Claimant failed to present evidence at trial that would allow the jury to quantify any diminished ability to earn money in the future or future medical expenses.[2] The Fifth DCA agreed and struck the jury's award of $500,000 for diminished earning capacity and $100,000 for future medical expenses.[3] On January 12, 2016, the trial court entered a second amended final judgment reducing the award from $2.6 million to $2 million. Respondent has paid $85,000—the remainder of the statutory cap—to Claimant.[4]

Following the imposition of the amended final judgment, Claimant's attorneys brought a declaratory judgment action against Volusia County and its insurer, Star Insurance Company, to force Star Insurance to pay the remaining amount of the judgment under the excess insurance policy. The action was removed to federal court, where it is still pending.

Declaratory judgment dispute

Section 768.28(5), F.S., provides that "[a]ny settlement or judgment in excess of the caps may be reported to the Legislature and be paid in part or in whole only by further act of the Legislature." However, the same section provides that "the state, or an agency, or subdivision thereof" may pay a settlement or judgment without further action by the Legislature as long as the settlement or judgment is within the limits of their insurance. This allows local subdivisions to pay a settlement that exceeds the statutory cap with their insurance[5] and avoid the legislative claim bill process.

Here, Respondent is insured by Star Insurance Company for $5 million. According to Claimant's attorneys, Star Insurance's policy for excess coverage in effect on July 31, 2011 does not mention the necessity of a claim bill, and Star Insurance must pay the remaining balance of the judgment. According to Star Insurance, its obligation to pay is not triggered until a claim bill is passed. A trial is set for the summer of 2017 to resolve this dispute.

CLAIMANT'S POSITION: Claimant argues Respondent is liable for her injuries sustained when Respondent's truck drove over Claimant, and she seeks the remaining balance of the final judgment to compensate her for past and future pain and suffering.

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[2] At the time of the incident, Claimant was on her husband's AETNA health insurance plan.

[3] *Volusia Cnty. v. Joynt*, 179 So. 3d 448 (Fla. 5th DCA 2015).

[4] Claimant's husband received $100,000 and their two children received $7,500 each. That left a remaining $85,000 in the statutory cap towards Claimant's final judgment. Claimant's husband also received $34,500 from Respondent's excess insurer, Star Insurance Company.

[5] The Florida Supreme Court has defined insurance to not include self-insurance, which many local subdivisions rely on instead of purchasing commercial insurance. *See Hillsborough Cnty. Hosp. & Welfare Bd. v. Taylor*, 546 So. 2d 1055, 1057 (Fla. 1989).

RESPONDENT'S POSITION:

Respondent argues this claim bill is not ripe for consideration in that Claimant has not exhausted all her remedies related to the federal litigation. Respondent argues the award is excessive and unsupported by the facts and circumstances, and that Claimant and her family have already received a sufficient amount to compensate her for her loss.

CONCLUSIONS OF LAW:

Regardless of whether there is a jury verdict or settlement, every claim bill must be reviewed *de novo* in light of the elements of negligence.

Duty, Breach, & Causation

Respondent admits its employee, Mr. Moderie, was operating within the scope of his duties on July 31, 2011, owed a duty to Claimant, and was negligent when he drove the F-150 pickup truck over Claimant's body. I find Respondent owed a duty to Claimant and was negligent in operating the truck, and that this negligence caused Claimant's injuries.

Damages

The sole issue in this claim is damages. The Legislature is not bound by jury verdicts, appellate decisions or this report. Claim bills are an act of legislative grace.[6] This claim seeks to compensate Claimant for $1.895 million solely for her past and future pain and suffering.

Respondent argues Claimant has made a remarkable recovery and has been adequately compensated for any pain and suffering sustained. Claimant has received $85,000. Respondent contends the settlements between the County and Claimant's husband and children should be seen as compensating her for her injuries. Additionally, Respondent argues Claimant was enriched by receiving $20,000 from Mr. Moderie's own insurance policy. Through the settlement of her family's claims and collateral sources, Respondent argues Claimant has received $254,500.

Despite Respondent's contention, I find the remaining final judgment amount to be a fair and just amount for Claimant's pain and suffering. Claimant has suffered disfigurement to her face and will never look the way she did prior to the incident. Dr. William Triggs, a medical doctor hired by Respondent to evaluate Claimant's damages, found Claimant suffers from a residual left facial palsy and that the facial weakness will never recover. This paralysis has taken an emotional toll on Claimant, and she will live with it the rest of her life.

Finally, Respondent argues the Legislature should not pass a claim bill consisting solely of pain and suffering damages. This

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[6] *Gamble v. Wells*, 450 So. 2d 850, 853 (Fla. 1984).

contention and issue is outside the purview of this report and only for the individual members to decide.

ATTORNEY'S/ LOBBYING FEES: Claimant's attorneys will limit their fees to 25 percent of any legislative award. Out of these fees, a lobbyist fee for 4% of the total award will be paid. Outstanding costs are $74,094.75.

COLLATERAL SOURCES: Claimant received $20,000 from Mr. Moderie's personal insurance. Claimant's husband received $134,500[7] from Respondent to settle his claims. Respondent paid $15,000 to settle Claimant's two children's claims. Claimant has received $85,000.

RESPONDENT'S ABILITY TO PAY: Respondent has an excess liability insurance policy with Star Insurance for $5 million. If the claim bill were to pass, Star Insurance would presumably pay the entirety of the award.

SUGGESTED AMENDMENT: The section addressing the limitation on attorney's fees should be amended to provide for specific fee amounts.

LEGISLATIVE HISTORY: This is the second session this claim has been presented to the Legislature. Last session, the claim was filed by Representative Santiago as HB 6543, which was reported unfavorably by the Civil Justice and Claims Subcommittee by a vote of 7-8.

RECOMMENDATION: I recommend HB 6537 be reported **FAVORABLY**.

Respectfully submitted,

JORDAN JONES

House Special Master

cc: Representative Byrd, House Sponsor
Senator Simmons, Senate Sponsor
John Ashley Peacock, Senate Special Master

[7] Volusia County paid $100,000 of this amount to Claimant's husband, and Star Insurance, the excess liability carrier, paid $34,500.

1 A bill to be entitled
2 An act for the relief of Erin Joynt by Volusia County;
3 providing for an appropriation to compensate Erin
4 Joynt for injuries sustained as a result of the
5 negligence of an employee of Volusia County; providing
6 that certain payments and the appropriation satisfy
7 all present and future claims related to the negligent
8 act; providing a limitation on the payment of attorney
9 fees; providing an effective date.
10
11 WHEREAS, on July 31, 2011, Erin Joynt, her husband, and two
12 children were vacationing beachgoers on Daytona Beach as they
13 journeyed from their native Wichita, Kansas, to their planned
14 destination of Walt Disney World, and
15 WHEREAS, at the same time, in the regular course of his
16 employment duties, Thomas Moderie, an employee of the Volusia
17 County Beach Patrol, was driving a Ford F-150 pickup truck owned
18 by the county along the beach, and
19 WHEREAS, Mr. Moderie negligently operated the truck,
20 running over Mrs. Joynt while she was sunbathing on the beach,
21 and
22 WHEREAS, as a result of the impact with the truck, Mrs.
23 Joynt sustained severe injuries, including, but not limited to,
24 multiple cranial and facial fractures, rib fractures, permanent
25 facial injuries, and chronic back pain, and

26 WHEREAS, Mrs. Joynt continues to suffer as a result of the
27 impact and is unable to blink her right eye without the
28 assistance of a gold weight sewn into her eyelid and has a
29 perforated eardrum and additional hearing loss, permanent facial
30 paralysis, speech and neurological deficits, and chronic pain,
31 and
32 WHEREAS, after a 4-day trial in June 2014, at which Volusia
33 County acknowledged the negligence of Mr. Moderie, a jury found
34 the county liable for Mrs. Joynt's injuries and awarded her
35 compensatory damages in the amount of $2.6 million, and
36 WHEREAS, on January 12, 2016, following resolution of an
37 appeal initiated by the county, a final judgment in the amount
38 of $2 million was entered against Volusia County by the trial
39 court, and
40 WHEREAS, Volusia County is insured for Mrs. Joynt's claim
41 for damages through an excess liability insurance policy
42 underwritten by Star Insurance Company, and
43 WHEREAS, Volusia County has already paid $85,000 of the
44 judgment to Mrs. Joynt pursuant to the statutory limits of
45 liability set forth in s. 768.28, Florida Statutes, which were
46 in effect at the time that Mrs. Joynt's claim arose, NOW,
47 THEREFORE,
48
49 Be It Enacted by the Legislature of the State of Florida:
50

51 Section 1. The facts stated in the preamble to this act
52 are found and declared to be true.
53 Section 2. Volusia County is authorized and directed to
54 appropriate from funds of the county not otherwise encumbered,
55 or from the county's liability insurance coverage, and to draw a
56 warrant in the sum of $1,895,000, payable to Erin Joynt as
57 compensation for injuries and damages sustained.
58 Section 3. The amount paid by Volusia County pursuant to
59 s. 768.28, Florida Statutes, and the amount awarded under this
60 act are intended to provide the sole compensation for all
61 present and future claims arising out of the factual situation
62 described in this act which resulted in injuries and damages to
63 Erin Joynt. The total amount paid for attorney fees relating to
64 this claim may not exceed 25 percent of the amount awarded under
65 this act.
66 Section 4. This act shall take effect upon becoming a law.

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF DUVAL

BEFORE me, the undersigned authority, personally appeared JOHN M. PHILLIPS, ESQUIRE and PATRICK BELL, who are personally known to me, and who after being first duly sworn, depose and say:

1. JOHN M. PHILLIPS of the Law Office of John M. Phillips, LLC is the lead attorney in the above referenced matter. His principal place of business is located at 4230 Ortega Boulevard, Jacksonville, FL 32210.

2. PATRICK BELL of Capitol Solutions, LLC was retained as a lobbyist in the above referenced matter.

3. On or about August 6, 2011, John M. Phillips, along with the Law Office of John M. Phillips, were retained to represent Erin Joynt under a standard Florida contingency fee contract.

4. Said contract provided for an attorney fee of not greater than twenty-five percent (25%) of any recovery against the state or any of its agencies or subdivisions consistent with §768.28(8), Florida Statutes plus any costs advanced to a third party on the client's behalf. A copy of the said contract is attached hereto as Exhibit A.

5. A proposed Closing Statement was originally submitted attached to affiant's first Affidavit dated January 4, 2017, detailing the attorney fee

percentage and itemizing all known costs. Said first proposed Closing Statement is attached hereto has Exhibit B.

6. Upon further review of the file, additional costs advanced to third parties on behalf of Mrs. Joynt were discovered and the corrected cost chart of JOHN M. PHILLIPS itemizing $74,094.75 of costs advanced to third parties on behalf of Ms. Joynt is attached hereto as Exhibit C.

7. Additionally, a fee of 33 1/3% was charged for settlement with Defendant Thomas Moderle. This has been reduced to 25%.

8. In pursuit of the requested claims bill, it has become necessary to retain the services of a lobbyist. As such, the undersigned retained Patrick Bell at Capitol Solutions, Inc. For his services, Mr. Bell charges, and Mrs. Joynt has agreed to pay, a fee of four percent (4%) of the amount recovered by claims bill. A copy of said contract with agreement is attached hereto as Exhibit D.

9. The four percent (4%) lobbyist fee referenced above is included in the twenty-five percent (25%) attorney's fees as referenced above, and are itemized on the revised proposed Closing Statement. See attached exhibits.

10. The full amount of $74,094.75 outstanding costs itemized on the attached Cost Chart of John M. Phillips, will be paid from the amount that may be awarded by the Legislature. See attached Exhibit C.

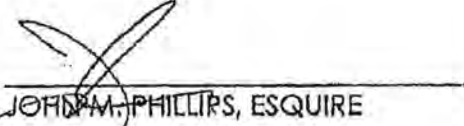
11. None of the outstanding costs itemized on the attached revised Costs Chart have been paid from the statutory cap payment, as these funds remain in an IOTA account pending resolution.

12. Of the $74,094.75 in costs advanced on behalf of Mrs. Joynt, $2,887.50 was for internal costs of the Law Office of John M. Phillips.

13. Additionally, even though lost wages and future medical expenses were not included in the trial or awarded on the verdict, The Rawlings Company has recently presented their demand to have their lien of $34,241.79 honored. This is an additional amount that was not presented previously. However, Ms. Joynt would pay this sum out of the requested $1,915,000.00.

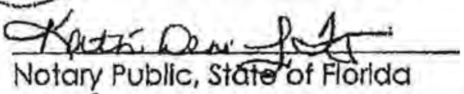
14. Finally, in addition to the costs itemized on the proposed Closing Statement and attached Cost Chart, Ms. Joynt has incurred significant out of pocket expenses for travel and accommodations for necessary appearances in Florida for two Compulsory Medical Examinations, Mediation, Trial and the Special Masters hearing. Currently these costs amount to $3,638.04. Ms. Joynt would be reimbursed for this sum out of the requested $1,915,000.00.

FURTHER AFFIANTS SAYETH NOT.



JOHN M. PHILLIPS, ESQUIRE

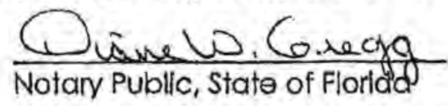
SUBSCRIBED and SWORN to before me this 1st day of March, 2017.



Notary Public, State of Florida

PATRICK BELL

SUBSCRIBED and SWORN to before me this 5th day of ~~March~~ Oct. 2017, 2017.



Notary Public, State of Florida

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 6537 (2018)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	___	

1 Committee/Subcommittee hearing bill: Civil Justice & Claims
2 Subcommittee
3 Representative Byrd offered the following:
4
5 **Amendment**
6 Remove lines 63-65 and insert:
7 Erin Joynt. Of the amount awarded under this act, the total
8 amount paid for attorney fees may not exceed $397,950.00, the
9 total amount paid for lobbying fees may not exceed $75,800.00,
10 and the total amount paid for costs and other similar expenses
11 relating to this claim may not exceed $74,094.75.