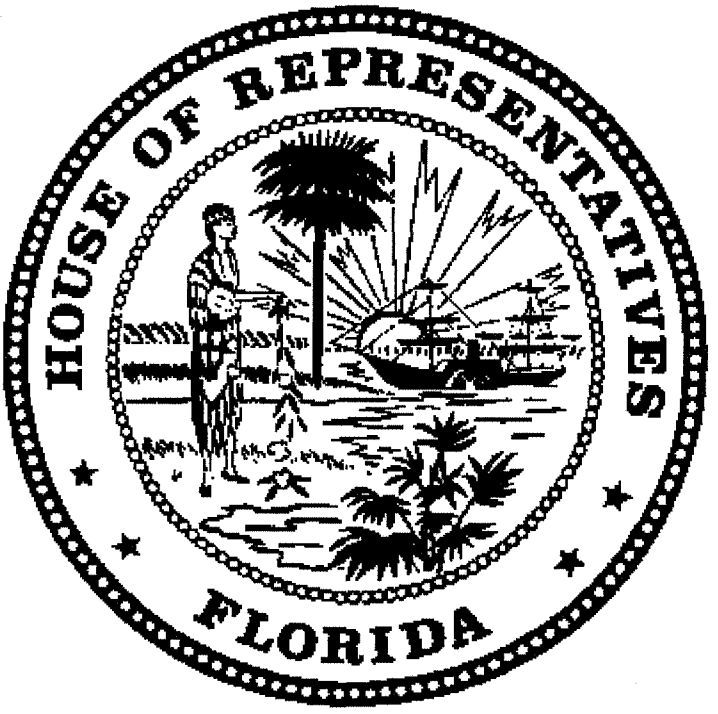

Civil Justice Subcommittee

Tuesday, March 8, 2011
8:00 AM
404 HOB

Dean Cannon
Speaker

Eric Eisnaugle
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Civil Justice Subcommittee

Start Date and Time: Tuesday, March 08, 2011 08:00 am

End Date and Time: Tuesday, March 08, 2011 10:00 am

Location: 404 HOB
Duration: 2.00 hrs

Consideration of the following bill(s):

HB 87 Judicial Opinions by Soto
HB 241 Wage Protection by Goodson
HB 423 Mobile Home Park Lot Tenancies by Nuñez
HB 479 Medical Malpractice by Horner
HB 4135 District Court Marshals by McBurney
HB 4137 Marshal of the Supreme Court by McBurney

NOTICE FINALIZED on 03/04/2011 16:12 by Jones.Missy

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 87 Judicial Opinions
SPONSOR(S): Soto
TIED BILLS: None **IDEN./SIM. BILLS:** SB 996

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Billmeier LMB	Bond
2) Rulemaking & Regulation Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

This bill requires the Florida Supreme Court or any district court of appeal that declares a statute, regulation, or government practice unconstitutional, recommends statutory changes, or identifies drafting issues to submit a copy of the opinion to the Speaker, the Governor, and the President of the Senate within 30 days after the opinion is published by the court. In response, the Speaker, the Governor, and the President of the Senate must serve an acknowledgement that they have received the opinion within 30 days and may state any and all action they intend to take in response to the opinion.

This bill appears to have a minimal negative fiscal impact on state government expenditures payable from the General Revenue Fund. This bill does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Opinions issued by the Florida Supreme Court and the five district courts of appeal are available on each of the courts' websites.[1] In addition, opinions are published by various private publishing companies. The courts routinely provide copies of the opinion to the parties that participated in the litigation. Such opinions are not routinely provided to nonparties.

Appellate court opinions sometimes declare a statute invalid. Often an executive branch agency is a party to the litigation and receives a copy of the opinion. However, a statute can be declared invalid in cases where no government entity is a party to the litigation. For example, in *Massey v. David*, 979 So. 2d 931 (Fla. 2008), the Florida Supreme Court declared s. 57.071(2), F.S., unconstitutional because it impermissibly encroached on the rulemaking authority of the court. The *Massey* case was a legal malpractice case between an attorney and a former client; no government entity was involved.

Courts occasionally issue opinions which recommend statutory changes or identify drafting issues in statute. For example, a Florida court noted an issue with Florida's Good Samaritan Act:

> Given the current state of Florida's Good Samaritan Act, F.S. 768.13, we have some public policy concerns regarding the potential impact of our ruling in this case. The Good Samaritan statute, which purports to insulate from liability those who assist injured parties in an emergency, in truth, provides very little protection. *See Botte v. Pomeroy*, 438 So. 2d 544, 545 (Fla. 4th DCA 1983). The immunity given under the Act to a person who gratuitously renders aid to an injured person is conditioned upon that person rendering aid "as an ordinary reasonably prudent person." Because this is no different than the common law standard of care that applies without this so-called immunity, the protection under the act is illusory.
>
> Thus, a business owner who has no legal duty to provide CPR to an injured invitee in a medical emergency might consider himself better off not undertaking to administer CPR. This is because he risks liability only if he voluntarily undertakes to administer CPR and then performs the procedure negligently. As our court did many years ago in *Botte*, we place the blame for this quandary on the legislature's failure to update the Good Samaritan Act. As written, the Act does not adequately protect individuals from civil liability for negligent acts committed while voluntarily providing emergency care. It thus discourages individuals from performing specialized skills, such as CPR, on injured persons when they have no duty to do so.[2]

Similarly, the Fourth District Court of Appeal recently issued an opinion noting the difficulty the courts have had interpreting the expert witness provisions of s. 766.102, F.S., and noting that a statute purporting to provide immunity to volunteer team physicians provides little protection:

> Section 768.135 appears to provide no more protection (save the "similarly licensed" requirement) than general tort law. The statute purports to provide immunity, but its protection is illusory. If the legislature intended to provide some additional layer of protection to those physicians who volunteer their services, then perhaps the statute needs another look.[3]

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[1] The opinions of the Florida Supreme Court are found here: http://www.floridasupremecourt.org/decisions/opinions.shtml. In addition, the webpage contains a link to the opinions of each of the five district courts of appeal.

[2] *L.A. Fitness International, LLC v. Mayer*, 980 So. 2d 550, 561 n.2 (Fla. 4th DCA 2008).

[3] *Weiss v. Pratt*, Case Nos. 4D08-2179 and 4D10-562 (Fla. 4th DCA February 16, 2011), Slip Opinion at 8.

This bill requires the Florida Supreme Court or any district court of appeal[4] which issues an opinion which declares a statute, regulation, or government practice unconstitutional, recommends statutory changes, or identifies drafting issues must submit a copy of the opinion to the Speaker, the Governor, and the President of the Senate within 30 days after the opinion is published by the court. In response, the Speaker, the Governor, and the President of the Senate must serve an acknowledgement that they have received the opinion within 30 days and may state any and all action they intend to take in response to the opinion.

The bill takes effect on July 1, 2011.

B. SECTION DIRECTORY:

Section 1 provides that the act may be cited as the "Judicial Opinion Communications Act."

Section 2 creates s. 25.079, F.S., relating to court opinions with certain holdings and communications with other branches.

Section 3 provides that the bill takes effect on July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Florida Supreme Court and the district courts of appeal may incur minimal recurring additional costs in reviewing opinions and providing notice to the appropriate persons. The costs of the notices would be payable from the General Revenue Fund.

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:

[4] The bill's reporting requirements do not apply to circuit or county courts.

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The bill provides that Florida Supreme Court and the district courts of appeal must provide copies of certain opinions to the Speaker, the Governor, and the President of the Senate. Article 5, section 2(a), of the Florida Constitution, provides that the Florida Supreme Court "shall adopt rules for the practice and procedure" in all courts. The Florida Supreme Court has interpreted this provision to mean that the court has the exclusive power to create rules of practice and procedure and statutes that do so are invalid. If the court were to determine that the provisions of this bill created a procedural rule, the court could hold the statute invalid or adopt it as a rule of court.[5]

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill amends s. 25.079, F.S. Chapter 25, F.S., relates to the Florida Supreme Court. Chapter 35, F.S., relates to the district courts of appeal. Accordingly, if this bill passes, the statutes will impose a duty on the district courts of appeal in the chapter of law relating to the supreme court. Chapter 43, F.S., relates to all state courts and is perhaps a better placement.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

[5] *See Jackson v. Department of Corrections*, 790 So. 2d 381, 385 (Fla. 2000)("If the [statute] were not so cumbersome and provided some benefit to this Court, we might merely accept the "suggested" procedure and amend our [rules] to implement the [statute]... [H]owever, compliance with the [statute] by this Court has been *extremely* cumbersome and of little, if any, use at all")(internal citations omitted).

A bill to be entitled

An act relating to judicial opinions; providing a short title; creating s. 25.079, F.S.; providing legislative intent; requiring that an opinion of the Supreme Court or a district court of appeal that has any of certain specified holdings be provided to specified offices in the other branches of government; requiring offices receiving such an opinion to acknowledge receipt within a specified period; allowing the acknowledgment to include a statement of any action to be taken in response; providing an effective date.

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

Section 1. This act may be cited as the "Judicial Opinion Communications Act."

Section 2. Section 25.079, Florida Statutes, is created to read:

25.079 Opinions with certain holdings; communication to other branches.—

(1) This section is specifically intended to create a communication process between the three branches of government with regard to judicial opinions and may not be construed to provide the legislative or executive branches with any powers regarding the Supreme Court or appellate courts that are not granted under the State Constitution.

(2) A court opinion rendered by the Florida Supreme Court or any of the district courts of appeal which:

(a) Declares a Florida statute, regulation, or government practice unconstitutional;

(b) Recommends any statutory or regulatory changes to the current law; or

(c) Identifies drafting issues

shall be submitted by the court rendering the opinion to the Governor, the President of the Senate, and the Speaker of the House of Representatives within 30 days after being published by the court.

(3) The Office of the Governor, the Office of the President of the Senate, and the Office of the Speaker of the House of Representatives shall serve an acknowledgment of receipt upon the chief judge or chief justice of the court rendering an opinion submitted to that office under subsection (2) within 30 days after the receipt of the opinion and may state in the acknowledgment any and all action to be taken in response to the opinion.

Section 3. This act shall take effect July 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 241 Wage Protection
SPONSOR(S): Goodson
TIED BILLS: None **IDEN./SIM. BILLS:** SB 982

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Woodburn JW	Bond NB
2) Community & Military Affairs Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Wage theft is a term used to describe the failure of an employer to pay any portion of wages due to an employee. Federal and state laws provide extensive protection from wage theft through various acts including the Federal Fair Labor Standards Act and Florida's minimum wage laws.

Counties and municipalities have broad home rule powers that allow the local governments to enact ordinances as long as the subject matter is not preempted to the state. Preemption may either be express or implied.

The bill provides that the regulation of wage theft is expressly preempted to the state.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Wage Theft

"Wage theft" is a general term sometimes used to describe the failure of an employer to pay any portion of wages due to an employee. Wage theft encompasses a variety of employer violations of Federal and state law resulting in lost income to an employee. Some examples of wage theft include:

- Employee is paid below the state or Federal minimum wage.
- Employee is paid partial wages or not paid at all.
- Non-exempt employee is not paid time and half for overtime hours.
- Employee is misclassified as an independent contractor.
- Employee does not receive final paycheck after employment is terminated

There are a variety of federal and state laws that protects employees from wage theft including, but not limited to, the Fair Labor Standards Act and Florida minimum wage laws.

Worker Protection: Federal and State

Both federal[1] and state laws provide protection to workers who are employed by private and governmental entities. These protections include workplace safety, anti-discrimination, anti-child labor, workers' compensation, and wage protection laws.

Fair Labor Standards Act of 1938

The Fair Labor Standards Act (FLSA)[2] establishes a federal minimum wage and requires employers to pay time and half to its employees for overtime time hours worked. The FLSA establishes standards for minimum wages,[3] overtime pay,[4] recordkeeping,[5] and child labor.[6] The FLSA applies to most classes of workers.[7]

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[1] A list of examples of federal laws that protect employees is located at: http://www.dol.gov/compliance/laws/main.htm (Last visited February 23, 2011). Examples include: *The Davis-Bacon and Related Acts* (requires all contractors and subcontractors performing work on federal or District of Columbia construction contracts or federally assisted contracts in excess of $2,000 to pay their laborers and mechanics not less than the prevailing wage rates and fringe benefits for corresponding classes of laborers and mechanics employed on similar projects in the area); *The McNamara-O'Hara Service Contract Act* (The SCA requires contractors and subcontractors performing services on covered federal or District of Columbia contracts in excess of $2,500 to pay service employees in various classes no less than the monetary wage rates and to furnish fringe benefits found prevailing in the locality, or the rates (including prospective increases) contained in a predecessor contractor's collective bargaining agreement); *The Migrant and Seasonal Agricultural Workers Protection Act* (provides employment-related protections to migrant and seasonal agricultural workers); *The Contract Work Hours and Safety Standards Act* (requires contractors and subcontractors on covered contracts to pay laborers and mechanics employed in the performance of the contracts one and one-half times their basic rate of pay for all hours worked over 40 in a workweek); *The Copeland "Anti-Kickback" Act* (prohibits federal contractors or subcontractors engaged in building construction or repair from inducing an employee to give up any part of the compensation to which he or she is entitled under his or her employment contract).

[2] 29 U.S.C Ch. 8.

[3] 29 U.S.C. §206.

[4] 29 U.S.C. §207.

[5] 29 U.S.C. §211.

[6] 29 U.S.C. §212.

[7] The U.S. Department of Labor provides an extensive list of types of employees covered under the FLSA at http://www.dol.gov/compliance/guide/minwage.htm (Last visited February 24, 2011).

The FLSA provides that:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.[8]

If an employee works more than forty hours in a week, then the employer must pay at least time and half for those hours over forty. A failure to pay is a violation of the FLSA.[9]

The FLSA also establishes a federal minimum wage in the United States.[10] The federal minimum wage is the lowest hourly wage that can be paid in the United States. A state may set the rate higher than the federal minimum, but not lower.[11]

The FLSA also provides for enforcement in three separate ways:

- Civil actions or lawsuits by the federal government;[12]
- Criminal prosecutions by the United States Department of Justice;[13] or
- Private lawsuits by employees, or workers, which includes individual lawsuits and collective actions.[14]

The FLSA provides that an employer who violates section 206 (minimum wage) or section 207 (maximum hours) is liable to the employee in the amount of the unpaid wages and liquidated damages equal to the amount of the unpaid wages.[15] The employer who fails to pay according to law is also responsible for the employee's attorney's fees and costs.[16]

State Protection of Workers

State law provides for protection of workers, including anti-discrimination, work safety and a state minimum wage. The state minimum wage was passed as a constitutional amendment[17] and the implementation language is located in s. 448.110, F.S.

Article X, s. 24(c) of the state constitution provides that, "Employers shall pay Employees Wages no less than the minimum wage for all hours worked in Florida." If an employer does not pay the state minimum wage, the amendment provides that an employee may bring a civil action in a court of competent jurisdiction for the amount of the wages withheld. A court may also award the employee liquidated damages in the amount of the wages withheld and reasonable attorney's fees and costs.

The current state minimum wage is $7.25 per hour, which is the federal rate.[18] Federal law requires the payment of the higher of the federal or state minimum wage.[19]

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[8] 29 U.S.C. §207(a)(1).
[9] There are several classes of exempt employees from the overtime requirement of the FLSA. For examples of exempt employees see http://www.dol.gov/compliance/guide/minwage.htm (Last visited February 24, 2011).
[10] 29 U.S.C. §206.
[11] 29 U.S.C. §218(a).
[12] 29 U.S.C. §216(c).
[13] 29 U.S.C. §216(a).
[14] 29 U.S.C. §216(b).
[15] 29 U.S.C. §216(b).
[16] 29 U.S.C. §216(b).
[17] See Article X, s. 24 of the Florida Constitution (adopted in 2004).
[18] See Agency for Workforce Innovation Website for information regarding the current minimum wage in the State of Florida. http://www.floridajobs.org/minimumwage/index.htm (Last visited February 24, 2011).
[19] 29 U.S.C. §218(a).

Home Rule and Preemption

Article VIII ss. 1 and 2, of the state constitution, establishes two types of local governments: counties[20] and municipalities. The local governments have wide authority to enact various ordinances to accomplish their local needs.[21] Under home rule powers, a municipality or county may legislate concurrently with the Legislature on any subject which has not been preempted to the state.

Preemption essentially takes a topic or field in which local government might otherwise establish appropriate local laws and reserves that topic for regulation exclusively by the state.[22] Florida law recognizes two types of preemption: express and implied.[23] Express preemption requires a specific legislative statement and cannot be implied or inferred.[24] Express preemption requires that a statute contain specific language of preemption directed to the particular subject at issue.

The absence of express preemption does not bar a court from a finding of preemption by implication. A court will look at two factors to determine if the subject matter has been preempted by the Legislature:

- Whether the Legislative scheme is so pervasive as to evidence an intent to preempt the particular area; and
- Whether there are strong public policy reasons for finding an area to be preempted by the Legislature.[25]

In order to determine whether a Legislative scheme is pervasive a court will look at several factors including the nature of the subject matter, the need for state uniformity, and the scope and purpose of the state legislation.[26] A court will also look at whether the ordinance in question regulates an area in which some local government control has traditionally been allowed and "whether chaos and confusion would result from having the two-tiered regulatory process that would result if local laws were not preempted by state law."[27] Examples of areas where the courts have found implied preemption include public records[28] and elections.[29]

There is no apparent express preemption of wage laws to the federal and state governments. It is possible that a court could find that the numerous existing laws regarding employee wages are an implied preemption of the subject.

Effect of the Bill

The bill provides that "as a matter of public policy that it is necessary to declare the theft of wages and the denial of fair compensation for work completed to be against the law and policies of this state." The bill also provides examples of current federal and state laws that protect employees from wage theft and provides that it is the intent of the bill to provide uniformity and to void all ordinances and regulations pertaining to wage theft that have been enacted by a governmental entity other than the state or federal government.

The bill provides that the regulation of wage theft is expressly preempted to the state.

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[20] There are two different types of counties in Florida; a charter county and a non-charter county.
[21] Article VIII of the state constitution establishes the powers of chartered counties, non-charter counties and municipalities. Chapters 125 and 166, F.S., provides the additional powers and constraints of counties and municipalities.
[22] *City of Hollywood v. Mulligan*, 934 So.2d 1238, 1243 (Fla. 2006).
[23] *Id.*
[24] *Id.*
[25] *Tallahassee Regional* at 851.
[26] *Browning v. Sarasota Alliance for Fair Elections, Inc.*, 968 So.2d 637, 645-46 (Fla. 2d DCA 2007).
[27] *Id.* at 646.
[28] *See Tribune Co. v. Cannella*, 458 So.2d 1075 (Fla. 1984).
[29] *See Browning v. Sarasota Alliance for Fair Elections, Inc.*, 968 So.2d 637 (Fla. 2d DCA 2007).

B. SECTION DIRECTORY:

Section 1 creates s. 448.111, F.S. providing for preemption of wage theft to the state.

Section 2 provides an effective date of July 1, 2011.

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:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill provides that "the denial of fair compensation for work completed to be against the laws and policies of the state." The term "fair compensation" is not defined by the bill. It is possible that this statement may be interpreted to create a civil cause of action for an employee to sue an employer for "fair compensation." Without a definition of the term, the courts would define fair compensation.

The bill also provides for the express preemption of "wage theft," but "wage theft" is not defined in the bill or elsewhere in Florida law.

One local government is known to have enacted a wage theft ordinance.[30] This bill may invalidate that ordinance.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

[30] "Wage Theft" Ch. 22, s.1-10 of the Code of Miami-Dade County, Florida.

A bill to be entitled

An act relating to wage protection; creating s. 448.111, F.S.; providing a short title; providing legislative findings and intent; preempting regulation of wage theft to the state, except as otherwise provided by federal law, and superseding any municipal or county ordinance or other local regulation on the subject; providing an effective date.

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

Section 1. Section 448.111, Florida Statutes, is created to read:

448.111 Florida Wage Protection Law.—

(1) This section may be cited as the "Florida Wage Protection Law."

(2) The Legislature finds as a matter of public policy that it is necessary to declare the theft of wages and the denial of fair compensation for work completed to be against the laws and policies of the state.

(3) The Legislature finds that employers and employees benefit from consistent and established standards of wage theft regulation and that existing federal and state laws, including the federal Fair Labor Standards Act of 1938, the Davis-Bacon Act, the McNamara-O'Hara Service Contract Act of 1965, the Migrant and Seasonal Agricultural Worker Protection Act, the Contract Work Hours and Safety Standards Act, the Copeland "Anti-kickback" Act, this chapter, and s. 24, Art. X of the

State Constitution seek to protect employees from predatory and unfair wage practices while also providing appropriate due process to employers.

(4) It is the intent of this section to provide uniform wage theft laws in the state, to void all ordinances and regulations relating to wage theft that have been enacted by a governmental entity other than the state or the Federal Government, to prohibit the enactment of any future ordinance or other local regulation relating to wage theft, and to require local governmental entities to enforce state and federal wage theft laws.

(5) Except as otherwise provided by federal law, this section expressly preempts regulation of wage theft to the state and supersedes any municipal or county ordinance or other local regulation on the subject.

Section 2. This act shall take effect July 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 423 Mobile Home Park Lot Tenancies
SPONSOR(S): Nuñez and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 650

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Woodburn JW	Bond MB
2) Business & Consumer Affairs Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Mobile home parks are regulated by the state. Current law places various obligations on mobile home park owners including providing notices for eviction in the event of sale, following building codes and maintaining common areas. Due to the cost and difficulty in moving mobile homes, current law requires a mobile home park owner to give tenants at least six months notice before eviction can take place due to a change of land use. A change of land use is where the land the park is on will be redeveloped into something other than a mobile home park.

The bill requires that, at the beginning of the six months eviction period, and if the tenants have created a homeowners' association, the park owner must offer to sell the park to the association. The association has 45 days to agree to the owner's asking price and terms.

Mobile home owners also have obligations by lease and by law that include the obligation to follow building codes and the obligation to keep the lot he or she rents sanitary and clean. Mobile home park owners report that they are being cited for offenses that were committed by their tenants.This bill requires a local government, when citing a violation of a local ordinance, to cite only the responsible party.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Mobile Home Parks

The landlord-tenant relationship between a mobile home park owner and a mobile home owner in a mobile home park is a unique relationship. Traditional landlord-tenant concepts are thought inapplicable where the land is owned by the park and the homes on the property are owned by the home owner. This relationship is impacted by the high cost of moving a mobile home. Chapter 723, F.S, governs the relationship between mobile home park owners and mobile home owners. Section 723.004(1), F.S, provides:

> The Legislature finds that there are factors unique to the relationship between a mobile home owner and a mobile home park owner. Once occupancy has commenced, unique factors can affect the bargaining position of the parties and can affect the operation of market forces. Because of those unique factors, there exist inherently real and substantial differences in the relationship which distinguish it from other landlord-tenant relationships. The Legislature recognizes that mobile home owners have basic property and other rights which must be protected. The Legislature further recognizes that the mobile home park owner has a legitimate business interest in the operation of the mobile home park as part of the housing market and has basic property and other rights which must be protected.

The Florida Supreme Court, in addressing mobile home park issues, has ruled that:

> A hybrid type of property relationship exists between the mobile home owner and the park owner and that the relationship is not simply one of landowner and tenant. Each has basic property rights which must reciprocally accommodate and harmonize. Separate and distinct mobile home laws are necessary to define the relationships and protect the interests of the persons involved.[1]

Before the current downturn in real estate values, escalating property values, especially in the coastal areas, prompted a number of mobile home park owners to close their parks so that the land can be used for a different purpose (such as retail, office, apartments or condominiums). As the economy recovers, mobile home parks will likely again be slated for redevelopment.

Purchase of Mobile Home Parks by Tenants

Section 723.061, F.S., provides the grounds for eviction of a mobile home park resident. One ground for eviction is an eviction of all tenants upon a change in land use. A change in land use is an intent to redevelop the land into something other than a mobile home park. Tenants evicted under this provision must be given at least six months notice.

Section 723.071, F.S., requires that a mobile home park owner who offers a mobile home park for sale to the general public must notify the homeowners' association (tenant's association) of the price, terms and conditions of sale. The requirement only applies if the tenants have organized a homeowners' association under ch. 723, F.S. The mobile home owners, by and through the homeowners' association, may purchase the park at the price, terms and conditions in the notice if the homeowners execute a purchase contract within 45 days after mailing of the notice. If the park owner later elects to offer the park at a lower price, the home owners have an additional 10 days to meet the price and terms and conditions of the park owner by executing a contract.

[1] *Stewart v. Green*, 300 So.2d 889, 892 (Fla. 1974).

The process in s. 723.071, F.S., gives the homeowners an opportunity to purchase the park in situations where the park owner is selling to a third party. Under current law, however, a park owner may elect the close the park and redevelop the land (a change in land use) without selling the land to a third party. In this situation, s. 723.071, F.S., does not apply, and current law does not require the park owner to give the homeowners an opportunity to purchase the park (and avoid having to move).

Effect of the Bill: Change in Land Use

This bill amends the eviction provisions of s. 723.061(1)(d), F.S., to provide mobile home owners with a process for purchase of the mobile home park from which they are to be evicted due to a change in land use. The purchase terms are similar to those in current law related to a park owner offering the park for sale. The park owner may not evict the homeowners from the park due to a change of land use unless the park owner first follows the process set forth in the bill. Specifically:

- If the homeowners have formed a homeowners' association pursuant to ss. 723.075-723.079, F.S., the bill requires the park owner to give written notice to the homeowners' association of the homeowners' right to purchase the mobile home park at the price, terms and conditions set forth in the notice. The park owner sets the price, terms and conditions.

- The written notice must be provided to the officers of the homeowners' association. The homeowners' association may then execute and deliver a contract for purchase of the park to the park owner within 45 days after the mailing of the written notice. The contract must be for the same price and terms and conditions set forth in the written notice. The park owner may not sell to another if the association agrees to a contract.

- If the park owner and the homeowners' association do not execute a contract within the 45 day period, the park owner may proceed with the eviction. If during the 6 month notice period prior to eviction the park owner elects to offer or sell the park at a price lower than in the initial notice, the park owner must notify the homeowners association and the association has an additional 10 days to agree to the revised offer terms. At the conclusion of the 6 month notice period, the park owner has no further obligation under the amended s. 723.061(1)(d), F.S., or under s. 723.071, F.S.

The bill also corrects s. 723.061, F.S., by removing subsection (3), which has no meaning.

Park Owner and Home Owner Obligations

The unique relationship between the park owner and mobile home owner places various obligations on each party. Section 723.022, F.S., requires a mobile home park owner to:

- Comply with building, housing and health codes.
- Maintain the common areas in a good state of repair.
- Provide access to the common areas.
- Maintain utility connections and systems in proper operating conditions.
- Comply with park rules.

Section 723.023, F.S. requires a mobile home owner to:

- Comply with applicable building, housing and health codes.
- Keep the mobile home lot which he or she occupies clean and sanitary.
- Comply with park rules.

Some confusion may result when local city or county inspectors cite a mobile home park owner for a violation related to an issue that is the responsibility of a mobile home owner pursuant to s. 723.023, F.S. For example, if the mobile home owner does not keep the lot in which he or she occupies clean

and sanitary, the local officials may cite the mobile home park owner even though current law provides that it is the mobile home owner's responsibility to keep the lot clean.[2]

Effect of the Bill: Citations

The bill creates s. 723.024, F.S., which provides that if a unit of local government finds a violation of s. 723.022, F.S., or s. 723.023, F.S., the unit of local government may only cite the responsible party. The bill also provides that a lien, penalty, fine or other administrative or civil proceedings may not be brought against a mobile home park owner for a violation under s. 723.023, F.S. and that a lien, penalty, fine or other administrative or civil proceedings may not be brought against a mobile home owner or mobile home for a violation of s. 723.022, F.S.

B. SECTION DIRECTORY:

Section 1 creates s. 723.024, F.S., regarding mobile home park owner's and mobile home owner's obligations.

Section 2 amends s. 723.061, F.S., regarding eviction from a mobile home park upon a change in land use.

Section 3 provides that the bill takes effect upon becoming a law.

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.

[2] Section 723.023(2), F.S., requires the mobile home owner to "Keep the mobile home lot which he or she occupies clean and sanitary."

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

There is an argument that the portion of this bill regarding eviction and sale to the tenants may constitute an unreasonable restraint on alienation of real property. The Third District Court of Appeal has found that:

> The basic premise of the public policy rule against unreasonable restraints on alienation, *see* 7 *Thompson On Real Property,* § 3161 (1962); 31 C.J.S. *Estates* 8(b)(2) (1964), is that free alienability of property fosters economic growth and commercial development. *Davis v. Geyer,* 151 Fla. 362, 9 So.2d 727 (1942); *Seagate Condominium Association, Inc. v. Duffy,* 330 So.2d 484. Because "[t]he validity or invalidity of a restraint depends upon its long-term effect on the improvement and marketability of the property," *Iglehart v. Phillips,* 383 So.2d 610, 614 (Fla.1980), where the restraint, for whatever duration, does not impede the improvement of the property or its marketability, it is not illegal. *Id.* at 615. **Accordingly, where a restraint on alienation, no matter how absolute and encompassing, is conditioned upon the restrainer's obligation to purchase the property at the then fair market value, the restraint is valid.** *Id.* at 614-15, and cases collected."[3] *(emphasis added)*

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

[3] *Aquarian Foundation, Inc. v. Sholom House, Inc.*, 448 So.2d 1166 (Fla. 3d DCA 1984).

A bill to be entitled

An act relating to mobile home park lot tenancies; creating s. 723.024, F.S.; providing for local enforcement of violations of provisions establishing the obligations of mobile home park owners and mobile home owners; prohibiting liens, penalties, fines, or other administrative or civil proceedings against one party or that party's property for a duty or responsibility of the other party; amending s. 723.061, F.S.; revising provisions relating to grounds and proceedings for eviction; revising procedures for mobile home owners being provided eviction notice due to a change in use of the land comprising the mobile home park or the portion thereof from which mobile homes are to be evicted; providing requirements of the park owner and requirements and rights of an applicable homeowners' association with respect to the sale of the mobile home park under a change in use eviction; deleting a provision relating to governmental action affecting the removal of mobile home owners; providing an effective date.

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

Section 1. Section 723.024, Florida Statutes, is created to read:

723.024 Compliance by mobile home park owners and mobile home owners.—Notwithstanding any other provision of this chapter or of any local law, ordinance, or code:

(1) If a unit of local government finds that a violation of s. 723.022 or s. 723.023 has occurred, the unit of local government shall cite the responsible party for the violation and enforce the citation under its local code and ordinance enforcement authority.

(2) A lien, penalty, fine, or other administrative or civil proceeding may not be brought against a mobile home owner or mobile home for any duty or responsibility of the mobile home park owner under s. 723.022 or against a mobile home park owner or mobile home park property for any duty or responsibility of the mobile home owner under s. 723.023.

Section 2. Section 723.061, Florida Statutes, is amended to read:

723.061 Eviction; grounds, proceedings.—

(1) A mobile home park owner may evict a mobile home owner, a mobile home tenant, a mobile home occupant, or a mobile home only on one or more of the following grounds: ~~provided in this section.~~

(a) Nonpayment of the lot rental amount. If a mobile home owner or tenant, whichever is responsible, fails to pay the lot rental amount when due and if the default continues for 5 days after delivery of a written demand by the mobile home park owner for payment of the lot rental amount, the park owner may terminate the tenancy. However, if the mobile home owner or tenant, whichever is responsible, pays the lot rental amount due, including any late charges, court costs, and attorney's fees, the court may, for good cause, deny the order of eviction, if ~~provided~~ such nonpayment has not occurred more than twice.

(b) Conviction of a violation of a federal or state law or local ordinance, if the ~~which~~ violation is ~~may be deemed~~ detrimental to the health, safety, or welfare of other residents of the mobile home park. The mobile home owner or mobile home tenant must vacate the premises within ~~will have~~ 7 days after ~~from~~ the date the ~~that~~ notice to vacate is delivered ~~to vacate the premises~~. This paragraph constitutes ~~shall be~~ grounds to deny an initial tenancy of a purchaser of a home under ~~pursuant to~~ paragraph (e) or to evict an unapproved occupant of a home.

(c) Violation of a park rule or regulation, the rental agreement, or this chapter.

1. For the first violation of any properly promulgated rule or regulation, rental agreement provision, or this chapter which is found by any court of competent ~~having~~ jurisdiction ~~thereof~~ to have been an act that ~~which~~ endangered the life, health, safety, or property of the park residents or employees or the peaceful enjoyment of the mobile home park by its residents, the mobile home park owner may terminate the rental agreement, and the mobile home owner, tenant, or occupant must vacate the premises within ~~will have~~ 7 days after ~~from the date that~~ the notice to vacate is delivered ~~to vacate the premises~~.

2. For a second violation of the same properly promulgated rule or regulation, rental agreement provision, or this chapter within 12 months, the mobile home park owner may terminate the tenancy if she or he has given the mobile home owner, tenant, or occupant written notice, within 30 days after ~~of~~ the first violation, which ~~notice~~ specified the actions of the mobile home owner, tenant, or occupant that ~~which~~ caused the violation and

gave the mobile home owner, tenant, or occupant 7 days to correct the noncompliance. The mobile home owner, tenant, or occupant must have received written notice of the ground upon which she or he is to be evicted at least 30 days prior to the date on which she or he is required to vacate. A second violation of a properly promulgated rule or regulation, rental agreement provision, or this chapter within 12 months of the first violation is unequivocally a ground for eviction, and it is not a defense to any eviction proceeding that a violation has been cured after the second violation. Violation of a rule or regulation, rental agreement provision, or this chapter more than ~~after the passage of~~ 1 year after ~~from~~ the first violation of the same rule or regulation, rental agreement provision, or this chapter does not constitute a ground for eviction under this section.

A ~~No~~ properly promulgated rule or regulation may not be arbitrarily applied and used as a ground for eviction.

(d) Change in use of the land comprising the mobile home park, or the portion thereof from which mobile homes are to be evicted, from mobile home lot rentals to some other use, if:

1. The park owner gives written notice to the homeowners' association formed and operating under ss. 723.075-723.079 of its right to purchase the mobile home park, if the land comprising the mobile home park is changing use from mobile home lot rentals to a different use, at the price and under the terms and conditions set forth in the written notice.

a. The notice shall be delivered to the officers of the

homeowners' association by United States mail. Within 45 days after the date of mailing of the notice, the homeowners' association may execute and deliver a contract to the park owner to purchase the mobile home park at the price and under the terms and conditions set forth in the notice. If the contract between the park owner and the homeowners' association is not executed and delivered to the park owner within the 45-day period, the park owner is under no further obligation to the homeowners' association except as provided in sub-subparagraph b.

b. If the park owner elects to offer or sell the mobile home park at a price lower than the price specified in her or his initial notice to the officers of the homeowners' association, the homeowners' association has an additional 10 days to meet the revised price, terms, and conditions of the park owner by executing and delivering a revised contract to the park owner.

c. The park owner is not obligated under this subparagraph or s. 723.071 to give any other notice to, or to further negotiate with, the homeowners' association for the sale of the mobile home park to the homeowners' association after 6 months after the date of the mailing of the initial notice under sub-subparagraph a.

2. The park owner gives the affected mobile home owners and tenants ~~provided all tenants affected are given~~ at least 6 months' notice of the eviction due to the projected change in ~~of~~ use and of their need to secure other accommodations.

a. The notice of eviction due to a change in use of the

land must ~~shall~~ include in a font no smaller than the body of the notice the following statement:

YOU MAY BE ENTITLED TO COMPENSATION FROM THE FLORIDA MOBILE HOME RELOCATION TRUST FUND, ADMINISTERED BY THE FLORIDA MOBILE HOME RELOCATION CORPORATION (FMHRC). FMHRC CONTACT INFORMATION IS AVAILABLE FROM THE FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION.

b. The park owner may not give a notice of increase in lot rental amount within 90 days before giving notice of a change in use.

(e) Failure of the purchaser, prospective tenant, or occupant of a mobile home situated in the mobile home park to be qualified as, and to obtain approval to become, a tenant or occupant of the home, if such approval is required by a properly promulgated rule. If a purchaser or prospective tenant of a mobile home situated in the mobile home park occupies the mobile home before such approval is granted, the mobile home owner or mobile home tenant must vacate the premises within ~~shall have~~ 7 days after ~~from~~ the date the notice of the failure to be approved for tenancy is delivered ~~to vacate the premises~~.

(2) In the event of eviction for a change in ~~of~~ use, homeowners must object to the change in use by petitioning for administrative or judicial remedies within 90 days after ~~of~~ the date of the notice or they will be barred from taking any subsequent action to contest the change in use. This subsection

does ~~provision shall~~ not ~~be construed to~~ prevent any homeowner from objecting to a zoning change at any time.

~~(3) The provisions of s. 723.083 shall not be applicable to any park where the provisions of this subsection apply.~~

(3)~~(4)~~ A mobile home park owner applying for the removal of a mobile home owner, tenant, or occupant~~,~~ or a mobile home shall file, in the county court in the county where the mobile home lot is situated, a complaint describing the lot and stating the facts that authorize the removal of the mobile home owner, tenant, or occupant~~,~~ or the mobile home. The park owner is entitled to the summary procedure provided in s. 51.011, and the court shall advance the cause on the calendar.

(4)~~(5)~~ Except for the notice to the officers of the homeowners' association under subparagraph (1)(d)1., any notice required by this section must be in writing, and must be posted on the premises and sent to the mobile home owner and tenant or occupant, as appropriate, by certified or registered mail, return receipt requested, addressed to the mobile home owner and tenant or occupant, as appropriate, at her or his last known address. Delivery of the mailed notice shall be deemed given 5 days after the date of postmark.

Section 3. This act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 479 Medical Malpractice
SPONSOR(S): Horner and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1590

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Billmeier LMB	Bond MB
2) Health & Human Services Access Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

This bill makes numerous changes to affect medical malpractice litigation in Florida.

This bill creates an "expert witness certificate" that an expert witness who is licensed in another jurisdiction must obtain before testifying in a medical negligence case or providing an affidavit in the presuit portion of a medical negligence case.

This bill provides for discipline against the license of a physician or osteopathic physician that provides misleading, deceptive, or fraudulent expert witness testimony related to the practice of medicine.

This bill provides for the creation of an informed consent form related to cataract surgery. Such a form is admissible in evidence and its use creates a rebuttable presumption that the physician properly disclosed the risks of cataract surgery.

This bill provides that medical malpractice insurance contracts must contain a clause stating whether the physician has a right to "veto" any admission of liability or offer of judgment made within policy limits by the insurer. Current law prohibits such provisions in medical malpractice insurance contracts.

This bill provides that records, policies, or testimony of an insurer's reimbursement policies or reimbursement decisions relating to the care provided to the plaintiff are not admissible in any civil action and provides that a health care provider's failure to comply with, or breach of, any federal requirement is not admissible in any medical negligence case.

This bill provides that a plaintiff in a medical negligence action must prove by clear and convincing evidence that the failure of health care provider to order, perform, or administer supplemental diagnostic tests is a breach of the standard of care.

This bill provides that a defendant or defense counsel in a medical negligence case may interview a claimant's health care providers without notice to the claimant or claimant's counsel. The bill also creates an authorization form to allow the defendant access to a claimant's health care providers and medical records.

This bill provides that a hospital is not liable for the negligence of a health care provider with whom the hospital has entered into a contract unless the hospital expressly directs or exercises actual control over the specific conduct which caused the injury.

The fiscal impact of the bill on private parties is speculative. The Department of Health reports that the expert witness certificate provision will require the hiring of additional staff but has not yet completed a fiscal analysis.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Overview of Medical Malpractice Litigation

This bill makes changes to numerous statutes relating to medical malpractice litigation. In general, a medical malpractice action proceeds as follows.

- Prior to the filing of a lawsuit, the claimant (the person injured by medical negligence or a party bringing a wrongful death action arising from an incidence of medical malpractice) and defendant (a physician, other medical professional, hospital, or other healthcare facility) are required to conduct "presuit" investigations to determine whether medical negligence occurred and what damages, if any, are appropriate.[1]

- Upon completion of its presuit investigation, the claimant must provide each prospective defendant with a notice of intent to initiate litigation ("presuit notice").[2]

- For a period of 90 days after the presuit notice is mailed to each potential defendant, no lawsuit can be filed and the statute of limitations is tolled.[3] During that time, the parties are required to conduct informal discovery, including the taking of unsworn statements, the exchange of relevant documents, written questions, and an examination of the claimant.[4]

- Upon completion of the presuit investigation and informal discovery process, each potential defendant is required to respond to the claimant and either (1) reject the claim; (2) make a settlement offer; or (3) offer to admit liability and proceed to arbitration to determine damages.[5] At that point, the claimant can either accept the defendant's offer or proceed with the filing of a lawsuit.[6]

- If the case proceeds to trial, economic damages are not capped and noneconomic damages are capped at $1 million recoverable from practitioners and $1.5 million recoverable from nonpractitioners.[7] Damages are apportioned based on comparative fault.[8]

The 2003 Legislation

In 2003, the Legislature adopted ch. 2003-416, L.O.F., in response to dramatic increases in medical malpractice liability insurance premiums and the "functional unavailability" of malpractice insurance for some physicians.[9] The legislation, among other things, created a cap on noneconomic damages, created requirements for expert witness testimony, provided for additional presuit discovery, and required the Office of Insurance Regulation to report yearly on the medical malpractice insurance market in Florida. The reports[10] show the number of closed claims, the amount of damages paid, and

[1] Section 766.203, F.S.
[2] Section 766.106, F.S.
[3] Section 766.106, F.S.
[4] Section 766.205, F.S.
[5] Section 766.106, F.S.
[6] Section 766.106, F.S.
[7] Section 766.118, F.S.
[8] Section 766.112, F.S.
[9] Section 766.201(1), F.S.
[10] Information compiled from the Medical Malpractice Closed Claim Database and Rate Filing Annual Reports created by the Office of Insurance Regulation, 2005-2010. The closed claim and damages information are contained in the "Executive Summary" of each report. These reports can be accessed at http://www.floir.com/DataReports/datareports.aspx

the total gross medical malpractice insurance premium reported to the Office of Insurance Regulation since the enactment of ch. 2003-416, L.O.F.:

Claims, Damages and Insurance Premiums			
Year	Closed Claims	Total Damages	Total Premiums
2004	3,574	$664 million	$860 million
2005	3,753	$677 million	$850 million
2006	3,811	$602 million	$847 million
2007	3,553	$523 million	$663 million
2008	3,336	$519 million	$596 million
2009	3,087	$570 million	$550 million

The Office of Insurance Regulation report summarized the insurance rate filings in 2009:

> On average, rates for companies writing physicians and surgeons malpractice insurance in the admitted market decreased 8.2%.[11]

The report noted, regarding the decrease in premium:

> This represents a dramatic decrease (36%) in the overall medical malpractice premium reported in Florida in 2009 from what was reported in 2004. This is attributable to the lowering of rates. However, it may also be due to new arrangements by physicians including the use of individual bonding, purchasing malpractice insurance through hospitals/employers as well as utilization of self-insurance funds, or other non-traditional insurance mechanisms.[12]

The report summarized the growth of Florida's medical malpractice insurance market since 2004. In 2009, the Office of Insurance Regulation reported that 22 companies wrote 80% of the direct written premium in medical malpractice insurance and compared that number to prior years:

> This year, achieving the 80% market share requirement again required the inclusion of 22 insurers as in the previous year; 17 were required in the 2007 report, 15 insurers for the 2006 annual report, 12 in the 2005 annual report, and only 11 for the 2004 report.[13]

According to information provided by the Office of State Court Administrator, 1,248 medical malpractice cases were filed in Florida in 2010.

Issues Addressed by the Bill

Presuit Investigation, Presuit Notice, and Presuit Discovery

Background

Section 766.203(2), F.S., requires a claimant to investigate whether there are any reasonable grounds to believe whether any named defendant was negligent in the care and treatment of the claimant and whether such injury resulted in injury to the claimant prior to issuing a presuit notice. The claimant must corroborate reasonable grounds to initiate medical negligence litigation by submitting an affidavit from a medical expert.[14] After completion of presuit investigation, a claimant must send a presuit notice

[11] Florida Office of Insurance Regulation, "2010 Annual Report – October 1, 2010 - Medical Malpractice Financial Information Closed Claim Database and Rate Filings" at page 4.
[12] Florida Office of Insurance Regulation, "2010 Annual Report – October 1, 2010 - Medical Malpractice Financial Information Closed Claim Database and Rate Filings" at page 12.
[13] Florida Office of Insurance Regulation, "2010 Annual Report – October 1, 2010 - Medical Malpractice Financial Information Closed Claim Database and Rate Filings" at page 11.
[14] Section 766.203(2), F.S.

to each prospective defendant.[15] The presuit notice must include a list of all known health care providers seen by the claimant for the injuries complained of subsequent to the alleged act of negligence, all known health care providers during the 2-year period prior to the alleged act of negligence who treated or evaluated the claimant, and copies of all of the medical records relied upon by the expert in signing the affidavit.[16] However, the requirement of providing the list of known health care providers may not serve as grounds for imposing sanctions[17] for failure to provide presuit discovery.[18]

Once the presuit notice is provided, no suit may be filed for a period of 90 days. During the 90-day period, the statute of limitations is tolled and the prospective defendant must conduct an investigation to determine the liability of the defendant.[19] Once the presuit notice is received, the parties must make discoverable information available without formal discovery.[20] Informal discovery includes:

1. Unsworn statements - Any party may require other parties to appear for the taking of an unsworn statement.

2. Documents or things - Any party may request discovery of documents or things.

3. Physical and mental examinations - A prospective defendant may require an injured claimant to appear for examination by an appropriate health care provider. Unless otherwise impractical, a claimant is required to submit to only one examination on behalf of all potential defendants.

4. Written questions - Any party may request answers to written questions.

5. Medical information release - The claimant must execute a medical information release that allows a prospective defendant to take unsworn statements of the claimant's treating physicians. The claimant or claimant's legal representative has the right to attend the taking of such unsworn statements.[21]

Section 766.106(7), F.S., provides that a failure to cooperate during the presuit investigation may be grounds to strike claims made or defenses raised. Statements, discussions, documents, reports, or work product generated during the presuit process are not admissible in any civil action and participants in the presuit process are immune from civil liability arising from participation in the presuit process.[22]

At or before the end of the 90 days, the prospective defendant must respond by either rejecting the claim, making a settlement offer, or making an offer to arbitrate in which liability is deemed admitted and arbitration will be held only on the issue of damages.[23] Failure to respond constitutes a rejection of the claim.[24] If the defendant rejects the claim, the claimant can file a lawsuit.

Effect of the Bill

This bill allows the court to impose sanctions for a claimant's failure to provide the list of health care providers required by statute.

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[15] Section 766.166(2)(a), F.S.
[16] Section 766.106(2)(a), F.S.
[17] Sanctions can include the striking of pleadings, claims, or defenses, the exclusion of evidence, or, in extreme cases, dismissal of the case.
[18] Section 766.106(2)(a), F.S.
[19] Section 766.106(3), (4), F.S.
[20] Section 766.106(6)(a), F.S. The statute also provides that failure to make information available is grounds for dismissal of claims or defenses.
[21] Section 766.106(6), F.S.
[22] Section 766.106(5), F.S.
[23] Section 766.106(3)(b), F.S.
[24] Section 766.106(3)(c), F.S.

This bill amends s. 766.106(5), F.S., to provide that immunity from civil liability does not prevent the Department of Health from taking disciplinary action against a physician that provides a false, misleading, deceptive expert opinion during the presuit process.

Ex Parte Interviews with Physicians by Defense Counsel

Background

Whether defense counsel can have an ex parte conference with the claimant's treating physicians has long been an issue in Florida. In many civil cases, counsel for any party can meet with any potential witness who is willing to speak without notice to the opposing counsel. In 1984, the Florida Supreme Court ruled that there was no common law or statutory privilege of confidentiality as to physician-patient communications[25] and that there was no prohibition on defense counsel communicating with a claimant's physicians. In 1988, the Legislature enacted a statute to create a physician-patient privilege.[26] The current version of the statute provides, in relevant part:

> Except as otherwise provided in this section and in s. 440.13(4)(c), [patient medical records] may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient.[27]

The statute provides some exceptions to the confidentiality in medical malpractice cases but the Florida Supreme Court has ruled that defense counsel are barred by the statute from having an ex parte conference with a claimant's current treating physicians.[28]

The Governor's Select Task Force on Healthcare Professional Liability Insurance noted problems caused by the inability of defense counsel to interview a claimant's treating physicians:

> [T]he defendant is frequently in the position of having to investigate the plaintiff's medical history or current condition in order to discover other possible causes of the plaintiff's injury that could be used in defending the action. In addition, this information is often useful in determining the strength of the plaintiff's case, which the defendant could use to decide whether to settle the claim or proceed to trial. It is often necessary to interview several of the plaintiff's treating healthcare providers in order to acquire this information. But, because formal discovery is an expensive and time consuming process, defendants are often unable to adequately gather this information in preparation of their defense.[29]

Opponents of allowing defendants access to ex parte interviews with treating physicians argued the system was not broken. The report continued:

> The problem the Legislature corrected was the private, closed-door meetings between insurance adjusters, defense lawyers, and the person being sued. Typically, the person being sued would speak with his or her colleagues and say "I need your help here. I'm getting sued. I need you to help me out on either the causation issue or the liability issue or the damage issue".
>
> The present system is not broken. Crafting language to go back prior to 1988, to allow unfettered access, is not appropriate. To allow a situation where a defense lawyer or an

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[25] See *Coralluzzo v. Fass*, 671 So. 2d 149 (Fla. 1984),
[26] Chapter 88-208, Laws of Florida
[27] Section 456.057(7)(a), F.S.
[28] *See Acosta v. Richter*, 671 So. 2d 149 (Fla. 1996).
[29] Report of the Govenor's Select Task Force on Healthcare Professional Liability Insurance (2003) at p. 231. The Report can be accessed at www.doh.state.fl.us/myflorida/DOH-Large-Final%20Book.pdf

insurance adjuster and the doctor go to see a patient's treating physician on an informal basis would further drive a wedge between that physician and the patient."[30]

In 2003, the Legislature amended s. 706.106, F.S., to require a claimant to execute a medical information release to allow prospective defendants to take unsworn statements of the claimant's treating physician on issues relating to the personal injury or wrongful death during the presuit process. The claimant and counsel are entitled to notice, an opportunity to be heard, and to attend the taking of the statement. The legislation did not provide for ex parte interviews by defense counsel with a claimant's treating physicians.[31]

Effect of the Bill

This bill provides that a prospective defendant or his or her legal representative shall have access to interview the claimant's treating health care providers without notice or the presence of the claimant or the claimant's legal representative.

This bill also makes changes to the presuit provision relating to unsworn statements. It removes the provision requiring a claimant to execute a medical release from s. 766.106, F.S., and creates a new release provision.

This bill requires a claimant to execute an "authorization for release of protected health information" and include it with the presuit notice of intent to initiate litigation. The form is provided in the bill and authorizes the disclosure of protected health information that is potentially relevant to the claim of personal injury or wrongful death. The bill provides that the presuit notice is void if it is not accompanied by the executed authorization form. It further provides that the presuit notice is retroactively void from the date of issuance if the authorization is revoked and that "any tolling effect that the presuit notice may have had on any applicable statute-of-limitations period is retroactively rendered void."

Specifically, the form that claimants are required to execute provides that representatives of the potential defendant may obtain and disclose information from health care providers for facilitating the investigation and evaluation of the medical negligence claim described in the presuit notice or defending against any litigation arising out of the medical negligence claim made on the basis of the presuit notice.

The form informs the claimant of the type of health information that may be obtained by defendants and defendant's counsel and from whom that information can be obtained. The form informs claimants of the extent of the authorization, that the authorization expires upon the resolution of the claim, that executing the authorization is not a condition of continued treatment, and that the claimant has the right to revoke the authorization at any time. The form has a section where claimants can list health providers to which the authorization does not apply. The claimant must certify that such health care information is not potentially relevant to the claim.

The language in the authorization form set forth in the bill appears to comply with federal requirements. In recent years, courts have been dealing with the effect of the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA") on state medical malpractice litigation. The HIPAA privacy rules prohibit the disclosure of protected health information except in specified circumstances.[32] With limited exceptions, HIPAA's privacy rules preempt any contrary requirement of state law unless the state law is more stringent than the federal rules.[33]

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[30] Report of the Govenor's Select Task Force on Healthcare Professional Liability Insurance (2003) at p. 233 (internal footnotes omitted).
[31] Chapter 2003-416, Laws of Florida
[32] 45 C.F.R. s. 164.502
[33] 45 C.F.R. s. 160.203

HIPAA rules permit disclosure of health information in a number of circumstances.[34] Health care information may be disclosed if the patient has executed a valid written authorization.[35]

States with statutory provisions that allow for ex parte interviews with claimant's physicians have had to determine whether HIPAA preempted state laws allowing such interviews. Some courts have held that state laws permitting ex parte interviews violate HIPAA.[36] Other courts have held that HIPAA does not prohibit such interviews.[37] Texas dealt with the issue by enacting a law that required a claimant to execute a form authorizing the release of health information. In *In re: Collins*, 286 S.W.3d 911 (Tex. 2009), the Texas Supreme Court held that the authorization form complied with the HIPAA requirements. The court specifically rejected the argument that the authorization was not freely given because it was a requirement to proceed with a lawsuit:

> First, while it is true that the [claimants] could not have proceeded with their suit if [the injured person] had not executed the authorization, it was their choice to file the suit in the first instance. Moreover, on several occasions, courts have ordered plaintiffs to execute authorizations compliant with section 164.508.
>
> HIPAA preempts state law only if it would be impossible for a covered entity to comply with both the state and federal requirement, or if it would undermine HIPAA's purposes. While several courts have held that HIPAA preempts state law procedures that would allow ex parte contacts between health care providers and defendants and their representatives, none of them involve situations in which the patient has executed a written release compliant with 45 C.F.R. s. 164.508. Because [the Texas statute at issue] authorizes disclosure under the exact same terms as 45 C.F.R. s. 164.508, it would not be impossible for a health care provider to comply with both laws. Moreover, while the privacy of medical information is the primary goal of the privacy rules, the rules balance that interest against other important needs. Reducing the costs of medical care is a concern underlying both HIPAA and [the Texas statute]. In this case, the legislatively prescribed form authorizes disclosure only to the extent the information would "facilitate the investigation and evaluation" or defense of the health care claim described in the [claimants'] notice. Accordingly, under the circumstances presented, we conclude that HIPAA does not preempt [the Texas statute].[38]

The language in the authorization form in the bill is substantially similar to the language approved by the Texas Supreme Court.

This bill also expands the court's authority to dismiss a claim and assess fees if the authorization form is not completed in good faith.

Expert Witness Qualifications

Background

Florida law requires expert witnesses in medical negligence cases to meet certain qualifications. The witness must be a licensed health care provider. If the health care provider against whom or on whose behalf the testimony[39] is offered is a specialist, the expert witness must:

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[34] Circumstances include in a judicial proceeding, protected information may be disclosed in response to a court order. It may also be disclosed without a court order in response to a subpoena or discovery request if the health care provider receives satisfactory assurances that the requestor has made reasonable efforts to ensure that the subject of the information has been given notice of the request. *See* 45 C.F.R. s. 164.512(3)(1)(i), 45 C.F.R. s. 164.512(e)(1)(ii)(A).

[35] 45 C.F.R. s. 164.508

[36] *See Law v. Zuckerman*, 307 F.Supp.2d 705 (D. Maryland 2004); *Moreland v. Austin*, 670 S.E.2d 68 (Georgia 2008).

[37] *See Holmes v. Nightingale*, 158 P.3d 1039 (Oklahoma 2007).

[38] *In re: Collins*, 286 S.W.3d 911, 920 (Tex. 2009)(internal citations omitted).

[39] Section 766.102, F.S., provides qualifications for expert witnesses testifying at trial. Sections 766.202(6) and 766.203, F.S., provide qualifications for expert witnesses that must provide presuit corroboration of negligence claims. The qualifications for trial experts and presuit experts are the same.

(1) Specialize in the same or similar specialty as the health care provider against whom or on whose behalf the testimony is offered and

(2) Have devoted professional time during the 3 years immediately preceding the date of the occurrence that is the basis for the action to:

a. The active clinical practice of, or consulting with respect to, the same or similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim and have prior experience treating similar patients;

b. Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same or similar specialty; or

c. A clinical research program that is affiliated with an accredited health professional school or accredited residency or clinical research program in the same or similar specialty.[40]

If the health care provider against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness must:

(1) Have devoted professional time during the 5 years immediately preceding the date of the occurrence that is the basis for the action to:

a. The active clinical practice or consultation as a general practitioner;

b. The instruction of students in an accredited health professional school or accredited residency program in the general practice of medicine; or

c. A clinical research program that is affiliated with an accredited medical school or teaching hospital and that is in the general practice of medicine.[41]

If the health care provider against whom or on whose behalf the testimony is offered is a health care provider other than a specialist or a general practitioner, the expert witness must:

(1) Have devoted professional time during the 3 years immediately preceding the date of the occurrence that is the basis for the action to:

a. The active clinical practice of, or consulting with respect to, the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered;

b. The instruction of students in an accredited health professional school or accredited residency program in the same or similar health profession in which the health care provider against whom or on whose behalf the testimony is offered; or

c. A clinical research program that is affiliated with an accredited medical school or teaching hospital and that is in the same or similar health

[40] Section 766.102(5), F.S.
[41] Section 766.102(5), F.S.

profession as the health care provider against whom or on whose behalf the testimony is offered.[42]

Chapter 458, F.S., governs the regulation of medical practice. Chapter 459, F.S., governs the regulation of osteopathic medicine. Each chapter creates a board to deal with issues relating to licensing and discipline of physicians and osteopathic physicians. Under current law, an expert witness is not required to possess a Florida license to practice medicine or osteopathic medicine.[43]

Effect of the Bill

This bill changes the amount of "professional time" an expert witness must have devoted to active practice, clinical research, or instruction of students from 3 years to 5 years if the expert is to provide testimony against a specialist or health care provider other than a specialist or general practitioner. The bill will make the "professional time" requirement the same for all three categories of expert witnesses.

The bill requires the Board of Medicine or the Board of Osteopathic Medicine to issue an "expert witness certificate" to a physician licensed in another state or Canada to provide expert witness testimony in this state. The bill requires each board to adopt rules to administer the expert witness certificate program. The certificate must be issued if the physician or osteopathic physician submits a complete registration form, pays an application fee of no more than $50, and has not had a previous expert witness certificate revoked by the appropriate board. The board must approve or deny the certificate within five business days after receipt of the application and payment of the fee or the application is approved by default. A physician must notify the appropriate board of his or her intent to rely on a certificate approved by default. The certificate is valid for two years.

The certificate authorizes a physician or osteopathic physician to provide a verified expert opinion in the presuit stage of a medical malpractice case and to provide testimony about the standard of care in medical negligence litigation. The certificate does not authorize the physician or osteopathic physician to practice medicine and does not require the certificate holder to obtain a license to practice medicine.

This bill amends s. 766.102, F.S., relating to the qualifications of expert witness in cases against physicians licensed under ch. 458 or ch. 459, F.S. The bill requires that the expert witness testifying about the standard of care in such cases must be licensed under ch. 458 or 459, F.S., or possess a valid expert witness certificate.

The bill amends s. 766.102(5), F.S., to require that an expert witness conduct a complete review of the pertinent medical records before the witness can give expert testimony.

License Disciplinary Actions

Background

Chapter 458, F.S., regulates medical practice. Chapter 459, F.S., regulates osteopathic medicine. Each chapter creates a board to deal with issues relating to discipline of physicians and osteopathic physicians. In general, the discipline process under ch. 458, F.S., and ch. 459, F.S., begins when a complaint is filed against a health care provider alleging a violation of the disciplinary statutes. The Department of Health reviews the case and a department prosecutor presents the case to appropriate board or probable cause panel of the appropriate board. If the probable cause is found, the Department of Health files an administrative complaint. If the health care provider disputes the allegations of the complaint, the provider can request a hearing before an administrative law judge. An attorney for the Department of Health prosecutes the case and the provider may be represented by counsel. The administrative law judge issues a recommended order upon the conclusion of the

[42] Section 766.102(5), F.S.

[43] *See Baptist Medical Center of the Beaches v. Rhodin*, 40 So. 3d 112, 117 (Fla. 1st DCA 2010)(noting that Florida's expert witness statute "does not encompass a universe limited only to Florida licensees").

hearing. The recommended order and any exceptions filed by the parties are considered by the appropriate board and the board determines the appropriate discipline which can include a fine, suspension of the license, or revocation of the license.[44]

Sections 456.072, 458.331, and 459.015, F.S., creates grounds for which disciplinary action may be taken against a licensee.[45] It is not clear from those statutes whether the boards can impose discipline against a licensee for providing misleading, deceptive, or fraudulent expert witness testimony related to the practice of medicine or osteopathic medicine. "Statutes providing for the revocation or suspension of a license to practice are deemed penal in nature and must be strictly construed, with any ambiguity interpreted in favor of the licensee."[46] Section 458.331(1)(k), F.S., provides the following ground for discipline:

> Making deceptive, untrue, or fraudulent representations in or related to the practice of medicine or employing a trick or scheme in the practice of medicine.[47]

It is not clear whether a court would find deceptive or untrue expert testimony in a medical negligence case to be "related to the practice" of medicine or osteopathic medicine.[48]

Current law allows discipline against a licensee for "being found by any court in this state to have provided corroborating written medical expert opinion attached to any statutorily required notice of claim or intent or to any statutorily required response rejecting a claim, without reasonable investigation."[49]

Effect of the Bill

The bill amends ss. 458.331 and 459.015, F.S., to provide that the appropriate board may impose discipline on a physician or osteopathic physician that provides "misleading, deceptive, or fraudulent expert witness testimony related to the practice of medicine." The disciplinary statutes allow the board to impose discipline against licensees who violate the statutes. The bill does not specifically provide for discipline against holders of expert witness certificates.[50]

The bill also amends ss. 458.331 and 459.015, F.S., to provide that the purpose of the disciplinary sections is "facilitate uniform discipline for those acts made punishable under this section and, to this end, a reference to this section constitutes a general reference under the doctrine of incorporation by reference."

Incorporation by Reference

Background

Current law allows for one section of statute to reference another, or "incorporation by reference." This is commonly done to prevent the repetition of a particular text. There are two kinds of references. A "specific reference" incorporates the language of the statute referenced and becomes a part of the new statute even if the referenced statute is later altered or repealed. The law presumes that the Legislature intends to incorporate the text of the current law as it existed when the reference was created. A law review article explained:

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[44] *See* ss. 456.072 and 456.073, F.S.
[45] Section 456.072(2), F.S., deals with discipline against licensees.
[46] *Elmariah v. Board of Medicine*, 574 So. 2d 164, 165 (Fla. 1st DCA 1990).
[47] Section 459.015(1)(m), F.S., contains the same language related to osteopathic physicians.
[48] In *Elmariah*, 574 So. 2d at 165, the court held that a deceptive application for staff privileges at a hospital was not made "in" the practice of medicine but noted that such an application might be "related" to the practice of medicine. The case demonstrates how a court will construe a statute very strictly in favor of the licensee.
[49] *See* ss. 458.331(1)(jj) and 459.015(1)(mm), F.S.
[50] *See* "Drafting Issues and Other Comments" in section III. C. of this analysis.

> From a very early time, it has been generally agreed that the legal effect of a specific statutory cross reference is to incorporate the language of the referenced statute into the adopting statute as though set out verbatim, and that in the absence of express legislative intent to the contrary, the Legislature intends that the incorporation by reference shall not be affected by a subsequent change to the referenced law – even its repeal. In other words, each referenced provision has two separate existences – as substantive provision and as an incorporation by reference – and neither is thereafter affected by anything that happens to the other.[51]

The second type of referenced statute is a "general reference." The general reference differs from the specific reference in that it presumes that the referenced section may be amended in the future, and any such changes are permitted to be incorporated into the meaning of the adopting statute. Again, Means explained in his article that "when the reference is not to a specific statute, but to the law in general as it applies to a specified subject, the reference takes the law as it exists at the time the law is applied. Thus, in cases of general references, the incorporation does include subsequent changes to the referenced law."[52]

Currently, other provisions of statutes provide statutory intent which allow for references to that statute to be construed as a general reference under the doctrine of incorporation by reference. For example, the statutes which deal with the punishments for criminal offenses contain clauses which allow for any reference to them to constitute a general reference.[53] This means that any time the Legislature amends a criminal offense, these punishment statutes do not have to be reenacted within the text of a bill because it is understood that their text or interpretation may change in the future.

Effect of the Bill

This bill contains a provision providing that the changes to the disciplinary statutes constitute a general reference under the doctrine of incorporation by reference. The incorporation by reference language in this bill could be interpreted to allow amendments to statutes which reference the disciplinary statute so that the reference takes the law as it exists at the time the law is applied.

Informed Consent

Background

The Mayo Clinic website describes cataract surgery as follows:

> Cataract surgery is a procedure to remove the lens of your eye and, in most cases, replace it with an artificial lens. Cataract surgery is used to treat a cataract — the clouding of the normally clear lens of your eye.[54]

Complications after cataract surgery are uncommon and risks include inflammation, infection, bleeding, swelling, retinal detachment, glaucoma, or a secondary cataract.[55]

The doctrine of informed consent requires a physician to advise his or her patient of the material risks of undergoing a medical procedure.[56] Physicians and osteopathic physicians are required to obtain informed consent of patients before performing procedures and are subject to discipline for failing to do

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[51] Earnest Means, "Statutory Cross References - The "Loose Cannon" of Statutory Construction," Florida State University Law Review, Vol. 9, p. 3 (1981).
[52] Earnest Means, "Statutory Cross References - The "Loose Cannon" of Statutory Construction," Florida State University Law Review, Vol. 9, p. 3 (1981).
[53] *See* ss. 775.082, 775.083, and 775.084, F.S.
[54] http://www.mayoclinic.com/health/cataract-surgery/MY00164 (accessed February 19, 2011).
[55] http://www.mayoclinic.com/health/cataract-surgery/MY00164/DSECTION=risks (accessed February 19, 2011).
[56] *See State v. Presidential Women's Center*, 937 So. 2d 114, 116 (Fla. 2006)("The doctrine of informed consent is well recognized, has a long history, and is grounded in the common law and based in the concepts of bodily integrity and patient autonomy").

so.[57] Florida has codified informed consent in the "Florida Medical Consent Law," s. 766.103, F.S. Section 766.103(3), F.S., provides:

> (3) No recovery shall be allowed in any court in this state against [specified health care providers including physicians and osteopathic physicians] in an action brought for treating, examining, or operating on a patient without his or her informed consent when:
>
> (a)1. The action of the [health care provider] in obtaining the consent of the patient or another person authorized to give consent for the patient was in accordance with an accepted standard of medical practice among members of the medical profession with similar training and experience in the same or similar medical community as that of the person treating, examining, or operating on the patient for whom the consent is obtained; and
>
> 2. A reasonable individual, from the information provided by the [health care provider], under the circumstances, would have a general understanding of the procedure, the medically acceptable alternative procedures or treatments, and the substantial risks and hazards inherent in the proposed treatment or procedures, which are recognized among other [health care providers] in the same or similar community who perform similar treatments or procedures; or
>
> (b) The patient would reasonably, under all the surrounding circumstances, have undergone such treatment or procedure had he or she been advised by the [health care provider] in accordance with the provisions of paragraph (a).

Section 766.103(4), F.S., provides:

> (4)(a) **A consent which** is evidenced in writing and **meets the requirements of subsection (3) shall**, if validly signed by the patient or another authorized person, **raise a rebuttable presumption of a valid consent.**
>
> (b) A valid signature is one which is given by a person who under all the surrounding circumstances is mentally and physically competent to give consent. (emphasis added).

The Florida Supreme Court discussed the effect of the rebuttable presumption in the Medical Consent Law in *Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596 (Fla. 1987). In that case, the patient signed two consent forms, one acknowledging that no guarantees had been made concerning the results of the operation and one stating that the surgery had been explained to her.[58] The patient argued that the doctor made oral representations that contradicted the consent forms and made other statements that were not addressed by the consent forms. The court found that such claims could overcome the presumption:

> [W]e note that no conclusive presumption of valid consent, rebuttable only upon a showing of fraud, will apply to the case. The alleged oral warranties, of course, if accepted by the jury may properly rebut a finding of valid informed consent.[59]

A second issue in Valcin was not related to informed consent but was which type of presumption should apply when surgical records related to the surgery at issue were lost. The *Valcin* court discussed the two types of presumptions created under the Evidence Code:

> At this point, we should clarify the type of rebuttable presumption necessitated under this decision. The instant problem should be resolved either by applying a shift in the burden of producing evidence, section 90.302(1), Florida Statutes

[57] *See* s. 458.331, F.S., and 459.015, F.S.
[58] *See Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 598 (Fla. 1987).
[59] *Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 599 (Fla. 1987).

> (1985), or a shift in the burden of proof. § 90.302(2), Fla.Stat. (1985). While the distinction sounds merely technical, it is not. In the former, as applied to this case, the hospital would bear the initial burden of going forward with the evidence establishing its nonnegligence. If it met this burden by the greater weight of the evidence, the presumption would vanish, requiring resolution of the issues as in a typical case. *See Gulle v. Boggs,* 174 So.2d 26 (Fla.1965); C. Ehrhardt, *Florida Evidence* § 302.1 (2d ed. 1984). The jury is never told of the presumption.
>
> In contrast, once the burden of proof is shifted under section 90.302(2), the presumption remains in effect even after the party to whom it has been shifted introduces evidence tending to disprove the presumed fact, and "the jury must decide whether the evidence introduced is sufficient to meet the burden of proving that the presumed fact did not exist." Ehrhardt at § 302.2, citing *Caldwell v. Division of Retirement,* 372 So. 2d 438 (Fla. 1979).[60]

The *Valcin* court discussed the second kind of rebuttable presumption:

> The second type of rebuttable presumption, as recognized in s. 90.302(2), F.S., affects the burden of proof, shifting the burden to the party against whom the presumption operates to prove the nonexistence of the fact presumed. "When evidence rebutting such a presumption is introduced, the presumption does not automatically disappear. It is not overcome until the trier of fact believes that the presumed fact has been overcome by whatever degree of persuasion is required by the substantive law of the case." Rebuttable presumptions which shift the burden of proof are "expressions of social policy," rather than mere procedural devices employed "to facilitate the determination of the particular action."
>
> A section 90.302(2) presumption shifts the burden of proof, ensuring that the issue of negligence goes to the jury.[61] (internal citations omitted).

Chapter 120, F.S. the Administrative Procedures Act, sets forth requirements for agency rulemaking. Section 120.541, F.S., provides additional requirements relating to legislative approval of agency rules.[62] It provides a procedure for substantially affected persons to submit lower cost regulatory alternatives to a proposed rule and requires the agency to prepare a revised statement of estimated regulatory costs in response to the alternative rule. Section 120.541(1)(b), F.S., requires an agency to prepare a statement of estimated regulatory costs if a proposed rule will have an adverse impact on small business or is likely to directly or indirectly increase regulatory costs in excess of $200,000 in the aggregate within 1 year of implementation of the rule. The statement of estimated regulatory costs must include an analysis showing whether the rule directly or indirectly is likely to increase regulatory costs or have an adverse impact on economic growth, business competitiveness, private sector job creation or employment, or private sector investment, in excess of $1 million in the aggregate within 5 years after the implementation of the rule.[63] The statement must also include a good faith estimate of the number of individuals and entities likely to be required to comply with the rule, a good faith estimate of the cost to governmental entities of implementing and enforcing the rule, and a good faith estimate of the transactional costs likely to be incurred by individuals and entities required to comply with the rule.[64]

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[60] *Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 600 (Fla. 1987).
[61] *Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 600-601 (Fla. 1987).
[62] Many of the requirements currently in s. 120.541, F.S., were created in ch. 2010-279, Laws of Florida, passed over the Governor's veto on November 16, 2010.
[63] Section 120.541(2)(a), F.S.
[64] Section 120.541(2)(b), (c), and (d), F.S.

If the adverse impact or regulatory costs of the rule exceed any of the criteria established in statute, the rule must be submitted to the President of the Senate and Speaker of the House of Representatives prior to the next regular legislative session and the rule may not take effect until it is ratified by the Legislature.[65]

Effect of the Bill

The bill requires that the Boards of Medicine and Osteopathic Medicine to adopt rules establishing a standard informed consent form setting forth recognized specific risks relating to cataract surgery. The boards must consider information from physicians and osteopathic physicians regarding specific recognized risks of cataract surgery and must consider informed consent forms used in other states.

The rule must be proposed within 90 days of the effective date of the bill and the provisions of s. 120.541, F.S., relating to adverse impacts, estimated regulatory costs, and legislative ratification of rules do not apply.

The bill provides that in a civil action or administrative proceeding against a physician or osteopathic physician based on the failure to properly disclose the risks of cataract surgery, a properly executed informed consent form is admissible and creates a rebuttable presumption that the physician or osteopathic physician properly disclosed the risks. The bill requires that the rebuttable presumption be included in the jury instruction in a civil action. The bill does not say whether the presumption shifts the burden of production, creating a "bursting bubble" presumption, or shifts the burden of proof.

Reports of Adverse Incidents

Current Law

Sections 458.351 and 459.026, F.S., require health care providers practicing in an office setting to report "adverse incidents" to the Department of Health and requires the Department of Health to review such incidents to determine whether disciplinary action is appropriate. Hospitals and other facilities licensed under s. 395.0197, F.S., also have adverse incident reporting requirements. In general, adverse incidents are incidents resulting in death, brain or spinal damage, wrong site surgical procedures, or performing the wrong surgical procedure.[66]

Effect of the Bill

The bill provides that incidents resulting from recognized specific risks described in the signed consent forms (discussed elsewhere in this analysis) related to cataract surgery are not considered adverse incidents for purposes of ss. 458.351, 459.026, and 395.0197, F.S.

"Consent to Settle" Clauses in Medical Malpractice Insurance Contracts

Background

Section 627.4147, F.S., contains provisions relating to medical malpractice insurance contracts. Among other things, medical malpractice insurance contracts must include a clause requiring the insured to cooperate fully in the presuit review process if a notice of intent to file a claim for medical malpractice is made against the insured.

In addition, the insurance contract must include a clause authorizing the insurer or self-insurer to "determine, to make, and to conclude, without the permission of the insured, any offer of admission of liability and for arbitration pursuant to s. 766.106, settlement offer, or offer of judgment, if the offer is

[65] Section 120.541(3), F.S.

[66] *See generally* s. 458.351,F.S., for examples of incidents required to be reported. Sections 459.026 and 395.0197, F.S., contain reporting requirements for osteopathic physicians and hospitals.

within the policy limits."[67] The statute further provides that it against public policy for any insurance policy to contain a clause giving the insured the exclusive right to veto any offer for admission of liability and for arbitration, settlement offer, or offer of judgment, when such offer is within the policy limits. However, the statute provides that the insurer must act in good faith and in the best interests of the insured.[68]

The provision giving insurers the exclusive right to settle claims within policy limits was enacted in 1985.[69] Subsequent to that legislation, there have been causes where physicians argued that insurance companies improperly settled claims.[70] In *Rogers v. Chicago Insurance Company*, 964 So. 2d 280 (Fla. 4th DCA 2007), a physician sued his malpractice carrier for failing to exercise good faith in settling a claim. He argued that the claim was completely defensible and he was damaged by the settlement because of, among other things, his inability to obtain medical malpractice insurance.[71] The court held that the statute did not create a cause of action for the physician and explained:

> Roger's interpretation of the statute would make its primary purpose, which is not to allow insured's to veto malpractice settlements, meaningless. We say that because, if an insurer did settle with the claimant over the objection of the insured, the insurer would then be exposed to unlimited damages for increased insurance premiums, inability to get insurance, or other far removed and unknown collateral damages. No insurer would take that risk and the objecting insured would thus have the veto which the statute purports to eliminate.
>
> We conclude that the statutory language, requiring that any settlement be in the best interests of the insured, means the interests of the insured's rights under the policy, not some collateral effect unconnected with the claim. For example, the insured may have a counterclaim in the malpractice lawsuit for services rendered, which should not be ignored. Nor should the insurer be able to settle with the claimant and leave the doctor exposed to a personal judgment for contribution by another defendant in the same case. By including the language that any settlement must be in the best interest of the insured, the legislature was merely making it clear that, although it was providing that an insured cannot veto a settlement, the power to settle is not absolute and must still be in the best interests of the insured[.][72]

In dissent, Judge Warner argued that the majority effectively writes the "good faith" provision out of the statute:

> The majority suggests that Rogers's interpretation would render meaningless part of the statute in that an insured could veto malpractice settlements by objecting. I do not agree. If the insurer has fulfilled its obligation of good faith in investigating and evaluating the case, and it has considered the best interests of the insured, then it can settle the case. The insured cannot veto the settlement...
>
> The statutory obligation of good faith and best interest provides the only protection to a doctor against insurance companies who may settle unfounded cases simply because it is cheaper to settle than to defend. That is a decision in the insurer's own interests, which it could do under *Shuster* but is not consistent, in my view, with its duties under section 627.4147. The majority opinion takes this statutory protection away from the physician. I would read the statute as written and allow Dr. Rogers's cause of action to proceed[.][73]

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[67] Section 627.4147(1)(b)1., F.S.
[68] Section 627.4147(1)(b)1., F.S.
[69] *See Shuster v. South Broward Hospital District Physicians' Professional Liability Insurance Trust*, 591 So. 2d 174, 176 n. 1 (Fla. 1992).
[70] In addition to the case discussed in this analysis, see *Freeman v. Cohen*, 969 So. 2d 1150 (Fla. 4th DCA 2008).
[71] *See Rogers v. Chicago Insurance Company*, 964 So. 2d 280, 281 (Fla. 4th DCA 2007).
[72] *Rogers v. Chicago Insurance Company*, 964 So. 2d 280, 284 (Fla. 4th DCA 2007).
[73] *Rogers v. Chicago Insurance Company,* 964 So. 2d 280, 285-286 (Fla. 4th DCA 2007)(Warner, J., dissenting).

Effect of the Bill

This bill allows medical malpractice insurance policies to contain provisions allowing physicians to "veto" settlement offers made to the insurance company that are within policy limits. Instead of not allowing such provisions, the bill would require that policies "clearly" state whether the physician has the exclusive right to veto settlements.

Standard of Proof in Cases Relating to Supplemental Diagnostic Tests

Background

Section 766.102(4), F.S., provides that the "failure of a health care provider to order, perform, or administer supplemental diagnostic tests shall not be actionable if the health care provider acted in good faith and with due regard for the prevailing professional standard of care."

Section 766.102, F.S., provides that a claimant in a medical negligence action must prove by "the greater weight of the evidence" that actions of the health care provider represented a breach of the prevailing professional standard of care. Greater weight of the evidence means the "more persuasive and convincing force and effect of the entire evidence in the case."[74]

Other statutes, such as license disciplinary statutes, require a heighted standard of proof called "clear and convincing evidence." Clear and convincing evidence has been described as follows:

> [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.[75]

Section 766.111, F.S., prohibits a health care provider from ordering, procuring, providing, or administering unnecessary diagnostic tests.

Effect of the Bill

The bill provides that the claimant in a medical negligence case where the death or injury resulted from a failure of a health care provider to order, perform, or administer supplemental diagnostic tests must prove that the health care provider breached the standard of care by clear and convincing evidence. This bill would have the effect of making such claims more difficult to prove. Standards of proof in other medical negligence cases would remain unchanged.

Exclusion of Evidence

Background

Section 90.402, F.S., provides that all relevant evidence is admissible, except as a provided by law. Section 90.401, F.S, defines "relevant evidence" as evidence tending to prove or disprove a material fact. The trial court judge determines whether evidence is admissible at trial and a decision on the admissibility is reviewable for an abuse of discretion.

Currently, information about whether an insurer reimbursed a physician for performing a particular procedure or test is subject to admission as evidence during a trial based on whether it is relevant. The trial judge makes an individual determination as to whether such evidence is admissible.

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[74] *Castillo v. E.I. Du Pont De Nemours & Co., Inc.*, 854 So. 2d 1264, 1277 (Fla. 2003)

[75] *Inquiry Concerning Davey*, 645 So. 2d 398, 404 (Fla. 1994)(quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

Effect of the Bill

The bill amends s. 766.102, F.S., to provide that records, policies, or testimony of an insurer's[76] reimbursement policies[77] or reimbursement determination regarding the care provided to the plaintiff are not admissible as evidence in any civil action.[78]

The bill amends s. 766.102, F.S., to provide that a health care provider's failure to comply with, or breach of, any federal requirement is not admissible as evidence in any medical negligence case. Evidence of a health care provider's compliance with federal requirements could be admissible if the trial judge found it to be relevant.

Hospital Liability for Independent Contractors

Background

The Florida Supreme Court has described the doctrine of vicarious liability:

> The concept of vicarious liability can be described as follows: "A person whose liability is imputed based on the tortious acts of another is liable for the entire share of comparative responsibility assigned to the other." Vicarious liability is often justified on the policy grounds that it ensures that a financially responsible party will cover damages. Thus, the vicariously liable party is liable for the entire share of the fault assigned to the active tortfeasor. The vicariously liable party has not breached any duty to the plaintiff; its liability is based solely on the legal imputation of responsibility for another party's tortious acts. The vicariously liable party is liable only for the amount of liability apportioned to the tortfeasor. In sum, the doctrine of vicarious liability takes a party that is free of legal fault and visits upon that party the negligence of another.[79]

Generally, a hospital may not be held liable for the negligence of independent contractor physicians to whom it grants staff privileges.[80] "Vicarious liability does not therefore necessarily attach to the hospital for the doctors' acts or omissions."[81] One court has explained:

> While some hospitals employ their own staff of physicians, others enter into contractual arrangements with legal entities made up of an association of physicians to provide medical services as independent contractors with the expectation that vicarious liability will not attach to the hospital for the negligent acts of those physicians.[82]

However, a hospital may be held vicariously liable for the acts of independent contractor physicians if the physicians act with the apparent authority of the hospital.[83] Apparent authority exists only if all three of the following elements are present: (a) a representation by the purported principal; (b) a reliance on that representation by a third party; and (c) a change in position by the third party in reliance on the representation.[84]

There are numerous cases in Florida appellate courts where courts have struggled over the issue of whether the hospital should be liable for the negligence of an independent contractor physician. Some

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[76] The bill defines "insurer" as "any public or private insurer, including the Centers for Medicare and Medicaid Services."
[77] The bill defines "reimbursement policies" as "an insurer's policies and procedures
[78] See Drafting Issues and Other Comments" in section III. C. of this analysis.
[79] *American Home Assurance Company v. National Railroad Passenger Corporation*, 908 So. 2d 459, 467-468 (Fla. 2005)(internal citations omitted).
[80] *See Insinga v. LaBella*, 543 So. 2d 209 (Fla. 1989).
[81] *Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 601 (Fla. 1987).
[82] *Roessler v. Novak*, 858 So. 2d 1158, 1162 (Fla. 2d DCA 2003).
[83] *See Stone v. Palms West Hospital*, 941 So. 2d 514 (Fla. 4th DCA 2006).
[84] *See Roessler v. Novak*, 858 So. 2d 1158, 1161 (Fla. 2d DCA 2003).

cases involve the apparent authority issue. Others involve the issue of whether the hospital has a nondelegable duty to provide certain medical services. One court found:

> Even where a physician is an independent contractor, however, a hospital that "undertakes by [express or implied] contract to do for another a given thing" is not allowed to "escape [its] contractual liability [to the patient] by delegating performance under a contract to an independent contractor."[85]

One argument in favor of imposing such a duty on hospitals is:

> This trend suggests that hospitals should be vicariously liable as a general rule for activities within the hospital where the patient cannot and does not realistically have the ability to shop on the open market for another provider. Given modern marketing approaches in which hospitals aggressively advertise the quality and safety of the services provided within their hospitals, it is quite arguable that hospitals should have a nondelegable duty to provide adequate radiology departments, pathology laboratories, emergency rooms, and other professional services necessary to the ordinary and usual functioning of the hospital. The patient does not usually have the option to pick among several independent contractors at the hospital and has little ability to negotiate and bargain in this market to select a preferred radiology department. The hospital, on the other hand, has great ability to assure that competent radiologists work within an independent radiology department and to bargain with those radiologists to provide adequate malpractice protections for their mutual customers. I suspect that medical economics would work better if the general rule placed general vicarious liability upon the hospital for these activities.[86]

In March 2003, the Florida Supreme Court issued its opinion in *Villazon v. Prudential Health Care Plan*, 843 So. 2d 842 (Fla. 2003). In *Villazon*, the court considered whether vicarious liability theories could make an HMO liable for the negligence of a physician who had a contract with the HMO. The court held that the HMO Act did not provide a cause of action against the HMO for negligence of the physician but that a suit could proceed under common law theories of negligence under certain circumstances.[87] It noted that the "existence of an agency relationship is normally one for the trier of fact to decide."[88] The court explained that the physician's contractual independent contractor status does not alone preclude a finding of agency and remanded the case for consideration of whether the insurer exercised sufficient control over the physician's actions such that an agency relationship existed or whether agency could be established under an apparent agency theory.[89]

Subsequent to *Villazon*, the Legislature passed ch. 2003-416, L.O.F., which created s. 768.0981, F.S. Section 768.0981, F.S., provides:

> An entity licensed or certified under chapter 624, chapter 636, or chapter 641[90] shall not be liable for the medical negligence of a health care provider with whom the licensed or certified entity has entered into a contract, other than an employee of such licensed or certified entity, unless the licensed or certified entity expressly directs or exercises actual control over the specific conduct that caused injury.

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[85] *Shands Teaching Hospital and Clinic, Inc. v. Juliana*, 863 So. 2d 343, 349 n. 9 (Fla. 1st DCA 2003). *But see Jones v. Tallahassee Memorial Regional Healthcare, Inc.* 923 So. 2d 1245 (Fla. 1st DCA 2006)(refusing to extend the nondelegable duty doctrine to physicians).

[86] *Roessler v. Novak*, 858 So. 2d 1158, 1164-1165 (Fla. 2d DCA 2003)(Altenbernd, C.J., concurring).

[87] *See Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 852 (Fla. 2003).

[88] *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 853 (Fla. 2003).

[89] *See Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 855-856 (Fla. 2003).

[90] Chapter 624, F.S., provides for licensing of health insurers under the Florida Insurance Code. Chapter 636, F.S., provides for licensing of prepaid limited health service organizations and discount medical plan organizations. Chapter 641, F.S., provides for licensing of health maintenance organizations and prepaid health clincs.

The statute provides that insurers, HMOs, prepaid limited health service organizations, and prepaid health clinics are not be liable for the negligence of health care providers with whom the entity has a contract unless the entity expressly directed or exercised actual control over the specific conduct that caused the injury.

Effect of the Bill

The bill amends s. 768.0981, F.S. to provide that a hospital is not liable for the medical negligence of a health care provider with whom the hospital has entered into a contract, other than an employee of the hospital, unless the hospital expressly directs or exercises actual control over the specific conduct that caused injury. This bill would limit the inquiry as to whether the hospital "expressly" directed or exercised actual control over the conduct that caused the injury.

B. SECTION DIRECTORY:

Section 1 creates s. 458.3175, F.S., relating to expert witness certificates.

Section 2 amends s. 458.331, F.S., relating to grounds for disciplinary action and action by the board and department.

Section 3 amends s. 458.351, F.S., relating to reports of adverse incidents in office practice settings.

Section 4 creates s. 459.0066, F.S., relating to expert witness certificates.

Section 5 amends s. 459.015, F.S., relating to grounds for disciplinary action and action by the board and department.

Section 6 amends s. 459.026, F.S., relating to reports of adverse incidents in office practice settings.

Section 7 amends s. 627.4147, F.S., relating to medical malpractice insurance contracts.

Section 8 amends s. 766.102, F.S., relating to medical negligence, standards of recovery, and expert witnesses.

Section 9 amends s. 766.106, F.S., relating to notice before filing action for medical negligence, presuit screening period, offers for admission of liability and for arbitration, and informal discovery.

Section 10 creates s. 766.1065, F.S., relating to authorization for release of protected health information.

Section 11 amends s. 766.206, F.S., relating to presuit investigation of medical negligence claims and defenses by a court.

Section 12 amends s. 768.0981, F.S., relating to limitations on actions against insurers, prepaid limited health service organizations, health maintenance organizations, hospitals, or prepaid health clinics.

Section 13 provides the bill takes effect on July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Department of Health noted that the bill will require additional staff to administer the two new programs created by the bill but has not yet completed the fiscal analysis.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill requires physicians licensed in another state or Canada to pay a fee of not more than $50 to obtain an expert witness certificate in order to provide an expert witness opinion or provide expert testimony relating to the standard of care in a medical malpractice case against a physician.

D. FISCAL COMMENTS:

The fiscal impact on private parties is speculative.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Access to Courts

Section 8 of the bill contains a provision that increases the standard of proof in certain medical negligence actions from preponderance of the evidence to clear and convincing evidence. Section 12 of the bill provides that a hospital is not liable, with some exceptions, for the medical negligence of a health care provider with whom the hospital has entered into a contract. Article 1, s. 21, Fla. Const., provides that the "courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." In *Kluger v. White*, 281 So. 2d 1, 4 (Fla, 1983), the Florida Supreme Court explained the constitutional limitation on the ability of the Legislature to abolish a civil cause of action:

> We hold, therefore, that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. s. 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

In *Eller v. Shova*, 630 So. 2d 537, 540 (Fla. 1993), the court applied *Kluger* to a case that changed the standard of proof from simple negligence to gross negligence in some workers compensation actions:

> In analyzing [the standard quoted above] in *Kluger*, we stated that a statute that merely changed the degree of negligence necessary to maintain a tort action did not abolish a right to redress for an injury.

Justice Kogan warned that the ability to change the standard of proof is not unlimited:

> [F]ew would question that access to the courts is being denied if the legislature purports to preserve a cause of action but then insulates defendants with conclusive, irrebuttable presumptions. Such a "cause of action" would be little more than a legal sham used to circumvent article 1, section 21.[91]

Separation of Powers

Sections 1 and 4 provide that the Boards of Medicine and Osteopathic Medicine must issue an expert witness certificate if the applicant meets specified conditions including not having had a "previous expert witness certificate revoked by the board." The bill contains no guidance regarding what would constitute grounds for revocation. Statutes granting enforcement power, such as revoking a license, must "clearly set out adequate standards to guide the agency in the execution of the powers delegated and must define those powers with sufficient clarify to preclude the agency from acting through whim, favoritism, or unbridled discretion."[92]

Rules of Practice and Procedure in the Courts

Sections 1, 3, 4, 6, and 8 of the bill change provisions relating to expert witnesses and the admissibility of evidence during a civil trial. Article V, s. 2(a), Fla. Const., provides that the Florida Supreme Court "shall adopt rules for the practice and procedure" in all courts. The Florida Supreme Court has interpreted this provision to mean that the court has the exclusive power to create rules of practice and procedure, and statutes that do so are invalid. Sections 1 and 4 provide requirements for expert witnesses who do not possess a Florida license. Section 3 and 6 provide for admissibility of informed consent forms, create presumptions, and provide for certain instruction to be given to the jury. Section 8 provides for exclusion of certain evidence even if the evidence is otherwise relevant. If a court were to find that any of these requirements encroached on the court's rulemaking power, it could hold the statute invalid.

Sections 3, 6, and 8 specifically provide that certain documents are admissible in evidence. The Florida Supreme Court has held that some portions of the Evidence Code are substantive and can be set by the Legislature and some portions are procedural and can only be set by the rules of court. If a court were to find that the provisions in this bill related to admission of evidence are procedural, it could hold the provisions invalid under art. V, s. 2, Fla. Const.

B. RULE-MAKING AUTHORITY:

The bill requires the Board of Medicine and the Board of Osteopathic Medicine to adopt rules to administer the expert witness certificate provisions of the bill. Sections 1 and 4 provide that the Boards of Medicine and Osteopathic Medicine must issue an expert witness certificate if the applicant meets specified conditions including not having had a "previous expert witness certificate revoked by the board." The bill contains no provision or guidance regarding what would constitute grounds for revocation.

Sections 3 and 6 of the bill require that the Boards of Medicine and Osteopathic Medicine adopt rules establishing a standard informed consent form setting forth recognized specific risks relating to cataract surgery. The boards must consider information from physicians and osteopathic physicians regarding specific recognized risks of cataract surgery and must consider informed consent forms used in other states.

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[91] *Eller v. Shova*, 630 So. 2d 537, 543 (Fla. 1993)(Kogan, J., concurring in result only).
[92] *In re Advisory Opinion to the Governor*, 509 So. 2d 292, 311 (Fla. 1987).

The rule must be proposed within 90 days of the effective date of the bill and the provisions of s. 120.541, F.S., relating to adverse impacts, estimated regulatory costs, and legislative ratification of rules do not apply.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Sections 2 and 5 of the bill make the act of providing misleading, deceptive, or fraudulent witness testimony related to the practice of medicine by a medical physician or osteopathic physician licensed in Florida grounds for denial of a license or disciplinary action. The disciplinary statutes do mention imposing discipline against holders of expert witness certificates and the bill does not provide for discipline of holders of expert witness certificates. In contrast, s. 458.3165(2), F.S., specifically provides that the Board of Medicine may take disciplinary action against the holder of a public psychiatry certificate.[93] It is unclear how the current statutory framework in chapters 456, 458 and 459, F.S., relating to disciplinary action would apply.

Sections 3 and 6 of the bill provide that the existence of a signed informed consent form creates a rebuttable presumption that the physician properly disclosed the risks of cataract surgery and requires that the presumption be included in the jury instruction. It is not clear how a court would instruct the jury under the bill. The *Valcin* court interpreted the rebuttable presumption in the Medical Consent Law as a "vanishing" presumption that, once rebutted with some contrary evidence, is not told to the jury. The *Valcin* court also noted that other presumptions in medical malpractice actions could be public policy presumptions that shift the burden of proof. Those presumptions are told to the jury. This bill creates a rebuttable presumption but does not state what kind of presumption or what should be told to the jury. That is, the jury will be told of the presumption but will not be told how to apply the presumption.

Section 8 of bill amends s. 766.102, F.S., to provide that any "records, policies, or testimony of an insurer's reimbursement policies or reimbursement determination regarding the care provided to the plaintiff are not admissible as evidence in any civil action." The bill prohibits admission of certain information relating to reimbursement policies in "any civil action." While the amendment is to s. 766.102, F.S., relating to medical negligence, it could be argued that the limitation applies to all civil actions, such as insurance coverage disputes and billing disputes are vital to the determination of the case.

The Department of Health analysis raises concerns that the rulemaking provisions of the bill provide a timeline that cannot be complied with due to the public meeting requirements of the Boards of Medicine and Osteopathic Medicine.

The effective date of the bill is July 1, 2011. If the bill becomes effective on that date, the law would require out-of-state licensees to possess expert witness certificates before they could provide testimony or corroboration of notices of intent. There may be some period of time in which a witness would not be able to obtain a certificate because the Department of Health's rulemaking process will not be complete. The bill provides that a certificate would be issued by default if the Department does not act with five business days.

In addition, the effective date provision does not state whether the bill should apply to causes of action that have already accrued or causes of action which will accrue after the effective date of the bill.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

[93] *See, also*, s. 458.315(3)(d), F.S. (providing that disciplinary provisions of s. 448.331, F.S., apply to holders of certificates for practice in areas of critical need).

A bill to be entitled

An act relating to medical malpractice; creating ss. 458.3175 and 459.0066, F.S.; requiring the Board of Medicine and the Board of Osteopathic Medicine to issue expert witness certificates to certain physicians licensed outside of the state; providing application and certification requirements; establishing application fees; providing for validity and use of certifications; exempting physicians issued certifications from certain licensure and fee requirements; requiring the boards to adopt rules; amending ss. 458.331 and 459.015, F.S.; providing additional acts that constitute grounds for denial of a license or disciplinary action to which penalties apply; providing construction with respect to the doctrine of incorporation by reference; amending ss. 458.351 and 459.026, F.S.; requiring the boards to adopt within a specified period certain patient forms specifying cataract surgery risks; exempting rules adopting the patient forms from certain administrative procedures; specifying that an incident resulting from risks disclosed in the patient form is not an adverse incident; providing for the execution and admissibility of the patient forms in civil and administrative proceedings; creating a rebuttable presumption that a physician disclosed cataract surgery risks if the patient form is executed; amending s. 627.4147, F.S.; deleting a requirement that medical malpractice insurance contracts contain a clause authorizing the insurer to make and conclude certain

offers within policy limits over the insured's veto; amending s. 766.102, F.S.; defining terms; providing that certain insurance information is not admissible as evidence in civil actions; requiring that certain expert witnesses who provide certain expert testimony meet certain licensure or certification requirements; establishing the burden of proof that a claimant must meet in certain damage claims against health care providers based on death or personal injury; excluding a health care provider's failure to comply with or breach of federal requirements from evidence in medical negligence cases in the state; amending s. 766.106, F.S.; requiring claimants for medical malpractice to execute an authorization form; allowing prospective medical malpractice defendants to interview a claimant's treating health care provider without notice to or the presence of the claimant or the claimant's legal representative; authorizing prospective defendants to take unsworn statements of a claimant's health care provider; creating s. 766.1065, F.S.; requiring that presuit notice for medical negligence claims be accompanied by an authorization for release of protected health information; providing requirements for the form of such authorization; amending s. 766.206, F.S.; requiring dismissal of a medical malpractice claim if such authorization is not completed in good faith; amending s. 768.0981, F.S.; limiting the liability of hospitals related to certain medical negligence claims; providing an effective date.

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

Section 1. Section 458.3175, Florida Statutes, is created to read:

458.3175 Expert witness certificate.—

(1)(a) The board shall issue a certificate authorizing a physician who holds an active and valid license to practice medicine in another state or a province of Canada to provide expert testimony in this state, if the physician submits to the board a complete registration application in the format prescribed by the board, pays an application fee established by the board not to exceed $50, and has not had a previous expert witness certificate revoked by the board.

(b) The board shall approve or deny an application for an expert witness certificate within 5 business days after receipt of the completed application and payment of the application fee. An application is approved by default if the board does not act upon the application within the required period. A physician must notify the board in writing of his or her intent to rely on a certificate approved by default.

(c) An expert witness certificate is valid for 2 years after the date of issuance.

(2) An expert witness certificate authorizes the physician to whom the certificate is issued to do only the following:

(a) Provide a verified written medical expert opinion as provided in s. 766.203.

(b) Provide expert testimony about the prevailing professional standard of care in connection with medical negligence litigation pending in this state against a physician licensed under this chapter or chapter 459.

(3) An expert witness certificate does not authorize a physician to engage in the practice of medicine as defined in s. 458.305. A physician issued a certificate under this section who does not otherwise practice medicine in this state is not required to obtain a license under this chapter or pay any license fees, including, but not limited to, a neurological injury compensation assessment.

(4) The board shall adopt rules to administer this section.

Section 2. Subsection (11) is added to section 458.331, Florida Statutes, paragraphs (oo) through (qq) of subsection (1) of that section are redesignated as paragraphs (pp) through (rr), respectively, and a new paragraph (oo) is added to that subsection, to read:

458.331 Grounds for disciplinary action; action by the board and department.—

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

(oo) Providing misleading, deceptive, or fraudulent expert witness testimony related to the practice of medicine.

(11) The purpose of this section is to facilitate uniform discipline for those acts made punishable under this section and, to this end, a reference to this section constitutes a

general reference under the doctrine of incorporation by reference.

Section 3. Subsection (6) of section 458.351, Florida Statutes, is renumbered as subsection (7), and a new subsection (6) is added to that section, to read:

458.351 Reports of adverse incidents in office practice settings.—

(6)(a) The board shall adopt rules establishing a standard informed consent form that sets forth the recognized specific risks related to cataract surgery. The board must propose such rules within 90 days after the effective date of this subsection, and the provisions of s. 120.541 relating to adverse impacts, estimated regulatory costs, and legislative ratification of rules do not apply to such rules.

(b) Before formally proposing the rule, the board must consider information from physicians licensed under this chapter or chapter 459 regarding recognized specific risks related to cataract surgery and the standard informed consent forms adopted for use in the medical field by other states.

(c) A patient's informed consent is not executed until the patient, or a person authorized by the patient to give consent, and a competent witness sign the form adopted by the board.

(d) An incident resulting from recognized specific risks described in the signed consent form is not considered an adverse incident for purposes of s. 395.0197 and this section.

(e) In a civil action or administrative proceeding against a physician based on his or her alleged failure to properly disclose the risks of cataract surgery, a patient's informed

consent executed as provided in paragraph (c) on the form adopted by the board is admissible as evidence and creates a rebuttable presumption that the physician properly disclosed the risks. This rebuttable presumption shall be included in the charge to the jury in a civil action.

Section 4. Section 459.0066, Florida Statutes, is created to read:

459.0066 Expert witness certificate.—

(1)(a) The board shall issue a certificate authorizing a physician who holds an active and valid license to practice osteopathic medicine in another state or a province of Canada to provide expert testimony in this state, if the physician submits to the board a complete registration application in the format prescribed by the board, pays an application fee established by the board not to exceed $50, and has not had a previous expert witness certificate revoked by the board.

(b) The board shall approve or deny an application for an expert witness certificate within 5 business days after receipt of the completed application and payment of the application fee. An application is approved by default if the board does not act upon the application within the required period. A physician must notify the board in writing of his or her intent to rely on a certificate approved by default.

(c) An expert witness certificate is valid for 2 years after the date of issuance.

(2) An expert witness certificate authorizes the physician to whom the certificate is issued to do only the following:

(a) Provide a verified written medical expert opinion as provided in s. 766.203.

(b) Provide expert testimony about the prevailing professional standard of care in connection with medical negligence litigation pending in this state against a physician licensed under chapter 458 or this chapter.

(3) An expert witness certificate does not authorize a physician to engage in the practice of osteopathic medicine as defined in s. 459.003. A physician issued a certificate under this section who does not otherwise practice osteopathic medicine in this state is not required to obtain a license under this chapter or pay any license fees, including, but not limited to, a neurological injury compensation assessment.

(4) The board shall adopt rules to administer this section.

Section 5. Subsection (11) is added to section 459.015, Florida Statutes, paragraphs (qq) through (ss) of subsection (1) of that section are redesignated as paragraphs (rr) through (tt), respectively, and a new paragraph (qq) is added to that subsection, to read:

459.015 Grounds for disciplinary action; action by the board and department.—

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

(qq) Providing misleading, deceptive, or fraudulent expert witness testimony related to the practice of osteopathic medicine.

(11) The purpose of this section is to facilitate uniform discipline for those acts made punishable under this section and, to this end, a reference to this section constitutes a general reference under the doctrine of incorporation by reference.

Section 6. Subsection (6) of section 459.026, Florida Statutes, is renumbered as subsection (7), and a new subsection (6) is added to that section, to read:

459.026 Reports of adverse incidents in office practice settings.—

(6)(a) The board shall adopt rules establishing a standard informed consent form that sets forth the recognized specific risks related to cataract surgery. The board must propose such rules within 90 days after the effective date of this subsection, and the provisions of s. 120.541 relating to adverse impacts, estimated regulatory costs, and legislative ratification of rules do not apply to such rules.

(b) Before formally proposing the rule, the board must consider information from physicians licensed under chapter 458 or this chapter regarding recognized specific risks related to cataract surgery and the standard informed consent forms adopted for use in the medical field by other states.

(c) A patient's informed consent is not executed until the patient, or a person authorized by the patient to give consent, and a competent witness sign the form adopted by the board.

(d) An incident resulting from recognized specific risks described in the signed consent form is not considered an adverse incident for purposes of s. 395.0197 and this section.

(e) In a civil action or administrative proceeding against a physician based on his or her alleged failure to properly disclose the risks of cataract surgery, a patient's informed consent executed as provided in paragraph (c) on the form adopted by the board is admissible as evidence and creates a rebuttable presumption that the physician properly disclosed the risks. This rebuttable presumption shall be included in the charge to the jury in a civil action.

Section 7. Paragraph (b) of subsection (1) of section 627.4147, Florida Statutes, is amended to read:

627.4147 Medical malpractice insurance contracts.—

(1) In addition to any other requirements imposed by law, each self-insurance policy as authorized under s. 627.357 or s. 624.462 or insurance policy providing coverage for claims arising out of the rendering of, or the failure to render, medical care or services, including those of the Florida Medical Malpractice Joint Underwriting Association, shall include:

(b)1. ~~Except as provided in subparagraph 2., a clause authorizing the insurer or self-insurer to determine, to make, and to conclude, without the permission of the insured, any offer of admission of liability and for arbitration pursuant to s. 766.106, settlement offer, or offer of judgment, if the offer is within the policy limits. It is against public policy for any insurance or self-insurance policy to contain a clause giving the insured the exclusive right to veto any offer for admission of liability and for arbitration made pursuant to s. 766.106, settlement offer, or offer of judgment, when such offer is within the policy limits. However, any offer of admission of~~

~~liability, settlement offer, or offer of judgment made by an insurer or self-insurer shall be made in good faith and in the best interests of the insured~~.

~~2.a. With respect to dentists licensed under chapter 466,~~ A clause clearly stating whether or not the insured has the exclusive right to veto any offer of admission of liability and for arbitration pursuant to s. 766.106, settlement offer, or offer of judgment if the offer is within policy limits. An insurer or self-insurer shall not make or conclude, without the permission of the insured, any offer of admission of liability and for arbitration pursuant to s. 766.106, settlement offer, or offer of judgment, if such offer is outside the policy limits. However, any offer for admission of liability and for arbitration made under s. 766.106, settlement offer, or offer of judgment made by an insurer or self-insurer shall be made in good faith and in the best interest of the insured.

2.~~b.~~ If the policy contains a clause stating the insured does not have the exclusive right to veto any offer or admission of liability and for arbitration made pursuant to s. 766.106, settlement offer or offer of judgment, the insurer or self-insurer shall provide to the insured or the insured's legal representative by certified mail, return receipt requested, a copy of the final offer of admission of liability and for arbitration made pursuant to s. 766.106, settlement offer or offer of judgment and at the same time such offer is provided to the claimant. A copy of any final agreement reached between the insurer and claimant shall also be provided to the insurer or his or her legal representative by certified mail, return

receipt requested not more than 10 days after affecting such agreement.

Section 8. Subsections (3), (4), and (5) of section 766.102, Florida Statutes, are amended, subsection (12) of that section is renumbered as subsection (14), and new subsections (12) and (13) are added to that section, to read:

766.102 Medical negligence; standards of recovery; expert witness.—

(3)(a) As used in this subsection, the term:

1. "Insurer" means any public or private insurer, including the Centers for Medicare and Medicaid Services.

2. "Reimbursement determination" means an insurer's determination of the amount that the insurer will reimburse a health care provider for health care services.

3. "Reimbursement policies" means an insurer's policies and procedures governing its decisions regarding health insurance coverage and method of payment and the data upon which such policies and procedures are based, including, but not limited to, data from national research groups and other patient safety data as defined in s. 766.1016.

(b) The existence of a medical injury does ~~shall~~ not create any inference or presumption of negligence against a health care provider, and the claimant must maintain the burden of proving that an injury was proximately caused by a breach of the prevailing professional standard of care by the health care provider. Any records, policies, or testimony of an insurer's reimbursement policies or reimbursement determination regarding the care provided to the plaintiff are not admissible as

evidence in any civil action. However, the discovery of the presence of a foreign body, such as a sponge, clamp, forceps, surgical needle, or other paraphernalia commonly used in surgical, examination, or diagnostic procedures, shall be prima facie evidence of negligence on the part of the health care provider.

(4)(a) The Legislature is cognizant of the changing trends and techniques for the delivery of health care in this state and the discretion that is inherent in the diagnosis, care, and treatment of patients by different health care providers. The failure of a health care provider to order, perform, or administer supplemental diagnostic tests is ~~shall~~ not ~~be~~ actionable if the health care provider acted in good faith and with due regard for the prevailing professional standard of care.

(b) In an action for damages based on death or personal injury which alleges that such death or injury resulted from the failure of a health care provider to order, perform, or administer supplemental diagnostic tests, the claimant has the burden of proving by clear and convincing evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care.

(5) A person may not give expert testimony concerning the prevailing professional standard of care unless the ~~that~~ person is a ~~licensed~~ health care provider who holds an active and valid license and conducts a complete review of the pertinent medical records and meets the following criteria:

(a) If the health care provider against whom or on whose

behalf the testimony is offered is a specialist, the expert witness must:

1. Specialize in the same specialty as the health care provider against whom or on whose behalf the testimony is offered; or specialize in a similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim and have prior experience treating similar patients; and

2. Have devoted professional time during the 5 ~~3~~ years immediately preceding the date of the occurrence that is the basis for the action to:

a. The active clinical practice of, or consulting with respect to, the same or similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim and have prior experience treating similar patients;

b. Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same or similar specialty; or

c. A clinical research program that is affiliated with an accredited health professional school or accredited residency or clinical research program in the same or similar specialty.

(b) If the health care provider against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness must have devoted professional time during the 5 years immediately preceding the date of the occurrence that is the basis for the action to:

1. The active clinical practice or consultation as a

general practitioner;

2. The instruction of students in an accredited health professional school or accredited residency program in the general practice of medicine; or

3. A clinical research program that is affiliated with an accredited medical school or teaching hospital and that is in the general practice of medicine.

(c) If the health care provider against whom or on whose behalf the testimony is offered is a health care provider other than a specialist or a general practitioner, the expert witness must have devoted professional time during the 5 ~~3~~ years immediately preceding the date of the occurrence that is the basis for the action to:

1. The active clinical practice of, or consulting with respect to, the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered;

2. The instruction of students in an accredited health professional school or accredited residency program in the same or similar health profession in which the health care provider against whom or on whose behalf the testimony is offered; or

3. A clinical research program that is affiliated with an accredited medical school or teaching hospital and that is in the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered.

(12) If a physician licensed under chapter 458 or chapter 459 is the party against whom, or on whose behalf, expert

testimony about the prevailing professional standard of care is offered, the expert witness must be licensed under chapter 458 or chapter 459 or possess a valid expert witness certificate issued under s. 458.3175 or s. 459.0066.

(13) A health care provider's failure to comply with or breach of any federal requirement is not admissible as evidence in any medical negligence case in this state.

Section 9. Paragraph (a) of subsection (2), subsection (5), and paragraph (b) of subsection (6) of section 766.106, Florida Statutes, are amended to read:

766.106 Notice before filing action for medical negligence; presuit screening period; offers for admission of liability and for arbitration; informal discovery; review.—

(2) PRESUIT NOTICE.—

(a) After completion of presuit investigation pursuant to s. 766.203(2) and prior to filing a complaint for medical negligence, a claimant shall notify each prospective defendant by certified mail, return receipt requested, of intent to initiate litigation for medical negligence. Notice to each prospective defendant must include, if available, a list of all known health care providers seen by the claimant for the injuries complained of subsequent to the alleged act of negligence, all known health care providers during the 2-year period prior to the alleged act of negligence who treated or evaluated the claimant, ~~and~~ copies of all of the medical records relied upon by the expert in signing the affidavit, and the executed authorization form provided in s. 766.1065. ~~The requirement of providing the list of known health care providers~~

~~may not serve as grounds for imposing sanctions for failure to provide presuit discovery.~~

(5) DISCOVERY AND ADMISSIBILITY.—A ~~No~~ statement, discussion, written document, report, or other work product generated by the presuit screening process is not discoverable or admissible in any civil action for any purpose by the opposing party. All participants, including, but not limited to, physicians, investigators, witnesses, and employees or associates of the defendant, are immune from civil liability arising from participation in the presuit screening process. This subsection does not prevent a physician licensed under chapter 458 or chapter 459 who submits a verified written expert medical opinion from being subject to denial of a license or disciplinary action under s. 458.331(1)(oo) or s. 459.015(1)(qq).

(6) INFORMAL DISCOVERY.—

(b) Informal discovery may be used by a party to obtain unsworn statements, the production of documents or things, and physical and mental examinations, as follows:

1. Unsworn statements.—Any party may require other parties to appear for the taking of an unsworn statement. Such statements may be used only for the purpose of presuit screening and are not discoverable or admissible in any civil action for any purpose by any party. A party desiring to take the unsworn statement of any party must give reasonable notice in writing to all parties. The notice must state the time and place for taking the statement and the name and address of the party to be examined. Unless otherwise impractical, the examination of any

party must be done at the same time by all other parties. Any party may be represented by counsel at the taking of an unsworn statement. An unsworn statement may be recorded electronically, stenographically, or on videotape. The taking of unsworn statements is subject to the provisions of the Florida Rules of Civil Procedure and may be terminated for abuses.

2. Documents or things.—Any party may request discovery of documents or things. The documents or things must be produced, at the expense of the requesting party, within 20 days after the date of receipt of the request. A party is required to produce discoverable documents or things within that party's possession or control. Medical records shall be produced as provided in s. 766.204.

3. Physical and mental examinations.—A prospective defendant may require an injured claimant to appear for examination by an appropriate health care provider. The prospective defendant shall give reasonable notice in writing to all parties as to the time and place for examination. Unless otherwise impractical, a claimant is required to submit to only one examination on behalf of all potential defendants. The practicality of a single examination must be determined by the nature of the claimant's condition, as it relates to the liability of each prospective defendant. Such examination report is available to the parties and their attorneys upon payment of the reasonable cost of reproduction and may be used only for the purpose of presuit screening. Otherwise, such examination report is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

4. Written questions.—Any party may request answers to written questions, the number of which may not exceed 30, including subparts. A response must be made within 20 days after receipt of the questions.

5. Ex parte interviews of treating health care providers.—A prospective defendant or his or her legal representative shall have access to interview the claimant's treating health care providers without notice to or the presence of the claimant or the claimant's legal representative.

6.~~5.~~ Unsworn statements of treating health care providers ~~Medical information release. The claimant must execute a medical information release that allows~~ A prospective defendant or his or her legal representative may also ~~to~~ take unsworn statements of the claimant's treating health care providers ~~physicians~~. The statements must be limited to those areas that are potentially relevant to the claim of personal injury or wrongful death. Subject to the procedural requirements of subparagraph 1., a prospective defendant may take unsworn statements from a claimant's treating physicians. Reasonable notice and opportunity to be heard must be given to the claimant or the claimant's legal representative before taking unsworn statements. The claimant or claimant's legal representative has the right to attend the taking of such unsworn statements.

Section 10. Section 766.1065, Florida Statutes, is created to read:

766.1065 Authorization for release of protected health information.—

(1) Presuit notice of intent to initiate litigation for medical negligence under s. 766.106(2) must be accompanied by an authorization for release of protected health information in the form specified by this section, authorizing the disclosure of protected health information that is potentially relevant to the claim of personal injury or wrongful death. The presuit notice is void if this authorization does not accompany the presuit notice and other materials required by s. 766.106(2).

(2) If the authorization required by this section is revoked, the presuit notice under s. 766.106(2) is deemed retroactively void from the date of issuance, and any tolling effect that the presuit notice may have had on any applicable statute-of-limitations period is retroactively rendered void.

(3) The authorization required by this section shall be in the following form and shall be construed in accordance with the "Standards for Privacy of Individually Identifiable Health Information" in 45 C.F.R. parts 160 and 164:

AUTHORIZATION FOR RELEASE OF PROTECTED HEALTH INFORMATION

A. I, (...Name of patient or authorized representative...) [hereinafter "Patient"], authorize that (...Name of health care provider to whom the presuit notice is directed...) and his/her/its insurer(s), self-insurer(s), and attorney(s) may obtain and disclose (within the parameters set out below) the protected health information described below for the following specific purposes:

1. Facilitating the investigation and evaluation of the medical negligence claim described in the accompanying presuit notice; or

2. Defending against any litigation arising out of the medical negligence claim made on the basis of the accompanying presuit notice.

B. The health information obtained, used, or disclosed extends to, and includes, the verbal as well as the written and is described as follows:

1. The health information in the custody of the following health care providers who have examined, evaluated, or treated the Patient in connection with injuries complained of after the alleged act of negligence: (List the name and current address of all health care providers). This authorization extends to any additional health care providers that may in the future evaluate, examine, or treat the Patient for the injuries complained of.

2. The health information in the custody of the following health care providers who have examined, evaluated, or treated the Patient during a period commencing 2 years before the incident which is the basis of the accompanying presuit notice.

(List the name and current address of such health care providers, if applicable.)

C. This authorization does not apply to the following list of health care providers possessing health care information about the Patient because the Patient certifies that such health care information is not potentially relevant to the claim of personal injury or wrongful death which is the basis of the accompanying presuit notice.

(List the name of each health care provider to whom this authorization does not apply and the inclusive dates of examination, evaluation, or treatment to be withheld from disclosure. If none, specify "none.")

D. The persons or class of persons to whom the Patient authorizes such health information to be disclosed or by whom such health information is to be used:

1. Any health care provider providing care or treatment for the Patient.

2. Any liability insurer or self-insurer providing liability insurance coverage, self-insurance, or defense to any health care provider to whom presuit notice is given regarding the care and treatment of the Patient.

3. Any consulting or testifying expert employed by or on behalf of (name of health care provider to whom presuit notice was given) his/her/its insurer(s), self-insurer(s), or attorney(s) regarding to the matter of the presuit notice accompanying this authorization.

4. Any attorney (including secretarial, clerical, or paralegal staff) employed by or on behalf of (name of health care provider to whom presuit notice was given) regarding the matter of the presuit notice accompanying this authorization.

5. Any trier of the law or facts relating to any suit filed seeking damages arising out of the medical care or treatment of the Patient.

E. This authorization expires upon resolution of the claim or at the conclusion of any litigation instituted in connection with the matter of the presuit notice accompanying this authorization, whichever occurs first.

F. The Patient understands that, without exception, the Patient has the right to revoke this authorization in writing. The Patient further understands that the consequence of any such revocation is that the presuit notice under s. 766.106(2), Florida Statutes, is deemed retroactively void from the date of issuance, and any tolling effect that the presuit notice may have had on any applicable statute-of-limitations period is retroactively rendered void.

G. The Patient understands that signing this authorization is not a condition for continued treatment, payment, enrollment, or eligibility for health plan benefits.

H. The Patient understands that information used or disclosed under this authorization may be subject to

additional disclosure by the recipient and may not be protected by federal HIPAA privacy regulations.

Signature of Patient/Representative: ....

Date: ....

Name of Patient/Representative: ....

Description of Representative's Authority: ....

Section 11. Subsection (2) of section 766.206, Florida Statutes, is amended to read:

766.206 Presuit investigation of medical negligence claims and defenses by court.—

(2) If the court finds that the notice of intent to initiate litigation mailed by the claimant does ~~is~~ not comply ~~in compliance~~ with the reasonable investigation requirements of ss. 766.201-766.212, including a review of the claim and a verified written medical expert opinion by an expert witness as defined in s. 766.202, or that the authorization accompanying the notice of intent required under s. 766.1065 is not completed in good faith by the claimant, the court shall dismiss the claim, and the person who mailed such notice of intent, whether the claimant or the claimant's attorney, shall be personally liable for all attorney's fees and costs incurred during the investigation and evaluation of the claim, including the reasonable attorney's fees and costs of the defendant or the defendant's insurer.

Section 12. Section 768.0981, Florida Statutes, is amended to read:

768.0981 Limitation on actions against insurers, prepaid

limited health service organizations, health maintenance organizations, hospitals, or prepaid health clinics.—An entity licensed or certified under chapter 395, chapter 624, chapter 636, or chapter 641 is ~~shall~~ not ~~be~~ liable for the medical negligence of a health care provider with whom the licensed or certified entity has entered into a contract, other than an employee of such licensed or certified entity, unless the licensed or certified entity expressly directs or exercises actual control over the specific conduct that caused injury.

Section 13. This act shall take effect July 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 4135 District Court Marshals
SPONSOR(S): McBurney
TIED BILLS: None **IDEN./SIM. BILLS:** SB 974

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Woodburn JW	Bond MB
2) Judiciary Committee			

SUMMARY ANALYSIS

Florida has five district courts of appeal. Each court appoints a marshal. This bill repeals the statutory requirement that requires the salary of the marshal to be set by general law.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Marshals for the District Court of Appeals

There are currently five district courts of appeal in the state.[1] Each district court of appeal is required to appoint a marshal.[2] Sections 35.26(2), (3) and (4), F.S., provides that:

- The marshal has the power to execute the process of the court throughout the state, and in any county may deputize the sheriff or a deputy sheriff for such purpose.
- The marshal is custodian of the headquarters occupied by the court and performs such other duties as directed by the court.
- The marshal is responsible for the security of the court.

Section 35.27, F.S., requires that the compensation of the marshal be provided by law.

Effect of the Bill

The bill repeals the requirement that the compensation of the marshal be provided by law by repealing s. 35.27, F.S.

B. SECTION DIRECTORY:

Section 1 repeals s. 35.27, F.S. regarding salary of the marshal of a district court of appeal.

Section 2 provides an effective date of July 1, 2011.

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.

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[1] Section 35.01, F.S.
[2] Section 35.26(1), F.S.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Art. V s. 4(c) of the state constitution requires that a district court of appeal appoint a marshal and provides that the salary of the marshal "be fixed by general law."

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to district court marshals; repealing s. 35.27 F.S., relating to compensation of the marshal; providing an effective date.

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

Section 1. Section 35.27, Florida Statutes, is repealed.

Section 2. This act shall take effect July 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 4137 Marshal of the Supreme Court
SPONSOR(S): McBurney
TIED BILLS: None **IDEN./SIM. BILLS:** SB 962

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Woodburn JW	Bond MB
2) Judiciary Committee			

SUMMARY ANALYSIS

The Supreme Court appoints a marshal. This bill repeals the statutory requirement that requires the salary of the marshal to be set by general law.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Marshal of the Supreme Court

Section 25.251, F.S., requires the Supreme Court to appoint a marshal. Sections 25.262 and 25.271, F.S., provide that:

- The marshal has the power to execute the process of the court throughout the state, and in any county may deputize the sheriff or a deputy sheriff for such purpose.
- The marshal is the custodian of the Supreme Court building and grounds.
- The marshal is responsible for security of the court.

Section 25.281, F.S., requires that the compensation of the marshal be provided by law.

Effect of the Bill

The bill repeals the requirement that the compensation of the marshal be provided by law by repealing s. 25.281, F.S.

B. SECTION DIRECTORY:

Section 1 repeals s. 25.281, F.S. regarding salary of the marshal of the Supreme Court.

Section 2 provides an effective date of July 1, 2011.

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:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Art. V s. 3(c) of the state constitution requires that the Supreme Court appoint a marshal and provides that the salary of the marshal "be fixed by general law."

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to the marshal of the Supreme Court; repealing s. 25.281, F.S., relating to compensation of the marshal; providing an effective date.

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

Section 1. Section 25.281, Florida Statutes, is repealed.

Section 2. This act shall take effect July 1, 2011.