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# **Civil Justice Subcommittee**

**Tuesday, March 8, 2011**

**8:00 AM**

**404 HOB**

**Revised**

# 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 Nufiez  
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	MB Bond MB
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.<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup>

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<sup>1</sup> 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.

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

<sup>3</sup> *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<sup>4</sup> 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:

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<sup>4</sup> 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.<sup>5</sup>

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

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<sup>5</sup> 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).

HB 87

2011

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

12  
 13 Be It Enacted by the Legislature of the State of Florida:

14  
 15 Section 1. This act may be cited as the "Judicial Opinion  
 16 Communications Act."

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

19 25.079 Opinions with certain holdings; communication to  
 20 other branches.—

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

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



HB 87

2011

29        (a) Declares a Florida statute, regulation, or government  
 30 practice unconstitutional;  
 31        (b) Recommends any statutory or regulatory changes to the  
 32 current law; or  
 33        (c) Identifies drafting issues  
 34  
 35 shall be submitted by the court rendering the opinion to the  
 36 Governor, the President of the Senate, and the Speaker of the  
 37 House of Representatives within 30 days after being published by  
 38 the court.  
 39        (3) The Office of the Governor, the Office of the  
 40 President of the Senate, and the Office of the Speaker of the  
 41 House of Representatives shall serve an acknowledgment of  
 42 receipt upon the chief judge or chief justice of the court  
 43 rendering an opinion submitted to that office under subsection  
 44 (2) within 30 days after the receipt of the opinion and may  
 45 state in the acknowledgment any and all action to be taken in  
 46 response to the opinion.  
 47        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 <i>W</i>	Bond <i>NB</i>
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<sup>1</sup> 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)<sup>2</sup> 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,<sup>3</sup> overtime pay,<sup>4</sup> recordkeeping,<sup>5</sup> and child labor.<sup>6</sup> The FLSA applies to most classes of workers.<sup>7</sup>

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<sup>1</sup> 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).

<sup>2</sup> 29 U.S.C Ch. 8.

<sup>3</sup> 29 U.S.C. §206.

<sup>4</sup> 29 U.S.C. §207.

<sup>5</sup> 29 U.S.C. §211.

<sup>6</sup> 29 U.S.C. §212.

<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup>

The FLSA also establishes a federal minimum wage in the United States.<sup>10</sup> 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.<sup>11</sup>

The FLSA also provides for enforcement in three separate ways:

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

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.<sup>15</sup> The employer who fails to pay according to law is also responsible for the employee's attorney's fees and costs.<sup>16</sup>

#### *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<sup>17</sup> 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.<sup>18</sup> Federal law requires the payment of the higher of the federal or state minimum wage.<sup>19</sup>

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<sup>8</sup> 29 U.S.C. §207(a)(1).

<sup>9</sup> 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).

<sup>10</sup> 29 U.S.C. §206.

<sup>11</sup> 29 U.S.C. §218(a).

<sup>12</sup> 29 U.S.C. §216(c).

<sup>13</sup> 29 U.S.C. §216(a).

<sup>14</sup> 29 U.S.C. §216(b).

<sup>15</sup> 29 U.S.C. §216(b).

<sup>16</sup> 29 U.S.C. §216(b).

<sup>17</sup> See Article X, s. 24 of the Florida Constitution (adopted in 2004).

<sup>18</sup> 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).

<sup>19</sup> 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<sup>20</sup> and municipalities. The local governments have wide authority to enact various ordinances to accomplish their local needs.<sup>21</sup> 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.<sup>22</sup> Florida law recognizes two types of preemption: express and implied.<sup>23</sup> Express preemption requires a specific legislative statement and cannot be implied or inferred.<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup> 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."<sup>27</sup> Examples of areas where the courts have found implied preemption include public records<sup>28</sup> and elections.<sup>29</sup>

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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<sup>20</sup> There are two different types of counties in Florida; a charter county and a non-charter county.

<sup>21</sup> 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.

<sup>22</sup> *City of Hollywood v. Mulligan*, 934 So.2d 1238, 1243 (Fla. 2006).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Tallahassee Regional* at 851.

<sup>26</sup> *Browning v. Sarasota Alliance for Fair Elections, Inc.*, 968 So.2d 637, 645-46 (Fla. 2d DCA 2007).

<sup>27</sup> *Id.* at 646.

<sup>28</sup> *See Tribune Co. v. Cannella*, 458 So.2d 1075 (Fla. 1984).

<sup>29</sup> *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.<sup>30</sup> This bill may invalidate that ordinance.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

n/a

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<sup>30</sup> "Wage Theft" Ch. 22, s.1-10 of the Code of Miami-Dade County, Florida.  
STORAGE NAME: h0241.CVJS.DOCX  
DATE: 3/4/2011



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

9  
 10   Be It Enacted by the Legislature of the State of Florida:

11  
 12           Section 1. Section 448.111, Florida Statutes, is created  
 13   to read:

14           448.111 Florida Wage Protection Law.—

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

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

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

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2011

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

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

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

44 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		Woodburr <i>SW</i>	Bond <i>NB</i>
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.<sup>1</sup>

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.

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<sup>1</sup> *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 to 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.<sup>2</sup>

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.

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<sup>2</sup> 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."<sup>3</sup>(*emphasis added*)

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

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<sup>3</sup> *Aquarian Foundation, Inc. v. Sholom House, Inc.*, 448 So.2d 1166 (Fla. 3d DCA 1984).



1 A bill to be entitled  
 2 An act relating to mobile home park lot tenancies;  
 3 creating s. 723.024, F.S.; providing for local enforcement  
 4 of violations of provisions establishing the obligations  
 5 of mobile home park owners and mobile home owners;  
 6 prohibiting liens, penalties, fines, or other  
 7 administrative or civil proceedings against one party or  
 8 that party's property for a duty or responsibility of the  
 9 other party; amending s. 723.061, F.S.; revising  
 10 provisions relating to grounds and proceedings for  
 11 eviction; revising procedures for mobile home owners being  
 12 provided eviction notice due to a change in use of the  
 13 land comprising the mobile home park or the portion  
 14 thereof from which mobile homes are to be evicted;  
 15 providing requirements of the park owner and requirements  
 16 and rights of an applicable homeowners' association with  
 17 respect to the sale of the mobile home park under a change  
 18 in use eviction; deleting a provision relating to  
 19 governmental action affecting the removal of mobile home  
 20 owners; providing an effective date.

21  
 22 Be It Enacted by the Legislature of the State of Florida:

23  
 24 Section 1. Section 723.024, Florida Statutes, is created  
 25 to read:

26 723.024 Compliance by mobile home park owners and mobile  
 27 home owners.—Notwithstanding any other provision of this chapter  
 28 or of any local law, ordinance, or code:

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

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

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

42        723.061 Eviction; grounds, proceedings.—

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

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

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

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

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

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

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

100

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

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

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

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

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

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

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

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

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

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

143 |  
 144 |       YOU MAY BE ENTITLED TO COMPENSATION FROM THE FLORIDA  
 145 |       MOBILE HOME RELOCATION TRUST FUND, ADMINISTERED BY THE  
 146 |       FLORIDA MOBILE HOME RELOCATION CORPORATION (FMHRC).  
 147 |       FMHRC CONTACT INFORMATION IS AVAILABLE FROM THE  
 148 |       FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL  
 149 |       REGULATION.

150 |  
 151 |       b. The park owner may not give a notice of increase in lot  
 152 | rental amount within 90 days before giving notice of a change in  
 153 | use.

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

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

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

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

173 (3)(4) A mobile home park owner applying for the removal  
 174 of a mobile home owner, tenant, or occupant, or a mobile home  
 175 shall file, in the county court in the county where the mobile  
 176 home lot is situated, a complaint describing the lot and stating  
 177 the facts that authorize the removal of the mobile home owner,  
 178 tenant, or occupant, or the mobile home. The park owner is  
 179 entitled to the summary procedure provided in s. 51.011, and the  
 180 court shall advance the cause on the calendar.

181 (4)(5) Except for the notice to the officers of the  
 182 homeowners' association under subparagraph (1)(d)1., any notice  
 183 required by this section must be in writing, and must be posted  
 184 on the premises and sent to the mobile home owner and tenant or  
 185 occupant, as appropriate, by certified or registered mail,  
 186 return receipt requested, addressed to the mobile home owner and  
 187 tenant or occupant, as appropriate, at her or his last known  
 188 address. Delivery of the mailed notice shall be deemed given 5  
 189 days after the date of postmark.

190 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 <i>LMB</i>	Bond <i>NB</i>
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.<sup>1</sup>
- Upon completion of its presuit investigation, the claimant must provide each prospective defendant with a notice of intent to initiate litigation ("presuit notice").<sup>2</sup>
- 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.<sup>3</sup> 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.<sup>4</sup>
- 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.<sup>5</sup> At that point, the claimant can either accept the defendant's offer or proceed with the filing of a lawsuit.<sup>6</sup>
- 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.<sup>7</sup> Damages are apportioned based on comparative fault.<sup>8</sup>

##### 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.<sup>9</sup> 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<sup>10</sup> show the number of closed claims, the amount of damages paid, and

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<sup>1</sup> Section 766.203, F.S.

<sup>2</sup> Section 766.106, F.S.

<sup>3</sup> Section 766.106, F.S.

<sup>4</sup> Section 766.205, F.S.

<sup>5</sup> Section 766.106, F.S.

<sup>6</sup> Section 766.106, F.S.

<sup>7</sup> Section 766.118, F.S.

<sup>8</sup> Section 766.112, F.S.

<sup>9</sup> Section 766.201(1), F.S.

<sup>10</sup> 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.flair.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%.<sup>11</sup>

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.<sup>12</sup>

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.<sup>13</sup>

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.<sup>14</sup> After completion of presuit investigation, a claimant must send a presuit notice

<sup>11</sup> Florida Office of Insurance Regulation, "2010 Annual Report – October 1, 2010 - Medical Malpractice Financial Information Closed Claim Database and Rate Filings" at page 4.

<sup>12</sup> Florida Office of Insurance Regulation, "2010 Annual Report – October 1, 2010 - Medical Malpractice Financial Information Closed Claim Database and Rate Filings" at page 12.

<sup>13</sup> Florida Office of Insurance Regulation, "2010 Annual Report – October 1, 2010 - Medical Malpractice Financial Information Closed Claim Database and Rate Filings" at page 11.

<sup>14</sup> Section 766.203(2), F.S.

to each prospective defendant.<sup>15</sup> 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.<sup>16</sup> However, the requirement of providing the list of known health care providers may not serve as grounds for imposing sanctions<sup>17</sup> for failure to provide presuit discovery.<sup>18</sup>

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.<sup>19</sup> Once the presuit notice is received, the parties must make discoverable information available without formal discovery.<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup>

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.<sup>23</sup> Failure to respond constitutes a rejection of the claim.<sup>24</sup> 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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<sup>15</sup> Section 766.166(2)(a), F.S.

<sup>16</sup> Section 766.106(2)(a), F.S.

<sup>17</sup> Sanctions can include the striking of pleadings, claims, or defenses, the exclusion of evidence, or, in extreme cases, dismissal of the case.

<sup>18</sup> Section 766.106(2)(a), F.S.

<sup>19</sup> Section 766.106(3), (4), F.S.

<sup>20</sup> 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.

<sup>21</sup> Section 766.106(6), F.S.

<sup>22</sup> Section 766.106(5), F.S.

<sup>23</sup> Section 766.106(3)(b), F.S.

<sup>24</sup> 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<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

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.<sup>28</sup>

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.<sup>29</sup>

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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<sup>25</sup> See *Coralluzzo v. Fass*, 671 So. 2d 149 (Fla. 1984),

<sup>26</sup> Chapter 88-208, Laws of Florida

<sup>27</sup> Section 456.057(7)(a), F.S.

<sup>28</sup> See *Acosta v. Richter*, 671 So. 2d 149 (Fla. 1996).

<sup>29</sup> Report of the Governor'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](http://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."<sup>30</sup>

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.<sup>31</sup>

### 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.<sup>32</sup> 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.<sup>33</sup>

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<sup>30</sup> Report of the Governor's Select Task Force on Healthcare Professional Liability Insurance (2003) at p. 233 (internal footnotes omitted).

<sup>31</sup> Chapter 2003-416, Laws of Florida

<sup>32</sup> 45 C.F.R. s. 164.502

<sup>33</sup> 45 C.F.R. s. 160.203

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

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.<sup>36</sup> Other courts have held that HIPAA does not prohibit such interviews.<sup>37</sup> 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].<sup>38</sup>

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<sup>39</sup> is offered is a specialist, the expert witness must:

<sup>34</sup> 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).

<sup>35</sup> 45 C.F.R. s. 164.508

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

<sup>37</sup> See *Holmes v. Nightingale*, 158 P.3d 1039 (Oklahoma 2007).

<sup>38</sup> *In re: Collins*, 286 S.W.3d 911, 920 (Tex. 2009)(internal citations omitted).

<sup>39</sup> 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.<sup>40</sup>

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.<sup>41</sup>

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

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<sup>40</sup> Section 766.102(5), F.S.

<sup>41</sup> Section 766.102(5), F.S.



profession as the health care provider against whom or on whose behalf the testimony is offered.<sup>42</sup>

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.<sup>43</sup>

### 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

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<sup>42</sup> Section 766.102(5), F.S.

<sup>43</sup> 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.<sup>44</sup>

Sections 456.072, 458.331, and 459.015, F.S., creates grounds for which disciplinary action may be taken against a licensee.<sup>45</sup> 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."<sup>46</sup> 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.<sup>47</sup>

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.<sup>48</sup>

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."<sup>49</sup>

### 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.<sup>50</sup>

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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<sup>44</sup> See ss. 456.072 and 456.073, F.S.

<sup>45</sup> Section 456.072(2), F.S., deals with discipline against licensees.

<sup>46</sup> *Elmariah v. Board of Medicine*, 574 So. 2d 164, 165 (Fla. 1st DCA 1990).

<sup>47</sup> Section 459.015(1)(m), F.S., contains the same language related to osteopathic physicians.

<sup>48</sup> 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.

<sup>49</sup> See ss. 458.331(1)(jj) and 459.015(1)(mm), F.S.

<sup>50</sup> 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.<sup>51</sup>

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.”<sup>52</sup>

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.<sup>53</sup> 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.<sup>54</sup>

Complications after cataract surgery are uncommon and risks include inflammation, infection, bleeding, swelling, retinal detachment, glaucoma, or a secondary cataract.<sup>55</sup>

The doctrine of informed consent requires a physician to advise his or her patient of the material risks of undergoing a medical procedure.<sup>56</sup> 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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<sup>51</sup> Earnest Means, "Statutory Cross References - The "Loose Cannon" of Statutory Construction," Florida State University Law Review, Vol. 9, p. 3 (1981).

<sup>52</sup> Earnest Means, "Statutory Cross References - The "Loose Cannon" of Statutory Construction," Florida State University Law Review, Vol. 9, p. 3 (1981).

<sup>53</sup> See ss. 775.082, 775.083, and 775.084, F.S.

<sup>54</sup> <http://www.mayoclinic.com/health/cataract-surgery/MY00164> (accessed February 19, 2011).

<sup>55</sup> <http://www.mayoclinic.com/health/cataract-surgery/MY00164/DSECTION=risks> (accessed February 19, 2011).

<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup>

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

<sup>57</sup> See s. 458.331, F.S., and 459.015, F.S.

<sup>58</sup> See *Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 598 (Fla. 1987).

<sup>59</sup> *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).<sup>60</sup>

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.<sup>61</sup> (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.<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup>

<sup>60</sup> *Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 600 (Fla. 1987).

<sup>61</sup> *Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 600-601 (Fla. 1987).

<sup>62</sup> 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.

<sup>63</sup> Section 120.541(2)(a), F.S.

<sup>64</sup> 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.<sup>65</sup>

### 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.<sup>66</sup>

#### 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

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<sup>65</sup> Section 120.541(3), F.S.

<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup>

The provision giving insurers the exclusive right to settle claims within policy limits was enacted in 1985.<sup>69</sup> Subsequent to that legislation, there have been causes where physicians argued that insurance companies improperly settled claims.<sup>70</sup> 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.<sup>71</sup> 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[.]<sup>72</sup>

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[.]<sup>73</sup>

<sup>67</sup> Section 627.4147(1)(b)1., F.S.

<sup>68</sup> Section 627.4147(1)(b)1., F.S.

<sup>69</sup> See *Shuster v. South Broward Hospital District Physicians' Professional Liability Insurance Trust*, 591 So. 2d 174, 176 n. 1 (Fla. 1992).

<sup>70</sup> In addition to the case discussed in this analysis, see *Freeman v. Cohen*, 969 So. 2d 1150 (Fla. 4th DCA 2008).

<sup>71</sup> See *Rogers v. Chicago Insurance Company*, 964 So. 2d 280, 281 (Fla. 4th DCA 2007).

<sup>72</sup> *Rogers v. Chicago Insurance Company*, 964 So. 2d 280, 284 (Fla. 4th DCA 2007).

<sup>73</sup> *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."<sup>74</sup>

Other statutes, such as license disciplinary statutes, require a heightened 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.<sup>75</sup>

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.

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

<sup>75</sup> *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<sup>76</sup> reimbursement policies<sup>77</sup> or reimbursement determination regarding the care provided to the plaintiff are not admissible as evidence in any civil action.<sup>78</sup>

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.<sup>79</sup>

Generally, a hospital may not be held liable for the negligence of independent contractor physicians to whom it grants staff privileges.<sup>80</sup> "Vicarious liability does not therefore necessarily attach to the hospital for the doctors' acts or omissions."<sup>81</sup> 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.<sup>82</sup>

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.<sup>83</sup> 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.<sup>84</sup>

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

<sup>76</sup> The bill defines "insurer" as "any public or private insurer, including the Centers for Medicare and Medicaid Services."

<sup>77</sup> The bill defines "reimbursement policies" as "an insurer's policies and procedures

<sup>78</sup> See Drafting Issues and Other Comments" in section III. C. of this analysis.

<sup>79</sup> *American Home Assurance Company v. National Railroad Passenger Corporation*, 908 So. 2d 459, 467-468 (Fla. 2005)(internal citations omitted).

<sup>80</sup> See *Insinga v. LaBella*, 543 So. 2d 209 (Fla. 1989).

<sup>81</sup> *Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 601 (Fla. 1987).

<sup>82</sup> *Roessler v. Novak*, 858 So. 2d 1158, 1162 (Fla. 2d DCA 2003).

<sup>83</sup> See *Stone v. Palms West Hospital*, 941 So. 2d 514 (Fla. 4th DCA 2006).

<sup>84</sup> 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."<sup>85</sup>

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.<sup>86</sup>

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.<sup>87</sup> It noted that the "existence of an agency relationship is normally one for the trier of fact to decide."<sup>88</sup> 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.<sup>89</sup>

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<sup>90</sup> 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.

<sup>85</sup> *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).

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

<sup>87</sup> *See Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 852 (Fla. 2003).

<sup>88</sup> *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 853 (Fla. 2003).

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

<sup>90</sup> 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 clinics.

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.<sup>91</sup>

### 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 clarity to preclude the agency from acting through whim, favoritism, or unbridled discretion."<sup>92</sup>

### 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.

<sup>91</sup> *Eller v. Shova*, 630 So. 2d 537, 543 (Fla. 1993)(Kogan, J., concurring in result only).

<sup>92</sup> *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.<sup>93</sup> 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 within 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

<sup>93</sup> 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).

1                                   A bill to be entitled  
 2           An act relating to medical malpractice; creating ss.  
 3           458.3175 and 459.0066, F.S.; requiring the Board of  
 4           Medicine and the Board of Osteopathic Medicine to issue  
 5           expert witness certificates to certain physicians licensed  
 6           outside of the state; providing application and  
 7           certification requirements; establishing application fees;  
 8           providing for validity and use of certifications;  
 9           exempting physicians issued certifications from certain  
 10          licensure and fee requirements; requiring the boards to  
 11          adopt rules; amending ss. 458.331 and 459.015, F.S.;  
 12          providing additional acts that constitute grounds for  
 13          denial of a license or disciplinary action to which  
 14          penalties apply; providing construction with respect to  
 15          the doctrine of incorporation by reference; amending ss.  
 16          458.351 and 459.026, F.S.; requiring the boards to adopt  
 17          within a specified period certain patient forms specifying  
 18          cataract surgery risks; exempting rules adopting the  
 19          patient forms from certain administrative procedures;  
 20          specifying that an incident resulting from risks disclosed  
 21          in the patient form is not an adverse incident; providing  
 22          for the execution and admissibility of the patient forms  
 23          in civil and administrative proceedings; creating a  
 24          rebuttable presumption that a physician disclosed cataract  
 25          surgery risks if the patient form is executed; amending s.  
 26          627.4147, F.S.; deleting a requirement that medical  
 27          malpractice insurance contracts contain a clause  
 28          authorizing the insurer to make and conclude certain

29 offers within policy limits over the insured's veto;  
 30 amending s. 766.102, F.S.; defining terms; providing that  
 31 certain insurance information is not admissible as  
 32 evidence in civil actions; requiring that certain expert  
 33 witnesses who provide certain expert testimony meet  
 34 certain licensure or certification requirements;  
 35 establishing the burden of proof that a claimant must meet  
 36 in certain damage claims against health care providers  
 37 based on death or personal injury; excluding a health care  
 38 provider's failure to comply with or breach of federal  
 39 requirements from evidence in medical negligence cases in  
 40 the state; amending s. 766.106, F.S.; requiring claimants  
 41 for medical malpractice to execute an authorization form;  
 42 allowing prospective medical malpractice defendants to  
 43 interview a claimant's treating health care provider  
 44 without notice to or the presence of the claimant or the  
 45 claimant's legal representative; authorizing prospective  
 46 defendants to take unsworn statements of a claimant's  
 47 health care provider; creating s. 766.1065, F.S.;

48 requiring that presuit notice for medical negligence  
 49 claims be accompanied by an authorization for release of  
 50 protected health information; providing requirements for  
 51 the form of such authorization; amending s. 766.206, F.S.;

52 requiring dismissal of a medical malpractice claim if such  
 53 authorization is not completed in good faith; amending s.  
 54 768.0981, F.S.; limiting the liability of hospitals  
 55 related to certain medical negligence claims; providing an  
 56 effective date.



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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.

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

88 (3) An expert witness certificate does not authorize a  
 89 physician to engage in the practice of medicine as defined in s.  
 90 458.305. A physician issued a certificate under this section who  
 91 does not otherwise practice medicine in this state is not  
 92 required to obtain a license under this chapter or pay any  
 93 license fees, including, but not limited to, a neurological  
 94 injury compensation assessment.

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

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

102 458.331 Grounds for disciplinary action; action by the  
 103 board and department.—

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

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

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

111 general reference under the doctrine of incorporation by  
 112 reference.

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

116 458.351 Reports of adverse incidents in office practice  
 117 settings.—

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

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

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

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

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

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

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

146 459.0066 Expert witness certificate.-

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

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

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

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

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

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

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

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

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

186 459.015 Grounds for disciplinary action; action by the  
 187 board and department.—

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

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

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

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

201       459.026 Reports of adverse incidents in office practice  
 202 settings.—

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

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

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

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

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

229 Section 7. Paragraph (b) of subsection (1) of section  
 230 627.4147, Florida Statutes, is amended to read:

231 627.4147 Medical malpractice insurance contracts.—

232 (1) In addition to any other requirements imposed by law,  
 233 each self-insurance policy as authorized under s. 627.357 or s.  
 234 624.462 or insurance policy providing coverage for claims  
 235 arising out of the rendering of, or the failure to render,  
 236 medical care or services, including those of the Florida Medical  
 237 Malpractice Joint Underwriting Association, shall include:

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

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

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

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



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

279 Section 8. Subsections (3), (4), and (5) of section  
 280 766.102, Florida Statutes, are amended, subsection (12) of that  
 281 section is renumbered as subsection (14), and new subsections  
 282 (12) and (13) are added to that section, to read:

283 766.102 Medical negligence; standards of recovery; expert  
 284 witness.—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

360 |       1. The active clinical practice or consultation as a

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361 | general practitioner;

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

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

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

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

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

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

387 |         (12) If a physician licensed under chapter 458 or chapter  
388 | 459 is the party against whom, or on whose behalf, expert

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

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

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

399 766.106 Notice before filing action for medical  
 400 negligence; presuit screening period; offers for admission of  
 401 liability and for arbitration; informal discovery; review.—

402 (2) PRESUIT NOTICE.—

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

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

419 (5) DISCOVERY AND ADMISSIBILITY.—~~A~~ No statement,  
 420 discussion, written document, report, or other work product  
 421 generated by the presuit screening process is not discoverable  
 422 or admissible in any civil action for any purpose by the  
 423 opposing party. All participants, including, but not limited to,  
 424 physicians, investigators, witnesses, and employees or  
 425 associates of the defendant, are immune from civil liability  
 426 arising from participation in the presuit screening process.  
 427 This subsection does not prevent a physician licensed under  
 428 chapter 458 or chapter 459 who submits a verified written expert  
 429 medical opinion from being subject to denial of a license or  
 430 disciplinary action under s. 458.331(1)(oo) or s.  
 431 459.015(1)(qq).

432 (6) INFORMAL DISCOVERY.—

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

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

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

451 2. Documents or things.—Any party may request discovery of  
 452 documents or things. The documents or things must be produced,  
 453 at the expense of the requesting party, within 20 days after the  
 454 date of receipt of the request. A party is required to produce  
 455 discoverable documents or things within that party's possession  
 456 or control. Medical records shall be produced as provided in s.  
 457 766.204.

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

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

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

482 ~~6.5. Unsworn statements of treating health care providers~~  
 483 ~~Medical information release. The claimant must execute a medical~~  
 484 ~~information release that allows~~ A prospective defendant or his  
 485 or her legal representative may also ~~to~~ take unsworn statements  
 486 of the claimant's treating health care providers ~~physicians~~. The  
 487 statements must be limited to those areas that are potentially  
 488 relevant to the claim of personal injury or wrongful death.  
 489 Subject to the procedural requirements of subparagraph 1., a  
 490 prospective defendant may take unsworn statements from a  
 491 claimant's treating physicians. Reasonable notice and  
 492 opportunity to be heard must be given to the claimant or the  
 493 claimant's legal representative before taking unsworn  
 494 statements. The claimant or claimant's legal representative has  
 495 the right to attend the taking of such unsworn statements.

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

498 766.1065 Authorization for release of protected health  
 499 information.—



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

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

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

517  
 518 AUTHORIZATION FOR RELEASE OF PROTECTED HEALTH INFORMATION

519  
 520 A. I, (...Name of patient or authorized  
 521 representative...) [hereinafter "Patient"], authorize that  
 522 (...Name of health care provider to whom the presuit  
 523 notice is directed...) and his/her/its insurer(s), self-  
 524 insurer(s), and attorney(s) may obtain and disclose  
 525 (within the parameters set out below) the protected health  
 526 information described below for the following specific  
 527 purposes:

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

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

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

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

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

551  
 552 (List the name and current address of such health care  
 553 providers, if applicable.)

554

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

562  
 563 (List the name of each health care provider to whom this  
 564 authorization does not apply and the inclusive dates of  
 565 examination, evaluation, or treatment to be withheld from  
 566 disclosure. If none, specify "none.")

567  
 568 D. The persons or class of persons to whom the  
 569 Patient authorizes such health information to be disclosed  
 570 or by whom such health information is to be used:

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

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

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

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

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

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

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

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

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

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

611  
 612 Signature of Patient/Representative: ....

613 Date: ....

614 Name of Patient/Representative: ....

615 Description of Representative's Authority: ....

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

618 766.206 Presuit investigation of medical negligence claims  
 619 and defenses by court.—

620 (2) If the court finds that the notice of intent to  
 621 initiate litigation mailed by the claimant does is not comply in  
 622 compliance with the reasonable investigation requirements of ss.  
 623 766.201-766.212, including a review of the claim and a verified  
 624 written medical expert opinion by an expert witness as defined  
 625 in s. 766.202, or that the authorization accompanying the notice  
 626 of intent required under s. 766.1065 is not completed in good  
 627 faith by the claimant, the court shall dismiss the claim, and  
 628 the person who mailed such notice of intent, whether the  
 629 claimant or the claimant's attorney, shall be personally liable  
 630 for all attorney's fees and costs incurred during the  
 631 investigation and evaluation of the claim, including the  
 632 reasonable attorney's fees and costs of the defendant or the  
 633 defendant's insurer.

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

636 768.0981 Limitation on actions against insurers, prepaid

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637 | limited health service organizations, health maintenance  
 638 | organizations, hospitals, or prepaid health clinics.—An entity  
 639 | licensed or certified under chapter 395, chapter 624, chapter  
 640 | 636, or chapter 641 is ~~shall~~ not be liable for the medical  
 641 | negligence of a health care provider with whom the licensed or  
 642 | certified entity has entered into a contract, other than an  
 643 | employee of such licensed or certified entity, unless the  
 644 | licensed or certified entity expressly directs or exercises  
 645 | actual control over the specific conduct that caused injury.

646 |         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 <i>W</i>	Bond <i>MB</i>
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.<sup>1</sup> Each district court of appeal is required to appoint a marshal.<sup>2</sup> 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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<sup>1</sup> Section 35.01, F.S.

<sup>2</sup> 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





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 <i>W</i>	Bond <i>NB</i>
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

HB 4137

2011

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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.





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# **Civil Justice Subcommittee**

**Tuesday, March 8, 2011**

**8:00 AM**

**404 HOB**

**AMENDMENT PACKET**

**Dean Cannon  
Speaker**

**Eric Eisnaugle  
Chair**

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

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

1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee  
 2 Representative(s) Soto offered the following:

3

4 **Amendment (with title amendment)**

5 Remove everything after the enacting clause and insert:

6 Section 1. This act may be cited as the "Communication of  
 7 Judicial Opinions Act."

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

10 25.079 Opinions having certain holdings; communication to  
 11 Governor and Legislature.—

12 (1) This section is specifically intended to facilitate  
 13 communication among the three branches of government relating to  
 14 the interpretation or constitutionality of Florida law. This  
 15 section is not intended to provide to the legislative or  
 16 executive branches any powers not granted by the State  
 17 Constitution.

18 (2) An opinion rendered by the Supreme Court which:

Amendment No. 1

19 (a) Declares a Florida statute, regulation, or  
20 governmental practice unconstitutional;

21 (b) Recommends any statutory or regulatory change; or

22 (c) Finds that the meaning of a statute is unclear,

23  
24 shall be transmitted by the clerk of the Supreme Court to the  
25 Governor, the President of the Senate, and the Speaker of the  
26 House of Representatives within 30 days after the opinion is  
27 published by the court.

28 Section 3. Section 35.079, Florida Statutes, is created to  
29 read:

30 35.079 Opinions having certain holdings; communication to  
31 Governor and Legislature.—

32 (1) This section is specifically intended to facilitate  
33 communication among the three branches of government relating to  
34 the interpretation or constitutionality of Florida law. This  
35 section is not intended to provide to the legislative or  
36 executive branches any powers not granted by the State  
37 Constitution.

38 (2) An opinion rendered by a district court of appeal  
39 which:

40 (a) Declares a Florida statute, regulation, or  
41 governmental practice unconstitutional;

42 (b) Recommends any statutory or regulatory change; or

43 (c) Finds that the meaning of a statute is unclear,

44  
45 shall be transmitted by the clerk of the district court to the  
46 Governor, the President of the Senate, and the Speaker of the

Amendment No. 1

47 House of Representatives within 30 days after the opinion is  
48 published by the court.

49 Section 4. This act shall take effect July 1, 2011.  
50  
51

52 -----

53 **T I T L E A M E N D M E N T**

54 Remove the entire title and insert:

55 An act relating to communications among the branches of state  
56 government; providing a short title; creating ss. 25.079 and  
57 35.079, F.S.; requiring the clerks of the State Supreme Court  
58 and district courts of appeal to transmit certain judicial  
59 opinions to the Governor, the President of the Senate, and the  
60 Speaker of the House of Representatives within a specified time;  
61 providing an effective date.



Amendment No. 1

20 Copeland "Anti-kickback" Act, this chapter, and s. 24, Art. X of  
21 the State Constitution protect employees from predatory and  
22 unfair wage practices while also providing appropriate due  
23 process to employers.

24 (5) It is the intent of this section to provide uniform  
25 wage theft laws in the state, to void all ordinances and  
26 regulations relating to wage theft that have been enacted by a  
27 governmental entity other than the state or the Federal  
28 Government, and to prohibit the enactment of any future  
29 ordinance or other local regulation relating to wage theft.

30 (6) This section hereby expressly preempts regulation of  
31 wage theft to the state

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**T I T L E   A M E N D M E N T**

35

Remove line 4 and insert:

36

findings and intent; creating a definition; preempting

37

regulation of wage theft

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COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 423 (2011)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

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

1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee  
2 Representative(s) Nuñez offered the following:

3  
4 **Amendment (with title amendment)**

5 Remove line 30 and insert:  
6 of a local code or ordinance has occurred, the unit of local

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9 -----  
10 **T I T L E A M E N D M E N T**

11 Remove lines 3-5 and insert:  
12 creating s. 723.024, F.S.; providing for local code and  
13 ordinance violations to be cited to the responsible party;

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

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

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1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee  
2 Representative(s) Horner offered the following:

3  
4 **Amendment (with title amendment)**

5 Remove lines 63-96 and insert:

6 (1) (a) The department shall issue a certificate  
7 authorizing a physician who holds an active and valid license to  
8 practice medicine in another state or a province of Canada to  
9 provide expert testimony in this state, if the physician submits  
10 to the department:

11 1. A complete registration application containing the  
12 physician's legal name, mailing address, telephone number,  
13 business locations, the names of the jurisdictions where the  
14 physician holds an active and valid license to practice  
15 medicine, the license number or other identifying number issued  
16 to the physician by the jurisdiction's licensing entity; and

17 2. An application fee of \$50.

18 (b) The department shall approve an application for an  
19 expert witness certificate within 7 business days after receipt



Amendment No. 1

20 of the completed application and payment of the application fee  
21 if the applicant holds an active and valid license to practice  
22 medicine in another state or a province of Canada and has not  
23 had a previous expert witness certificated revoked by the board.  
24 An application is approved by default if the department does not  
25 act upon the application within the required period. A  
26 physician must notify the department in writing of his or her  
27 intent to rely on a certificate approved by default.

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

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

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

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

38 (3) An expert witness certificate does not authorize a  
39 physician to engage in the practice of medicine as defined in s.  
40 458.305. A physician issued a certificate under this section  
41 who does not otherwise practice medicine in this state is not  
42 required to obtain a license under this chapter or pay any  
43 license fees, including, but not limited to, a neurological  
44 injury compensation assessment. An expert witness certificate  
45 shall be treated as a license in any disciplinary action and the  
46 holder of an expert witness certificate shall be subject to  
47 discipline by the board.

Amendment No. 1

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**T I T L E   A M E N D M E N T**

Remove lines 3-11 and insert:

458.3175 and 459.0066, F.S.; requiring the Department of Health to issue expert witness certificates to certain physicians licensed outside of the state; providing application and certification requirements; establishing application fees; providing for the validity and use of certifications; exempting physicians issued certifications from certain licensure and fee requirements; amending ss. 458.331 and 459.015, F.S.;

Amendment No. 2

COMMITTEE/SUBCOMMITTEE ACTION

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

1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee  
 2 Representative(s) Horner offered the following:

4 **Amendment (with title amendment)**

5 Remove lines 147-180 and insert:

6 (1) (a) The department shall issue a certificate  
 7 authorizing a physician who holds an active and valid license to  
 8 practice osteopathic medicine in another state or a province of  
 9 Canada to provide expert testimony in this state, if the  
 10 physician submits to the department:

11 1. A complete registration application containing the  
 12 physician's legal name, mailing address, telephone number,  
 13 business locations, the names of the jurisdictions where the  
 14 physician holds an active and valid license to practice  
 15 osteopathic medicine, the license number or other identifying  
 16 number issued to the physician by the jurisdiction's licensing  
 17 entity; and

18 2. An application fee of \$50.

Amendment No. 2

19       (b) The department shall approve an application for an  
20 expert witness certificate within 7 business days after receipt  
21 of the completed application and payment of the application fee  
22 if the applicant holds an active and valid license to practice  
23 osteopathic medicine in another state or a province of Canada  
24 and has not had a previous expert witness certificated revoked  
25 by the board. An application is approved by default if the  
26 department does not act upon the application within the required  
27 period. A physician must notify the department in writing of  
28 his or her intent to rely on a certificate approved by default.

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

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

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

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

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

Amendment No. 2

47 | disciplinary action and the holder of an expert witness  
48 | certificate shall be subject to discipline by the board.

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52 | **T I T L E A M E N D M E N T**

53 | Remove lines 3-11 and insert:

54 | 458.3175 and 459.0066, F.S.; requiring the Department of Health  
55 | to issue expert witness certificates to certain physicians  
56 | licensed outside of the state; providing application and  
57 | certification requirements; establishing application fees;  
58 | providing for the validity and use of certifications; exempting  
59 | physicians issued certifications from certain licensure and fee  
60 | requirements; amending ss. 458.331 and 459.015, F.S.;

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 479 (2011)

Amendment No. 3

COMMITTEE/SUBCOMMITTEE ACTION

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

1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee  
2 Representative(s) Horner offered the following:

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4 **Amendment (with title amendment)**

5 Remove line 305 and insert:  
6 evidence in any medical negligence action. However, the  
7 discovery of the

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10 -----  
11 **T I T L E A M E N D M E N T**

12 Remove line 32 and insert:  
13 evidence in medical negligence actions; requiring that certain  
14 expert

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 479 (2011)

Amendment No. 4

COMMITTEE/SUBCOMMITTEE ACTION

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

1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee  
2 Representative(s) Horner offered the following:

3

4 **Amendment**

5 Remove lines 478-479 and insert:

6 A prospective defendant or his or her legal representative may  
7 interview the claimant's treating health care

Amendment No. 5

COMMITTEE/SUBCOMMITTEE ACTION

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

1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee  
 2 Representative(s) Horner offered the following:

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**Amendment (with title amendment)**

Remove lines 122-143 and insert:

subsection.

(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



Amendment No. 5

20 disclose the risks of cataract surgery, a patient's informed  
21 consent executed as provided in paragraph (c) on the form  
22 adopted by the board is admissible as evidence and creates a  
23 rebuttable presumption that the physician properly disclosed the  
24 risks.

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26 **T I T L E A M E N D M E N T**

27 Remove lines 18-19 and insert:

28 cataract surgery risks;

Amendment No. 6

COMMITTEE/SUBCOMMITTEE ACTION

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

1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee  
 2 Representative(s) Horner offered the following:

3  
 4 **Amendment (with title amendment)**

5 Remove lines 207-228 and insert:  
 6 subsection.

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

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

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

18 (e) In a civil action or administrative proceeding against  
 19 a physician based on his or her alleged failure to properly

Amendment No. 6

20 | disclose the risks of cataract surgery, a patient's informed  
21 | consent executed as provided in paragraph (c) on the form  
22 | adopted by the board is admissible as evidence and creates a  
23 | rebuttable presumption that the physician properly disclosed the  
24 | risks.

25 | -----

26 | **T I T L E   A M E N D M E N T**

27 | Remove lines 18-19 and insert:

28 | cataract surgery risks;