

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 2686

INTRODUCER: Senator Lawson

SUBJECT: Litigation

DATE: April 14, 2009

REVISED: 04/20/09

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Treadwell	Maclure	JU	Pre-meeting
2.			CJ	
3.			CF	
4.				
5.				
6.				

I. Summary:

The bill makes numerous substantive changes to law governing the removal of children for abuse and neglect, termination of parental rights hearings, joint and several liability, privileges and immunities, assignment of interests in claims and rights, attorney's fee sanctions, matters reviewable by appeal, the unauthorized practice of law, and criminal and juvenile procedure. In part, the bill:

- Eliminates the need for an administrative order executed by the chief judge for the establishment of a citizen review panel;
- Provides for the consideration of the citizen review panel's report and recommendation in termination of parental rights cases;
- Provides that continuances in termination of parental rights cases may not extend beyond one year except under extraordinary circumstances;
- Requires termination of parental rights hearings and trials to be open to the public;
- Eliminates certain privileges and immunities in certain cases;
- Creates substantive rights associated with the award of attorney's fees sanctions;
- Requires courts to cite at least one binding authority in cases reversing judgments or granting new trials;
- Creates a right of interlocutory appeal for rulings on summary judgment motions;
- Provides that a person has a qualified right to lay representation;
- Provides for contempt or prosecution if a layperson is deemed inadequate for representation in an action or proceeding;
- Provides that an attorney who willfully or intentionally violates the rules and discipline of the court is guilty of a first-degree misdemeanor;

- Provides that an attorney who violates the oath of admission to the Florida Bar or who violates 18 U.S.C. ss. 241 or 242, commits a third-degree felony;
- Specifies procedure for apportioning damages to a nonparty;
- Creates a first-degree misdemeanor for sheriffs, prosecuting officers, court reporters, stenographers, interpreters, and judicial or quasi-judicial officers who willfully or corruptly fail to perform their duties;
- Creates a third-degree felony for any public servant or employee who intentionally obstructs or attempts to obstruct the law;
- Creates a second-degree felony for any public servant or employee who intentionally renders any ruling, order, or opinion contrary to the doctrines of stare decisis, binding precedent, the supremacy clause of the United States Constitution, or his or her oath of office; and
- Revises procedures relating to the restraint of juveniles and children.

This bill substantially amends the following sections of the Florida Statutes: 39.401, 39.702, 39.809, 57.105, 59.041, 59.06, 454.18, 454.23, 768.81, 839.24, 843.0855, 924.051, 924.33, 985.35, and 985.483.

The bill creates the following sections of the Florida Statutes: 46.061, 46.071, 46.081, and 939.051.

The bill also repeals section 924.395, Florida Statutes.

II. Present Situation:

Joint and Several Liability

At common law, the doctrine of joint and several liability applied when the negligent acts of multiple parties acting in concert or individually produced an indivisible injury.¹ Under joint and several liability, each party is deemed individually liable for the full amount of damages suffered by a plaintiff. The sometimes harsh result derived from the application of joint and several liability was illustrated in the case of *Disney v. Wood*.² In response to the result in *Disney*, the Legislature enacted s. 768.81(3), F.S. (Supp. 1986). The statute required courts to:

enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of . . . joint and several liability. . . .³

However, the Legislature preserved the application of joint and several liability under certain circumstances. In 2006, following the culmination of additional reforms, the Legislature generally repealed the application of joint and several liability for negligence actions.⁴ It

¹ *Smith v. Department of Insurance*, 507 So. 2d 1080, 1091 (Fla. 1987).

² *Disney v. Wood*, 515 So. 2d 198 (Fla. 1987). In *Disney*, Ms. Wood was injured while visiting a Walt Disney World attraction when her fiancé slammed into her vehicle from behind. At trial, the jury returned a verdict finding Ms. Wood 14 percent at fault, her fiancé 85 percent at fault, and Disney 1 percent at fault. Applying joint and several liability, the Florida Supreme Court held that Disney was liable for 86 percent of the damages.

³ Chapter 86-160, s. 60, at 755, Laws of Fla.

⁴ Chapter 2006-6, s. 1, at 190, Laws of Fla.

amended s. 768.81, F.S., to provide, subject to limited exceptions, for apportionment of damages in negligence cases according to each party's percentage of fault, rather than under joint and several liability.

Apportionment of Fault to Nonparties

In *Fabre v. Marin*, the court held that “the only means of determining a party's percentage of fault is to compare that party's percentage to all of the other entities who contributed to the accident, regardless of whether they have been or could have been joined as defendants.”⁵ Citing s. 768.81(3), F.S., the court recognized that:

the legislature decided that . . . a plaintiff should take each defendant as he or she finds them. If a defendant is insolvent, the judgment of liability of another defendant is not increased. The statute requires the same result where a potential defendant is not or cannot be joined as a party to the lawsuit.

As a result of the *Fabre* decision, juries are allowed to apportion fault on a jury verdict form among all the parties to the accident, including nonparties to the litigation. Hence, these nonparties are commonly referred to as “*Fabre* defendants.”

Attorney's Fee Sanction Statute

Existing law provides the statutory framework for pursuing sanctions against both an opposing party and possibly his or her attorney for initiating or refusing to withdraw frivolous claims and defenses, or pursuing intentional delays in litigation.⁶ The purpose of the statute is to “discourage baseless claims, stonewall defenses and sham appeals in civil litigation by placing the price tag of attorney's fees awards on the losing parties.”⁷

Award of Attorney's Fees

Under the statute, upon the court's own initiative, or by the motion of any party, the court will award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney if the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense:

- Was not supported by the material facts necessary to establish the claim or defense; or
- Would not be supported by the application of then existing law to those material facts.⁸

In practice, the different types of frivolous and vexatious claims that may emerge in a civil action include:

⁵ *Fabre v. Marin*, 623 So. 2d 1182, 1185 (Fla. 1993).

⁶ Allison S. Miller-Bernstein, *A Survey of Section 57.105, Florida Statutes: Effective Use of This Powerful Statute and How to Avoid Its Consequences*, 25 TRIAL ADVOC. Q. 10, 10 (2006).

⁷ *Id.* (citing *Murphy v. WISU Props., Ltd.*, 895 So. 2d 1088, 1093 (Fla. 4th DCA 2004)).

⁸ Section 57.105(1), F.S. These sanction provisions also apply in administrative proceedings under ch. 120, F.S. Section 57.105(5), F.S.

- A lawsuit that has no merit when filed;
- A particular claim or defense that has no merit when filed; and
- A claim or defense that discovery reveals has no merit.⁹

Once it is determined that these particular claims or defenses lack merit, a party has a duty to dismiss the frivolous claim or defense, or risk exposure to an award of attorney's fees.¹⁰

Limitations on Sanctions

A losing party's attorney may not be responsible for sanctions if he or she acted in good faith, based upon the representations of his or her client.¹¹ In addition, an attorney or his client may not be responsible for sanctions if the court determines that a claim or defense was initially presented as a good faith argument for the extension, modification, or reversal of existing law or the establishment of a new law.¹² If the court determines that a party has been forced to participate in actions that were taken for the primary purpose of unreasonable delay, the court may award sanctions, including attorney's fees and other losses resulting from the improper delay.¹³

Safe Harbor Provision

Similar to Federal Rule of Civil Procedure 11, the Florida statute contains a 21-day safe harbor provision.¹⁴ An aggrieved party must serve the motion for sanctions on the opposing party. If the opposing party does not withdraw or correct the claim within 21 days, the aggrieved party may file the motion and seek all available sanctions.

Interlocutory Orders in Florida

An order that grants or denies a summary judgment motion is classified as "interlocutory in character."¹⁵ Florida courts do not consider a summary judgment order a final order subject to appellate review because it "merely establishes an entitlement to a judgment but is not itself a judgment."¹⁶ These types of "piecemeal appeals" are not permitted in Florida unless otherwise provided by law.¹⁷

Unauthorized Practice of Law

An unlicensed practice of law violation can involve a disbarred or suspended attorney continuing to practice in Florida, or a layperson engaging in the practice of law in this state. While the admission of attorneys to practice is a constitutionally designated court function, various

⁹ Miller-Bernstein, *supra* note 6, at 12.

¹⁰ *Id.*

¹¹ Section 57.105(1), F.S.

¹² Section 57.105(2), F.S.

¹³ Section 57.105(3), F.S.

¹⁴ Section 57.105(4), F.S.

¹⁵ Fla. R. Civ. P. 1.510(c).

¹⁶ 3 Fla. Jur. 2d *Appellate Review* s. 64 (2009).

¹⁷ *Perry v. Perry*, 976 So. 2d 1151 (Fla. 4th DCA 2008).

regulations are provided for in statute.¹⁸ Therefore, both the Florida Statutes and the Florida Bar Rules address unlicensed practice, and both authorize the imposition of sanctions.¹⁹ In this way, the constitutional role of the court to govern the process for admission to practice also encompasses the “duty to protect the public from laypeople who claim that they are licensed to practice law, but are not.”²⁰ In assessing whether someone has committed an unlicensed practice of law violation, the courts generally look to whether the individual has engaged in the traditional tasks of a lawyer.²¹ In so doing, the court views this type of behavior by an unqualified individual as potentially significantly jeopardizing a client’s interests.²²

III. Effect of Proposed Changes:

The bill makes numerous substantive changes to law governing the removal of children for abuse and neglect, termination of parental rights hearings, joint and several liability, privileges and immunities, assignment of interests in claims and rights, attorney fee sanctions, matters reviewable by appeal, the unauthorized practice of law, and criminal and juvenile procedure. Following is a section-by-section analysis of the bill:

Custody of Dependent Children

Section 1 amends s. 39.401, F.S., to provide that, except in cases involving an immediate threat to the health or safety of a child, no person, including a law enforcement officer, a duly authorized person, any other officer of the court or of the state, may take a child into custody unless sworn testimony is provided, which results in a court order issued after a finding of probable cause by the court.

Citizen Review Panels

Section 2 amends s. 39.702, F.S. Current law provides that a citizen review panel may be established in each judicial circuit and shall be authorized by an administrative order executed by the chief judge of each circuit. The bill provides for the establishment of a citizen review panel in each judicial circuit without the need for an administrative order executed by the chief judge of each circuit.

Termination of Parental Rights

Section 3 amends s. 39.809, F.S., to provide for the consideration of the citizen review panel’s report and recommendation in its determination of the termination of parental rights. The bill also provides that the report and recommended order regarding the court’s findings of fact and

¹⁸ Section 15, article V of the Florida Constitution grants exclusive jurisdiction to the Florida Supreme Court to regulate “the admission of persons to the practice of law and the discipline of persons admitted.”

¹⁹ See *State v. Palmer*, 791 So. 2d 1181 (Fla. 1st DCA 2001), for the holding that legislating the unlicensed practice of law is not a constitutional violation of the separation of powers, as the state constitution grants exclusive jurisdiction to the judiciary over admission to practice, not the unlicensed practice of law.

²⁰ See *The Florida Bar v. Abreu*, 833 So. 2d 752 (Fla. 2002)

²¹ See *The Florida Bar v. Rapoport*, 845 So. 2d 874 (Fla. 2003).

²² See *The Florida Bar v. Neiman*, 816 So. 2d 587 (Fla. 2002).

conclusions of law must include the report and recommended order from the citizen review panel.

In addition, the bill provides that in termination of parental rights cases, continuances may not extend beyond one year after the advisory hearing unless there are compelling reasons or extraordinary circumstances for the continuance. Current law governing dependency cases already provides that continuances are limited to no more than 60 days within a 12-month period unless the purpose of the continuance is to protect the constitutional rights of a party or unless the child's best interests will be harmed by denial of the continuance.²³ As a result, this provision of the bill conflicts with the general provision governing continuances in dependency cases and provides for a much longer continuance in termination cases. This change could impede current goals expressed by the Legislature of expediting permanency.

The bill also provides that all hearings or trials involving termination of parental rights must be open to the public, except upon a written motion requesting the closing of a hearing or trial by a parent or guardian of the child or children who are the subject of the hearing or trial.

Joint and Several Liability

Section 4 creates s. 46.061, F.S., to provide that in negligence cases, the court must enter judgment against each party and nonparty liable on the basis of that party's percentage of fault under s. 768.81, F.S., and not, initially, on the bases of the doctrine of joint and several liability.

The bill defines the term "negligence cases" as "civil actions for damages based upon theories of negligence, strict liability, products liability, and professional malpractice whether couched in terms of contract, tort, or breach of warranty and like theories." The bill specifies that, in determining whether a case falls within the term "negligence cases" the court must look to the substance of the action and not the terms used by the parties to characterize it.

The bill provides that the doctrine of joint and several liability will still apply to any action brought by a party to recover actual economic damages resulting from pollution, to any action based upon an intentional tort, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by:

- Chapter 403 (Environmental Control);
- Chapter 498 (Drug, Cosmetic, and Household Products);
- Chapter 517 (Securities Transactions);
- Chapter 542 (Combinations Restricting Trade or Commerce); or
- Chapter 895 (RICO).

Privileges and Immunity Defenses

Section 5 creates 46.071, F.S., to provide that litigation privilege, judicial, qualified, or absolute immunity, and similar defenses or privileges are not valid common law defenses in actions under statutes that provide for rights and claims in injury, tort, or contract liability for acts that may be

²³ Section 39.0136, F.S.

or are committed, directly or indirectly, involving judicial or administrative proceedings. It is unclear what is intended by the reference to “acts that may be or are committed, directly or indirectly, involving judicial or administrative proceedings.” Therefore, the scope of the preclusion of the referenced immunities and privileges is not known.

The bill also provides that the litigation privilege, judicial, qualified, or absolute immunity, and the like are not viable or valid defenses in actions on claims and rights for abuse of process, malicious prosecution, and fraud upon the court, also known as extrinsic fraud.

Attorney’s Fee Sanctions

Section 7 amends s. 57.105, F.S., to provide that a motion filed with the court that does not comply with the 21-day safe harbor provision is null and void. A motion filed with the court is not typically deemed null and void. These terms are most frequently paired with contracts, waivers, or other written documents executed by persons.

The bill provides that this provision is substantive and may not be waived except in writing. In addition, the bill clarifies that the provision does not apply to sanctions ordered upon the court’s own initiative.

The bill also provides that it creates substantive rights to the award of attorney’s fees and any procedural provisions are directly related to the definition of those rights. In addition, any procedural aspects of the provision are intended to implement the substantive provisions of the law. The bill defines the following terms:

- “Attorney” means a lawyer and, where applicable, a layperson, qualified, or designated representatives appearing for a party;
- “Party” means any person represented by a lawyer or appearing pro se.

Finally, this section specifies that it is the intent of the Legislature that the award of fees, costs, damages, and sanctions under this provision apply and are a right to any party, lawyer, or representative equally whether the person is or is not a lawyer.

Citations to Binding Authority

Section 8 amends s. 59.041, F.S., to provide that upon the reversal of a judgment, the grant of a new trial, the opinion of the court must be supported by at least one binding authority for each point for review that must be cited in the rendered final order or opinion. This provision does not account for those scenarios in which the court’s decision rests on a matter of first impression or when binding authority is not available regarding a particular point of law.

In addition, the bill provides that neither the court file nor the appellate record requires a transcript or statement of proceedings for a proper, full examination of the cases before the court.

Matters Reviewable By Appeal

Section 9 amends s. 59.06, F.S., to create an interlocutory appeal of summary judgments. More specifically, the bill provides that sustaining a motion to dismiss or a motion for summary judgment without leave to amend or with prejudice or absent an allowance for some further action expressly rendered by the court is an order sufficient to allow an interlocutory appeal to be made within 30 days after the order is entered by the court.

Unauthorized Practice of Law

Section 10 amends s. 454.18, F.S., to provide that any person, whether an attorney at law or not, has a qualified right to lay representation or to be represented by a person of his or her choice as prescribed by:

- Chapter 120, F.S., concerning a qualified representative;
- Chapter 44, F.S., concerning a designated representative;
- Section 709.08, concerning an attorney in fact;
- Decisions of the Florida Supreme Court concerning representation by a realty property manager;
- Decisions of the Florida Supreme Court concerning a nonlawyer using approved forms;
- Decisions of the Florida Supreme Court concerning appearances in county court or small claims court;
- Rule 5-15, Florida Rules Relating to the Admissions to the Bar;
- Judicial discretion under the inherent authority of the courts doctrine; and
- Federal law, or any other clearly expressed rule, statute, or court decision or order under other federal or state law and authority.

The bill also provides that any party, counsel of record, judicial or quasi-judicial court or officer, whether required or not, absent federal preemption, may inquire and challenge the competence and character of the lay representative upon notice and hearing. The bill specifies that these challenges must be in accordance with Rules 28-106.106 and 28-1-6.107, F.A.C.

If the court finds that the lay representative is inadequate, the lay representative is disqualified from conducting the cause. Otherwise, the lay representative may maintain the cause. If the lay representative is disqualified, he or she may be found in contempt or reported to the Florida Bar's unlicensed practice of law division or state attorney for prosecution. The bill expressly states that this provision should not be construed to preclude a lay representative's protection from double jeopardy.

Review of the determination of the qualifications of a lay representative must be by petition for certiorari. Notwithstanding these provisions, if the lay representative has a valid interest in the cause or by assignment, the disqualified lay representative may appear pro se only to intervene or by substitution as allowed by law.

The bill expressly states that the provisions governing the unauthorized practice of law are to have both retroactive and prospective application in law.

Penalties for the Unauthorized Practice of Law

Section 11 amends s. 454.23, F.S., regarding penalties for the unauthorized practice of law. The bill provides that any attorney duly admitted or authorized to practice in this state who willfully or intentionally violates the rules and discipline of any court, tribunal, or officer in any matter of order or procedure in this state is guilty of a first-degree misdemeanor. In addition, any attorney admitted or authorized to practice in Florida who willfully violates the oath of admission to the Florida Bar, or commits or causes any act in violation of 18 U.S.C. s. 241²⁴ or 18 U.S.C. s. 242,²⁵ commits a third-degree felony.

Apportionment of Damages to Third Parties

Section 12 amends s. 768.81, F.S., to provide that in order to allocate any or all fault to a nonparty and include the named or unnamed nonparty on the verdict form for purposes of apportioning damages, a defendant must have filed with the court and served process on the nonparty with all pertinent motions and pleadings, thereby subjecting the nonparty to the jurisdiction of the court. If the defendant fails to satisfy these notice requirements and fails to prove the fault of the nonparty at trial by a preponderance of the evidence, the defendant is fully liable for the allocation of fault attributed to the nonparty.

The bill also provides that any nonparty brought into a case who has been absolved by a party is immune from liability. It is unclear if the reference to “absolved” encompasses scenarios in which a waiver has been executed or if a party has otherwise been formally released from any liability. If a nonparty is immune, this must be reflected in the judgment with the determined percentage of fault as to liability and damages being nonexecutable against the nonparty.

Failure to Perform Duties Required of Officer

Section 13 amends s. 839.24, F.S., to provide that in addition to a sheriff, prosecuting officer, court reporter, stenographer, interpreter under any provision of the Florida Rules of Court or ch. 120, F.S., a judicial or quasi-judicial officer who willfully or negligently fails, or corruptly refuses, to perform his or her duty commits a first-degree misdemeanor.

The bill does not define “quasi-judicial officer.” In addition, it is not clear what is intended by a person “corruptly refusing” to perform his or her duty.

Criminal Actions Under Color of Law

Section 14 amends s. 843.0855, F.S., to provide that any public servant or employee who, under color of law, in any manner intentionally obstructs or attempts to obstruct the due execution of the law, or with the intent to intimidate, hinder, deprive, or interrupt any officer, beverage

²⁴ 18 U.S.C. s. 241 provides that “if two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same” may be fined and imprisoned.

²⁵ 18 U.S.C. s. 242 provides a criminal penalty for the deprivation of rights under the color of law.

enforcement agent, or other person or party in the legal performance of his or her duty or the exercise of his or her rights under Florida law, in connection with or relating to any legal process, commits a third-degree felony.

In addition, any public servant or employee who under color of law in any manner intentionally renders any ruling, order, or opinion, or any action of inaction adverse or contrary to the doctrines of stare decisis, binding precedent, the supremacy clause of the United States Constitution, or his or her oath of office in connection with or relating to any legal process affecting persons and property, commits a second-degree felony, unless the servant or employee has the authority to overrule or recede from such rule of law, distinguishes such rule of law, or sets forth some other intervening or superseding evidence or information.

The bill provides that any public servant or employee or person who causes any act in violation of 18 U.S.C. s. 241 or 18 U.S.C. s. 242 in connection with or relating to any legal process affecting persons and property commits a second-degree felony.

Collateral Review in Criminal Cases

Section 15 amends s. 924.051, F.S., to provide that an opinion of the appellate court regarding a judgment or sentence must be supported by at least one binding authority for each point for review that must be cited in the rendered final order or opinion. This provision does not account for those scenarios in which the court's decision is based on a matter of first impression or when binding authority is not available regarding a particular point of law.

Reversal of Criminal Judgment

Section 16 amends s. 939.051, F.S. In reversing or modifying a judgment, the bill provides that the opinion of the court must be supported by at least one binding authority for each point for review that must be cited in the rendered final order or opinion. This provision does not account for those scenarios in which the court's decision rests on a matter of first impression or when binding authority is not available regarding a particular point of law.

Sanctions for Unfounded Offense, Defense, or Delay

Section 17 creates s. 939.051, F.S., to express that the Legislature strongly encourages the courts to impose sanctions against any person, lawyer or nonlawyer, including the state, within the court's jurisdiction who is found at any time in any trial court or appellate court proceeding to have abused the judicial system in any way, including the following:

- Abused a petition for extraordinary relief or postconviction motion, or an appeal;
- Abused or caused unreasonable delay in any pretrial proceeding;
- Raised a claim that court has found to be frivolous or procedurally barred or that should have been preserved by objection in the trial court or raised on a direct appeal;
- Improperly withheld or misleadingly used evidence or testimony;
- Adversely affected the orderly administration of justice; or
- Engaged in dilatory tactics, sandbagging, or any other improper practices.

Sanctions that the court may and should consider, when applicable and appropriate, include:

- Dismissal of a pleading or case;
- Disciplinary sanctions;
- A fine;
- Imposition of costs, fees, expenses, or damages; or
- Any other sanction that is available to the court under its inherent powers.

The bill specifies who may file a motion for sanctions and provides that the motion must clearly express facts demonstrating the need for sanction. The motion must be verified, served on all parties in the case, and filed with the court within 10 days after being subject to and apprised of the misconduct involved. Any motion filed with the court that does not comply with this subsection is void. The bill expresses that this provision is substantive and does not apply to sanctions ordered upon the court's own initiative. The bill provides that sanctions must be awarded and approved by the Chief Financial Officer.

Repeal of Sanctions Provision

Section 18 repeals s. 924.395, F.S. This section of the Florida Statutes encourages the courts to issue sanctions in capital postconviction proceedings or appeals similar to those delineated in section 17 of the bill.

Juvenile Procedure

Section 19 amends s. 985.35, F.S., relating to juvenile procedure to provide that the Department of Juvenile Justice (department) must adopt by rule procedures for restraining a child upon his or her arrival at the courthouse. The rules must prohibit the use of mechanical devices and unreasonable restraints. In addition, the bill provides that a child may not be subject to extended periods of isolation. More specifically, the bill provides that instruments of restraint, such as handcuffs, chains, irons, or straitjackets, may not be used on a child during any court proceeding and must be removed when the child appears before the court unless:

- Restraints are necessary to prevent physical harm to the child or another person;
- A less restrictive alternative is not available which would prevent physical harm, including, but not limited to, the presence of personnel of the department, a law enforcement officer, or a bailiff;
- The child has a history of disruptive behavior in the courtroom which places others in potentially harmful situations or presents a substantial risk of inflicting bodily harm on others as evidenced by recent behavior;
- The child is likely to attempt to escape during a transfer or a hearing; or
- The child is charged with a capital offense.

The bill provides that the department must comply with the Protective Action Response policy adopted under s. 985.645(2) whenever mechanical restraints are used.

Section 20 amends s. 985.483, F.S., to correct a cross-reference to a Florida statute.

Section 21 creates s. 985.602, F.S., to provide that instruments of restraints, such as handcuffs, chains, irons, or straitjackets, may not be used on a child during any court proceeding unless the court finds that:

- Restraints are necessary to prevent physical harm to the child or another person;
- A less restrictive alternative is not available which would prevent physical harm, including, but not limited to, the presence of personnel of the department, a law enforcement officer, or a bailiff;
- The child has a history of disruptive behavior in the courtroom which places others in potentially harmful situations or presents a substantial risk of inflicting bodily harm on others as evidenced by recent behavior;
- The child is likely to attempt to escape during a transfer or a hearing; or
- The child is charged with a capital offense.

The bill provides that the Department of Juvenile Justice must comply with the Protective Action Response policy adopted under s. 985.645(2), F.S., whenever mechanical restraints are used.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Single-Subject Issue

This bill may implicate article III, section 6 of the Florida Constitution, which provides that “[e]very law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title.” This bill pertains to multiple issues including joint and several liability, attorney’s fees sanctions, unauthorized practice of law, privilege and immunities defenses, criminal actions, and juvenile procedure, as well as issues pertaining to family law matters. The single-subject requirement requires a logical or natural connection between the various portions of a legislative enactment. This connection may be satisfied if there is a reasonable explanation as to why the Legislature joined multiple subjects within the same legislative act. *See Grant v. State*, 770 So. 2d 655, 657 (Fla. 2000).

Arguably, there may not be a logical or natural connection between the multiple issues addressed in the bill. While some of the provisions of the bill, such as joint and several

liability and attorney's fees sanctions, may arguably have a logical connection, linking these subjects with family court issues or criminal and juvenile issues may surpass the single-subject limitation.

Retroactive Application

The bill provides that Section 10 will operate retroactively in addition to prospectively. In general, courts will refuse to apply a statute retroactively if it affects substantive rights, liabilities, and duties,²⁶ impairs vested rights, creates new obligations, or imposes new penalties.²⁷ However, statutes which do not alter contractual or vested rights, but relate only to remedies or procedure, can be applied retroactively.²⁸

Florida courts have recognized that a statute may be retroactively applied if:

- There is clear evidence that the Legislature intended to apply the statute retroactively; and
- Retroactive application is constitutionally permissible.²⁹

The bill clearly meets the first prong because Section 10 of the bill states explicitly that it will operate retroactively in addition to prospectively.

In determining whether retroactive application is constitutional, courts have generally held that due process considerations prevent the retroactive abolition of vested rights.³⁰ This is not an absolute rule, however, because the courts have identified factors that may be considered in determining whether to allow retroactivity. In one case, the Supreme Court weighed three factors in considering the validity of retroactivity:

- The strength of the public interest served by the statute;
- The extent to which the right affected is abrogated; and
- The nature of the right affected.³¹

The constitutionality of the retroactive application of Section 10 will likely turn on the court's evaluation of these factors.

Separation of Powers/Interlocutory Appeals

The State Constitution provides the Supreme Court with power to "adopt rules for the practice and procedure in all courts."³² In addition to other judiciary powers, article V, section 4(b)(1) of the Florida Constitution grants the Supreme Court the authority to

²⁶ *Progressive Express Ins. Co. v. Menendez*, 979 So. 2d 324 (Fla. 3d DCA 2008).

²⁷ *Romine v. Florida Birth Related Neurological Injury Compensation Ass'n*, 842 So. 2d 148, 153 (Fla. 5th DCA 2003).

²⁸ *Menendez*, 979 So. 2d at 330.

²⁹ *Metropolitan Dade County v. Chase Fed. Housing Corp.*, 737 So. 2d 494 (Fla. 1999); *Promontory Enterprises, Inc. v. Southern Engineering & Contracting, Inc.*, 864 So. 2d 479 (Fla. 5th DCA. 2004).

³⁰ *State Dept. of Transportation v. Knowles*, 402 So. 2d 1155 (Fla. 1981).

³¹ *Id.*

³² FLA. CONST. art. V, s. 2(a).

adopt court rules that determine when an interlocutory order is entitled to appellate review. District courts of appeal “may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court.”³³

Article II, section 3 of the Florida Constitution requires the powers of the state be divided into three branches of government and declares that “[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.”³⁴

Florida case law has held, that “[t]he Constitution does not authorize the legislature to provide for interlocutory review. Any statute purporting to grant interlocutory appeals is clearly a declaration of legislative policy and no more. . . . [W]e find that [the Supreme Court] alone has the power to define the scope of interlocutory appeals. . . .”³⁵

Because the bill authorizes interlocutory review in the summary judgment context, a court could determine that this provision is only a declaration of legislative policy and beyond the scope of legislative authority.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Private attorneys and parties may be subject to additional monetary sanctions for certain activity in civil and criminal cases.

The bill allows for lay representation in cases. Parties may choose to seek lay representation rather than an attorney, which may result in savings to a party. However, if the court determines that a lay representative is not competent to represent a party, the lay representative may be subject to prosecution for the unauthorized practice of law.

Parties, as well as nonparties, in civil actions may be impacted by changes to the joint and several liability and nonparty provisions in the bill.

C. Government Sector Impact:

The impact from the creation of additional felonies and misdemeanors has not been determined.

The elimination of certain privileges and immunities will affect numerous governmental entities, including judicial officers.

³³ FLA. CONST. art. V, s. 4(b)(1).

³⁴ FLA. CONST. art. II, s. 3.

³⁵ *State v. Gaines*, 770 So. 2d 1221, 1224-25 (Fla. 2000).

The Department of Juvenile Justice and the Chief Financial Officer will likely experience a fiscal impact associated with new duties created in the bill.

VI. Technical Deficiencies:

On line 199 of the bill, it appears that the word “contact” should be “contract.”

On lines 344-345 of the bill, the words “for dismissal” appear to be redundant and should be deleted.

VII. Related Issues:

None.

VIII. Additional Information:

A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. **Amendments:**

None.