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 Committee on Banking and Insurance

BILL:	SB 236
INTRODUCER:	Senator Hutson
SUBJECT:	Civil Remedies
DATE:	March 2, 2023
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Thomas	Knudson	BI	**Pre-meeting**
2.			JU	
3.			FP	

I. Summary:

SB 236 makes the following changes to Florida's civil justice system:

- Provides that a contingency fee multiplier for an attorney fee award is appropriate only in a rare and exceptional circumstance, adopting the federal standard.
- Reduces the statute of limitations for general negligence cases from 4 years to 2 years.
- Modifies Florida's "bad faith" framework to:
  - Provide an insurer has no liability for bad faith failure to settle a liability claim if the insurer tenders the lesser of the policy limits or the amount demanded by the claimant before a complaint is filed, or within 90 days after service of the complaint.
  - Provide that negligence alone is not enough to demonstrate bad faith.
  - Require insureds, claimants, and their representatives to act in good faith with respect to furnishing information, making demands, setting deadlines, and attempting to settle the insurance claim.
  - Allow an insurer, when there are multiple claimants in a single action, to limit the insurer's bad faith liability by paying the total amount of the policy limits at the outset to the court through an interpleader action or, through binding arbitration, making the entire policy limits available for payment to the competing third-party claimants.
- Provides a uniform process for the admissibility and the calculation of medical damages in personal injury or wrongful death actions, thereby, modifying the collateral source rule limiting the introduction of evidence for medical damages.
- Requires the trier of fact in a negligent security action against the owner, lessor, operator, or manager of commercial or real property brought by a person lawfully on the property who was injured by the criminal act of a third party, to consider the fault of all persons who contributed to the injury.
- Applies the offer of judgment statute to any civil action involving an insurance contract.
- Except for causes of action for personal injury or wrongful death arising out of medical negligence, changes Florida's comparative negligence system from a "pure" comparative

negligence system to a "modified" comparative negligence system, whereby a plaintiff who is found to be more that 50 percent at fault for his or her own harm may not recover damages from any defendant.
- Repeals Florida's one-way attorney fee provisions for insurance cases.

The bill may have a positive fiscal impact on state and local government.

The bill takes effect upon becoming a law.

II. Present Situation:

Torts: Negligence, Elements, and Standards

A tort is a civil legal action to recover damages for a loss, injury, or death due to the conduct of another. Some have characterized a tort as a civil wrong, other than a claim for breach of contract, in which a remedy is provided through damages.[1] When a plaintiff files a tort claim, he or she alleges that the defendant's "negligence" caused the injury. Negligence means "doing something that a reasonably careful person would not do" in a similar situation or "failing to do something that a reasonably careful person would do" in a similar situation.[2] When a plaintiff seeks to recover damages for a personal injury and alleges that the injury was caused by the defendant's negligence, the plaintiff bears the legal burden of proving that the defendant's alleged action was a breach of the duty that the defendant owed to the plaintiff.[3]

Negligence Pleadings

To establish a claim for relief and initiate a negligence lawsuit, a plaintiff must file a "complaint." The complaint must state a cause of action and contain: a short and plain statement establishing the court's jurisdiction, a short and plain statement of the facts showing why the plaintiff is entitled to relief, and a demand for judgment for relief that the plaintiff deems himself or herself entitled. The defendant responds with an "answer," and provides in short and plain terms the defenses to each claim asserted, admitting or denying the averments in response.[4] Under the Florida Rules of Civil Procedure, allegations of fraud, mistake, and a denial of performance or occurrence must be pled with "particularity."[5]

Four Elements of a Negligence Claim

To establish liability, the plaintiff must prove four elements:
- Duty – That the defendant owed a duty, or obligation, of care to the plaintiff;
- Breach – That the defendant breached that duty by not conforming to the standard required;
- Causation – That the breach of the duty was the legal cause of the plaintiff's injury; and

[1] BLACK'S LAW DICTIONARY (11th ed. 2019).
[2] Fla. Std. Jury Instr. Civil 401.3, *Negligence*.
[3] Florida is a comparative negligence jurisdiction as provided in s. 768.81(2), F.S. In lay terms, if a plaintiff and defendant are both at fault, a plaintiff may still recover damages, but those damages are reduced proportionately by the degree that the plaintiff's negligence caused the injury.
[4] Fla. R. Civ. P. 1.110.
[5] Fla. R. Civ. P. 1.120(b) and (c).

- Damages – That the plaintiff suffered actual harm or loss.[6]

Burden or Standard of Proof

A "burden of proof" is the obligation a party bears to prove a material fact. The "standard of proof" is the level or degree to which an issue must be proved.[7] The plaintiff carries the burden of proving, by a specific legal standard, that the defendant breached the duty that was owed to the plaintiff that resulted in the injury. In civil cases, two standards of proof generally apply:

- The "greater weight of the evidence" standard, which applies most often in civil cases, or
- The "clear and convincing evidence" standard, which is a higher standard of proof.[8]

However, both of these standards are lower than the "reasonable doubt" standard which is used in criminal prosecutions.[9] Whether the greater weight standard or clear and convincing standard applies is determined by case law or the statutes that govern the underlying substantive issues.[10]

Greater Weight of the Evidence

The greater weight of the evidence standard of proof means "the more persuasive and convincing force and effect of the entire evidence in the case."[11] Some people explain the "greater weight of the evidence" concept to mean that, if each party's evidence is placed on a balance scale, the side that dips down, even by the smallest amount, has met the burden of proof by the greater weight of the evidence.

Clear and Convincing

The clear and convincing standard, a higher standard of proof than the greater weight of the evidence standard, requires that the evidence be credible and the facts which the witness testifies to must be remembered distinctly. The witness's "testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue." The evidence must be so strong that it guides the trier of fact to a firm conviction, to which there is no hesitation, that the allegations are true.[12]

Standards of Care and Degrees of Negligence

Courts have developed general definitions for the degrees of negligence.

Slight Negligence

Slight negligence is generally defined to mean the failure to exercise a great amount of care typical of an extraordinarily prudent person.[13]

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[6] 6 *Florida Practice Series* s. 1.1; *see Barnett v. Dept. of Fin. Serv*., 303 So.3d 508, 513 (Fla. 2020).
[7] 5 Fla. Prac. Civil Practice s. 16.1, (2020 ed.)
[8] *Id*.
[9] Thomas D. Sawaya, *Florida Personal Injury Law and Practice with Wrongful Death Actions*, s. 24:4 (2020).
[10] 5 Fla. Prac. Civil Practice s. 16.1 (2020 ed.).
[11] Fla. Std. Jury Instr. 401.3, *Greater Weight of the Evidence*.
[12] *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. 4th DCA 1983) as discussed in the Sawaya treatise, *supra* at s. 24:4.
[13] Sawaya, *supra* at s. 2:12.

Ordinary Negligence

Ordinary negligence, which is also referred to as simple negligence, is the standard of care applied to the vast majority of negligence cases. It is characterized as the conduct that a reasonable and prudent person would know could possibly cause injury to a person or property.[14]

Gross Negligence

Gross negligence means the failure of a person to exercise slight care. Florida courts have defined gross negligence as the type of conduct that a "reasonably prudent person knows will probably and most likely result in injury to another" person.[15]

In order for a plaintiff to succeed on a claim involving gross negligence, he or she must prove:
- Circumstances, which, when taken together, create a clear and present danger;
- Awareness that the danger exists; and
- A conscious, voluntary act or omission to act, that will likely result in an injury.[16, 17]

Statute of Limitations

A statute of limitation establishes a time limit for a plaintiff to file an action, or the case will be barred. "Statutes of limitations are designed to protect defendants from unusually long delays in the filing of lawsuits and to prevent prejudice to defendants from the unexpected enforcement of stale claims."[18] Similarly, statutes of limitations "are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[19] A statute of limitation begins to run when the cause of action accrues. A cause of action accrues when the last element constituting the cause of action occurs.[20] In a personal injury action based on the negligent act of another, the last element occurs when the plaintiff is injured.[21] In Florida, an action for a negligence claim must be brought within 4 years after the cause of action accrues.[22]

Florida's is among only four states[23] that have a statute of limitation of 4 years for negligence actions. Only three states have statutes of limitation longer than 4 years.[24] Forty-three states and the District of Columbia have statutes of limitation of less than 4 years (16 states[25] and the

[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] Culpable negligence is a fourth degree of negligence but is not discussed in this analysis.
[18] *Caduceus Properties, LLC, v. Graney*, 137 So.3d 987, 992 (Fla. 2014) (citing *Totura & Co. v. Williams*, 754 So.2d 671, 681 (Fla. 2000).
[19] *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-89 (1944).
[20] Section 95.031(1)(a), F.S.
[21] 35 Fla. Jur 2d *Limitations and Laches* s. 65 (2020).
[22] Section 95.11(3)(a), F.S.
[23] Nebraska, Wyoming, and Utah (2 years for wrongful death) are the others.
[24] Missouri (5 years), Maine (6 years) and North Dakota (6 years, 2 years for wrongful death).
[25] Arkansas, Maryland, Massachusetts, Michigan, Mississippi, Montana, New Hampshire, New Mexico, New York, North Carolina, Rhode Island, South Carolina, South Dakota, Vermont, Washington, and Wisconsin.

District of Columbia have a 3 year statute of limitation, 24 states[26] have a 2 year statute of limitation, and three states[27] have a 1 year statute of limitation).

Statutory and Common Law Bad Faith Actions

Insurance, Generally

Insurance is a contract between an insurance company ("insurer") and the insurance policy's beneficiary ("the insured"), in which, for specified consideration called a "premium," the insurer agrees to pay the insured or third-party claimants for covered losses.[28] An insurer generally owes two significant contractual duties to its insured in exchange for premium payments: the duty to indemnify and the duty to defend.[29]

- The "duty to indemnify" refers to the insurer's obligation to issue payment to the insured on a valid claim.[30] For example, an insured may purchase a policy requiring the insurer to repair or replace the insured's vehicle in the event of a car accident. If a covered accident then occurs, causing the insured's vehicle to be destroyed, the duty to indemnify requires the insurer to replace the insured's vehicle.
- The "duty to defend" refers to the insurer's duty to defend the insured in court against a third party with respect to a covered claim.[31] For example, an insured may purchase a liability policy in the event the insured causes a car accident and injuries a third party. If a covered accident then occurs, causing injury to a third-party claimant who sues the insured, the duty to indemnify requires the insurer to defend the insured against the claimant's lawsuit.

Insurer's Common Law and Statutory Duties

Historically, damages in actions for breaches of insurance contracts were limited to those contemplated by the parties when they entered into the contract.[32] As liability policies began to replace indemnity policies as the standard insurance policy form, courts recognized that insurers owed a duty to act in good faith towards their insureds.[33] Florida courts for many years have recognized an additional duty that does not arise directly from the insurance contract, the common law duty of good faith on the part of an insurer to the insured in negotiating settlements with third-party claimants.[34] The common law rule is that a third-party beneficiary who is not a formal party to a contract may sue for damages sustained as the result of the acts of one of the parties to the contract.[35] This is known as a third-party claim of bad faith. At common law, the insured cannot raise a bad faith claim against the insurer outside of the third-party claim context.[36]

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[26] Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Minnesota, Nevada, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Virginia, and West Virginia.
[27] Kentucky, Louisiana, and Tennessee.
[28] 16 Williston on Contracts s. 49:103 (4th ed.).
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *See Auto. Mut. Indem. Co. v. Shaw*, 184 So. 852 (Fla. 1938).
[35] *See Thompson v. Commercial Union Insurance Company*, 250 So.2d 259 (Fla. 1971).
[36] *See Laforet*, 658 So.2d at 58-59.

Florida's bad faith law and jurisprudence were designed to hold insurers accountable for failing to fulfill their contractual obligation to indemnify the insured or beneficiary on a valid claim.[37] Florida recognizes two distinct bad faith causes of action that may be initiated against an insurer. The first recognized bad faith cause of action provides a third-party common law cause of action when an insurer fails in good faith to settle a third party's claim against the insurer within policy limits and exposes the insured to liability in excess of his or her insurance coverage.[38] Florida courts do not recognize a *common law* first-party bad faith cause of action by the insured against its own insurer.[39] However, a first-party bad faith cause of action has been created by the legislature.

In 1982, the Legislature enacted s. 624.155, F.S. Section 624.155, F.S., recognizes a claim for bad faith against an insurer not only in the instance of settlement negotiations with a third party but also for an insured seeking payment from his or her own insurance company. Thus the section creates a first-party bad faith cause of action in Florida. Most property insurance claims are first-party claims[40], and bad faith actions on such claims may proceed only pursuant to s. 624.155, F.S. Here, bad faith is defined as the commission of any of the following acts by the insurer that damages any person:

- Violating certain provisions of the Florida Insurance Code such as specified provisions of the Unfair Insurance Trade Practices Act under s. 626.9541, F.S.
- Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured with due regard for her or his interests;
- Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made; or
- Except as to liability coverages, failing to promptly settle claims, when the obligation to settle the claim has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.[41]

Florida courts have interpreted an insurer's obligation to "act fairly" towards its insured, holding that when the insured's liability is clear and an excess judgment[42] is likely due to the resulting damage, the insurer has an affirmative duty to initiate settlement negotiations with third-party claimants.[43] If settlement fails, the insurer has the burden of showing that there was no realistic possibility of settling the claim within the policy limits.[44] However, failure to settle a claim, without more, does not necessarily mean that an insurer has acted in bad faith, as liability may be unclear or the damages may be minimal. Further, courts have generally indicated that merely

[37] *Harvey v. GEICO General Insurance Company*, 259 So.3d 1, 6, (Fla. 2018) (quoting *Berges v. Infinity Insurance Company*, 896 So.2d 665, 682 (Fla. 2004)).
[38] *Opperman v. Nationwide Mutual Fire Insurance Company*, 515 So.2d 263, 265 (Fla. 5th DCA 1987).
[39] *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 58-59 (Fla. 1995).
[40] Homeowners insurance provides liability coverage, thus third-party litigation may occur under a property insurance policy.
[41] Section 624.155(1)(a) and (b), F.S.
[42] An "excess judgment" is a judgment in an amount over and above the insurance policy's coverage limits, which amount is paid out of the insured's own pocket.
[43] *Powell v. Prudential Prop. and Cas. Ins. Co.*, 584 So.2d 12, 14 (Fla. 3d DCA 1991).
[44] *Id.* at 14.

negligently failing to settle a claim does not rise to the level of bad faith, though a jury may consider negligence in the larger context of whether bad faith occurred.[45]

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

- Damages the plaintiff incurred due to the insurer's bad faith conduct;[46]
- Compensation for emotional distress, in certain circumstances;[47] and
- Punitive damages where the insurer's bad faith conduct occurred with such frequency as to constitute a general business practice and such conduct was:
  - Willful, wanton, and malicious;
  - In reckless disregard for the rights of any insured; or
  - In reckless disregard for the rights of a beneficiary under a life insurance contract.[48]

Presuit Notice to Initiate Bad Faith Litigation under s. 624.155, F.S.

As a condition precedent to bringing a bad faith cause of action under s. 624.155, F.S., the insured must have provided the insurer and the Department of Financial Services at least 60 days written notice of the alleged violation.[49] The 60-day window contemplated under s. 624.155, F.S., provides insurers with a final opportunity to comply with their claim-handling obligations when a good-faith decision by the insurer would indicate that contractual benefits are owed.[50] The civil remedy notice must specify the following information:

- The statutory provision, including the specific language of the statute, which the authorized insurer allegedly violated;
- The facts and circumstance giving rise to the violation;
- The name of any individual involved in the violation;
- A reference to specific policy language that is relevant to the violation, if any. If the person bringing the civil action is a third-party claimant, she or he shall not be required to reference the specific policy language if the authorized insurer has not provided a copy of the policy to the third party claimant pursuant to written request; and
- A statement that the notice is given in order to perfect the right to pursue the civil remedy authorized under s. 624.155, F.S.[51]

This notice requirement does not apply to bad faith actions that proceed under the common law.

Response by the Insurer in Bad Faith Litigation

If the insurer fails to respond to a civil remedy notice under s. 624.155, F.S., within the 60-day window, there is a presumption of bad faith sufficient to shift the burden to the insurer to show

[45] *See DeLaune v. Liberty Mut. Ins. Co.*, 314 So.2d 601, 603 (Fla. 4th DCA 1975).
[46] Section 624.155(4), F.S.
[47] *Times Ins. Co., Inc. v. Burger*, 712 So.2d 389 (Fla. 1998).
[48] Section 624.155(5), F.S.
[49] Section 624.155(3), F.S.
[50] *See Talat Enterprises, Inc., v. Aetna Cas. and Sur. Co*, 753 So.2d 1278, 1284 (Fla. 2000).
[51] Section 624.155(3)(b)(1)-(5), F.S.

why it did not respond.[52] No action shall lie if the insurer responds within 60 days of receipt of the civil remedy notice by either paying damages or correcting the circumstances giving rise to the claim.[53]

Indefiniteness About What Constitutes Bad Faith

In Florida, the question of whether the insurer has committed "bad faith" is generally a question for the jury, but Florida law does not define what conduct constitutes bad faith. In *Berges v. Infinity Ins. Co.*, the Florida Supreme Court noted that "the question of whether an insurer has acted in bad faith in handling claims against the insured is determined under the 'totality of the circumstances' standard . . . Each case is determined on its own facts and ordinarily the question of failure to act in good faith with due regard for the interests of the insured is for the jury."[54]

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

> What the jury knows in these cases is that there is a tragically and grievously injured victim, that the insured had very low limits of insurance, and that if the jury finds against the insurer, then all of the victim's damages will be paid by the insurer. It is these very facts which are not allowed to be known by a jury in liability cases because of the known prejudicial influence these facts . . . have on jury verdicts.[55]

Following the *Berges* decision, courts have noted that "[u]ntil there is a substantial change in the statutory scheme or the rationale explained in the majority opinion in *Berges*, however, juries will continue to render verdicts regarding an insurer's alleged bad faith when the pertinent facts are in dispute."[56] In any event, the *Berges* decision made it more difficult for an insurer to resolve a third-party bad faith lawsuit through a motion for summary judgment, as such motions are decided by the court based on questions of law, and whether an insurer acted in bad faith is now, under *Berges*, almost always a question of fact.

Statutory Bad Faith Actions against Property Insurers

Section 624.1551, F.S., provides that bad faith litigation for failure to settle a property insurance claim may not be filed until after the insured has established through adverse adjudication by a court that the insurer breached the insurance contract and a final judgment or decree has been rendered against the insurer. The acceptance of an offer of judgment or the payment of an appraisal award does not constitute an adverse adjudication. The difference between an insurer's appraiser's final estimate and the appraisal award may be evidence of bad faith but is not considered an adverse adjudication and does not on its own give rise to a cause of action for bad faith. The provision applies to civil remedy actions based upon a property insurer:

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[52] *Fridman v. Safeco Ins. Co. of Illinois*, 185 So.3d 1214, 1220, (Fla. 2016); *Imhof v. Nationwide Mut. Ins. Co.*, 643 So.2d 617, 619 (Fla 1994).
[53] *Id.*
[54] *Berges*, 896 So.2d at 680.
[55] *Id.* at 686, n. 12 (Wells, J., dissenting).
[56] *United Auto. Ins. Co. v. Estate of Levine ex rel. Howard*, 87 So.3d 782, 788 (Fla. 3d DCA 2011).

- Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his or her interests;
- Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made; or
- Except as to liability coverages, failing to promptly settle claims, when the obligation to settle a claim has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy.

Transparency in Damages

Calculating Medical Damages

In a typical negligence action, the jury is responsible for determining the amount of damages to the plaintiff. In such action, the plaintiff may seek to inform the jury of the plaintiff's medical bills as evidence of the plaintiff's medical damages. However, Florida law generally prohibits defendants from introducing evidence of amounts accepted by a plaintiff's medical providers as evidence of the plaintiff's medical costs.[57] Whether a plaintiff's medical bills, instead of amounts accepted as payment in full, are reasonable evidence of a plaintiff's medical damages has become a matter of dispute because medical bills are often multiples of amounts typically accepted as payment in full.[58]

Further complicating matters, is the fact that medical providers often have significantly different rates for an identical procedure, based on their contracts with an insurer, an accepted standard Medicare or Medicaid rate, or a negotiated discounted amount. Nonetheless, plaintiffs have an incentive to present large medical bills for past medical costs to a jury. Awards for past medical expenses influence awards for future medical costs and non-economic damages, including damages for pain and suffering.[59]

Collateral Source Rule

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

- The United States Social Security Act, except Title XVIII and Title XIX; any federal, state, or local income disability act; or any other public programs providing medical expenses, disability payments, or other similar benefits, except those prohibited by federal law and those expressly excluded by law as collateral sources.
- Any health, sickness, or income disability insurance; automobile accident insurance that provides health benefits or income disability coverage; and any other similar insurance

[57] *Dial v. Calusa Palms Master Assn., Inc.,* 337 So.3d 1229, 1231-32 (Fla. 2022) (Polston, J. concurring)
[58] George A. Nation, III, *Hospital Chargemaster Insanity: Heeling the Healers*, 43 PEPP L. REV. 745 (2016) (stating that "[h]ospital list prices, contained in something called a chargemaster are insanely high, often running ten times the amount that hospitals routinely accept as full payment from insurers").
[59] *See Durse v. Henn*, 68 So.3d 271, 275 (Fla. 4th DCA 2011). In *Durse*, the plaintiff argued that the admission of the full amount of his medical bills, not the amount accepted as payment in full, was necessary to establish the "value of future medical expenses and non-economic damages." *Id.* Larger awards for past medical expenses would seem to promote larger awards for other types of damages.

benefits, except life insurance benefits available to the claimant, whether purchased by her or him or provided by others.
- Any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services.
- Any contractual or voluntary wage continuation plan provided by employers or by any other system intended to provide wages during a period of disability.[60]

At common law, the collateral source rule did two things:
- First, the rule ensured that a plaintiff could recover the full amount of damages suffered in a personal injury tort case. Under the rule, a court was prohibited from reducing the damages a plaintiff received by the benefits of collateral sources. As such, a plaintiff could recover the full value of the medical services billed, regardless of the amount that was actually paid for the services.
- Second, the rule prohibited a defendant from introducing evidence of collateral sources at trial for fear that introduction of such evidence would confuse and mislead the jury.[61]

Legislative Modification of the Collateral Source Rule

In 1986, the Legislature enacted the Tort Reform and Insurance Act ("Act") which modified the first prong of the collateral source rule.[62] The Act created s. 768.76, F.S., requiring a court to reduce the amount of damages awarded to a plaintiff from all collateral sources, except where a subrogation or reimbursement right exists.[63] For example, if a jury awards damages for past medical costs that were paid in full by the plaintiff's health insurer, a court must reduce that award after the trial.

Goble v. Froman, a 2005 Florida Supreme Court case,[64] demonstrates how courts apply the Act in a case involving past paid medical damages. In *Goble*, the plaintiff's medical providers billed him $574,554 for treatment. However, because his insurer had a preexisting fee schedule with the medical providers, the providers accepted $145,970, writing off more than $400,000. The plaintiff argued on appeal that the jury award of $574,554 should stand.

The Second District Court of Appeal (DCA) disagreed, holding that the payments were collateral sources made on the claimant's behalf subject to setoff under s. 768.76, F.S. [65] On appeal, the Florida Supreme Court agreed, finding that permitting a setoff for contractual discounts was consistent with the Legislature's intent to reduce litigation costs when insurers are required to pay damages in excess of what an injured party actually incurred. Thus, the Act prevented the plaintiff from receiving a windfall of over $400,000 in "phantom damages."[66]

Even though the Act modified the first prong of the collateral source rule with respect to what damages a plaintiff could ultimately recover, the Act did not modify the second evidentiary

[60] Section 768.76(2)(a), F.S.
[61] *Gormley v. GTE Prods. Corp.*, 587 So.2d 455, 458 (Fla. 1991).
[62] Chapter 86-160, s. 55, L.O.F.
[63] Section 768.76(1), F.S.
[64] *Goble v. Frohman*, 901 So.2d 830, 834 (Fla. 2005).
[65] *Goble v. Frohman*, 848 So.2d 406, 409 (Fla. 2d DCA 2003).
[66] *See Goble*, 901 So.2d at 834.

prong of the rule. Accordingly, a plaintiff may still introduce into evidence the full amount of his or her medical bills; but a defendant may be prohibited from introducing the amounts paid and accepted in full satisfaction of those bills.[67] As such, it is possible that the jury will not be informed of the actual amounts that were paid and accepted for a plaintiff's medical care.[68]

Letters of Protection

A "letter of protection" is a written agreement between a plaintiff and a medical provider wherein the provider agrees to defer collection on the medical bill until the plaintiff recovers in a lawsuit; upon recovery from a lawsuit, the provider is then paid from the proceeds of the lawsuit.[69] As such, a letter of protection may give the plaintiff's medical provider a financial interest in the outcome of the litigation.[70] If there is no favorable recovery, the client may remain liable to pay the medical bills.[71]

Letters of protection have sometimes been criticized as reflecting inflated, inaccurate amounts for medical damages that are not reflective of the usual and customary billing practices in the medical community.[72] Since a letter of protection is an agreement in which the provider agrees not to collect payment for services until litigation has ended, there may not yet be a "paid value" available to present to the jury for consideration.

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

Florida's Evidence Code recognizes that certain communications are "privileged," and therefore may be confidential and not discoverable in a legal proceeding.[73] One such privilege is the lawyer-client privilege, which provides that a communication between lawyer and client is "confidential" if it is not intended to be disclosed to other persons except those to whom disclosure is in furtherance of the rendition of legal services to the client, and those reasonably necessary for the transmission of the communication.[74] The lawyer-client privilege does not apply to protect the communication when any of the following apply:

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[67] Lance B. Stephan, *Sticker Shock: Florida Juries Still Awarding Phantom Damages*, 33 Trial Advoc. Q. 23 (Fall 2014).
[68] Instead of providing evidence of the amounts paid and accepted for the plaintiff's care, the defense must generally introduce evidence of the reasonable value of the medical care. See Instruction 501.2b., Fla. Std. Jury Instr. (Civ.).
[69] *Cf. Broward Outpatient Med. Ctr., LLC v. Fenstersheib Law Group, P.A.*, 307 So.3d 779, 780 (Fla. 4th DCA 2020) (quoting language from a letter of protection as follows: "[T]he attorney for the above [Plaintiff] (patient), does hereby agree to . . . withhold such sums from any settlement or judgment as may be necessary to adequately protect the above listed health care providers and to promptly pay such sums to them upon receipt of payment of any settlement or judgment without demand.").
[70] *See Carnival Corp. v. Jimenez*, 112 So.3d 513, 520 (Fla. 2d DCA 2013) ("Undeniably, the existence of the letter of protection gave Dr. Smith a financial interest in the outcome of Ms. Jimenez's personal injury action").
[71] *See Smith v. Geico Cas. Co.*, 127 So.3d 808, 812 n.2 (Fla. 2d DCA 2013) (quoting Caroline C. Pace, *Tort Recovery for Medicare Beneficiaries: Procedures, Pitfalls and Potential Values*, 49 Hous. Law 24, 27 (2012)).
[72] *Cf. Worley v. Central Fla. Young Men's Christian Ass'n, Inc.*, 228 So.3d 18, 24 (Fla. 2017) ("[A] Sea Spine employee testified during depositions that at the time of Worley's treatment, its entire practice was based on patients treated pursuant to LOPs"); *id.* at 27 (Polston, J., dissenting) ("YMCA contends, and has throughout the litigation, that these providers' bills are grossly inflated and do not reflect usual and customary billing practices within the medical community. Worley concedes that YMCA has sufficient evidence to argue that the medical bills [from the treating physicians in this case] are unreasonable").
[73] *See, e.g.*, s. 90.5015, F.S. (journalist's privilege); s. 90.502, F.S. (lawyer-client privilege); s. 90.503, F.S. (psychotherapist-patient privilege); s. 90.504, F.S. (husband-wife privilege); s. 90.505, F.S. (privilege with respect to communications to clergy).
[74] Section 90.502(1)(c), F.S.

- The services of the lawyer were sought or obtained to enable anyone to commit or plan to commit a crime or fraud.
- A communication is relevant to an issue between parties who claim through the same deceased client.
- A communication is relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer, arising from the lawyer-client relationship.
- A communication is relevant to an issue concerning the intention or competence of a client executing an attested document to which the lawyer is an attesting witness, or concerning the execution or attestation of the document.
- A communication is relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest.[75]

In 2017, the Florida Supreme Court decided *Worley v. Central Florida YMCA*,[76] where the issue was whether a communication between an attorney and a client in which the attorney referred the client to a particular medical treatment provider was admissible in court. In that case, the plaintiff suffered an injury when she fell in the defendant's parking lot. She subsequently went to the emergency room, where she was advised to see a knee pain specialist. The plaintiff ultimately retained an attorney, and only after she retained this attorney did she seek medical care from a particular orthopedic institute and other specified providers. Afterwards, the attorney filed suit on the plaintiff's behalf against the defendant, seeking to recover damages, including the costs of her medical care from those medical providers.[77]

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

The Florida Supreme Court, by a 4-3 margin, agreed with the plaintiff, holding that "the question of whether a plaintiff's attorney referred him or her to a doctor for treatment is protected by the attorney-client privilege."[78] The Court concluded as follows:

> Even in cases where a plaintiff's medical bills appear to be inflated for the purposes of litigation, we do not believe that engaging in costly and time-consuming discovery to uncover a "cozy agreement" between the law firm and a treating physician is the appropriate response . . . Moreover, we worry that discovery orders such as the one in this case will inflate the costs of litigation to the point that some plaintiffs will be denied access to the courts, as attorneys will no longer be willing to advance these types of costs. Finally, attempting to discover this information requires the disclosure of materials that would otherwise be protected under the attorney-client privilege.[79]

[75] Section 90.502(4), F.S.
[76] 228 So.3d 18 (Fla. 2017).
[77] *Id.* at 20.
[78] *Id.* at 25.
[79] *Id.* at 26.

In contrast, the dissent in *Worley* argued that a lawyer's referral of a client to a medical provider is for medical care, not for legal services and therefore, is not an attorney-client privileged communication.[80] In support of its position, the dissent cited several other court opinions finding that a referral or history of a referral relationship is relevant to financial bias. One of the cited cases also explained that a referral was relevant to "whether the expert has recommended an allegedly unnecessary and costly procedure with greater frequency in litigation cases, and whether the expert, as a treating physician, allegedly overcharged for the medical services at issue in the lawsuit."[81] In further support for its position, the dissent argued that if the financial relationship between an insurer and its expert is discoverable, which it is, the same relationship between a plaintiff's law firm and its experts should also be discoverable.[82]

Premises Liability

Premises liability refers to the duty of an individual or entity that owns or controls real property to reasonably operate and maintain such property for the safety of those who enter or remain on the property. Unlike ordinary negligence, which is based upon active negligence, a premises liability claim is based upon passive negligence; that is, a premises liability claim stems from the tortfeasor's failure to act to prevent harm to the injured party and not from any affirmative actions of the tortfeasor.[83]

Common premises liability claims include slip and fall accidents, dog bites, trip or misstep accidents, and swimming pool accidents. As to an invitee, a landowner or possessor is liable if he/she/it:

- Negligently failed to maintain the premises in a reasonably safe condition; or
- Negligently failed to correct a dangerous condition about which the defendant either knew or should have known, by the use of reasonable care; or
- Negligently failed to warn the claimant of a dangerous condition about which the defendant had, or should have had, knowledge greater than that of claimant, and, if so, such negligence was a legal cause of loss, injury, or damage.[84]

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

- Plaintiff was lawfully present on the defendant's property;[85]
- Defendant had a duty to provide adequate security on the property but breached such duty;[86]

[80] *Id.* at 26-27.
[81] *Id.* (quoting *Katzman v. Rediron Fabrication, Inc.*, 76 So.3d 1060, 1064 (Fla. 4th DCA 2011).
[82] *Id.* at 29-30.
[83] *Nicholson v. Stonybrook Apts., LLC,* 154 So.3d 490 (Fla. 4th DCA 2015).
[84] Fla. Std. Jury Instr. 401.20 *Issues on Plaintiff's Claim — Premises Liability*.
[85] The only duty a property owner owes to an undiscovered trespasser is to refrain from causing intentional harm, while the only duty he or she owes to a known trespasser is to refrain from committing gross negligence or intentional harm and to warn of known dangers that are not readily observable. *Nicholson,* 154 So.3d at 492.
[86] Generally, a property owner has no duty to protect another person from criminal acts committed by third parties on his or her property, but such a duty may arise where a special relationship exists between the property owner and the victim or

- Plaintiff was injured because of a third party's criminal act, which act was reasonably foreseeable to the defendant and would not have occurred but for the defendant's breach;[87] and
- Plaintiff incurred actual damages.[88]

In Florida, comparative negligence does not apply to an action based upon an intentional tort.[89] Thus, when apportioning fault in a negligent security claim, a jury is unable to apportion fault to a criminal actor whose intentional conduct injured the plaintiff. This means the owner or operator of the premises where the criminal conduct occurred is financially responsible for all the damages caused by the criminal conduct of a third party.

Comparative Negligence

Joint and Several Liability

Traditionally, when multiple defendants contributed to a plaintiff's injury, the doctrine of "joint and several liability" required any one of the defendants to pay the full amount of the plaintiff's damages.[90] This was true even where the defendants did not act in concert but instead each committed a separate and independent act, and then the acts combined to cause an injury to the plaintiff. For example, if defendants A, B, and C, while driving their vehicles, each contributed to an accident that caused a plaintiff damages of $100,000, with A being 40% at fault, B being 59% at fault, and C being 1% at fault, the plaintiff could recover the full $100,000 from the plaintiff's choice of any of the three defendants.

Contributory Negligence

Under the common law, a plaintiff who was found to be at fault for his or her own injury was completely barred from recovering any damages from the defendant.[91] This doctrine, known as "contributory negligence," prohibited any recovery by the plaintiff, even if the plaintiff had only barely contributed to his or her own injuries. The doctrine rested on a "policy of making the

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between the property owner and the third party such that the property owner has a duty to control the third party's conduct. Special relationships recognized by Florida courts include landlord-tenant, hotel-guest, employer-employee, proprietor-patron, and school-student; all involve a person who has entered upon the property of another and in so doing lost a measure of control in providing for his or her own protection. *See, Stevens v. Jefferson*, 436 So.2d 33 (Fla. 1983); *K.M. ex rel. D.M. v. Publix Super Markets, Inc.*, 895 So.2d 1114 (Fla. 4th DCA 2005); *Gross v. Fam. Servs. Agency, Inc.*, 716 So.2d 337 (Fla. 4th DCA 1998); *Salerno v. Hart Fin. Corp.*, 521 So.2d 234 (Fla. 4th DCA 1988); Restatement 2d Torts s. 315; Frederic S. Zinober, *Litigating the Negligent Security Case: Who's In Control Here?*, 44 Stetson L. Rev. 289 (2015).

[87] Generally, a negligent person is not liable for the damages suffered by another when some separate force or action is an intervening cause of the harm, but where the intervening cause is foreseeable, the original negligent actor may still be held liable. Thus, a negligent security claim's success often hinges on the foreseeability of the crime committed, as property owners are not expected to prevent all possible crimes which may occur on their property. Whether or not a crime was foreseeable is a question of fact, but evidence of foreseeability may include the crime rate in the premises' immediate area, whether similar crimes have previously been committed on the premises, and the nature of the property itself (in other words, is the property of a type that is likely to attract crime). *Stevens*, 436 So.2d at 34-35; *Gibson v. Avis Rent-A-Car System, Inc.*, 386 So.2d 520 (Fla. 1980); *Williams v. Office of Sec. & Intelligence, Inc.*, 509 So.2d 1282 (Fla. 3d DCA 1987).

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

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

[90] *See Louisville & Nashville R.R. Co. v. Allen*, 65 So. 8, 12 (Fla. 1914) ("Where . . . separate and independent acts of negligence of several combine to produce directly a single injury, each is responsible for the entire result . . . .").

[91] *See Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973).

personal interests of each party depend upon his own care and prudence."[92] However, over time, most United States jurisdictions began to believe the doctrine of contributory negligence was too harsh of a rule and began to change their approaches.

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

In 1886, the Florida Supreme Court adopted the contributory negligence approach;[93] and in 1914, the Court acknowledged its acceptance of the doctrine of joint and several liability.[94] In 1973, the Florida Supreme Court changed Florida to a "pure comparative negligence" jurisdiction, deciding that the traditional contributory negligence approach was "almost universally regarded as unjust and inequitable."[95] As a result, under the pure comparative negligence approach, juries would now decide the percentage of fault contributed by each party in an accident, and then the damages would be apportioned accordingly.[96]

In 1986, the Legislature passed the Tort Reform and Insurance Act ("Act"), which essentially codified *Hoffman* and further committed Florida to the comparative negligence approach.[97] Within the same Act, the Legislature also substantially limited the application of the doctrine of joint and several liability in negligence actions.[98] Joint and several liability was repealed for the purposes of most negligence actions in 2006.[99]

As a result of the Act in its current form, Florida is a "pure comparative negligence jurisdiction" without the doctrine of joint and several liability.[100] In other words, a jury in a typical Florida negligence action decides each party's percentage of fault; and the court, in its final judgment, apportions damages based on the jury's fault determination.[101]

Comparative Negligence Approaches by United States Jurisdictions

Today, three different approaches for how a court should apportion damages in a negligence action when two or more defendants contribute to an injury generally exist, as follows:[102]

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[92] Kevin J. Grehan, *Comparative Negligence*, 81 COLUM. L. REV. 1688, note 3 (quoting W. Prosser, The Law of Torts ss. 1, 42 (4th ed. 1971).
[93] *Louisville & Nashville R.R. Co. v. Yniestra*, 21 Fla. 700 (1886) (citing *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809)).
[94] *Louisville & Nashville R.R. Co. v. Allen,* 65 So. at 12.
[95] *Hoffman v. Jones*, 280 So.2d at 436.
[96] *See id.* at 438 ("If plaintiff and defendant are both at fault, the former may recover, but the amount of his recovery may be only such proportion of the entire damages plaintiff sustained as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant").
[97] Chapter 86-160, s. 60, L.O.F. (codified at s. 768.81(2), F.S.).
[98] Chapter 86-160, s. 60, L.O.F. (codified at s. 768.81(3), F.S.).
[99] Chapter 2006-6, s. 1, L.O.F. (codified at s. 768.81(3), F.S.).
[100] Section 768.81(3), F.S. ("In a negligence action, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability.").
[101] *See* Fla. Sup. Ct. Std. Jury Instr. 501.4 (Comparative Negligence, Non-Party Fault and Multiple Defendants), https://www.floridabar.org/rules/florida-standard-jury-instructions/civil-jury-instructions/civil-instructions/#500 (last accessed February 27, 2023).
[102] LawInfo, *Comparative and Contributory Negligence Laws by State*, https://www.lawinfo.com/resources/personal-injury/comparative-and-contributory-negligence-laws-by-state.html (last accessed February 27, 2023).

- *Contributory negligence approach,* followed by four states[103] and the District of Columbia. Under this traditional common law approach, if the plaintiff contributed to the accident in any way, the plaintiff recovers nothing. For example:
  - If the plaintiff is 1 percent at fault for an accident causing the plaintiff $100,000 in damages and the defendant is 99 percent at fault in such accident, the plaintiff recovers nothing.
  - If the plaintiff is zero percent and the defendant is 100 percent at fault in such accident, the plaintiff recovers 100 percent of his or her damages—that is, $100,000.
- *Pure comparative negligence approach*, followed by Florida and 11 other states.[104] Under this approach, the jury determines each party's percentage of fault and the court apportions damages accordingly. For example:
  - If the plaintiff is 40 percent at fault for an accident causing the plaintiff $100,000 in damages and the defendant is 60 percent at fault in such accident, the plaintiff recovers 60 percent of his or her damages—that is, $60,000.
  - If the plaintiff is 70 percent at fault for an accident causing the plaintiff $100,000 in damages and the defendant is 30 percent at fault in such accident, the plaintiff recovers 30 percent of his or her damages—that is, $30,000.
- *Modified comparative negligence approach*, followed by 34 states. Under this approach, the jury determines each party's percentage of fault, but the plaintiff recovers nothing if he or she was to blame for at least a certain percentage of the fault, with three sub-approaches:
  - In 10 states, the plaintiff recovers nothing if he or she was 50 percent or more at fault.[105] For example:
    - If the plaintiff is 50 percent at fault for an accident causing the plaintiff $100,000 in damages, the plaintiff recovers nothing.
    - If the plaintiff is 49 percent and the defendant is 51 percent at fault for such accident, the plaintiff recovers 51 percent of his or her damages—that is, $51,000.
  - In 23 states, the plaintiff recovers nothing if he or she was more than 50 percent at fault.[106] For example:
    - If the plaintiff is 51 percent and the defendant is 49 percent at fault for an accident causing the plaintiff $100,000 in damages, the plaintiff recovers nothing.
    - If the plaintiff and the defendant are each 50 percent at fault for such accident, the plaintiff recovers 50 percent of his or her damages—that is, $50,000.
  - In one state, the plaintiff recovers only if his or her conduct was "slightly" negligent and the defendant's conduct was "grossly negligent."

Awarding Attorney Fees in Litigation

In most United States jurisdictions, each party to civil litigation pays its own attorney, regardless of the outcome of the litigation, and a court may only award attorney fees to the prevailing side if authorized by statute or agreement of the parties to the litigation.[107] This is often referred to as

[103] Alabama, Maryland, North Carolina, and Virginia. *See id.*
[104] Alaska, Arizona, California, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, New York, Rhode Island, and Washington state. *See id.*
[105] *Id.*
[106] *Id.*
[107] *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, 1147-1148 (Fla. 1985).

the “American Rule” for attorney fees, and contravenes the “English Rule” under which English courts generally awarded attorney fees to the prevailing party in litigation.[108]

Florida has enacted a number of statutes that authorize courts to award attorney fees in civil litigation. As the Florida Supreme Court has noted, these statutory provisions generally fall into two categories.[109] In the first category, statutes direct a court to assess attorney fees against only one side in certain types of actions. An example is found in s. 627.428, F.S., which directs the court to assess reasonable attorney fees against the insurer and in favor of the insured or a beneficiary who prevails in litigation. The second category follows the English Rule and authorizes the prevailing party, whether it is the plaintiff or the defendant, to recover its attorney fees from the opposing party.

Lodestar Approach

In 1985, the Florida Supreme Court held that courts should calculate the amount of statutorily-authorized attorney fees under the "lodestar approach."[110] Under this approach, the first step is for the court to determine the number of hours reasonably expended by an attorney on the case. The second step requires the court to determine a reasonable hourly rate. The number of hours reasonably expended (determined in the first step), multiplied by the reasonable hourly rate (determined in the second step), produces the “lodestar amount,” which is considered an objective basis for what the attorney fee amount should be.

Addition of a Contingency Fee Multiplier

In certain cases, the court may greatly increase the lodestar amount by applying a contingency fee multiplier, which essentially takes the lodestar amount and multiplies that amount by a factor of 1.5, 2.0, 2.5, or some other number.[111] The concept of the contingency fee multiplier arose from judicial interpretations of statutory authorization of attorney fees in particular cases,[112] but the Legislature has also expressly provided for use of a contingency fee multiplier in certain cases.[113] In a 1990 case, the Florida Supreme Court discussed three different types of cases and whether a contingency fee multiplier should be applied in each case, as follows:

- *Public policy enforcement cases*. These cases may involve discrimination, environmental issues, and consumer protection issues. In these cases, a contingency fee multiplier is usually inappropriate.
- *Family law, eminent domain, estate, and trust cases*. In these cases, a contingency fee multiplier is usually inappropriate.

[108] *Id*.
[109] *Id*.
[110] *Fla. Patient's Comp. Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985).
[111] The Court may also adjust the amount based on the results obtained by the attorney. *Standard Guar. Ins. Co. v. Quanstrom*, 555 So.2d 828, 830-31 (Fla. 1990). Contingency risk multipliers are also referred to as contingency fee multipliers.
[112] The rationale for applying a contingency risk multiplier to increase an attorney fee award is that plaintiffs and plaintiffs' attorneys generally do not recover any money unless they prevail. The attorney fee multiplier induces attorneys to take a risk on cases they might not otherwise take, allowing would-be plaintiffs to find attorneys willing to represent them.
[113] *See* s. 790.33(3)(f)1., F.S. (explicitly authorizing a contingency fee multiplier in certain cases relating to the preemption of firearm and ammunition regulation).

- *Tort and contract claims, including insurance cases*. In these cases, a contingency fee multiplier may be applied if the plaintiff can demonstrate the following factors show a need for the multiplier:
  - Whether the relevant market requires a contingency fee multiplier to obtain counsel;
  - Whether the attorney can mitigate the risk of nonpayment; and
  - Whether any other factors established in *Rowe*[114] support the use of the multiplier.[115]

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

- 1.0 to 1.5, if the trial court determines that success was more likely than not at the outset;
- 1.5 to 2.0, if the trial court determines that the likelihood of success was approximately even at the outset; and
- 2.0 to 2.5, if the trial court determines that success was unlikely at the outset.[116]

Federal Court Treatment of the Contingency Fee Multiplier

Part of the Florida Supreme Court's rationale for adopting the contingency fee multiplier framework in 1985 was that, at the time, it was being applied in federal courts.[117] However, in 1992, the U.S. Supreme Court decided *Burlington v. Dague*, in which it rejected the use of a contingency fee multiplier under certain federal fee-shifting statutes. *Dague* essentially signaled that the Supreme Court was closing the door on the contingency fee multiplier's use in most, if not all, federal cases.[118]

In 2010, in the case of *Perdue v. Kenny A. ex. rel. Winn*, a case involving a class action lawsuit filed on behalf of 3,000 children in the Georgia foster care system, the U.S. Supreme Court again addressed the contingency risk multiplier issue.[119] The plaintiffs argued in the underlying case that the foster care system in two counties was constitutionally deficient. The case went to

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

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

Rowe, 472 So.2d at 1150–1151.

[115] *Quanstrom*, 555 So.2d at 833-835.

[116] *Id.* at 834.

[117] *See Rowe*, 472 So.2d at 1146 ("[W]e . . . adopt the federal lodestar approach for computing reasonable attorney fees").

[118] *See City of Burlington v. Dague*, 112 S.Ct. 2638, 2642-2643 (1992) ("Thus, enhancement for the contingency risk posed by each case would encourage meritorious claims to be brought, but only at the social cost of indiscriminately encouraging nonmeritorious claims to be brought as well... [W]e hold that enhancement for contingency is not permitted under the fee-shifting statutes at issue").

[119] *Perdue v. Kenny A. ex rel. Winn*, 130 S.Ct. 1662 (2010).

mediation, and the parties entered a consent decree resolving all issues. Subsequently, the plaintiffs' attorneys sought attorney fees under 42 U.S.C. s. 1988.[120]

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

- Advanced $1.7 million with no ongoing reimbursement.
- Worked on a contingency basis, and therefore were not guaranteed payment.
- Displayed a high degree of skill, commitment, dedication, and professionalism.
- Achieved extraordinary results.[121]

On review, the U.S. Supreme Court reversed the district court's calculation of attorney fees, remanding the case because the district court did not provide adequate justification for the 75 percent increase. The Court reiterated that "there is a strong presumption that the lodestar figure is reasonable," but that such presumption "may be overcome in those *rare circumstances* in which the lodestar does not adequately consider a factor that may properly be considered in determining a reasonable fee."[122] The Court also determined that a contingency fee multiplier may be applicable in "exceptional" circumstances.[123]

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

- When a trial court fails to give detailed explanations for why it applies a contingency fee multiplier, "widely disparate awards may be made, and awards may be influenced . . . by a judge's subjective opinion regarding particular attorneys or the importance of the case."[124]
- "[U]njustified enhancements that serve only to enrich attorneys are not consistent" with the aims of a statute that seek to compensate plaintiffs.[125]
- In many cases, attorney fees "are not paid by the individuals responsible for the constitutional or statutory violations on which the judgment is based . . . . Instead, the fees are paid . . . by state and local taxpayers," resulting in a diversion of funds from other government programs.[126]

Florida Supreme Court Treatment of the Contingency Fee Multiplier

In 2017, the Florida Supreme Court rejected the U.S. Supreme Court's *Dague* decision, instead holding that the contingency fee multiplier in Florida courts is not subject to the "rare and exceptional circumstances" requirement.[127] The Court acknowledged that, based upon its

[120] 42 U.S.C. s. 1988(b) allows the court to award attorney fees to the prevailing party in certain civil rights actions.
[121] *Perdue*, 130 S.Ct. at 1670.
[122] *Id.* at 1673 (emphasis added).
[123] *Id.*
[124] *See id.* at 1676.
[125] *See id.*
[126] *See id.* at 1677.
[127] *See Joyce v. Federated Nat'l Ins. Co.*, 228 So.3d 1122 (Fla. 2017) ("[W]ith all due deference to the United States Supreme Court, we do not accept the *Dague* majority's rationale for rejecting contingency fee multipliers").

decision to maintain the applicability of the contingency fee multiplier without the restrictions implemented by the *Dague* decision, Florida "separat[ed] from federal precedent in this area."[128]

Recent Florida Legislation

During Special Session D in May of 2022, the Legislature passed CS/SB 2-D, which was signed into law by the Governor. Amending s. 627.70152, F.S., the bill created a strong presumption that, in lawsuits arising under a residential or commercial property insurance policy, a lodestar fee is sufficient and reasonable; and that such presumption could only be rebutted in a rare and exceptional circumstance.[129]

Attorney Fees Arising from Insurance Litigation

Section. 627.428, F.S., allows an insured to recover attorney fees if he or she prevails in a lawsuit against the insurer to enforce an insurance policy – which has been referred to as the "one-way attorney fee" in insurance litigation.[130] Some version of this statute has been the law in Florida since at least 1893.[131] The statute provides, in part:

> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.[132]

Section 626.9373, F.S., applies the same standard to suits against surplus lines insurers. In December 2022, during Special Session A, the legislature passed SB 2-A, which was signed into law by the Governor. The passage of SB 2-A eliminated one-way attorney fees for property insurance cases, and in turn, removed the provision added during the May 2022 Special Session D relating to lodestar fees in such property insurance cases.[133]

Attorney Fees Arising from Offers of Judgment

Section 768.79, F.S., provides for attorney fees where a party's offer to settle a case has been rejected. The statute states, in part:

> (1) In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant

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[128] *Id. at* 1130.
[129] Chapter 2022-268, s. 16, L.O.F.
[130] Other states with similar "one-way" attorney fee provisions for insureds are Arkansas (Ark. Code s. 23-79-208), Delaware (18 Del. Code s. 4102), Hawaii (Hi. Rev. Stat. s. 431:10-242), Idaho (Id. Code 41-1839), Kansas (Kan. Stat. s. 40-256), Nebraska (Neb. Rev. Stat. Ann. S. 44-359), New Hampshire (N.H. Rev. Stat. s. 491-22-b), New Jersey – by court rule (N.J. Court R. 4:42-9(a)(6)), New Mexico (N.M. Stat. s. 39.2-1), North Carolina - for litigation not over $25,000 (N.C. Gen. Stat. s. 6-21.1), and Texas (Tex. Ins. Code s. 542.060).
[131] *See Tillis v. Liverpool & London & Globe Insurance Company*, 35 So. 171 (Fla. 1903) (rejecting an insurance company argument that the 1893 law providing that an insured may recover attorney fees in actions against an insurance company to enforce a policy violates due process and equal protection).
[132] Section 627.428(1), F.S. This is similar to the language in s. 626.9373, F.S., which applies to surplus lines insurers. Florida courts interpret the statutes to have the same meaning.
[133] Chapter 2022-271, s. 17, L.O.F.

> shall be entitled to recover reasonable costs and attorney's fees incurred by her or him … if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer…. If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees….

An offer must:

- Be in writing and state that it is being made pursuant to this section;
- Name the party making it and the party to whom it is being made;
- State with particularity the amount offered to settle a claim for punitive damages, if any; and
- State its total amount.[134]

The court may disallow an award of costs and attorney fees to the prevailing party if it is determined the prevailing party did not make the offer in good faith.[135] When determining the reasonableness of an award of attorney fees, the court must consider the following factors along with other relevant criteria:

- The then apparent merit or lack of merit in the claim;
- The number and nature of offers made by the parties;
- The closeness of questions of fact and law at issue;
- Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer;
- Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties; and
- The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.[136]

III. Effect of Proposed Changes:

Contingency Fee Multiplier

Section 1 amends s. 57.104, F.S., to create a presumption that the lodestar fee is sufficient and reasonable in a case in which attorney fees are determined by or awarded by the court. A claimant may overcome this presumption only in a rare and exceptional circumstance, and only if he or she can demonstrate that he or she could not have otherwise reasonably retained competent counsel. Essentially, the bill brings Florida contingency fee multiplier law in line with the current federal standard.

Statute of Limitations

Section 2 amends s. 95.11, F.S., to reduce the statute of limitations for general negligence actions from four years to two years. This generally means that a plaintiff who fails to file a

[134] Section 768.79(2), F.S.
[135] Section 768.79(8)(a), F.S.
[136] Section 768.79(8)(b), F.S.

lawsuit within two years, rather than within four years, of the occurrence of negligence will be barred from filing the suit.

Statutory and Common Law Bad Faith Actions

Section 3 amends s. 624.155, F.S., to provide that an insurer may not be found to have acted in bad faith for failure to settle a liability insurance claim, whether pursuant to the statute or common law, if the insurer tenders the lesser of the policy limits or the amount demanded by the claimant either:

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

Failure of the insurer to tender such payment does not constitute bad faith and is inadmissible as evidence in any action seeking to establish bad faith on the part of the insurer.

The bill makes the following provisions applicable to all bad faith claims:

- Mere negligence alone is insufficient to constitute bad faith.
- The insured, the third-party claimant, and any representative of the insured or the claimant have a duty to act in good faith in furnishing information about the claim, making demands of the insurer, setting deadlines, and attempting to settle the claim.[137]
- The trier of fact may consider whether the insured, the third-party claimant, or his or her representative did not act in good faith and, if so, reasonably reduce the damages awarded against the insurer.

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

- Files an interpleader action[138] under the Florida Rules of Civil Procedure;[139] or
- Pursuant to binding arbitration that has been agreed to by the insurer and the third-party claimants, makes the entire amount of the policy limits available for payment to the competing third-party claimants before a qualified arbitrator selected by the insurer at the insurer's expense.[140]

[137] Under the bill, this duty does not create a separate cause of action.
[138] An interpleader action is an action initiated by the holder of property to determine the rights of two or more claimants to the property. This avoids the problem of the property holder being sued by the claimants separately. Legal Information Institute, *Interpleader*, https://www.law.cornell.edu/wex/interpleader#:~:text=A%20way%20for%20a%20holder,who%20actually%20owns%20the%20property (last accessed February 27, 2023).
[139] If the trier of fact finds that the claims of the competing third-party claimants exceed the policy limits, the bill specifies that the third-party claimants are entitled to a prorated share of the policy limits as determined by the trier of fact. This does not alter or limit the insurer's duty to defend the insured.
[140] The bill specifies that the third-party claimants are entitled to a prorated share of the policy limits as determined by the arbitrator, who must consider the comparative fault, if any, of each third-party claimant, and the total likely outcome at trial based upon the total of the economic and non-economic damages submitted to the arbitrator for consideration. Further, a

Transparency in Damages

Section 4 creates s. 768.0427, F.S., to establish a uniform process for the admissibility of evidence and the calculation of medical damages in personal injury or wrongful death actions. As such, the bill modifies the collateral source rule to limit the introduction of evidence for medical damages.

Definitions

The bill defines the following terms:

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

Limitations on Admissible Evidence

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

Past Paid Medical Bills

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

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third-party claimant whose claim is resolved by the arbitrator must execute and deliver a general release to the insured party whose claim is resolved by the proceeding.

Past Unpaid Medical Bills

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

- Claimant has insurance: If the claimant has health care coverage, evidence of the amount the coverage is obligated to pay the provider for satisfaction of the medical services rendered plus the claimant's portion of medical expenses under the contract are admissible.
- Claimant has insurance but obtains treatment under a letter of protection: If the claimant has health care coverage but forgoes the coverage and obtains medical treatment under a letter of protection (or otherwise does not submit charges to his or her insurer), evidence of the amount the health care coverage would pay under the contract plus the claimant's portion of medical expenses, had he or she obtained treatment pursuant to the health care coverage, is admissible.
- Claimant has no insurance: If the claimant does not have health care coverage, evidence of 120 percent of the Medicare reimbursement rate in effect at the time of the trial is admissible. If there is no applicable Medicare rate for the services in question, the admissible amount is 170 percent of the applicable state Medicaid rate.
- Claimant receives services under a letter of protection, and the bill is then transferred to a third party: If the claimant receives services pursuant to a letter of protection and the provider subsequently transfers the right to receive payment of the bill to a third party, evidence of the amount the third party agreed to pay the provider for the right to receive payment is admissible.

Future Medical Bills

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

- Claimant has insurance or is eligible for insurance: If the claimant has health care coverage or is eligible for health care coverage, evidence of the amount for which the future charges could be satisfied by the coverage plus the petitioner's portion of medical expenses under the contract are admissible.
- Claimant has no insurance: If the claimant does not have health care coverage, evidence of 120 percent of the Medicare reimbursement rate in effect at the time of the trial for such future services is admissible. If there is no applicable Medicare rate for the future services in question, 170 percent of the applicable state Medicaid rate amount is admissible.

Disclosure of Contracts

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

Required Disclosures When a Letter of Protection is Used

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

- A copy of the letter of protection.
- All billings for the rendered medical expenses, which must be itemized and coded for the year services are rendered.
- If the provider sells the accounts receivable to a third party or factoring company, the name of the third party and the dollar amount for which the third party purchased the accounts.
- Whether the claimant had health care coverage at the time of treatment, and the identity of such coverage.
- Whether the claimant was referred for treatment under a letter of protection and, if so, the identity of the person who made the referral. If the referral was made by the claimant's attorney, disclosure of the referral is permitted, and evidence of the referral is admissible in the litigation, notwithstanding the lawyer-client privilege in s. 90.502, F.S. In such instance, the financial relationship between a law firm and a medical provider, including the number of referrals, frequency, and financial benefit obtained, is relevant to the issue of any bias of a testifying medical expert.

Amount of Damages

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

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

Premises Liability

Section 5 creates s. 768.0701, F.S., to provide that, in a negligent security action against the owner, lessor, operator, or manager of commercial or real property brought by a person lawfully on the property who was injured by a third party's criminal act, the trier of fact must consider the fault of all persons who contributed to the injury.

Attorney Fees Arising from Offers of Judgment

Section 6 amends s. 768.79, F.S., to apply the offer of judgment statute to any civil action involving an insurance contract.

Comparative Negligence

Section 7 amends s. 768.81, F.S., to, except for causes of action for personal injury or wrongful death arising out of medical malpractice, modify Florida's damages apportionment standard from a pure comparative negligence approach to a modified comparative negligence approach. Under

the bill, any party to a negligence action found to be more than 50 percent at fault for his or her own harm may not recover any damages.

One-Way Attorney Fees

Sections 8 and 9 repeal ss. 626.9373 and 627.428, F.S., thereby eliminating Florida's one-way attorney fee provisions for insurance cases.

Miscellaneous Sections of the Bill

Sections 10 – 24 amend/repeal various sections of Florida Statutes in order to conform them to changes made elsewhere by the bill.

Section 25 directs the Division of Law Revision to replace the phrase "the effective date of this act" with the date the bill becomes law.

Section 26 provides that the bill takes effect upon becoming a law. The change to the statute of limitations for general negligence cases from 4 years to 2 years applies to causes of action accruing after the effective date of the bill. The remaining changes in the bill apply to causes of action filed after the effective date of the bill.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

The bill provides that the reduction to the statute of limitations for general negligence actions from 4 years to 2 years applies to causes of action accruing after the bill becomes law. The rest of the bill applies to causes of action filed after the bill becomes effective upon becoming law. To the extent these effective dates apply to actions under an insurance contract that was issued (or renewed) prior to the effective date of the bill, such provisions may implicate the issue of retroactive application.

Where the Legislature expressly provides that a statute will have retroactive application, Florida courts will reject such an application if the statute impairs a vested right, creates a new obligation, or imposes a new penalty.[141] In *Menendez v. Progressive Express*, the Florida Supreme Court stated that:

> In our analysis, we look at the date the insurance policy was issued and not the date that the suit was filed or the accident occurred, because "the statute in effect at the time an insurance contract is executed governs substantive issues arising in connection with that contract." *Hassen v. State Farm Mut. Auto. Ins. Co.*, 674 So.2d 106, 108 (Fla. 1996*); see also Lumbermens Mut. Cas. Co. v. Ceballos*, 440 So.2d 612, 613 (Fla. 3d DCA 1983) (holding that a liability policy is governed by the law in effect at the time the policy is issued, not the law in effect at the time a claim arises); *Hausler v. State Farm Mut. Auto. Ins. Co.*, 374 So.2d 1037, 1038 (Fla. 2d DCA 1979) (holding that the date of the accident does not determine the law that is applicable to a dispute).[142]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 57.104, 95.11, 624.155, 768.79, 768.81, 624.123, 624.488, 627.062, 627.401, 627.727, 627.736, 627.756, 628.6016, 475.01, 475.611, 517.191, 627.441, and 632.638.

This bill creates the following sections of the Florida Statutes: 768.0427 and 768.0701.

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[141] *See State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 61 (Fla. 1995).
[142] 35 So.3d 873, 876 (Fla. 2010)

This bill repeals the following sections of the Florida Statutes: 626.9373, 627.428, 631.70, and 631.926.

IX. Additional Information:

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

None.

B. Amendments:

None.