FLORIDA HOUSE OF REPRESENTATIVES
BILL ANALYSIS

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BILL #: CS/CS/HB 947 **TITLE:** Civil Actions **SPONSOR(S):** Blanco, Jacques	**COMPANION BILL:** None **LINKED BILLS:** None **RELATED BILLS:** SB 1520 (Grall); CS/CS/SB 832 (Burgess); HB 1551 Cassel; SB 426 (Martin); CS/HB 585 Albert, Gentry

Committee References

Judiciary
16 Y, 4 N, As CS

SUMMARY

Effect of the Bill:

CS/CS/HB 947 amends s. 376.308, F.S., and creates a defense from strict liability for lawsuits brought under the Water Quality Assurance Act if the lawsuit is related to pollution caused by a former phosphate mine and certain requirements are met.

The bill requires a court to award prevailing party attorney fees in specified insurance lawsuits and provides that, where such fees are awardable, the offer of judgment statute does not apply.

The bill amends s. 768.0427, F.S., clarifying certain types of evidence that shall be admissible to calculate medical damages in a personal injury or wrongful death action. The bill allows parties to present certain evidence related to what the plaintiff's private health insurance would be obligated to pay for past unpaid or future medical damages, the reasonable and customary rates for such rendered or future medical services, and other evidence.

The bill provides for applicability and has an effective date of July 1, 2025.

Fiscal or Economic Impact:

The bill may have a fiscal impact on state government and may have an economic impact on the private sector.

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ANALYSIS

EFFECT OF THE BILL:

Civil Actions Relating to a Former Phosphate Mine

CS/CS/HB 947 creates a defense from strict liability for lawsuits related to environmental pollution brought under the Water Quality Assurance Act (WQAA) if the lawsuit is related to pollution caused by a former phosphate mine and certain requirements are met. This strict liability defense applies to lawsuits brought by the Department of Environmental Protection (DEP) as well as lawsuits brought by any other person. Therefore, if the requirements for the strict liability defense are met, DEP or the person bringing the action must prove that the party alleged to be responsible for the pollution engaged in negligence. (Section 1).

In order for a defendant to be exempt from strict liability under the defense created by the bill, the defendant must prove:

- The condition giving rise to the lawsuit is a natural geological substance of a former phosphate mine;
- A notice that identifies the property as a former phosphate mine has been recorded with the county where the property is located; and

- The Department of Health (DOH) has conducted a radiation survey of the land parcel where the former phosphate mine is located. (Section 1).

The bill provides a legislative finding that phosphate mining is an essential agricultural activity that is necessary for the food security of the nation and the state and that former mined lands are a valuable resource. The bill specifies that the highest and best use of formerly mined lands is in the state's interest. (Section 2).

To meet the notice requirement, the bill authorizes a landowner to record a notice in the official county records that identifies the landowner's property as a former phosphate mine. The bill requires recorded notices to be in substantially the following form (Section 2):

> NOTICE
>
> This property is a former phosphate mine as defined in s. 378.213(3), Florida Statutes.

The bill specifies that such recording serves as notice that the land is a former phosphate mine. (Section 2).

The bill defines "former phosphate mine" to mean an area of land upon which phosphate mining has been conducted and which may have been subject to a radiation survey and state reclamation requirements, but does not include a phosphogypsum stack. (Section 2).

To meet the gamma radiation survey requirement, the bill also establishes a process whereby a landowner can request that DOH conduct such survey on a former phosphate land parcel. Upon such petition, DOH must conduct the survey within 120 days of the receipt of the petition to determine the radioactivity levels. The survey must document gamma radiation exposure measurements and the locations of the measurements. (Section 3).

The bill requires DOH to provide a copy of the preliminary survey results to the landowner within 30 days after completion of the survey. Within 60 days after receipt of the survey, the landowner may request an additional survey based upon a reasonable belief that the survey was flawed or not representative of conditions on the site. The bill requires DOH to conduct one additional survey within 90 days after receipt of the request. The additional survey must meet the requirements described above and is deemed final within 90 days after completion. (Section 3).

For any lawsuit based on strict liability, negligence, or similar conduct related to an alleged discharge of hazardous substances or condition of pollution related to phosphate mining (not just those lawsuits brought by the DEP), the bill requires the plaintiff to include with the complaint a radiation survey that meets certain requirements. The bill specifies that the lawsuits subject to this requirement include those that relate to the presence of mining overburden, solid waste from the extraction, or beneficiation of phosphate rock from a phosphate mine as well as any other similar claim related to the mining of phosphatic rock or reclamation of a mined area. (Section 4).

The bill requires such surveys to be prepared by a person certified as either a health physicist by the American Board of Health Physics or as a radiation protection technologist by the National Registry of Radiation Protection Technologists. The survey must be representative and document the measured gamma radiation on the property, including background values determined in accordance with the Environmental Protection Agency's Multi-agency Radiation Survey and Site Investigation Manual;[1] the locations of the measurements; the testing equipment; testing methodology used, including the equipment calibration date and protocol; and the name of the person performing the survey and describe the person's relevant training, education, and experience. The survey must be verified under penalty of perjury. (Section 4).

[1] The Multi-Agency Radiation Survey and Site Investigation Manual is a manual created with input from multiple federal agencies that provides information on planning, conducting, evaluating, and documenting building surface and surface soil final status radiological surveys for demonstrating compliance with dose or risk-based regulations or standards. Environmental Protection Agency (EPA), *Multi-Agency Radiation Survey and Site Investigation Manual (MARSSIM)*, https://www.epa.gov/sites/default/files/2017-09/documents/marssim_manual_rev1.pdf (last visited Feb. 25, 2025).

Attorney Fees in Civil Insurance Actions for Damages

The bill creates s. 626.9375, F.S., to require a court to award attorney fees to the prevailing party in any civil action for damages between a surplus lines insurer and a named or omnibus insured or the named beneficiary under an insurance policy executed by the insurer. (Section 6).

Similarly, the bill provides for the award of "two-way," prevailing party attorney fees in most insurance disputes. Specifically, the bill creates s. 627.4275, F.S., to require a court to award attorney fees to the prevailing party in any civil action for damages between an insurer and a named or omnibus insured or the named beneficiary under an insurance policy executed by the insurer. (Section 7).

The bill provides that, in any such action for damages, the insured or named beneficiary is the "prevailing party" when such person obtains a judgment greater than the highest written, good faith settlement offer previously made by the insurer; conversely, the bill provides that the insurer is the "prevailing party" when the insured or named beneficiary does not obtain a judgment greater than the highest written, good faith settlement offer previously made by the insurer or if the insured or named beneficiary is not awarded a monetary judgment. For purposes of determining who is the prevailing party, the bill defines "judgment" to include any reasonable attorney fees, taxable costs, and prejudgment interest that the insured had incurred when the highest written, good faith settlement offer was previously made by the insurer; provides that any settlement offer tendered by an insurer which is not left open for at least five business days is not made in good faith; and specifies that, if the insurer fails to make any good faith settlement offer, then the settlement offer amount is deemed to be zero. The definition of "prevailing party," as it relates to an insured, and of "judgment" incorporated into the bill generally mirror the definitions of those terms which the courts used to apply when interpreting the now-repealed one-way attorney fee statute. (Sections 6 and 7).

Finally, the bill specifies that s. 627.4275, F.S., applies, or does not apply, to specific insurance disputes in the same manner in which Florida law used to apply the now-repealed one-way attorney fee statutes. Significantly, under the bill, the provision applies:

- To certain international health insurance policies. (Section 8).
- To self-insurance funds. (Section 9).
- To wet marine and transportation insurance, title insurance, and credit life or credit disability insurance. (Section 11).
- In an uninsured motorist coverage dispute only if there is a dispute over whether the policy provided coverage for an uninsured motorist proven to be liable for the accident. (Section 12).
- But only in a limited manner, with respect to the Florida Motor Vehicle No-Fault Law. (Section 13).
- To suits brought against a surety insurer under a payment or performance bond written by the insurer. (Section 14).
- To assessable mutual insurers. (Section 15).
- To claims brought against the Florida Insurance Guaranty Association only if the association denied a covered claim or a portion thereof. (Section 16).
- To claims brought against the Florida Workers' Compensation Insurance Guaranty Association only if the association denies a covered claim or a portion thereof. (Section 17).
- To fraternal benefit societies, unless limited by another provision of law. (Section 18).

Attorney Fees in Actions for Declaratory Relief

The bill preserves current s. 86.121, F.S., relating to attorney fee awards in actions for declaratory relief to determine insurance coverage after total coverage denial of a claim under policies other than residential and commercial property insurance policies. However, the bill specifies that, in an action for declaratory relief to determine insurance coverage, which action is not governed by s. 86.121, F.S. (in other words, in an action to determine coverage under a residential or commercial property insurance policy), newly-created s. 626.9375, F.S., or newly-created s. 627.4275, F.S., applies. Practically speaking, this means that a prevailing insured may recover one-way attorney fees in an action for declaratory relief brought under s. 86.121, F.S., but two-way attorney fees are available to a prevailing party in an action for declaratory relief not brought under that section. Under the bill,

the insured or a named beneficiary is the "prevailing party" for the purposes of an action for declaratory relief not brought under s. 86.121, F.S., if the court enters a declaratory judgment in his or her favor, while the insurer is the prevailing party in such an action if the court enters a declaratory judgment in the insurer's favor. (Sections 6 and 7).

Offer of Judgment

The bill amends s. 624.1552, F.S., to provide that, where prevailing party attorney fees are awardable under either newly-created s. 627.4275, F.S., or newly-created s. 626.9375, F.S., the offer of judgment statute does not apply; the bill also restates this policy in such newly-created sections. Practically speaking, this makes the two-way, prevailing party attorney fee statutes the sole mechanism by which attorney fees may be awarded in most suits brought by an insured against insurers in this state, absent the award of attorney fees as a sanction under s. 57.105, F.S. or a controlling contract provision. (Sections 5, 6, and 7).

Admissibility of Evidence to Prove Medical Expenses in Civil Actions

The bill amends s. 768.0427, F.S., to clarify types of evidence that shall be admissible, if offered by a party, to prove or rebut the correct calculation of medical damages in certain tort actions.

Calculating Medical Damages

With respect to evidence offered to prove or rebut unpaid charges for incurred medical services, the admissible evidence shall include, but is not limited to:

- The amount the plaintiff's insurance is obligated to pay the provider under the plaintiff's contract for the service or treatment provided plus the plaintiff's portion of those costs, for a plaintiff who has health insurance other than Medicare or Medicaid;
- The amount a plaintiff's health insurance would pay under the plaintiff's contract for services or treatment rendered to a plaintiff plus the plaintiff's portion of medical expenses that would have been incurred, for a plaintiff who has health insurance but opts to obtain treatment under a letter of protection;
- The amount a third party has paid for the right to receive payment under a letter of protection, if applicable;
- Evidence of the reasonable and customary rates for such treatment or services rendered by a qualified provider; and
- Any evidence of reasonable amounts billed to the claimant for medically necessary treatment of services. (Section 19).

As such, under the bill, any party may present the evidence identified above to prove or rebut medical damages; such evidence shall be admissible if offered. (Section 19).

With respect to evidence offered to prove or rebut the amount of future medical treatment or services, admissible evidence offered by any party shall include, but is not limited to:

- The amount the plaintiff's insurance is obligated to pay the provider under the plaintiff's contract for the future charges for service or treatment plus the plaintiff's portion of those costs, for a plaintiff who has health insurance other than Medicare or Medicaid;
- The reasonable and customary rates for such future treatment and services rendered by a qualified provider, for a plaintiff who does not have health insurance coverage or has coverage under Medicaid or Medicare; and
- Any evidence of reasonable future amounts to be billed to the claimant for medically necessary treatment of services. (Section 19).

The bill explicitly clarifies that the provisions of the bill do not impose an affirmative duty on any party to offer any specific evidence made admissible by the bill. (Section 19).

Applicability

The bill clarifies that the amendments made to s. 768.0427, F.S., apply to all causes of action which accrued after March 24, 2023, and for which a final judgment as not yet been entered by July 1, 2025. (Section 20).

The bill further provides that the amendments made by the bill to chapters 624, 626, 627, 628, 631, and 632, F.S., apply to an insurance policy or contract issued on or after the effective date of the bill. The amendments made may not be construed to impair or limit any right under an insurance policy or contract issued before the effective date of the bill. (Section 21).

The bill authorizes the Division of Law Revision to replace the phrase "the effective date of this act" wherever it occurs in the bill with the date the bill becomes a law. (Section 22).

The bill has an effective date of July 1, 2025. (Section 23).

FISCAL OR ECONOMIC IMPACT:

STATE GOVERNMENT:

The bill may have a fiscal impact on the state court system. Whether such an impact is positive or negative will depend on whether the bill increases or reduces the number of lawsuits filed in this state. Additionally, the bill may have an indeterminate negative fiscal impact on the Department of Health associated with conducting radiation surveys contemplated by the bill.

PRIVATE SECTOR:

The bill may have a positive economic impact on the private sector. Specifically, the bill may:

- Incentivize insurers to expediently and fairly resolve insurance disputes and insureds to accept fair settlement offers tendered by their insurers.
- Incentivize attorneys to take on insurance lawsuits which they might not otherwise have accepted due to the financial constraints of the insured.
- Increase the recovery of a plaintiff in certain cases where the value of medical treatment is at issue.
- Have a positive fiscal impact on landowners of former phosphate mines who may have a defense to strict liability lawsuits under the WQAA.

However, the bill may have a negative economic impact on the private sector. Specifically, the bill may:

- Result in the losing party being responsible for the payment of the winning party's attorney fees in certain insurance cases.
- Have a negative fiscal impact on defendants in certain cases where the calculation of medical damages is at issue.
- Have a negative fiscal impact on plaintiffs associated with hiring a health physicist or radiation protection technologist in certain civil actions relating to former phosphate mines.

RELEVANT INFORMATION

SUBJECT OVERVIEW:

The Civil Justice System in General

The main purpose of Florida's civil justice system is to properly and fairly redress the civil wrongs caused throughout the state, whether such wrongs be in the form of tortious conduct, breaches of contract, or other non-criminal harm for which the law provides a remedy. The civil justice system accomplishes this goal by providing a neutral court system empowered to decide the amount of monetary damages required to make each wronged person whole again. A functioning civil justice system, when it operates justly:

- Provides a fair and equitable forum to resolve disputes;
- Discourages persons from resorting to self-help methods to redress wrongs;
- Appropriately compensates legitimately harmed persons;

- Shifts losses to responsible parties;
- Provides incentives to prevent future harm; and
- Deters undesirable behavior.[2]

Tort Law

One of the goals of the civil justice system is to redress tortious conduct, or "torts." A tort is a wrong for which the law provides a remedy. Torts are generally divided into two categories, as follows:

- An intentional tort, examples of which include an assault, a battery, or a false imprisonment.
- Negligence, which is a tort that is unintentionally committed. To prevail in a negligence lawsuit, the party seeking the remedy, the "plaintiff," must demonstrate that the:
  - Defendant had a legal duty of care requiring the defendant to conform to a certain standard of conduct for the protection of others, including the plaintiff, against unreasonable risks;
  - Defendant breached his or her duty of care by failing to conform to the required standard;
  - Defendant's breach caused the plaintiff to suffer an injury; and
  - Plaintiff suffered actual damage or loss resulting from such injury.[3]

Negligence

Duty of Care

The first of the four elements a plaintiff must show to prevail in a negligence action is that the defendant owed the plaintiff a "duty of care" to do something or refrain from doing something. The existence of a legal duty is a threshold requirement that, if satisfied, "merely opens the courthouse doors."[4] Whether a duty sufficient to support a negligence claim exists is a matter of law[5] determined by the court.[6] A duty may arise from various sources, including:

- Legislative enactments or administrative regulations;
- Judicial interpretations of such enactments or regulations;
- Other judicial precedent; and
- The general facts of the case.[7]

In determining whether a duty arises from the general facts of the case, courts look to whether the defendant's conduct foreseeably created a "zone of risk" that posed a general threat of harm to others—that is, whether there was a likelihood that the defendant's conduct would result in the type of injury suffered by the plaintiff.[8] Such zone of risk defines the scope of the defendant's legal duty, which is typically to either lessen the risk or ensure that sufficient precautions are taken to protect others from the harm the risk poses.[9] However, it is not enough that a risk merely exists or that a particular risk is foreseeable; rather, the defendant's conduct must create or control the risk before liability may be imposed.[10]

Breach of the Duty of Care

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[2] *Cf.* Am. Jur. 2d Torts s. 2.
[3] 6 *Florida Practice Series* s. 1.1; *see Barnett v. Dept. of Fin. Serv.*, 303 So. 3d 508 (Fla. 2020).
[4] *Kohl v. Kohl*, 149 So. 3d 127 (Fla. 4th DCA 2014).
[5] A matter of law is a matter determined by the court, unlike a matter of fact, which must be determined by the jury. Matters of law include issues regarding a law's application or interpretation, issues regarding what the relevant law is, and issues of fact reserved for judges to resolve. Legal Information Institute, *Question of Law*, https://www.law.cornell.edu/wex/question_of_law (last visited March 12, 2025); Legal Information Institute, *Question of Fact*, https://www.law.cornell.edu/wex/Question_of_fact (last visited March 12, 2025).
[6] *Kohl*, 149 So. 3d at 135; *Goldberg v. Fla. Power & Light Co.*, 899 So. 2d 1110 (Fla. 2005).
[7] *Goldberg,* 899 So. 2d at 1105 (citing *Clay Elec. Co-op., Inc. v. Johnson*, 873 So. 2d 1182 (Fla. 2003)).
[8] *Kohl*, 149 So. 3d at 135 (citing *McCain v. Fla. Power Corp.*, 593 So. 2d 500 (Fla. 1992); *Whitt v. Silverman*, 788 So. 2d 210 (Fla. 2001)).
[9] *Kohl*, 149 So. 3d at 135; *Whitt*, 788 So. 2d at 217.
[10] *Bongiorno v. Americorp, Inc.*, 159 So. 3d 1027 (Fla. 5th DCA 2015) (citing *Demelus v. King Motor Co. of Fort Lauderdale*, 24 So. 3d 759 (Fla. 4th DCA 2009)).

The second element a plaintiff must prove is that the defendant "breached," or failed to discharge, the duty of care. Whether a breach occurred is generally a matter of fact for the jury to determine.[11]

Causation

The third element a plaintiff must prove is that the defendant's breach of the duty of care "proximately caused" the plaintiff's injury. Whether or not proximate causation exists is generally a matter of fact for the jury to determine.[12] Florida follows the "more likely than not" standard in proving causation; thus, the inquiry for the factfinder is whether the defendant's negligence probably caused the plaintiff's injury.[13] In making such a determination, the factfinder must analyze whether the injury was a foreseeable consequence of the danger created by the defendant's negligent act or omission.[14] It is not required that the defendant's conduct must be the exclusive cause, or even the primary cause, of the plaintiff's injury suffered; instead, the plaintiff must only show that the defendant's conduct substantially caused the injury.[15]

Damages

The final element a plaintiff must show to prevail in a negligence action is that the plaintiff suffered some harm, or "damages." Actual damages, also called compensatory damages, are damages the plaintiff actually suffered as the result of the injury.[16] Juries award compensatory damages to compensate an injured person for a defendant's negligent acts.[17] Compensatory damages consist of both:

- "Economic damages," which typically consist of financial losses that can be easily quantified, such as lost wages, the cost to replace damaged property, or the cost of medical treatment; and
- "Non-economic damages," which typically consist of nonfinancial losses that cannot be easily quantified, such as pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, and loss of the capacity to enjoy life.[18]

In certain limited situations, a court may also award "punitive damages," the purpose of which is to punish a defendant for bad behavior and deter future bad conduct, rather than to compensate the plaintiff for a loss.[19]

Strict Liability

Strict liability is a legal concept in civil and criminal actions that holds a defendant liable for committing an action, regardless of their intent or mental state.[20] The legal theory of strict liability does not rely on the intent of a defendant or how his or her actions compare to what a reasonable person might have done; rather, strict liability is imposed on a defendant solely based on the nature of his or her alleged conduct.[21] Thus, the plaintiff in a civil action where strict liability applies does not have to prove the defendant was negligent in order to prevail in the action.

There are various kinds of conduct that may give rise to strict liability, including:

- The possession of animals known to be harmful;

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[11] *Wallace v. Dean*, 3 So. 3d 1035 (Fla. 2009).
[12] *Sanders v. ERP Operating Ltd. P'ship*, 157 So. 3d 273 (Fla. 2015).
[13] *Ruiz v. Tenent Hialeah Healthsystem, Inc.*, 260 So. 3d 977 (Fla. 2018).
[14] *Id.* at 981-982.
[15] *Id.* at 982.
[16] *Birdsall v. Coolidge*, 93 U.S. 64 (1876).
[17] *St. Regis Paper Co. v. Watson*, 428 So. 2d 243 (Fla. 1983).
[18] *Cf.* s. 766.202(8), F.S.
[19] *See* ss. 768.72, 768.725, and 768.73, F.S. (providing standards and requirements for awarding punitive damages).
[20] Cornell Law School, *Strict Liability*, https://www.law.cornell.edu/wex/strict_liability (last visited Feb. 25, 2025).
[21] LexisNexis,, Understanding the Interplay Between Strict Liability and Product Liability (Jan. 02, 2021), https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/understanding-the-interplay-between-strict-liability-and-products-liability?srsltid=AfmBOoqW7FmmdmXqVZCcqNyMWo_5ImhljMtNlTFGxWmEDsl6Up4nSWBK (last visited March 7, 2025)..

- Engaging in abnormally dangerous activities; and
- Products liability.[22]

Phosphate Mining

Phosphate rock contains the mineral phosphorus, an ingredient used in some fertilizers to help plants grow strong roots.[23] Phosphate rock contains small amounts of naturally-occurring radioactive[24] elements, known as radionuclides, such as uranium and radium.[25] The natural breakdown of uranium and radium results in radon, a radioactive gas that can move through the ground to accumulate in buildings over time.[26]

Prior to mining for phosphate, certain permits must be obtained, and the land must be surveyed and cleared to prepare the site for mining.[27] The phosphate is mined by digging up the top 15 to 30 feet of earth to dig out the phosphate rock.[28] The phosphate rock is dug out with clay and sand that is then dumped into a pit to create a slurry that is then sent to a beneficiation plant where the phosphate is separated from the sand and clay.[29] When processing phosphate rock to make fertilizer, the phosphorous is removed by dissolving the rock in an acidic solution.[30] The solid waste that is left behind is called phosphogypsum.[31]

Phosphogypsum stacks are any defined geographic area associated with a phosphoric acid production facility at which phosphogypsum is disposed of or stored, other than within a fully enclosed building, container, or tank.[32] To limit the public's exposure to radon, which is created as a result of radium decay of phosphogypsum, the phosphogypsum stacks are located on private property, away from the public.[33] DEP regulates phosphogypsum stacks and phosphogypsum stack systems[34] to ensure they are maintained to meet safety standards to prevent any harmful spills or discharges to surface or ground waters.[35]

Phosphate Mines in Florida

Phosphate mining is the fifth largest mining industry in the United States (U.S.) in terms of the amount of material mined.[36] Florida is the largest known U.S. source of phosphates, accounting for more than 60 percent of U.S.

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[22] *Id*.
[23] EPA, *Radioactive Material from Fertilizer Production*, https://www.epa.gov/radtown/radioactive-material-fertilizer-production (last visited Feb. 20, 2025).
[24] These elements emit radiation at a specific rate that is measured in terms of a half-life. A half-life is the time required for half of the radioactive atoms present to decay. This process can take seconds or millions of years, depending on the radionuclide. EPA, *Radionuclides*, https://www.epa.gov/radiation/radionuclides (last visited Feb. 21, 2025).
[25] EPA, *Radioactive Material from Fertilizer Production*, https://www.epa.gov/radtown/radioactive-material-fertilizer-production (last visited Feb. 21, 2025).
[26] EPA, *Radionuclide Basics: Radon*, https://www.epa.gov/radiation/radionuclide-basics-radon (last visited Feb. 21, 2025).
[27] Department of Environmental Protection (DEP), *Phosphate*, https://floridadep.gov/water/mining-mitigation/content/phosphate (last visited Feb. 21, 2025).
[28] *Id.*
[29] *Id.*
[30] EPA, *Radioactive Material from Fertilizer Production*, https://www.epa.gov/radtown/radioactive-material-fertilizer-production (last visited Feb. 21, 2025).
[31] EPA, *Phosphogypsum*, https://www.epa.gov/radiation/phosphogypsum (last visited Feb. 21, 2025).
[32] S. 403.4154(d), F.S.
[33] *Id*.; EPA, *Radioactive Material from Fertilizer Production*, https://www.epa.gov/radtown/radioactive-material-fertilizer-production (last visited Feb. 21, 2025).
[34] "Phosphogypsum stack system" means the phosphogypsum stack, pile, or landfill, together with all pumps, piping, ditches, drainage conveyances, water-control structures, collection pools, cooling ponds, surge ponds, and any other collection or conveyance system associated with the transport of phosphogypsum from the plant to the phosphogypsum stack, its management at the stack, and the process-wastewater return to the phosphoric acid production or other process. This does not include conveyances within the confines of the fertilizer production plant. Section 403.4154(e), F.S.
[35] S. 403.4155(1), F.S.
[36] EPA, *Radioactive Material from Fertilizer Production*, https://www.epa.gov/radtown/radioactive-material-fertilizer-production (last visited Feb. 21, 2025).

production.[37] Within Florida, phosphate mining primarily occurs in an area known as Bone Valley. This area is approximately 1.3 million acres that span Hardee, Hillsborough, Manatee, and Polk counties.[38]

There are 28 phosphate mines in Florida, of which 11 mines are currently active and 10 mines are 100 percent reclaimed and released from reclamation obligations.[39] The remaining mines are either not started or are shut down. Phosphate mines typically range in size from approximately 5,000 to 100,000 acres.[40] Approximately 25 to 30 percent of these lands are wetlands or other surface waters.[41]

Reclamation

The Legislature has found that mining phosphate serves as an important economic interest for the state, but recognizes that it is a temporary land use.[42] As such, all lands mined after July 1, 1975, are required to be reclaimed once mining is completed at a site.[43] DEP is responsible for creating and enforcing rules regarding phosphate mining, including phosphate mine reclamation.[44]

The process of reclamation begins with an applicant submitting a conceptual plan[45] application for reclamation at least six months prior to beginning site preparation[46] or mining operations,[47] whichever occurs first.[48] To be approved, a conceptual plan has to meet certain safety, water quality, flooding and draining, and waste disposal criteria.[49] Reclamation and restoration of mining lands must be completed within two years of the actual completion of mining operations.[50] Each year on March 1, after the approval of a conceptual reclamation plan, each operator is required to submit an annual mining and reclamation report describing the mining and reclamation activities for the previous calendar year and the proposed mining and reclamation for the current year.[51]

During the process of reclamation, credentialed representatives of DEP are authorized to enter lands for the purpose of inspecting to ensure compliance with reclamation regulations.[52] Once an operator of a phosphate mine has completed its reclamation and restoration requirements within a reclamation parcel, it may request a release of the reclamation parcel through writing.[53] Within 90 days of receiving a written request for release, DEP will conduct a final inspection of the land. If DEP does not find that all the reclamation and restoration requirements have been met, it will notify the operator of the deficiencies that must be corrected.[54] When DEP approves of the reclamation and restoration of a parcel, an operator is released from their reclamation and tax obligations for the phosphate mining parcels.[55]

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[37] United States Geological Survey, *LCMAP Assessment: Phosphate Mining in Florida*, https://geonarrative.usgs.gov/lcmap-assessment-phosphate-mining-florida/ (last visited Feb. 21, 2025).
[38] DEP, *Phosphate*, https://floridadep.gov/water/mining-mitigation/content/phosphate (last visited Feb. 21, 2025).
[39] *Id*.
[40] *Id*.
[41] *Id*.
[42] Ss. 403.4154(2), F.S. and 378.202(1), F.S.
[43] S. 378.204, F.S. These lands are referred to as mandatory land, whereas lands mined prior to July 1, 1975, were exempt from reclaim regulations and are called nonmandatory land.
[44] S. 378.205(2), F.S.
[45] "Conceptual plan" means a graphic and written description of general activities to be undertaken across the whole mine to comply with the reclamation standards. Rule 62C-16.0021(5), F.A.C.
[46] "Site preparation" means those physical activities involving clearing or modification of the land surface conducted before initiating mining or mining operations, excluding prospecting, or agricultural practices or agricultural activities that are not initiated to directly serve future mining operations. Rule 62C-16.0021(20), F.A.C.
[47] "Mining operation" means those physical activities other than prospecting and site preparation which are necessary for extraction, waste disposal, storage, or dam maintenance prior to abandonment. Rule 62C-16.0021(10), F.A.C.
[48] Rule 62C-16.0032, F.A.C.
[49] Rule 62C-16.0051, F.A.C.
[50] S. 378.209(1), F.S.; Rule 62C-16.0051(12)(b)4., F.A.C.
[51] Rule 62C-16.0091(1), F.A.C.
[52] Rule 62C-16.0067(1), F.A.C.
[53] Rule 62C-16.0068(1), F.A.C.
[54] Rule 62C-16.0068(3), F.A.C.
[55] Rule 62C-16.0068(3)(b), F.A.C.

Radiation Surveys

Radon that naturally occurs in soil is generally not a health concern; however, exposure to radon at higher levels and over prolonged periods of time can cause a serious hazard to human health by increasing the risk of developing lung cancer.[56] DOH takes samples from the soil, air, and water from phosphate mining parcels before mining begins and after reclamation has been completed to monitor the radioactivity of phosphate mining sites.[57] These samples include gamma radiation exposure measurements, soil radon emanation determinations, soil radium determinations, air monitoring, and surface and ground water monitoring of areas that are potentially impacted by mining activities.[58] DOH requires a mining company to pay fees for such monitoring.[59]

Radiation Measurement Specialists

DOH requires any person who tests or mitigates the presence of radon for a fee to be certified by DOH.[60] Additionally, the American Board of Health Physics and the National Registry of Radiation Protection Technologists have certification programs for specialists engaging in radiation measurements.

A health physicist who is certified by the American Board of Health Physics must do the following to become certified:

- Obtain a bachelor's or graduate degree from an accredited college or university in physical science, engineering, or biological science;
- Complete at least six years of responsible professional experience in health physics, with three years of that being applied health physics. A degree may be substituted for two years of experience;
- Submit a list of professional references;
- Submit a written report demonstrating that the candidate has produced professional level work in health physics; and
- Pass a two-part exam.[61]

A radiation protection technologist who is certified by the National Registry of Radiation Protection Technologists must do the following to become certified:

- Have a high school diploma or equivalent;
- Be at least 21 years old at the time of applying;
- Submit evidence of operational abilities as a Radiation Protection Technologist, showing at least five years of experience. Experience can be substituted for training or formal education; and
- Pass an examination.[62]

Water Quality Assurance Act (WQAA)

In 1983, the Legislature passed the WQAA[63] to address pollution in surface and ground waters across the state.[64] To ensure the preservation of the state's water resources, the WQAA prohibits discharges or pollutants or

[56] EPA, *Phosphogypsum*, https://www.epa.gov/radiation/phosphogypsum (last visited Feb. 24, 2025).
[57] DOH, *Environmental Radiation Programs*, https://www.floridahealth.gov/environmental-health/radiation-control/envrad/index.html (last visited Feb. 24, 2025). Rule 64E-5.1002, F.A.C.
[58] Rule 64E-5.1002, F.A.C.
[59] Rule 64E-5.1003, F.A.C.; Gamma radiation exposure measurements are made at the rate of one per acre.
[60] Rule 64E-5.1203(2), F.A.C.
[61] American Board of Health Physics, *Prospectus for the American Board of Health Physics*, https://www.aahp-abhp.org/wp-content/uploads/2024/10/Prospectus-for-the-ABHP-June-2024.pdf (last visited Feb. 24, 2025).
[62] National Registry of Radiation Protection Technologists, *Examination Requirements, Fees and Schedules*, https://www.nrrpt.org/index.cfm/m/7/ (last visited Feb. 24, 2025).
[63] Ss. 376.30-376.317, F.S.
[64] S. 376.30, F.S.; University of Florida Institute for Food and Agricultural Sciences, *Water Quality Assurance Act*, https://www.piecenter.com/pep/wp-content/uploads/PEP_WQAA_Final.pdf (last visited Feb. 27, 2025).

hazardous substances into or upon the surface or ground waters of the state.[65] DEP is the agency authorized to establish and enforce programs to rehabilitate any polluted waters or lands.[66] As part of its authority, DEP may sue any person[67] to enforce the liabilities imposed by the WQAA.[68]

Additionally, the WQAA creates a private cause of action for all damages resulting from a discharge[69] or other condition of pollution covered under the WQAA if the discharge was not specifically authorized by ch. 403, F.S.[70] The WQAA defines pollution as the presence on the land or in the waters of the state of pollutants in quantities that are or may be potentially harmful or injurious to human health or welfare, animal or plant life, or property or which may unreasonably interfere with the enjoyment of life or property, including outdoor recreation.[71]

The WQAA imposes strict liability on a polluter, meaning it is only necessary to show the prohibited discharge or other pollutive condition occurred, and it is not necessary to prove the polluter acted negligently.[72] The WQAA expressly imposes strict liability on an owner or operator of a facility or any person who caused a discharge or other polluting condition at a facility.[73]

Because the WQAA imposes a strict liability standard, if a defendant is sued under the WQAA, the only defense a defendant may plead and prove to avoid liability is that the occurrence was solely the result of any of the following conditions or a combination of conditions:

- An act of war;
- An act of government;[74]
- An act of God;[75] or
- An act or omission of a third party under certain conditions.[76]

Liability under the WQAA is joint and several.[77] However, if more than one discharge has occurred and the damage is divisible and can be attributed to a particular defendant or defendants, each defendant is liable only for the costs associated with his or her damages.[78]

Attorney Fees in Civil Insurance Actions for Damages

With respect to the payment of attorney fees following civil litigation, the traditional "English rule" entitled a prevailing party in civil litigation to an attorney fees award as a matter of right. However, Florida, and a majority of other United States jurisdictions, have since adopted what is now known as the "American rule," under which each party bears its own attorney fees unless a "fee-shifting statute" or contract provision provides an entitlement to an

[65] S. 376.302(1), F.S.
[66] S. 376.30(3), F.S.
[67] "Person" means any individual, partner, joint venture, or corporation; any group of the foregoing, organized or united for a business purpose; or any governmental entity.
[68] S. 376.303(j), F.S.
[69] "Discharge" means any spilling, leaking, seeping, pouring, misapplying, emitting, emptying, releasing, or dumping of any pollutant or hazardous substance which occurs and which affects lands and the surface and ground waters of the state not regulated by the WQAA. Section 376.301(13), F.S.
[70] S. 376.313(3), F.S.; Ch. 403, F.S., relates to environmental control, including pollution control, environmental regulation, and water supply and water treatment plants.
[71] S. 376.301(37), F.S.
[72] S. 376.308(1), F.S.
[73] S. 376.308(1)(a), F.S.
[74] S. 376.308(2)(b), F.S. This includes state, federal, or local acts of government, unless the person claiming the defense is a governmental body, in which case the defense is available only by acts of other governmental bodies.
[75] S. 376.308(2)(c), F.S.; This includes only unforeseeable acts exclusively occasioned by the violence of nature without the interference of any human agency.
[76] S. 376.308(2), F.S.; Defenses exist for an owner of a petroleum storage facility or a dry-cleaning or wholesale supply facility where certain circumstances apply.
[77] S. 376.313(4), F.S.; Joint and several liability refers to instances where there are multiple parties who are liable for an injury, and each party responsible for the injury may be liable to the extent they caused the injury. Cornell Law School, *Joint and Several Liability*, https://www.law.cornell.edu/wex/strict_liability (last visited Feb. 27, 2025).
[78] *Id*.

attorney fees award. In Florida, several such fee-shifting statutes entitle the prevailing party or, in some instances, a particular prevailing plaintiff, to have his or her fees paid by the other party.[79]

Before 2022, s. 627.428, F.S., commonly known as Florida's "one-way attorney fee statute," generally provided that, when an insured or named beneficiary under an insurance policy prevailed in a legal action against the insurer, the insurer must pay the insured's attorney fees; a related statute, s. 626.9373, F.S., contained a similar one-way attorney fee provision applicable to insurance disputes involving a surplus lines insurer. In interpreting these sections, the Florida Supreme Court held that an insured was the prevailing party only when the insured "obtain[ed] a judgment greater than any offer of settlement previously tendered by the insurer."[80] Further, the Court held that the term "judgment" included the insured's damages plus any attorney fees, taxable costs, and prejudgment interest incurred before the insurer's offer.[81] However, the court also drew a distinction between pre-offer and post-offer periods, finding that, unless and until the insurer offers to pay the insured's damages, plus attorney fees, costs, and interest, the one-way attorney fee provision entitled the insured to attorney fees; once such an offer was made and rejected, though, an insured who later failed to obtain a judgment greater than the offer could only claim his or her pre-offer attorney fees under the one-way statute, as he or she had already rejected the full amount owed.[82]

Generally speaking, the one-way attorney fee statutes were designed to incentivize insurers to deal fairly with insureds in resolving insurance disputes. However, several statutory provisions limited the application of s. 627.428, F.S., to certain types of insurance disputes; such provisions included language specifying that:

- The statutes applied to suits brought against a surety insurer under a payment or performance bond written by the insurer.[83]
- The statutes applied in an uninsured motorist coverage dispute only if there was a dispute over whether the policy provided coverage for an uninsured motorist proven to be liable for the accident.[84]
- The statutes applied, but only in a limited manner, with respect to the Florida Motor Vehicle No-Fault Law.[85]
- The statutes applied to claims brought against the Florida Insurance Guaranty Association only if the association denied a covered claim or a portion thereof.[86]
- The statutes applied to claims brought against the Florida Workers' Compensation Insurance Guaranty Association only if the association denied a covered claim or a portion thereof.[87]

Further, in 2022, the Florida Legislature eliminated the application of the one-way attorney fee statutes to lawsuits arising under a residential or commercial property insurance policy.[88] In 2023, the Florida Legislature eliminated the one-way attorney fee statutes entirely, repealing ss. 627.428 and 626.9373, F.S.[89]

Thus, under current law, each party to an insurance lawsuit generally must pay the party's own attorney fees, regardless of whether or not the party prevails, absent the application of the offer of judgment statute in s. 768.79,

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[79] *See, e.g.,* s. 400.023, F.S. (nursing home resident); s. 440.34, F.S. (claimant in a workers' compensation case in certain situations); s. 501.2105, F.S. (plaintiff in specified FDUTPA actions); s. 790.33, F.S. (plaintiff in a suit to enforce his or her firearm rights).

[80] *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067 (Fla. 2006).

[81] *Id.* at 1074.

[82] *Id.*

[83] S. 627.756, F.S. (2022).

[84] S. 627.727(8), F.S. (2022).

[85] S. 627.736(8), F.S. (2022).

86 S. 631.70, F.S. (2022).

[87] S. 631.926, F.S. (2022).

[88] In 2021, the Florida Legislature had created specific one-way attorney fee provisions for residential and commercial property insurance lawsuits that based the entitlement to a fee award on the difference between the judgment obtained and the pre-suit settlement offer; these provisions were eliminated as part of the 2022 reforms. Ch. 2021-77, L.O.F.; ch. 2022-271, L.O.F.

[89] Ch. 2023-15, L.O.F.

F.S., fees awarded as a sanction under s. 57.105, F.S.,[90] or another controlling statute or contract provision providing otherwise.

Attorney Fees in Actions for Declaratory Relief

In conjunction with the 2023 repeal of Florida's one-way attorney fee statutes, the Florida Legislature enacted s. 86.121, F.S., to provide that, in an action brought for declaratory relief[91] in state or federal court to determine insurance coverage after the insurer has made a total coverage denial of a claim, either party is entitled to the summary procedure provided in s. 51.011, F.S.,[92] and the court shall advance the cause on the calendar.[93] Further, this section directs the court to award reasonable attorney fees to the named insured, omnibus insured, or named beneficiary under a policy issued by the insurer upon rendition of a declaratory judgment[94] in favor of the named insured, omnibus insured, or named beneficiary; however, such fees are limited to those incurred in the action brought under this chapter for declaratory relief to determine insurance coverage, and this section does not apply to any action arising under a residential or commercial property insurance policy.

Offer of Judgment

Florida's "offer of judgment" statute, codified in s. 768.79, F.S., provides attorney fee incentives to encourage swift settlement and decrease litigation. Specifically, under this statute, if a defendant in a civil action for damages makes an offer of judgment and the plaintiff does not accept such offer within 30 days, the plaintiff must pay the defendant's reasonable costs and attorney fees incurred from the date the defendant made the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than the offer. On the other hand, if the plaintiff files a demand for judgment and the defendant does not accept such demand within 30 days, the defendant must pay the plaintiff's reasonable costs and attorney fees incurred from the date the plaintiff made the demand if the plaintiff recovers a judgment in an amount at least 25 percent greater than the demand.

Further, s. 624.1552, F.S., expressly provides that the offer of judgment statute applies to any civil action involving an insurance contract; this clarification was made in 2023 in conjunction with the repeal of Florida's one-way attorney fee statutes.[95] However, before the repeal of the one-way attorney fee statute, courts interpreted the interaction between the offer of judgment statute and the one-way attorney fee statute to allow for the award of attorney fees in insurance disputes, as follows:[96]

If the judgment is:	The insured receives:	The insurer receives:
No liability	No fees	Post-offer fees under the offer of judgment statute
75 percent or less of insurer's offer	Pre-offer fees under the one-way statute	Post-offer fees under the offer of judgment statute

[90] Generally speaking, under this provision, a court may award attorney fees to the prevailing party in a civil proceeding when the court finds that the losing party, or the losing party's attorney, knew or should have known that a claim or defense when initially presented to the court or at an time before trial: a) was not supported by the material facts necessary to establish the claim or defense; or b) would not be supported by the application of then-existing law to those material facts. The court may also award attorney fees to a moving party that proves, by a preponderance of the evidence, that any action taken by the opposing party was taken for the purpose of unreasonable delay.

[91] An "action for declaratory relief" is a legal process whereby a court clarifies the legal rights and obligations of parties involved in a dispute, without ordering any specific action or awarding damages. Legal Information Institute, *Declaratory Relief*, https://www.law.cornell.edu/wex/declaratory_relief (last visited Apr. 11, 2025).

[92] Generally speaking, the summary procedure provides for expedited pleading, discovery, trial, and appeal deadlines.

[93] *Supra, note 88.*

[94] A "declaratory judgment" is the court ruling issued in an action for declaratory relief, which ruling clarifies the legal rights and obligations of parties involved in a dispute. Legal Information Institute, *Declaratory Judgment*, https://www.law.cornell.edu/wex/declaratory_judgment (last visited Apr. 11, 2025).

[95] *Supra, note 88.*

[96] *State Farm Mut. Auto. Ins. Co.,* 932 So. 2d at 1074.

More than 75 percent of the insurer's offer, but not more than 100 percent thereof	Pre-offer fees under the one-way statute	No fees
More than the insurer's offer	All fees under the one-way statute	No fees

Admissibility of Evidence in General

"Admissible evidence" is evidence that may be presented to the factfinder (the judge or jury) for consideration in deciding the case.[97] Generally, for evidence to be admissible, it must be relevant and not outweighed by countervailing considerations (e.g. the evidence is unfairly prejudicial, confusing, a waste of time, privileged based on hearsay, etc.).[98]

In Florida, the admissibility of evidence is provided for under ch. 90, Florida Statutes, in the Florida Evidence Code. It is up to the judge to determine whether evidence presented is admissible under the Florida Evidence Code. In a case that is tried before a jury, the court must conduct the proceedings in such a manner as to prevent inadmissible evidence from being suggested to the jury by any means.[99] Thus, a judge may hear arguments from both sides in a case outside the presence of the jury to determine whether a piece of evidence is admissible or not.

Evidence of Insurance Coverage Prior to 2023

Generally, the existence or amount of insurance coverage is not relevant to the issue of liability and damages and should not be considered by the jury.[100] The court shave adopted this general rule because of the potential harm inherent in allowing knowledge of insurance to be injected into a trial and the unfair influence it may have on the jury.[101] Rather, the focus of the litigation and the jury's attention should be directed to first determining liability based on fundamental tort principles of liability as applied to the actions or inactions of the litigants and then identifying the damages incurred by the injured party and the value of those damages.[102]

To further emphasize the concern of the potential to prejudice a jury, the Florida Legislature created a non-joinder statute in s. 627.4136, F.S.[103] The non-joinder statute prevents a plaintiff from including an alleged tortfeasor's insurance carrier as a party in a suit against the alleged tortfeasor.[104] The public policy behind the non-joinder statute is to ensure that jurors to not consider the existence of insurance coverage as a factor in determining liability and the amount of damages.[105] However, an exception to the general rule of non-disclosure exists with respect to an action involving a underinsured motorist.[106] As such, the joinder of an underinsured motorist insurer as a party in an action against the tortfeasor is permitted.[107]

The courts have held that improper reference to insurance coverage may be rendered harmless by the trial court if:

- An appropriate curative instruction is given to the jury instructing it to completely disregard any mention or consideration of insurance in rendering its verdict; and
- The court finds that insurance had no adverse effect upon the jury's verdict.[108]

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[97] Cornell Law School, Legal Information Institute, *Admissible Evidence*, https://www.law.cornell.edu/wex/admissible_evidence (last visited March 8, 2025).
[98] *Id.*
[99] S. 90.104(2), F.S.
[100] *Florida Drum Co. v. Thompson*, 668 So. 2d 192 (Fla. 1996).
[101] Thomas D. Saraya, *Selected Evidentiary Issues that Frequently Arise in Personal Injury and Wrongful Death Actions*, 6 FLPRAC s. 24:15 (2024).
[102] *Id. See also, Florida Drum* (Fla. 1996).
[103] *Id.*
[104] *Id.*
[105] *Id. See also, Canal Ins. Co. v. Reed*, 666 So. 2d 888 (Fla. 1996).
[106] *Id. See also, Government Employees Ins. Co. v. Krawzak*, 675 So. 2d 115 (Fla. 1996).
[107] *Id.*
[108] *Odoms v. Travelers Ins. Co.*, 339 So. 2d 196 (Fla. 1976); *Allstate Ins. Co. v. Wood*, 535 So. 2d 699 (Fla. 1st DCA 1988).

Calculating Medical Damages

In a typical negligence action, the jury is responsible for determining the amount of damages to award to the plaintiff. In such action, the plaintiff may seek to inform the jury of the plaintiff's medical bills so that the jury can accurately calculate the amount of damages. This process of accurately computing damages can become difficult, however, in light of the lack of a set standard of the cost of a medical procedure or treatment.

A plaintiff may recover compensatory damages for past and future medical expenses, as well as for pain and suffering. A policy question that often arises is how a court should calculate medical damages and what evidence is admissible for the jury to hear in order to make such calculations.

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 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.[109]

At common law,[110] 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.[111]

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.[112] Specifically, the Act created s. 768.76, F.S., which required a court to reduce the amount of damages awarded to a plaintiff from all collateral sources, except where a subrogation or reimbursement right exists.[113] 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,[114] 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

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[109] S. 768.76(2)(a), F.S.
[110] "Common law" refers to laws made by judicial decisions as opposed to laws found in statutes. *See* Black's Law Dictionary (11th ed. 2019).
[111] *Gormley v. GTE Prods. Corp.*, 587 So. 2d 455, 458 (Fla. 1991).
[112] Ch. 86-160, s. 55, L.O.F.
[113] S. 768.76(1), F.S.
[114] *Goble v. Frohman*, 901 So. 2d 830, 834 (Fla. 2005).

Second DCA disagreed, holding that the payments were collateral sources made on the claimant's behalf subject to setoff under s. 768.76, F.S. 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.[115]

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. If there is no favorable recovery, the client may remain liable to pay the medical bills.[116] A person might need to obtain services under a letter of protection if he or she is uninsured and unable to pay out of pocket for necessary medical treatment prior to obtaining a settlement or judgment against the party who was responsible for the injury.

Under Current Law (*Post 2023 HB 837)*

During the 2023 legislative session,[117] the Legislature created s. 768.0427, F.S., and established defined guidelines for the admissibility of evidence and the calculation of damages in personal injury or wrongful death actions. The 2023 legislation created a statutory process for the calculation of damages by defining and limiting the types of evidence the factfinder (judge or jury) could hear.

Under current law, the following restrictions on the admissibility of evidence apply:

- **Past paid medical bills**. To prove damages for past paid medical bills and services, only the amount actually paid for the service or treatment is admissible, regardless of the course of such payment. Thus, evidence of the initial billed amount or of the usual and customary amount for a similar treatment is inadmissible; only evidence of the amount actually paid is admissible.[118]
- **Past unpaid medical bills**. With respect to medical treatments or services that have already been rendered but have not yet been paid, admissible evidence shall include, but is not limited to, any evidence of reasonable amounts billed to the claimant for medically necessary treatment or services provided to the claimant. The evidence offered must also include, but is not limited to, the following amounts depending on whether the claimant has health care coverage:[119]
    - *Claimant has health care coverage other than Medicare or Medicaid*: If the claimant has health care coverage other than Medicare or Medicaid, 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.
    - *Claimant has health care coverage but opts to use 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.
    - *Claimant has Medicare or Medicaid or does not have health care coverage*: If the claimant has Medicare or Medicaid or does not have health care coverage, 120% of the Medicare reimbursement rate in effect on the date the claimant incurred the medical services; or, if there is no applicable Medicare rate for the services in question, 170% 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.

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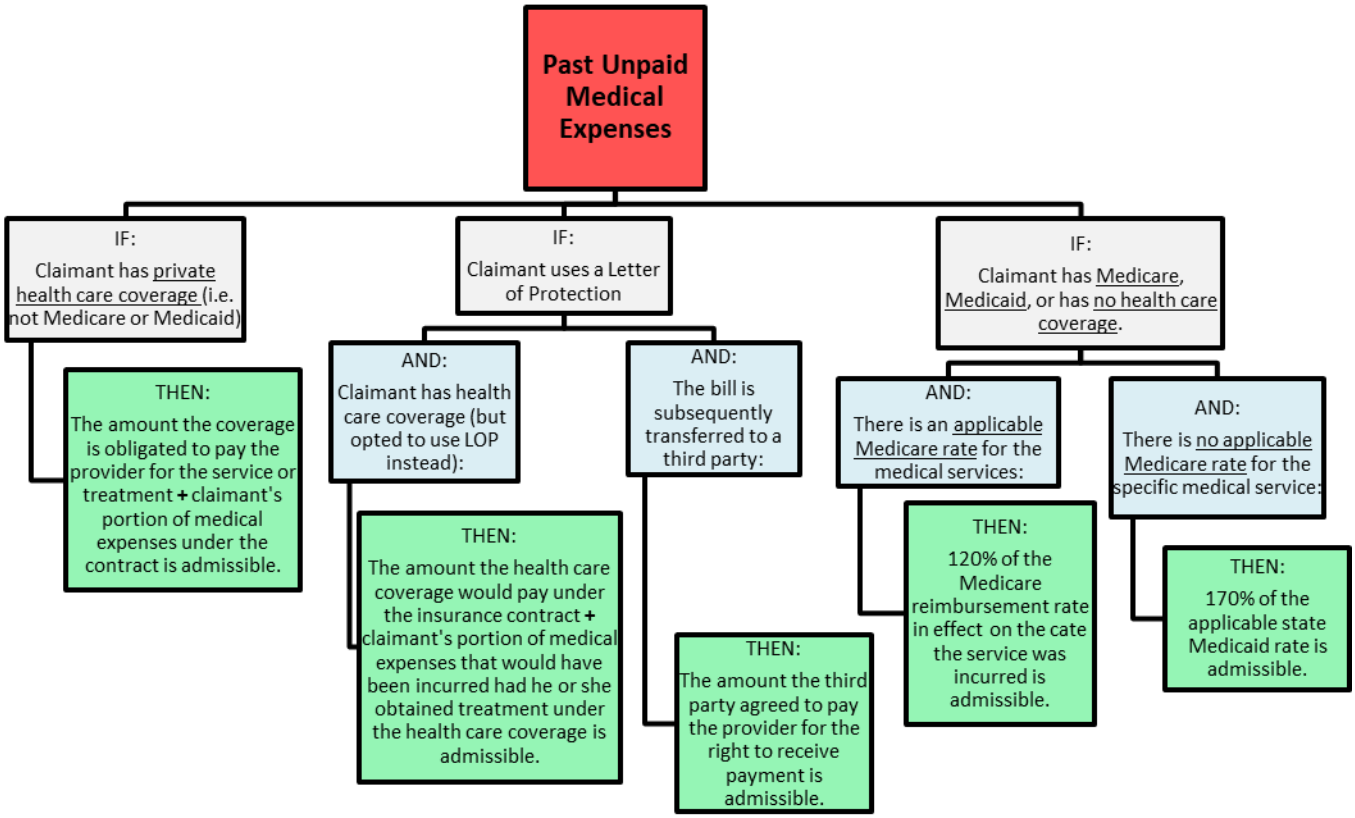
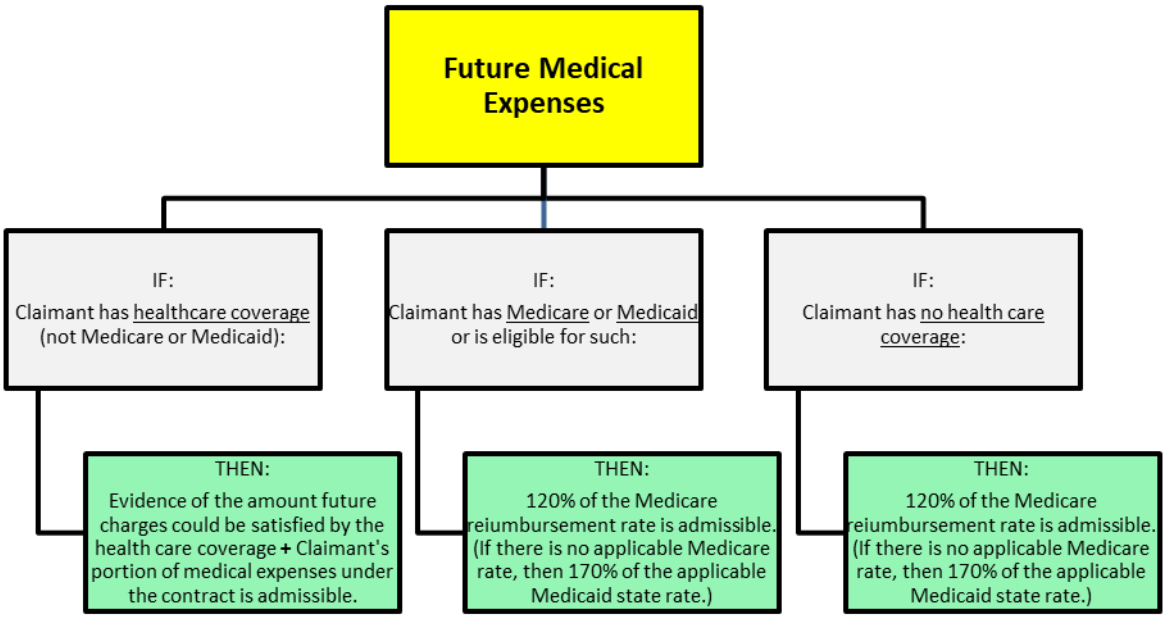
[115] *Goble v. Frohman*, 848 So. 2d 406, 409 (Fla. 2d DCA 2003).
[116] *See Smith v. Geico Cas. Co.*, 127 So. 3d 808, 812 n.2 (Fla. 2d DCA 2013) (quoting Caroline C. Pace, *Tort Recovery for Medicare Beneficiaries: Procedures, Pitfalls and Potential Values*, 49 Hous. Law 24, 27 (2012)).
[117] Ch. 2023-15, L.O.F.
[118] S. 768.0427(2)(a), F.S.
[119] S. 768.0427(2)(b), F.S.



- **Future medical bills**. With respect to evidence to prove damages for future medical services or treatments, admissible evidence must include any evidence of reasonable future amounts to be billed to the claimant for medically necessary services. Evidence offered must also include, but is not limited to, the following amounts, depending on whether the claimant has health care coverage:[120]
    - *Claimant has health care coverage other than Medicare or Medicaid or is eligible for such health care coverage*: In this situation, 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.
    - *Claimant has Medicare or Medicaid, is eligible for such coverage, or does not have health care coverage*: In this situation, 120% of the Medicare reimbursement rate in effect at the time of the trial for such future services; or, if there is no applicable Medicare rate for the future services in question, 170% of the applicable state Medicaid rate.

[120] S. 768.0427(2)(c), F.S.



Additionally, under current law, disclosure for individual contracts between providers and authorized commercial insurers or authorized health maintenance organizations (HMOs) are privileged and not subject to discovery or disclosure and are not admissible into evidence. [121]

RECENT LEGISLATION:

YEAR	BILL #	HOUSE SPONSOR(S)	SENATE SPONSOR	OTHER INFORMATION
2023	CS/CS/HB 837	Gregory, Fabricio	Hutson	The bill became law on March 24, 2023.
2022A	SB 2-A	Leek	Boyd	The bill became law and took effect on December 16, 2022, except as otherwise expressly provided.
2021	CS/CS/CS/SB 76	Rommel	Boyd	The bill became law on July 1, 2021.

[121] S. 768.0427(2)(e), F.S.

BILL HISTORY

COMMITTEE REFERENCE	ACTION	DATE	STAFF DIRECTOR/ POLICY CHIEF	ANALYSIS PREPARED BY
Judiciary Committee	16 Y, 4 N, As CS	4/17/2025	Kramer	Mathews
THE CHANGES ADOPTED BY THE COMMITTEE:	• Added a strict liability defense for lawsuits brought under the WQAA if the condition giving rise to the cause of action is a natural geological substance of a former phosphate mine, notice has been filed in the county, and DOH has conducted a radiation survey. • Required an award of two-way, prevailing party attorney fees in most insurance cases. • Clarified that the specified evidence described in the bill to prove or rebut medical damages in personal injury and wrongful death actions shall be admissible. • Clarified that neither party has an affirmative duty to offer any specific evidence at trial, despite certain evidence being deemed admissible under the bill.			

THIS BILL ANALYSIS HAS BEEN UPDATED TO INCORPORATE ALL OF THE CHANGES DESCRIBED ABOVE.
