CIVIL LITIGATION

HB 775 — Civil Litigation Reform

by Conference Committee on Civil Litigation Reform (CS/SB 236 by Judiciary Committee and Senator Latvala; CS/SB 374 by Judiciary Committee and Senators Laurent and Webster; CS/SB 376 by Judiciary Committee and Senator Lee; and CS/SB 378 by Judiciary Committee and Senator Webster)

This bill is the product of the Senate and House of Representatives Conference Committee on Civil Litigation Reform. The bill makes wide-ranging and substantial modifications to procedural and substantive components of the civil litigation system in Florida. The bill is summarized below by topics with reference to the corresponding bill sections.

Jury Duty and Instructions

Section 1 creates s. 40.50, F.S., which provides a series of jury reform measures to be implemented by the courts including, but not limited to, providing detailed preliminary and final instructions to the jurors, permitting jurors to take notes in trials likely to exceed 5 days, and allowing jurors to submit written questions directed to witnesses (subject to approval by the court).

Mediation

Section 2 amends s. 44.102, F.S., to mandate that all civil actions for monetary damages be referred to mediation upon the request of a party, provided the requesting party is willing to pay the costs of mediation or the costs can be equitably divided between the parties. The following actions are exempt: a) Landlord and tenant disputes not involving a claim for personal injury; b) Debt collections; c) Medical malpractice; d) Claims governed by the Florida Small Claims Rules; e) Claims the court determines are proper for non-binding arbitration; f) Claims the parties have agreed to submit to binding arbitration, and; g) Claims the parties have agreed to submit to voluntary trial resolution under s. 44.104, F.S. The court may refer to mediation all or any part of an action for which mediation is not required under this section.

Voluntary Trial Resolution

Section 3 amends s. 44.104, F.S., relating to voluntary binding arbitration, to include new voluntary trial resolution provisions. Two or more parties involved in a civil action may agree to a voluntary trial resolution where no constitutional issue is involved. The parties are responsible for selecting and compensating the trial resolution judge. The trial resolution judge must be a member in good standing of the Florida Bar for the preceding 5 years, which is the same qualification for a circuit court or county court judge.

The trial resolution judge shall have the authority to administer oaths and conduct the proceedings in accordance with the Florida Rules of Civil Procedure, as well as issue enforceable subpoenas. A party may enforce a decision obtained in a voluntary trial resolution by filing a petition for final judgment in circuit court. An appeal may be made to the appropriate appellate court but review of factual findings is not allowed. The "harmless error doctrine" applies in all appeals, which is generally applied in all appellate cases under current law. The language does not clarify what the standard of review will be other than to state that no further review will be allowed of a judgment unless a constitutional issue is raised. The presence of competent substantial evidence to support the findings is a standard of review for most appellate cases.

Voluntary trial resolution is not available to parties in actions involving child custody, visitation or child support. It is also not available when an indispensable third party notifies the trial resolution judge that the third party would be a proper party if the dispute were resolved in court, the third party intends to intervene in the action in court, and the third party does not agree to proceed with the voluntary trial resolution.

Frivolous Lawsuits

Section 4 amends s. 57.105, F.S., relating to an award of attorney's fees in frivolous or unfounded lawsuits. This section replaces the existing standard for an award of attorney's fees, which is based on a complete absence of a justiciable issue of law or fact. The new standard for an award of attorney's fees, which may occur upon the court's initiative or motion of a party, will be based on whether the losing party or the losing party's attorney knew or should have known that the claim or defense at the time it was initially presented, or at any time before trial, was not supported by material facts or by the application of then-existing law to the material facts. This section retains the good faith exception, with a slight modification, for the losing party's attorney if the attorney acted in good faith based on the client's representations as to material facts. Additionally, sanctions for attorney's fees will not apply if the claim or defense is determined to have been made as a good faith attempt with a reasonable expectation of changing then-existing law.

This section expands the court's authority to impose sanctions for protracted litigation if the moving party proves by a preponderance of the evidence that any litigation activities were taken for the primary purpose of unreasonable delay. This section also authorizes the court to impose additional sanctions as are just and warranted for either unsupported claims or defenses, or protracted litigation, including contempt of court, taxable costs, striking of a claim, or dismissal of a pleading.

Expert Witness Costs

Section 5 amends s. 57.071, F.S., relating to taxable costs in civil proceedings, to condition the recovery of expert witness fees as taxable costs to a prevailing party. The prevailing party must furnish each opposing party with a written report signed by the expert witness which summarizes the expert's opinions and the factual basis of each opinion, including documentary evidence and the authorities relied upon in reaching each opinion. The report must be filed at least 5 days prior to the deposition of the expert or 20 days prior to the discovery cutoff, whichever is sooner, or as otherwise determined by the court. This section does not apply to any action proceeding under the Florida Family Law Rules of Procedure.

Expedited Civil Trials

Section 6 creates an optional speedy civil trial procedure called an expedited trial. Upon joint motion of the parties, with approval of the court, the court is authorized to conduct an expedited civil trial. For purposes of the expedited trial, where two or more plaintiffs or defendants have a unity of interest, such as husband and wife, the parties shall be considered one party. Unless otherwise ordered by the court or agreed to by the parties, discovery must be completed within 60 days after the court enters the order adopting the joint expedited trial stipulation. The court must determine the number of depositions to be taken. The trial, whether jury or non-jury, must be conducted within 30 days after discovery ends. Jury selection is limited to 1 hour. Case presentation is limited to 3 hours each. The trial is limited to 1 day. Verified expert witness reports, with an accompanying affidavit of the expert's curriculum vitae, may be introduced in lieu of live testimony. Excerpts from depositions, including video depositions, may be used in lieu of live testimony regardless of where the deponent lives or the deponent's availability to testify at trial. The jury may be given "plain language" jury instructions and a verdict form, both of which must be agreed upon by the parties.

Itemized Jury Verdicts

Section 7 amends s. 768.77, F.S., relating to itemized verdicts, to repeal the requirements that the trier of fact itemize and calculate on the verdict form economic damages before and after reduction to present value and to specify the period of time for which future

damages are intended to provide compensation. This section may have the effect of simplifying the verdict form and reducing some of the confusion for jurors. The trier of fact would still be required to itemize damages as to economic and non-economic losses, as well as itemize punitive damages when awarded.

Alternative Methods of Payment

Section 8 amends s. 768.78, F.S., relating to alternative methods of payment of damage awards, to conform the provisions of the alternative payment statute with the elimination of the itemization of future economic losses by the trier of fact as amended in s. 768.77, F.S. The term "trier of fact" is replaced with the term "the court" as the specific trier of fact to make the determination of whether an award includes future economic losses exceeding $250,000, for purposes of alternative payment of damage awards.

Venue

Section 9 creates s. 47.025, F.S., providing that contract provisions which require legal action involving resident contractors, subcontractors, sub-subcontractors, and materialmen to be brought outside this state are void as a matter of public policy. In that event, such legal actions arising out of the contract may be brought only in Florida in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located, unless the parties agree to another venue after the dispute arises.

Case Reporting

Section 10 requires the clerk of the court, through the uniform case reporting system, to report to the Office of the State Court Administrator, beginning in 2003, certain information from each settlement or jury verdict and final judgment in a negligence case as defined in s. 768.81(4), F.S. This reporting requirement need be made only as deemed necessary from time to time by the President of the Senate and the Speaker of the House of Representatives.

Statute of Repose

Section 11 amends s. 95.031, F.S., to create varying statutes of repose applicable to product liability actions. The new statute of repose requires that an action based on products liability be brought within a certain time from the date of delivery of the completed product to the original purchaser or lessee, regardless of the date on which the defect in the product was or should have been discovered. Otherwise, the action is forever barred. This provision would operate in conjunction with s. 95.11(3), F.S., relating to a 4-year statute of limitations, to bar product liability actions.

All products except certain aircraft, vessels, railroad equipment, improvements to real property and expressly warranted products, are presumed to have a useful life of 10 years or less and the repose period for these products is 12 years. Aircraft and railroad equipment used in commercial or contract carrying of passengers or freight, as well as vessels weighing more than 100 gross tons, have a statute of repose of 20 years. Any product that the manufacturer specifically warrants as having a useful life greater than the applicable 12 or 20 year repose period shall have a repose period equal to that of the warranted period. Improvements to real property, including elevators and escalators, are not subject to this section's statute of repose.

The repose periods do no apply if the claimant used or was exposed to the product within the repose period but the injury caused by such use or exposure did not manifest itself until after the repose period. Also, the repose periods are tolled for any period during which the manufacturer had actual knowledge the product was defective and took affirmative steps to conceal the defect.

Section 12 creates a grandfather clause to allow products liability actions that would not have otherwise been barred, but for the new statute of repose provisions, to be brought before July 1, 2003, or otherwise be subject to the new repose periods.

Subsequent Remedial Measures

Section 13 amends s. 90.407, F.S., relating to the subsequent remedial measures evidentiary rule, to expressly extend its application to products liability cases. Evidence of measures taken after an injury, which measures if taken before the event would have made the injury less likely to occur, is not admissible to prove the existence of a product defect. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as impeachment, or proving ownership, control, or the feasibility of precautionary measures, if controverted.

State of the Art Defense

Section 14 creates s. 768.1257, F.S., to provide for a "state of the art defense" in products liability actions. In an action based upon defective design, brought against the product manufacturer, the finder of fact shall consider the state of the art of scientific and technical knowledge and other circumstances that existed at the time of manufacture, not at the time of loss or injury.

Government Rules Defense

Section 15 creates s. 768.1256, F.S., to provide for a government rules defense in products liability actions. This section provides that a manufacturer or seller could raise a rebuttable presumption that a product is not defective or unreasonably dangerous and thus, he or she would not be liable, if at the time the product was sold or delivered to the initial purchaser the aspect of the product that allegedly caused the harm was: a) In compliance with applicable federal or state codes, statutes, regulations or standards relevant to the event causing the injury; b) The codes, statutes, rules, regulations or standards are designed to prevent the type of harm that occurred, and; c) Compliance with the codes, statutes, rules, regulations or standards is required as a condition for selling the product. This section also provides a reverse presumption that the product is defective or unreasonably dangerous and the manufacturer is liable when the manufacturer did not comply with applicable codes, statutes, rules, regulations or standards. This defense does not apply to drugs ordered off the market or seized by the Federal Food and Drug Administration.

Negligent Hiring

Section 16 creates s. 768.096, F.S., to provide for a rebuttable presumption that an employer was not negligent in hiring an employee if, before hiring such employee, the employer conducted a pre-employment background investigation and the investigation did not reveal any information that reasonably demonstrated the unsuitability of the individual for the particular work to be performed or for employment in general. The background investigation must consist of one of the following: a) A criminal background investigation; b) Reasonable efforts to contact references and former employers; c) Completion of an employment application that elicits information on criminal convictions and civil actions involving intentional torts; d) A check of the prospective employee's driver's license record, if such a check is relevant to the type of work the employee will be performing and the record can be reasonably obtained; or e) An interview of the prospective employee. The election of an employer not to conduct the background investigation does not raise a presumption that the employer failed to use reasonable care in hiring an employee.

Disclosure of Employee Information

Section 17 amends s. 768.095, F.S., to broaden the immunity from liability for information disclosed by an employer about a former employee to a prospective employer, to apply also to information disclosed about current employees. This section also expands the immunity from liability to apply to information disclosed beyond information about an employee's job performance. Further, this section narrows the grounds for subjecting the employer to liability by requiring a showing of clear and convincing evidence that the information disclosed by the employer was knowingly false or violated the person's civil

rights. Under current law, the employer may also be subject to liability if the information was intentionally misleading or was disclosed with a malicious purpose. This section eliminates those two grounds.

Premises Liability

Section 18 creates s. 768.0705, F.S., providing that the owner or operator of a convenience business that substantially implements the applicable security measures listed in ss. 812.173 and 812.174, F.S., shall gain a presumption against liability for criminal attacks that occur on the premises and that are committed by third parties who are not employees or agents of the owner or operator of the convenience business.

Trespass

Section 19 amends s. 768.075, F.S., to expand the immunity from liability to trespassers on real property, to preclude all trespassers under the influence of drugs or alcohol from recovery of damages. This section also lowers the blood-alcohol threshold from 0.10 percent to 0.08 percent or higher. The immunity does not apply if the property owner engaged in gross negligence or intentional misconduct.

This section also defines the terms "invitation," "discovered trespasser" and "undiscovered trespasser." This section also delineates the duties owed by the property owner to different categories of trespassers. Under this section, a property owner is not liable to an undiscovered trespasser as long as the owner refrains from intentional misconduct. There is no duty to warn of dangerous conditions. A property owner is not liable to discovered trespassers as long as the property owner refrains from intentional misconduct or gross negligence, and warns the discovered trespasser of dangerous conditions known to the owner but not readily observable by others. This section modifies the common law as it relates to constructive notice of the presence of trespassers and dangerous conditions.

This section expressly provides that it does not alter the common law doctrine of attractive nuisance, which applies to children who are lured onto property by the dangerous condition that injures them and who, because of their age, are unable to appreciate the risks involved. Therefore, a property owner has a duty to protect trespassing children from dangerous conditions when the owner knows that children frequent the area and the expense of eliminating the danger is slight compared to the risk of injury.

This section also provides that a property owner is not liable for civil damages for negligent conduct resulting in death, injury or damage to a person attempting to commit, or committing, a felony on the property.

Alcohol Defense

Section 20 creates s. 768.36, F.S., to prohibit recovery of any damages for injury or loss to person or property in any civil action by a plaintiff whose blood or breath alcohol level was at least 0.08 percent, or whose faculties were impaired due to the influence of alcohol or drugs, at the time of injury and, as a result, was more than 50 percent at fault for his or her own harm. The section also defines the terms "alcoholic beverage" and "drug."

Punitive Damages

Section 21 creates s. 768.725, F.S., to raise the common law burden of proof necessary to recover punitive damages from "preponderance of evidence" to "clear and convincing evidence." The "greater weight of the evidence" burden of proof applies to the amount of punitive damages.

Section 22 amends s. 768.72, F.S., by adding subsection (2) which stiffens the common law standard of conduct necessary to hold a defendant liable for punitive damages. A defendant may only be liable for punitive damages if shown by clear and convincing evidence that the defendant was guilty of intentional misconduct or gross negligence. The term "intentional misconduct" is defined as conduct which the defendant had actual knowledge of its wrongfulness and of its high probability that it would result in injury to the claimant but intentionally pursued it anyway. The term "gross negligence" is defined as conduct so reckless or wanting in care that it constitutes a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

This section also adds subsection (3) to revise substantially the common law threshold for holding an employer vicariously liable. This subsection specifies the criteria necessary to hold an employer, principal, corporation, or other legal entity liable for punitive damages based on the conduct of an employee or agent. The employee's conduct must rise to the level of gross negligence or intentional misconduct, and either: a) The employer, principal, corporation or other legal entity actively and knowingly participated in such conduct; b) The officers, directors, or managers thereof knowingly condoned, ratified, or consented to such conduct; or c) The employer, principal, corporation or other legal entity engaged in conduct that constituted gross negligence and that contributed to the loss, damage, or injury suffered by the claimant.

Section 23 amends s. 768.73, F.S., relating to caps on punitive damages, to revise the current cap which is set at three times the amount of compensatory damages. This section imposes a three-tiered system for determining the amounts and extent of punitive damages caps. The first tier provides that punitive damages may not exceed the **greater** of three times the amount of compensatory damages or the sum of $500,000. The second tier applies to cases where the fact finder determines the wrongful conduct was motivated

solely by financial gain and the fact finder determines the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, were actually known by the defendant's managing agent, officer, director or other policy making person. In this scenario, the amount of punitive damages may not exceed the **greater** of four times the amount of compensatory damages or the sum of $2,000,000. The third tier provides that there are **no caps** on punitive damages when the fact finder determines the defendant had a specific intent to harm the claimant and the defendant's conduct did in fact harm the claimant.

This section also adds a limitation to multiple awards of punitive damages against the same defendant in any civil action if that defendant can establish, before trial, that punitive damages have previously been awarded against that defendant in any state or federal court alleging harm from the same act or single course of conduct for which the claimant seeks damages. A subsequent award may be made if the court determines by clear and convincing evidence, and makes specific findings of fact, that the amount of prior awards was insufficient to punish the defendant's behavior. The court may consider whether the defendant's act or course of conduct has ceased. Any subsequent award of punitive damages must be reduced by the amount of the earlier award or awards.

This section also provides that the claimant's attorney's fees, if payable from the judgment, are, to the extent the fees are based on punitive damages, calculated based on the final judgment for punitive damages.

The amendments in this section apply to all causes of action arising after the effective date, which is October 1, 1999.

Section 24 creates s. 768.735, F.S., to exempt certain abuse actions or actions arising under ch. 400, F.S., relating to nursing homes and other health related facilities, from a number of the new punitive damages provisions. Any civil action based upon child abuse, abuse of an elderly person, or abuse of a developmentally disabled person, or any civil action arising under ch. 400, F.S., are exempt from the new provisions in s. 768.72(2)-(4), F.S. (relating to types of conduct necessary for an award of punitive damages and vicarious liability of employers), s. 768.73, F.S., (relating to caps on punitive damages), and s. 768.725, F.S., (relating to the burden of proof required for recovery of punitive damages.)

Section 25 creates s. 768.736, F.S., to prohibit application of ss. 768.725 and 768.73, F.S., to the recovery of punitive damages against any defendant who, at the time of the act or omission was under the influence of any alcoholic beverage or drug to the extent that the defendant's normal faculties were impaired, or who had a blood or breath alcohol level of 0.08 percent or higher. This would mean that the provisions on burden of proof and limitation of damages would not apply.

Section 26 creates s. 768.737, F.S., to specify that the provisions of ss. 768.72, 768.725, and 768.73, F.S., apply to arbitration proceedings where punitive damages are available as a remedy in such proceedings.

Joint and Several Liability

Section 27 amends s. 768.81, F.S., relating to comparative fault and apportionment of damages by eliminating automatic application of joint and several liability for actions with total damages of $25,000 or less. This repeal has the effect of eliminating joint and several liability for all non-economic damages. Subsection (3) is amended to provide a multi-tiered limitation on joint and severable liability for economic damages dependent upon whether the plaintiff has any fault.

When a plaintiff is found to be at fault, the following shall apply:

- Any defendant found 10 percent or less at fault shall not be subject to joint and several liability;
- For any defendant found more than 10 percent but less than 25 percent at fault, joint and several liability shall not apply to that portion of economic damages in excess of $200,000;
- For any defendant found at least 25 percent at fault but not more than 50 percent at fault, joint and several liability shall not apply to that portion of economic damages in excess of $500,000; and
- For any defendant found more than 50 percent at fault, joint and several liability shall not apply to that portion of economic damages in excess of $1,000,000.

Where a plaintiff is found to be without fault, the following shall apply:

- Any defendant found less than 10 percent at fault shall not be subject to joint and several liability;
- For any defendant found at least 10 percent but less than 25 percent at fault, joint and several liability shall not apply to that portion of economic damages in excess of $500,000;
- For any defendant found at least 25 percent at fault but not more than 50 percent at fault, joint and several liability shall not apply to that portion of economic damages in excess of $1,000,000; and
- For any defendant found more than 50 percent at fault, joint and several liability shall not apply to that portion of economic damages in excess of $2,000,000.

This section further provides that the amount of economic damages calculated under joint and several liability shall be in addition to the amount of economic and non-economic damages already apportioned to that defendant based on that defendant's percentage of fault.

This section also codifies the *Fabre* and *Nash* decisions, in part, to require a defendant who alleges a non-party to be at fault to affirmatively plead that defense and, absent a showing of good cause, identify that non-party or describe that non-party as specifically as practicable, in a motion or in an initial pleading, subject to amendment any time before trial in accordance with the rules of court. Additionally, in order to allocate any fault to the non-party on the verdict form, the defendant must prove by a preponderance of the evidence at trial the non-party's fault in causing the claimant's injury.

Vicarious Liability

Section 28 amends s. 324.021, F.S., relating to the financial responsibility of an operator or owner of a motor vehicle. This section limits the vicarious liability of a motor vehicle owner or a rental company that rents or leases motor vehicles. Subsection (9)(b)2. is added to provide that unless there is a showing of negligence or intentional misconduct on the part of a motor vehicle owner or rental car company that rents or leases motor vehicles for a period less than one year, the vicarious liability of the lessor to a third party for injury or damage to a third party due to the operation of the vehicle by an operator or lessee is limited to $100,000 per person and $300,000 per occurrence for bodily injury and $50,000 for property damage. If the lessee or operator of the motor vehicle has less than $500,000 combined property and bodily injury liability insurance, then the lessor is liable for an additional cap of $500,000 in economic damages which shall be reduced by any amount actually recovered from the lessee, the operator or insurer of the lessee or operator.

Subsection (9)(b)3. is added to apply the same vicarious liability limitations to owners who are natural persons and who lend their vehicles to permissive users, including relatives who live in their household. Subsection (9)(c) is added to exclude owners of motor vehicles that are used in commercial activity, other than rental companies that rent or lease motor vehicles to the general public, from the limits on vicarious liability in subsections (9)(b)2. and (9)(b)3. The term "rental company" includes a motor vehicle dealer that provides temporary replacement vehicles to its customers for up to 10 days.

Subsection (9)(c)2. is added to exclude certain motor vehicles carrying hazardous materials from the vicarious liability limitations in subsections (9)(b)2. and (9)(b)3. Commercial motor vehicles as defined in s. 627.732, F.S., carrying hazardous materials as defined in the Hazardous Materials Transportation Act of 1994, as amended, 49 U.S.C. ss. 5101 et seq., are excluded from the vicarious liability limitations in this section unless, at

the time of rental or lease, the lessee indicates in writing that the vehicle will not be used to transport hazardous materials or the lessee or other operator has insurance with limits of at least $5,000,000 combined property damage and bodily injury liability.

This section has the effect of limiting the amount of damages that may be awarded under Florida's common law dangerous instrumentality doctrine, which currently allows a motor vehicle owner to be held liable for injuries caused by the negligence of someone entrusted to use the motor vehicle.

Joint Employer Liability

Section 29 creates s. 768.098, F.S., to provide a limitation of liability for employers in a joint employment relationship. An employer in a joint employment relationship pursuant to s. 468.520, F.S., shall not be liable for the tortious actions of another employer in that relationship, or for the tortious actions of any jointly employed employee under that relationship, provided:

- The employer seeking to avoid liability did not authorize or direct the tortious action;
- The employer seeking to avoid liability did not have actual knowledge of the tortious conduct and fail to take appropriate action;
- The employer seeking to avoid liability did not have actual control over the day-to-day job duties of the jointly employed tortfeasor, nor actual control over the job site where the tortious conduct arose or where the jointly employed tortfeasor worked, and that said control was assigned to the other employer under the contract;
- The employer seeking to avoid liability is expressly absolved in the written contract forming the joint employment relationship of control over the day-to-day job duties of the jointly employed tortfeasor, and actual control over the job site where the tortious conduct arose or where the tortfeasor worked, and that said control was assigned to the other employer under the contract; and
- Complaints, allegations, or incidents of any tortious misconduct or workplace safety violations, regardless of the source, are required to be reported to the employer seeking to avoid liability by all other joint employers under the written contract forming the joint employment relationship, and that the employer seeking to avoid liability did not fail to take appropriate action as a result of receiving any such report related to a jointly employed employee who has committed a tortious act.

This section shall not alter any responsibilities of the joint employer who has actual control over the day-to-day job duties of the jointly employed employee and who has actual control over the job site at which or from which the employee is employed, which arises from s. 768.096, F.S. (relating to presumptions against negligent hiring.)

Civil Enforcement - Residents of Chapter 400 Facilities

Sections 30-32 amend ss. 400.023, 400.429, and 400.629, F.S., relating to civil enforcement of rights for residents of nursing homes, assisted living care facilities, and adult family-care homes. Subsection (6) is added to s. 400.023, F.S., and subsection (2) is added to ss. 400.429 and 400.629, F.S. These sections are all identical.

These sections require mediation by the parties in actions based upon these sections as a prerequisite to the plaintiff's recovery of attorney's fees from the defendant. Mediation must be held within 120 days of the filing of a responsive pleading or defensive motion in response to a complaint. These sections provide the details of the procedure for setting and conducting the mediation. If no settlement is reached, then the last offer made by the defendant at the mediation is reduced to writing to include the amount of the offer, the date of the written offer and the date the offer was rejected. If the amount of damages awarded at trial, exclusive of attorney's fees, is equal to or less than the last written offer, then the plaintiff is not entitled to recover any attorney's fees. The mediation provisions apply to all causes of action that accrue on or after October 1, 1999.

Subsection (7) is added to s. 400.023, F.S., and an identical subsection (3) is added to ss. 400.429 and 400.629, F.S. These sections prohibit the discovery of financial information for purposes of determining the value of punitive damages in any civil action under these sections unless the plaintiff first proffers or shows evidence in the record that a reasonable basis exists to support a punitive damages claim.

Subsection (8) is added to s. 400.023, F.S., and an identical subsection (4) is added to ss. 400.429 and 400.629, F.S. These sections require that, in addition to any other standards for punitive damages, any award of punitive damages must be reasonable in light of the actual harm suffered by the resident and the egregiousness of the conduct that caused the actual harm to the resident.

Actuarial Analysis

Section 33 requires the Office of Program Policy Analysis and Governmental Accountability (OPPAGA) to contract with a national independent actuarial firm to conduct an actuarial analysis of the expected reduction in liability judgments, settlements, and related costs resulting from the civil litigation reform provisions in this act. The

analysis must be based on credible loss cost data derived from settlement or adjudication of liability claims accruing after October 1, 1999. The analysis shall include an estimate of the percentage decrease in such judgments, settlements, and costs by the type of coverage affected by this act, including the time period when such savings or reductions are expected. The report must be completed and submitted to OPPAGA by March 1, 2007.

Judicial Rulemaking Request

Section 34 provides that it is the intent of the Legislature not to infringe upon the constitutional prerogatives of the judiciary. If any court of competent jurisdiction declares any provision of this act to be an improper encroachment upon the Florida Supreme Court's authority to determine the rules of practice and procedure in Florida courts, then the Legislature declares its intent that any such provision be construed as a request for rule change pursuant to s. 2, Art. V, State Constitution.

Section 35 provides a severability clause.

If approved by the Governor, the statute of repose and the motor vehicle vicarious liability provisions take effect July 1, 1999, and the remaining provisions take effect October 1, 1999.
Vote: Senate 26-14; House 84-33

ESTATE LAW

CS/CS/HB 301 — Probate/Elective Share

by Real Property & Probate Committee and Reps. Goodlette and others (CS/SB 298 by Judiciary Committee and Senator Geller)

The bill revises a substantial portion of the Elective Share Law in Part II of chapter 732, F.S. (ss. 732.201-.215, F.S.), i.e., the law providing for a surviving spouse's optional right to claim a percentage share of a decedent's property. The bill establishes a comprehensive mechanism for exercising the right to an elective share. Specifically, the bill provides the following:

- Identifies the probatable and nonprobatable property assets, including any inter vivos trust, that will constitute a part of the elective estate for purposes of determining the elective share;
- Excludes certain property assets from the elective estate, such as assets in a qualifying special needs trust for an incapacitated spouse;

- Revises existing fair market valuation of elective share property to provide for different valuation of specific categories of elective estate property, and for fair market valuation of all other unspecified property;
- Introduces valuation dates on which different elective share properties are to be valued;
- Retains the elective share percentage at a flat 30% of the elective estate;
- Revises the priority scheme of recipients and beneficiaries of the elective estate into a 3-tiered priority scheme and expands the sources from which to satisfy the elective share;
- Imposes liability on direct recipients and beneficiaries for the value of the estate or property, or for the actual estate or probate property sold or otherwise transferred prior to the distribution or contribution toward satisfying the elective share;
- Revises the mechanism for extension of time to file and withdraw an election to an elective share, including extending the statute of limitations period for filing notice to exercise an elective share from the existing 4 months to the earlier of either within 6 months of the first publication of the notice of administration or within 2 years of the date of the decedent's death;
- Imposes a statutory duty on the personal representative of the decedent to collect contributions from the recipients to satisfy the elective share; and
- Excludes the application of the law to irrevocable contracts entered into before October 1, 1999.

The bill also repeals s. 732.205, F.S., relating to the application of the elective share solely by a spouse of a Florida resident decedent; s. 732.211, F.S., relating to the effect of the exercise of the right of election; s. 732.213, F.S., relating to the pre-existing right to dower; s. 732.214, F.S., relating to proceedings on election of an elective share; and s. 732.215, F.S., relating to the effect of elective share on taxes.

If approved by the Governor, these provisions take effect October 1, 1999.
Senate: 40-0; House 117-0

TRIAL PROCEEDINGS

CS/SB 198 — Trial Testimony/Sexual Offenses

by Judiciary Committee and Senator Klein

This bill amends s. 918.16, F.S., to expand the court's authority to clear the courtroom of persons during testimony about a sexual offense by a victim in a civil or criminal trial. Specifically, such victim, irrespective of age or mental capability, can request that the court clear the courtroom of all persons with the exception of parties to the cause and their immediate families, guardians, attorneys and their secretaries, court officers, jurors, news reporters or broadcasters, court reporters, victim advocates, and witness advocates.

If approved by the Governor, these provisions take effect July 1, 1999.
Vote: Senate 37-0; House 113-0

LIENS

CS/HB 681 — Construction

by Real Property & Probate Committee and Rep. Merchant (CS/CS/SB 1206 by Commerce & Economic Opportunities Committee; Judiciary Committee; and Senator Webster)

This bill creates s. 47.025, F.S., providing that contract provisions which require legal action involving resident contractors, subcontractors, sub-subcontractors, and materialmen to be brought outside this state are void as a matter of public policy. In that event, such legal actions arising out of the contract may be brought only in Florida in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located, unless the parties agree to another venue after the dispute arises.

This bill also amends the laws governing the legal remedy for unpaid persons who provide labor, services or materials during the construction of a home or building. Specifically, the bill amends s. 255.05, F.S., relating to contractor bonds for public construction, and chapter 713, F.S., relating to the Construction Lien Law, as follows:

- Specifies that the time period for providing notice of nonpayment, recording a claim of lien or bringing an action against a contractor or surety bond begins to run on the last day the lienor furnishes labor, services or materials;
- Requires the Notice of Commencement to contain the names and addresses of the owner and the contractor, and the location or address of the construction property;

- Requires the issuing authority to confirm the information in the Notice of Commencement against the information in the building permit application;
- Defines "information" as applied to information required in a statement of accounts to mean the nature and quantity of the labor, services furnished or to be furnished, the amount paid, the amount due or the amount to become due, and provides that the omission of such information does not eliminate the requirement that the statement of account be made under oath;
- Provides that a waiver and release of a right to a lien will also constitute a waiver and release of a right to make a claim against a payment bond; and
- Exempts persons from filing a Notice of Commencement on direct contracts of less than $5,000 for the repair or replacement of heating or air-conditioning systems.

If approved by the Governor, these provisions take effect October 1, 1999.
Vote: Senate 38-0; House 118-0

COURTS

HB 2163 — Local Decision for Election or Merit Selection and Retention of Circuit and County Court Judges

by Election Reform Committee and Rep. Flanagan (CS/SB 1210 by Judiciary Committee and Senator Grant)

This bill amends those sections in chapters 34, 101, 105, and 106, F.S., relating to the election of circuit or county court judges or the retention of only justices of the Supreme Court and judges of the District Court of Appeal, to allow for election or retention votes for circuit and county court judges. It implements the provisions of a constitutional amendment to Article V of the Florida Constitution, passed in November 1998, which provide that the voters of each judicial circuit or county must be provided the opportunity to determine if judges within the circuit or county will be elected or appointed through judicial selection and retention.

The bill also establishes the process by which the method of selection of circuit and county court judges will be placed on the ballot and provides the ballot language. The Secretary of State is directed to place on the ballot for the 2000 general election the questions regarding the selection of circuit and county court judges, whether election or merit selection and retention. Subsequent to the 2000 general election the bill establishes the process by which political committees may be created for the collection of petitions to place the question regarding the method for selection of circuit and county court judges on the ballot in any general election. This process provides for registration as a political

committee, the petition form to be developed by the Secretary of State, and the process by which the Secretary of State and the supervisors of elections will verify the signatures and certify the ballot position of the question. The Secretary of State is to notify the Supreme Court after each general election of those counties and circuits where the method of judicial selection has changed.

Circuit and county court judges holding office at the time of a change in the selection process will not be affected by the change until the end of their term. At the election prior to the end of a judge's term of office, the judge will be required to either stand for election or a retention vote depending on what process is to be used for selection of judges in that county or circuit at that election.

If approved by the Governor, these provisions take effect January 1, 2000.
Vote: Senate 38-0; House 117-0

CS/SB 1282 — Clerk of Court

by Judiciary Committee and Senator Laurent

The bill amends various statutory provisions relating to the duties and responsibilities of the clerk of the circuit court, as follows:

- Sections 28.001, 28.07, and 28.222, F.S., to implement the recent constitutional amendment to lift the restriction against recording at branch offices, to remove the unnecessary reference to the "books" which constitute the "Official Records", and to require the "register" of Official Records to be available at each branch office;

- Section 40.32, F.S., to extend the time from 10 days to 20 days in which clerks of court are to compensate witnesses or jurors for their services;

- Section 45.031, F.S., to eliminate a person's or entity's option to pay a $1,000 deposit at the time of a judicial sale rather than a deposit in the amount of 5% of the final bid;

- Section 177.091, F.S., 1998 Supp., to eliminate the requirement that a plat for recording be submitted on a specific type of linen or film;

- Section 177.111, F.S., to eliminate the obsolete requirement that the clerk or the recording officer retain a photographic cloth copy of the plat for public inspection;

- Section 215.425, F.S., 1998 Supp., to allow employees of clerks of courts to receive extra compensation from public funds;

- Section 569.11, F.S., to impose a 30-day time period in which a minor must pay a fine assessed for noncriminal violations of tobacco possession or misrepresentation of age or military service for purposes of securing a tobacco product, to begin to run from the date of the citation, or if a court appearance is mandatory, from the date of the hearing; and

- Section 741.09, F.S., to delete obsolete provisions requiring the clerk to keep records of marriage licenses and certificates in books.

The bill also repeals s. 142.17, F.S., relating to duties no longer performed by the state Comptroller regarding the preparation of forms for audit claims against the county paid out of the County Fine and Forfeiture Fund. It also repeals ss. 938.09, and 938.11, F.S., relating to provisions for the assessment of court costs fees on fines for crimes against handicapped or disabled persons; these provisions were rendered unnecessary after the repeal of the Handicapped and Elderly Security Assistance Act in chapter 426, F.S., in 1998.

If approved by the Governor, these provisions take effect upon becoming law.
Vote: Senate 39-0; House 116-0

HB 1877 — Judicial Certification

by Rep. Warner and others (CS/SB 1334 by Fiscal Policy Committee and Senator Grant)

This bill amends s. 35.06, F.S., to create a position for a new district court of appeals judge in the fifth judicial circuit effective October 1, 1999. Section 26.031, F.S., creates positions for 14 new circuit court judges on August 1, 1999 and 12 new circuit court judges on October 1, 1999. Section 34.022, F.S., is amended to create positions for 1 new county court judge on August 1, 1999 and 4 new county court judges on October 1, 1999. The judicial nominating commissions may solicit applications for the positions created August 1 beginning on that date and may seek applications for the second group of positions beginning October 1, 1999. The budget contains funding for the commission of the first group of positions beginning on November 1, 1999 and for commission of the second group of positions created in October beginning on January 1, 2000. The creation of the positions was staggered to allow time for the Governor to interview and make appointments within the constitutional time frames. Additionally, the time between creation of the positions and the funding should provide the constitutionally required time for the judicial nominating commissions to make recommendations to the Governor and for the Governor to make appointments.

If approved by the Governor, these provisions take effect August 1, 1999.
Vote: Senate 38-0; House 114-0