Judiciary Committee

Friday, January 27, 2012
8:00 AM
Morris Hall (17 HOB)

Meeting Packet

Dean Cannon
Speaker

William Snyder
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Judiciary Committee

Start Date and Time:	Friday, January 27, 2012 08:00 am
End Date and Time:	Friday, January 27, 2012 09:15 am
Location:	Morris Hall (17 HOB)
Duration:	1.25 hrs

Consideration of the following bill(s):

PCS for CS/HB 385 -- Medical Malpractice

NOTICE FINALIZED on 01/25/2012 16:15 by Jones.Missy

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for CS/HB 385 Medical Malpractice
SPONSOR(S): Judiciary Committee
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1506

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Judiciary Committee		Bond NB	Havlicak RH

SUMMARY ANALYSIS

This bill allows a prospective defendant in a medical malpractice action to interview a claimant's health care providers without the presence of the claimant if the prospective defendant provides 10 days notice of the intent to interview.

This bill provides that a plaintiff in a medical negligence action must prove by clear and convincing evidence that the failure of a health care provider to order, perform, or administer supplemental diagnostic tests is a breach of the standard of care.

Medical professionals on duty in a hospital emergency room or trauma center are required by federal and state law to evaluate any individual who presents himself or herself as needing medical treatment, and provide emergency medical treatment, regardless of whether the individual pays or has the ability to pay for such services. This bill makes legislative findings declaring that these medical professionals are agents of the government performing a government duty.

Sovereign immunity is a legal concept that protects governments from being sued without their consent. The protection is often extended to government contractors performing governmental functions. This bill provides that a physician, osteopathic physician, podiatrist or dentist working in a hospital emergency room or trauma center is an agent of the state protected by sovereign immunity. These medical professionals may elect to opt out of sovereign immunity, and may later opt back in. A medical professional covered by the sovereign immunity protection recognized in this bill is required to reimburse the state for claims and costs up to the sovereign immunity limits, and the failure to reimburse the state is grounds for discipline against the medical license.

This bill does not appear to have a fiscal impact on local governments. This bill has an unknown potential negative fiscal impact on state government expenditures.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Medical Malpractice Actions - In General

In general, a person has a common law cause of action against another for personal injury occasioned by the other's negligence. The term "medical malpractice" refers to personal injury lawsuits related to negligence committed by medical professionals. Negligence actions in general are governed by ch. 768, F.S.; medical malpractice actions are also governed by ch. 766, F.S.

Standard of Proof in Medical Malpractice Cases Relating to Supplemental Diagnostic Tests

Section 766.102(4), F.S., provides that the "failure of a health care provider to order, perform, or administer supplemental diagnostic tests shall not be actionable if the health care provider acted in good faith and with due regard for the prevailing professional standard of care."

Section 766.102, F.S., provides that a claimant in a medical negligence action must prove by "the greater weight of the evidence" that actions of the health care provider represented a breach of the prevailing professional standard of care. Greater weight of the evidence means the "more persuasive and convincing force and effect of the entire evidence in the case."[1]

Other statutes, such as license disciplinary statutes, require a heightened standard of proof called "clear and convincing evidence." Clear and convincing evidence has been described as follows:

> [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.[2]

Section 766.111, F.S., prohibits a health care provider from ordering, procuring, providing, or administering unnecessary diagnostic tests.

The bill provides that the claimant in a medical negligence case where the death or injury resulted from a failure of a health care provider to order, perform, or administer supplemental diagnostic tests must prove that the health care provider breached the standard of care by clear and convincing evidence. This bill would have the effect of making such claims more difficult to prove. Standards of proof in other medical negligence cases would remain unchanged.

Interviews with Treating Health Care Providers in Medical Malpractice Cases

Background

Section 766.203(2), F.S., requires a claimant (a prospective medical malpractice plaintiff) to investigate whether there are any reasonable grounds to believe that a health care provider was negligent in the care and treatment of the claimant and whether such injury resulted in injury to the claimant prior to issuing a presuit notice. The claimant must corroborate reasonable grounds to initiate medical negligence litigation by submitting an affidavit from a medical expert.[3] After completion of presuit

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[1] *Castillo v. E.I. Du Pont De Nemours & Co., Inc.*, 854 So.2d 1264, 1277 (Fla. 2003)
[2] *Inquiry Concerning Davey*, 645 So.2d 398, 404 (Fla. 1994)(quoting *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. 4th DCA 1983).
[3] Section 766.203(2), F.S.

investigation, a claimant must send a presuit notice to each prospective defendant.[4] The presuit notice must include a list of all known health care providers seen by the claimant for the injuries complained of subsequent to the alleged act of negligence, all known health care providers during the 2-year period prior to the alleged act of negligence who treated or evaluated the claimant, and copies of all of the medical records relied upon by the expert in signing the affidavit.[5] However, the requirement of providing the list of known health care providers may not serve as grounds for imposing sanctions[6] for failure to provide presuit discovery.[7]

Once the presuit notice is provided, no suit may be filed for a period of 90 days. During the 90-day period, the statute of limitations is tolled and the prospective defendant must conduct an investigation to determine the liability of the defendant.[8] Once the presuit notice is received, the parties must make discoverable information available without formal discovery.[9] Informal discovery includes:

1. Unsworn statements - Any party may require any other party to appear for the taking of an unsworn statement.

2. Documents or things - Any party may request discovery of documents or things.

3. Physical and mental examinations - A prospective defendant may require an injured claimant to appear for examination by an appropriate health care provider. Unless otherwise impractical, a claimant is required to submit to only one examination on behalf of all potential defendants.

4. Written questions - Any party may request answers to written questions.

5. Unsworn statements - The claimant must execute a medical information release that allows a prospective defendant to take unsworn statements of the claimant's treating health care providers. The claimant or claimant's legal representative has the right to attend the taking of such unsworn statements.[10]

Section 766.106(7), F.S., provides that a failure to cooperate during the presuit investigation may be grounds to strike claims made or defenses raised. Statements, discussions, documents, reports, or work product generated during the presuit process are not admissible in any civil action and participants in the presuit process are immune from civil liability arising from participation in the presuit process.[11]

At or before the end of the 90 days, the prospective defendant must respond by rejecting the claim, making a settlement offer, or making an offer to arbitrate in which liability is deemed admitted, at which point arbitration will be held only on the issue of damages.[12] Failure to respond constitutes a rejection of the claim.[13] If the defendant rejects the claim, the claimant can file a lawsuit.

Ex Parte Interviews with Physicians by Defense Counsel

In many civil cases, counsel for any party can meet with any potential witness who is willing to speak without notice to the opposing counsel. In 1984, the Florida Supreme Court ruled that there was no

[4] Section 766.106(2)(a), F.S.
[5] Section 766.106(2)(a), F.S.
[6] Sanctions can include the striking of pleadings, claims, or defenses, the exclusion of evidence, or, in extreme cases, dismissal of the case.
[7] Section 766.106(2)(a), F.S.
[8] Section 766.106(3), (4), F.S.
[9] Section 766.106(6)(a), F.S. The statute also provides that failure to make information available is grounds for dismissal of claims or defenses.
[10] Section 766.106(6), F.S.
[11] Section 766.106(5), F.S.
[12] Section 766.106(3)(b), F.S.
[13] Section 766.106(3)(c), F.S.

common law or statutory privilege of confidentiality as to physician-patient communications[14] and that there was no prohibition on defense counsel communicating with a claimant's physicians. In 1988, the Legislature enacted a statute to create a physician-patient privilege.[15] The current version of the statute provides, in relevant part:

> Except as otherwise provided in this section and in s. 440.13(4)(c), [patient medical records] may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient.[16]

The statute provides some exceptions to the confidentiality in medical malpractice cases but the Florida Supreme Court has ruled that defense counsel are barred by the statute from having an ex parte conference with a claimant's current treating physicians.[17]

The Governor's Select Task Force on Healthcare Professional Liability Insurance noted problems caused by the inability of defense counsel to interview a claimant's treating physicians:

> [T]he defendant is frequently in the position of having to investigate the plaintiff's medical history or current condition in order to discover other possible causes of the plaintiff's injury that could be used in defending the action. In addition, this information is often useful in determining the strength of the plaintiff's case, which the defendant could use to decide whether to settle the claim or proceed to trial. It is often necessary to interview several of the plaintiff's treating healthcare providers in order to acquire this information. But, because formal discovery is an expensive and time consuming process, defendants are often unable to adequately gather this information in preparation of their defense.[18]

Opponents of allowing defendants access to ex parte interviews with treating physicians argued the system was not broken. The report continued:

> The problem the Legislature corrected was the private, closed-door meetings between insurance adjusters, defense lawyers, and the person being sued. Typically, the person being sued would speak with his or her colleagues and say "I need your help here. I'm getting sued. I need you to help me out on either the causation issue or the liability issue or the damage issue.
>
> The present system is not broken. Crafting language to go back prior to 1988, to allow unfettered access, is not appropriate. To allow a situation where a defense lawyer or an insurance adjuster and the doctor go to see a patient's treating physician on an informal basis would further drive a wedge between that physician and the patient.[19]

In 2003, the Legislature amended s. 706.106, F.S., to require a claimant to execute a medical information release to allow prospective defendants to take unsworn statements of the claimant's treating physician on issues relating to the personal injury or wrongful death during the presuit process. The claimant and counsel are entitled to notice, an opportunity to be heard, and to attend the taking of the statement. The legislation did not provide for ex parte interviews by defense counsel with a claimant's treating physicians.[20]

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[14] See *Coralluzzo v. Fass*, 671 So.2d 149 (Fla. 1984),
[15] Chapter 88-208, L.O.F.
[16] Section 456.057(7)(a), F.S.
[17] *See Acosta v. Richter*, 671 So.2d 149 (Fla. 1996).
[18] *Report of the Govenor's Select Task Force on Healthcare Professional Liability Insurance* (2003) at p. 231. The Report can be accessed at www.doh.state.fl.us/myflorida/DOH-Large-Final%20Book.pdf (last accessed January 26, 2012).
[19] *Id.* at 233 (internal footnotes omitted).
[20] Chapter 2003-416, Laws of Florida.

Effect of the Bill - Interviews

This bill provides that a prospective defendant or his or her legal representative may interview the claimant's treating health care providers without the presence of the claimant or the claimant's legal representative. This bill provides that a prospective defendant or his or her representative must provide the claimant with 10 days notice prior such interview.

Medical Malpractice Cases Related to Emergency Medical Treatment

Background - Mandated Emergency Medical Treatment

Under current law, certain health care providers are obligated under state and federal law to provide emergency services.

Section 395.1041(3)(a), F.S., requires every general hospital which has an emergency department to provide emergency services and care for any emergency medical condition when:

- Any person requests emergency services and care; or
- Emergency services and care are requested on behalf of a person by an emergency medical services provider who is rendering care to or transporting the person; or by another hospital when such hospital is seeking a medically necessary transfer.

Section 395.1041(3)(f), F.S., requires emergency services and care to be provided regardless of whether the patient is insured or otherwise able to pay for services.

Section 401.45, F.S(1), F.S. provides that a licensed basic life support service, advanced life support service, or air ambulance service may not deny needed prehospital treatment or transport for an emergency medical condition to any person.

Similarly, federal law requires hospitals to provide a "medical screening evaluation" regardless of an individual's ability to pay.[21]

Background - Liability Laws Related to Emergency Medical Treatment

A health care practitioner providing mandated emergency medical treatment is not liable for civil damages related to such services unless the injured patient can show that the practitioner acted with "a reckless disregard for the consequences so as to affect the life or health of another."[22]

An award of noneconomic damages[23] related to medical malpractice caused by a medical practitioner providing emergency services and care is limited to $150,000 per claimant and $300,000 per incident.[24] There is no limit on the corresponding economic damages.

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[21] 42 U.S.C. s. 1395dd., which reads at subsection (a):

> In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this subchapter) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1) of this section) exists.

[22] Section 768.13(2)(b), F.S.

[23] Noneconomic damages are often referred to as "pain and suffering."

[24] Section 766.118(4), F.S.

Background - Sovereign Immunity

Sovereign Immunity is a "doctrine which precludes bringing suit against the government without its consent."[25] The Florida Constitution recognizes that the concept of sovereign immunity applies to the state[26], although the state may waive its immunity through an enactment of general law.[27] Sovereign immunity extends to all subdivisions of the state, including counties and school boards.

In 1973, the Legislature enacted s. 768.28, F.S., a partial waiver of sovereign immunity, allowing individuals to sue state government and its subdivisions. According to subsection (1), individuals may sue the government under circumstances where a private person "would be liable to the claimant, in accordance with the general laws of [the] state . . . . "

Section 768.28(5), F.S., imposes a $200,000 limit on the government's liability to a single person, and a $300,000 total limit on liability for claims arising out of a single incident. These limits have been upheld as constitutional.[28] The limit applies to the total of economic and noneconomic damages.

An injured party may obtain a judgment in excess of the statutory limits, but cannot enforce payment above the limit. The Legislature may, by general law, provide for payment in excess of the statutory cap by virtue of a claims bill.[29] The courts have explained:

> Even if he is able to obtain a judgment against the Department of Transportation in excess of the settlement amount and goes to the legislature to seek a claims bill with the judgment in hand, this does not mean that the liability of the Department has been conclusively established. The legislature will still conduct its own independent hearing to determine whether public funds would be expended, much like a non jury trial. After all this, the legislature, in its discretion, may still decline to grant him any relief.[30]

Section 768.28(9)(b)2., F.S., defines the term "officer, employee, or agent" (which are the persons to whom sovereign immunity applies). Several identified groups are included in the definition, including health care providers when providing contract services pursuant to s. 766.1115, F.S. That section provides that certain health care providers who contract with the state are considered agents of the state, and thus entitled to the protection of sovereign immunity.

Florida law provides that a number of persons who perform public services are agents of the state and thus covered by sovereign immunity, including:

- Persons or organizations providing shelter space without compensation during an emergency.[31]
- A health care entity providing services as part of a school nurse services contract.[32]
- Members of the Florida Health Services Corps who provide medical care to indigent persons in medically underserved areas.[33]

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[25] Blacks Law Dictionary, at 1396 (6th ed. 1990).
[26] Article X, s. 13, Fla.Const.
[27] *See generally* Gerald T. Wetherington and Donald I. Pollock, *Tort Suits Against Government Entities in Florida*, 44 U.Fla.L.Rev. 1 (1992).
[28] *Berek v. Metropolitan Dade County*, 422 So.2d 838 (Fla. 1982); *Cauley v. City of Jacksonville*, 403 So.2d 379 (Fla. 1981).
[29] *See generally* D. Stephen Kahn, *Legislative Claim Bills: A Practical Guide to a Potent(ial) Remedy*, FLA.B.J. 8 (April 1988).
[30] *Gerard v. Dept. of Transportation*, 472 So.2d 1170 (Fla. 1985).
[31] Section 252.51, F.S.
[32] Section 381.0056(10), F.S.
[33] Section 381.0302(11), F.S.

- A person under contract to review materials, make site visits or provide expert testimony regarding complaints or applications received by the Department of Health or the Department of Business and Professional Regulation.[34]

- A business contracted with by the Department of Business and Professional Regulation under the Management Privatization Act.[35]

- Physicians retained by the Florida State Boxing Commission.[36]

- Health care providers under contract to provide uncompensated care to indigent state residents.[37]

- Health care providers or vendors under contract with the Department of Corrections to provide inmate care.[38]

- An operator, dispatcher, or other person or entity providing security or maintenance for rail services in the South Florida Rail Corridor, under contract with the Tri-County Commuter Rail Authority or the Department of Transportation.[39]

- Professional firms that provide monitoring and inspection services of work required for state roadway, bridge or other transportation facility projects.[40]

- A provider or vendor under contract with the Department of Juvenile Justice to provide juvenile and family services. [41]

- Health care practitioners under contract with state universities to provide medical services to student athletes.[42]

- A not-for-profit college or university that owns or operates an accredited medical school or any of its employees or agents that have agreed in an affiliation agreement or other contract to provide patient services as agents of a teaching hospital which is owned or operated by the state, a county, a municipality, a public health trust, a special taxing district, any other governmental entity having health care responsibilities, or a not-for-profit entity that operates such facilities as an agent of that governmental entity under a lease or other contract.[43]

Effect of Bill - Sovereign Immunity and Medical Malpractice Occurring in Emergency Settings

This bill amends s. 768.28, F.S., to provide that an emergency health care provider compelled to provide medical services in an emergency room is an agent of the state and thus entitled to sovereign immunity protection.

[34] Sections 455.221(3) and 456.009(3), F.S.
[35] Section 455.32(4), F.S.
[36] Section 548.046(1), F.S.
[37] Section 768.28(9)(b), F.S.
[38] Section 768.28(10)(a), F.S.
[39] Section 768.28(10)(d), F.S.
[40] Section 768.28(10)(e), F.S.
[41] Section 768.28(11)(a), F.S.
[42] Section 768.28(12)(a), F.S.
[43] Section 768.28(10)(f), F.S.

The term "emergency health care provider" is defined by the bill to include the following medical professionals:

- A physician licensed under ch. 458, F.S.
- An osteopathic physician licensed under ch. 459, F.S.
- A podiatrist licensed under ch. 461, F.S.
- A dentist licensed under ch. 466, F.S.

The sovereign immunity law applies to a person who is an "officer, employee or agent" of the state. This bill amends the definition of an officer, employee or agent of the state to include any person who is an emergency health care provider providing emergency health care mandated by ss. 395.1041 or 401.45, F.S.

The bill allows a health care provider to opt out of sovereign immunity protection, and allows a provider who has opted out to opt back in. Notice must be given to the Department of Health, and is effective upon receipt by the department.

The bill defines, and thus limits the protections of the bill, to "emergency medical services", which is

> [A]ll screenings, examinations, and evaluations by a physician, hospital, or other person or entity acting pursuant to obligations imposed by s. 395.1041 or s. 401.45, and the care, treatment, surgery, or other medical services provided to relieve or eliminate the emergency medical condition, including all medical services to eliminate the likelihood that the emergency medical condition will deteriorate or recur without further medical attention within a reasonable period of time.

The bill also requires a covered emergency health care provider to assume financial duties related to any claim. Initially, an injured person would seek payment from the state. The bill requires the physician to reimburse the state for judgments, settlement costs and all other liabilities incurred by the state. Repayment is limited to the statutory sovereign immunity limits ($200,000 per person, and a total of $300,000 for all claims related to a single incident). The failure of a physician to timely repay the state is grounds for emergency suspension of the medical license. The Department of Health must suspend the license if the physician is more than 30 days delinquent. The bill allows the department to negotiate a payment plan with a physician in lieu of full payment.

Effective Date of this Bill

The bill is effective upon becoming law, and applies to causes of action that accrue on or after that date.

B. SECTION DIRECTORY:

Section 1 provides legislative findings.

Section 2 amends s. 766.102, F.S., regarding medical negligence, standards of recovery.

Section 3 amends s. 766.106, F.S., regarding notice before filing an action for medical negligence.

Section 4 amends s. 768.28, F.S., regarding sovereign immunity for emergency health care workers.

Section 5 provides an effective date of upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   Unknown likely negative fiscal impact on state expenditures. See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may lower the cost to physicians for obtaining medical malpractice insurance coverage, and may lower possible recoveries by persons injured due to medical malpractice.

D. FISCAL COMMENTS:

State government will incur costs to investigate and cover the claims for health care providers providing services in an emergency room or trauma center in Florida. The state agency or division responsible for such claims is the Division of Risk Management in the Department of Financial Services. Although the bill requires responsible physicians to reimburse the state up to a limit, it is possible that state government may incur losses for uncollectible reimbursements.[44] The potential uncollectible amount cannot be reliably estimated.[45]

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

[44] Situations that may lead to state financial loss include death, bankruptcy or insolvency of a physician. It is also possible that the claim plus claims handling expense could exceed the reimbursement limit.

[45] In reviewing similar bills in the past: In 2011 DFS estimated the potential loss as "UNKNOWN" (See analysis of 2011 HB 623 dated 2/22/2011) with little comment. In 2010 DFS estimated the potential loss at $34.5 million, but that version of the bill required the state to pay all claims handing expenses (See Senate bill analysis of 2010 SB 1474 dated 3/22/2010).

2. Other:

Article 1, s. 21, Fla. Const., provides that the "courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." The Florida Supreme Court has in the past found that this provision limits the ability of the Legislature to amend tort law. In the leading case, the Florida Supreme Court first explained the constitutional limitation on the ability of the Legislature to abolish a civil cause of action:

> We hold, therefore, that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. s. 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[46]

The courts have shown inconsistent treatment of this provision. Some caps on damages have been found unconstitutional,[47] but more recently others have been found constitutional.[48] The creation of an alternative recovery system has been found constitutional.[49]

B. RULE-MAKING AUTHORITY:

The bill does not provide any new rulemaking authority. The Department of Health will have to amend rules relating to disciplinary actions to account for the changes made by this bill, which changes can be made within existing authority.[50]

C. DRAFTING ISSUES OR OTHER COMMENTS:

In calendar year 2010, there were 8,117,359 emergency room visits in the state.[51] Also in 2010, there were 2,520 medical malpractice claims closed by medical malpractice insurance carriers, of which 318 (12.6%) were identified as having occurred in an emergency room setting.[52]

A 2007 study by the Senate Committee on Health Regulation regarding the availability of physicians to work in emergency rooms found:

> [I]n general, physicians are reluctant to provide emergency on-call coverage due to the negative impact on their lifestyle, the perceived hostile medical malpractice climate, and the inability to obtain adequate compensation for services rendered. All of these reasons are disincentives to assuming liability for treating emergency patients previously unknown to the physician.[53]

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[46] *Kluger v. White*, 281 So.2d 1, 4 (Fla. 1973).

[47] A $450,000 cap on noneconomic damages applicable to all tort cases is unconstitutional. *Smith v. Dept. of Ins.*, 507 So.2d 1080 (Fla. 1987); but see, *Adams by and through Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 906 (Mo. 1992)("We doubt the wisdom of a rule of law that limits the legislature's ability to respond statutorily to changing societal concerns or correct previous policy positions upon receipt of better information.")

[48] Statutory caps on non-economic damages in medical malpractice actions at s. 766.118, F.S., are constitutional. *Estate of McCall ex rel. McCall v. U.S.*, 642 F.3d 944 (11th Cir. 2011); *M.D. v. U.S.*, 745 F.Supp.2d 1274 (Fla. M.D. 2010).

[49] *Lasky v. State Farm Ins. Co.*, 296 So.2d 9 (Fla. 1974)(automobile no-fault insurance law); *Mahoney v. Sears, Roebuck & Co.*, 440 So.2d 1285 (Fla. 1983)(workers compensation law).

[50] Department of Health, Bill Analysis, Economic Statement and Fiscal Note, dated December 7, 2011.

[51] http://www.floridahealthfinder.gov/researchers/OrderData/order-note.aspx#emergency accessed January 26, 2012.

[52] *Florida Office of Insurance Regulation, 2011 Annual Report – October 1, 2011, Medical Malpractice Financial Information Closed Claim Database and Rate Filings*, at page 44. Note that settlements or judgments against uninsured practitioners would not be reflected here and there is no known means to determine claims experience of uninsured practitioners.

[53] Senate interim report 2008-138, at page 1.

The bill requires a covered emergency health care provider to reimburse the state for judgments, settlement costs and all other liabilities incurred by the state. It is unclear whether an emergency health care provider will have grounds or a means by which to object to defense strategies, settlements, or unreasonable costs.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On December 7, 2011, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment created a means for a physician to opt out of sovereign immunity, and to opt back in. The amendment also changed the "relating to" clause of the title.

A bill to be entitled

An act relating to medical malpractice; providing legislative findings and intent; amending s. 766.102, F.S.; establishing the burden of proof that a claimant must meet in certain damage claims against health care providers based on death or personal injury; amending s. 766.106, F.S.; allowing a prospective medical malpractice defendant to interview a claimant's treating health care providers without the presence of the claimant or the claimant's legal representative; requiring a prospective defendant to provide 10 days' notice before an interview; amending s. 768.28, F.S.; providing sovereign immunity to emergency health care providers acting pursuant to obligations imposed by specified statutes; providing an exception; providing that emergency health care providers are agents of the state and requiring them to indemnify the state up to the specified liability limits; providing for sanctions against emergency health care providers who fail to comply with indemnification obligations; providing definitions; providing that an emergency medical provider may elect to not be an agent of the state; providing for revocation of such election; providing that elections and revocations are effective upon receipt by the Department of Health; providing applicability; providing an effective date.

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

Section 1. Legislative findings and intent.—

(1) The Legislature finds and declares it to be of vital importance that emergency services and care be provided by hospitals, physicians, and emergency medical services providers to every person in need of such care. The Legislature finds that providers of emergency services and care are critical elements in responding to disaster and emergency situations that may affect local communities, the state, and the country. The Legislature recognizes the importance of maintaining a viable system of providing for the emergency medical needs of the state's residents and visitors. The Legislature and the Federal Government have required such providers of emergency medical services and care to provide emergency services and care to all persons who present themselves to hospitals seeking such care.

(2) The Legislature has further mandated that emergency medical treatment may not be denied by emergency medical services providers to persons who have or are likely to have an emergency medical condition. Such governmental requirements have imposed a unilateral obligation for providers of emergency services and care to provide services to all persons seeking emergency care without ensuring payment or other consideration for provision of such care. The Legislature also recognizes that providers of emergency services and care provide a significant amount of uncompensated emergency medical care in furtherance of such governmental interest.

(3) The Legislature finds that a significant proportion of the residents of this state who are uninsured or are Medicaid or

Medicare recipients are unable to access needed health care on an elective basis because health care providers fear the increased risk of medical malpractice liability. The Legislature finds that such patients, in order to obtain medical care, are frequently forced to seek care through providers of emergency medical services and care.

(4) The Legislature finds that providers of emergency medical services and care in this state have reported significant problems with respect to the affordability of professional liability insurance, which is more expensive in this state than the national average. The Legislature further finds that a significant number of specialist physicians have resigned from serving on hospital staffs or have otherwise declined to provide on-call coverage to hospital emergency departments due to the increased exposure to medical malpractice liability created by treating such emergency department patients, thereby creating a void that has an adverse effect on emergency patient care.

(5) It is the intent of the Legislature that hospitals, emergency medical services providers, and physicians be able to ensure that patients who may need emergency medical treatment and who present themselves to hospitals for emergency medical services and care have access to such needed services.

Section 2. Subsection (4) of section 766.102, Florida Statutes, is amended to read:

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

(4)(a) The Legislature is cognizant of the changing trends

and techniques for the delivery of health care in this state and the discretion that is inherent in the diagnosis, care, and treatment of patients by different health care providers. The failure of a health care provider to order, perform, or administer supplemental diagnostic tests is ~~shall~~ not ~~be~~ actionable if the health care provider acted in good faith and with due regard for the prevailing professional standard of care.

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

Section 3. Paragraph (b) of subsection (6) of section 766.106, Florida Statutes, is amended to read:

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

(6) INFORMAL DISCOVERY.—

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

1. Unsworn statements.—Any party may require other parties to appear for the taking of an unsworn statement. Such statements may be used only for the purpose of presuit screening

and are not discoverable or admissible in any civil action for any purpose by any party. A party desiring to take the unsworn statement of any party must give reasonable notice in writing to all parties. The notice must state the time and place for taking the statement and the name and address of the party to be examined. Unless otherwise impractical, the examination of any party must be done at the same time by all other parties. Any party may be represented by counsel at the taking of an unsworn statement. An unsworn statement may be recorded electronically, stenographically, or on videotape. The taking of unsworn statements is subject to the provisions of the Florida Rules of Civil Procedure and may be terminated for abuses.

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

3. Physical and mental examinations.—A prospective defendant may require an injured claimant to appear for examination by an appropriate health care provider. The prospective defendant shall give reasonable notice in writing to all parties as to the time and place for examination. Unless otherwise impractical, a claimant is required to submit to only one examination on behalf of all potential defendants. The practicality of a single examination must be determined by the nature of the claimant's condition, as it relates to the

liability of each prospective defendant. Such examination report is available to the parties and their attorneys upon payment of the reasonable cost of reproduction and may be used only for the purpose of presuit screening. Otherwise, such examination report is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

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

5. Unsworn statements of treating health care providers.—A prospective defendant or his or her legal representative may also take unsworn statements of the claimant's treating health care providers. The statements must be limited to those areas that are potentially relevant to the claim of personal injury or wrongful death. Subject to the procedural requirements of subparagraph 1., a prospective defendant may take unsworn statements from a claimant's treating physicians. Reasonable notice and opportunity to be heard must be given to the claimant or the claimant's legal representative before taking unsworn statements. The claimant or claimant's legal representative has the right to attend the taking of such unsworn statements.

6. Ex parte interviews of treating health care providers.—A prospective defendant or his or her legal representative may interview the claimant's treating health care providers without the presence of the claimant or the claimant's legal representative. A prospective defendant or his or her legal representative that intends to interview a claimant's health

care providers must provide the claimant with notice of such intent at least 10 days prior to the interview.

Section 4. Subsection (9) of section 768.28, Florida Statutes, is amended to read:

768.28 Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions; indemnification; risk management programs.—

(9)(a) No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. However, such officer, employee, or agent shall be considered an adverse witness in a tort action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function. The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in her or his official capacity, or the constitutional officer of which the officer, employee, or agent is an employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful

disregard of human rights, safety, or property. The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of her or his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

(b) As used in this subsection, the term:

1. "Employee" includes any volunteer firefighter.

2. "Officer, employee, or agent" includes, but is not limited to:~~,~~

a. Any health care provider when providing services pursuant to s. 766.1115; any member of the Florida Health Services Corps, as defined in s. 381.0302, who provides uncompensated care to medically indigent persons referred by the Department of Health; any nonprofit independent college or university located and chartered in this state which owns or operates an accredited medical school, and its employees or agents, when providing patient services pursuant to paragraph (10)(f); and any public defender or her or his employee or agent, including, among others, an assistant public defender and an investigator.

b. Any emergency health care provider acting pursuant to obligations imposed by s. 395.1041 or s. 401.45, except for persons or entities that are otherwise covered under this section.

(c)1. Emergency health care providers are agents of the state and shall indemnify the state for any judgments,

settlement costs, or other liabilities incurred, only up to the liability limits in subsection (5).

2. Any emergency health care provider who is licensed by the state and who fails to indemnify the state after reasonable notice and written demand to do so is subject to an emergency suspension order of the regulating authority having jurisdiction over the licensee.

3. The Department of Health shall issue an emergency order suspending the license of any licensee under its jurisdiction or any licensee of a regulatory board within the Department of Health who fails to comply within 30 days after receipt by the department of a notice from the Division of Risk Management of the Department of Financial Services that the licensee has failed to satisfy her or his obligation to indemnify the state or enter into a repayment agreement with the state for costs under this subsection. The terms of such agreement must provide assurance of repayment of the obligation which is satisfactory to the state. For licensees within the Division of Medical Quality Assurance of the Department of Health, failure to comply with this paragraph constitutes grounds for disciplinary action under each respective practice act and under s. 456.072(1)(k).

4. As used in this subsection, the term:

a. "Emergency health care provider" means a physician licensed under chapter 458, chapter 459, or chapter 461, or a dentist licensed under chapter 466.

b. "Emergency medical services" means all screenings, examinations, and evaluations by a physician, hospital, or other person or entity acting pursuant to obligations imposed by s.

395.1041 or s. 401.45, and the care, treatment, surgery, or other medical services provided to relieve or eliminate the emergency medical condition, including all medical services to eliminate the likelihood that the emergency medical condition will deteriorate or recur without further medical attention within a reasonable period of time.

5. An emergency health care provider may affirmatively elect in writing not to be considered an agent of the state by submitting a form to that effect to the Department of Health. An emergency health care provider who makes such election may revoke the election by submitting a form revoking the election. An election or revocation is effective upon filing with the department. Any emergency health care provider who declines the status conferred by sub-subparagraph b. shall not be considered an agent of the state.

(d) ~~(c)~~ For purposes of the waiver of sovereign immunity only, a member of the Florida National Guard is not acting within the scope of state employment when performing duty under the provisions of Title 10 or Title 32 of the United States Code or other applicable federal law; and neither the state nor any individual may be named in any action under this chapter arising from the performance of such federal duty.

(e) ~~(d)~~ The employing agency of a law enforcement officer as defined in s. 943.10 is not liable for injury, death, or property damage effected or caused by a person fleeing from a law enforcement officer in a motor vehicle if:

1. The pursuit is conducted in a manner that does not involve conduct by the officer which is so reckless or wanting

in care as to constitute disregard of human life, human rights, safety, or the property of another;

2. At the time the law enforcement officer initiates the pursuit, the officer reasonably believes that the person fleeing has committed a forcible felony as defined in s. 776.08; and

3. The pursuit is conducted by the officer pursuant to a written policy governing high-speed pursuit adopted by the employing agency. The policy must contain specific procedures concerning the proper method to initiate and terminate high-speed pursuit. The law enforcement officer must have received instructional training from the employing agency on the written policy governing high-speed pursuit.

Section 5. This act shall take effect upon becoming a law and shall apply to any cause of action accruing on or after that date.