

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: SB 248

INTRODUCER: Senator Yarborough and others

SUBJECT: Medical Negligence

DATE: January 18, 2024 **REVISED:** _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Bond	Cibula	JU	Pre-meeting
2.		AHS	
3.		RC	

I. Summary:

SB 248 expands the application of the Florida Wrongful Act to allow certain parents and children of a deceased patient who dies due to medical negligence to recover noneconomic damages.

Under existing law, all of a decedent's statutory survivors may recover some economic damages for the loss of the decedent. However, there is a tiered priority of classes of survivors who may recover noneconomic damages, which notably includes damages for a survivor's pain and suffering, for the decedent's wrongful death.

The highest class of survivors who may recover noneconomic damages consists of the decedent's surviving spouse and surviving minor children. If the decedent is a minor child, the highest class of survivors are the child's parents. (Minors under the act are those younger than 25 years of age.) The second class of survivors, consisting of the decedent's adult and minor children, may recover noneconomic damages, only if the decedent does not leave a surviving spouse. The third and last class of survivors are the parents of a deceased adult child.

Under current law, only the highest class of survivors may recover noneconomic damages regardless of the form of negligence which causes a decedent's wrongful death. If a wrongful death is caused by medical malpractice, the medical malpractice exception in the act precludes the decedent's adult children or parents of a deceased adult child from recovering damages for their pain and suffering.

The bill addresses the medical malpractice exception by allowing the precluded individuals to recover noneconomic damages against a health care practitioner if the Department of Health finds probable cause that a practitioner committed malpractice. The bill also allows the precluded individuals to recover damages against a health care facility if the facility is vicariously liable for

the malpractice of a practitioner or the Agency for Health Care Administration finds that the facility committed medical malpractice.

The bill deems the appropriate findings, allowing a medical malpractice action, to have been made if the decedent's personal representative files a complaint with the department or the agency within 180 days after the decedent's death and the department or the agency fails to dismiss or resolve the complaint within 9 months after its submission. These administrative disciplinary processes eliminate the need for plaintiffs to engage in the costly presuit screening process that is otherwise required for bringing a medical negligence action under chapter 766, F.S.

Finally, the bill provides that, in all wrongful death actions if a death is caused by medical negligence, the negligent health care provider must reimburse the estate for medical bills paid and must forgo collection of any outstanding balance.

The bill is effective July 1, 2024.

II. Present Situation:

Most of the state's tort law is derived from the common law. At common law, there was no right to recover for the negligent wrongful death of another person.¹ Over time, however, the Legislature authorized recoveries for wrongful death and expanded the types of damages recoverable and the classes of survivors entitled to recover. "Because wrongful death actions did not exist at common law, all claims for wrongful death are created and limited by Florida's Wrongful Death Act."²

History of Wrongful Death Actions

The early versions of the state's wrongful death laws limited the right to recover damages to a surviving spouse, to surviving children if there was no surviving spouse, and to those dependent upon the decedent for support if there was no one belonging to the prior two classes, and finally to the executor of the decedent's estate if there was no one belonging from the prior three classes.³ To show dependence on the decedent, a claimant had to show that he or she was a minor, physically or mentally disabled, or elderly.⁴ Adults who were mentally and physically capable of providing for themselves could not recover despite having been supported by the decedent.⁵ Any damages recoverable were limited to a form of economic damages.

The wrongful death law was substantially re-written in 1972.⁶ That law created the Florida Wrongful Death Act, which provides the framework for current law. One of the major changes

¹ *Louisville & Nashville Railroad Co. v. Jones*, 45 Fla. 407, 416 (Fla. 1903).

² *Chinghina v. Racik*, 647 So. 2d 289, 290 (Fla. 4th DCA 1994).

³ *Duval v. Hunt*, 34 Fla. 85 (Fla. 1894) (discussing a wrongful death statute enacted in 1883).

⁴ *Id.* at 101-102.

⁵ The Court interpreted the dependency requirement in the statute as requiring a person to have a genuine inability to support himself or herself based on the view that strong, healthy adults who are capable of earning a livelihood should not be content to "live in idleness upon the fruits of [another's] labor." *Id.* at 101.

⁶ Chapter 72-35, Laws of Fla.

made by this law was to consolidate or merge survival and wrongful death actions.⁷ A survival action is a legal action allowed under the survival statute to continue notwithstanding the plaintiff's death. As merged, the 1972 law allowed the statutory survivors to recover damages for their pain and suffering as a substitute for recoveries for the decedent's pain and suffering under the survival statute.⁸

The type of damages that a survivor is entitled to, under the 1972 law, depends upon the classification of the survivor. The 1972 law allows all survivors to recover the value of lost support and services, a type of economic damages. A surviving spouse may also recover loss of marital companionship and pain and suffering, types of noneconomic damages. Minor children, then defined as under age 21⁹ and unmarried, may also recover loss of parental companionship and pain and suffering. The parents of a deceased minor child may also recover pain and suffering. Any survivor who paid them may recover final medical, funeral, and burial expenses. The estate of the decedent may recover lost earnings from date of injury to date of death, plus net accumulations, which is essentially an estimate of the present value of the future estate that would have been available for inheritance.

A 1981 act expanded the definition of "minor children" to include all children of the decedent under age 25, regardless of whether such child is married or dependent.¹⁰ The statutes did not authorize a wrongful death action by a nondependent, adult child for the loss of a parent or an action by a parent for the loss of an adult child.¹¹

In 1990, the Legislature generally expanded the class of survivors entitled to recover damages for pain and suffering for a wrongful death.¹² As expanded, a decedent's adult children may recover damages for pain and suffering if there is no surviving spouse. The parents of an adult decedent may also recover damages for pain and suffering if there is no surviving spouse or surviving minor or adult children.¹³

However, the same law that expanded the class entitled to recover damages for pain and suffering for a wrongful death precluded the additional class members from recovering those damages for a wrongful death based on medical malpractice.¹⁴ Thus, a narrower group of survivors may recover damages for pain and suffering for a wrongful death that is caused by medical malpractice, and a broader group may recover damages for pain and suffering for death that is caused by all other forms of negligence.

In a 2000 opinion, the Florida Supreme Court found the medical negligence exception constitutional.¹⁵ The Court found that the exception was rationally related to the need to control

⁷ *Sheffield v. R.J. Reynolds Tobacco Co.*, 329 So. 3d 114, 121 (Fla. 2021).

⁸ *Martin v. United Sec. Services, Inc.*, 314 So. 2d 765, 767 (Fla. 1975).

⁹ Florida changed the age of majority from 21 to 18 in the following year, but that act did not change the reference to age 21 in the wrongful death law. Section 743.07, F.S.; chapter 73-21, Laws of Florida.

¹⁰ Chapter 81-183, Laws of Fla.

¹¹ *Mizrahi v. North Miami Medical Center, Ltd.*, 761 So. 2d 1040, 1042 (Fla. 2000).

¹² Chapter 90-14, Laws of Fla.

¹³ *Id.* (amending s. 768.18(3) and (4), F.S.). The adult children were also authorized by the 1990 law to recover noneconomic damages for lost parental companionship, instruction, and guidance.

¹⁴ *Id.* (amending s. 768.18(8), F.S.).

¹⁵ *Mizrahi v. North Miami Medical Center, Ltd.*, 761 So. 2d 1040, 1042 (Fla. 2000).

the costs of health care and medical malpractice insurance due to a medical malpractice insurance crisis. However, Justice Pariente, in her dissenting opinion, argued that the exception should be found to be unconstitutional because of her belief that the medical malpractice insurance crisis, which initially justified the exception, no longer existed.¹⁶ The Florida Supreme Court later found that the malpractice crisis is over,¹⁷ but that finding did not overrule the ruling that the medical negligence exceptions are constitutional.¹⁸

Current Effect of the Medical Negligence Exceptions to the Wrongful Death Law

Currently, neither an adult (25+) child of an unmarried person who dies due to medical negligence, nor the parents of an adult (25+) child who dies due to medical negligence, may recover noneconomic damages (commonly referred to as "pain and suffering damages"). They can recover through the estate economic damages such as net accumulations, final medical bills, and funeral and burial expenses. Plaintiff's attorneys report that these other damages are often insufficient to warrant the cost and time required to prosecute a medical negligence case.¹⁹

Medical Negligence Actions -- Presuit Requirements

Medical negligence claims are subject to statutory presuit screening and investigation requirements.²⁰ A claimant may, and typically does, request the relevant medical records, which must be furnished by the medical providers at a reasonable charge.²¹ The claimant must then conduct a reasonable investigation of the claim and obtain a written opinion from a medical expert that malpractice occurred.²² The claimant may then serve a notice of intent to initiate litigation on every prospective defendant. The suit may not be filed until at least 90 days after service of the notice.²³ During the 90 days, the parties must engage in pretrial discovery²⁴ and the prospective defendant must conduct an investigation.²⁵ If not resolved in the 90 days, the claimant may file suit. When filing the suit, the attorney must file a certificate that he or she has reviewed the evidence and has a good faith belief that a medical negligence case is warranted.²⁶

Failure of the claimant to pursue the pretrial process constitutes grounds for a dismissal of the claim. A failure of any party to the action to cooperate with the presuit process may be grounds to strike any claim or defense raised by the non-cooperative party.²⁷

¹⁶ *Id.*

¹⁷ *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014). *North Broward Hospital District v. Kalitan*, 219 So. 3d 49 (Fla. 2017).

¹⁸ *Santiago v. Rodriguez*, 281 So. 3d 603 (Fla. 2nd DCA 2019), *rev. dismissed*, 2020 WL 927717 (Fla. 2020).

¹⁹ Fasig Brooks Law Offices, *Unfair and Illogical: Florida's Wrongful Death Medical Malpractice Law*, <https://www.fasigbrooks.com/2019/02/unfair-and-illogical-floridas-wrongful-death-med/>, last accessed Jan. 8, 2024 (stating that "such limited recovery would not make a malpractice lawsuit financially feasible").

²⁰ Sections 766.104, 766.106 and 766.203, F.S.

²¹ Sections 766.104(3) and 766.204, F.S.

²² Sections 766.104(1) and 766.203(2), F.S.

²³ Section 766.106(4), F.S.

²⁴ Section 766.106(6) and 766.205, F.S.

²⁵ Section 766.203(3), F.S.

²⁶ Section 766.104(1), F.S.

²⁷ Section 766.106(7), F.S.

Regulation and Discipline of Medical Professionals and Medical Facilities

Medical professionals are regulated by a comprehensive regulatory system through the Department of Health. Discipline guidelines vary between practice areas. For example, there are 49 grounds for discipline of a physician, including the commission of malpractice²⁸ or performing professional responsibilities that the physician knows that he or she is not competent to perform.²⁹ A complaint against a physician is first referred to the department to conduct an investigation.³⁰ This investigation should generally be completed within 6 months.³¹

If the investigation finds that an offense may have occurred, the matter is referred to a probable cause panel³² appointed by the Board of Medicine.³³ The panel must make its determination of probable cause within 30 days after it receives the department's final investigative report unless grounds for extensions apply.³⁴ If the probable cause panel finds that probable cause exists that an offense has occurred, the complaint is referred to the full board for consideration of the appropriate discipline.³⁵ Similar provisions for investigation by the department, referral to a probable cause panel, and discipline by the licensing board of other licensed medical providers apply.³⁶

Health care facilities are licensed and disciplined by the state through the Agency for Health Care Administration.³⁷ A health care facility may be disciplined or have its license revoked for various grounds, including commission of a negligent act materially affecting the health or safety of a client.³⁸ A disciplinary case may be commenced by the filing of a complaint with the agency.³⁹ If the agency has authority over the subject of the complaint, it will be referred to the Complaint Administration Unit, which may conduct an investigation.⁴⁰ The investigation may lead to the filing of an administrative complaint and the imposition of disciplinary sanctions if a violation is found.⁴¹ There is no probable cause finding required, and no statutory time limit for completion of the investigation stage or final resolution of a complaint.

Billing and Payment of Medical Bills

In general, medical bills are governed by the general laws of contract. A patient is deemed to have entered into a contract with the medical providers and medical facilities whereby the providers and facilities provide goods and services and the patient owes them for the reasonable value of such goods and services.

²⁸ Section 458.331(1)(t), F.S.

²⁹ Section 458.331(1)(v), F.S.

³⁰ Sections 458.311(7) and 456.073(1), F.S.

³¹ Section 456.073(2), F.S.

³² Section 458.311(4), F.S.

³³ Section 458.307, F.S.

³⁴ Section 456.073(4), F.S.

³⁵ Sections 456.311(4) and 458.331(2)-(8), F.S.

³⁶ See generally, ch. 456, F.S.

³⁷ See generally, part II of ch. 408, F.S.

³⁸ Section 408.815(1)(b), F.S.

³⁹ <https://ahca.myflorida.com/contact-ahca/filing-a-complaint>.

⁴⁰ Id.

⁴¹ See generally, s. 408.813, F.S.

The estate of a person who died due to medical negligence may recover medical or funeral expenses due to the decedent's injury or death that have become a charge against the decedent's estate or were paid by or on behalf of the decedent by someone other than a survivor.⁴² However, one might interpret the "due to" phrase to only include medical services resulting from the negligence. This interpretation would exclude the medical bills for the negligently-provided treatment or procedure.

III. Effect of Proposed Changes:

The bill changes the two medical malpractice exceptions in the Wrongful Death Act to allow actions to recover noneconomic damages if the Department of Health or the Agency for Health Care Administration finds that, or finds probable cause to believe that, the facility or practitioner breached the prevailing standard of care in causing the death. If this finding is made, the plaintiff is not required to participate in the presuit investigation and discovery normally required in a medical negligence action. If the personal representative of the decedent's estate files a complaint alleging medical negligence with the department or the agency within 180 days after the decedent's death and the department or agency does not adjudicate the complaint within 9 months after receipt, the appropriate findings authorizing a medical negligence action are deemed to have been made.

The bill also provides that, in all wrongful death actions where the death was caused by medical negligence, the negligent health care provider must reimburse the estate for medical bills related to the care or treatment that was negligently provided, and must forgo collection of any outstanding balance related to the treatment or care.

The bill takes effect July 1, 2024.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

⁴² Section 768.21(6)(b), F.S.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The bill may provide for wrongful death recoveries by parties that are barred by current law, and may correspondingly increase medical malpractice insurance premiums or medical malpractice self-insurance costs of medical providers. Similarly, the availability of damages for mental pain and suffering may provide a sufficient incentive for plaintiff attorneys who work on a contingency-fee-basis to pursue more medical negligence lawsuits.

C. Government Sector Impact:

The bill may create an indeterminate negative fiscal impact on the state and local governments to the extent that the state or a local government operates or controls a medical care facility. Any such claims, however, would be limited by the state's sovereign immunity limits.⁴³ The bill will likely increase the workload of the state courts system.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 768.21 of the Florida Statutes.

⁴³ Section 768.28, F.S.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
