

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 839 Wrongful Death of a Viable Fetus
SPONSOR(S): Llorente and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 2538

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Billmeier	Billmeier
2) Justice Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

HB 839 amends the Florida Wrongful Death Act to permit recovery of damages for the wrongful death of a viable fetus. This bill permits recovery when the death of a viable fetus, defined as fetus of a mother in the third trimester of pregnancy that has become capable of independent life, is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person and the event would have entitled the viable fetus to maintain an action if the fetus had been born alive and the death had not ensued. Damages recoverable under this bill are the same as those recoverable under the Florida Wrongful Death Act, including lost support and services, mental pain and suffering, and medical expenses.

This bill provides that there is no cause of action against a physician or medical institution:

- For the wrongful death of a viable fetus caused by an abortion, if the abortion was permitted by law and consent was lawfully obtained; or
- For the wrongful death of a viable fetus caused by the performance of obstetrical services, if the services were permitted by law, consent was given, and the services were performed under the applicable standard of care.

The bill does not provide an abortion exception in situations where a fetus was born alive but subsequently dies.

This bill provides that there is no cause of action against a medical institution or physician if the medical institution or physician did not know and had no reason to know of the pregnancy of the mother of the fetus.

This bill amends the definition of “minor children” in the Florida Wrongful Death Act to include viable fetuses.

The fiscal impact of this bill is uncertain. See “Fiscal Comments.”

This bill takes effect on July 1, 2005.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – This bill creates a new civil cause of action under the Florida Wrongful Death Act. It creates a new class of plaintiffs, viable fetuses, who will have a cause of action under current law.

Promote personal responsibility – This bill imposes new liability on persons who cause the wrongful death of a viable fetus.

B. EFFECT OF PROPOSED CHANGES:

The Florida Wrongful Death Act

The “Florida Wrongful Death Act” (“the Wrongful Death Act”) is found in sections 768.16 – 768.26, F.S.¹ The purpose of the Wrongful Death Act is to “shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer.”²

Section 768.19, F.S., provides a cause of action when death is caused by “the wrongful act, negligence, default, or breach of contract or warranty of any person” and the event would have entitled the decedent to maintain a cause of action if death had not ensued. Section 768.21, F.S., specifies the damages that may be recovered under the Wrongful Death Act:

(1) Each survivor³ may recover the value of lost support and services⁴ from the date of the decedent's injury to her or his death, with interest, and future loss of support and services from the date of death and reduced to present value;⁵

(2) The surviving spouse may also recover for loss of the decedent's companionship and protection and for mental pain and suffering from the date of injury;⁶

(3) Minor children⁷ of the decedent, and all children of the decedent if there is no surviving spouse, may also recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury;⁸

(4) Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury. Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors;⁹

(5) Medical or funeral expenses due to the decedent's injury or death may be recovered by a survivor who has paid them;¹⁰

¹ Section 768.16, F.S.

² Section 768.17, F.S.

³ “Survivor” means “the decedent’s spouse, children, parents, and, when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters. It includes the child born out of wedlock of a mother, but not the child born out of wedlock of the father unless the father has recognized a responsibility for the child’s support.” s. 768.18(1), F.S.

⁴ “Support” includes contributions in kind as well as money. s. 768.18(3), F.S. “Services” means “tasks, usually of a household nature, regularly performed by the decedent that will be a necessary expense to the survivors of the decedent.” s. 768.18(4), F.S.

⁵ Section 768.21(1), F.S.

⁶ Section 768.21(2), F.S.

⁷ “Minor children” is defined as “children under 25 years of age, notwithstanding the age of majority.” s. 768.18(2), F.S.

⁸ Section 768.21(3), F.S.

⁹ Section 768.21(4), F.S.

The decedent's personal representative may recover for loss of earnings of the deceased from the date of injury to the date of death, less lost support of survivors excluding contributions in kind, with interest for the decedent's estate.¹¹

Limitation on Damages in Medical Negligence Cases the Florida Wrongful Death Act

Section 768.21, F.S., provides that certain persons cannot recover certain damages for wrongful death due to medical negligence. Adult children may not recover for lost parental companionship, instruction, guidance, or mental pain and suffering for the wrongful death of their parents due to medical negligence. Parents may not recover mental pain and suffering for the wrongful death of their adult children due to medical negligence.¹²

Recovery Under the Wrongful Death Act for the Death of a Fetus

There is no statutory right of recovery for the wrongful death of a fetus under the Wrongful Death Act. The Florida Supreme Court explained:

At the outset, we note that this Court has repeatedly held that there is no cause of action under Florida's Wrongful Death Act for the death of a stillborn fetus. Young v. St. Vincent's Medical Center, Inc., 673 So. 2d 482 (Fla. 1996); Hernandez v. Garwood, 390 So. 2d 357 (Fla. 1980); Duncan v. Flynn, 358 So. 2d 178 (Fla. 1978); Stern v. Miller, 348 So. 2d 303 (Fla. 1977). **The rationale for these decisions is that a fetus is not a "person" within the meaning of the statute.**

Tanner v. Hartog, 696 So. 2d 705, 706 (Fla. 1997)(emphasis added).

The Tanner opinion noted that "a majority of jurisdictions" uphold claims for negligently caused stillbirths under their wrongful death statutes.¹³ The Tanner court ultimately recognized a cause of action for negligent stillbirth under common law, noting that the damages recoverable would be limited to mental pain and anguish and medical expenses incurred incident to the pregnancy.¹⁴

Termination of Pregnancies in the Third Trimester

Section 390.0111, F.S., prohibits the termination of pregnancy during the third trimester¹⁵ unless (a) two physicians certify in writing that to a reasonable degree of medical probability, the termination is necessary to save the life or preserve the health of the pregnant woman, or (b) the physician certifies in writing to the medical necessity for legitimate emergency medical procedures for termination of pregnancy and another physician is not available for consultation.¹⁶

HB 839

HB 839 amends the Wrongful Death Act to permit recovery of damages for the wrongful death of a viable fetus. This bill amends the definition of "minor children" in the Wrongful Death Act to include viable fetuses. The bill defines "viable fetus" as "a fetus of a mother in the third trimester of pregnancy, as defined in s. 390.011, that has become capable of independent life." Section 390.011, F.S., defines "third trimester" as the weeks of pregnancy after the 24th week of pregnancy.

¹⁰ Section 768.21(5), F.S.

¹¹ Section 768.21(6), F.S.

¹² Section 768.21(8), F.S.

¹³ Tanner, 696 So. 2d at 707.

¹⁴ Id. at 708-709.

¹⁵ Section 390.011(8), F.S., defines "third trimester" as the weeks of pregnancy after the 24th week of pregnancy.

¹⁶ Section 390.0111(1), F.S.

The change in definition would cause viable fetuses to be treated as “minor children” under the Wrongful Death Act. It would permit actions to be brought on behalf of viable fetuses for the wrongful death of its parents.

This bill permits recovery when the death of a viable fetus is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person and the event would have entitled the viable fetus to maintain an action if the fetus had been born alive and the death had not ensued.¹⁷ Damages recoverable under this bill are the same as those recoverable under the Wrongful Death Act, including lost support and services, mental pain and suffering, and medical expenses.

Exceptions

The bill provides exceptions. This bill provides that there is no cause of action against a physician or medical institution:

- For the wrongful death of a viable fetus caused by an abortion, if the abortion was permitted by law and consent was lawfully obtained; or

- For the wrongful death of a viable fetus caused by the performance of obstetrical services, if the services were permitted by law, consent was given, and the services were performed under the applicable standard of care.

The bill does not provide an abortion exception in situations where a fetus was born alive but subsequently dies.

This bill provides that there is no cause of action against a medical institution or physician if the medical institution or physician did not know and had no reason to know of the pregnancy of the mother of the fetus.

This bill takes effect on July 1, 2005.

C. SECTION DIRECTORY:

Section 1. Amends s. 768.18, F.S., to change the definition of “minor children” in the Florida Wrongful Death Act to include viable fetuses.

Section 2. Amends s. 768.19, F.S., to create a cause of action for the wrongful death of a viable fetus. Provides exceptions to the cause of action.

Section 3. Provides an effective date of July 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See “Fiscal Comments.”

2. Expenditures:

See “Fiscal Comments.”

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

¹⁷ The language in the bill is very similar to language currently in s. 768.19, F.S.

1. Revenues:
See "Fiscal Comments."
2. Expenditures:
See "Fiscal Comments."

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See "Fiscal Comments."

D. FISCAL COMMENTS:

The fiscal impact of this bill is not known. This bill would create a new cause of action for the wrongful death of a viable fetus and would permit viable fetuses to be plaintiffs in certain actions that exist under current law. The number of actions that will be brought under this bill cannot be determined.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to take an action requiring the expenditure of funds, does not reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not reduce the percentage of state tax shared with counties or municipalities.

2. Other:

This bill provides that there is no cause of action against a physician or medical institution when the death of the fetus is caused by an abortion where the abortion was permitted under law and the requisite consent was lawfully obtained. The right to abortion is protected in Florida by the right to privacy in Art. 1, s. 23, Fla. Const.¹⁸ It can be argued that the cause of action created under this bill will interfere with a woman's right to abortion. However, this bill defines "viable fetus" as a fetus of a mother in the third trimester of pregnancy that has become capable of independent life. The Florida Supreme Court has stated:

Following viability [generally upon completion of the second trimester of pregnancy], the state may protect its interest in the potentiality of life by regulating abortion, provided that the mother's health is not jeopardized.

In re T.W., 551 So. 2d 1186, 1194 (Fla. 1989).

It can be argued that this bill does not restrict a woman's right to abortion because it provides no cause of action in situations where a lawful abortion is performed. The bill creates a cause of action in cases where the fetus of a mother in the third trimester has become capable of independent life. Florida law prohibits third trimester abortions unless two physicians certify the procedure is necessary to save the life or preserve the health of the mother or there is an emergency.¹⁹ Accordingly, it can be argued that this bill contains a health exception as required by T.W.

A cause of action is not prohibited where the fetus is born alive but subsequently dies. It can be argued that this provision creates an undue burden on the right to abortion under Stenberg v.

¹⁸ See In re T.W., 551 So. 2d 1186 (Fla. 1989).

¹⁹ Section 390.0111, F.S.

Carhart.²⁰ In Stenberg, the United States Supreme Court held that Nebraska's partial birth abortion statute violated the United States Constitution because it did not contain a health exception and because it banned a specific type of abortion, thereby placing an "undue burden" on a woman's right to choose abortion.²¹ It can be argued that the burden placed on the right to abortions by this bill, such as lawsuits against abortion providers who perform illegal abortions, are not "undue burdens" on the right to abortion. The bill does not permit lawsuits in cases of legal abortions and Stenberg appears to permit prohibition of third trimester abortions as long as there is a health exception.

However, the Nebraska law at issue in Stenberg also prohibited "delivering and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child."²² This bill permits a cause of action in cases where "a fetus is born alive but subsequently dies." It is not clear that any abortion procedure involves allowing a fetus to be born alive and subsequently killed but, to the extent one does, such a procedure could subject an abortion provider to a civil cause of action for wrongful death under this bill.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

N/A

²⁰ 530 U.S. 914 (2000).

²¹ See Stenberg, 530 U.S. at 930.

²² Id. at 922.