

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 839 CS 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	4 Y, 0 N, w/CS	Billmeier	Billmeier
2) Judiciary Committee	8 Y, 2 N, w/CS	Thomas	Hogge
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

HB 839 creates a new section of law in chapter 768, F.S., relating to negligence. The bill, by authorizing the trier of fact in cases where a pregnancy was wrongfully ended by the negligence of another to consider the characteristics of the unborn fetus, including the sex, the name chosen, and the circumstances surrounding the loss of the pregnancy, recognizes the recovery of damages for mental pain and suffering by a mother and father in such cases.

The bill provides that it does not create a new cause of action not otherwise recognized by current law and that it is intended to codify existing law and not to expand nor restrict the law.

The bill does not appear to have a fiscal impact on state or local government.

This bill takes effect upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote personal responsibility – The bill recognizes the recovery of damages by the parents for mental pain and suffering in cases where a pregnancy was wrongfully ended by the negligence of another.

B. EFFECT OF PROPOSED CHANGES:

HB 839 creates a new section of law in chapter 768, F.S., relating to negligence. The bill, by authorizing the trier of fact in cases where a pregnancy was wrongfully ended by the negligence of another to consider the characteristics of the unborn fetus, including the sex, the name chosen, and the circumstances surrounding the loss of the pregnancy, recognizes the recovery of damages for mental pain and suffering by a mother and father in such cases.

The bill provides that it does not create a new cause of action not otherwise recognized by current law; that it is intended to codify existing law; and it is not intended to expand nor restrict the law as it exists on the effective date of the bill.

The “Impact” Rule in Florida Tort Law

Current law generally prohibits recovery for negligent infliction of emotional distress absent physical impact (known as the “impact rule”). In Tanner v. Hartog,¹ the Florida Supreme Court explained the impact rule in Florida:

Generally stated, the impact rule requires that before a plaintiff can recover damages for emotional distress caused by the negligence of another, the emotional stress must flow from physical injuries sustained in an impact.

Tanner held, however, that expectant parents could recover for “negligent stillbirth” when the negligence of a physician caused the fetus to be stillborn. In Tanner, the court created a “narrow” exception to the impact rule.² The Supreme Court left it to the various courts to define other cases where the impact rule might not be applicable:

We today modify to a limited extent our previous holdings on the impact doctrine. In doing so, however, we are unable to establish a rigid hard and fast rule that would set the parameters for recovery for psychic trauma in every case that may arise. The outer limits of this cause of action will be established by the courts of this state in the traditional manner of the common law on a case-by-case basis.³

The Florida Supreme Court recently explained the purpose of the impact rule:

The impact rule has been traditionally applied primarily as a limitation to assure a tangible validity of claims for emotional or psychological harm. Florida jurisprudence has generally reasoned that such assurance is necessary because, unlike physical injury, emotional harm may not readily align with traditional tort law damage principles. Our courts have explained that the existence of emotional harm is difficult to prove, resultant damages are not easily quantified, and the precise cause of such injury can be elusive.

¹ 696 So.2d 705, 707 (Fla. 1997).

² Id. at 708.

³ Id. at 708 n. 5 (quoting Champion v. Gray, 478 So.2d 17, 21-22 (Fla. 1985)(Alderman, J., concurring specially)).

This Court has also theorized that without the impact rule, Florida courts may be inundated with litigation based solely on psychological injury.⁴

However, Chief Justice Pariente has argued that the impact rule should be abolished:

In my view, the impact rule reflects an outmoded skepticism for damages resulting from mental injuries. As best summarized by the Illinois Supreme Court:

The requirement [of physical manifestation of emotional distress] is overinclusive because it permits recovery for mental anguish when the suffering accompanies or results in any physical impairment, regardless of how trivial the injury. More importantly, the requirement is underinclusive because it arbitrarily denies court access to persons with valid claims they could prove if permitted to do so.

Additionally, the requirement is defective because it "encourages extravagant pleading and distorted testimony." To continue requiring proof of physical injury when mental suffering may be equally recognizable standing alone would force "victim[s] to exaggerate symptoms of sick headaches, nausea, insomnia, etc., to make out a technical basis of bodily injury upon which to predicate a parasitic recovery for the more grievous disturbance, the mental and emotional distress she endured."

Corgan v. Muehling, 143 Ill.2d 296, 158 Ill.Dec. 489, 574 N.E.2d 602, 608 (1991) (quoting St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 652 (Tex.1987)) (citations omitted).

I believe that the traditional foreseeability analysis applicable to negligence claims is the more appropriate framework for a limitation on tort recovery in this State.⁵

In Thomas v. OB/GYN Specialists of the Palm Beaches,⁶ the Fourth District Court of Appeal held that medical malpractice leading to the death of a fetus of fifteen to eighteen weeks gestation was not a "wrongful stillbirth" under Tanner. This case is pending review by the Florida Supreme Court.

C. SECTION DIRECTORY:

Section 1. Creates s. 768.38, F.S., relating to admissibility of evidence in an action alleging that a pregnancy was wrongfully ended by the negligence of another.

Section 2. 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:

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

⁴ Rowell v. Holt, 850 So.2d 474, 478 (Fla. 2003)(citations omitted).

⁵ Gracey v. Eaker, 837 So.2d 348, 359 (Fla. 2002)(Pariente, J., concurring).

⁶ 889 So.2d 971 (Fla. 4th DCA 2004).

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:

The bill appears to recognize a waiver of the impact rule in negligence cases resulting in the loss of a pregnancy. This may increase litigation and damages awarded in such cases.

D. FISCAL COMMENTS:

None.

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:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

The Civil Justice Committee considered the bill on March 16, 2005, and adopted a "strike everything" amendment that narrowed the cause of action from wrongful death of a viable fetus to the cause of action for negligent infliction of emotional distress.

This analysis is drawn to the Committee Substitute that was adopted at the April 13, 2005, meeting of the House Judiciary Committee. The Committee Substitute differs from the bill as filed in that the Committee Substitute does not create a new cause of action, but rather:

- Provides for the admissibility of certain evidence in evaluating a claim for damages for the mental pain and suffering of the parents in an action alleging that a pregnancy was wrongfully ended by negligence of another.
- Provides that nothing in the bill creates a new cause of action not otherwise recognized by current law.
- Provides that the bill is intended to codify existing law and not to expand nor restrict the law as it exists as of the effective date of the bill.