

By Senator Fasano

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1 A bill to be entitled

2 An act for the relief of Joseph G. Donahey, Jr., and
3 Tena Donahey, his spouse; providing an appropriation
4 to compensate them for injuries received by Joseph
5 Donahey, Jr., and for damages sustained by Mr. and
6 Mrs. Donahey as a result of the medical treatment of
7 Joseph G. Donahey, Jr., provided by employees of the
8 University of South Florida; providing a limitation on
9 the payment of fees and costs; providing an effective
10 date.

11
12 WHEREAS, Joseph G. Donahey, Jr., a former circuit judge of
13 the State of Florida, has for years suffered a worsening
14 condition of his back which caused him significant pain and
15 suffering and affected his ability to serve as a circuit judge,
16 and

17 WHEREAS, Judge Donahey was referred by his personal
18 physician to Dr. David Cahill, a neurosurgeon reputed to be
19 skilled in orthopedic surgery, and

20 WHEREAS, Judge Donahey was advised by Dr. Cahill that a
21 surgical procedure could be performed which could significantly
22 improve the condition of his back and that Dr. Cahill was the
23 neurosurgeon responsible for developing that procedure, and

24 WHEREAS, unknown to Judge Donahey, Dr. Cahill was on the
25 faculty of the University of South Florida College of Medicine
26 and employed by the Board of Regents of the State of Florida,
27 and

28 WHEREAS, Judge Donahey consented to surgery by Dr. Cahill,
29 to be conducted at Tampa General Hospital in Tampa, Florida, and

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30 WHEREAS, the surgery was performed on January 11, 1999, at
31 Tampa General Hospital, and

32 WHEREAS, a series of events took place which resulted in
33 Judge Donahey becoming totally blind during the surgery. Those
34 events are summarized as follows:

35 (1) The spinal surgery performed on Judge Donahey's back
36 was a complicated and lengthy surgery.

37 (a) Complicated surgery exposes patients to longer bouts of
38 anesthesia, greater blood loss, and decreased blood pressure
39 and, therefore, increases the risk of decreased blood flow and
40 loss of vision due to ischemic optic neuropathy.

41 (b) Unknown to Judge Donahey, the surgery was performed in
42 part by a resident physician who, as part of his training, was
43 employed by the Board of Regents and received training by
44 observing and participating in surgery conducted by Dr. Cahill,
45 who was the resident physician's professor.

46 (c) During that time and unknown to Judge Donahey, Dr.
47 Cahill supervised three other surgeries. The University of South
48 Florida records reflect that another surgery for Dr. Cahill was
49 scheduled to start at 7:30 a.m. and last 6 hours, with Judge
50 Donahey's surgery scheduled to also start at 7:30 a.m. and last
51 4 hours. Each surgery was to be followed by a short surgery in
52 the respective operating room. All four procedures were elective
53 and not emergency surgeries. However, the scheduled 6-hour
54 surgery lasted 7 hours and 5 minutes, followed in the same
55 operating room by the two short surgeries. For unknown reasons,
56 Judge Donahey's surgery lasted 10 hours and 15 minutes. Each
57 time Dr. Cahill went back and forth between operating rooms he
58 was required to do a complete scrub and re-gown, thus

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59 contributing to the length of each surgery.

60 (d) Unknown to Judge Donahey, the anesthesiologist who was
61 to provide anesthesia services was also a resident student
62 employed by the Board of Regents and, as such, performed
63 anesthesiology services for patients being operated on by Dr.
64 Cahill and others while under only partial supervision by a
65 board-certified anesthesiologist who was the anesthetist's
66 professor. The supervising anesthesiologist was, at the same
67 time, supervising the anesthesia services on the other patients.

68 (2) The risks associated with this complicated and lengthy
69 surgery, as known to all of the physicians participating in the
70 surgery, were increased by a combination of factors. The
71 following risks were not known by Judge Donahey and were not
72 conveyed to him by the physicians:

73 (a) Hypotensive anesthesia was employed for Judge Donahey's
74 surgery. Hypotensive anesthesia is a technique employed during
75 spinal surgery in which blood pressure is kept artificially low
76 through the administration of medicine in order to minimize
77 bleeding.

78 (b) Low blood pressure has an additive ischemic effect on
79 blood flow when combined with blood loss, placing certain vital
80 organs at risk for decreased blood flow. The optic nerve, which
81 stimulates vision through the brain, is part of the organ of the
82 eyes and, during spinal surgery, is at risk for decreased blood
83 flow.

84 (c) Hemoglobin drops with blood loss and, as such, is the
85 parameter monitored, together with systolic and diastolic blood
86 pressures, to ensure adequate blood flow to all parts of the
87 body during surgery, especially during the practice of

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88 hypotensive anesthesia.

89 (d) Prone body positioning is known to exacerbate the
90 cumulative effects of low hemoglobin and low blood pressures,
91 and Judge Donahey's surgery was performed in the prone position.

92 (e) The resident who provided anesthesia services was
93 educated and trained in the increasing cumulative risk of visual
94 loss in the face of low blood pressure blood loss and lengthy
95 surgery and knew that increased risk of visual loss may occur
96 due to ischemic optic neuropathy when hemoglobin drops below 10.
97 Testimony indicated that Judge Donahey's hemoglobin was below 10
98 for about 4 hours.

99 (f) The resident who provided anesthesia services was
100 educated and trained in these additive effects and also knew
101 that increased risk of visual loss may occur due to ischemic
102 optic neuropathy when systolic blood pressure drops below 100 mm
103 Hg. Judge Donahey's systolic blood pressure dropped below 100 mm
104 Hg during the same period in which his hemoglobin was below 10,
105 and further, Judge Donahey required and received neo-synephrine
106 in order to elevate his systolic blood pressure.

107 (g) The surgeons who performed Judge Donahey's spinal
108 surgery were never directly informed of the low hemoglobin or
109 low systolic blood pressure since those symptoms were not deemed
110 a risk requiring the interruption of surgery.

111 (h) Despite the knowledge of the risks associated with
112 hypotensive anesthesia and complicated spinal surgery, the
113 physicians ultimately relied on and employed slightly differing
114 minimum standards for blood pressure and hemoglobin, thereby
115 creating confusion in the context of the surgery, and thus
116 increased the overall risk under which Judge Donahey's surgery

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117 was performed and, correspondingly, increased the likelihood
118 that ischemic optic neuropathy would occur.

119 (i) The physicians involved in Judge Donahey's surgery
120 acknowledged that the occurrence of blindness arising from
121 decreased blood flow to the optic nerve, or ischemic optic
122 neuropathy, had increased in the 5 years immediately preceding
123 Judge Donahey's surgery.

124 (j) Vision problems related to surgery had been reported
125 approximately 120 times in medical literature for this surgery
126 and, on three previous patients, Dr. Cahill had performed
127 surgery that resulted in unilateral vision loss. A significant
128 portion of these cases involved patients who were in the prone
129 position during lengthy surgery. This problem had been discussed
130 by Dr. Cahill, his resident students, and staff and had been
131 discussed at national meetings. Both the literature and the
132 discussions reflected that a significant causative effect was
133 reduced blood pressure and lowered hemoglobin, which would cause
134 damage to the optic nerve.

135 (3) The surgeons who performed Judge Donahey's surgery
136 acknowledged the option of performing the surgery in two stages
137 on different days, thereby limiting anesthesia time in each
138 procedure. Judge Donahey was never informed of the cumulative
139 risks that were exacerbated by the length of his surgery and was
140 not informed of the option of having his surgery performed in
141 two stages. If Judge Donahey had been informed of all the risks
142 and of the option of staged surgery, he would have avoided the
143 lengthy anesthesia and would not be blind today, and

144 WHEREAS, all of the advice and consultation between Judge
145 Donahey, Judge Donahey's wife, and Dr. Cahill was conducted in a

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146 manner that led Judge Donahey, with good cause, to believe that
147 Dr. Cahill would perform his surgery or that it would be
148 conducted by Dr. Cahill or his assistants under his direct and
149 immediate supervision and in his presence. In fact, Dr. Cahill
150 and the University of South Florida knew that a significant
151 portion of the surgery would be performed by persons unknown to
152 Judge Donahey, each of whom was significantly less qualified by
153 training and experience than Dr. Cahill, and that significant
154 portions of the surgery would be conducted during lengthy
155 absences of Dr. Cahill from the operating room, and

156 WHEREAS, all communications to Judge Donahey from the staff
157 of Tampa General Hospital and the staff of the University of
158 South Florida reinforced and represented that it was Dr. Cahill,
159 the well-known and renowned physician, who would be performing
160 the surgery. Documents admitting the patient to Tampa General
161 Hospital reinforced Judge Donahey's belief that his care and
162 treatment would be under the direct control and supervision of
163 Dr. Cahill by referencing only Dr. Cahill by name as the
164 surgeon, and

165 WHEREAS, the policy of the State of Florida is to require
166 physicians who are not insured for medical malpractice to notify
167 their patients in clear, unequivocal language of the lack of
168 insurance, however, the University of South Florida avoids
169 informing potential patients that if one of its employees makes
170 an error that results in devastating injury and damages, the
171 patient may be limited to the recovery of \$100,000 per claim or
172 \$200,000 per incident, regardless of the severity of the
173 incident or injury, including death, unless the patient is able
174 to have the Legislature order full payment pursuant to a claim

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175 bill, and

176 WHEREAS, the records of the University of South Florida are
177 such that it is impossible to determine who was or was not
178 present at any time during the surgery, who performed any parts
179 of the surgery, or the length and number of times when nothing
180 was taking place because of the absence of a specific surgeon to
181 do a specific procedure. The university has provided no
182 explanation of what went wrong. To the extent that any
183 investigation was conducted by the university, such information
184 has not been submitted for review. Even after repeated requests,
185 the university has failed or refused to explain the delay to
186 Judge Donahey. As a result, it is impossible to determine with
187 any degree of accuracy who performed what parts of the surgery
188 during the four surgeries involved, or why a surgery scheduled
189 to last 4 hours lasted over 10 hours, and

190 WHEREAS, although Dr. Cahill's dictation of what occurred
191 in the operating room during Judge Donahey's surgery was
192 supposed to occur during the surgery, the dictation was
193 completed one-half hour before the surgery was finished. In
194 addition, the report was dictated as if describing an event
195 observed by the person doing the dictation. However, much of the
196 surgery was conducted by others in Dr. Cahill's absence and
197 without his direct supervision. No operative record was
198 maintained by the other two surgeons who were present during Dr.
199 Cahill's absence, and

200 WHEREAS, in sworn testimony Dr. Cahill admits that he
201 doesn't remember what happened and that he cannot recall what
202 parts of the procedure he performed, when he was absent, when he
203 was present, or anything about what happened in his absence. In

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204 statements taken under oath, Dr. Cahill could not explain how he
205 happened to be covering three other surgeries while Judge
206 Donahey was under prolonged anesthesia. Dr. Cahill testified
207 that it was his policy that although he might supervise more
208 than one surgery at a time, this would be done only in
209 circumstance in which one serious surgery was performed at the
210 same time as minor surgery of short duration, and

211 WHEREAS, in accordance with s. 766.106, Florida Statutes,
212 Joseph G. Donahey, Jr., joined by his wife, Tena Donahey, filed
213 a notice of intent to commence litigation, took statements of
214 the physicians and the anesthesiologists involved, and supported
215 their notice of intent to commence litigation with the requisite
216 affidavits required by law, and

217 WHEREAS, the Board of Regents of the State of Florida
218 denied liability as authorized by s. 766.106, Florida Statutes,
219 and

220 WHEREAS, Joseph G. Donahey, Jr., filed a lawsuit against
221 the Board of Regents of the State of Florida in the Thirteenth
222 Judicial Circuit of Hillsborough County, Florida, and took
223 discovery depositions of the physicians involved, obtained the
224 records relating to the care and treatment involved, and fully
225 complied with all pretrial requirements of law, and

226 WHEREAS, the Board of Regents formally offered to settle
227 all claims of the plaintiffs, Joseph G. Donahey, Jr., and Tena
228 Donahey, by the payment of \$200,000, which, pursuant to s.
229 768.28, Florida Statutes, represented the maximum amount that
230 the Board of Regents could be required to pay Joseph G. Donahey,
231 Jr., and Tena Donahey if they won their lawsuit, absent the
232 passage of a legislative claim bill, and the penalty for not

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233 accepting that offer would be that Joseph G. Donahey, Jr., and
234 Tena Donahey would have to pay the attorney's fees of the Board
235 of Regents if they lost the litigation, and

236 WHEREAS, Joseph G. Donahey, Jr., and Tena Donahey formally
237 accepted the proposed offer of settlement conditioned upon the
238 release being a standard release of a defendant from liability,
239 and

240 WHEREAS, the Board of Regents submitted for signature to
241 Joseph and Tena Donahey a proposed release that would have
242 prevented them from seeking relief from the Legislature, and
243 Joseph and Tena Donahey refused to sign a release containing
244 such a limitation, and

245 WHEREAS, the Board of Regents subsequently tendered a
246 release from which the restriction against seeking legislative
247 relief had been removed, which release was executed to the Board
248 of Regents of the State of Florida and accepted by the board,
249 and

250 WHEREAS, it was the intent of Joseph G. Donahey, Jr., and
251 Tena Donahey that the acceptance of the offer of settlement and
252 the giving and tendering of the release would have the effect of
253 removing responsibility for the financial expense of trial from
254 the University of South Florida and the plaintiff but would
255 allow Joseph G. Donahey, Jr., and Tena Donahey to make
256 application to the Legislature for equitable relief under the
257 circumstances set forth in this act, and

258 WHEREAS, the University of South Florida paid to Joseph G.
259 Donahey, Jr., \$100,000, and to Tena Donahey \$100,000, from the
260 University of South Florida Health Sciences Center's self-
261 insurance fund, which was created to provide compensation to

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262 patients injured due to the fault of employees of the
263 university, including personnel providing medical treatment.

264 (1) The self-insurance fund is funded from fees paid for
265 medical treatment by patients and patients' insurers and is
266 administered by the university apart from the state budget.

267 (2) The policy of the university is to never make payments
268 from the fund of more than \$100,000 per claimant unless required
269 to do so by the Legislature pursuant to a claim bill.

270 (3) The fund is also used to purchases reinsurance to
271 reimburse amounts paid from the fund in excess of \$1 million per
272 incident, and

273 WHEREAS, the payment of an additional \$1.5 million, of
274 which \$700,000 will be reimbursed by the fund's reinsurer
275 resulting in a net loss of \$800,000 from the University of South
276 Florida Health Sciences Center's self-insurance fund, will be in
277 furtherance of the reason the fund was created and in
278 furtherance of the insurance contract purchased by the fund, to
279 wit: to pay full and just compensation to patients of the
280 University of South Florida injured by reason of the fault of
281 employees of the university, and

282 WHEREAS, Joseph G. Donahey, Jr., has suffered significant
283 mental pain and suffering and loss of the enjoyment of his life
284 by reason of his blindness and continued to serve as a circuit
285 judge with great difficulty, and, upon his retirement from the
286 bench, has found that his earning capacity as a teacher or as a
287 lawyer has been significantly and adversely affected by his
288 blindness, and

289 WHEREAS, in his attempt to seek relief from his blindness,
290 Joseph G. Donahey, Jr., has incurred economic expenses that have

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291 not been compensated by insurance, and

292 WHEREAS, by reason of her husband's injuries, Tena Donahey
293 has suffered an economic loss due to her need to assist him in
294 his daily life and has also suffered a significant loss of
295 consortium, NOW, THEREFORE,

296

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

298

299 Section 1. The facts stated in the preamble to this act are
300 found and declared to be true.

301 Section 2. (1) The sum of \$1 million is appropriated from
302 the University of South Florida Health Sciences Center's self-
303 insurance fund for the relief of Joseph G. Donahey, Jr., for
304 damages sustained.

305 (2) The Chief Financial Officer is directed to draw a
306 warrant in favor of Joseph G. Donahey, Jr., in the sum of \$1
307 million from the University of South Florida Health Sciences
308 Center's self-insurance fund and to pay the same out of such
309 funds.

310 Section 3. (1) The sum of \$500,000 is appropriated from
311 University of South Florida Health Sciences Center's self-
312 insurance fund for the relief of Tena Donahey for damages
313 sustained.

314 (2) The Chief Financial Officer is directed to draw a
315 warrant in favor of Tena Donahey in the sum of \$500,000 from the
316 University of South Florida Health Sciences Center's self-
317 insurance fund and to pay the same out of such funds.

318 Section 4. The amounts awarded in this act are intended to
319 provide the sole compensation for all present and future claims

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320 arising out of the factual situation described in this act which
321 resulted in injury to Joseph G. Donahey, Jr. The total amount
322 paid for attorney's fees, lobbying fees, costs, and other
323 similar expenses relating to this claim may not exceed 25
324 percent of the total amount awarded under this act.

325 Section 5. This act shall take effect upon becoming a law.