# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1393 Sovereign Immunity
**SPONSOR(S):** Civil Justice Subcommittee; Artiles and Nunez
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1676; CS/SB 1972

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
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| 1) Civil Justice Subcommittee | 12 Y, 3 N, As CS | Billmeier | Bond |
| 2) Health & Human Services Committee | 16 Y, 1 N | Poche | Gormley |
| 3) Appropriations Committee | | | |
| 4) Judiciary Committee | | | |

## SUMMARY ANALYSIS


Sovereign immunity is a legal concept that prohibits suits against the government, unless the government waives the protection. The state has long provided a limited waiver of its sovereign immunity for ordinary tort liability, including medical malpractice. This bill provides that a not-for-profit college or university that owns or operates an accredited medical school, while under contract with a teaching hospital to provide patient services, is considered a part of state government, and thus is entitled to sovereign immunity protection.

There is a possibility that this bill may result in some increase in future state expenditures, although the amount is unknown. This bill does not appear to have a fiscal impact on local governments.

This bill takes effect upon becoming a law and applies to all claims arising after the effective date.

## I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

**Background**

The term "sovereign immunity" originally referred to the English common law concept that the government may not be sued because "the King can do no wrong." Sovereign immunity bars lawsuits against the government or its political subdivisions for the torts of officers or agents of such governments unless such immunity is expressly waived.

Article X, s. 13, Fla. Const., recognizes the concept of sovereign immunity and gives the Legislature the right to waive such immunity in part or in full by general law. In 1973, the Legislature enacted a partial waiver of sovereign immunity.[1] Section 768.28, F.S., contains the limited waiver of sovereign immunity applicable to the state. Section 768.28(1), F.S., provides that individuals may sue the government under circumstances where a private person would be liable to the claimant. Section 768.28(5), F.S., limits the recovery of any one person to $100,000 for one incident and limits all recovery related to one incident to a total of $200,000. Those amounts increase to $200,000 and $300,000, respectively, effective October 1, 2011.[2] Where the state's sovereign immunity applies, section 768.28(9), F.S., provides that the officers, employees and agents of the state that were involved in the commission of the tort are not personally liable to an injured party. Sovereign immunity extends to all subdivisions of the state, including counties and school boards.[3]

Whether sovereign immunity applies turns on the degree of control of the agent of the state retained by the state.[4] In *Stoll v. Noel*, the Florida Supreme Court explained that independent contractor physicians may be agents of the state for purposes of sovereign immunity:

> One who contracts on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also independent contractor.[5]

The court examined the employment contract between the physicians and the state to determine whether the state's right to control was sufficient to create an agency relationship and held that it did.[6] The court explained:

> Whether CMS physician consultants are agents of the state turns on the degree of control retained or exercised by CMS. This Court has held that the right to control depends upon the terms of the employment contract. *National Sur. Corp. v. Windham,* 74 So.2d 549, 550 (Fla.1954) ("The [principal's] right to control depends upon the terms of the contract of employment...."). CMS requires each consultant, as a condition of participating in the CMS program, to agree to abide by the terms published in its HRS Manual and CMS Consultant's Guide which contain CMS policies and rules governing its relationship with the consultants. The Consultant's Guide states that all services provided to CMS patients must be authorized in advance by the clinic medical director. The language of the HRS Manual ascribes to CMS responsibility to supervise and direct the medical care of all CMS patients and supervisory authority over all personnel. The manual also grants to the CMS medical director absolute authority over payment for treatments proposed by consultants. The HRS Manual and the Consultant's Guide demonstrate that CMS has final authority over all care and treatment provided to CMS

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[1] Chapter 73-313, L.O.F.
[2] Chapter 2010-26, L.O.F.
[3] Section 768.28(2), F.S.
[4] *Stoll v. Noel*, 694 So.2d 701, 703 (Fla. 1997).
[5] *Stoll v. Noel*, 694 So.2d 701, 703 (Fla. 1997)(quoting The Restatement of Agency).
[6] *Stoll v. Noel*, 694 So.2d 701, 703 (Fla. 1997).

patients, and it can refuse to allow a physician consultant's recommended course of treatment of any CMS patient for either medical or budgetary reasons.

> Our conclusion is buttressed by HRS's acknowledgment that the manual creates an agency relationship between CMS and its physician consultants, and despite its potential liability in this case, HRS has acknowledged full financial responsibility for the physicians' actions. HRS's interpretation of its manual is entitled to judicial deference and great weight.[7]

The sovereign immunity recovery caps do not prevent a plaintiff from obtaining a judgment in excess of the caps. However, the plaintiff cannot recover the excess damages without action by the Legislature.[8] The limits are constitutional.[9] In *Gerard v. Dept. of Transportation*, 472 So.2d 1170 (Fla. 1985), the Florida Supreme Court held that the recovery caps within s. 768.28(5), F.S., did not prevent a plaintiff from seeking a judgment exceeding the recovery caps. However, the court noted that "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."[10]

Chapter 766, F.S., provides current law on medical malpractice. Section 766.1115, F.S., 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. The protection only applies where the contract contains specific conditions.

Section 768.28(9)(b)2., F.S., defines the term "officer, employee, or agent" for purposes of the sovereign immunity statute. Several identified groups are included in the definition, including health care providers when providing services pursuant to s. 766.1115, F.S.

Florida law confers sovereign immunity to a number of persons who perform public services, including:

- Persons or organizations providing shelter space without compensation during an emergency.[11]
- A health care entity providing services as part of a school nurse services contract.[12]
- Members of the Florida Health Services Corps who provide medical care to indigent persons in medically underserved areas.[13]
- 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.[14]
- Physicians retained by the Florida State Boxing Commission.[15]
- Health care providers under contract to provide uncompensated care to indigent state residents.[16]
- Health care providers or vendors under contract with the Department of Corrections to provide inmate care.[17]

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[7] *Stall v. Noel*, 694 So.2d 701,703 (Fla. 1997).
[8] Section 768.28(5), F.S.
[9] *Berek v. Metropolitan Dade County*, 422 So.2d 838 (Fla. 1982); *Cauley v. City of Jacksonville*, 403 So.2d 379 (Fla. 1981).
[10] *Gerard v. Department of Transportation*, 472 So.2d 1170, 1173 (Fla. 1985).
[11] S. 252.51, F.S.
[12] S. 381.0056(10), F.S.
[13] S. 381.0302(11), F.S.
[14] SS. 455.221(3) and 456.009(3), F.S.
[15] S. 548.046(1), F.S.
[16] S. 768.28(9)(b), F.S.
[17] 768.28(10)(a), F.S.

- 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 the Department of Transportation.[18]
- Professional firms that provide monitoring and inspection services of work required for state roadway, bridge or other transportation facility projects.[19]
- A provider or vendor under contract with the Department of Juvenile Justice to provide juvenile and family services.[20]
- Health care practitioners under contract with state universities to provide medical services to student athletes.[21]

Under the federal Emergency Medical Treatment and Active Labor Act,[22] any patient who presents at an emergency department requesting examination or treatment for a medical condition must be provided with an appropriate medical screening examination to determine if he or she is suffering from an emergency medical condition. If so, the hospital is obligated to either provide treatment until the patient is stable or to transfer the patient to another hospital.

Jackson Memorial Hospital is an accredited, non-profit, tertiary care hospital located in Miami. It is the major teaching facility for the University of Miami School of Medicine. It has over 1500 licensed beds. Jackson Memorial is the regional trauma center.[23] Jackson Memorial Hospital is operated by a public health trust.[24] According to information provided by the University of Miami, faculty members at the University Miami School of Medicine provide patient services at Jackson Memorial Hospital. While Jackson Memorial Hospital is protected by sovereign immunity, the University of Miami may not be covered under current law.

**Effect of this Bill**

This bill amends the definition of "officer, employee, or agent" in s. 768.28(9)(b), F.S., to include a Florida not-for-profit college, university, or medical school and its employees, under certain circumstances.

This bill creates s. 768.28(10)(f), F.S., to provide that any Florida 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[25] as agents of a teaching hospital[26] 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, are agents of the state. As agents of the state, the specified persons and entities are immune from liability for torts in the same manner and to the same extent as a teaching hospital and its governmental owner or operator while acting within the scope of, and pursuant to, guidelines established in the contract to provide patient services.

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[18] S. 768.28(10)(d), F.S.
[19] S. 768.28(10)(e), F.S.
[20] S. 768.28911)(a), F.S.
[21] S. 768.28(12)(a), F.S.
[22] *See* 42 USC 1395dd
[23] http://www.jhsmiami.org/landing.cfm?id=7
[24] http://www.jhsmiami.org/body.cfm?id=1142
[25] This bill defines "patient services" as any comprehensive health care services; the training or supervision of medical students, interns, residents, or fellows; access to or participation in medical research protocols; or any related executive, managerial, or administrative services provided according to an affiliation agreement or other contract with the teaching hospital or its governmental owner or operator.
[26] Section 408.07(45), F.S., defines "teaching hospital" as any Florida hospital officially affiliated with an accredited Florida medical school which exhibits activity in the area of graduate medical education as reflected by at least seven different graduate medical education programs accredited by the Accreditation Council for Graduate Medical Education or the Council on Postdoctoral Training of the American Osteopathic Association and the presence of 100 or more full-time equivalent resident physicians.

This bill requires that the contract to provide patient services must provide for indemnification of the state by the agent for any liability incurred up to the limits set forth in ch. 768, F.S., to the extent liability was caused by the negligence of the college, university, or medical school or its employees or agents. Current limits are $100,000 for any one person for one incident and all recovery related to one incident is limited to a total of $200,000. The amounts increase to $200,000 and $300,000, respectively, effective October 1, 2011.[27]

This bill requires that the contract for patient services provide that the portions of the college or university that are considered agents of the state are acting on behalf of a public agency for purposes of s. 119.011, F.S. This would have the effect of making the public records law applicable to those portions of the college or university.

Section 766.1115, F.S., provides that certain health care providers who contract with the state are considered agents of the state and are entitled to the protection of sovereign immunity. The protection only applies where the contract contains specific conditions. This bill amends s. 766.1115, F.S., to provide that any affiliation agreement or contract entered into by a medical school to provide comprehensive health care services to patients at public hospitals, which agreement or contract is subject to the sovereign immunity provisions in s. 768.28, F.S., is exempt from the requirements of s. 766.1115, F.S.

This bill provides that an employee or agent of a college, university, or its medical school is not personally liable in tort and may not be named as a defendant in any action arising from the provision of any such patient services, except as provided in s. 768.27(9), F.S.[28]

This bill requires the public teaching hospital, the medical school, or its employees or agents to provide written notice to each patient, or the patient's legal representative, that the medical school and its employees are agents of the state and that the exclusive remedy for injury or damage suffered as a result of any act or omission of the public teaching hospital, the medical school, or an employee or agent of the medical school while acting within the scope of his or her duties pursuant to the affiliation agreement or other contract is by commencement of an action pursuant to s. 768.28, F.S. The patient or his or her legal representative must acknowledge receipt of the written notice.

This bill provides that an employee providing patient services is not an employee of the state for purposes of the state's worker's compensation statute. Therefore, in general, if an employee providing patient services, pursuant to the terms of a contract, is injured in the course and scope of his or her employment, the state would not be responsible for providing workers' compensation benefits to the employee pursuant to chapter 440, F.S.

This bill provides extensive findings intended to demonstrate that there is an overwhelming public necessity for the sovereign immunity liability protection provided in this bill.

This bill takes effect upon becoming a law and applies to all claims arising after the effective date.

B. SECTION DIRECTORY:

**Section 1:** provides legislative findings.
**Section 2:** amends s. 766.1115, F.S., relating to health care providers and creation of agency relationship with governmental contractors.
**Section 3:** amends s. 768.28, F.S., relating to a waiver of sovereign immunity.
**Section 4:** provides that this bill takes effect upon becoming a law and applies to all claims arising after the effective date.

[27] Chapter 2010-26, L.O.F.
[28] This bill defines "employee or agent of a college, university, or medical school" as an officer, a member of the faculty, a health care practitioner or licensee defined in s. 456.001, or any other person who is directly or vicariously liable.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See "Fiscal Comments."

D. FISCAL COMMENTS:

It is unknown how many cases this bill may affect, so the effect of this bill on private parties is not known.

The Agency for Health Care Administration reports that this bill is not anticipated to have a fiscal impact on the agency. This bill could affect state expenditures if the Legislature chooses to pass a claims bill that exceeds the sovereign immunity limits.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

   Article I, 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. In *Kluger v. White,* 281 So.2d 1 (Fla. 1973), the Florida Supreme Court held that:

   > [w]here a right of access to the courts for redress for a particular injury has been provided…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.[29]

   The Florida Supreme Court in *Kluger* invalidated a statute that required a minimum of $550 in property damages arising from an automobile accident before a lawsuit could be brought. Based

[29] *Kluger v. White,* 281 So2d 1, 4 (Fla. 1973).

upon the *Kluger* test, the Florida Supreme Court has also invalidated a portion of a tort reform statute that placed a cap on all noneconomic damages because the statute did not provide claimants with a commensurate benefit.[30] Thus, the Legislature cannot restrict damages by either enacting a minimum damage amount or a monetary cap on damages without meeting the *Kluger* test. This bill limits all damages to the amounts set forth in s. 768.28, F.S., unless the Legislature subsequently enacts a claims bill.

The caps on noneconomic damages in medical malpractice cases, found in ss. 766.207 and 766.209, F.S., have been found by the Florida Supreme Court to meet the *Kluger* test and are not violative of the access to courts provision in the Florida Constitution. In *University of Miami v. Echarte,* 618 So.2d 189 (Fla. 1993), the court ruled that the arbitration scheme met both prongs of the *Kluger* test. First, the court held that the arbitration scheme provided claimants with a commensurate benefit for the loss of the right to fully recover noneconomic damages as the claimant has the opportunity to receive prompt recovery without the risk and uncertainty of litigation or having to prove fault in a civil trial. Additionally, the claimant benefits from reduced costs of attorney and expert witness fees which would be required to prove liability; joint and several liability of multiple defendants; prompt payment of damages after determination by the arbitration panel; interest penalties against the defendant for failure to promptly pay the arbitration award; and limited appellate review of the arbitration award.

Second, the court in *Echarte* ruled that, even if the medical malpractice arbitration statutes did not provide a commensurate benefit, the statutes satisfied the second prong of *Kluger* which requires a legislative finding that an overpowering public necessity exists, and, further, that no alternative method of meeting such public necessity can be shown. The court found that the Legislature's factual and policy findings of a medical malpractice crisis constituted an overpowering public necessity. The court also ruled that the record supported the conclusion that no alternative or less onerous method existed for meeting the public necessity of ending the medical malpractice crisis. The court explained, "…it is clear that both the arbitration statute, with its conditional limits on recovery of noneconomic damages, and the strengthened regulation of the medical profession are necessary to meet the medical malpractice insurance crisis."[31]

This bill limits the recovery of damages. If the cap is challenged, the court may scrutinize this limitation based on the rulings in *Kluger* and its progeny. Accordingly, the court would have to determine whether this bill provided a claimant with a reasonable alternative to the right to recover full noneconomic damages. If not, the court would look to see whether this bill was a response to an overpowering public necessity and that no alternative method of meeting such public necessity could have been shown. In addition, the court may scrutinize the contract between the entity and the hospital to determine whether the state entity exercised control over the physician, similar to the physicians in *Stoll v. Noel*.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

**Public Records and Public Meetings**

This bill makes portions of the college or university that enter into appropriate contracts subject to the state's public records law. Article I, s. 24, Fla. Const, provides that records and meetings of public entities are to be open to the public, unless a statutory exemption applies. Statutory provisions implementing art. I, s. 24, include ch. 119 and ch. 286, F.S. The Florida Supreme Court addressed the issue of when a private entity under contract with a public agency falls under the purview of the public records and meeting provisions. The court looked to a number of factors which indicate a significant level of involvement by the public agency:

[30] *See Smith v. Dept. of Insurance,* 507 So.2d 1080 (Fla. 1987).
[31] *University of Miami v. Echarte*, 618 So.2d 189, 195-197 (Fla. 1993).

> The factors considered include, but are not limited to: 1) the level of public funding; 2) commingling of funds; 3) whether the activity was conducted on publicly owned property; 4) whether services contracted for are an integral part of the public agency's chosen decision-making process; 5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform; 6) the extent of the public agency's involvement with, regulation of, or control over the private entity; 7) whether the private entity was created by the public agency; 8) whether the public agency has a substantial financial interest in the private entity; and 9) for who's benefit the private entity is functioning.[32]

This bill provides that "any Florida not-for-profit college or university that owns or operates an accredited medical school or any of its employees or agents" that have a 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", are agents of the state. Since the private entities (colleges, universities, medical schools, or employees) are contracting with government entities, it could be argued that they are subject to the public records and meetings laws under *Schwab*. If the issue is litigated, the court would have to determine whether the factors set forth in *Schwab* apply. If the court were to find that the public records or meetings laws applied to the private entities, it would have to determine whether a statutory public records or meetings exemption applied.

One court noted a difficulty in determining which records are public records when a private corporation acts on behalf of the state:

> In holding that [private corporation] is subject to the public records act because it is acting on behalf of the [government entity], we emphasize that we are not ruling that all of its records are public. Some of its records may be subject to statutory exemptions or to valid claims of privacy. Likewise, we cannot rule that every function of this corporation is performed on behalf of the [government entity]. While we have seen little evidence of functions that might fall outside the realm of public access, the trial court is free to review specific activities of the corporation on remand to determine whether they involve nongovernmental functions which fall outside the public disclosure requirements.[33]

Currently, the six teaching hospitals to which this bill would appear to apply are: Jackson Memorial in Miami, Mount Sinai Medical Center in Miami Beach, Shands Healthcare at the University of Florida in Gainesville, Shands Jacksonville Medical Center, Orlando Health in Orlando, and Tampa General Hospital. Currently, there are two medical schools in Florida operated by not-for-profit universities. One of the universities has a contract to provide some patient services at Jackson Memorial. This bill would allow the parties to the current contract to modify it so as to receive sovereign immunity protection. In addition, any not-for-profit college or university, now or in the future, could be covered under sovereign immunity if it entered into an appropriate contract with a public teaching hospital.

## IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

The Civil Justice Subcommittee considered the bill on April 1, 2011, and adopted an amendment to require the contract between the college or university and the public teaching hospital to make the portions of the college or university that provide services pursuant to the contract an agent of the state pursuant to s. 119.011, F.S. The bill, as amended, was reported favorably as a committee substitute. This analysis reflects the committee substitute.

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[32] *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group*, 596 So.2d 1029, 1031 (Fla. 1992).

[33] *Sarasota Herald-Tribune Co. v. Community Health Corp., Inc.,* 582 So.2d 730, 734 (Fla. 2d DCA 1991)(footnote omitted).