

FINAL BILL ANALYSIS

BILL #: CS/SB 1676

FINAL HOUSE FLOOR ACTION:

109 Y's 8 N's

SPONSOR: Sen. Thrasher (Reps. Artiles and Nuñez)

GOVERNOR'S ACTION: Approved

COMPANION BILLS: CS/CS/HB 1393

SUMMARY ANALYSIS

CS/SB 1676 passed the House on May 4, 2011. The bill was approved by the Governor on June 24, 2011, chapter 2011-219, Laws of Florida, and became effective on that date and applies to all claims arising after the effective date.

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 nonprofit independent college or university located and chartered in Florida that owns or operates an accredited medical school, while under contract with a teaching hospital to provide patient services as an agent of the teaching hospital, is considered an agent of the teaching hospital, 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.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF 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

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 *Id.* (quoting The Restatement of Agency).

⁶ *Id.*

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 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 not unconstitutional.⁹ In *Gerard v. Dept. of Transportation*,¹⁰ 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."¹¹

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.

⁷ *Id.*

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).

¹⁰ 472 So.2d 1170 (Fla. 1985).

¹¹ *Gerard v. Department of Transportation*, 472 So.2d 1170, 1173 (Fla. 1985).

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.¹²
- A health care entity providing services as part of a school nurse services contract.¹³
- Members of the Florida Health Services Corps who provide medical care to indigent persons in medically underserved areas.¹⁴
- 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.¹⁵
- Physicians retained by the Florida State Boxing Commission.¹⁶
- Health care providers under contract to provide uncompensated care to indigent state residents.¹⁷
- Health care providers or vendors under contract with the Department of Corrections to provide inmate care.¹⁸
- 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.¹⁹
- Professional firms that provide monitoring and inspection services of work required for state roadway, bridge or other transportation facility projects.²⁰
- A provider or vendor under contract with the Department of Juvenile Justice to provide juvenile and family services.²¹
- Health care practitioners under contract with state universities to provide medical services to student athletes.²²

Under the federal Emergency Medical Treatment and Active Labor Act,²³ 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 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.²⁴ Jackson Memorial Hospital is operated by a public health trust.²⁵ According to information provided by the University of Miami, faculty members at the

¹² Section 252.51, F.S.

¹³ Section 381.0056(10), F.S.

¹⁴ Section 381.0302(11), F.S.

¹⁵ Sections 455.221(3) and 456.009(3), F.S.

¹⁶ Section 548.046(1), F.S.

¹⁷ Section 768.28(9)(b), F.S.

¹⁸ 768.28(10)(a), F.S.

¹⁹ Section 768.28(10)(d), F.S.

²⁰ Section 768.28(10)(e), F.S.

²¹ Section 768.28911(a), F.S.

²² Section 768.28(12)(a), F.S.

²³ See 42 USC 1395dd

²⁴ <http://www.jhsmiami.org/landing.cfm?id=7>

²⁵ <http://www.jhsmiami.org/body.cfm?id=1142>

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 creates s. 768.28(10)(f), F.S., to provide that any nonprofit independent college or university, or any of its employees or agents, which is located and chartered in this state which owns or operates an accredited medical school and has agreed in an affiliation agreement to provide patient services as agents of a teaching hospital, is considered an agent of the teaching hospital when acting pursuant to the affiliation agreement.

This bill requires that the contract to provide patient services²⁶ must provide for indemnification of the teaching hospital 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 provides that the portions of the college or university that are providing health care services 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.

This bill requires that patients be given written notice 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 is by commencement of an action pursuant to s. 768.28, F.S.

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 legislative findings demonstrating 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.

²⁶ "Patient services" is defined as comprehensive health care services as defined in s. 641.19, including any related administrative service, provided to patients in a teaching hospital; training and supervision of interns, residents, and fellows providing patient services in a teaching hospital; or training and supervision of medical students in a teaching hospital.

²⁷ Chapter 2010-26, L.O.F.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Agency for Health Care Administration reports that this bill is not anticipated to have a fiscal impact on the agency.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

This bill could affect local government expenditures if the Legislature chooses to pass a claims bill that exceeds the sovereign immunity limits.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.