The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Health Regulation Committee

BILL:	SB 1676
INTRODUCER:	Senator Thrasher
SUBJECT:	Sovereign Immunity
DATE:	March 31, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Stovall	HR	**Pre-meeting**
2.			JU	
3.			BC	
4.				
5.				
6.				

I. Summary:

The bill amends Florida Statutes to provide that, for the purposes of s. 768.28, F.S.,[1] 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 as agents of a public teaching hospital, are agents of the state and are immune from liability for torts in the same manner and to the same extent as the teaching hospital and its governmental owner or operator while acting within the scope of and pursuant to guidelines in the contract.

The bill also creates non-statutory provisions of law for legislative findings regarding the role of and the need for teaching hospitals and graduate medical education for Florida residents. The bill provides a legislative declaration that there is an overwhelming public necessity for the bill and that there is no alternative method of meeting such public necessity.

The bill takes effect upon becoming a law and applies to all claims accruing on or after that date.

This bill substantially amends the following sections of the Florida Statutes: 766.1115 and 768.28.

[1] The catch line for s. 768.28, F.S., reads, "Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions; indemnification; risk management programs."

II. Present Situation:

Sovereign Immunity

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 state or its political subdivisions for the torts of officers, employees, or agents of such governments unless the immunity is expressly waived.

Article X, s. 13, of the Florida Constitution recognizes the concept of sovereign immunity and gives the Legislature the right to waive such immunity in part or in full by general law. Section 768.28, F.S., contains the limited waiver of sovereign immunity applicable to the state.

Under this statute, officers, employees, and agents of the state will not be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Instead, the state steps in as the party litigant and defends against the claim. Subsection (5) limits the recovery of any one person to $100,000 for one incidence and limits all recovery related to one incidence to a total of $200,000.[2] For purposes of this analysis, when the term sovereign immunity is used, it means the application of sovereign immunity and the limited waiver of sovereign immunity as provided in s. 768.28, F.S.

Where the state's sovereign immunity applies, s 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.[3] Sovereign immunity extends to all subdivisions of the state, including counties and school boards.[4]

Whether sovereign immunity applies turns on the degree of control of the agent of the state retained by the state.[5] 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.[6]

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[2] Section 1, ch. 2010-26, Laws of Florida, amended s. 768.28(5), F.S., effective October 1, 2011, to increase the limits to $200,000 for one person for one incidence and $300,000 for all recovery related to one incidence, to apply to claims arising on or after that effective date.

[3] Section 768.28(9)(a), F.S., provides that no officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, *unless* such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

[4] Section 768.28(2), F.S.

[5] *Stoll v. Noel*, 694 So.2d 701, 703 (Fla. 1997).

[6] *Stoll v. Noel*, 694 So.2d 701, 703 (Fla. 1997)(quoting The Restatement of Agency).

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.[7] 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[8] Manual and CMS Consultants 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.[9]

The sovereign immunity recovery caps do not prevent a plaintiff from obtaining a judgment in excess of the caps but the plaintiff cannot recover the excess damages without action by the Legislature.[10] The limits are constitutional.[11] 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."[12]

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,

[7] *Stoll v. Noel*, 694 So.2d 701, 703 (Fla. 1997).
[8] Florida Department of Health and Rehabilitative Services
[9] *Stall v. Noel*, 694 So.2d 701,703 (Fla. 1997).
[10] Section 768.28(5), F.S.
[11] *Berek v. Metropolitan Dade County*, 422 So.2d 838 (Fla. 1982); *Cauley v. City of Jacksonville*, 403 So.2d 379 (Fla. 1981).
[12] *Gerard v. Department of Transportation*, 472 So.2d 1170, 1173 (Fla. 1985).

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.[13]
- A health care entity providing services as part of a school nurse services contract.[14]
- Members of the Florida Health Services Corps who provide medical care to indigent persons in medically underserved areas.[15]
- 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.[16]
- Physicians retained by the Florida State Boxing Commission.[17]
- Health care providers under contract to provide uncompensated care to indigent state residents.[18]
- Health care providers or vendors under contract with the Department of Corrections to provide inmate care.[19]
- 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.[20]
- Professional firms that provide monitoring and inspection services of work required for state roadway, bridge or other transportation facility projects.[21]
- A provider or vendor under contract with the Department of Juvenile Justice to provide juvenile and family services.[22]
- Health care practitioners under contract with state universities to provide medical services to student athletes.[23]

III. Effect of Proposed Changes:

Section 1 creates 16 subsections of non-statutory law providing extensive legislative findings and intent to demonstrate that that there is an overwhelming public necessity for the sovereign

[13] *See* s. 252.51, F.S.
[14] *See* s. 381.0056(10), F.S.
[15] *See* s. 381.0302(11), F.S.
[16] *See* ss. 455.221(3) and 456.009(3), F.S.
[17] *See* s. 548.046(1), F.S.
[18] *See* s. 768.28(9)(b), F.S.
[19] *See* s. 768.28(10)(a), F.S.
[20] *See* s. 768.28(10)(d), F.S.
[21] *See* s. 768.28(10)(e), F.S.
[22] *See* s. 768.28(11)(a), F.S.
[23] *See* s. 768.28(12)(a), F.S.

immunity liability protection in the bill and that there is no alternative method of meeting such public necessity.

Section 2 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 provisions of s. 766.1115, F.S. – the Access to Health Care Act – which was created with legislative intent to ensure that health care professionals who contract to provide free quality medical services to underserved populations of the state as agents of the state are provided sovereign immunity.

Section 3 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.

The 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[24] as agents of a teaching hospital,[25] 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 and 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.

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.

The 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 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 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.[26]

[24] The 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.
[25] 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.
[26] *Supra* note 2.

The bill provides that an employee or agent of a college, university, or its medical school[27] is not personally liable in tort and may not be named as a party defendant in any action arising from the provision of any such patient services except as provided in s. 768.28(9)(a), F.S.[28]

The bill requires that the public teaching hospital, the medical school, or its employees or agents must 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 her or his duties pursuant to the affiliation agreement or other contract is by commencement of an action pursuant to s. 768.28, F.S. In order for the hospital, the medical school, or its employees or agents to fulfill this requirement, the patient or his or her legal representative must acknowledge in writing his or her receipt of the written notice.

The bill provides that an employee providing patient services under s. 768.28(10)(f), F.S., is not made an employee for purposes of the state's workers' compensation statute by virtue of s. 768.28(10)(f), F.S

Section 4 provides that the bill takes effect upon becoming a law and applies to all claims accruing on or after that date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

By designating certain entities as agents of the state, the bill could render those entities subject to provisions of Article I, Section 24, of the Florida Constitution relating to access to public records and meetings. (See section VII. Related Issues.)

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

If immunity from liability is legislatively accorded to a private entity, a potential constitutional challenge would be that the law violates the right of access to the courts. Article I, s. 21, of the Florida Constitution provides that the courts shall be open to all for redress for an injury. To impose a barrier or limitation on litigant's right to file certain

[27] The 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.
[28] *Supra* note 3.

actions, an extension of immunity from liability would have to meet the test announced by the Florida Supreme Court in *Kluger v. White*.[29] Under the test, the Legislature would have to provide a reasonable alternative remedy or commensurate benefit, or make a legislative showing of overpowering public necessity for the abolishment of the right and no alternative method of meeting such public necessity.

However, a substitute remedy does not need to be supplied by legislation that reduces but does not destroy a cause of action. When the Legislature extends sovereign immunity to a private entity, the cause of action is not constitutionally suspect as a violation of the access to courts provision of the State Constitution because the cause of action is not completely destroyed, although recovery for negligence may be more difficult.[30]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The fiscal impact on the private sector is indeterminate.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill does not address what will happen in cases where a patient is unable to provide a written acknowledgment of having received the required notice, e.g. a patient who presents at the hospital emergency room seriously injured, unconscious, or otherwise incapacitated, and no legal representative is available.

In lines 275-289, it is not clear whether the college or university, the medical school, the employees or agents, or all of the above, must enter into the affiliation agreement or contract with the governmental entity in order to invoke the provisions of the bill regarding immunity from liability for torts.

Public Records

The Florida Supreme Court has 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

[29] 281 So.2d 1 (Fla. 1973)
[30] *Id.* at 4.

looked to a number of factors which indicate a significant level of involvement by the public agency:

> 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.[31]

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 an affiliation agreement or other 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.

As noted previously, the bill is not clear whether the college or university, the medical school, the employees or agents, or all of the above, must enter into the affiliation agreement or contract with the governmental entity in order to invoke the provisions of the bill regarding immunity from liability for torts.

However, since one or more private entities (colleges, universities, medical schools, or employees or agents) will contract with the governmental entity under the bill, it could be argued that those private entities that *do* enter into the contract could be 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

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

review specific activities of the corporation on remand to determine whether they involve nongovernmental functions which fall outside the public disclosure requirements.[32]

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

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