

By Senator Storms

10-00408-11

20111948\_\_

1                                   A bill to be entitled  
2       An act relating to abortions; creating s. 390.25,  
3       F.S.; creating the "Pain-capable Unborn Child  
4       Protection Act"; providing legislative findings;  
5       providing definitions; requiring a physician to  
6       determine the probable postfertilization age of an  
7       unborn child before performing or inducing an abortion  
8       or attempting to perform or induce an abortion;  
9       requiring the physician to inquire and conduct  
10      necessary medical examinations to determine the  
11      probable postfertilization age of an unborn child;  
12      providing that a physician is subject to disciplinary  
13      action for failing to determine the probable  
14      postfertilization age of an unborn child before  
15      performing or inducing an abortion or attempting to  
16      perform or induce an abortion; providing exceptions;  
17      requiring a physician who performs or induces or  
18      attempts to perform or induce an abortion to report to  
19      the Department of Health certain information;  
20      requiring the department to issue a public report  
21      providing certain statistics; providing penalties and  
22      disciplinary action; authorizing certain persons to  
23      maintain a cause of action for actual damages against  
24      a person who performed an abortion under certain  
25      conditions; providing a cause of action for injunctive  
26      relief against a person who intentionally violates the  
27      act; providing that the injunction prevent the  
28      abortion provider from performing further abortions in  
29      violation of the act; providing for attorney's fees;

10-00408-11

20111948\_\_

30 prohibiting damages and attorney's fees from being  
31 assessed against the woman upon whom an abortion was  
32 performed or attempted to be performed; providing an  
33 exception; requiring the department to adopt rules to  
34 administer the act; creating s. 92.551, F.S.;

35 requiring that the confidential and exempt status of  
36 the identifying information regarding a woman upon  
37 whom an abortion was performed or attempted be  
38 maintained in court proceedings under certain  
39 conditions; authorizing the defendant to apply to the  
40 trial court for an order of disclosure of the  
41 confidential and exempt information for the purpose of  
42 preparing a defense; prohibiting the defendant from  
43 disclosing the woman's identity to persons other than  
44 the defense attorney; providing a penalty for  
45 disclosing such confidential and exempt information;

46 requiring the use of a pseudonym instead of the  
47 woman's name in court records and proceedings;

48 providing for a waiver of the confidential and exempt  
49 status of the identifying information; authorizing the  
50 publication or broadcast of the substance of the trial  
51 testimony in a civil proceeding or prosecution for an  
52 offense described in the act under certain conditions;

53 providing a penalty; amending ss. 458.331 and 459.015,  
54 F.S.; revising the grounds for disciplinary action  
55 against a physician or an osteopathic physician;

56 providing for severability; providing an effective  
57 date.

58

10-00408-11

20111948\_\_

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

60  
61 Section 1. Section 390.25, Florida Statutes, is created to  
62 read:

63 390.25 Pain-capable unborn child protection.-

64 (1) SHORT TITLE.-This section may be cited as the "Pain-  
65 capable Unborn Child Protection Act."

66 (2) LEGISLATIVE FINDINGS.-The Legislature finds that:

67 (a) At least by 20 weeks after fertilization there is  
68 substantial evidence that an unborn child has the physical  
69 structures necessary to experience pain;

70 (b) There is substantial evidence that, by 20 weeks after  
71 fertilization, an unborn child seeks to evade certain stimuli in  
72 a manner that, in an infant or an adult, would be interpreted as  
73 a response to pain;

74 (c) Anesthesia is routinely administered to unborn children  
75 who have developed 20 weeks or more past fertilization who  
76 undergo prenatal surgery;

77 (d) Even before 20 weeks after fertilization, unborn  
78 children have been observed to exhibit hormonal stress responses  
79 to painful stimuli. Such responses were reduced when pain  
80 medication was administered directly to such unborn children;  
81 and

82 (e) It is the intent of the Legislature to assert a  
83 compelling state interest in protecting the lives of unborn  
84 children during the stage at which substantial medical evidence  
85 indicates that they are capable of feeling pain.

86 (3) DEFINITIONS.-As used in this section, the term:

87 (a) "Abortion" means the use or prescription of any

10-00408-11

20111948

88 instrument, medicine, drug, or other substance or device to  
89 terminate the pregnancy of a woman known to be pregnant with an  
90 intention other than to increase the probability of a live  
91 birth, to preserve the life or health of the child after live  
92 birth, or to remove a dead unborn child who dies as the result  
93 of natural causes in utero, accidental trauma, or a criminal  
94 assault on the pregnant woman or her unborn child, and which  
95 causes the premature termination of the pregnancy.

96 (b) "Attempt to perform or induce an abortion" means an  
97 act, or an omission of a statutorily required act, that, under  
98 the circumstances as the actor believes them to be, constitutes  
99 a substantial step in a course of conduct planned to culminate  
100 in the performance or induction of an abortion.

101 (c) "Department" means the Department of Health.

102 (d) "Fertilization" means the fusion of a human  
103 spermatozoon with a human ovum.

104 (e) "Medical emergency" means a condition that, in  
105 reasonable medical judgment, so complicates the medical  
106 condition of a pregnant woman as to necessitate the immediate  
107 abortion of her pregnancy in order to avert her death or for  
108 which a delay will create a serious risk of substantial and  
109 irreversible physical impairment of a major bodily function. A  
110 condition is a medical emergency if it is based on a claim or  
111 diagnosis that the woman will engage in conduct that would  
112 result in her death or in substantial and irreversible physical  
113 impairment of a major bodily function.

114 (f) "Postfertilization age" means the age of the unborn  
115 child as calculated from the fertilization of the human ovum.

116 (g) "Reasonable medical judgment" means a medical judgment

10-00408-11

20111948\_\_

117 that would be made by a reasonably prudent physician who is  
118 knowledgeable about the case and the treatment possibilities  
119 with respect to the medical conditions involved.

120 (h) "Physician" means any person licensed to practice  
121 medicine under chapter 458 or osteopathic medicine under chapter  
122 459.

123 (i) "Probable postfertilization age of the unborn child"  
124 means the reasonably probable postfertilization age of the  
125 unborn child at the time the abortion is planned to be performed  
126 based upon a physician's reasonable medical judgment.

127 (j) "Unborn child" means an individual organism of the  
128 species Homo sapiens from fertilization until live birth.

129 (k) "Woman" means a female human being whether or not she  
130 has reached the age of majority.

131 (4) PROHIBITION.-

132 (a) Except in the case of a medical emergency that prevents  
133 compliance with this section, an abortion may not be performed  
134 or induced or be attempted to be performed or induced unless the  
135 physician performing or inducing it has first determined the  
136 probable postfertilization age of the unborn child or relied  
137 upon such a determination made by another physician. In making  
138 such a determination, a physician shall make such inquiries of  
139 the woman and perform or cause to be performed such medical  
140 examinations and tests as a reasonably prudent physician,  
141 knowledgeable about the case and the medical conditions  
142 involved, would consider necessary to perform in making an  
143 accurate diagnosis with respect to postfertilization age.

144 (b) A physician who fails to conform to the requirements of  
145 this subsection is subject to disciplinary action under s.

10-00408-11

20111948\_\_

146 458.331 or s. 459.015.

147 (5) EXCEPTIONS.—A person may not perform or induce or  
148 attempt to perform or induce an abortion upon a woman when it  
149 has been determined, by the physician performing or inducing the  
150 abortion or by another physician upon whose determination that  
151 physician relies, that the probable postfertilization age of the  
152 woman's unborn child is 20 or more weeks unless, in reasonable  
153 medical judgment:

154 (a) It is necessary to preserve the life of the unborn  
155 child.

156 (b) The pregnant woman has a condition that so complicates  
157 her medical condition as to necessitate the abortion of her  
158 pregnancy to avert her death or to avert serious risk of  
159 substantial and irreversible physical impairment of a major  
160 bodily function.

161  
162 Such condition does not exist if it is based on a claim or  
163 diagnosis that the woman will engage in conduct that will result  
164 in her death or in substantial and irreversible physical  
165 impairment of a major bodily function. In such a case, the  
166 physician shall terminate the pregnancy in the manner that, in  
167 his or her reasonable medical judgment, provides the best  
168 opportunity for the unborn child to survive, unless, in the  
169 physician's reasonable medical judgment, termination of the  
170 pregnancy in that manner would pose a greater risk of the death  
171 of the pregnant woman or of the substantial and irreversible  
172 physical impairment of a major bodily function of the woman than  
173 would another available method. A greater risk does not exist if  
174 it is based on a claim or diagnosis that the woman will engage

10-00408-11

20111948

175 in conduct that would result in her death or in substantial and  
176 irreversible physical impairment of a major bodily function.

177 (6) PHYSICIAN'S REPORTING REQUIREMENTS.—A physician who  
178 performs or induces or attempts to perform or induce an abortion  
179 shall report to the department within 30 days after the abortion  
180 is performed or induced or attempted to be performed or induced  
181 in accordance with rules adopted by the department:

182 (a) If a determination of probable postfertilization age  
183 was made, the probable postfertilization age determined and the  
184 method and basis of the determination.

185 (b) If a determination of probable postfertilization age  
186 was not made, the basis of the determination that a medical  
187 emergency existed.

188 (c) If the probable postfertilization age was determined to  
189 be 20 or more weeks, the basis of the determination that the  
190 pregnant woman had a condition that so complicated her medical  
191 condition as to necessitate the abortion of her pregnancy to  
192 avert her death or to avert serious risk of substantial and  
193 irreversible physical impairment of a major bodily function, or  
194 the basis of the determination that it was necessary to preserve  
195 the life of the unborn child.

196 (d) The method used for the abortion and, in the case of an  
197 abortion performed when the probable postfertilization age was  
198 determined to be 20 or more weeks, whether the method of  
199 abortion used was one that, in the physician's reasonable  
200 medical judgment, provided the best opportunity for the unborn  
201 child to survive or, if such a method was not used, the basis of  
202 the determination that termination of the pregnancy in that  
203 manner would pose a greater risk of the death of the pregnant

10-00408-11

20111948\_\_

204 woman or the substantial and irreversible physical impairment of  
205 a major bodily function of the woman than would other available  
206 methods.

207 (7) REPORT.—By June 30 of each year, the department shall  
208 issue a public report providing statistics for the previous  
209 fiscal year compiled from all of the reports covering that year  
210 and submitted in accordance with this section for each of the  
211 items listed in subsection (6). Each report shall also provide  
212 the statistics for all previous years during which this section  
213 was in effect, adjusted to reflect any additional information  
214 from late or corrected reports.

215 (8) PENALTIES.—

216 (a) A physician who fails to submit a report within 30 days  
217 after performing or inducing or attempting to perform or induce  
218 an abortion must remit a late fee of \$500 to the department, and  
219 \$500 for each additional 30-day period or portion of a 30-day  
220 period that the report is overdue. A physician who is required  
221 to report in accordance with this section and who has not  
222 submitted a report, or who has submitted an incomplete report  
223 more than 1 year after performing or inducing or attempting to  
224 perform or induce an abortion, may be directed by a court of  
225 competent jurisdiction to submit a complete report within a time  
226 period ordered by the court or be subject to civil contempt. A  
227 physician who fails to conform to the requirements in this  
228 subsection, other than late filing of a report, is subject to  
229 disciplinary action under s. 458.331 or s. 459.015. A physician  
230 who fails to submit a complete report in accordance with a court  
231 order is subject to disciplinary action under s. 458.331 or s.  
232 459.015.



10-00408-11

20111948

233 (b) Intentional or reckless falsification of any report  
234 required under subsection (6) is a noncriminal violation,  
235 punishable by a fine only as provided in s. 775.082 or s.  
236 775.083.

237 (c) Any person who intentionally or recklessly performs or  
238 attempts to perform an abortion in violation of subsection (5)  
239 commits a felony of the third degree, punishable as provided in  
240 s. 775.082, s. 775.083, or s. 775.084. A penalty may not be  
241 assessed against a woman upon whom the abortion is performed or  
242 attempted to be performed.

243 (9) DAMAGES.—

244 (a) A woman upon whom an abortion has been performed in  
245 violation of this section or the father of the unborn child who  
246 was the subject of such an abortion may maintain an action for  
247 actual damages against the person who performed the abortion in  
248 an intentional or a reckless violation of this section.

249 (b) A woman upon whom an abortion has been attempted in  
250 violation of this section may maintain an action for actual  
251 damages against the person who attempted to perform the abortion  
252 in an intentional or a reckless violation of this section.

253 (c) A cause of action for injunctive relief against a  
254 person who has intentionally violated this section may be  
255 maintained by:

256 1. The woman upon whom an abortion was performed or  
257 attempted to be performed in violation of this section.

258 2. A person who is the spouse, parent, sibling, or guardian  
259 of, or a current or former licensed health care provider of, the  
260 woman upon whom an abortion has been performed or attempted to  
261 be performed in violation of this section.

10-00408-11

20111948

262 3. A state attorney who has appropriate jurisdiction.

263 4. The Attorney General.

264  
265 The injunction shall prevent the abortion provider from  
266 performing further abortions in violation of this section.

267 (10) ATTORNEY'S FEES.—

268 (a) If judgment is rendered in favor of the plaintiff in an  
269 action described in this section, the court shall also render  
270 judgment for reasonable attorney's fees in favor of the  
271 plaintiff against the defendant.

272 (b) If judgment is rendered in favor of the defendant and  
273 the court finds that the plaintiff's suit was frivolous and  
274 brought in bad faith, the court shall also render judgment for  
275 reasonable attorney's fees in favor of the defendant against the  
276 plaintiff.

277 (c) Damages or attorney's fees may not be assessed against  
278 the woman upon whom an abortion was performed or attempted to be  
279 performed except as provided in paragraph (b).

280 (11) RULES.—The department shall adopt rules to administer  
281 this section by October 1, 2011.

282 Section 2. Section 92.551, Florida Statutes, is created to  
283 read:

284 92.551 Judicial proceedings and court records involving a  
285 woman upon whom an abortion was performed or attempted.—

286 (1) (a) The confidential and exempt status of information  
287 contained in a report created under s. 390.25(7), criminal  
288 intelligence information, criminal investigative information, or  
289 information in a civil proceeding or action made confidential  
290 and exempt pursuant to s. 119.071(2) (k) must be maintained in

10-00408-11

20111948\_\_

291 court records pursuant to s. 119.0714(1)(h) and in court  
292 proceedings, including testimony from witnesses and exclusion of  
293 certain persons from the criminal or civil proceedings. As used  
294 in this section, the term "woman" means the woman upon whom an  
295 abortion was performed or attempted under s. 390.25.

296 (b) If a petition for access to such confidential and  
297 exempt records is filed with the trial court having jurisdiction  
298 over the alleged offense involving the woman upon whom an  
299 abortion was performed or attempted under s. 390.25, the  
300 confidential and exempt status of such information shall be  
301 maintained by the court if the state, the plaintiff, or the  
302 woman demonstrates that:

303 1. The identity of the woman is not already known in the  
304 community;

305 2. The woman has not voluntarily called public attention to  
306 the offense;

307 3. The identity of the woman has not otherwise become a  
308 reasonable subject of public concern;

309 4. The disclosure of the woman's identity would be  
310 offensive to a reasonable person; and

311 5. The disclosure of the woman's identity would:

312 a. Endanger the woman because of the likelihood of  
313 retaliation, harassment, or intimidation;

314 b. Cause severe emotional or mental harm to the woman;

315 c. Make the woman unwilling to testify as a witness; or

316 d. Be inappropriate for other good cause shown.

317 (2) A defendant charged with a crime described in s.  
318 390.25, may apply to the trial court for an order of disclosure  
319 of information in court records held confidential and exempt

10-00408-11

20111948

320 pursuant to s. 119.0714(1)(h) or maintained as confidential and  
321 exempt pursuant to court order under this section. Such  
322 identifying information concerning the woman upon whom an  
323 abortion was performed or attempted under s. 390.25 may be  
324 released to the defendant or his or her attorney in order to  
325 prepare the defense. The confidential and exempt status of this  
326 information does not prevent the disclosure of the woman's  
327 identity to the defendant; however, the defendant may not  
328 disclose the woman's identity to any person other than the  
329 defendant's attorney or any other person directly involved in  
330 the preparation of the defense. A willful and knowing disclosure  
331 of the identity of the woman to any other person by the  
332 defendant constitutes contempt.

333 (3) The state attorney or a person who brings an action  
334 under s. 390.25(9) must use a pseudonym instead of the woman's  
335 name to designate the woman in all court records and records of  
336 court proceedings, both civil and criminal.

337 (4) The protection of this section may be waived by the  
338 woman of the alleged offense under s. 390.25 in a writing filed  
339 with the court, in which the woman consents to the use or  
340 release of identifying information during court proceedings and  
341 in the records of court proceedings.

342 (5) This section does not prohibit the publication or  
343 broadcast of the substance of trial testimony in a civil  
344 proceeding or action or a prosecution for an offense described  
345 in s. 390.25, but the publication or broadcast may not include  
346 an identifying photograph, an identifiable voice, or the name or  
347 address of the woman, unless the woman has consented in writing  
348 to the publication and filed such consent with the court or

10-00408-11

20111948

349 unless the court has declared such records not confidential and  
350 exempt as provided for in subsection (1).

351 (6) A willful and knowing violation of this section or a  
352 willful and knowing failure to obey any court order issued under  
353 this section constitutes contempt.

354 Section 3. Paragraphs (rr), (ss), and (tt) are added to  
355 subsection (1) of section 458.331, Florida Statutes, to read:

356 458.331 Grounds for disciplinary action; action by the  
357 board and department.—

358 (1) The following acts constitute grounds for denial of a  
359 license or disciplinary action, as specified in s. 456.072(2):

360 (rr) Performing or inducing or attempting to perform or  
361 induce an abortion in violation of the Pain-capable Unborn Child  
362 Protection Act.

363 (ss) Failing to submit a report to the Department of Health  
364 within 30 days after performing or inducing or attempting to  
365 perform or induce an abortion in accordance with the Pain-  
366 capable Unborn Child Protection Act.

367 (tt) Failing to submit a complete report to the Department  
368 of Health in accordance with a court order after performing or  
369 inducing or attempting to perform or induce an abortion.

370 Section 4. Paragraphs (tt), (uu), and (vv) are added to  
371 subsection (1) of section 459.015, Florida Statutes, to read:

372 459.015 Grounds for disciplinary action; action by the  
373 board and department.—

374 (1) The following acts constitute grounds for denial of a  
375 license or disciplinary action, as specified in s. 456.072(2):

376 (tt) Performing or inducing or attempting to perform or  
377 induce an abortion in violation of the Pain-capable Unborn Child

10-00408-11

20111948\_\_

378 Protection Act.

379 (uu) Failing to submit a report to the Department of Health  
380 within 30 days after performing or inducing or attempting to  
381 perform or induce an abortion in accordance with the Pain-  
382 capable Unborn Child Protection Act.

383 (vv) Failing to submit a complete report to the Department  
384 of Health in accordance with a court order after performing or  
385 inducing or attempting to perform or induce an abortion.

386 Section 5. If any provision of this act or its application  
387 to any person or circumstance is held invalid, the invalidity  
388 does not affect other provisions or applications of the act  
389 which can be given effect without the invalid provision or  
390 application, and to this end the provisions of this act are  
391 severable.

392 Section 6. This act shall take effect July 1, 2011.