

Additionally, the bill adds wrongful death claims to the 90-day period for agency action already in place for medical malpractice claims. Thus, if no agency action occurred on a wrongful death claim for 90 days, such inaction would result in an automatic final denial of the claim. Finally, the bill tolls the statute of limitations for wrongful death and medical malpractice claims during the time period provided for agency action.

The bill makes pre-suit notice requirements and limitations on the waiver of sovereign immunity applicable for retaliatory discharge claims under s. 440.205, F.S.

This bill substantially amends section 768.28, Florida Statutes.

II. Present Situation:

Wrongful Death Actions

A wrongful death action is a lawsuit brought on behalf of a decedent's survivors for damages resulting from a tortious injury that caused the decedent's death.¹ The "Florida Wrongful Death Act" is codified in ss. 768.16-768.26, F.S. The Florida Wrongful Death Act provides that when the death of a person is caused by the wrongful act, negligence, default, or breach of contract of any person, the person who would have been liable for injury, if death had not ensued, is still liable for the damages resulting from the tortious conduct.² Furthermore, s. 768.20, F.S., provides that the personal representative of the decedent shall bring the wrongful death action and seek recovery on behalf of the survivors and the decedent's estate. The following damages are recoverable under the Florida Wrongful Death Act:

- Payer of medical and funeral expenses may recover those expenses;
- Surviving spouse, minor children (defined as under 25 years of age³), and all children if there is no surviving spouse, hereafter "survivors", may recover lost value of support and services from date of injury until resulting death;
- Survivors may recover lost value of future support and services;
- Survivors may recover for loss of companionship and mental pain and suffering;
- Parents of deceased minors may recover for mental pain and suffering from the date of injury; and,
- Decedent's estate may recover lost earnings from date of injury to the date of death.⁴

Statutes of Limitations

A statute of limitations is a law that bars legal claims after a specified period of time, usually based on when the injury occurred or was discovered.⁵ These laws are designed to create equity and have a conclusive effect by preventing surprises and disallowing claims that have been allowed to slumber until evidence, memories, and availability of witnesses have eroded.⁶ The

¹ Black's Law Dictionary (9th ed. 2009).

² Section 768.19, F.S.

³ Section 768.18, F.S.

⁴ Section 768.21, F.S.

⁵ Black's Law Dictionary (9th ed. 2009).

⁶ *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944).

theory behind a statute of limitations is that, even if one has a just claim, it is unjust not to put the adversary on notice that he/she must defend that claim within the period of limitation.⁷

Section 786.28, F.S., provides for tort actions against the state and its subdivisions. Section 768.28(14), F.S., creates special limitation periods when the state or one of its subdivisions is the defendant, notably:

Every claim against the state or one of its agencies or subdivisions for damages for a negligent or wrongful act or omission pursuant to this section shall be forever barred unless the civil action is commenced by filing a complaint in the court of appropriate jurisdiction within 4 years after such claim accrues; except that an action for contribution must be commenced within the limitations provided in s. 768.31(4),⁸ and an action for damages arising from medical malpractice must be commenced within the limitations for such an action in s. 95.11(4).

Section 95.11, F.S., sets forth the time limitations for commencing civil actions in Florida. Specifically, s. 95.11(4)(d), F.S., provides that an action for wrongful death must be commenced within 2 years of the death from which the cause of action accrues.

In *Beard v. Hambrick*, 396 So. 2d 708 (Fla. 1981), the Florida Supreme Court held that the 4-year statute of limitations provided in s. 768.28, F.S., is applicable to political subdivisions of the state rather than the 2-year statute of limitations for wrongful death actions provided in s. 95.11(4), F.S. The Court based its holding on a determination that a sheriff's office was an integral part of a "county" as defined in the Florida Constitution and therefore fell within the definition of a "political subdivision" of the state.⁹ The Court found that the Legislature intended there to be one limitations period for all actions brought under s. 768.28, F.S.¹⁰ Therefore, there is currently a 4-year statute of limitations for filing a wrongful death action against the state and its political subdivisions, and there is a 2-year statute of limitations for filing a wrongful death action against anyone other than the state and its political subdivisions.

Notice Requirements for Claims Against the State

Currently, if a claimant wishes to bring an action against the state or one of its subdivisions, then the claimant must give notice to the appropriate agency within 3 years of the claim accruing. Once notice has been given, the agency then has 90 days in the case of medical malpractice claims, and 6 months in all other cases, to take action on the claim. If no agency action occurs during the 6-month or 90-day period, then such inaction constitutes a denial of the claim. Additionally, the statute of limitations continues to run on claims after notice is given and while

⁷ *Id.* at 349.

⁸ Section 768.31 (4), F.S., provides that where there is a judgment for wrongful death against a tortfeasor seeking contribution, any separate action by her or him to enforce contribution must be commenced within one year after the judgment has become final by lapse of time for appeal or after appellate review.

⁹ *Hambrick*, 396 So. 2d at 711-12.

¹⁰ *Id.* at 712.

they are awaiting agency action. No action may be taken against the state or one of its subdivisions prior to the satisfaction of these notice requirements.¹¹

Until recently, the courts had held that actions for retaliatory discharge in Workers' Compensation cases were subject to the pre-suit notice requirements and the caps on the state's waiver of sovereign immunity for torts claims.¹² However, the Supreme Court of Florida recently overruled those cases holding that the Workers' Compensation laws did not specifically mention a pre-suit notice requirement and no dismissal was warranted for failure to comply with pre-suit notice in an action against a special taxing district for retaliatory discharge under s. 440.205, F.S.¹³ Additionally, the court held that ch. 440, F.S., has its own waiver of sovereign immunity for retaliatory discharge because it includes the state and its political subdivisions in the definition of "employer."¹⁴

III. Effect of Proposed Changes:

This bill shortens the statute of limitations for wrongful death actions against the state from 4 years to 2 years. Whereas the Court in *Beard v. Hambrick* held that the 4-year statute of limitations was applicable to wrongful death actions against the state and its subdivisions, this bill would legislatively override that decision and offer only the 2-year statute of limitations, provided for in s. 95.11(4), F.S., in which to file a wrongful death action against the state and its subdivisions.¹⁵ Potentially, shortening the statute of limitations will bar some claims against the state based on the fact that claims filed after the 2-year limitation period will be untimely and dismissed on those grounds.

The bill changes the time that a claimant has to give notice to the appropriate agency of its wrongful death claim to 2 years. The bill also provides that the agency has 90 days from the time that notice is given to take action on the wrongful death claim. If the agency takes no action during that 90-day period, then the agency's inaction constitutes a final denial of the claim. Additionally, the bill provides that the statute of limitations for wrongful death and medical malpractice claims are tolled during the time that the agency has to take action after the claimant gives the agency notice of its claim. This period for agency action could toll the statute of limitations for up to 90 days in wrongful death actions.

The CS limits the government and its subdivisions from liability for retaliatory discharge for filing a Workers' Compensation claim by explicitly stating that sovereign immunity is not waived for these purposes. Additionally, the CS requires the employees suing under the retaliatory discharge provision to comply with the pre-suit notice provisions. Although the first sentence seems to prohibit any waiver of liability, the second presupposes that liability will be waived up to the caps for torts. This second meaning accurately reflects the intent of the language.

¹¹ Section 768.28 (6), F.S.

¹² *Kelley v. Jackson County Tax Collector*, 745 So. 2d 1040 (Fla. 1st DCA 1999); and *Osten v. City of Homestead*, 757 So.2d 1243 (Fla. 3d DCA 2000) but see *Bifulco v. Patient Business & Financial Services, Inc.*, 39 So.3d 1255 (Fla. 2010).

¹³ *Bifulco*, 39 So.3d at 1257-58.

¹⁴ *Id.*

¹⁵ *Hambrick*, at 712.

The bill provides an effective date of July 1, 2011, and applies to causes of action accruing on or after that date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

An estate will have a shorter period of time in which to commence a lawsuit on behalf of the survivors of a person whose death is caused by the wrongful act of the state or one of its subdivisions.

C. Government Sector Impact:

To the extent that a shorter period of time in which to institute litigation against the state or its subdivisions results in fewer wrongful death lawsuits being filed, the state and its subdivisions may potentially benefit fiscally from having fewer judgments entered against them.

The government should see a cost saving from being more insulated from liability claims of wrongful discharge or coercion under s. 440.205, F.S.

Pre-suit notice can help resolve disputes prior to litigation, which can save government and private sector money.

VI. Technical Deficiencies:

The CS reads, "No provision of section, or any other provision of state law, waives the immunity of the state or any of its agencies with regard to claims brought under s. 440.205. Claims brought against the state or any of its agencies pursuant to s. 440.205 must be brought in compliance with this section." The first sentence stating "No provision of this section... waives the immunity..." is in the section that waives immunity for torts and sets caps on the liability. If the intent is to

limit the waiver of liability, and not to eliminate it completely, this language should be revised to better reflect that intent.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Community Affairs on April 11, 2011:

Makes retaliatory discharge claims subject to the pre-suit notice requirements for torts and limits the waiver of sovereign immunity.

CS by Judiciary on March 9, 2011:

The committee substitute amends the original bill in the following ways:

- Changes the statutory period in which a claimant is required to give notice to the appropriate agency of its claim to 2 years;
- Adds wrongful death actions to the 90-day period for agency action that is already in place for medical malpractice actions;
- Adds a provision to the end of s. 768.28(6)(d), F.S., that tolls the statute of limitations during the 90 days that an agency has to take action once notice is given, and applies this provision to wrongful death and medical malpractice claims; and
- Changes the effective date to provide that this bill only applies to causes of action accruing on or after the effective date.

B. Amendments:

None.