

**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.)

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: SB 262

INTRODUCER: Senator Rodriguez and others

SUBJECT: Damages Recoverable by Parents of an Adult Child in Medical Negligence Actions

DATE: January 28, 2022

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Bond	Cibula	JU	<b>Pre-meeting</b>
2.			BI	
3.			RC	

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**I. Summary:**

SB 262 allows a parent to recover damages for mental pain and suffering in a lawsuit against a health care provider whose medical negligence causes the death of an adult child due to medical negligence, provided that the adult child does not have a spouse or a child under 25 years of age. Under existing law, the damages that a parent may recover in these situations are limited to economic damages such as medical and funeral expenses, lost earnings, and the value of lost support and services. Damages for pain and suffering authorized by the bill tend to be unpredictable, but they will likely be much greater than the economic damages available under existing law.

The bill is effective July 1, 2022.

**II. Present Situation:**

Most of the state's tort law is in the common law. At common law, there was no right to recover for the negligent wrongful death of another person.<sup>1</sup> Rights to recover for wrongful death are thus only available to the extent provided by statute. Florida has long had some form of wrongful death statute that authorizes wrongful death actions.

The wrongful death law was substantially re-written in 1972.<sup>2</sup> That law provides the framework of the current law. The amount of damages that a survivor is entitled to depends upon the classification of the survivor. The 1972 law allows all survivors to recover the value of lost support and services. A surviving spouse may also recover loss of marital companionship and pain and suffering. Minor children, then defined as under age 21<sup>3</sup> and unmarried, may also

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<sup>1</sup> *Louisville & Nashville Railroad Co. v Jones*, 45 Fla. 407, 416 (Fla. 1903).

<sup>2</sup> Chapter 72-35, Laws of Fla.

<sup>3</sup> Florida changed the age of majority from 21 to 18 in the following year, but that act did not change the reference to age 21 in the wrongful death law. Section 743.07, F.S.; chapter 73-21, Laws of Fla.

recover loss of parental companionship and pain and suffering. The parents of a deceased minor child may also recover pain and suffering. Any survivor who paid them may recover final medical, funeral and burial expenses. The estate of the decedent may recover lost earnings from date of injury to date of death, plus net accumulations, which is essentially an estimate of the present value of the future estate that would have been available for inheritance.

A 1981 act expanded the definition of “minor children” to include all children of the decedent under age 25, regardless of whether such child is married or dependent.<sup>4</sup> The statutes did not authorize a wrongful death action by a nondependent, adult child for the loss of a parent or an action by a parent for the loss of an adult child.<sup>5</sup>

In 1990, the Legislature expanded the rights to recover for a wrongful death.<sup>6</sup> Specifically, the act added:

- If there is no surviving spouse of the deceased, a wrongful death action by a nondependent, adult child (ages 25 and up) for lost parental companionship, instruction, guidance, and for mental pain and suffering is authorized.<sup>7</sup>
- If there are no survivors (no spouse or children) of a deceased adult child (ages 25 and up), a wrongful death action by a parent for mental pain and suffering is authorized.<sup>8</sup>
- However, neither of these new claims are authorized if the wrongful death action is based on a claim of medical negligence.<sup>9</sup>

In 2000, the Florida Supreme Court issued its opinion in *Mizrahi v. North Miami Medical Center, Ltd.*, a case challenging the constitutionality of the medical negligence exception. The Court found that the exception was rationally related to the need to control the costs of health care and medical malpractice insurance due to a medical malpractice insurance crisis. However, Justice Pariente, in her dissenting opinion, argued that the exception should be found to be unconstitutional because of her belief that the medical malpractice insurance crisis, which initially justified the exception, no longer existed.<sup>10</sup> The Florida Supreme Court later found that the malpractice crisis is over,<sup>11</sup> but that finding does not overrule the ruling in *Mizrahi* that s. 768.21(8), F.S. is constitutional.<sup>12</sup>

Currently, neither an adult (25+) child of an unmarried person who dies due to medical negligence, nor the parents of an adult (25+) child who dies due to medical negligence, may recover pain and suffering damages. They can recover through the estate other damages such as net accumulations, final medical bills, and funeral and burial expenses. Plaintiff’s attorneys

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<sup>4</sup> Chapter 81-183, Laws of Fla.

<sup>5</sup> *Mizrahi v. North Miami Medical Center, Ltd.*, 761 So. 2d 1040, 1042 (Fla. 2000).

<sup>6</sup> Chapter 90-14, Laws of Fla.

<sup>7</sup> Section 768.21(3), F.S.

<sup>8</sup> Section 768.21(4), F.S.

<sup>9</sup> Section 768.21(8), F.S.

<sup>10</sup> *Mizrahi*, *infra*.

<sup>11</sup> *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014). *North Broward Hospital District v. Kalitan*, 219 So. 3d 49 (Fla. 2017).

<sup>12</sup> *Santiago v. Rodriguez*, 281 So. 3d 603 (Fla. 2nd DCA 2019), *rev. dismissed*, 2020 WL 927717 (Fla. 2020).

report that these other damages are insufficient to warrant the cost and time required to prosecute a medical negligence case, and therefore, they commonly refuse to accept such cases.<sup>13</sup>

### **III. Effect of Proposed Changes:**

The bill repeals a portion of the medical malpractice exception to the Wrongful Death Act at s. 768.21(8), F.S. This repeal allows a parent to recover damages for mental pain and suffering from a health care provider whose medical negligence causes the death of an adult child due to medical negligence where the adult child had no other survivors.

The bill takes effect July 1, 2022.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

The bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

#### **B. Public Records/Open Meetings Issues:**

None.

#### **C. Trust Funds Restrictions:**

None.

#### **D. State Tax or Fee Increases:**

None.

#### **E. Other Constitutional Issues:**

None identified.

### **V. Fiscal Impact Statement:**

#### **A. Tax/Fee Issues:**

None.

#### **B. Private Sector Impact:**

SB 262 may provide for wrongful death recoveries by parents that are barred by current law, and may correspondingly increase medical malpractice insurance premiums or

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<sup>13</sup> Fasig Brooks Law Offices, Unfair and Illogical: Florida's Wrongful Death Medical Malpractice Law, <https://www.fasigbrooks.com/2019/02/unfair-and-illogical-floridas-wrongful-death-med/>, last accessed Jan. 11, 2022 (stating that "such limited recovery would not make a malpractice lawsuit financially feasible.").

medical malpractice self-insurance costs of medical providers. Similarly, the availability of damages for mental pain and suffering may provide a sufficient incentive for plaintiff attorneys who work on a contingency-fee basis to pursue more medical negligence lawsuits.

**C. Government Sector Impact:**

The bill may create an indeterminate negative fiscal impact to the state and local governments to the extent that the state or a local government operates or controls a medical care facility. Any such claims, however, would be limited by the state's sovereign immunity limits.<sup>14</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 768.21 of the Florida Statutes.

**IX. Additional Information:**

**A. Committee Substitute – Statement of Changes:**

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

None.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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<sup>14</sup> Section 768.28, F.S.