

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 Committee on Rules

BILL: CS/CS/SB 476

INTRODUCER: Fiscal Policy Committee; Judiciary Committee; and Senator Grall

SUBJECT: Civil Liability for the Wrongful Death of an Unborn Child

DATE: February 23, 2024

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Bond</u>	<u>Cibula</u>	<u>JU</u>	Fav/CS
2.	<u>Bond</u>	<u>Yeatman</u>	<u>FP</u>	Fav/CS
3.	<u>Bond</u>	<u>Twogood</u>	<u>RC</u>	Pre-meeting

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 476 expands Florida’s Wrongful Death Act to allow the parents of an unborn child to recover noneconomic damages for mental pain and suffering from a person who is responsible for the death of the unborn child. However, the mother cannot be sued in a wrongful death action for the death of her unborn child.

The bill is effective July 1, 2024.

II. Present Situation:

Most of the state’s tort law is derived from the common law. At common law, there was no right to recover for the negligent wrongful death of another person.¹ Over time, however, the Legislature authorized recoveries for wrongful death and expanded the types of damages recoverable and the classes of survivors entitled to recover. “Because wrongful death actions did not exist at common law, all claims for wrongful death are created and limited by Florida’s Wrongful Death Act.”²

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

² *Chinghina v. Racik*, 647 So. 2d 289, 290 (Fla. 4th DCA 1994).

History of Wrongful Death Actions

The early versions of the state's wrongful death laws limited the right to recover damages to a surviving spouse, surviving children if there was no surviving spouse, those dependent upon the decedent for support if there was no one belonging to the prior two classes, and finally the executor of the decedent's estate if there was no one belonging to the prior three classes.³ In order to show dependence on the decedent, a claimant had to show that he or she was a minor, physically or mentally disabled, or elderly.⁴ Adults who were mentally and physically capable of providing for themselves could not recover despite having been supported by the decedent.⁵ Any damages recoverable were limited to a form of economic damages.

The wrongful death law was substantially re-written in 1972.⁶ That law created the Florida Wrongful Death Act, which provides the framework for current law. One of the major changes made by this law was to consolidate or merge survival and wrongful death actions.⁷ A survival action is a legal action allowed under the survival statute to continue notwithstanding the plaintiff's death. As merged, the 1972 law allowed the statutory survivors to recover damages for their pain and suffering as a substitute for recoveries for the decedent's pain and suffering under the survival statute.⁸

The type of damages that a survivor is entitled to, under the 1972 law, depends upon the classification of the survivor. The 1972 law allows all survivors to recover the value of lost support and services, a type of economic damages. A surviving spouse may also recover loss of marital companionship and pain and suffering, types of noneconomic damages. Minor children, then defined as under age 21⁹ and unmarried, may also 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.¹⁰ 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.¹¹

³ *Duval v. Hunt*, 34 Fla. 85 (Fla. 1894) (discussing a wrongful death statute enacted in 1883).

⁴ *Id.* at 101-102.

⁵ The Court interpreted the dependency requirement in the statute as requiring a person to have a genuine inability to support himself or herself based on the view that strong, healthy adults who are capable of earning a livelihood should not be content to "live in idleness upon the fruits of [another's] labor." *Id.* at 101.

⁶ Chapter 72-35, Laws of Fla.

⁷ *Sheffield v. R.J. Reynolds Tobacco Co.*, 329 So. 3d 114, 121 (Fla. 2021).

⁸ *Martin v. United Sec. Services, Inc.*, 314 So. 2d 765, 767 (Fla. 1975).

⁹ 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 Florida.

¹⁰ Chapter 81-183, Laws of Fla.

¹¹ *Mizrahi v. North Miami Medical Center, Ltd.*, 761 So. 2d 1040, 1042 (Fla. 2000).

In 1990, the Legislature generally expanded the class of survivors entitled to recover damages for pain and suffering for a wrongful death.¹² As expanded, a decedent's adult children may recover damages for pain and suffering if there is no surviving spouse. The parents of an adult decedent may also recover damages for pain and suffering if there is no surviving spouse or surviving minor or adult children.¹³

Wrongful Death Actions for the Death of an Unborn Child

In 1978 the Florida Supreme Court held that an unborn fetus is not a "person" for purposes of Florida's Wrongful Death Act (Act).¹⁴ Thus, when a person causes the death of an unborn child, the child's parents cannot recover civil damages under the Act for the death.¹⁵

In 1997 the Florida Supreme Court reiterated that "there is no cause of action under Florida's Wrongful Death Act for the death of a stillborn fetus."¹⁶ However, in that same case, the Court recognized a common law action for "negligent stillbirth." The Court emphasized that the damages recoverable in such action are limited to mental pain and anguish and medical expenses incurred incident to the pregnancy, and that such legal action is different from an action under the Wrongful Death Act, as follows:

A suit for negligent stillbirth is a direct common law action by the parents which is different in kind from a wrongful death action. The former is directed toward the death of a fetus while the latter is applicable to the death of a living person. As contrasted to the damages recoverable by parents under the wrongful death statute, the damages recoverable in an action for negligent stillbirth would be limited to mental pain and anguish and medical expenses incurred incident to the pregnancy.¹⁷

Therefore, Florida allows a limited recovery of damages for negligent stillbirth, but it does not recognize a cause of action for wrongful death based on the death of an unborn child.

Florida remains one of six states, including California and New York,¹⁸ that currently do not recognize a cause of action for the wrongful death of an unborn child.¹⁹ Forty-three states currently have some form of cause of action for the wrongful death of an unborn child. These statutes condition recovery based on the viability²⁰ of the child in question.²¹

¹² Chapter 90-14, Laws of Fla.

¹³ *Id.* (amending s. 768.18(3) and (4), F.S.). The adult children were also authorized by the 1990 law to recover noneconomic damages for lost parental companionship, instruction, and guidance.

¹⁴ *Duncan v. Flynn*, 358 So. 2d 178 (Fla. 1978).

¹⁵ *Singleton v. Ranz*, 534 So. 2d 847 (Fla. 5th DCA 1988)(citing *Duncan v. Flynn*, 358 So. 2d 178 (Fla. 1978)).

¹⁶ *Tanner v. Hartog*, 696 So. 2d 705, 706 (Fla. 1997).

¹⁷ *Tanner*, 696 So. 2d at 708-09.

¹⁸ *Rosales v. Northeast Community Clinic*, B276465, 2018 WL 1633068, at *2 (Cal. Ct. App. Apr. 5, 2018); *Endresz v. Friedberg*, 24 N.Y. 2d 478, 484 (N.Y. 1969).

¹⁹ *Stern v. Miller*, 348 So. 2d 303, 307-08 (Fla. 1977); The three other states include Iowa, Maine, and New Jersey. *Dunn v. Rose Way, Inc.*, 333 N.W. 2d 830, 831 (Iowa 1983); *Shaw v. Jendzejec*, 717 A.2d 367, 371 (Me. 1998); *Giardina v. Bennett*, 111 N.J. 412, 421-25 (N.J. 1988).

²⁰ "Viability" is the ability of a developing fetus to survive independent of a pregnant woman's womb. Elizabeth Chloe Romanis, *Is "viability" viable? Abortion, conceptual confusion and the law in England and Wales and the United States*, 7 J. Law. Biosci. (Jan.-Dec. 2020).

²¹ Only Wyoming remains undecided as to whether a cause of action for wrongful death exists as to an unborn child.

Fifteen states afford a cause of action for the wrongful death of an unborn child at any stage of development.²² Several of these states, however, provide an exception so that the mother cannot be sued for the wrongful death of her unborn child.²³

Three states, including Connecticut,²⁴ Georgia,²⁵ and Mississippi,²⁶ allow a wrongful death action to be brought on behalf of an unborn child if the quickening standard is met, which requires fetal movement to have been detected prior to death.²⁷

Twenty-five states allow a cause of action for the wrongful death of an unborn child under a viability standard, which examines whether an unborn child can exist independently outside of the mother's womb.²⁸ Of these 25 states, one state, Indiana, expressly prohibits a wrongful death action if the death of an unborn child is the result of a lawful abortion.²⁹

Finally, one state, Wyoming, remains undecided as to whether a cause of action for wrongful death exists as to an unborn child.³⁰

²² Alabama (*Hamilton v. Scott*, 97 So. 3d 728 (Ala. 2012)); *Mack v. Carmack*, 79 So. 3d 597 (Ala. 2011)); Alaska (Alaska Stat. Ann. § 09.55.585); Arkansas (Ark. Code Ann. § 15-62-102); Illinois (740 Ill. Comp. Stat. Ann. 180/2.2); Kansas (Kan. Stat. Ann. § 60-1901); Louisiana (Louisiana Civil Code Art. 26); Michigan (Mich. Comp. Laws Ann. § 600.2922a); Missouri (Mo. Ann. Stat. § 1.205); Nebraska (Neb. Rev. Stat. § 30-809); Oklahoma (12 Okl. St. Ann. § 1053, OK ST T. 12 § 1053; *Pino v. United States*, 2008 OK 26, 183 P.3d 1001); South Dakota (S.D. Codified Laws §21-5-1); Texas (Tex. Civ. Prac. & Rem. Code § 71.002); Utah (*Carranza v. United States*, 2011 UT 80, 267 P.3d 912); Virginia (Va. Code. Ann. §§8.01-50); West Virginia (*Farley v. Sarti*, 195 W. Va. 671, 681 (1995)).

²³ See Kan. Stat. Ann. § 60-1901; Tex. Civ. Prac. & Rem. Code § 71.003.

²⁴ *Elderkin v. Mahoney*, No. No. CV156056191, 2017 WL 5178583 (Conn. Super. Ct. Sept. 28, 2017).

²⁵ *Porter v. Lassiter*, 91 Ga. App. 712 (1955); *Shirley v. Bacon*, 154 Ga. App. 203 (1980).

²⁶ Miss. Code Ann. § 11-7-13 (2018).

²⁷ Romanis, *supra*, note 20.

²⁸ Arizona (*Summerfield v. Superior Ct. in and for Maricopa County*, 144 Ariz. 467 (Ariz. 1985)); Colorado (*Gonzales v. Mascarenas*, 190 P. 3d 826 (Colo. App. 2008)); Delaware (*Worgan v. Greggo & Ferrera, Inc.*, 50 Del. 258 (Del. Super. Ct. 1956)); Hawaii (*Hawaii Castro v. Melchor*, 137 Hawai'i 179 (Haw. Ct. App. 2016)); Idaho (*Volk v. Baldazo*, 103 Idaho 570 (Idaho 1982)); Indiana (Ind. Code Ann. §34-23-2-1(b)); Kentucky (*Stevens v. Flynn*, No. 2010-CA-00196-MR, 2011 WL 3207952 (Ky. Ct. App. July 29, 2011)); Maryland (*Brown v. Contemporary OB/GYN Assocs.*, 143 Md. App. 199 (Md. Ct. Spec. App. 2002); Md. Code Ann., Cts. & Jud. Proc. §§ 3-902, 3-904); Massachusetts (*Thibert v. Milka*, 419 Mass. 693 (Mass. 1995)); Minnesota (*Pehrson v. Kistner*, 301 Minn. 299 (Minn. 1974)); Montana (*Blackburn v. Blue Mt. Women's Clinic*, 286 Mont. 60 (Mont. 1997)); Nevada (*White v. Yup*, 85 Nev. 527 (Nev. 1969)); New Hampshire (*Wallace v. Wallace*, 120 N.H. 675 (N.H. 1980)); New Mexico (*Miller v. Kirk*, 120 N.M. 654 (N.M. 1995)); North Carolina (*DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489 (1987)); North Dakota (*Hopkins v. McBane*, 359 N.W. 2d 862 (N.D. 1984)); Ohio (*Griffiths v. Doctor's Hosp.*, 150 Ohio App. 3d 234, 2002-Ohio-6173, 780 N.E.2d 603 (2002)); Oregon (*LaDu v. Oregon Clinic, P.C.*, 165 Or. App. 687 (Or. Ct. App. 2000)); Pennsylvania (*Coveleski v. Bubnis*, 535 Pa.166 (Pa. 1993)); Rhode Island (*Miccolis v. AMICA*, 587 A. 2d 67 (R.I. 1991)); South Carolina (*Crosby v. Glasscock Trucking*, 340 S.C. 626 (S.C. 2000)); Tennessee (Tenn. Code Ann. § 2 0-5-106(c)); Vermont (*Vaillancourt v. Med. Ctr. Hosp. Vt., Inc.*, 139 Vt. 38 (Vt. 1980)); Washington (*Baum v. Burrington*, 119 Wash. App.36 (Wash. Ct. App. 2003)); Wisconsin (*Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 34 Wis. 2d 14 (Wis. 1967)).

²⁹ Ind. Code Ann. §34-23-2-1.

³⁰ Wyoming has not determined whether an unborn child is a "person" under the state's Wrongful Death Act. But, the Court has held that an unborn child is not a "minor" for whom guardianship statutes authorize the appointment of a guardian. *Matter of Guardianship of MKH*, 2016 WY 103, 382 P.3d 1096 (Wyo. 2016).

III. Effect of Proposed Changes:

The bill expands Florida's Wrongful Death Act to allow the parents of an unborn child to recover noneconomic damages through the Act for mental pain and suffering from a person who is responsible for the death of their unborn child. The term "unborn child" is "a member of the species *Homo sapiens*, at any stage of development, who is carried in the womb." Thus, the bill authorizes a wrongful death action for an unborn child who is lost at any stage of a pregnancy.

By authorizing a wrongful death action, the parents of the unborn child will not be limited to the damages available under the common law cause of action for negligent stillbirth. The parents, instead, are authorized to recover the full measure of the economic and noneconomic damages available under the Wrongful Death Act. These damages include damages for the parents' mental pain and suffering related to the death and their future mental pain and suffering based on the life expectancy of the parents and the child.

Although the bill authorizes the parents of an unborn child to recover damages for the loss of an unborn child, the bill does not change the requirements of the Wrongful Death Act that the action be brought by the court-appointed personal representative.³¹

The bill specifies that the mother of the unborn child is not liable in a wrongful death action for the death of her unborn child.³²

The bill is effective July 1, 2024.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

³¹ See s. 768.20, F.S. (stating that the "action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate all damages"). See also s. 733.301(1)(b), F.S., which establishes an order of preference for appointing personal representatives for intestate estates (persons who die without a will).

³² Nothing in the bill appears to authorize a lawsuit for the death of an unborn child as the result of an abortion that is lawfully and non-negligently performed with the informed consent of the mother.

E. Other Constitutional Issues:

None apparent.

V. **Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may increase private insurance rates to the extent that this bill provides for tort claim recoveries that are not paid under current law.

C. Government Sector Impact:

None.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

None.

VIII. **Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 768.18, 768.19, and 768.21.

IX. **Additional Information:**

A. Committee Substitute – Statement of Substantial Changes:

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

CS/CS by Fiscal Policy on February 15, 2024:

The committee substitute defined the term “unborn child” by cross-reference to s. 775.021(5)(e), F.S., which defines the term to mean “a member of the species *Homo sapiens*, at any stage of development, who is carried in the womb.” Accordingly, the bill with the amendment, will clarify that a wrongful death action is authorized for the loss of an unborn child at any stage of a pregnancy.

CS by Judiciary on February 5, 2024:

The committee substitute added the limitation whereby the mother is not liable for the death of her unborn child and removed a provision limiting certain recoveries where the wrongful death of the unborn child was due to medical negligence.

B. Amendments:

None.

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