HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/CS/HB 385 Medical Malpractice
SPONSOR(S): Government Operations Appropriations Subcommittee; Judiciary Committee; Civil Justice Subcommittee; Gaetz; Renuart and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1506

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	10 Y, 2 N, As CS	Bond	Bond
2) Judiciary Committee	11 Y, 2 N, As CS	Bond	Havlicak
3) Government Operations Appropriations Subcommittee	8 Y, 3 N, As CS	Keith	Topp
4) Health & Human Services Committee			

SUMMARY ANALYSIS

This bill allows a prospective defendant in a medical malpractice action to interview a claimant's health care providers without the presence of the claimant if the prospective defendant provides 10 days notice of the intent to interview.

This bill provides that a plaintiff in a medical negligence action must prove by clear and convincing evidence that the failure of a health care provider to order, perform, or administer supplemental diagnostic tests is a breach of the standard of care.

This bill does not appear to have a fiscal impact on state or local governments.

CS/CS/CS/HB 385 provides an effective date of upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Medical Malpractice Actions - In General

In general, a person has a common law cause of action against another for personal injury occasioned by the other's negligence. The term "medical malpractice" refers to personal injury lawsuits related to negligence committed by medical professionals. Negligence actions in general are governed by ch. 768, F.S.; medical malpractice actions are also governed by ch. 766, F.S.

Standard of Proof in Medical Malpractice Cases Relating to Supplemental Diagnostic Tests

Section 766.102(4), F.S., provides that the "failure of a health care provider to order, perform, or administer supplemental diagnostic tests shall not be actionable if the health care provider acted in good faith and with due regard for the prevailing professional standard of care."

Section 766.102, F.S., provides that a claimant in a medical negligence action must prove by "the greater weight of the evidence" that actions of the health care provider represented a breach of the prevailing professional standard of care. Greater weight of the evidence means the "more persuasive and convincing force and effect of the entire evidence in the case."[1]

Other statutes, such as license disciplinary statutes, require a heightened standard of proof called "clear and convincing evidence." Clear and convincing evidence has been described as follows:

> [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.[2]

Section 766.111, F.S., prohibits a health care provider from ordering, procuring, providing, or administering unnecessary diagnostic tests.

The bill provides that the claimant in a medical negligence case where the death or injury resulted from a failure of a health care provider to order, perform, or administer supplemental diagnostic tests must prove that the health care provider breached the standard of care by clear and convincing evidence. This bill would have the effect of making such claims more difficult to prove. Standards of proof in other medical negligence cases would remain unchanged.

Interviews with Treating Health Care Providers in Medical Malpractice Cases

Background

Section 766.203(2), F.S., requires a claimant (a prospective medical malpractice plaintiff) to investigate whether there are any reasonable grounds to believe that a health care provider was negligent in the care and treatment of the claimant and whether such injury resulted in injury to the claimant prior to issuing a presuit notice. The claimant must corroborate reasonable grounds to initiate medical negligence litigation by submitting an affidavit from a medical expert.[3] After completion of presuit

[1] *Castillo v. E.I. Du Pont De Nemours & Co., Inc.*, 854 So.2d 1264, 1277 (Fla. 2003).
[2] *Inquiry Concerning Davey*, 645 So.2d 398, 404 (Fla. 1994)(quoting *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. 4th DCA 1983).
[3] Section 766.203(2), F.S.

investigation, a claimant must send a presuit notice to each prospective defendant.[4] The presuit notice must include a list of all known health care providers seen by the claimant for the injuries complained of subsequent to the alleged act of negligence, all known health care providers during the 2-year period prior to the alleged act of negligence who treated or evaluated the claimant, and copies of all of the medical records relied upon by the expert in signing the affidavit.[5] However, the requirement of providing the list of known health care providers may not serve as grounds for imposing sanctions[6] for failure to provide presuit discovery.[7]

Once the presuit notice is provided, no suit may be filed for a period of 90 days. During the 90-day period, the statute of limitations is tolled and the prospective defendant must conduct an investigation to determine the liability of the defendant.[8] Once the presuit notice is received, the parties must make discoverable information available without formal discovery.[9] Informal discovery includes:

1. Unsworn statements - Any party may require any other party to appear for the taking of an unsworn statement.

2. Documents or things - Any party may request discovery of documents or things.

3. Physical and mental examinations - A prospective defendant may require an injured claimant to appear for examination by an appropriate health care provider. Unless otherwise impractical, a claimant is required to submit to only one examination on behalf of all potential defendants.

4. Written questions - Any party may request answers to written questions.

5. Unsworn statements - The claimant must execute a medical information release that allows a prospective defendant to take unsworn statements of the claimant's treating health care providers. The claimant or claimant's legal representative has the right to attend the taking of such unsworn statements.[10]

Section 766.106(7), F.S., provides that a failure to cooperate during the presuit investigation may be grounds to strike claims made or defenses raised. Statements, discussions, documents, reports, or work product generated during the presuit process are not admissible in any civil action and participants in the presuit process are immune from civil liability arising from participation in the presuit process.[11]

At or before the end of the 90 days, the prospective defendant must respond by rejecting the claim, making a settlement offer, or making an offer to arbitrate in which liability is deemed admitted, at which point arbitration will be held only on the issue of damages.[12] Failure to respond constitutes a rejection of the claim.[13] If the defendant rejects the claim, the claimant can file a lawsuit.

[4] Section 766.106(2)(a), F.S.
[5] Section 766.106(2)(a), F.S.
[6] Sanctions can include the striking of pleadings, claims, or defenses, the exclusion of evidence, or, in extreme cases, dismissal of the case.
[7] Section 766.106(2)(a), F.S.
[8] Section 766.106(3), (4), F.S.
[9] Section 766.106(6)(a), F.S. The statute also provides that failure to make information available is grounds for dismissal of claims or defenses.
[10] Section 766.106(6), F.S.
[11] Section 766.106(5), F.S.
[12] Section 766.106(3)(b), F.S.
[13] Section 766.106(3)(c), F.S.

Ex Parte Interviews with Physicians by Defense Counsel

In many civil cases, counsel for any party can meet with any potential witness who is willing to speak without notice to the opposing counsel. In 1984, the Florida Supreme Court ruled that there was no common law or statutory privilege of confidentiality as to physician-patient communications[14] and that there was no prohibition on defense counsel communicating with a claimant's physicians. In 1988, the Legislature enacted a statute to create a physician-patient privilege.[15] The current version of the statute provides, in relevant part:

> Except as otherwise provided in this section and in s. 440.13(4)(c), [patient medical records] may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient.[16]

The statute provides some exceptions to the confidentiality in medical malpractice cases but the Florida Supreme Court has ruled that defense counsel are barred by the statute from having an ex parte conference with a claimant's current treating physicians.[17]

The Governor's Select Task Force on Healthcare Professional Liability Insurance noted problems caused by the inability of defense counsel to interview a claimant's treating physicians:

> [T]he defendant is frequently in the position of having to investigate the plaintiff's medical history or current condition in order to discover other possible causes of the plaintiff's injury that could be used in defending the action. In addition, this information is often useful in determining the strength of the plaintiff's case, which the defendant could use to decide whether to settle the claim or proceed to trial. It is often necessary to interview several of the plaintiff's treating healthcare providers in order to acquire this information. But, because formal discovery is an expensive and time consuming process, defendants are often unable to adequately gather this information in preparation of their defense.[18]

Opponents of allowing defendants access to ex parte interviews with treating physicians argued the system was not broken. The report continued:

> The problem the Legislature corrected was the private, closed-door meetings between insurance adjusters, defense lawyers, and the person being sued. Typically, the person being sued would speak with his or her colleagues and say "I need your help here. I'm getting sued. I need you to help me out on either the causation issue or the liability issue or the damage issue.
>
> The present system is not broken. Crafting language to go back prior to 1988, to allow unfettered access, is not appropriate. To allow a situation where a defense lawyer or an insurance adjuster and the doctor go to see a patient's treating physician on an informal basis would further drive a wedge between that physician and the patient.[19]

In 2003, the Legislature amended s. 706.106, F.S., to require a claimant to execute a medical information release to allow prospective defendants to take unsworn statements of the claimant's treating physician on issues relating to the personal injury or wrongful death during the presuit process. The claimant and counsel are entitled to notice, an opportunity to be heard, and to attend the taking of

[14] See *Coralluzzo v. Fass*, 671 So.2d 149 (Fla. 1984).
[15] Chapter 88-208, L.O.F.
[16] Section 456.057(7)(a), F.S.
[17] *See Acosta v. Richter*, 671 So.2d 149 (Fla. 1996).
[18] *Report of the Governor's Select Task Force on Healthcare Professional Liability Insurance* (2003) at p. 231. The Report can be accessed at www.doh.state.fl.us/myflorida/DOH-Large-Final%20Book.pdf (last accessed January 26, 2012).
[19] *Id.* at 233 (internal footnotes omitted).

the statement. The legislation did not provide for ex parte interviews by defense counsel with a claimant's treating physicians.[20]

Effect of the Bill - Interviews

This bill provides that a prospective defendant or his or her legal representative may interview the claimant's treating health care providers without the presence of the claimant or the claimant's legal representative. This bill provides that a prospective defendant or his or her representative must provide the claimant with 10 days notice prior such interview.

Effective Date of this Bill

The bill is effective upon becoming law, and applies to causes of action that accrue on or after that date.

B. SECTION DIRECTORY:

Section 1 amends s. 766.102, F.S., regarding medical negligence, standards of recovery.

Section 2 amends s. 766.106, F.S., regarding notice before filing an action for medical negligence.

Section 3 provides an effective date of upon becoming law and applies to causes of action that accrue on or after that date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The bill does not appear to have a fiscal impact on state government.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   The bill does not appear to have a fiscal impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may lower the cost to physicians for obtaining medical malpractice insurance coverage, and may lower possible recoveries by persons injured due to medical malpractice.

D. FISCAL COMMENTS:

None.

[20] Chapter 2003-416, Laws of Florida.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

B. RULE-MAKING AUTHORITY:

The bill does not provide any new rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On December 7, 2011, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment created a means for a physician to opt out of sovereign immunity, and to opt back in. The amendment also changed the "relating to" clause of the title.

On January 27, 2012, the Judiciary Committee adopted a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute adds podiatrists and dentists to the definition of "emergency health care provider," which definition controls who is covered by sovereign immunity. The committee substitute also added provisions on interviews with treating physicians and the burden of proof required in a claim of negligent failure to order a diagnostic test. This analysis is written to the proposed committee substitute adopted by the Judiciary Committee.

On February 13, 2012, the Government Operations Appropriations Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment maintained the language previously in the bill related to medical negligence, standards of recovery as well as the notice requirement before filing an action for medical negligence and removed the language relating to sovereign immunity. This analysis is written to the committee substitute as adopted by the Government Operations Appropriations Subcommittee.