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 Judiciary

BILL:	CS/SB 248
INTRODUCER:	Judiciary Committee, Senator Yarborough and others
SUBJECT:	Medical Negligence
DATE:	January 23, 2024
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Bond	Cibula	JU	**Fav/CS**
2.			AHS	
3.			RC	

I. Summary:

CS/SB 248 expands the application of the Florida Wrongful Death Act by repealing exceptions that prohibit certain parents and children of a deceased patient who dies due to medical negligence from recovering noneconomic damages.

The bill also enacts limits on non-economic damages that apply to all actions for medical negligence. The limits applicable to negligence by a practitioner are $500,000 per claimant; but limited to $150,000 if the care was related to emergency services and the claimant and practitioner had no existing patient-practitioner relationship, or limited to $300,000 per claimant if services were provided to a Medicaid recipient and not provided in a wrongful manner. The limits applicable to a nonpractitioner are $750,000 per claimant; but are limited to $300,000 per claimant if the nonpractitioner is a hospital or ambulatory surgical center, services were provided to a Medicaid recipient, and the services were not provided in a wrongful manner.

The bill also requires the Office of Insurance Regulation to examine the medical malpractice premium rates in light of the changes made in this bill, and requires insurers to furnish relevant data to the office. The bill requires the Office of Program Policy Analysis and Government Accountability to study the efficacy of the limits on noneconomic damages created by the bill and issue a report of its findings and recommendations by December 31, 2029.

The bill is effective July 1, 2024, and applies to causes of action accruing on or after that date.

II. Present Situation:

History of Wrongful Death Actions

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]

The early versions of the state's wrongful death laws limited the right to recover damages to a surviving spouse, to surviving children if there was no surviving spouse, and to those dependent upon the decedent for support if there was no one belonging to the prior two classes, and finally to the executor of the decedent's estate if there was no one belonging from the prior three classes.[3] 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 21[9] 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

[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).
[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 Fla.

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]

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]

However, the same law that expanded the class entitled to recover damages for pain and suffering for a wrongful death precluded the additional class members from recovering those damages for a wrongful death based on medical malpractice.[14] Thus, a narrower group of survivors may recover damages for pain and suffering for a wrongful death that is caused by medical malpractice, and a broader group may recover damages for pain and suffering for death that is caused by all other forms of negligence.

In a 2000 opinion, the Florida Supreme Court found the medical negligence exception constitutional.[15] 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.[16] The Florida Supreme Court later found that the malpractice crisis was over,[17] but that finding did not overrule the ruling that the medical negligence exceptions are constitutional.[18]

Current Effect of the Medical Negligence Exceptions to the Wrongful Death Law

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 noneconomic damages (commonly referred to as "pain and suffering damages"). They may, however, recover through the estate economic damages such as net accumulations, final medical bills, and funeral and burial expenses. Plaintiff's attorneys report that these other

[10] Chapter 81-183, Laws of Fla.
[11] *Mizrahi v. North Miami Medical Center, Ltd.*, 761 So. 2d 1040, 1042 (Fla. 2000).
[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] *Id.* (amending s. 768.18(8), F.S.).
[15] *Mizrahi v. North Miami Medical Center, Ltd.*, 761 So. 2d 1040, 1042 (Fla. 2000).
[16] *Id.*
[17] *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014). *North Broward Hospital District v. Kalitan*, 219 So. 3d 49 (Fla. 2017).
[18] *Santiago v. Rodriguez*, 281 So. 3d 603 (Fla. 2nd DCA 2019), *rev. dismissed*, 2020 WL 927717 (Fla. 2020).

damages are often insufficient to warrant the cost and time required to prosecute a medical negligence case.[19]

Medical Negligence Actions

Procedures for a Medical Negligence Action

Medical negligence claims are subject to statutory presuit screening and investigation requirements.[20] A claimant may, and typically does, request the relevant medical records, which must be furnished by the medical providers at a reasonable charge.[21] The claimant must then conduct a reasonable investigation of the claim and obtain a written opinion from a medical expert that malpractice occurred.[22] The claimant may then serve a notice of intent to initiate litigation on every prospective defendant. The suit may not be filed until at least 90 days after service of the notice.[23] During the 90 days, the parties must engage in pretrial discovery[24] and the prospective defendant must conduct an investigation.[25] If not resolved in the 90 days, the claimant may file suit. When filing the suit, the attorney must file a certificate that he or she has reviewed the evidence and has a good faith belief that a medical negligence case is warranted.[26] Failure of the claimant to pursue the pretrial process constitutes grounds for a dismissal of the claim. A failure of any party to the action to cooperate with the presuit process may be grounds to strike any claim or defense raised by the non-cooperative party.[27] After the presuit requirements are met, a claim of medical negligence generally proceeds through the court system like any other tort action.

General Statutory Limits on Noneconomic Damages in Medical Negligence Actions

Current statutes establish limits on an award of noneconomic damages in a medical negligence action. As will be discussed shortly hereafter, these statutory limits are not currently enforced by the courts. It is important to note that these limits do not limit an award of economic damages. Economic damages include lost wages, medical expenses, and any other form of actual out-of-pocket expense. The only limit on an award of economic damages is reasonableness.

The limits on noneconomic damages in a medical negligence action vary based on the status of the negligent party and in some instances are based on the relationship between the provider and the patient. For purposes of the limits, a negligent party is classified as either a "practitioner" or a "nonpractitioner," which are defined as:

- A "practitioner" includes any person licensed as a physician, physician assistant, osteopathic physician, chiropractor, podiatrist, naturopath, optometrist, dentist, midwife, physical

[19] 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. 8, 2024 (stating that "such limited recovery would not make a malpractice lawsuit financially feasible").
[20] Sections 766.104, 766.106 and 766.203, F.S.
[21] Sections 766.104(3) and 766.204, F.S.
[22] Sections 766.104(1) and 766.203(2), F.S.
[23] Section 766.106(4), F.S.
[24] Section 766.106(6) and 766.205, F.S.
[25] Section 766.203(3), F.S.
[26] Section 766.104(1), F.S.
[27] Section 766.106(7), F.S.

therapist, or advanced practice registered nurse. The term "practitioner" also means any association, corporation, firm, partnership, or other business entity under which such practitioner practices or any employee of such practitioner or entity acting in the scope of his or her employment. For the purpose of determining the limitations on noneconomic damages set forth in this section, the term "practitioner" includes any person or entity for whom a practitioner is vicariously liable and any person or entity whose liability is based solely on such person or entity being vicariously liable for the actions of a practitioner.[28]

- The term "nonpractitioner" is not defined in statute nor in case law. It appears to reference any individual or entity liable for medical negligence that does not fall within the definition of "practitioner."

A medical negligence claim against a practitioner is limited as follows: In general, noneconomic damages may not exceed $500,000 per claimant, and no individual practitioner is liable for more than $500,000 in noneconomic damages, regardless of the number of claimants.[29] However:

- The total noneconomic damages recoverable from all practitioners, regardless of the number of claimants, is $1 million if:
  - The negligence resulted in a permanent vegetative state or death; or
  - The trial court determines that a manifest injustice would occur unless increased noneconomic damages are awarded, based on a finding that because of the special circumstances of the case, the noneconomic harm sustained by the injured patient was particularly severe; and the trier of fact determines that the defendant's negligence caused a catastrophic injury to the patient.[30]
- If the practitioner was providing emergency services and care to a patient who does not have a then-existing patient-practitioner relationship with that practitioner, then:
  - Regardless of the number of practitioner defendants, noneconomic damages may not exceed $150,000 per claimant, and
  - The total noneconomic damages recoverable by all claimants from all practitioners may not exceed $300,000.[31]
- If the practitioner was providing medical services to a Medicaid recipient, regardless of the number of such practitioner defendants providing the services and care, noneconomic damages may not exceed $200,000 per claimant, unless the claimant pleads and proves, by clear and convincing evidence, that the practitioner acted in a wrongful manner, in which case damages may not exceed $300,000.[32]

For purposes of the Medicaid exception, the term "wrongful manner" means acting "in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property."[33]

A medical negligence claim against a nonpractitioner is limited as follows: In general, noneconomic damages may not exceed $750,000 per claimant, and no individual nonpractitioner

[28] Section 766.118(1)(c), F.S.
[29] Section 766.118(2)(a), F.S.
[30] Section 766.118(2)(b), F.S.
[31] Section 766.118(4), F.S.
[32] Section 766.118(6), F.S.
[33] Section 766.118(6)(c), F.S.

is liable for more than $750,000 in noneconomic damages, regardless of the number of claimants.[34] However:

- The total noneconomic damages recoverable by such claimant from all nonpractitioner defendants may not exceed $1.5 million if:
  - The negligence resulted in a permanent vegetative state or death, or
  - The trial court determines that a manifest injustice would occur unless increased noneconomic damages are awarded, based on a finding that because of the special circumstances of the case, the noneconomic harm sustained by the injured patient was particularly severe; and the trier of fact determines that the defendant's negligence caused a catastrophic injury to the patient.[35]
- If the nonpractitioner was a hospital or ambulatory surgical center providing medical services to a Medicaid recipient, regardless of the number of such nonpractitioner defendants providing the services and care, noneconomic damages may not exceed $200,000 per claimant, unless the claimant pleads and proves, by clear and convincing evidence, that the practitioner acted in a wrongful manner, in which case damages may not exceed $300,000.[36]

These limits are commonly referred to as a "per incident" limit as opposed to a "per claimant" limit. These limits are in current statutes but are not enforced because appellate court decisions have ruled them unconstitutional.

Leading Florida Cases finding the General Limits on Noneconomic Damages in Medical Negligence Litigation to be Unconstitutional

In *McCall*, the court found that the limits on noneconomic damages in medical negligence litigation that were created by the Legislature's choice of "per incident" limits rather than "per claimant" limits[37] violated the Equal Protection Clause of the state constitution,[38] finding that:

> The plain language of this statutory plan irrationally impacts circumstances which have multiple claimants/survivors differently and far less favorably than circumstances in which there is a single claimant/survivor and also exacts an irrational and unreasonable cost and impact when, as here, the victim of medical negligence has a large family, all of whom have been adversely impacted and affected by the death.[39]

Three years later, the Florida Supreme Court in *Kalitan* again ruled the limits unconstitutional, this time in a single claimant case. Again using the rational basis test of Equal Protection analysis, the court ruled that "the arbitrary caps are not rationally related to alleviating the purported medical malpractice crisis."[40]

[34] Section 766.118(3)(a), F.S.
[35] Section 766.118(3)(b), F.S.
[36] Section 766.118(6), F.S.
[37] *Est. of McCall ex rel. McCall v. United States*, 642 F.3d 944, 951 (11th Cir. 2011), certified question answered sub nom. *Est. of McCall v. United States*, 134 So. 3d 894 (Fla. 2014)
[38] Article I, s. 2, FLA. CONST.
[39] *Est. of McCall v. United States*, 134 So. 3d 894, 901–02 (Fla. 2014).
[40] *N. Broward Hosp. Dist. v. Kalitan*, 219 So. 3d 49, 58 (Fla. 2017).

Criticism of McCall and Kalitan

It appears that *McCall* and *Kalitan* were decided contrary to legislative intent and contrary to case law interpreting the equal protection clauses of the United States Constitution and the State Constitution. They also are inconsistent with the decisions of other courts addressing limits on damages.

The criticism of *McCall* starts in the opinion itself. The opinion is very weak on its face, with only two justices signing onto the primary opinion, with three others concurring in the result only. Indeed, the three concurring justices said:

> [We] disagree with the plurality's application of the rational basis test in this case. Specifically, [our] primary disagreement is with the decision not to afford deference to the legislative findings in the absence of a showing that the findings were "clearly erroneous." *Univ. of Miami v. Echarte*, 618 So.2d 189, 196 (Fla. 1993).
>
> Although this Court is not bound to blindly defer to all legislative findings, [we] disagree with the plurality's independent evaluation and reweighing of reports and data, including information from legislative committee meetings and floor debate, as well as an article published in the Palm Beach Post newspaper, as part of its review of whether the Legislature's factual findings and policy decisions as to the alleged medical malpractice crisis were fully supported by available data. See, e.g., plurality op. at 908–10 (Lewis, J.) (quoting from the legislative floor debate and committee meeting testimony and reviewing studies); id. at 910–11 (citing to and quoting from a newspaper article and quoting additional legislative committee testimony and floor debate).[41]

The dissent in *McCall* went further, pointing out that the majority failed to honor the ordinary standards for Equal Protection analysis by a court, saying:

> Under a 'rational basis' standard of review a court should inquire only whether it is conceivable that the regulatory classification bears some rational relationship to a legitimate state purpose[:]
>
> > The burden is upon the party challenging the statute or regulation to show that there is no conceivable factual predicate which would rationally support the classification under attack. Where the challenging party fails to meet this difficult burden, the statute or regulation must be sustained.
>
> *Fla. High Sch. Activities Ass'n v. Thomas*, 434 So.2d 306, 308 (Fla. 1983); see also *Westerheide v. State*, 831 So.2d 93, 112 (Fla. 2002). It is not the judiciary's task under the rational basis standard "to determine whether the legislation achieves its intended goal in the best manner possible, but only whether the goal is legitimate and the means to achieve it are rationally related to the goal." *Loxahatchee River*

[41] *Est. of McCall v. United States*, 134 So. 3d 894, 916–17 (Fla. 2014).

> *Envtl. Control Dist. v. Sch. Bd. of Palm Beach Cnty.*, 496 So.2d 930, 938 (Fla. 4th DCA 1986).[42]

Similarly, the criticism of *Kalitan* starts in the opinion itself. The dissent noted:

> The majority just discards and ignores all of the Legislature's work and fact-finding. But, under our constitutional system, it is the Legislature, not this Court, that is entitled to make laws as a matter of policy based upon the facts it finds. See art. II, § 3, Fla. Const.; art. III, § 1, Fla. Const. It is the Legislature's task to decide whether a medical malpractice crisis exists, whether a medical malpractice crisis has abated, and whether the Florida Statutes should be amended accordingly. For a majority of this Court to decide that a crisis no longer exists, if it ever existed, so it can essentially change a statute and policy it dislikes, improperly interjects the judiciary into a legislative function.[43]

The U.S. Supreme Court has said that legislative findings should be given great deference by the courts when deciding on the constitutionality of a law being challenged on equal protection grounds. The standard is:

> We many times have said, and but weeks ago repeated, that rational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. Nor does it authorize the judiciary to sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, a legislature that creates these categories need not actually articulate at any time the purpose or rationale supporting its classification. Instead, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.
>
> A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. A statute is presumed constitutional, and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality. The

[42] *McCall* at 927.
[43] *Kalitan*, at 63 (Polston, dissenting).

> problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.[44]

Medical Negligence Cases and Offers to Arbitrate

In addition to the general limits on medical negligence that apply to all medical negligence cases, which limits are not enforced by the courts, current law contains different limits on noneconomic damages in medical malpractice cases that are. The limits apply where the parties agree to binding arbitration of the claim.[45] Either party may offer arbitration, the other has 30 days to reply.[46] If the parties agree to arbitration, noneconomic damages are limited to $250,000 per incident, and are calculated on a percentage basis with respect to capacity to enjoy life, so that a finding that the claimant's injuries resulted in a 50-percent reduction in his or her capacity to enjoy life would warrant an award of not more than $125,000 noneconomic damages.[47] Future economic damages are paid in periodic payments, and the defendant must pay the plaintiff's attorney fees.[48] Other provisions not relevant to this analysis apply. If a defendant refuses a plaintiff offer for arbitration and thereafter loses at trial, the defendant is additionally liable to the plaintiff for reasonable attorney's fees.[49] If a plaintiff rejects a defendant's offer of binding arbitration, the plaintiff is limited to noneconomic damages of no more than $350,000 per incident.[50]

The Florida Supreme Court has found these limits on noneconomic damages to be constitutional in *Echarte*[51] (access to courts challenge) and *Phillipe*[52] (equal protection challenge).

Issues Related to Medical Malpractice Litigation and Florida's Unlimited Liability System

High Premiums in Florida

The Florida Office of Insurance Regulation (OIR) publishes an annual report regarding medical malpractice insurance. In the report, the OIR examined the top 10 states for physician malpractice. The report found that for the year 2022 "Florida is the highest of the 10 states in seven of the eight examples and ranked third as far as premiums go in the other scenario."[53] For a typical $1 million policy, the OIR found:

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[44] *Heller v. Doe by Doe*, 509 U.S. 312, 319–21 (1993) (internal citations and quote marks removed).
[45] See generally, ss. 766.207, 766.208 and 766.209, F.S.
[46] Section 766.207(3), F.S.
[47] Section 766.207(7)(b), F.S.
[48] Sections 766.207(7)(c) and (7)(f), F.S.
[49] Section 766.209(3), F.S.
[50] Section 766.209(4), F.S.
[51] *Univ. of Miami v. Echarte*, 618 So. 2d 189, 190 (Fla. 1993).
[52] *St. Mary's Hospital, Inc. v. Phillipe*, 769 So. 2d 961 (Fla. 2000).
[53] Florida OIR, *Medical Malpractice Financial Information, Closed Claim Database and Rule Filings Annual Report - October 1, 2023*, at p. 53.

Summary of Results for Territories with the Highest Rates				
Physician	**State Rank**	**State**	**Territory**	**Premium**
Family Practitioner	1	Florida	Miami-Dade	$ 52,173
	10	Texas	El Paso, Webb	$ 9,185
Emergency Room	1	Florida	Miami-Dade	$ 112,624
	10	Texas	El Paso, Webb	$ 16,074
Orthopedist	1	Florida	Miami-Dade	$ 141,919
	10	Texas	El Paso, Webb	$ 26,637
Obstetrician	1	Florida	Miami-Dade	$ 237,535
	10	Texas	El Paso, Webb	$ 42,710

Summary of Results for Territories with the Lowest Rates				
Physician	**State Rank**	**State**	**Territory**	**Premium**
Family Practitioner	1	Florida	remainder of FL	$ 27,031
	10	New York	rural	$ 4,243
Emergency Room	1	Florida	remainder of FL	$ 57,755
	10	Texas	rural	$ 8,374
Orthopedist	1	Florida	remainder of FL	$ 72,780
	10	Texas	rural	$ 13,877
Obstetrician	1	New Jersey	entire state	$ 132,301
	3	Florida	remainder of FL	$ 121,813
	10	Texas	rural	$ 22,250

A private study confirmed this finding that medical professional liability insurance premiums in Miami-Dade County appear to be the highest in the country.[54] Another study showing rates in all 50 states confirms that Miami-Dade County leads the nation in 2023 medical malpractice insurance rates for Internal Medicine, General Surgery, and OB/GYN.[55]

In 2015, the cost of defending a medical malpractice claim in Florida was 2.9 times the national average and, in 2014, the average amount of a malpractice payment in Florida was $299,800, compared to a national average of $242,000.[56]

Supply of Healthcare Professionals

The United States is facing a health care workforce shortage.[57] Much of the state is considered a Health Care Professional Shortage Area and/or a Medically Underserved Area.[58] Between 2019 and 2035, a report estimates that while physician supply will increase by 6 percent overall and by 3 to 4 percent for primary care, the demand for physician services in Florida will grow by 27

[54] Guardado J., *Prevalence of Medical Liability Premium Increases Unseen Since 2000s Continues for Fourth Year in a Row.* (American Medical Association; 2023), at p. 10. https://www.ama-assn.org/system/files/prp-mlm-premiums-2022.pdf.
[55] *Annual Rate Survey Issue*, Medical Liability Monitor, vol. 48, no. 10 (October 2023).
[56] Cunningham Group, *Brief History and other important facts of medical malpractice insurance in Florida* https://www.cunninghamgroupins.com/medical-malpractice-insurance-by-state/florida
[57] See, The Florida Senate, *Bill Analysis and Fiscal Impact Statement for CS/SB 7016* (Jan. 16, 2024), pp. 2-3.
[58] *Id.* at pp. 3-7.

percent.[59] Physician supply can be affected in part by the litigation climate of the state relative to other states. One study found that limits on noneconomic damages "increase total physician supply in the least densely-populated areas by 3-5 percent. This effect appears to be driven by a relative increase in the supply of specialists by 10-12 percent, with no effect on the supply of general practice physicians."[60] Another similarly found a positive correlation between limits on noneconomic damages and physician supply.[61]

A 2010 study from Northwestern University found that

> [h]alf of all graduating medical residents or fellows trained in Illinois leave the state to practice medicine elsewhere, in large part due to the medical liability environment in Illinois . . . . Many of these new graduates cite Illinois' toxic medical malpractice environment as a major reason. The Illinois Supreme Court's decision to lift the liability caps seems to send the message that the potential for litigation supersedes the need for residents of Illinois to get needed health care.[62]

Defensive Medicine

Defensive medicine refers to the practice of some medical providers who, fearing liability, order unnecessary tests or procedures to avoid the appearance of committing medical negligence. This drives up health care costs. Estimates of the cost of defensive medicine may be as high as 5 to 9 percent of all healthcare expenditures.[63] On the other hand, there is little evidence that a greater malpractice risk improves patient outcomes.[64]

Effectiveness of Limits on Noneconomic Damages in Medical Negligence Cases

In first enacting the limits in 2003, the Legislative findings included: "The Legislature finds that the high cost of medical malpractice claims can be substantially alleviated by imposing a limitation on noneconomic damages in medical malpractice actions."[65]

A 2019 study examining California's long-standing limit on noneconomic damages in medical negligence cases found that such limits reduce overall health care costs by reducing the incentive to litigate weak claims, limiting the average size of liability awards, and reducing the incentive for health care providers to order costly and medically unnecessary tests and procedures that do not benefit the patient (commonly referred to as "defensive medicine").[66]

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[59] *Florida Statewide and Regional Physician Workforce Analysis: 2019 to 2035: 2021 Update to Projections of Supply and Demand*, at V.
[60] Matsa, *Does Malpractice Liability Keep the Doctor Away? Evidence from Tort Reform Damage Caps*, J.LegalStud. 2007:36(2). Note that general practice physicians have relatively low rates because they are rarely sued for malpractice.
[61] Encinosa, *Have State Caps on Malpractice Awards Increased the Supply of Physicians?* (May 2005), Health Aff. (Millwood). 2005;24:250-258.
[62] Marla Paul, *Graduating Doctors Flee Illinois, Cite Malpractice Policy*, NORTHWESTERN NOW (Nov. 11, 2020), https://www.northwestern.edu/newscenter/stories/2010/11/doctors-flee-illinois.html.
[63] Kessler, *Do doctors practice defensive medicine?* Q J Econ. 1996;111(2):353-390
[64] Bilimoria, *Relationship between state malpractice environment and quality of health care in the United States*. Jt Comm J Qual Patient Saf. 2017;43(5):241-250.
[65] Section 1, ch. 2003-416, Laws of Fla.
[66] Hamm, *MICRA and Access to Health Care*, Berkley Research Group (May 2019), at pp. 3-5.

III. Effect of Proposed Changes:

The bill expands the application of the Florida Wrongful Death Act by repealing exceptions that prohibit certain parents and children of a deceased patient who dies due to medical negligence from recovering noneconomic damages. The bill provides that, where a wrongful death occurs as a result of medical negligence, a decedent's adult children may recover noneconomic damages if there is no surviving spouse and provides that the parents of an adult decedent may recover noneconomic damages if there is no surviving spouse or surviving minor or adult children.

The bill amends the medical negligence law to enact limits on recovery of noneconomic damages in a medical negligence action. The bill makes Legislative findings to support the policy behind the bill:

> WHEREAS, the Legislature finds that expanding the right to recover noneconomic damages for wrongful death caused by medical negligence furthers an important state interest of promoting accountability and adherence to the applicable standards of care, and
>
> WHEREAS, the Legislature further recognizes that the expansion of the right to recover damages must be balanced against the important state interests of minimizing increases in the cost of malpractice insurance and promoting the availability of quality health care services, and
>
> WHEREAS, the Legislature finds that limitations on noneconomic damages in medical negligence cases further the critical state interest in promoting the affordability and availability of health care services, and
>
> WHEREAS, the Legislature finds that the cases of *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014) and *North Broward Hospital District v. Kalitan*, 219 So. 3d 49 (Fla. 2017), which invalidated limits on noneconomic damages, were decided contrary to legislative intent and prior case law interpreting the equal protection clauses of the United States Constitution and the State Constitution, and
>
> WHEREAS, the cases of *Estate of McCall v. United States* and *North Broward Hospital District v. Kalitan* are inconsistent with the decisions of other courts addressing limits on damages, and
>
> WHEREAS, the Legislature finds that the state has the highest medical malpractice insurance premiums in the nation and is in a sustained and continuing crisis of affordability with respect to the price of medical malpractice insurance, and
>
> WHEREAS, the Legislature finds that having the highest medical malpractice insurance premiums in the nation is causing physicians to practice medicine without malpractice insurance, begin medical careers in other states, pursue opportunities to practice in other states, abstain from performing high-risk procedures in this state, or retire early from the practice of medicine, and

WHEREAS, the Legislature finds that the crisis of having the highest medical malpractice insurance premiums in the nation threatens the quality and availability of health care services for everyone in this state, and

WHEREAS, the Legislature finds that the rapidly growing population and the changing demographics of this state make it imperative for the state to have a legal environment that helps to attract and retain physicians, and

WHEREAS, the Legislature finds that there is an overpowering public necessity to ensure that physicians practice medicine in this state, and

WHEREAS, the Legislature finds that there is also an overpowering public necessity to enact policies that prevent medical malpractice insurance premiums from being unaffordable and continuing at crisis levels, and

WHEREAS, the Legislature finds that limitations on noneconomic damages in medical negligence cases further the public necessities of making quality health care available to the residents of this state, ensuring that physicians practice medicine in this state, and ensuring that those physicians have the opportunity to purchase affordable medical malpractice insurance.

A medical negligence claim against a practitioner is limited by the bill as follows:

- If the practitioner was providing emergency services and care to a patient who does not have a then-existing patient-practitioner relationship with that practitioner, then noneconomic damages may not exceed $150,000 per claimant.
- If the practitioner was providing medical services to a Medicaid recipient outside of the emergency services definition, noneconomic damages may not exceed $300,000 per claimant, except that this limit does not apply if the claimant proves that the nonpractitioner acted in a wrongful manner.
- In all other instances, noneconomic damages against a practitioner may not exceed $500,000 per claimant.

A medical negligence claim against a nonpractitioner is limited by the bill as follows:

- If the nonpractitioner was providing emergency services and care, noneconomic damages may not exceed $750,000 per claimant.
- If the nonpractitioner was a hospital or ambulatory surgical center and was providing medical services to a Medicaid recipient outside of the emergency services definition, noneconomic damages may not exceed $300,000 per claimant, except that this limit does not apply if the claimant proves that the nonpractitioner acted in a wrongful manner.
- In all other instances, noneconomic damages against a nonpractitioner may not exceed $750,000 per claimant.

The bill directs the Office of Insurance Regulation (OIR) to require every medical malpractice insurer and every medical malpractice insurer rate filing made with the OIR on or after January 1, 2025, to reflect the projected changes in claim frequency, claim severity, and loss adjustment expenses, including for attorney fees, and any other change actuarially indicated, due to the

combined effect of the applicable provisions of this bill to ensure that rates for such insurance accurately reflect the risk of providing such insurance. Additionally, the OIR must consider in its review of rate filings made on or after January 1, 2025, the projected changes in costs associated with the changes made by this bill. The OIR may develop methodology and data that incorporate generally accepted actuarial techniques and standards to be used in its review of rate filings governed by this section. The methodology must account for the expected losses, by class, of insureds covered by medical malpractice insurance, provided the methodology is consistent with generally accepted actuarial techniques and standards. Such methodology and data are not intended to create a mandatory rate increase or decrease for all medical malpractice insurers, but rather to ensure that the rates for such coverage are not inadequate, excessive, or unfairly discriminatory and allow such insurers a reasonable rate of return.

The bill requires the Office of Program Policy Analysis and Government Accountability (OPPAGA) to study the efficacy of the statutory caps imposed by the bill on noneconomic damages in actions for personal injury or wrongful death arising from medical negligence. The office may retain experts as are reasonably necessary to complete the study. The study must include, but need not be limited to, an evaluation of the current, historical, and forecast data of the following:

- The availability, affordability, and volatility of professional liability insurance coverage for medical negligence.
- The per capita supply of licensed physicians in this state, including those in high-risk specialties that may include, but are not limited to, internal medicine, general surgery, and obstetrics and gynecology.
- The extent to which physicians in this state are forced to practice medicine without professional liability insurance, leave the state, refrain from practice in high-risk specialties, or retire early from the practice of medicine.
- Evidence of the relationship between the statutory caps and changes in the matters addressed in the preceding.

By December 31, 2029, OPPAGA must submit a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives which includes findings from its study and recommendations as to whether the statutory caps on noneconomic damages should be retained, modified, or eliminated.

The bill takes effect July 1, 2024.

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:

Litigants in both *McCall* and *Kalitan* argued that the Access to Courts provision of the State Constitution, as interpreted by the *Kluger* decision, was an alternative ground to invalidate the limits on noneconomic damages. Florida's Access to Courts clause reads: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."[67] In 1973, the Florida Supreme Court in *Kluger* interpreted the Access to Courts clause to mean that:

> where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to [s. 2.01, F.S.], the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[68]

The *Kluger* opinion cites to no authority for this broad interpretation of the clause other than an old legal encyclopedia.[69] This form of broad interpretation of an access to courts clause has been criticized "[a]s a substantive limit on the legislature, the remedies provision seems to lead to a type of judicial supremacy that is incompatible with representative government."[70]

Nevertheless, the case is currently binding precedent, even if questionable. The Legislative findings of the bill conform the bill to *Kluger's* requirements by providing that the current circumstances create an overpowering public necessity for limiting noneconomic damages in medical negligence cases.

[67] Article I, s. 21, FLA.CONST.
[68] *Kluger v. White*, 281 So.2d 1, 3 (Fla. 1973).
[69] The case cites to Corpus Juris Secundum, 16A C.J.S. Constitutional Law s 710, pp. 1218—1219. The current relevant CJS article is at 16D C.J.S. Constitutional Law § 2415.
[70] Bauman, *Remedies Provisions in State Constitutions and the Proper Role of the State Courts*, 26 WAKE FOREST L. REV. 237, 241 (1991).

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may provide for wrongful death recoveries by parties that are barred by current law, and may correspondingly increase medical malpractice insurance premiums or 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.

The bill may limit noneconomic damages in the larger medical negligence lawsuits, limiting recovery by those injured persons (and limiting related contingency-based attorney fees) and lowering costs to insurers. It is anticipated that lowered medical malpractice premiums will allow free market economic forces to lower malpractice insurance rates which would ultimately benefit consumers.[71]

C. Government Sector Impact:

The bill may create an indeterminate negative fiscal impact on 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.[72] The bill may create an indeterminate positive fiscal impact on the state and local governments to the extent that the bill's effects positively impact malpractice premium rates and the supply of medical practitioners.

The bill will likely temporarily increase the workload of the state courts system.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

[71] CRC Group, *Medical Malpractice Claims Trends* (2023)("While it may seem that large verdicts paid out by companies with deep pockets and high insurance limits balance the scales of justice, in actuality, massive settlements or judgments increase hardship for many consumers and insureds. As loss ratios climb higher, insurance premiums generally rise because carriers charge prices today that are intended to cover the claims they'll pay tomorrow. So, as insurance companies pay for massive awards, they balance the loss by narrowing coverage terms, expanding deductibles, and raising premiums until they achieve a profit or leave the line of business, which can impact the availability of liability coverage. All of these costs are ultimately borne by consumers and insureds who must find a way to pay for rate increases, bigger deductibles or retentions, and assume uninsured liability risks.").

[72] Section 768.28, F.S.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 400.023, 400.0235, 429.295, 766.118, and 768.21.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on January 22, 2024:
The CS removes from the bill the limited ability for certain parents of a deceased child or for certain adult children of a deceased parent, to sue for wrongful death resulting from medical negligence. The amendment, instead, broadly repeals the medical negligence exceptions to the Wrongful Death Act, thereby allowing a decedent's adult children or parents of a deceased adult child to recover damages for their pain and suffering in a wrongful death action related to medical negligence where such recovery is otherwise allowed pursuant to the Wrongful Death Act. The CS also removes a provision applicable to all wrongful death actions that if a death is caused by medical negligence, the negligent health care provider must reimburse the estate for medical bills paid and must forgo collection of any outstanding balance.

In addition to repealing the medical negligence exceptions, the CS adds limits on non-economic damages that apply to all actions for medical negligence, and adds requirements for future studies examining the effects of the limitations on noneconomic damages created by the bill.

B. Amendments:

None.