

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Judiciary Committee

BILL: CS/SB 1974

SPONSOR: Judiciary Committee and Senator Posey

SUBJECT: Pregnancy/Loss/Negligence of Another

DATE: April 25, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/CS</u>
2.	_____	_____	<u>BI</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This committee substitute clarifies that when a prenatal death lawsuit is filed under existing statutory authority based on negligence, other than for medical negligence actions, certain evidence is admissible in court.

Characteristics of the fetus are admissible in court, including the gender and name selected, circumstances surrounding the pregnancy loss, and references to the child as a son or daughter.

This committee substitute creates section 768.38, Florida Statutes.

II. Present Situation:

Case Law

In *Tanner v. Hartog*, plaintiff parents sued a doctor and health care center for a negligence stillbirth.¹ The court held that a cause of action for the loss of a fetus is not authorized under Florida's Wrongful Death statute, as a fetus is not considered a "person" under the interpretation of that statute.² Additionally, prior to a recovery for damages based on emotional distress, the impact rule requires a sufficient showing that the emotional stress suffered is the result of physical injuries that the plaintiff suffered in an impact.³ The court ruled that the application of the impact rule is generally inappropriate to cases involving primarily emotional damages, and

¹ 696 So.2d 705, 706 (Fla. 1997).

² *Id.* at 706.

³ *Id.* at 707.

therefore, a cause of action exists for expectant parents for the loss of a fetus.⁴ Still, the court limited recovery to mental pain and suffering and medical costs related to pregnancy.⁵

The court in *Kammer v. Hurley* considered the specific evidence that is admissible in a negligence stillbirth case.⁶ As the mental state of the parents is at issue in an emotional damages case, the court reasoned, references by the plaintiffs to “their son,” “their child,” and the name they selected, as well as testimony that the plaintiffs eagerly anticipated his birth, are appropriate and admissible.⁷

The Fourth District Court of Appeal declined to extend the narrowly carved negligent stillbirth exception to the impact rule for a case involving a fetus estimated to be between fifteen and eighteen weeks old.⁸ Here, the court held that in a negligent infliction of emotional distress case, the exception only relates to wrongful stillbirth, reiterating the intent of the *Tanner* court to provide a narrow application.⁹

III. Effect of Proposed Changes:

This committee substitute provides a legislative finding that current law does not adequately address legal actions based on negligence relating to a prenatal death.

Recoverable damages include mental pain and suffering.

In a court proceeding, characteristics of the fetus are admissible, including the gender and name selected, references to the child as a son or daughter, and circumstances surrounding the pregnancy loss.

This committee substitute takes effect upon becoming a law, and applies to all actions in which a stillbirth occurs after the effective date of the act.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

⁴ *Id.* at 708.

⁵ *Id.* at 709.

⁶ 765 So.2d 975 (Fla. 4th DCA 2000).

⁷ *Id.* at 978.

⁸ *Thomas v. Ob/Gyn Specialists of the Palm Beaches, Inc.*, 889 So.2d 971, 972 (Fla. 4th DCA 2004).

⁹ *Id.* at 972.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

VIII. Summary of Amendments:

None.

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