

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 19 Liability for Termination of Pregnancies  
**SPONSOR(S):** Civil Justice & Claims Subcommittee; Grall and others  
**TIED BILLS:** None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee	10 Y, 6 N, As CS	Stranburg	Bond
2) Health Quality Subcommittee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

There is no cause of action in common law or current statutory law that is specific to termination of pregnancy. There are, however, causes of action for wrongful acts that may occur during an abortion. For instance, common law allows a claimant to sue for battery or intentional infliction of emotional distress; and statutory law allows actions for medical malpractice and wrongful death. In most tort actions, an injured person may recover damages, but not attorney's fees. In medical malpractice tort actions, regardless of the legal theory, claimants must go through presuit investigation and informal discovery, and may be subject to court ordered arbitration before being allowed to file suit.

The bill creates a statutory civil cause of action for a woman injured as a result of an abortion, or who suffers emotional distress as a result of the physician's failure to obtain informed consent prior to an abortion. The signing of an informed consent form by the woman does not bar a cause of action pursuant to this section. The cause of action is not a claim for medical malpractice and the requirements of medical malpractice claims do not apply to this cause of action. This cause of action does not bar any other applicable cause of action regarding abortion procedures. A prevailing plaintiff is entitled to reasonable attorney's fees and costs. Damages available to this cause of action include all special and general damages recoverable in intentional tort, negligence, survival, or wrongful death claims.

The statute of limitations for a common law tort action is 4 years. The general limitation on personal injury or wrongful death arising from medical negligence is 2 years from the incident giving rise to the action or discovery of the incident. The limitations period for the cause of action created by this bill is 4 years from the injury or 4 years from the time the woman knew or should have known of the injury. A suit pursuant to this cause of action may not be commenced later than 10 years after the time of the incident giving rise to the injury. The limitations periods are tolled while a woman is a minor.

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

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### *Florida Tort Actions Related to a Termination of Pregnancy*

There is no statutory or common law cause of action specific to termination of pregnancy. There are, however, statutory and common law causes of action whereby an injured person may sue for damages resulting from a termination of pregnancy. Statutory law creates civil causes of action for medical malpractice<sup>1</sup> and wrongful death.<sup>2</sup> Common law creates causes of action such as negligence,<sup>3</sup> assault,<sup>4</sup> battery,<sup>5</sup> and intentional infliction of emotional distress.<sup>6</sup> In any tort claim, the basic elements necessary are a legal duty, breach of that duty, causation between the breach of the duty and the injury, and actual damage.<sup>7</sup> In each of these actions, the injured party may recover economic and non-economic damages, but not attorney's fees.

In Florida, "an intentional tort is one in which [a person] exhibits a deliberate intent to injure or engages in conduct which is substantially certain to result in injury or death."<sup>8</sup> A defendant will be held liable for an intentional tort if the plaintiff's injuries were the natural and probable consequence of the defendant's intended actions.<sup>9</sup> In addition to being liable for economic and non-economic damages, a defendant who commits an intentional tort may be liable for punitive damages.<sup>10</sup>

Any action for personal injury or wrongful death arising from medical negligence is subject to the requirements of ch. 766, F.S.<sup>11</sup> Any such action is subject to a statute of limitations of 2 years from the time of the incident or 2 years from the time the incident is discovered.<sup>12</sup> An action may not be brought more than 4 years after the date of the incident, except for an action brought on behalf of a minor on or before the child's eighth birthday.<sup>13</sup> Assault, battery, and other intentional torts are subject to a four year statute of limitations.<sup>14</sup> The statute of limitations for a cause of action may be tolled in limited circumstances while a person entitled to sue is under the age of 18, but in no case will the tolling extend a statute of limitations beyond 7 years.<sup>15</sup>

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<sup>1</sup> ch. 766, F.S.

<sup>2</sup> The Florida Wrongful Death Act is at ss. 768.16-.26, F.S.

<sup>3</sup> *Mascheck, Inc. v. Mausner*, 264 So. 2d 859, 861 (Fla. 3d DCA 1972) ("Negligence is the failure to use that degree of care, diligence and skill that is one's legal duty to use in order to protect another person from injury.")

<sup>4</sup> *Lay v. Kremer*, 411 So. 2d 1347, 1349 (Fla. 1st DCA 1982) ("Assault is defined as an intentional, unlawful offer of corporal injury to another by force, or force unlawfully directed toward another under such circumstances as to create a fear of imminent peril, coupled with the apparent present ability to effectuate the attempt.")

<sup>5</sup> *Paul v. Holbrook*, 696 So. 2d 1311, 1312 (Fla. 5th DCA 1997) ("A battery consists of the infliction of a harmful or offensive contact upon another with the intent to cause such contact or the apprehension that such contact is imminent.")

<sup>6</sup> *Gallogly v. Rodriguez*, 970 So. 2d 470 (Fla. 2d DCA 2007); see *Johnson v. Thigpen*, 788 So. 2d 410, 412 (Fla. 1st DCA 2001) (In order to state a cause of action for intentional infliction of emotional distress, the plaintiff must demonstrate that: 1) the wrongdoer acted recklessly or intentionally; 2) the conduct was extreme and outrageous; 3) the conduct caused the plaintiff's emotional distress; and 4) plaintiff's emotional distress was severe.)

<sup>7</sup> 55 Fla. Jur 2d Torts § 2 (2015).

<sup>8</sup> *Boza v. Carter*, 993 So. 2s 561, 562 (Fla. 1st DCA 2008) (quoting *D'Amario v. Ford Motor Co.*, 806 So. 2d 424, 438 (Fla. 2001)).

<sup>9</sup> 55 Fla. Jur 2d Torts § 6 (2015).

<sup>10</sup> s. 768.72, F.S.

<sup>11</sup> s. 766.104, F.S.

<sup>12</sup> s. 95.11(4)(b), F.S.

<sup>13</sup> *Id.*

<sup>14</sup> s. 95.11(3)(o), F.S.

<sup>15</sup> s. 95.051(1)(i), F.S.

In general, a person has a common law cause of action against another for personal injury caused by the other's negligence. The term "medical malpractice" refers to any personal injury or wrongful death tort action, regardless of legal theory, arising from negligence committed by medical professionals.<sup>16</sup> Negligence actions in general are governed by ch. 768, F.S.; medical malpractice actions are also governed by ch. 766, F.S.

Medical malpractice lawsuits have a number of differences from other negligence lawsuits. A claimant (prospective medical malpractice plaintiff) must 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 treatment resulted in injury to the claimant.<sup>17</sup> After completion of the presuit investigation, a claimant must send a presuit notice to each prospective defendant.<sup>18</sup> This notice includes lists of healthcare providers seen before and after the alleged act of negligence and the medical records relied upon by the corroborating expert in the presuit investigation.<sup>19</sup> Once the presuit notice is received, all parties must make discoverable information available for a period of informal discovery.<sup>20</sup>

At any time in an action for recovery of damages for medical malpractice, the court may require, upon motion by either party, that the claim be submitted to nonbinding arbitration.<sup>21</sup> Upon selection of the arbitrators, the hearing must be scheduled within 60 days after the date of selection, provided there has been at least 20 days notice to the parties.<sup>22</sup> The decision of the panel is nonbinding.<sup>23</sup> If the parties accept the decision, the decision is be deemed to be a settlement of the case and the case is dismissed with prejudice.<sup>24</sup> After the arbitration award is rendered, any party may demand a trial de novo in circuit court.<sup>25</sup>

The Florida Patient's Compensation Fund may pay a portion of a medical malpractice claim.<sup>26</sup> Hospitals are required to join the fund and other health care providers may choose to join the Fund.<sup>27</sup> The Fund covers up to a limit selected by the member for actual damages in a suit.<sup>28</sup> The Fund does not cover punitive damages from a medical malpractice suit.<sup>29</sup>

Medical malpractice actions are subject to a general 2 year statute of limitations from the time of the incident giving rise to the action or discovery of the incident, whichever is later.<sup>30</sup> If fraud, concealment, or intentional misrepresentation of fact concealed the injury, the period of limitations is extended forward 2 years from the time the injury is discovered or should have been discovered, but not to exceed 7 years from the date of the incident giving rise to the injury.<sup>31</sup>

### Effect of Proposed Changes

The bill creates s. 390.035, F.S., relating to the termination of pregnancies. The bill creates a cause of action for a woman who suffers injury or death as a result of an abortion or emotional distress based on the physician's failure to obtain the woman's informed consent before the abortion. The bill provides

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<sup>16</sup> s. 766.104(1), F.S.

<sup>17</sup> s. 766.203(2), F.S.

<sup>18</sup> s. 766.106(2)(a), F.S.

<sup>19</sup> *Id.*

<sup>20</sup> s. 766.106(6), F.S.

<sup>21</sup> s. 766.107(1), F.S.

<sup>22</sup> s. 766.107(3), F.S.

<sup>23</sup> s. 766.107(4), F.S.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> s. 766.105(3), F.S.

<sup>27</sup> s. 766.105(2), F.S.

<sup>28</sup> *Id.*

<sup>29</sup> s. 766.105(2)(b), F.S.

<sup>30</sup> s. 95.11(4)(b), F.S.

<sup>31</sup> *Id.*

that the signing of an informed consent form does not bar the woman from bringing a claim pursuant to this section.

The bill provides that this claim is not a claim for medical malpractice and ch. 766, F.S., does not apply. The presuit investigation and notice, informal discovery, and court ordered arbitration required by ch. 766, F.S., therefore, do not apply to these claims. The Florida Patient's Compensation Fund will not cover any part of damages awarded in claims filed pursuant to this section.

The cause of action created by the bill does not bar any other statutory or common law cause of action otherwise available regarding an injury from abortion procedures or diminish the nature or extent of those causes of action, including medical malpractice. Therefore, the cause of action created in the bill is in addition to any other statutory or common law cause of action.

The bill provides a 4 year statute of limitations from the time of the injury or from the time the woman discovered or should have discovered the injury, whichever is longer. In no case will the limitations period extend beyond 10 years from the time of the incident. The limitations periods in the bill are tolled while the woman is a minor.

A prevailing plaintiff in an action pursuant to this bill is entitled to reasonable attorney's fees and costs.

The cause of action created by the bill provides that damages includes all special and general damages recoverable in an intentional tort, negligence, survival, or wrongful death claim, including actual and punitive damages.

**B. SECTION DIRECTORY:**

Section 1 creates s. 390.035, F.S., relating to liability for acts related to a termination of pregnancy

Section 2 provides an effective date of July 1, 2017.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

The bill does not appear to have any impact on local revenues.

2. Expenditures:

The bill does not appear to have any impact on local expenditures.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill creates a cause of action that may financially benefit women who have been harmed by an abortion procedure, and correspondingly cause providers to pay the judgment. The Florida Patient's Compensation Fund will not pay these claims. Depending upon the terms of an insurance contract, medical malpractice insurance might not pay these claims.

**D. FISCAL COMMENTS:**

None.

### 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:

Florida's constitutional right to privacy is "clearly implicated" in a woman's decision whether to terminate her pregnancy.<sup>32</sup> The Florida Supreme Court has repeatedly held that burdens on abortion must meet the compelling state interest standard in order to comply with the Florida Constitution.<sup>33</sup>

*Roe v. Wade* established the fundamental right to abortion under the U.S. Constitution.<sup>34</sup> After the U.S. Supreme Court's decision in *Planned Parenthood v. Casey*, this fundamental right is evaluated under the U.S. Constitution using the undue burden test.<sup>35</sup> A law governing abortion is struck down as an undue burden "if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability."<sup>36</sup>

Constitutional law cases regarding abortion are mostly related to laws creating various regulatory burdens on abortion. For civil causes of action, courts in other states have ruled that civil causes of action based on strict liability constitute an undue burden on the right to an abortion.<sup>37</sup> There have been no Florida case rulings on the constitutionality of a specific cause of action regarding abortion.

#### B. RULE-MAKING AUTHORITY:

The bill does not appear to create rulemaking authority or a need for rulemaking.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 9, 2017, the Civil Justice & Claims Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute differs from the bill as filed by removing comparative negligence language, matching statutes of limitations of minors and adults, and adding tolling of the statute of limitations while a woman is a minor. This analysis is drafted to the committee substitute as passed by the Civil Justice & Claims Subcommittee.

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<sup>32</sup> *In re T.W.*, 551 So. 2d 1186, 1192.

<sup>33</sup> *North Fla. Women's Health & Counseling Servs., Inc. v. Florida*, 866So. 2d 612, 620-21 (Fla. 2003); *In re T.W.*, 551 So. 2d 1186.

<sup>34</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>35</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

<sup>36</sup> *Planned Parenthood v. Casey*, 505 U.S. at 836.

<sup>37</sup> *Planned Parenthood v. Miller*, 63 F. 3d 1452 (8th Cir. 1995).