

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 19 Termination of Pregnancies

SPONSOR(S): Health Quality Subcommittee; 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	9 Y, 7 N, As CS	Roth	McElroy
3) Judiciary Committee			

SUMMARY ANALYSIS

Chapter 766, F.S. sets out several requirements for petitioners who wish to bring forth an action for medical malpractice in Florida. Medical malpractice is harm that occurs to a patient by a doctor or other medical professional who fails to competently perform his or her medical duties.

CS/HB 19 creates a new cause of action separate from ch. 766, F.S., for women upon whom an abortion is performed for any physical or emotional injuries caused by the physician's negligence or failure to obtain the informed consent required by s. 390.0111, F.S. Damages available under this cause of action include all special and general damages recoverable in intentional tort, negligence, survival, or wrongful death claims.

The bill creates a statute of limitation for this cause of action. A woman must bring a claim within 4 years from the injury or 4 years from the time the woman knew or should have known of the injury but in no case may an action 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 authorizes the award of attorney's fees to prevailing plaintiffs.

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

The bill provides an effective date of July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Federal Abortion Law

Right to Abortion

In 1973, the foundation of modern abortion jurisprudence, *Roe v. Wade*¹, was decided by the U.S. Supreme Court. Using strict scrutiny, the Court determined that a woman's right to an abortion is part of a fundamental right to privacy guaranteed under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. Further, the Court reasoned that state regulation limiting the exercise of this right must be justified by a compelling state interest, and must be narrowly drawn.² In 1992, the fundamental holding of *Roe* was upheld by the U.S. Supreme Court in *Planned Parenthood v. Casey*.³

Undue Burden

In *Planned Parenthood v. Casey*, the U.S. Supreme Court established the undue burden standard for determining whether a law places an impermissible obstacle to a woman's right to an abortion. The Court held that health regulations which impose undue burdens on the right to abortion are invalid.⁴ State regulation imposes an "undue burden" on a woman's decision to have an abortion if it has the purpose or effect of placing a substantial obstacle in the path of the woman who seeks the abortion of a nonviable fetus.⁵ However, the court opined, not every law which makes the right to an abortion more difficult to exercise is an infringement of that right.⁶

Florida Abortion Law

Right to Abortion

The Florida Constitution, as interpreted by Florida courts, affords greater privacy rights than those provided by the U.S. Constitution. While the federal Constitution traditionally shields enumerated and implied individual liberties from state or federal intrusion, the U.S. Supreme Court has noted that state constitutions may provide greater protections.⁷ Unlike the U.S. Constitution, Article I, § 23 of the Florida Constitution contains an express right to privacy:

Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

The Florida Supreme Court opined in *In re T.W.* that this express privacy clause provides greater privacy rights than those implied by the U.S. Constitution.⁸

¹ *Roe v. Wade*, 410 U.S. 113 (1973).

² *Id.*

³ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

⁴ *Id.* at 878.

⁵ *Id.* at 877.

⁶ *Id.* at 873.

⁷ *In re T.W.*, 551 So.2d 1186, 1191 (Fla. 1989), citing *Pruneyard Shopping Center v. Robins*, 100 S.Ct. 2035, 2040 (1980).

⁸ *Id.* at 1191-1192.

The Florida Supreme Court has recognized Florida's constitutional right to privacy "is clearly implicated in a woman's decision whether or not to continue her pregnancy."⁹ In *In re T.W.*, the Florida Supreme Court ruled that¹⁰:

[P]rior to the end of the first trimester, the abortion decision must be left to the woman and may not be significantly restricted by the state. Following this point, the state may impose significant restrictions only in the least intrusive manner designed to safeguard the health of the mother. Insignificant burdens during either period must substantially further important state interests....Under our Florida Constitution, the state's interest becomes compelling upon viability....Viability under Florida law occurs at that point in time when the fetus becomes capable of meaningful life outside the womb through standard medical procedures.

The court recognized that after viability, the state can regulate abortion in the interest of the unborn child if the mother's health is not in jeopardy.¹¹

Informed Consent for Abortion

The Agency for Health Care Administration (AHCA) licenses and regulates abortion clinics in the state, pursuant to ch. 390, F.S., and part II of ch. 408, F.S.¹² There are 61 licensed abortion clinics in Florida.¹³ An abortion must be performed by a physician¹⁴ licensed under ch. 458, F.S., or ch. 459, F.S., or a physician practicing allopathic or osteopathic medicine in the employment of the United States.¹⁵ Physicians are regulated by the Board of Medicine or Board of Osteopathic Medicine (Boards), within the Department of Health (DOH), under those chapters. In 2016, there were 225,255 live births in Florida,¹⁶ and 69,765 abortion procedures.¹⁷

In 1997, the Florida Legislature enacted the "Woman's Right to Know Act," now codified in s. 390.0111(3), F.S., which prohibits a termination of pregnancy unless and until the woman has given voluntary and written informed consent (except when there is a medical emergency). The physician must inform the woman of the nature of the procedure, and risks of undergoing and not undergoing the procedure, the medical risks of carrying the pregnancy to term and the probable gestational age of the fetus. The physicians must also provide printed materials with a description of the fetus, a list of agencies that offer alternatives to terminating the pregnancy, and information on the availability of medical assistance benefits for pre-natal and neo-natal care and childbirth.¹⁸ Later amendments to the statute require an ultrasound to verify gestational age and an opportunity to view and receive an explanation of the ultrasound, and require the informed consent to be obtained in-person and at least 24 hours prior to the procedure.¹⁹

A 1998 constitutional challenge was resolved by the Florida Supreme Court in 2006, which found that the Act is not unconstitutional in that it "constitutes a neutral informed consent statute that is comparable to the common law and to informed consent statutes implementing the common law that exist for other types of medical procedures."²⁰

⁹ *Id.* at 1192.

¹⁰ *Id.* at 1193.

¹¹ *Id.* at 1194.

¹² Section 408.802(3) provides for the applicability of the Health Care Licensing Procedures Act to abortion clinics.

¹³ Agency for Health Care Administration, *Abortion Clinic Results*, available at <http://www.floridahealthfinder.gov/facilitylocator/ListFacilities.aspx> (last viewed February 16, 2017).

¹⁴ Section 390.0111(2), F.S.

¹⁵ Section 390.011(9), F.S.

¹⁶ Florida Department of Health, Bureau of Vital Statistics, *FLHealthCHARTS query, live births 2016 (provisional)*, available at <http://www.flhealthcharts.com>.

¹⁷ AHCA, *Reported Induced Terminations of Pregnancy Calendar Year 2016*, on file with the Health Quality Subcommittee Staff.

¹⁸ Section 390.0111(5), F.S. (2006).

¹⁹ Section 390.0111(5), F.S. (2016). The 24-hour waiting period is currently being challenged in state court, and on February 16, 2017, the Florida Supreme Court upheld the circuit court's temporary injunction on the 24-hour waiting period. *Gainesville Woman Care, LLC v. State of Florida*, Case No. SC16-381.

²⁰ *State v. Presidential Women's Ctr.*, 937 So. 2d 114 (Fla. 2006).

Florida Tort Actions Related to Abortion

There is no statutory or common law cause of action specific to abortion. There are, however, statutory and common law causes of action whereby an injured person may sue for damages resulting from an abortion. These include claims for medical malpractice²¹, wrongful death,²² negligence,²³ assault,²⁴ battery,²⁵ and intentional infliction of emotional distress.²⁶

A tort is a civil wrong, other than a breach of contract, for which a remedy may be obtained, usually in the form of damages; and/or a breach of a duty that the law imposes on persons who stand in a particular relation to one another.²⁷ Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances.²⁸ Common tort actions include claims for negligence and medical malpractice.

For an individual to prevail on a claim for negligence or medical malpractice, the plaintiff must establish four elements: 1) the health care provider owed the patient a duty to conform to a certain standard of conduct (duty); 2) the health care provider failed to conform to the standard of conduct (breach); 3) the failure was both the factual and legal cause of the patient's injuries (causation); and 4) the injuries were of the type and extent that the law requires compensation (economic and non-economic damages).²⁹

Florida Medical Malpractice

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.³⁰ In Florida, medical malpractice cases are governed by ch. 766, F.S. and carry strict pre-suit procedural rules that negligence cases (governed by ch. 768, F.S.) do not require.

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.³¹ After completion of the presuit investigation, a claimant must send a presuit notice to each prospective defendant.³² 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.³³ Once the presuit notice is received, all parties must make discoverable information available for a period of informal discovery.³⁴

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.³⁵ Upon selection of the

²¹ Chapter 766, F.S.

²² The Florida Wrongful Death Act is at ss. 768.16-.26, F.S.

²³ *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.")

²⁴ *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.")

²⁵ *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.")

²⁶ *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.)

²⁷ *Black's Law Dictionary* (3rd Pocket ed. 2006).

²⁸ *Black's Law Dictionary* (6th ed. 1990).

²⁹ *Limones v. Sch. Dist.*, 161 So. 3d 384 (Fla. 2015).

³⁰ Section 766.104(1), F.S.

³¹ Section 766.203(2), F.S.

³² Section 766.106(2)(a), F.S.

³³ *Id.*

³⁴ Section 766.106(6), F.S.

³⁵ Section 766.107(1), F.S.

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.³⁶ The decision of the panel is nonbinding.³⁷ If the parties accept the decision, the decision is deemed to be a settlement of the case and the case is dismissed with prejudice.³⁸ After the arbitration award is rendered, any party may demand a trial de novo in circuit court.³⁹

Ch. 766.118, F.S., limits noneconomic damages (pain and suffering damages) for negligence of health care providers in medical malpractice cases. There is a \$500,000 cap on noneconomic damages against practitioners⁴⁰ and a \$750,000 cap against non-practitioners⁴¹. If the negligence results in a permanent vegetative state or death there is a cap of \$1 million dollars for practitioners⁴² and \$1.5 million for non-practitioners⁴³. There is no cap for economic damages (past and future medical care necessitated by the malpractice).

Prohibition Against Double Recovery

Double recovery is a judgment that erroneously awards damages twice for the same loss, based on two different theories of recovery.⁴⁴ The prohibition against double recovery is aimed at preventing enrichment of one party at the expense of another in circumstances which the law treats as unjust. In Florida, once a party obtains satisfaction of its claim under one theory, it may not use a different theory of recovery to obtain a second recovery for the same injuries.⁴⁵ However, when the remedies in question redress different injuries or enforce different and distinct rights, a party is not required to elect among them.⁴⁶

Statutes of Limitations

Statutes of limitations bars claims after a specified period of time, to require diligent prosecution of known claims, thereby providing finality and predictability in legal affairs and ensuring that claims will be resolved while evidence is reasonably available and fresh.⁴⁷

Section 95.11, F.S., sets out Florida's statute of limitations for all civil actions other than the recovery of real property. An action founded on negligence must be brought within four years of the negligent act.⁴⁸ An act for medical malpractice must be commenced within two years from the time the incident giving rise to the action occurred or within two years from the time the incident is discovered, but not later than four years from the incident.⁴⁹ If it can be showed that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury, the medical malpractice claim must be commenced within seven years.⁵⁰ When the claimant in a medical malpractice case is age eight or younger the statute of limitations do not apply to such claimant.⁵¹

Abortion-Related Cause of Action in Other States

In 1993, South Dakota amended its abortion laws to create a strict liability cause of action against an abortion provider for failing to provide informed consent. The law required a plaintiff be awarded punitive damages of \$10,000 and triple of her actual damages if the abortion provider failed to obtain

³⁶ Section 766.107(3), F.S.

³⁷ Section 766.107(4), F.S.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Section 766.118(2)(a), F.S.

⁴¹ Section 766.118(3)(a), F.S.

⁴² Section 766.118(2)(b), F.S.

⁴³ Section 766.118(3)(b), F.S.

⁴⁴ Double Recovery, Black's Law Dictionary (3rd Pocket ed. 2006).

⁴⁵ *Lutheran Brotherhood v. Hooten*, 237 So. 2d 23 (Fla. 2d DCA 1970).

⁴⁶ *Security & Investment Corp. of the Palm Beaches v. Droege*, 529 So. 2d 799 (Fla. 4th DCA 1988).

⁴⁷ Statute of Limitations, Black's Law Dictionary (3rd Pocket ed. 2006).

⁴⁸ Section 95.11(3)(a), F.S.

⁴⁹ Section 95.11(4)(b), F.S.

⁵⁰ *Id.*

⁵¹ *Id.*

informed consent.⁵² The 8th Circuit Court of Appeal held that the award of punitive damages without a finding of willful, wanton or malicious conduct by the abortion provider and the mandatory \$10,000 award was improper and struck down the law.⁵³

In 1997, Louisiana passed Act 825, now Louisiana Revised Statutes Section 9:2800.12, Liability for termination of a pregnancy.⁵⁴ The Act provides a cause of action for women who have suffered injuries as a result of a termination of pregnancy, imposing strict liability on providers. The Act was challenged by providers three times. In two cases, federal courts dismissed the actions for lack of case or controversy.⁵⁵

In the third case,⁵⁶ the 5th Circuit Court of Appeal found health care providers lacked standing to claim compensation fund coverage under the state's medical malpractice law. The Court also upheld the Act, finding it was rationally related to the promotion of informed consent and that, though the exemption of the entitlement to the benefits of the state's malpractice law may make it difficult for those providers to obtain relevant insurance, that limitation "is merely a 'means of unequal subsidization of abortion and other medical services.'"⁵⁷ The court further held that, "while 'government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those' obstacles, like Louisiana's dearth of affordable insurance, that are 'not of the government's own creation.'"⁵⁸

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 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 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. A woman who chooses to file a suit under this new cause of action is barred from seeking compensation under the medical malpractice statute.

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.

⁵² *Planned Parenthood v. Miller*, 63 F.3d 1452 (8th Cir. SD 1995).

⁵³ *Id.*

⁵⁴ *K.P. v. Leblanc*, 729 F.3d 427 (5th Cir. La. 2013)

⁵⁵ *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. La. 2001); *Women's Health Clinic v. State*, 825 So. 2d 1208 (La. App. 1 Cir 2002).

⁵⁶ Plaintiffs argued unconstitutional vagueness, equal protection violations without rational basis, and undue burden privacy violations caused by an anticipated reduction in service availability due to the inapplicability of the state's medical malpractice act.

⁵⁷ *K.P. v. Leblanc* (5th Circuit La. 2013), at 442, quoting *Harris v. McRae*, 448 U.S. 297 at 315 (1980).

⁵⁸ *Id.*, quoting *McRae*, 448 U.S. at 316.

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, and correspondingly cause providers to pay the judgment.

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:

None.

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.

On February 22, 2017, the Health Quality Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The committee substitute differs from the bill as filed by adding language denoting that a woman who chooses to file a suit under this new cause of action is barred from seeking compensation under the medical malpractice statute. This analysis is drafted to the committee substitute as passed by the Health Quality Subcommittee.