

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 651 Recovery of Damages in Claims for Medical Negligence

SPONSOR(S): Roach

TIED BILLS: **IDEN./SIM. BILLS:** SB 1112

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Property Rights Subcommittee	18 Y, 0 N	Brascomb	Jones
2) Judiciary Committee	19 Y, 0 N	Brascomb	Kramer

SUMMARY ANALYSIS

A "wrongful death" action arises when a person dies from injuries sustained as a result of a wrongful act or omission by the defendant. In a wrongful death action, Florida's Wrongful Death Act limits the types of damages recoverable by certain parties as follows:

- The deceased's estate may recover for:
 - Lost wages, benefits, and other earnings;
 - Medical and funeral expenses that were paid by the estate; and
 - The value the estate could reasonably have been expected to acquire if the deceased had lived.
- Specified family members may recover for:
 - The value of support and services the deceased provided;
 - Loss of companionship and guidance;
 - Mental and emotional pain and suffering, in specified cases; and
 - Compensation for medical and funeral expenses the family member has paid for the deceased.

In an ordinary wrongful death action (such as a suit based on a death caused by an automobile accident), parents can recover for their mental pain and suffering for the loss of an adult child when there is no surviving spouse or child. However, when the wrongful death action is based on a medical malpractice claim, parents cannot recover for their mental pain and suffering for the loss of an adult child.

HB 651 amends s. 768.21(8), F.S., to allow parents of a child who is 25 years old or older and has no surviving spouse or children to recover for mental pain and suffering in a medical malpractice wrongful death action.

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

The bill provides an effective date of July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Florida's Wrongful Death Act

A "wrongful death" action arises when a person dies from injuries sustained as a result of an act or omission by the defendant.¹ At common law, there was no cause of action for wrongful death.² Courts reasoned that a deceased person could not pursue legal action, so the claim died with the decedent.³ In turn, states began to enact wrongful death statutes to create a civil right to recovery when the would-be plaintiff dies, shifting the resulting losses from the decedent's survivors to the wrongdoer.⁴

Under Florida's Wrongful Death Act (Act),⁵ when a person's death is caused by a wrongful act, negligence, or breach of contract of another, and the event would have entitled the deceased to recover damages if he or she had survived, the defendant is liable for damages notwithstanding the injured person's death.⁶ The Act specifies the parties who may recover for a wrongful death, who are generally:

- The deceased's estate;
- The surviving spouse of the deceased;
- Children under 25 of the deceased;
- Children 25 or older of the deceased if there is no surviving spouse;
- Parents of a deceased child under 25; and
- Parents of a deceased child 25 and older who had no surviving spouse or children.⁷

However, these parties may recover only damages that are specified under the Act. The deceased's estate may recover only for:

- Lost wages, benefits, and other earnings including the potential for future earnings;
- Medical and funeral expenses that were paid by the estate; and
- The value the estate could reasonably have acquired had the deceased lived.⁸

Family members may claim recovery only for:

- The value of support and services the deceased provided;
- Loss of companionship and guidance in certain circumstances;
- Mental and emotional pain and suffering if the family member seeking damages is:
 - A surviving spouse;
 - A child under 25 of the deceased;
 - A child 25 or older of the deceased if there is no surviving spouse;
 - A parent of a deceased child under 25;
 - A parent of a deceased child 25 or older who had no surviving spouse or children; and
- Compensation for medical and funeral expenses the family member has paid for the deceased.⁹

¹ See *Pezzi v. Brown*, 697 So. 2d 883, 884 n.1 (Fla. 4th DCA 1997).

² Dennis M. Doiron, *A Better Interpretation of the Wrongful Death Act*, 43 Me. L. Rev. 449 (1991), <https://core.ac.uk/download/pdf/304932065.pdf> (last visited Mar. 19, 2021).

³ *Id.*

⁴ *Id.*; s. 768.17, F.S.

⁵ Ss. 768.16 – 26, F.S.

⁶ S. 768.19, F.S.

⁷ S. 768.21, F.S.

⁸ *Id.*

⁹ *Id.*

Medical Negligence Exception to Wrongful Death Act

The Act evolved from the medical malpractice tort reform of the late 1980s and early 1990s, prior to which there were limitations on who could bring any kind of wrongful death lawsuit for damages.¹⁰ In 1990, the Legislature amended a statute to allow adult children and parents of an adult child to seek noneconomic damages¹¹ for wrongful death in non-medical negligence cases—a right they had not previously enjoyed.¹² However, while that meant they could seek noneconomic damages in an ordinary wrongful death suit, such as a suit based on a death caused by an automobile accident, the statute expressly excluded noneconomic damages in medical malpractice lawsuits.

The Legislature reasoned that by protecting medical providers from increased malpractice suit exposure and escalating liability insurance rates, it would encourage more physicians to practice in the state and lower the cost of health care by reducing malpractice premiums.¹³

Currently, in the case of the death of a parent due to medical negligence, a child who is 25 or older may not seek noneconomic damages; and, in the case of the death of a child who is 25 or older due to medical negligence, a surviving parent may not seek noneconomic damages.¹⁴

Other States

Florida is the only state that excludes adult children and parents of adult children from seeking noneconomic damages for wrongful death in medical negligence cases.¹⁵ Other states do not differentiate between a medical negligence wrongful death action and other wrongful death actions, and they generally allow adult children and parents of adult children to bring suits seeking:

- The value of support and services the deceased provided;
- Loss of companionship and guidance;
- Mental and emotional pain and suffering;
- Compensation for medical and funeral expenses the family member has paid for the deceased.¹⁶

Effect of Proposed Changes

HB 651 amends s. 768.21(8), F.S., to allow parents of a child who is 25 years old or older and has no surviving spouse or children to recover for mental pain and suffering in a medical malpractice wrongful death claim.

The bill provides an effective date of July 1, 2021.

¹⁰ Weston F. Smith, *Is Florida's Wrongful Death Act Unfair to the Victims of Medical Malpractice?*, St. Petersburg Bar Association (Feb. 2021), https://cdn.ymaws.com/www.stpetebar.com/resource/resmgr/docs/paraclete_1&2-2021.pdf (last visited Mar. 19, 2021); Carrie Seidman, *A loophole in Florida's Wrongful Death Act*, Herald Tribune (Oct. 13, 2019), <https://www.heraldtribune.com/news/20191013/loophole-in-floridas-wrongful-death-act> (last visited Mar. 19, 2021). Weston F. Smith, *Is Florida's Wrongful Death Act Unfair to the Victims of Medical Malpractice?*

¹¹ Noneconomic damages are compensation for subjective, non-monetary losses such as pain, suffering, inconvenience, emotional distress, loss of society and companionship, loss of consortium, and loss of enjoyment of life. Economic damages are compensation for objectively verifiable monetary losses such as past and future medical expenses, loss of past and future earnings, loss of use of property, costs of repair or replacement, the economic value of domestic services, and loss of employment or business opportunities. Center for Justice and Democracy, *Fact Sheet: Understanding Non-Economic Damages*, New York Law School, <https://centerjd.org/content/fact-sheet-understanding-non-economic-damages> (last visited Mar. 19, 2021).

¹² *Id.*

¹³ *Id.*; Ch. 90-14, Laws of Fla.

¹⁴ S. 768.21, F.S.

¹⁵ Carrie Seidman, *supra*, at 10.

¹⁶ *Id.*

B. SECTION DIRECTORY:

Section 1: Amends s. 768.21, F.S., relating to damages.

Section 2: Provides an effective date of July 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill makes defendant health care providers liable in a medical malpractice wrongful death action for the pain and suffering damages of parents of a child 25 or older who has no surviving spouse or children.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

There do not appear to be any constitutional issues with the bill. However, the general subject of recovery in a medical malpractice wrongful death claim has been litigated. In *Mizrahi v. North Miami Medical Center*, the appellant argued that the medical negligence exception to the Wrongful Death Act treated adult children of a person who dies as a result of medical malpractice differently than adult children whose parent dies as a result of a cause other than medical malpractice, violating the Equal Protection Clause under the Florida Constitution, since there was no rational basis to make that distinction.¹⁷ The Florida Supreme Court upheld this exclusion as constitutional, noting that "the statute's disparate treatment of medical malpractice wrongful deaths does bear a rational relationship to the legitimate state interest of ensuring the accessibility of medical care to Florida residents by curtailing the skyrocketing medical malpractice insurance premiums in Florida."¹⁸

B. RULE-MAKING AUTHORITY:

¹⁷ *Mizrahi v. N. Miami Med. Ctr.*, 761 So. 2d 1040 (Fla. 2000).

¹⁸ *Id.*

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES