

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 871 Sovereign Immunity for Child Protection Teams

SPONSOR(S): Snyder

TIED BILLS: **IDEN./SIM. BILLS:** SB 826

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Property Rights Subcommittee	18 Y, 0 N	Mathews	Jones
2) Children, Families & Seniors Subcommittee	17 Y, 0 N	Rahming	Brazzell
3) Judiciary Committee			

SUMMARY ANALYSIS

Under s. 39.201(2)(a), F.S., reports of suspected child abuse, neglect, or abandonment by a parent, caregiver, custodian, or guardian of a child are reported to the Department of Children and Families (DCF). The DCF has a central abuse hotline that is available twenty-four hours a day for reporting such abuse, neglect, or abandonment. A Child Protection Team (CPT) is responsible for receiving referrals from the DCF to provide specialized support and services in processing child abuse, neglect, and abandonment cases. CPT services are funded by state general revenue and social services block grant funds through the DCF.

The Florida Department of Health's (DOH), Division of Children's Medical Services (CMS), Bureau of Child Protection and Special Technologies staff provides oversight of the statewide CPT system. A CPT generally consists of a group of physician-directed professionals who evaluate allegations of abuse, neglect, or abandonment, assess risks, and provide recommendations for child safety and support services.

Currently, individual government employees, officers, or agents are immune from civil liability for damages caused by an action arising within the scope of employment. Such immunity from civil liability does not extend to actions made in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard for human rights, safety, or property. The government entity is not liable for tortious actions arising outside the scope of the employee's employment. Case law indicates that contracted CPT physician consultants have immunity from civil liability under certain circumstances because in those situations the physician consultants are acting as agents of the state.

There are approximately 238 CPT members who are independent contractors. The DOH acknowledges that any CPT members acting within the scope and direction of their contractual duties may assert a claim of sovereign immunity as a defense to an action against that CPT member. However, if the trier of fact rejects the sovereign immunity claim, the DOH's indemnification and hold harmless contract provisions would apply and the contractor would be required to indemnify and defend the DOH if the agency were sued.

HB 871 expands the immunity from civil liability to include any member of a CPT, which includes the independent contractors. Therefore, any member of a CPT is immune from civil liability for actions arising out of the scope of his or her employment under the control, direction, and supervision of the state or any of its agencies or subdivisions.

The bill has an indeterminate fiscal impact on state government. The bill has no fiscal impact on local governments.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Waiver of Sovereign Immunity

Sovereign immunity is a principle under which a government cannot be sued without its consent.¹ Article X, section 13 of the Florida Constitution allows the Legislature to waive this immunity. A limited statutory waiver of sovereign immunity permits tort lawsuits against Florida and its agencies and subdivisions for damages resulting from the negligence of a government officer, employee, or agent acting in the scope of employment.² This liability exists only where a private person would be liable for the same conduct.³ The waiver of sovereign immunity applies only to “injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee’s office or employment”⁴

An individual government employee, officer, or agent is immune from suit or liability for damages caused by any action taken in the scope of his or her employment unless the damages result from an action made in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard for human rights, safety, or property.⁵ A government entity is not liable for any damages resulting from actions by an employee outside the scope of his or her employment or for damages resulting from actions committed by the employee in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard for human rights, safety, or property.⁶

For purposes of this immunity from liability, an “officer, employee, or agent” includes, but is not limited to any:

- Health care provider when providing services pursuant to s. 766.1115, F.S.;
- Nonprofit independent college or university located and chartered in this state which owns or operates an accredited medical school, and its employees or agents, when providing patient services pursuant to paragraph (10)(f); and
- Public defender or her or his employee or agent, including, an assistant public defender and an investigator.⁷

Damages

Current law caps tort recovery from a governmental entity at \$200,000 per person and \$300,000 per accident.⁸ The limits apply to all elements of the monetary award to a plaintiff against a sovereignly immune entity.⁹ The limited waiver of immunity does not apply to punitive damages or interest for the period before judgment.¹⁰ Additionally, an attorney may not charge more than 25 percent of any judgment or settlement.¹¹

Claim Bills

Although an “excess” judgment award may be entered by a court, the statutory limitations make it impossible, absent a claim bill passed by the Legislature, for a claimant to collect more than the limits

¹ *Sovereign immunity*, Legal Information Institute, https://www.law.cornell.edu/wex/sovereign_immunity (last visited March 18, 2021).

² S. 768.28(1), F.S.

³ *Id.*

⁴ *City of Pembroke Pines v. Corrections Corp. of America, Inc.*, 274 So. 3d 1105, 1112 (Fla. 4th DCA 2019).

⁵ S. 768.28(9)(a), F.S.

⁶ *Id.*

⁷ S. 768.28(9)(b)2., F.S.

⁸ S. 768.28(5), F.S.

⁹ *Gallagher v. Manatee County*. 927 So. 2d 914, 918 (Fla. 2d DCA 2006).

¹⁰ S. 768.28(5), F.S.

¹¹ S. 768.28(8), F.S.

identified above.¹² A claim bill, also known as a relief act, is a bill that compensates a particular individual or entity for injuries or losses occasioned by the negligence or error of a public officer or agency.¹³ It is not an action at law, but rather is a legislative measure that directs a relevant government entity or officer to pay a specific sum of money to a claimant to satisfy an obligation.¹⁴ A claim bill may be obtained exclusively from the Legislature or after obtaining a judgment from a Florida court.¹⁵

A government entity may, without a claim bill, settle a claim against it for an amount above the limits in s. 768.28, F.S., if that amount is within the limits of insurance coverage.¹⁶

Child Protection Teams

The Florida Department of Health (DOH) currently contracts with 22 independent, community-based organizations that serve as child protection teams.¹⁷ A “Child Protection Team” (CPT) is a team of professionals established by the DOH to receive referrals from the protective investigators and protective supervision staff of the Department of Children and Families (DCF) and to provide specialized and supportive services to the program in processing child abuse,¹⁸ abandonment,¹⁹ or neglect cases.^{20, 21} The teams perform medical evaluations, assess risks, and provide recommendations for child safety and support services.²²

Composition and Responsibilities

The CPT is one of six programs that make up the Division of Children’s Medical Services (CMS) of the DOH. The CPTs, within the CMS, have 22 district offices.²³ Each office must be available 24 hours per day, every day, to provide immediate medical diagnosis and evaluation, for consultations by phone, or for other assessment services.²⁴

Services

When a CPT accepts a referral from the DCF or law enforcement, the team must be able to provide, in part, the following services:

- Medical diagnosis and evaluation services;
- Nursing assessments;

¹² S. 768.28(5), F.S.; *Breaux v. City of Miami Beach*, 899 So. 2d 1059 (Fla. 2005).

¹³ The Florida Senate, The Florida House of Representatives Civil Justice Subcommittee, *Legislative Claim Bill Manual, Policies, Procedures, and Information Concerning Introduction and Passage*, p. , August 2019, <https://www.flsenate.gov/PublishedContent/ADMINISTRATIVEPUBLICATIONS/leg-claim-manual.pdf> (last visited Mar. 18, 2021).

¹⁴ *Wagner v. Orange Cty.*, 960 So. 2d 785, 788 (Fla. 5th DCA 2007).

¹⁵ *City of Miami v. Valdez*, 847 So. 2d 1005, 1006-1007 (Fla. 3d DCA 2003).

¹⁶ S. 768.28(5), F.S.

¹⁷ Florida Department of Health (DOH), *Agency Analysis for HB 871*, March 2, 2021.

¹⁸ S. 39.01(2), F.S., defines “abuse” as any willful act or threatened act that results in any physical, mental, or sexual abuse, injury, or harm that causes or is likely to cause the child’s physical, mental, or emotional health to be significantly impaired.

¹⁹ S. 39.01(1), F.S., defines “abandoned” or “abandonment” as a situation in which the parent or legal custodian of a child or, in the absence of a parent or legal custodian, the caregiver, while being able, has made no significant contribution to the child’s care and maintenance or has failed to establish or maintain a substantial and positive relationship with the child, or both. “Establish or maintain a substantial and positive relationship” means, in part, frequent and regular contact with the child, and the exercise of parental rights and responsibilities.

²⁰ S. 39.01(50), F.S., states “neglect” occurs when a child is deprived of, or is allowed to be deprived of, necessary food, clothing, shelter, or medical treatment or a child is permitted to live in an environment when such deprivation or environment causes the child’s physical, mental, or emotional health to be significantly impaired or to be in danger of being significantly impaired, except when such circumstances are caused primarily by financial inability unless services have been offered and rejected by such person.

²¹ S. 39.01(13), F.S.

²² Florida Department of Children and Families, *CFOP 170-5*, Chapter 9, p. 1 (Feb. 1, 2021), <https://www.myflfamilies.com/admin/publications/cfops/CFOP%20170-xx%20Child%20Welfare/CFOP%20170-05%20%20Child%20Protective%20Investigations/CFOP%20170-05,%20%20Chapter%2009,%20Coordination%20with%20Child%20Protection%20Team.pdf> (last visited Mar. 26, 2021).

²³ The Florida Department of Health, *Children’s Medical Services Child Protection Teams*, 2020, <http://www.cms-kids.com/home/contact/cpt.pdf> (last visited Mar. 26, 2021).

²⁴ The Florida Department of Health, Children’s Medical Services, *Child Protection Team Program Handbook*, p. 4 (June 28, 2019), http://www.cms-kids.com/providers/prevention/documents/handbook_cpt.pdf (last visited Mar. 26, 2021).

- Child and family social assessments;
- Multidisciplinary case staffings;
- Psychological and psychiatric diagnosis and evaluations;
- Specialized and forensic interviews; and
- Expert medical, psychological, and related professional testimony in court cases.²⁵

Cases Referred to a Child Protection Team

The following cases involving child abuse, abandonment, or neglect that are reported to the Central Abuse Hotline must be referred to a CPT:

- Head injuries, bruises to the head or neck, burns, or fractures in a child, regardless of age.
- Bruises that appear anywhere on a child who is five years old or younger.
- Alleged child sexual abuse.
- A sexually transmitted disease that occurs in a prepubescent child.
- Reported malnutrition or failure to thrive.
- Medical neglect.
- Instances of a child or sibling remaining in a home where a child has been pronounced dead on arrival at a hospital or a child has been injured and then died due to suspected abuse, abandonment, or neglect.
- Symptoms of serious emotional issues occurring in a child.²⁶

Employees and Sovereign Immunity

The CPTs operate under the oversight of a medical director who is a board-certified pediatrician with special training in child abuse and neglect.²⁷ According to the DOH, Florida's CPTs have approximately 364 team members, excluding medical directors, who are employed by private, non-profit entities.²⁸ Each team includes a medical director, other physicians, advanced practice registered nurses, physician assistants, registered nurses, team coordinators, case coordinators, and support staff.²⁹ State universities and county governmental entities employ approximately 126 of the team members.³⁰ The remaining 238 or so members are independent contractors.

Sovereign Immunity and Child Protection Team Physicians

It is not definitively settled whether all CPT physicians are covered under sovereign immunity. Whether sovereign immunity applies depends on the degree of control that the state maintains over the agent on a case-by-case basis. In *Stoll v. Noel*,³¹ the Florida Supreme Court explained that, under the appropriate circumstances, independent contractor physicians may be agents of the state for purposes of sovereign immunity, and therefore protected.

The *Stoll* Court examined the employment contract between CMS physicians and the state to determine whether the state's right to control was sufficient to create an agency relationship and held that it did. The manuals and guides given to physician consultants demonstrated that CMS had final authority over all care and treatment provided to CMS patients, and that CMS could refuse to allow a physician consultant's recommended course of treatment of any CMS patient for either medical or budgetary reasons. Furthermore, the Court's conclusion was supported by the state's acknowledgement that the manual creates an agency relationship between CMS and its physician consultants, and the state acknowledged full financial responsibility for the physicians' actions. The

²⁵ S. 39.303(3), F.S. Further, a CPT that is evaluating a report of medical neglect and assessing the health care needs of a medically complex child is required to consult with a physician who has experience in treating children with the same condition.

²⁶ S. 39.303(4), F.S.

²⁷ S. 39.303(2)(a), F.S.

²⁸ *Supra* note 17, at 2.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Stoll v. Noel*, 694 So. 2d 701, 703 (Fla. 1997).

Court noted that the state’s interpretation of its manual is entitled to judicial deference and great weight.³²

Currently, the DOH acknowledges that a CPT member acting within the scope and direction of the contractual duties they provide on behalf of the DOH may assert a claim of sovereign immunity as a defense to an action against that CPT member.³³ However, it is the trier of fact that ultimately decides whether sovereign immunity succeeds as a defense to an action. Therefore, if the trier of fact rejects a sovereign immunity claim, the DOH’s indemnification and hold harmless contract provisions³⁴ would apply and the contractor would be required to indemnify and defend the DOH if the agency were sued.³⁵ Additionally, the contractor may be required to join the lawsuit as part of that clause prior to the final determination by the trier of fact.³⁶

Litigation Cases

Since FY 2006-2007, there have been a total of 33 claims involving some level of involvement with CPTs:³⁷

Division of Risk Management Claims Involving Child Protection Team Members

<i>Fiscal Year</i>	<i>Lawsuits</i>	<i>Notice of Claim Only³⁸</i>	<i>Total Claims</i>	<i>Current Status</i>
2006-2007	9	2	11	All Closed
2007-2008	4	1	5	All Closed
2008-2009	4	1	5	All Closed
2009-2010	0	1	1	All Closed
2010-2011	0	1	1	All Closed
2011-2012	0	1	1	All Closed
2012-2013	3	0	3	All Closed
2013-2014	1	2	3	All Closed
2014-2015	0	1	1	All Closed
2015-2016	1	1	2	All Closed
2016-2017	0	0	0	
2017-2018	0	0	0	
2018-2019	0	0	0	
2019-2020	0	0	0	
2020-2021	0	0	0	
TOTAL	22	11	33	

Effect of Proposed Changes

The bill amends s. 768.28(9)(b), F.S., to expand the definition of “officer, employee, or agent” to include “any member of a child protection team, as defined in s. 39.01, F.S., when carrying out her or his duties as a team member under the control, direction, and supervision of the state or any of its agencies or subdivisions.” Under the bill, a member of a CPT will receive sovereign immunity protection in a tort action only when a team member is determined to have acted under the control, direction, and supervision of the state or one of its entities. If the CPT member is found to be acting outside of that control, then sovereign immunity will not protect the team member in a tort lawsuit.

³² *Id.*

³³ *Supra* note 17, at 6.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Email from Meredith Brock Stanfield, Director of Legislative and Cabinet Affairs, Office of Chief Financial Officer Jimmy Patronis, RE: HB 871 (2020), regarding updated information on claims involving Child Protection Team Members (Mar. 25, 2021).

³⁸ Notice was filed with the Division of Risk Management pursuant to s. 768.28(6), F.S., but formal litigation was not instituted.

B. SECTION DIRECTORY:

Section 1: Amends s. 768.28, F.S., relating to waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions; indemnification; risk management programs.

Section 2: The bill 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:

Indeterminate.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES