

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 651 Civil Liability for the Wrongful Death of an Unborn Child

SPONSOR(S): Judiciary Committee, Civil Justice Subcommittee, Persons-Mulicka

TIED BILLS: IDEN./SIM. BILLS: SB 476

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 5 N, As CS	Leshko	Jones
2) Judiciary Committee	15 Y, 7 N, As CS	Leshko	Kramer

SUMMARY ANALYSIS

Florida's Wrongful Death Act (Act) provides that when a person's death is caused by a wrongful act, negligence, default, or breach of contract or warranty, and the deceased person would have been entitled to recover damages if he or she had survived, the person responsible for the death is liable for damages notwithstanding the injured person's death. In a wrongful death action, the 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 lost support and services from the date of the decedent's injury to his or her death;
 - Future loss of support and services from the date of death, reduced to present value;
 - 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.

However, the Florida Supreme Court has held that an unborn child is not legally a "person" for purposes of the Act—meaning that a person whose action causes the death of an unborn child is not civilly liable to the surviving parents for damages under the Act.

CS/CS/HB 651 expands Florida's Wrongful Death Act to allow the parents of an unborn child to recover monetary damages from a person who is responsible for the unborn child's death. However, the bill clarifies that such wrongful death action may not be brought against the mother for the wrongful death of her own unborn child.

The bill may have an indeterminate fiscal impact as it expands Florida's Wrongful Death Act, which may allow for parents of an unborn child to recover increased monetary damages from state and local government entities and private individuals party to the suit.

The bill provides an effective date of July 1, 2024.

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, default, or breach of contract or warranty of any person, and the event would have entitled the deceased to recover damages if he or she had survived, the person who would have been liable if death had not occurred is still liable for specified damages, notwithstanding the injured person's death.⁶

A wrongful death suit must be brought by the decedent's personal representative, who may recover damages for the benefit of certain specified individuals.⁷ 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 of the deceased, who are under 25 years of age;
- Children of the deceased, who are 25 years of age or older, if there is no surviving spouse;
- Parents of a deceased child who was under 25 years of age; and
- Parents of a deceased child who was 25 years of age or older who had no surviving spouse or children.⁸

However, these parties may only recover damages that are specified under the Act. The deceased's estate may recover 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.⁹

A "survivor" under the Act—which means the decedent's spouse, child, and parents, as well as other blood relatives,¹⁰ may recover for:

- The value of lost support and services from the date of the deceased's injury to his or her death;¹¹ and
- Loss of future support and services from the date of death, reduced to present value.¹²

Further, specified family members may recover for:

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 Feb. 10, 2024).

³ *Id.*

⁴ *Id.*; s. 768.17, F.S.

⁵ Ss. 768.16 – 26, F.S.

⁶ S. 768.19, F.S.

⁷ S. 768.20, F.S.

⁸ S. 768.21, F.S.

⁹ S. 768.21(6), F.S.

¹⁰ S. 768.18(1), F.S.

¹¹ S. 768.21(1), F.S.

¹² *Id.*

- Loss of companionship and guidance in certain circumstances;¹³
- Mental pain and suffering if the family member seeking damages is:
 - A surviving spouse;¹⁴
 - A child of the deceased who is under 25 years of age;
 - A child of the deceased who is 25 years of age or older, if there is no surviving spouse;¹⁵
 - A parent of a deceased child who was under 25 years of age;
 - A parent of a deceased child who was 25 years of age or older who had no surviving spouse or children;¹⁶ and
- Compensation for medical and funeral expenses the family member has paid for the deceased.¹⁷

However, the Act also provides that, in the case of the death of a parent due to medical negligence, a child who is 25 years of age or older may not seek noneconomic damages (such as damages for mental pain and suffering); and, in the case of the death of a child who was 25 years of age or older due to medical negligence, a surviving parent may not seek noneconomic damages.¹⁸

Civil Remedies for the Death of an Unborn Child

In the 1978 case of *Duncan v. Flynn*, the Florida Supreme Court held that, legally speaking, an unborn fetus is not a “person” for purposes of Florida’s Wrongful Death Act (Act). In turn, when a person causes the death of an unborn child, the child’s parents cannot recover civil damages under the Act for the child’s death.¹⁹

In 1997, in *Tanner v. Hartog*, the Florida Supreme Court reiterated that “there is no cause of action under Florida’s Wrongful Death Act for the death of a stillborn fetus.”²⁰ However, in that same case, the Court recognized a common law action for “negligent stillbirth.” The Court emphasized that the damages recoverable in such an action are limited to mental pain and anguish and medical expenses incurred incident to the pregnancy, and that such legal action is different from an action under the Wrongful Death Act, as follows:

A suit for negligent stillbirth is a direct common law action by the parents which is different in kind from a wrongful death action. The former is directed toward the death of a fetus while the latter is applicable to the death of a living person. As contrasted to the damages recoverable by parents under the wrongful death statute, the damages recoverable in an action for negligent stillbirth would be limited to mental pain and anguish and medical expenses incurred incident to the pregnancy.²¹

Therefore, although Florida allows a limited recovery of damages for negligent stillbirth, it does not currently recognize a cause of action for wrongful death based on the death of an unborn child.

Other States

Florida remains one of six states, including California and New York,²² that does not currently recognize a cause of action for the wrongful death of an unborn child.²³ Forty-three states currently do allow for a

¹³ S. 768.21(2)-(3), F.S.

¹⁴ S. 768.21(2), F.S.

¹⁵ S. 768.21(3), F.S.

¹⁶ S. 768.21(4), F.S.

¹⁷ S. 768.21(5), F.S.

¹⁸ S. 768.21(8), F.S.

¹⁹ *Singleton v. Ranz*, 534 So. 2d 847, 847 (Fla. 5th DCA 1988)(citing *Duncan v. Flynn*, 358 So. 2d 178, 178 (Fla. 1978)).

²⁰ *Tanner v. Hartog*, 696 So. 2d 705, 706 (Fla. 1997).

²¹ *Tanner*, 696 So. 2d at 708-09.

²² *Rosales v. Northeast Community Clinic*, B276465, 2018 WL 1633068, at *2 (Cal. Ct. App. Apr. 5, 2018); *Endresz v. Friedberg*, 24 N.Y. 2d 478, 484 (N.Y. 1969).

²³ *Stern v. Miller*, 348 So. 2d 303, 307–08 (Fla. 1977); The three other states include Iowa, Maine, and New Jersey. *Dunn v. Rose Way, Inc.*, 333 N.W. 2d 830, 831 (Iowa 1983); *Shaw v. Jendzejec*, 717 A.2d 367, 371 (Me. 1998); *Giardina v. Bennett*, 111 N.J. 412, 421–25 (N.J. 1988).

cause of action for the wrongful death of an unborn child, depending on the viability²⁴ of the child in question.²⁵

Fifteen states afford a cause of action for the wrongful death of an unborn child at any stage of development.²⁶ Several of these states, however, provide an exception so that the mother cannot be sued for the wrongful death of her unborn child.²⁷

Three states, including Connecticut,²⁸ Georgia,²⁹ and Mississippi,³⁰ permit a wrongful death action to be brought on behalf of an unborn child if the quickening standard is met, which requires fetal movement to have been detected prior to death.³¹

Twenty-five states permit a cause of action for the wrongful death of an unborn child under a viability standard, which examines whether an unborn child can exist independently outside of the mother's womb.³² Of these 25 states, one state, Indiana, prohibits a wrongful death action where the death is of an unborn child as the result of a lawful abortion.³³

Finally, one state, Wyoming, remains undecided as to whether a cause of action for wrongful death exists as to an unborn child.³⁴

Effect of Proposed Changes

CS/CS/HB 651 amends ss. 768.18 and 768.21, F.S., to expand Florida's Wrongful Death Act (Act) to allow parents of an unborn child to recover civil damages for such unborn child's death in the same way that other survivors may generally recover under the Act. The bill accomplishes this by amending the definition of "survivors" to include parents of an unborn child and by specifically providing that parents of an unborn child may also recover for mental pain and suffering from the date of injury. Under the bill, the parents in such a wrongful death suit could potentially recover damages allowed by the Act,

²⁴ "Viability" is the ability of a developing fetus to survive independent of a pregnant woman's womb. Elizabeth Chloe Romanis, *Is "viability" viable? Abortion, conceptual confusion and the law in England and Wales and the United States*, 7 J. Law. Biosci. (Jan.-Dec. 2020).

²⁵ Only Wyoming remains undecided as to whether a cause of action for wrongful death exists as to an unborn child.

²⁶ Alabama (*Hamilton v. Scott*, 97 So. 3d 728 (Ala. 2012)); *Mack v. Carmack*, 79 So. 3d 597 (Ala. 2011)); Alaska (Alaska Stat. Ann. § 09.55.585); Arkansas (Ark. Code Ann. § 15-62-102); Illinois (740 Ill. Comp. Stat. Ann. 180/2.2); Kansas (Kan. Stat. Ann. § 60-1901); Louisiana (Louisiana Civil Code Art. 26); Michigan (Mich. Comp. Laws Ann. § 600.2922a); Missouri (Mo. Ann. Stat. § 1.205); Nebraska (Neb. Rev. Stat. § 30-809); Oklahoma (12 Okl. St. Ann. § 1053, OK ST T. 12 § 1053); *Pino v. United States*, 2008 OK 26, 183 P.3d 1001); South Dakota (S.D. Codified Laws §21-5-1); Texas (Tex. Civ. Prac. & Rem. Code § 71.002); Utah (*Carranza v. United States*, 2011 UT 80, 267 P.3d 912); Virginia (Va. Code Ann. §§8.01-50); West Virginia (*Farley v. Sarti*, 195 W. Va. 671, 681 (1995)).

²⁷ See Kan. Stat. Ann. § 60-1901; Tex. Civ. Prac. & Rem. Code § 71.003.

²⁸ *Elderkin v. Mahoney*, No. No. CV156056191, 2017 WL 5178583 (Conn. Super. Ct. Sept. 28, 2017).

²⁹ *Porter v. Lassiter*, 91 Ga. App. 712 (1955); *Shirley v. Bacon*, 154 Ga. App. 203 (1980).

³⁰ Miss. Code Ann. § 11-7-13 (2018).

³¹ Romanis, *supra*, note 24.

³² Arizona (*Summerfield v. Superior Ct. in and for Maricopa County*, 144 Ariz. 467 (Ariz. 1985)); Colorado (*Gonzales v. Mascarenas*, 190 P. 3d 826 (Colo. App. 2008)); Delaware (*Worgan v. Greggo & Ferrera, Inc.*, 50 Del. 258 (Del. Super. Ct. 1956)); Hawaii (*Hawaii Castro v. Melchor*, 137 Hawai'i 179 (Haw. Ct. App. 2016)); Idaho (*Volk v. Baldazo*, 103 Idaho 570 (Idaho 1982)); Indiana (Ind. Code Ann. §34-23-2-1(b)); Kentucky (*Stevens v. Flynn*, No. 2010-CA-00196-MR, 2011 WL 3207952 (Ky. Ct. App. July 29, 2011)); Maryland (*Brown v. Contemporary OB/GYN Assocs.*, 143 Md. App. 199 (Md. Ct. Spec. App. 2002); Md. Code Ann., Cts. & Jud. Proc. §§ 3-902, 3-904); Massachusetts (*Thibert v. Milka*, 419 Mass. 693 (Mass. 1995)); Minnesota (*Pehrson v. Kistner*, 301 Minn. 299 (Minn. 1974)); Montana (*Blackburn v. Blue Mt. Women's Clinic*, 286 Mont. 60 (Mont. 1997)); Nevada (*White v. Yup*, 85 Nev. 527 (Nev. 1969)); New Hampshire (*Wallace v. Wallace*, 120 N.H. 675 (N.H. 1980)); New Mexico (*Miller v. Kirk*, 120 N.M. 654 (N.M. 1995)); North Carolina (*DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489 (1987)); North Dakota (*Hopkins v. McBane*, 359 N.W. 2d 862 (N.D. 1984)); Ohio (*Griffiths v. Doctor's Hosp.*, 150 Ohio App. 3d 234, 2002-Ohio-6173, 780 N.E.2d 603 (2002)); Oregon (*LaDu v. Oregon Clinic, P.C.*, 165 Or. App. 687 (Or. Ct. App. 2000)); Pennsylvania (*Coveleski v. Bubnis*, 535 Pa.166 (Pa. 1993)); Rhode Island (*Miccolis v. AMICA*, 587 A. 2d 67 (R.I. 1991)); South Carolina (*Crosby v. Glasscock Trucking*, 340 S.C. 626 (S.C. 2000)); Tennessee (Tenn. Code Ann. § 2 0-5-106(c)); Vermont (*Vaillancourt v. Med. Ctr. Hosp. Vt., Inc.*, 139 Vt. 38 (Vt. 1980)); Washington (*Baum v. Burrington*, 119 Wash. App.36 (Wash. Ct. App. 2003)); Wisconsin (*Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 34 Wis. 2d 14 (Wis. 1967)).

³³ Ind. Code Ann. §34-23-2-1.

³⁴ Wyoming has not determined whether an unborn child is a "person" under the state's Wrongful Death Act. But, the Wyoming Supreme Court has held that an unborn child is not a "minor" for whom guardianship statutes authorize the appointment of a guardian. *Matter of Guardianship of MKH*, 2016 WY 103, 382 P.3d 1096 (Wyo. 2016).

including the value of future loss of support and services, reduced to present value; mental pain and suffering; and already-paid medical or funeral expenses.

However, the bill also amends s. 768.19, F.S., to clarify that the wrongful death action created by the bill may not be brought against the mother of the unborn child.

The bill defines “unborn child” to have the same meaning as in s. 775.021(5), F.S., which provides that the term “unborn child” means a member of the species *Homo sapiens*, at any stage of development, who is carried in the womb.

The bill provides an effective date of July 1, 2024.

B. SECTION DIRECTORY:

- Section 1:** Amends s. 768.18, F.S., relating to definitions.
- Section 2:** Amends s. 768.19, F.S., relating to right of action.
- Section 3:** Amends s. 768.21, F.S., relating to damages.
- Section 4:** Provides an effective date of July 1, 2024.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

- 1. Revenues:
None.
- 2. Expenditures:
See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

- 1. Revenues:
None.
- 2. Expenditures:
See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See Fiscal Comments.

D. FISCAL COMMENTS:

The bill may have an indeterminate fiscal impact as it expands Florida’s Wrongful Death Act, which may allow for parents of an unborn child to recover increased monetary damages from state and local government entities and private individuals party to the suit.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

- 1. Applicability of Municipality/County Mandates Provision:
Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On January 18, 2024, the Civil Justice Subcommittee adopted a proposed committee substitute (PCS) and reported the bill favorably as a committee substitute. The PCS differed from the original bill as it:

- Amended s. 768.19, F.S., to prohibit a right of action against the mother for the wrongful death of the mother's unborn child.
- Removed a provision that limited when parents of an unborn child may recover medical or funeral expenses.

On February 21, 2024, the Judiciary Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment added a definition for the term "unborn child."

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.