

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1639 w/CS Sovereign Immunity
SPONSOR(S): State Administration, Llorente and others
TIED BILLS: none **IDEN./SIM. BILLS:** SB 2948

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>State Administration</u>	<u>5 Y, 2 N w/CS</u>	<u>Bond</u>	<u>Everhart</u>
2) _____	_____	_____	_____
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

Sovereign immunity is a legal concept that prohibits suits against the government, unless the government waives the protection. The state has long provided a limited waiver of its sovereign immunity for ordinary tort liability, including medical malpractice. This bill provides that a private medical school and its employees, while under contract with a public hospital, are considered a part of state government, and thus are entitled to sovereign immunity protection.

There is a possibility that this bill may result in some increase in future state expenditures, although the amount is unknown. This bill appears to have a positive fiscal impact on local government expenditures. See Fiscal Comments.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1639a.sa.doc
DATE: March 24, 2004

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|--|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

This bill expands the definition of sovereign immunity, and decreases the personal responsibility of tortfeasors.

B. EFFECT OF PROPOSED CHANGES:

Background

Sovereign Immunity is a "doctrine which precludes bringing suit against the government without its consent." Blacks Law Dictionary, 1396 (6th ed. 1990). Art. X, s. 13, Fla.Const., recognizes that the concept of sovereign immunity applies to the state, although the state may waive its immunity through an enactment of general law. See generally Gerald T. Wetherington and Donald I. Pollock, *Tort Suits Against Government Entities in Florida*, 44 U.Fla.L.Rev. 1 (1992). Sovereign immunity extends to all subdivisions of the state, including counties and school boards.

In 1973, the Legislature enacted s. 768.28, F.S., a partial waiver of sovereign immunity allowing individuals to sue state government, subdivisions of the state, and municipalities. According to subsection (1), individuals may sue the government under circumstances where a private person "would be liable to the claimant, in accordance with the general laws of th[e] state" Section 768.28, F.S., imposes a \$100,000 limit on the government's liability to a single person. Furthermore, it imposes a \$200,000 limit on the government's liability for claims arising out of a single incident. These limits do not preclude plaintiffs from obtaining judgments in excess of the recovery cap. However, plaintiffs cannot force the government to pay damages which exceed the recovery cap. The limits are constitutional. *Berek v. Metropolitan Dade County*, 422 So.2d 838 (Fla. 1982); *Cauley v. City of Jacksonville*, 403 So.2d 379 (Fla. 1981). In *Gerard v. Department of Transportation*, 472 So.2d 1170 (Fla. 1985), the Florida Supreme Court held that the recovery caps within s. 768.28(5), F.S., did not prevent a plaintiff from seeking a judgment exceeding the recovery caps. However, the court noted: "Even if he is able to obtain a judgment against the Department of Transportation in excess of the settlement amount and goes to the legislature to seek a claims bill with the judgment in hand, this does not mean that the liability of the Department has been conclusively established. The legislature will still conduct its own independent hearing to determine whether public funds would be expended, much like a non jury trial. After all this, the legislature, in its discretion, may still decline to grant him any relief." See generally D. Stephen Kahn, *Legislative Claim Bills: A Practical Guide to a Potent(ial) Remedy*, FLA.B.J. 8 (April 1988).

Chapter 766, F.S., provides current law on medical malpractice. Section 766.1115, F.S., provides that certain health care providers who contract with the state are considered agents of the state, and thus entitled to the protection of sovereign immunity. The protection only applies should the contract contain specific conditions.

Section 768.28(9)(b)2., F.S., defines the term "officer, employee, or agent" (which are the persons to whom sovereign immunity applies). Several identified groups are included in the definition, including health care providers when providing services pursuant to s. 766.1115, F.S.

Florida law confers sovereign immunity to a number of persons who perform public services, including:

- Persons or organizations providing shelter space without compensation during an emergency. s. 252.51, F.S.
- A health care entity providing services as part of a school nurse services contract. s. 381.0056(10), F.S.
- Members of the Florida Health Services Corps who provide medical care to indigent persons in medically underserved areas. s. 381.0302(11), F.S.
- A person under contract to review materials, make site visits or provide expert testimony regarding complaints or applications received by the Department of Health or the Department of Business and Professional Regulation. ss. 455.221(3) and 456.009(3), F.S.
- A business contracted with by the Department of Business and Professional Regulation under the Management Privatization Act. s. 455.32(4), F.S.
- Physicians retained by the Florida State Boxing Commission. s. 548.046(1), F.S.
- Health care providers under contract to provide uncompensated care to indigent state residents. s. 768.28(9)(b), F.S.
- Health care providers or vendors under contract with the Department of Corrections to provide inmate care. s. 768.28(10)(a), F.S.
- An operator, dispatcher, or other person or entity providing security or maintenance for rail services in the South Florida Rail Corridor, under contract with the Tri-County Commuter Rail Authority the Department of Transportation. s. 768.28(10)(d), F.S.
- Professional firms that provide monitoring and inspection services of work required for state roadway, bridge or other transportation facility projects. s. 768.28(10)(e), F.S.
- A provider or vendor under contract with the Department of Juvenile Justice to provide juvenile and family services. s. 768.28(11)(a), F.S.
- Health care practitioners under contract with state universities to provide medical services to student athletes. s. 768.28(12)(a), F.S.

Jackson Memorial Hospital is an accredited, non-profit, tertiary care hospital located in Miami. It is the major teaching facility for the University of Miami School of Medicine. With 1,567 licensed beds, Jackson Memorial Hospital's many roles in South Florida include: being the only full-service provider for the indigent and medically indigent of Miami-Dade County, a regional referral center, and a magnet for medical research and innovation. Based on the number of admissions to a single facility, Jackson Memorial is one of the nation's busiest hospitals. Jackson Memorial Hospital's trauma facilities form the only adult and pediatric Level 1 Trauma Center in South Florida. This center serves as a regional trauma center resource, one of the busiest such providers in the nation.¹ Jackson Memorial is operated by the Public Health Trust for Miami-Dade County.

¹ From <http://um-jmh.org/JHS/Jackson.html>, accessed on March 22, 2004.

The University of Miami is a private university located in Miami. While Jackson Memorial, as a public hospital, currently is protected under sovereign immunity, the university and its professors are not. The result is the University of Miami becomes the proverbial “deep pocket” defendant in many medical malpractice suits filed regarding an adverse incident occurring at Jackson Memorial.²

Effect of Bill

This bill makes the following Legislative findings and intent:

(1) The Legislature finds that access to quality, affordable health care for all residents of this state is a necessary goal for the state and that public hospitals play an essential role in providing access to comprehensive health care services.

(2) The Legislature further finds that access to quality health care at public hospitals is enhanced when public hospitals affiliate and coordinate their common endeavors with medical schools. These affiliations have proven to be an integral part of the delivery of more efficient and economical health care services to patients of public hospitals by offering quality graduate medical education programs to resident physicians who provide patient services at public hospitals. These affiliations ensure continued access to quality comprehensive health care services for residents of this state and therefore should be encouraged in order to maintain and expand such services.

(3) The Legislature finds that when medical schools affiliate or enter into contracts with public hospitals to provide comprehensive health care services to patients of public hospitals, they greatly increase their exposure to claims arising out of alleged medical malpractice and other allegedly negligent acts because some colleges and universities and their medical schools and employees do not have the same level of protection against liability claims as governmental entities and their public employees providing the same patient services to the same public hospital patients.

(4) The Legislature finds that the high cost of litigation, unequal liability exposure, and increased medical malpractice insurance premiums have adversely impacted the ability of some medical schools to permit their employees to provide patient services to patients of public hospitals. This finding is consistent with the report issued in April 2002 by the American Medical Association declaring this state to be one of 12 states in the midst of a medical liability insurance crisis. The crisis in the availability and affordability of medical malpractice insurance is a contributing factor in the reduction of access to quality health care in this state. In the past 15 years, the number of public hospitals in this state has declined significantly. In 1988, 33 hospitals were owned or operated by the state and local governments or established as taxing districts. In 1991, that number dropped to 28. In 2001, only 18 remained, 7 of these concentrated in 1 county. Thus, 11 public hospitals serve the other 66 counties of this state. If no corrective action is taken, this health care crisis will lead to a continued reduction of patient services in public hospitals.

(5) The Legislature finds that the public is better served and will benefit from corrective action to address the foregoing concerns. It is imperative that the Legislature further the public benefit by conferring sovereign immunity upon colleges and universities, their medical schools, and their employees when, pursuant to an affiliation agreement or a contract to provide comprehensive health care services, they provide patient services to patients of public hospitals.

² From information supplied by the University of Miami, on March 20, 2004.

(6) It is the intent of the Legislature that colleges and universities that affiliate with public hospitals be granted sovereign immunity protection under s. 768.28, Florida Statutes, in the same manner and to the same extent as the state and its agencies and political subdivisions. It is also the intent of the Legislature that employees of colleges and universities who provide patient services to patients of a public hospital be immune from lawsuits in the same manner and to the same extent as employees and agents of the state and its agencies and political subdivisions and, further, that they shall not be held personally liable in tort or named as a party defendant in an action while performing patient services except as provided in s. 768.28(9)(a), Florida Statutes.

This bill amends s. 766.1115, F.S., to provide that the any affiliation agreement or contract entered into by a medical school to provide comprehensive health care services to patients at public hospitals, which agreement or contract is subject to s. 768.28(10)(f) (created by this bill), is exempt from the requirements of s. 766.1115, F.S.

This bill amends s. 768.28(9)(b), F.S., to add to the list of persons within the definition of the term "officer, employee, or agent" any college or university or its medical school that enters into an affiliation agreement or a contract to allow its employees to provide comprehensive health care services to patients treated at public statutory teaching hospitals, any other health care facilities owned or used by a governmental entity, or other locations under contract with the governmental entity to provide comprehensive health care services to public hospital patients pursuant to s. 768.28(10)(f); and any faculty member or other health care professional, practitioner, or ancillary caregiver or employee of a college or university or its medical school that enters into an affiliation agreement or a contract to provide comprehensive health care services with a public hospital or its governmental owner and who provides such services to patients of public hospitals.

This bill creates paragraph s. 768.28(10)(f), F.S., to provide that any not-for-profit college or university with a medical, dental, or nursing school, or any other academic programs of medical education accredited by any association, agency, council, commission, or accrediting body recognized by this state as a condition for licensure of its graduates, hereinafter collectively referred to as "medical school," that has entered into an affiliation agreement or a contract to allow its faculty, health care professionals, practitioners, and ancillary caregivers and employees, hereinafter referred to as "employees," to provide patient services to patients treated at a public hospital, together with the employees of such medical school, shall be deemed agents of the governmental entity for purposes of this section and shall be immune from liability for torts in the same manner and to the same extent as the state and its agencies and subdivisions while providing patient services.

As to the new paragraph (f), this bill defines "patient services" to mean any comprehensive health care services, as defined in s. 641.19(4), F.S., including related administrative services to patients of a public hospital; supervision of interns, residents, and fellows providing any patient services to patients of a public hospital; or access to participation in medical research protocols. This bill also defines "public hospital" to mean a statutory teaching hospital and any other health care facility owned or used by the state, a county, a municipality, a public authority, a special taxing district with health care responsibilities, or any other local governmental entity, or at any location under contract with the governmental entity.

C. SECTION DIRECTORY:

Section 1 makes legislative findings.

Section 2 amends s. 766.1115, F.S., to provide an exception to the requirement that a contract between a private medical school and a public hospital must contain certain provisions.

Section 3 amends s. 768.28, to provide that a private medical school, and its agents and employees, are considered within the definition of "officer, employee, or agent" of the state, and are thus entitled to sovereign immunity protection.

Section 4 provides an effective date of upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None. This bill does not affect a state revenue source.

2. Expenditures:

Unknown, see Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None. This bill does not affect a local government revenue source.

2. Expenditures:

This bill may perhaps have a positive fiscal impact on expenditures by the Public Health Trust of Miami-Dade County. See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The University of Miami spent \$49 million in its most recent fiscal year on malpractice claims and related claims costs.³ This bill may thus represent a \$49 million annual benefit to the University of Miami. As this bill limits economic damages recoverable by certain individuals in the private sector who have been damaged in tort, those individuals may not be able to recover as much in damages.

D. FISCAL COMMENTS:

This bill limits the damages that an individual alleging that a health care professional affiliated with the University of Miami medical school, and operating out of Jackson Memorial Hospital, can receive. The University of Miami states that would have saved the University \$49 million last year, and approximately \$60 million this year. Currently, the Public Health Trust, which operates Jackson Memorial Hospital, contracts with the University of Miami for medical personnel. Presumably, should this bill be enacted into law, the savings from reduced malpractice exposure would be passed on the Public Health Trust in the form of a lower contract costs.

It is unknown how much of that \$49 million represents payments for compensatory damages to victims of medical malpractice, and how much represents claims costs. To the extent that compensatory damages are unpaid by any tortfeasor, it is possible that some of such costs may eventually be paid by state and local governments in the form of increased Medicaid, disability, and unemployment compensation payments. If this occurs, it is likely that such payments are significantly less than the \$49 million.

³ Comments by Donna Shalala, President of the University of Miami, and Ron Book, representative of the University of Miami, before the Committee on State Administration, March 24, 2004.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

A representative of Jackson Memorial states that, in the most recent fiscal year, the hospital received \$247 million in tax support, provided \$438 million in charity care, and had an operating loss of \$26 million. He also stated that, without the relatively low-cost services provided through the hospital's affiliation with the medical school of the University of Miami, the hospital could not operate.⁴

Opponents of the bill believe that this bill is deficient because it does not specifically provide for how future malpractice claims where a health care provider affiliated with the University of Miami, working at Jackson Memorial Hospital, will be handled.⁵ The bill appears, however, to provide that any such healthcare provider will be treated as if he or she were an employee of Jackson Memorial. As such, Jackson Memorial would be liable for the malpractice committed by the individual. Jackson Memorial is covered by sovereign immunity, and if found negligent, Jackson Memorial would be required to pay the claim up to the statutory cap, plus any amount above the cap required by the legislature should a claims bill be enacted.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 24, 2004, the Committee on State Administration adopted one amendment narrowing the definition of "public hospital" to address the concern that the definition, as written in the bill as filed, might encompass every hospital in the state. The bill was then reported favorably with a committee substitute.

⁴ Comments by Marvin O'Quinn before the Committee on State Administration, March 24, 2004.

⁵ Comments by Alex Rebozo, Esquire, representing the Academy of Florida Trial Lawyers, before the Committee on State Administration, March 24, 2004.