

The Florida Senate
PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Judiciary Committee

BILL: CS/SB 1508

INTRODUCER: Judiciary Committee and Senator Peaden

SUBJECT: Informed Consent

DATE: March 28, 2007

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Munroe</u>	<u>Wilson</u>	<u>HR</u>	<u>Fav/1 amendment</u>
2.	<u>Luczynski</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/CS</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill adds Florida-certified advanced registered nurse practitioners and Florida-licensed physician assistants to the list of health care providers who are granted immunity in actions brought for examining or treating a patient without his or her informed consent if:

- The patient at the time of the examination or treatment is intoxicated, under the influence of drugs, or otherwise incapable of providing informed consent as required under the Florida Medical Consent Law;
- The patient at the time of the examination or treatment is experiencing an emergency medical condition; and
- The patient would reasonably undergo the examination, treatment, or procedure if he or she were advised in accordance with the Florida Medical Consent Law.

The bill amends the Florida Medical Consent Law to add advanced registered nurse practitioners and physician assistants to the list of health care providers from whom no recovery is allowed in an action brought for treating, examining, or operating on a patient without the patient's informed consent when the elements of informed consent are satisfied.

This bill amends sections 401.445 and 766.103, Florida Statutes.

II. Present Situation:

Informed Consent

Under s. 401.445, F.S., no recovery is allowed in any court in Florida against any emergency medical technician, paramedic, or physician, or any person acting under the direct medical supervision of a physician, in an action brought for examining or treating a patient without his or her informed consent if:

- The patient at the time of the examination or treatment is intoxicated, under the influence of drugs, or otherwise incapable of providing informed consent as provided in s. 766.103, F.S.;
- The patient at the time of the examination or treatment is experiencing an emergency medical condition; and
- The patient would reasonably, under all the surrounding circumstances, undergo such examination, treatment, or procedure if he or she were advised by the emergency medical technician, paramedic, or physician in accordance with s. 766.103, F.S.

Section 766.103, F.S., is the Florida Medical Consent Law, which codifies the common law elements of informed consent.¹ Section 766.103(3), F.S., provides that no recovery is allowed in any court in Florida against a Florida-licensed medical physician, osteopathic physician, chiropractic physician, podiatric physician, or dentist in an action brought for treating, examining, or operating on a patient without informed consent if:

- The action of the health care provider in obtaining informed consent of the patient or another person authorized to give consent for the patient was in accordance with an accepted standard of medical practice among the members of the medical profession with similar training and experience in the same or similar medical community; and
- A reasonable individual, from the information provided by the health care provider under the circumstances, would have a general understanding of the procedure, the medically acceptable alternative procedures or treatments, and the substantial risks and hazards inherent in the proposed treatment or procedures, which are recognized among health care providers in the same or similar community who perform similar treatments or procedures; or
- The patient would reasonably, under all the surrounding circumstances, have undergone such treatment or procedure had he or she been advised by the health care provider.

A written consent, if validly signed by the patient or another authorized person, meets the requirements of s. 766.103(3), F.S., and raises a rebuttable presumption of a valid consent.

Nursing

Part I, ch. 464, F.S., governs the practice of nursing and sets forth requirements for licensure of registered nurses and licensed practical nurses. Advanced registered nurse practitioners may perform all duties of a registered nurse and advanced level nursing in accordance with

¹ Parikh v. Cunningham, 493 So. 2d 999, 1001 (Fla. 1986).

established protocols, including managing selected medical problems, monitoring and altering drug therapies, initiating appropriate therapies for certain conditions, performing physical examinations, ordering and evaluating diagnostic tests, ordering physical and occupational therapy, and initiating and monitoring therapies for certain uncomplicated acute illnesses.²

Section 464.003(3)(c), F.S., requires the Board of Nursing to adopt rules authorizing advanced registered nurse practitioners to perform acts of medical diagnosis and treatment, prescription, and operation, which are identified and approved by a joint committee. Advanced registered nurse practitioners may perform medical acts under the general supervision of a medical physician, osteopathic physician, or dentist within the framework of standing protocols, which identify the medical acts to be performed, and the conditions for their performance. The Board of Nursing and the Board of Medicine have filed identical administrative rules setting forth standards for the protocols,³ which establish obligations on medical physicians, osteopathic physicians, and dentists who enter into protocol relationships with advanced registered nurse practitioners. The Board of Osteopathic Medicine and the Board of Dentistry, which have regulatory jurisdiction over osteopathic physicians and dentists, respectively, are not required to adopt administrative rules regarding the standards for advanced registered nurse practitioner protocols.⁴ Although advanced registered nurse practitioners may prescribe medications in accordance with a protocol, they cannot prescribe controlled substances.⁵

Physician Assistants

Physician assistants licensed under ch. 458 or ch. 459, F.S.,⁶ are authorized to provide health care services under the supervision of a medical physician or osteopathic physician. Sections 458.347 and 459.022, F.S., authorize a supervising physician to delegate to a physician assistant whom he or she supervises the authority to perform health care tasks consistent with the patient's health and welfare. Each physician or group of physicians supervising a licensed physician assistant must be qualified in the medical areas in which the physician assistant is to perform and must be individually or collectively responsible and liable for the performance and the acts and omissions of the physician assistant.⁷

III. Effect of Proposed Changes:

The bill adds advanced registered nurse practitioners and physician assistants to the list of health care providers who are granted immunity, under s. 401.445, F.S., in actions brought for examining or treating a patient without his or her informed consent if:

- The patient at the time of the examination or treatment is intoxicated, under the influence of drugs, or otherwise incapable of providing informed consent as required by s. 766.103, F.S.;

² Section 464.012, F.S.

³ See FLA. ADMIN. CODE R. 64B9-4.010 and FLA. ADMIN. CODE R. 64B8-35.002.

⁴ Section 459.025, F.S.

⁵ See s. 456.0392, F.S.

⁶ See ss. 458.347, 459.022, F.S.

⁷ Sections 458.347(3), 459.022(3), F.S.

- The patient at the time of the examination or treatment is experiencing an emergency medical condition; and
- The patient would reasonably, under all the surrounding circumstances, undergo such examination, treatment, or procedure if he or she were advised by the emergency medical technician, paramedic, physician, *advanced registered nurse practitioner* or *physician assistant* in accordance with s. 766.103, F.S.

The bill also amends the Florida Medical Consent Law, s. 766.103, F.S., to add advanced registered nurse practitioners and physician assistants to the list of health care providers from whom no recovery is allowed in actions for treating, examining, or operating on a patient without the patient's informed consent when the elements of informed consent are satisfied. The elements of informed consent are detailed in Section II, Present Situation section above.

The bill provides for an effective date of July 1, 2007.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

To the extent the bill precludes an individual's recovery in an action brought for providing medical care to a patient without informed consent under certain circumstances, it implicates a potential infringement on the individual's constitutional right of access to courts under the State Constitution.⁸ Article I, section 21 of the State Constitution provides that the courts shall be open to all for redress for an injury. The Legislature may not abolish or limit the right to redress an injury unless one of the *Kluger* exceptions is met.⁹ The *Kluger*¹⁰ exceptions require the Legislature to (1) provide a reasonable alternative remedy or commensurate benefit, or (2) show an overpowering public necessity for the abolishment or restriction of the right and no alternative method of meeting such public necessity.¹¹

With s. 401.445, F.S., the Legislature arguably has provided a commensurate benefit. The patient should receive the benefit of prompt medical treatment when experiencing a

⁸ FLA. CONST. art. I, § 21.

⁹ *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1088 (Fla. 1987).

¹⁰ *Kluger v. White*, 281 So. 2d 1 (Fla. 1973).

¹¹ *Smith*, 507 So. 2d at 1088.

medical emergency and he or she is incapable of providing consent. Without the restriction on the right to recover in an action brought for providing examination or treatment without informed consent, the provision of emergency medical services might be delayed while medical personnel attempt to obtain informed consent.

Arguably, s. 766.103, F.S., does not offend the constitutional right of access to courts. In *Parikh v. Cunningham*, the Florida Supreme Court found that s. 766.103, F.S., codified the common law elements of informed consent.¹² Thus the statute merely provides that there is no recovery for an action brought for treating, examining, or operating on a patient without his or her informed consent when the elements of informed consent have been satisfied.¹³

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may reduce the financial liability of advanced registered nurse practitioners and physician assistants relating to providing medical care without informed consent under certain circumstances.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

¹² *Parikh v. Cunningham*, 493 So. 2d 999, 1001 (Fla. 1986).

¹³ Moreover, there appears to be no existing Florida case law holding s. 401.445 or s. 766.103, F.S., unconstitutional.

VIII. Summary of Amendments:

None.

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