

By Senator Fasano

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1 A bill to be entitled

2 An act for the relief of Joseph G. Donahey, Jr., and
3 Tena Donahey, his spouse; providing an appropriation
4 to compensate them for injuries sustained as a result
5 of the negligence of the University of South Florida;
6 providing a limitation on the payment of fees and
7 costs; providing an effective date.

8
9 WHEREAS, Joseph G. Donahey, Jr., a former circuit judge of
10 the State of Florida, has for years suffered a worsening
11 condition of his back which caused him significant pain and
12 suffering and affected his ability to serve as a circuit judge,
13 and

14 WHEREAS, Judge Donahey was referred by his personal
15 physician to Dr. David Cahill, a neurosurgeon reputed to be
16 skilled in orthopedic surgery, and

17 WHEREAS, Judge Donahey was advised by Dr. Cahill that a
18 surgical procedure could be performed which could significantly
19 improve the condition of his back and that Dr. Cahill was the
20 neurosurgeon responsible for developing that procedure, and

21 WHEREAS, unknown to Judge Donahey, Dr. Cahill was on the
22 faculty of the University of South Florida College of Medicine
23 and employed by the Board of Regents of the State of Florida,
24 and

25 WHEREAS, although Dr. Cahill was on the faculty of the
26 University of South Florida College of Medicine, a significant
27 portion of his income was earned through an entity known as the
28 University of South Florida Physicians Group, which claims the
29 benefits of the state's sovereign immunity. The group provides

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30 multispecialty medical services, collects insurance proceeds and
31 private payments for such services, and distributes a portion of
32 these funds as income to providing physicians and health
33 practitioners who are employees of the University of South
34 Florida, and

35 WHEREAS, Judge Donahey consented to surgery by Dr. Cahill,
36 to be conducted at Tampa General Hospital, where the surgery was
37 performed on January 11, 1999, and

38 WHEREAS, a series of events took place during the surgery
39 which resulted in Judge Donahey becoming totally blind, with
40 those events summarized as follows:

41 (1) Judge Donahey's surgery was scheduled to begin at 7:30
42 a.m. and last 4 hours.

43 (2) The spinal surgery performed on Judge Donahey's back
44 was a complicated and lengthy surgery.

45 (a) Complicated surgery exposes patients to longer periods
46 of time under anesthesia, greater blood loss, and decreased
47 blood pressure and, therefore, increases the risk of decreased
48 blood flow and loss of vision due to ischemic optic neuropathy.

49 (b) Unknown to Judge Donahey, the surgery was performed in
50 part by a resident physician who, as part of his training, was
51 employed by the Board of Regents and received training by
52 observing and participating in surgery conducted by Dr. Cahill,
53 who was the resident physician's professor.

54 (c) During the same time that surgery was being performed
55 on Judge Donahey, and unknown to Judge Donahey, Dr. Cahill
56 supervised three other surgeries. The University of South
57 Florida records reflect that Dr. Cahill was scheduled to begin
58 another surgery at 7:30 a.m., which was scheduled to last 6

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59 hours. Both this surgery and Judge Donahey's surgery were to be
60 followed by a second, shorter surgery in the same operating
61 room. All four procedures were elective and not emergency
62 surgeries. However, the scheduled 6-hour surgery lasted 7 hours
63 and 5 minutes, followed in the same operating room by the two
64 short surgeries. For unknown reasons, Judge Donahey's surgery
65 lasted 10 hours and 15 minutes. Each time Dr. Cahill went back
66 and forth between operating rooms, he was required to do a
67 complete scrub and re-gown, thus contributing to the length of
68 each surgery.

69 (d) Unknown to Judge Donahey, the anesthesiologist who
70 provided anesthesia services was also a resident student
71 employed by the Board of Regents and, as such, performed
72 anesthesiology services for patients being operated on by Dr.
73 Cahill and others while under only partial supervision by a
74 board-certified anesthesiologist who was the anesthetist's
75 professor. The supervising anesthesiologist was simultaneously
76 supervising the anesthesia services of the other patients.

77 (3) The risks associated with this complicated and lengthy
78 surgery, as known to all of the physicians participating in the
79 surgery, were increased by a combination of factors. The
80 following risks were not known by Judge Donahey and were not
81 conveyed to him by the physicians:

82 (a) Hypotensive anesthesia was employed for Judge Donahey's
83 surgery. Hypotensive anesthesia is a technique employed during
84 spinal surgery in which blood pressure is kept artificially low
85 through the administration of medicine in order to minimize
86 bleeding.

87 (b) Low blood pressure has an additive ischemic effect on

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88 blood flow when combined with blood loss, placing certain vital
89 organs at risk for decreased blood flow. The optic nerve, which
90 stimulates vision through the brain, is part of the organ of the
91 eyes and, during spinal surgery, is at risk for decreased blood
92 flow.

93 (c) Hemoglobin drops with blood loss and, as such, is the
94 parameter monitored, together with systolic and diastolic blood
95 pressures, to ensure adequate blood flow to all parts of the
96 body during surgery, especially during the practice of
97 hypotensive anesthesia.

98 (d) Prone body positioning is known to exacerbate the
99 cumulative effects of low hemoglobin and low blood pressures,
100 and Judge Donahey's surgery was performed in the prone position.

101 (e) The resident who provided anesthesia services was
102 educated and trained in the increasing cumulative risk of vision
103 loss due to low blood pressure, blood loss, and lengthy surgery
104 and knew that a patient was at increased risk of loss of vision
105 due to ischemic optic neuropathy when hemoglobin drops below 10.
106 Testimony indicated that Judge Donahey's hemoglobin was below 10
107 for about 4 hours.

108 (f) The resident who provided anesthesia services was
109 educated and trained in these additive effects and also knew
110 that increased risk of vision loss may occur due to ischemic
111 optic neuropathy when systolic blood pressure drops below 100 mm
112 Hg. Judge Donahey's systolic blood pressure dropped below 100 mm
113 Hg during the same period in which his hemoglobin was below 10,
114 and, further, Judge Donahey required and received neo-synephrine
115 in order to elevate his systolic blood pressure.

116 (g) The surgeons who performed Judge Donahey's spinal

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117 surgery were never directly informed of the low hemoglobin or
118 low systolic blood pressure since those symptoms were not deemed
119 a risk requiring the interruption of surgery.

120 (h) Despite the knowledge of the risks associated with
121 hypotensive anesthesia and complicated spinal surgery, the
122 physicians ultimately relied on and employed slightly differing
123 minimum standards for blood pressure and hemoglobin, thereby
124 creating confusion in the context of the surgery, thus
125 increasing the overall risk to Judge Donahey, and
126 correspondingly increased the likelihood that ischemic optic
127 neuropathy would occur.

128 (i) The physicians involved in Judge Donahey's surgery
129 acknowledged that the occurrence of blindness arising from
130 decreased blood flow to the optic nerve, or ischemic optic
131 neuropathy, had increased in the 5 years immediately preceding
132 Judge Donahey's surgery.

133 (j) Vision problems related to surgery had been reported
134 about 120 times in medical literature for this surgery and Dr.
135 Cahill had performed surgery on three previous patients which
136 resulted in unilateral vision loss. A significant portion of
137 these cases involved patients who were in the prone position
138 during lengthy surgery. This problem had been discussed by Dr.
139 Cahill, his resident students, and staff and had been discussed
140 at national meetings. Both the literature and the discussions
141 reflected that a significant causative effect was reduced blood
142 pressure and lowered hemoglobin, which would cause damage to the
143 optic nerve.

144 (4) The surgeons who performed Judge Donahey's surgery
145 acknowledged the option of performing the surgery in two stages

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146 on different days, thereby limiting anesthesia time in each
147 procedure. Judge Donahey was never informed of the cumulative
148 risks that were exacerbated by the length of his surgery and was
149 not informed of the option of having his surgery performed in
150 two stages. If Judge Donahey had been informed of all the risks
151 and of the option of staged surgery, he may have elected the
152 staged surgery, thus avoiding the lengthy anesthesia, and would
153 not be blind today, and

154 WHEREAS, all of the advice and consultation between Judge
155 Donahey, Judge Donahey's wife, and Dr. Cahill was conducted in a
156 manner that led Judge Donahey, with good cause, to believe that
157 Dr. Cahill would perform his surgery or that it would be
158 conducted by Dr. Cahill or his assistants under his direct and
159 immediate supervision and in his presence. In fact, Dr. Cahill
160 and the University of South Florida knew that a significant
161 portion of the surgery would be performed by persons unknown to
162 Judge Donahey, each of whom was significantly less qualified by
163 training and experience than Dr. Cahill, and that significant
164 portions of the surgery would be conducted during Dr. Cahill's
165 lengthy absences from the operating room, and

166 WHEREAS, all communications to Judge Donahey from the staff
167 of Tampa General Hospital and the staff of the University of
168 South Florida reinforced and represented that it was Dr. Cahill,
169 the well-known and renowned physician, who would be performing
170 the surgery. Documents admitting the patient to Tampa General
171 Hospital reinforced Judge Donahey's belief that his care and
172 treatment would be under the direct control and supervision of
173 Dr. Cahill by referencing only Dr. Cahill by name as the
174 surgeon, and

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175 WHEREAS, it is the policy of the State of Florida to
176 require physicians who are not insured for medical malpractice
177 to notify their patients in clear, unequivocal language of the
178 lack of insurance. However, the University of South Florida
179 avoids informing potential patients that if one of its employees
180 makes an error that results in devastating injury and damages,
181 the patient may be limited to the recovery of \$100,000 per claim
182 or \$200,000 per incident, regardless of the severity of the
183 incident or injury, including death, unless the patient is able
184 to have the Legislature order full payment pursuant to a claim
185 bill, and

186 WHEREAS, the records of the University of South Florida are
187 such that it is impossible to determine who was or was not
188 present at any time during the surgery, who performed any parts
189 of the surgery, or the length and number of times when nothing
190 was taking place because of the absence of a specific surgeon to
191 do a specific procedure. The university has provided no
192 explanation of what went wrong. To the extent that any
193 investigation was conducted by the university, such information
194 has not been submitted for review. Even after repeated requests,
195 the university has failed or refused to explain the delay to
196 Judge Donahey. As a result, it is impossible to determine with
197 any degree of accuracy who performed what parts of the surgery
198 during the four surgeries, or why a surgery scheduled to last 4
199 hours lasted more than 10 hours, and

200 WHEREAS, although Dr. Cahill's dictation of what occurred
201 in the operating room during Judge Donahey's surgery was
202 supposed to occur during the surgery, the dictation was
203 completed one-half hour before the surgery was finished. In

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204 addition, the report was dictated as if describing a personally
205 observed event. However, much of the surgery was conducted by
206 others in Dr. Cahill's absence and without his direct
207 supervision. No operative record was maintained by the other two
208 surgeons who were present during Dr. Cahill's absence, and

209 WHEREAS, in sworn testimony Dr. Cahill admits that he
210 doesn't remember what happened and that he cannot recall what
211 parts of the procedure he performed, when he was absent, when he
212 was present, or anything about what happened in his absence. In
213 statements taken under oath, Dr. Cahill could not explain how he
214 happened to be covering three other surgeries while Judge
215 Donahey was under prolonged anesthesia. Dr. Cahill testified
216 that it was his policy that although he might supervise more
217 than one surgery at a time, this would be done only in
218 circumstances in which one serious surgery was performed at the
219 same time as minor surgery of short duration, and

220 WHEREAS, in accordance with s. 766.106, Florida Statutes,
221 Joseph G. Donahey, Jr., joined by his wife, Tena Donahey, filed
222 a notice of intent to commence litigation, took statements of
223 the physicians and the anesthesiologists involved, and supported
224 their notice of intent to commence litigation with the requisite
225 affidavits required by law, and

226 WHEREAS, the Board of Regents of the State of Florida
227 denied liability as authorized by s. 766.106, Florida Statutes,
228 and

229 WHEREAS, Joseph G. Donahey, Jr., filed a lawsuit against
230 the Board of Regents of the State of Florida in the Thirteenth
231 Judicial Circuit of Hillsborough County, Florida, and took
232 discovery depositions of the physicians involved, obtained the

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233 records relating to the care and treatment involved, and fully
234 complied with all pretrial requirements of law, and

235 WHEREAS, the Board of Regents formally offered to settle
236 all claims of the plaintiffs, Joseph G. Donahey, Jr., and Tena
237 Donahey, by the payment of \$200,000, which, pursuant to s.
238 768.28, Florida Statutes, represented the maximum amount that
239 the Board of Regents could be required to pay Joseph G. Donahey,
240 Jr., and Tena Donahey if they won their lawsuit, absent the
241 passage of a legislative claim bill. The penalty for not
242 accepting that offer would be that Joseph G. Donahey, Jr., and
243 Tena Donahey would have to pay the attorney's fees of the Board
244 of Regents if they lost the litigation, and

245 WHEREAS, Joseph G. Donahey, Jr., and Tena Donahey formally
246 accepted the proposed offer of settlement conditioned upon the
247 release being a standard release of a defendant from liability,
248 and

249 WHEREAS, the Board of Regents submitted for signature to
250 Joseph and Tena Donahey a proposed release that would have
251 prevented them from seeking relief from the Legislature, and
252 Joseph and Tena Donahey refused to sign a release containing
253 such a limitation, and

254 WHEREAS, the Board of Regents subsequently tendered a
255 release from which the restriction against seeking legislative
256 relief had been removed, which release was executed to the Board
257 of Regents of the State of Florida and accepted by the board,
258 and

259 WHEREAS, it was the intent of Joseph G. Donahey, Jr., and
260 Tena Donahey that the acceptance of the offer of settlement and
261 the giving and tendering of the release would have the effect of

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262 removing responsibility for the financial expense of trial from
263 the University of South Florida and the plaintiff but would
264 allow Joseph G. Donahey, Jr., and Tena Donahey to make
265 application to the Legislature for equitable relief under the
266 circumstances set forth in this act. This intent was based on
267 the well-founded belief that the university used a portion of a
268 patient's deductible payments and payments from the patient's
269 insurer for medical treatment to fund a self-insurance fund
270 established for the purpose of covering the cost of injuries to
271 patients receiving negligent medical care from medical personnel
272 employed by the university, and

273 WHEREAS, the University of South Florida paid the sum of
274 \$100,000 each to Joseph G. Donahey, Jr., and Tena Donahey from
275 the University of South Florida Health Sciences Center's self-
276 insurance fund, which is the agent of the University of South
277 Florida Health Science Center Insurance Company, Inc. The South
278 Florida Health Science Center Insurance Company, Inc., is a
279 Vermont corporation, formerly registered in Bermuda, created to
280 provide compensation to patients injured due to the fault of
281 employees of the university, including personnel providing
282 medical treatment. The South Florida Health Science Center
283 Insurance Company, Inc., is a wholly owned corporation of the
284 University of South Florida. The corporation is not registered
285 as an insurance company in Vermont or Florida, is registered as
286 a for-profit corporation in the State of Vermont, and is not
287 registered as doing business in the State of Florida even though
288 all of its business is effectively related to the University of
289 South Florida.

290 (1) The self-insurance fund is funded from fees paid for

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291 medical treatment by patients and patients' insurers and is
292 administered by the university apart from the state budget.

293 (2) The policy of the university is to never make payments
294 from the fund of more than \$100,000 per claimant unless required
295 to do so by the Legislature pursuant to a claim bill.

296 (3) The fund is also used to purchase reinsurance to
297 reimburse amounts paid from the fund in excess of \$1 million per
298 incident, and

299 WHEREAS, Joseph G. Donahey, Jr., has suffered significant
300 mental pain and suffering and loss of the enjoyment of his life
301 by reason of his blindness and continued to serve as a circuit
302 judge with great difficulty, and, upon his retirement from the
303 bench, has found that his earning capacity as a teacher or as a
304 lawyer has been significantly and adversely affected by his
305 blindness, and

306 WHEREAS, in his attempt to seek relief from his blindness,
307 Joseph G. Donahey, Jr., has incurred economic expenses that have
308 not been compensated by insurance, and

309 WHEREAS, by reason of her husband's injuries, Tena Donahey
310 has suffered an economic loss due to her need to assist him in
311 his daily life and has also suffered a significant loss of
312 consortium, and

313 WHEREAS, the payment of an additional \$3 million to Joseph
314 G. Donahey, Jr., and Tena Donahey to compensate them for damages
315 sustained will be in furtherance of the reason the self-
316 insurance fund was created and in furtherance of the insurance
317 contract purchased by the fund, to wit: to pay full and just
318 compensation to patients of the University of South Florida
319 injured by reason of the fault of employees of the university,

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320 NOW, THEREFORE,

321

322 Be It Enacted by the Legislature of the State of Florida:

323

324 Section 1. The facts stated in the preamble to this act are
325 found and declared to be true.

326 Section 2. The University of South Florida is directed to
327 draw a warrant in favor of Joseph G. Donahey, Jr., in the sum of
328 \$2 million payable from the University of South Florida Health
329 Sciences Center's self-insurance fund or the University of South
330 Florida Health Science Center Insurance Company, Inc., as
331 appropriate.

332 Section 3. The University of South Florida is directed to
333 draw a warrant in favor of Tena Donahey in the sum of \$1 million
334 payable from the University of South Florida Health Sciences
335 Center's self-insurance fund or the University of South Florida
336 Health Science Center Insurance Company, Inc., as appropriate.

337 Section 4. The amount paid by the University of South
338 Florida pursuant to s. 768.28, Florida Statutes, and the amount
339 awarded under this act are intended to provide the sole
340 compensation for all present and future claims arising out of
341 the factual situation described in this act which resulted in
342 the injuries and damages to Joseph G. Donahey, Jr., and Tena
343 Donahey. The total amount paid for attorney's fees, lobbying
344 fees, costs, and other similar expenses relating to this claim
345 may not exceed 25 percent of the total amount awarded under this
346 act.

347 Section 5. This act shall take effect upon becoming a law.