

House Bill No. 67-E

An act relating to liability; amending s. 762.112, F.S.; prescribing applicability of provisions relating to comparative fault to boards of trustees; amending s. 768.28, F.S.; providing venue in actions brought against boards of trustees; providing applicability of provisions relating to waiver of sovereign immunity to boards of trustees; amending s. 626.852, F.S.; providing inapplicability of provisions relating to insurance adjusters to employees and agents of a board of trustees; amending s. 766.302, F.S.; defining the terms “family member” and “family residential or custodial care”; amending s. 766.31, F.S.; authorizing compensation awards for professional or family residential or custodial care; amending s. 766.314, F.S.; revising requirements for assessments used for certain supervised personnel; providing for construction of laws enacted at the 2002 Regular Session in relation to this act; providing effective dates.

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

Section 1. Subsection (2) of section 766.112, Florida Statutes, is amended to read:

766.112 Comparative fault.—

(2) In an action for damages for personal injury or wrongful death arising out of medical malpractice, whether in contract or tort, when an apportionment of damages pursuant to s. 768.81 is attributed to a the board of trustees of a state university ~~Regents~~, the court shall enter judgment against the board of trustees ~~Regents~~ on the basis of the board's ~~such party's~~ percentage of fault and not on the basis of the doctrine of joint and several liability. The sole remedy available to a claimant to collect a judgment or settlement against a board of trustees ~~damages~~, subject to the provisions of this subsection, ~~against the Board of Regents~~ shall be pursuant to s. 768.28.

Section 2. Subsections (1) and (2) of section 768.28, Florida Statutes, are amended to read:

768.28 Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions; indemnification; risk management programs.—

(1) In accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for 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 under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance

with the general laws of this state, may be prosecuted subject to the limitations specified in this act. Any such action may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued. However, any such action against a state university board of trustees shall be brought in the county in which that university's main campus is located or in the county in which the cause of action accrued if the university maintains therein a substantial presence for the transaction of its customary business.

(2) As used in this act, "state agencies or subdivisions" include the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Spaceport Florida Authority.

Section 3. Subsection (5) of section 626.852, Florida Statutes, is amended to read:

626.852 Scope of this part.—

(5) This part does not apply to any employee or agent of a state university the board of trustees Regents providing services in support of any self-insurance program created under s. 240.213 or s. 1004.24 adopted by such Board of Regents.

Section 4. The amendments to sections 766.112(2) and 768.28(1) and (2) shall apply to causes of action arising on or after January 7, 2003.

Section 5. Subsections (9) and (10) are added to section 766.302, Florida Statutes, to read:

766.302 Definitions; ss. 766.301-766.316.—As used in ss. 766.301-766.316, the term:

(9) "Family member" means a father, mother, or legal guardian.

(10) "Family residential or custodial care" means care normally rendered by trained professional attendants which is beyond the scope of child care duties, but which is provided by family members. Family members who provide nonprofessional residential or custodial care may not be compensated under this act for care that falls within the scope of child care duties and other services normally and gratuitously provided by family members. Family residential or custodial care shall be performed only at the direction and control of a physician when such care is medically necessary. Reasonable charges for expenses for family residential or custodial care provided by a family member shall be determined as follows:

(a) If the family member is not employed, the per-hour value equals the federal minimum hourly wage.

(b) If the family member is employed and elects to leave that employment to provide such care, the per-hour value of that care shall equal the rates

established by Medicaid for private-duty services provided by a home health aide. A family member or a combination of family members providing care in accordance with this definition may not be compensated for more than a total of 10 hours per day. Family care is in lieu of professional residential or custodial care, and no professional residential or custodial care may be awarded for the period of time during the day that family care is being provided.

(c) The award of family residential or custodial care as defined in this section shall not be included in the current estimates for purposes of s. 766.314(9)(c).

Section 6. Paragraph (a) of subsection (1) of section 766.31, Florida Statutes, is amended to read:

766.31 Administrative law judge awards for birth-related neurological injuries; notice of award.—

(1) Upon determining that an infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at the birth, the administrative law judge shall make an award providing compensation for the following items relative to such injury:

(a) Actual expenses for medically necessary and reasonable medical and hospital, habilitative and training, family residential or custodial care, professional residential, and custodial care and service, for medically necessary drugs, special equipment, and facilities, and for related travel. However, such expenses shall not include:

1. Expenses for items or services that the infant has received, or is entitled to receive, under the laws of any state or the Federal Government, except to the extent such exclusion may be prohibited by federal law.

2. Expenses for items or services that the infant has received, or is contractually entitled to receive, from any prepaid health plan, health maintenance organization, or other private insuring entity.

3. Expenses for which the infant has received reimbursement, or for which the infant is entitled to receive reimbursement, under the laws of any state or the Federal Government, except to the extent such exclusion may be prohibited by federal law.

4. Expenses for which the infant has received reimbursement, or for which the infant is contractually entitled to receive reimbursement, pursuant to the provisions of any health or sickness insurance policy or other private insurance program.

Expenses included under this paragraph shall be limited to reasonable charges prevailing in the same community for similar treatment of injured persons when such treatment is paid for by the injured person.

Section 7. Paragraph (c) of subsection (4) of section 766.314, Florida Statutes, is amended to read:

766.314 Assessments; plan of operation.—

(4) The following persons and entities shall pay into the association an initial assessment in accordance with the plan of operation:

(c) On or before December 1, 1988, each physician licensed pursuant to chapter 458 or chapter 459 who wishes to participate in the Florida Birth-Related Neurological Injury Compensation Plan and who otherwise qualifies as a participating physician under ss. 766.301-766.316 shall pay an initial assessment of \$5,000. However, if the physician is either a resident physician, assistant resident physician, or intern in an approved postgraduate training program, as defined by the Board of Medicine or the Board of Osteopathic Medicine by rule, and is supervised in accordance with program requirements established by the Accreditation Council for Graduate Medical Education or the American Osteopathic Association by a physician who is participating in the plan, such resident physician, assistant resident physician, or intern is deemed to be a participating physician without the payment of the assessment. Participating physicians also include any employee of the Board of Regents who has paid the assessment required by this paragraph and paragraph (5)(a), and any certified nurse midwife supervised by such employee. Participating physicians include any certified nurse midwife who has paid 50 percent of the physician assessment required by this paragraph and paragraph (5)(a) and who is supervised by a participating physician who has paid the assessment required by this paragraph and paragraph (5)(a). Supervision for nurse midwives shall require that the supervising physician will be easily available and have a prearranged plan of treatment for specified patient problems which the supervised certified nurse midwife ~~or physician~~ may carry out in the absence of any complicating features. Any physician who elects to participate in such plan on or after January 1, 1989, who was not a participating physician at the time of such election to participate and who otherwise qualifies as a participating physician under ss. 766.301-766.316 shall pay an additional initial assessment equal to the most recent assessment made pursuant to this paragraph, paragraph (5)(a), or paragraph (7)(b).

Section 8. If any law that is amended by this act was also amended by a law enacted at the 2002 Regular Session of the Legislature, such laws shall be construed as if they had been enacted at the same session of the Legislature, and full effect should be given to each if that is possible.

Section 9. This act, except for this section and sections 5, 6, 7, and 8, which shall take effect upon becoming a law, shall take effect January 7, 2003.

Approved by the Governor June 7, 2002.

Filed in Office Secretary of State June 7, 2002.