

By Senator Thrasher

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1 A bill to be entitled
2 An act relating to medical malpractice; providing
3 legislative findings and intent; amending s. 766.102,
4 F.S.; providing that the claimant has the burden of
5 proving by clear and convincing evidence that the
6 actions of a health care provider represented a breach
7 of the prevailing professional standard of care in an
8 action for damages based on death or personal injury
9 which alleges that the death or injury resulted from
10 the failure of a health care provider to order,
11 perform, or administer supplemental diagnostic tests;
12 amending s. 766.106, F.S.; authorizing a prospective
13 defendant to obtain informal discovery by conducting
14 ex parte interviews of treating health care providers;
15 requiring advance notice to the claimant of an ex
16 parte interview; amending s. 768.28, F.S.; redefining
17 the term "officer, employee, or agent" to include an
18 emergency health care provider; providing that an
19 emergency health care provider is an agent of the
20 state; requiring an emergency health care provider to
21 indemnify the state for any judgments, settlement
22 costs, or other liabilities; imposing a penalty
23 against an emergency health care provider who fails to
24 indemnify the state; requiring that the Department of
25 Health issue an emergency order suspending the license
26 of any licensee under the department's jurisdiction
27 who fails to indemnify the state or enter into a
28 repayment agreement; providing for disciplinary action
29 for licensees in the Division of Medical Quality

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30 Assurance of the department; providing an effective
31 date.

32
33 Be It Enacted by the Legislature of the State of Florida:

34
35 Section 1. Legislative findings and intent.—

36 (1) The Legislature finds and declares it to be of vital
37 importance that emergency services and care be provided by
38 hospitals, physicians, and providers of emergency medical
39 services to every person in need of such services and care. The
40 Legislature also finds that providers of emergency services are
41 a critical element in responding to natural disasters and
42 emergency situations that may affect local communities, the
43 state, and the country. The Legislature recognizes the
44 importance of maintaining a viable system of providing for the
45 emergency medical needs of the state's residents and visitors.
46 The Legislature and the Federal Government have required
47 providers of emergency medical services to provide emergency
48 services and care to all persons who present themselves to
49 hospitals seeking such care. As used in this section, the term
50 "emergency medical services" means all screenings, examinations,
51 and evaluations by a physician, hospital, or other person or
52 entity acting pursuant to obligations imposed by s. 395.1041 or
53 s. 401.45, Florida Statutes, and the care, treatment, surgery,
54 or other medical services provided to relieve or eliminate the
55 emergency medical condition, including all medical services to
56 eliminate the likelihood that the emergency medical condition
57 will deteriorate or recur without further medical attention
58 within a reasonable period of time.

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59 (2) The Legislature has further mandated that emergency
60 medical treatment may not be denied by providers of emergency
61 medical services to persons who have or are likely to have an
62 emergency medical condition. This mandate imposes a unilateral
63 obligation on providers of emergency medical services to provide
64 services to all persons seeking emergency care without guarantee
65 of payment or other consideration for provision of such care.
66 The Legislature also recognizes that providers of emergency
67 medical services provide a significant amount of uncompensated
68 emergency medical care in furtherance of this governmental
69 interest.

70 (3) The Legislature further finds that:

71 (a) A significant proportion of the residents of this state
72 who are uninsured or receive Medicaid or Medicare assistance are
73 unable to access needed health care on an elective basis because
74 health care providers fear the increased risk of medical
75 malpractice liability. The Legislature finds that, in order to
76 obtain medical care, these patients frequently are forced to
77 seek care through providers of emergency medical services.

78 (b) Providers of emergency medical services in this state
79 have reported significant problems regarding the affordability
80 of professional liability insurance. The cost of professional
81 liability insurance in this state is more expensive than the
82 national average. The Legislature further finds that a
83 significant number of physicians who hold a board certification
84 in a specialty have resigned from serving on hospital staffs or
85 have otherwise declined to provide on-call coverage to hospital
86 emergency departments due to the increased exposure to medical
87 malpractice liability created by treating patients admitted into

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88 an emergency department of a medical facility, thereby creating
89 a void that has an adverse effect on emergency patient care.

90 (4) It is the intent of the Legislature that hospitals,
91 providers of emergency medical services, and physicians ensure
92 that patients who need emergency medical treatment and who
93 present themselves to hospitals for emergency medical services
94 and care have access to these needed services.

95 Section 2. Subsection (4) of section 766.102, Florida
96 Statutes, is amended to read:

97 766.102 Medical negligence; standards of recovery; expert
98 witness.—

99 (4) (a) The Legislature is cognizant of the changing trends
100 and techniques for the delivery of health care in this state and
101 the discretion that is inherent in the diagnosis, care, and
102 treatment of patients by different health care providers. The
103 failure of a health care provider to order, perform, or
104 administer supplemental diagnostic tests is shall not be
105 actionable if the health care provider acted in good faith and
106 with due regard for the prevailing professional standard of
107 care.

108 (b) The claimant has the burden of proving by clear and
109 convincing evidence that the alleged actions of the health care
110 provider represent a breach of the prevailing professional
111 standard of care in an action for damages based on death or
112 personal injury which alleges that the death or injury resulted
113 from the failure of a health care provider to order, perform, or
114 administer supplemental diagnostic tests.

115 Section 3. Paragraph (b) of subsection (6) of section
116 766.106, Florida Statutes, is amended to read:

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117 766.106 Notice before filing action for medical negligence;
118 presuit screening period; offers for admission of liability and
119 for arbitration; informal discovery; review.—

120 (6) INFORMAL DISCOVERY.—

121 (b) Informal discovery may be used by a party to obtain
122 unsworn statements, the production of documents or things, ~~and~~
123 physical and mental examinations, and ex parte interviews, as
124 follows:

125 1. Unsworn statements.—Any party may require other parties
126 to appear for the taking of an unsworn statement. Such
127 statements may be used only for the purpose of presuit screening
128 and are not discoverable or admissible in any civil action for
129 any purpose by any party. A party desiring to take the unsworn
130 statement of any party must give reasonable notice in writing to
131 all parties. The notice must state the time and place for taking
132 the statement and the name and address of the party to be
133 examined. Unless otherwise impractical, the examination of any
134 party must be done at the same time by all other parties. Any
135 party may be represented by counsel at the taking of an unsworn
136 statement. An unsworn statement may be recorded electronically,
137 stenographically, or on videotape. The taking of unsworn
138 statements is subject to the provisions of the Florida Rules of
139 Civil Procedure and may be terminated for abuses.

140 2. Documents or things.—Any party may request discovery of
141 documents or things. The documents or things must be produced,
142 at the expense of the requesting party, within 20 days after the
143 date of receipt of the request. A party is required to produce
144 discoverable documents or things within that party's possession
145 or control. Medical records shall be produced as provided in s.

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146 766.204.

147 3. Physical and mental examinations.—A prospective
148 defendant may require an injured claimant to appear for
149 examination by an appropriate health care provider. The
150 prospective defendant shall give reasonable notice in writing to
151 all parties as to the time and place for examination. Unless
152 otherwise impractical, a claimant is required to submit to only
153 one examination on behalf of all potential defendants. The
154 practicality of a single examination must be determined by the
155 nature of the claimant's condition, as it relates to the
156 liability of each prospective defendant. Such examination report
157 is available to the parties and their attorneys upon payment of
158 the reasonable cost of reproduction and may be used only for the
159 purpose of presuit screening. Otherwise, such examination report
160 is confidential and exempt from the provisions of s. 119.07(1)
161 and s. 24(a), Art. I of the State Constitution.

162 4. Written questions.—Any party may request answers to
163 written questions, the number of which may not exceed 30,
164 including subparts. A response must be made within 20 days after
165 receipt of the questions.

166 5. Unsworn statements of treating health care providers.—A
167 prospective defendant or his or her legal representative may
168 also take unsworn statements of the claimant's treating health
169 care providers. The statements must be limited to those areas
170 that are potentially relevant to the claim of personal injury or
171 wrongful death. Subject to the procedural requirements of
172 subparagraph 1., a prospective defendant may take unsworn
173 statements from a claimant's treating physicians. Reasonable
174 notice and opportunity to be heard must be given to the claimant

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175 or the claimant's legal representative before taking unsworn
176 statements. The claimant or claimant's legal representative has
177 the right to attend the taking of such unsworn statements.

178 6. Ex parte interviews of treating health care providers.-A
179 prospective defendant or his or her legal representative may
180 interview the claimant's treating health care providers without
181 the presence of the claimant or the claimant's legal
182 representative. If a prospective defendant or his or her legal
183 representative intends to interview a claimant's health care
184 providers, the prospective defendant must provide the claimant
185 with notice of such interview at least 10 days before the date
186 of the interview.

187 Section 4. Subsection (9) of section 768.28, Florida
188 Statutes, is amended to read:

189 768.28 Waiver of sovereign immunity in tort actions;
190 recovery limits; limitation on attorney fees; statute of
191 limitations; exclusions; indemnification; risk management
192 programs.-

193 (9) (a) No officer, employee, or agent of the state or of
194 any of its subdivisions shall be held personally liable in tort
195 or named as a party defendant in any action for any injury or
196 damage suffered as a result of any act, event, or omission of
197 action in the scope of her or his employment or function, unless
198 such officer, employee, or agent acted in bad faith or with
199 malicious purpose or in a manner exhibiting wanton and willful
200 disregard of human rights, safety, or property. However, such
201 officer, employee, or agent shall be considered an adverse
202 witness in a tort action for any injury or damage suffered as a
203 result of any act, event, or omission of action in the scope of

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204 her or his employment or function. The exclusive remedy for
205 injury or damage suffered as a result of an act, event, or
206 omission of an officer, employee, or agent of the state or any
207 of its subdivisions or constitutional officers shall be by
208 action against the governmental entity, or the head of such
209 entity in her or his official capacity, or the constitutional
210 officer of which the officer, employee, or agent is an employee,
211 unless such act or omission was committed in bad faith or with
212 malicious purpose or in a manner exhibiting wanton and willful
213 disregard of human rights, safety, or property. The state or its
214 subdivisions are ~~shall~~ not be liable in tort for the acts or
215 omissions of an officer, employee, or agent committed while
216 acting outside the course and scope of her or his employment or
217 committed in bad faith or with malicious purpose or in a manner
218 exhibiting wanton and willful disregard of human rights, safety,
219 or property.

220 (b) As used in this subsection, the term:

221 1. "Employee" includes any volunteer firefighter.

222 2. "Officer, employee, or agent" includes, but is not
223 limited to:r

224 a. Any health care provider when providing services
225 pursuant to s. 766.1115; any member of the Florida Health
226 Services Corps, as defined in s. 381.0302, who provides
227 uncompensated care to medically indigent persons referred by the
228 Department of Health; any nonprofit independent college or
229 university located and chartered in this state which owns or
230 operates an accredited medical school, and its employees or
231 agents, when providing patient services pursuant to paragraph
232 (10) (f); and any public defender or her or his employee or

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233 agent, including, among others, an assistant public defender and
234 an investigator.

235 b. Any emergency health care provider acting pursuant to
236 obligations imposed by s. 395.1041 or s. 401.45, except for a
237 person or entity that is otherwise covered under this section,
238 unless the emergency health care provider waives the agency
239 status granted in this section.

240 (c)1. An emergency health care provider is an agent of the
241 state and shall indemnify the state for any judgments,
242 settlement costs, or other liabilities incurred, up to the
243 liability limits in subsection (5). As used in this paragraph,
244 the term "emergency health care provider" means a physician
245 licensed under chapter 458 or chapter 459.

246 2. Any emergency health care provider who is licensed in
247 this state who fails to indemnify the state after reasonable
248 notice and written demand to do so is subject to an emergency
249 suspension order of the regulating authority having jurisdiction
250 over the licensee.

251 3. The Department of Health shall issue an emergency order
252 suspending the license of any licensee under its jurisdiction or
253 any licensee of a regulatory board within the Department of
254 Health who fails to comply within 30 days after receipt by the
255 department of a notice from the Division of Risk Management of
256 the Department of Financial Services that the licensee has
257 failed to satisfy his or her obligation to indemnify the state
258 or enter into a repayment agreement for costs under this
259 subsection. The terms of such agreement must provide assurance
260 of repayment of the obligation which is satisfactory to the
261 state. For licensees within the Division of Medical Quality

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262 Assurance of the Department of Health, failure to comply with
263 this paragraph constitutes grounds for disciplinary action under
264 each respective practice act and under s. 456.072(1)(k).

265 (d)~~(e)~~ For purposes of the waiver of sovereign immunity
266 only, a member of the Florida National Guard is not acting
267 within the scope of state employment when performing duty under
268 the provisions of Title 10 or Title 32 of the United States Code
269 or other applicable federal law; and neither the state nor any
270 individual may be named in any action under this chapter arising
271 from the performance of such federal duty.

272 (e)~~(d)~~ The employing agency of a law enforcement officer as
273 defined in s. 943.10 is not liable for injury, death, or
274 property damage effected or caused by a person fleeing from a
275 law enforcement officer in a motor vehicle if:

276 1. The pursuit is conducted in a manner that does not
277 involve conduct by the officer which is so reckless or wanting
278 in care as to constitute disregard of human life, human rights,
279 safety, or the property of another;

280 2. At the time the law enforcement officer initiates the
281 pursuit, the officer reasonably believes that the person fleeing
282 has committed a forcible felony as defined in s. 776.08; and

283 3. The pursuit is conducted by the officer pursuant to a
284 written policy governing high-speed pursuit adopted by the
285 employing agency. The policy must contain specific procedures
286 concerning the proper method to initiate and terminate high-
287 speed pursuit. The law enforcement officer must have received
288 instructional training from the employing agency on the written
289 policy governing high-speed pursuit.

290 Section 5. This act shall take effect July 1, 2012.