

By the Committee on Health, Aging, and Long-Term Care; and
Senator Saunders

317-2036-03

1 A bill to be entitled
2 An act relating to medical malpractice;
3 amending s. 46.015, F.S.; revising requirements
4 for setting damages in medical malpractice
5 actions; amending s. 456.057, F.S.; authorizing
6 the release of medical information to defendant
7 health care practitioners in medical
8 malpractice actions under specified
9 circumstances; amending s. 766.102, F.S.;
10 revising requirements for health care providers
11 providing expert testimony in medical
12 negligence actions; amending s. 766.104, F.S.;
13 allowing testimony of expert witnesses in
14 medical negligence actions to be subject to
15 discovery; amending s. 766.106, F.S.; providing
16 for the discovery and admissibility of
17 statements and opinions of experts in medical
18 negligence actions; requiring a claimant to
19 execute a medical release as a condition of
20 filing a medical negligence suit; authorizing
21 defendants in medical negligence actions to
22 conduct ex parte interviews with claimant's
23 treating physicians; imposing requirements on
24 ex parte interviews of a medical malpractice
25 claimant's treating physicians; providing
26 conditions for causes of action against
27 insurers who have acted in bad faith in
28 providing coverage for medical negligence;
29 providing factors to be considered with respect
30 to certain claims for bad faith against an
31 insurer; creating s. 766.1065, F.S.;

1 establishing a procedure by which medical
2 malpractice litigants can mediate their
3 disputes; providing requirements for mediation
4 between medical malpractice litigants;
5 requiring mediators to maintain information on
6 issues and facts presented at mediation to be
7 available for review by a court; amending s.
8 766.108, F.S., requiring mediation as a
9 condition of filing a medical malpractice
10 action; providing requirements for mediation
11 between litigants in a medical malpractice
12 action; amending s. 766.202, F.S.; redefining
13 terms; providing requirements for the
14 structuring of future noneconomic damage
15 payments in medical malpractice actions;
16 amending s. 766.207, F.S.; authorizing periodic
17 payment of future noneconomic damages in
18 medical malpractice actions; requiring the
19 awarding of noneconomic damages to be per
20 claimant; providing for the applicability of
21 the Wrongful Death Act or general law to
22 arbitration awards; amending s. 766.209, F.S.;
23 revising requirements for damages awardable at
24 trial when an offer for voluntary arbitration
25 has been rejected; providing for the
26 applicability of the Wrongful Death Act for the
27 awarding of noneconomic damages; requiring the
28 award of noneconomic damages to be per
29 claimant; amending s. 768.041, F.S.; revising
30 requirements for setting damages in medical
31 malpractice actions; amending ss. 768.13,

1 768.28, F.S.; revising requirements for
2 immunity from civil liability to physicians,
3 hospitals, and certain hospital employees
4 rendering medical care or treatment in response
5 to an emergency within a hospital or trauma
6 center; extending immunity from liability to
7 certain health care practitioners in a
8 hospital; amending s. 768.28, F.S.; redefining
9 terms for purposes of determining who is an
10 agent to which sovereign immunity is waived, to
11 include specified health care professionals
12 providing services in an emergency room or
13 trauma center of a licensed hospital; amending
14 s. 768.77, F.S.; prescribing matters to be
15 considered by the trier of fact when damages
16 are awarded in medical malpractice actions;
17 amending s. 768.78, F.S.; revising methods of
18 the payment for damage awards in medical
19 malpractice actions; authorizing periodic
20 payment of future noneconomic damages in
21 medical malpractice actions; amending s.
22 768.81, F.S.; providing for an apportionment of
23 damages based on a party's percentage of fault
24 and not on the basis of the doctrine of joint
25 and several liability; providing a contingent
26 effective date.

27
28 Be It Enacted by the Legislature of the State of Florida:

29
30 Section 1. Subsection (4) is added to section 46.015,
31 Florida Statutes, to read:

1 46.015 Release of parties.--

2 (4) At trial pursuant to a suit filed under chapter
3 766, in arbitration pursuant to s. 766.207, or at trial
4 pursuant to s. 766.209, if any defendant shows the court that
5 the plaintiff, or his or her legal representative, has
6 delivered a written release or covenant not to sue to any
7 person in partial satisfaction of the damages sued for, the
8 court or arbitration panel shall set off this amount from the
9 amount of any judgment or arbitration award to which the
10 plaintiff would otherwise be entitled at the time of rendering
11 the judgment or arbitration award, regardless of whether the
12 jury has allocated fault to the settling defendant at trial
13 and regardless of the theory of liability. The amount of the
14 setoff must include all sums received by the plaintiff,
15 including economic and noneconomic damages, costs, and
16 attorney's fees.

17 Section 2. Subsection (6) of section 456.057, Florida
18 Statutes, is amended to read:

19 456.057 Ownership and control of patient records;
20 report or copies of records to be furnished.--

21 (6) Except in a medical negligence action or
22 administrative proceeding when a health care practitioner or
23 provider is or reasonably expects to be named as a defendant,
24 information disclosed to a health care practitioner by a
25 patient in the course of the care and treatment of such
26 patient is confidential and may be disclosed only to other
27 health care practitioners and providers involved in the care
28 or treatment of the patient, or if permitted by written
29 authorization from the patient or compelled by subpoena at a
30 deposition, evidentiary hearing, or trial for which proper
31 notice has been given or pursuant to a medical negligence suit

1 filed under chapter 766 in which the patient has executed, as
2 a condition of filing the suit, a medical release that allows
3 a defendant health care practitioner who is considered to be a
4 health care provider under chapter 766, or his or her legal
5 representative, to conduct ex parte interviews with the
6 claimant's treating physicians, which interviews must be
7 limited to areas that are potentially relevant to the
8 claimant's alleged injury or illness.

9 Section 3. Subsection (2) of section 766.102, Florida
10 Statutes, is amended to read:

11 766.102 Medical negligence; standards of recovery.--

12 (2)(a) If the health care provider whose negligence is
13 claimed to have created the cause of action is not certified
14 by the appropriate American board as being a specialist, is
15 not trained and experienced in a medical specialty, or does
16 not hold himself or herself out as a specialist, a "similar
17 health care provider" is one who:

18 1. Is licensed by the appropriate regulatory agency of
19 this state;

20 2. Is trained and experienced in the same discipline
21 or school of practice; ~~and~~

22 3. Practices in the same or similar medical community;
23 ~~and-~~

24 4. Has, during the 5 years immediately preceding the
25 date of the occurrence that is the basis for the action,
26 engaged in any combination of the following:

27 a. Active clinical practice;

28 b. Instruction of students in an accredited health
29 professional school or accredited residency program in the
30 same health profession as the health care provider against
31 whom or on whose behalf the testimony is offered; or

1 c. A clinical research program that is affiliated with
2 an accredited medical school or teaching hospital in the same
3 health profession as the health care provider against whom or
4 on whose behalf the testimony is offered.

5 (b) If the health care provider whose negligence is
6 claimed to have created the cause of action is certified by
7 the appropriate American board as a specialist, is trained and
8 experienced in a medical specialty, or holds himself or
9 herself out as a specialist, a "similar health care provider"
10 is one who:

11 1. Is trained and experienced in the same specialty;
12 ~~and~~

13 2. Is certified by the appropriate American board in
14 the same specialty; ~~and-~~

15 3. Has, during the 5 years immediately preceding the
16 date of the occurrence that is the basis for the action,
17 engaged in any combination of the following:

18 a. Active clinical practice in the same specialty or a
19 similar specialty that includes the evaluation, diagnosis, or
20 treatment of the medical condition or procedure that is the
21 subject of the action;

22 b. Instruction of students in an accredited health
23 professional school or accredited residency program in the
24 same health profession and the same or similar specialty as
25 the health care provider against whom or on whose behalf the
26 testimony is offered; or

27 c. A clinical research program that is affiliated with
28 an accredited medical school or teaching hospital and that is
29 in the same health profession and the same or similar
30 specialty as the health care provider against whom or on whose
31

1 behalf the testimony is offered and that is in the general
2 practice of medicine.

3

4 However, if any health care provider described in this
5 paragraph is providing treatment or diagnosis for a condition
6 which is not within his or her specialty, a specialist trained
7 in the treatment or diagnosis for that condition shall be
8 considered a "similar health care provider."

9 ~~(c) The purpose of this subsection is to establish a~~
10 ~~relative standard of care for various categories and~~
11 ~~classifications of health care providers. Any health care~~
12 ~~provider may testify as an expert in any action if he or she:~~

13 1. ~~Is a similar health care provider pursuant to~~
14 ~~paragraph (a) or paragraph (b); or~~

15 2. ~~Is not a similar health care provider pursuant to~~
16 ~~paragraph (a) or paragraph (b) but, to the satisfaction of the~~
17 ~~court, possesses sufficient training, experience, and~~
18 ~~knowledge as a result of practice or teaching in the specialty~~
19 ~~of the defendant or practice or teaching in a related field of~~
20 ~~medicine, so as to be able to provide such expert testimony as~~
21 ~~to the prevailing professional standard of care in a given~~
22 ~~field of medicine. Such training, experience, or knowledge~~
23 ~~must be as a result of the active involvement in the practice~~
24 ~~or teaching of medicine within the 5-year period before the~~
25 ~~incident giving rise to the claim.~~

26 Section 4. Subsection (1) of section 766.104, Florida
27 Statutes, is amended to read:

28 766.104 Pleading in medical negligence cases; claim
29 for punitive damages; authorization for release of records for
30 investigation.--

31

1 (1) No action shall be filed for personal injury or
2 wrongful death arising out of medical negligence, whether in
3 tort or in contract, unless the attorney filing the action has
4 made a reasonable investigation as permitted by the
5 circumstances to determine that there are grounds for a good
6 faith belief that there has been negligence in the care or
7 treatment of the claimant. The complaint or initial pleading
8 shall contain a certificate of counsel that such reasonable
9 investigation gave rise to a good faith belief that grounds
10 exist for an action against each named defendant. For
11 purposes of this section, good faith may be shown to exist if
12 the claimant or his or her counsel has received a written
13 opinion, which shall ~~not~~ be subject to discovery by an
14 opposing party, of an expert as defined in s. 766.102 that
15 there appears to be evidence of medical negligence. If the
16 court determines that such certificate of counsel was not made
17 in good faith and that no justiciable issue was presented
18 against a health care provider that fully cooperated in
19 providing informal discovery, the court shall award attorney's
20 fees and taxable costs against claimant's counsel, and shall
21 submit the matter to The Florida Bar for disciplinary review
22 of the attorney.

23 Section 5. Paragraph (a) of subsection (7) of section
24 766.106, Florida Statutes, is amended, and subsections (13),
25 (14), and (15) are added to that section, to read:

26 766.106 Notice before filing action for medical
27 malpractice; presuit screening period; offers for admission of
28 liability and for arbitration; informal discovery; review.--

29 (7) Informal discovery may be used by a party to
30 obtain unsworn statements, the production of documents or
31 things, and physical and mental examinations, as follows:

1 (a) Unsworn statements.--Any party may require other
2 parties to appear for the taking of an unsworn statement. Such
3 statements may be used only for the purpose of presuit
4 screening and are not discoverable or admissible in any civil
5 action for any purpose by any party. However, the statements
6 and opinions of the expert required by s. 766.203 are subject
7 to discovery and are admissible in any civil action for any
8 purpose by any party.A party desiring to take the unsworn
9 statement of any party must give reasonable notice in writing
10 to all parties. The notice must state the time and place for
11 taking the statement and the name and address of the party to
12 be examined. Unless otherwise impractical, the examination of
13 any party must be done at the same time by all other parties.
14 Any party may be represented by counsel at the taking of an
15 unsworn statement. An unsworn statement may be recorded
16 electronically, stenographically, or on videotape. The taking
17 of unsworn statements is subject to the provisions of the
18 Florida Rules of Civil Procedure and may be terminated for
19 abuses.

20 (13) If an injured prospective claimant files suit
21 under this chapter, the claimant must execute a medical
22 information release that allows a defendant or his or her
23 legal representative to conduct ex parte interviews with the
24 claimant's treating physicians, which interviews must be
25 limited to those areas that are potentially relevant to the
26 claimant's alleged injury or illness.

27 (14) In matters relating to professional liability
28 insurance coverage for medical negligence, an insurer shall
29 not be held to have acted in bad faith for failure to timely
30 pay its policy limits if it tenders its policy limits and
31 meets all other conditions of settlement prior to the

1 conclusion of the presuit screening period provided for in
2 this section.

3 (15) In all matters relating to professional liability
4 insurance coverage for medical negligence, and in determining
5 whether the insurer acted fairly and honestly towards its
6 insured with due regard for her or his interest during the
7 presuit process or after a complaint has been filed, the
8 following factors shall be considered:

9 (a) The insurer's willingness to negotiate with the
10 claimant;

11 (b) The insurer's consideration of the advice of its
12 defense counsel;

13 (c) The insurer's proper investigation of the claim;

14 (d) Whether the insurer informed the insured of the
15 offer to settle within the limits of coverage, the right to
16 retain personal counsel, and risk of litigation;

17 (e) Whether the insured denied liability or requested
18 that the case be defended; and

19 (f) Whether the claimant imposed any condition, other
20 than the tender of the policy limits, on the settlement of the
21 claim.

22 Section 6. Section 766.1065, Florida Statutes, is
23 created to read:

24 766.1065 Presuit mediation.--

25 (1)(a) After the completion of presuit investigation
26 by the parties pursuant to s. 766.203 and any informal
27 discovery pursuant to s. 766.106, the parties or their
28 designated representatives may submit the matter to presuit
29 mediation to discuss the issues of liability and damages in
30 accordance with this paragraph for the purpose of attaining an
31 early resolution of the matter.

1 1. The parties shall:
2 a. Agree on a mediator. If the parties are unable to
3 agree on a mediator within 15 days after the parties agree to
4 presuit mediation, the general counsel of the Department of
5 Health shall appoint a mediator from the list of certified
6 circuit court mediators maintained by the chief judge of the
7 circuit in which the suit may be filed.
8 b. Set a date for presuit mediation.
9 2. The presuit mediation must be conducted in the
10 following manner:
11 a. Each party shall ensure that all persons necessary
12 for complete settlement authority are present at the presuit
13 mediation.
14 b. Each party shall mediate in good faith.
15 3. All aspects of the presuit mediation which are not
16 specifically established for mediation by this subsection must
17 be conducted according to the rules of practice and procedure
18 adopted by the Supreme Court of this state.
19 (b) If the parties do not settle the case pursuant to
20 mediation, the last offer of the defendant made at mediation
21 shall be recorded by the mediator in a written report that
22 states the amount of the offer, the date the offer was made in
23 writing, and the date the offer was rejected. The mediator
24 shall maintain a report of the issues and facts presented at
25 the mediation and the final settlement offers of each party at
26 the mediation. If the matter subsequently proceeds to trial,
27 the court must consider whether issues and facts presented at
28 mediation were significantly the same as those at trial.
29 (2) The presuit mediation shall be confidential as
30 required in court-ordered mediation under s. 44.102, except as
31 provided by paragraph (1)(b).

1 Section 7. Section 766.108, Florida Statutes, is
2 amended to read:

3 766.108 Mandatory mediation and mandatory settlement
4 conference in medical malpractice actions.--

5 (1) Within 120 days after suit is filed, the parties
6 shall conduct mandatory mediation in accordance with s.
7 44.102, if binding arbitration under s. 766.106 or s. 766.207
8 has not been agreed to by the parties. The Florida Rules of
9 Civil Procedure apply to mediation held pursuant to this
10 section. During the mediation, each party shall make a demand
11 for judgment or an offer of settlement. At the conclusion of
12 the mediation, the mediator shall record the final demand and
13 final offer to provide to the court upon the rendering of a
14 judgment.

15 (2) If a claimant who rejects the final offer of
16 settlement made during the mediation does not obtain a
17 judgment more favorable than the offer, the court shall assess
18 the defendant the mediation costs and reasonable costs,
19 expenses, and attorney's fees that were incurred after the
20 date of mediation. The assessment attaches to the proceeds of
21 the claimant and is attributable to any defendant whose final
22 offer was more favorable than the judgment.

23 (3) If the judgment obtained at trial is not more
24 favorable to a defendant than the final demand for judgment
25 made by the claimant to the defendant during mediation, the
26 court shall assess the defendant the mediation costs and
27 reasonable costs, expenses, and attorney's fees that were
28 incurred after the date of mediation.

29 (4) The final offer and final demand made during the
30 mediation required in this section are the only offer and
31 demand that the court may consider in assessing costs,

1 expenses, attorney's fees, and prejudgment interest under this
2 section. A subsequent offer or demand by either party is
3 inapplicable to the determination of whether sanctions will be
4 assessed by the court under this section.

5 (5) Notwithstanding any law to the contrary, ss.
6 45.061 and 768.79 are inapplicable to medical negligence or to
7 wrongful death cases arising out of medical negligence causes
8 of action.

9 (6)~~(1)~~ In any action for damages based on personal
10 injury or wrongful death arising out of medical malpractice,
11 whether in tort or contract, the court shall require a
12 settlement conference at least 3 weeks before the date set for
13 trial.

14 (7)~~(2)~~ Attorneys who will conduct the trial, parties,
15 and persons with authority to settle shall attend the
16 settlement conference held before the court unless excused by
17 the court for good cause.

18 Section 8. Subsections (3), (5), (7), and (8) of
19 section 766.202, Florida Statutes, are amended to read:

20 766.202 Definitions; ss. 766.201-766.212.--As used in
21 ss. 766.201-766.212, the term:

22 (3) "Economic damages" means financial losses that
23 ~~which~~ would not have occurred but for the injury giving rise
24 to the cause of action, including, but not limited to, past
25 and future medical expenses and 80 percent of wage loss and
26 loss of earning capacity, to the extent the claimant is
27 entitled to recover such damages under general law, including
28 the Wrongful Death Act.

29 (5) "Medical expert" means a person duly and regularly
30 engaged in the practice of his or her profession who holds a
31 health care professional degree from a university or college

1 and who meets the requirements of an expert witness as set
2 forth in s. 766.102 ~~has had special professional training and~~
3 ~~experience or one possessed of special health care knowledge~~
4 ~~or skill about the subject upon which he or she is called to~~
5 ~~testify or provide an opinion.~~

6 (7) "Noneconomic damages" means nonfinancial losses
7 which would not have occurred but for the injury giving rise
8 to the cause of action, including pain and suffering,
9 inconvenience, physical impairment, mental anguish,
10 disfigurement, loss of capacity for enjoyment of life, and
11 other nonfinancial losses, to the extent the claimant is
12 entitled to recover such damages under general law, including
13 the Wrongful Death Act.

14 (8) "Periodic payment" means provision for the
15 structuring of future economic and future noneconomic damages
16 payments, in whole or in part, over a period of time, as
17 follows:

18 (a) A specific finding must be made of the dollar
19 amount of periodic payments which will compensate for these
20 future damages after offset for collateral sources and after
21 having been reduced to present value shall be made. A periodic
22 payment must be structured to last as long as the claimant
23 lives or the condition of the claimant for which the award was
24 made persists, whichever may be shorter, but without regard
25 for the number of years awarded ~~The total dollar amount of the~~
26 ~~periodic payments shall equal the dollar amount of all such~~
27 ~~future damages before any reduction to present value.~~

28 (b) A defendant that elects to make periodic payments
29 of either or both future economic or future noneconomic losses
30 may contractually obligate a company that is authorized to do
31 business in this state and rated by A.M. Best Company as A+ or

1 higher to make those periodic payments on its behalf. Upon a
2 joint petition by the defendant and the company that is
3 contractually obligated to make the periodic payments, the
4 court shall discharge the defendant from any further
5 obligations to the claimant for those future economic and
6 future noneconomic damages that are to be paid by that company
7 by periodic payments.

8 (c) A bond or security may not be required of any
9 defendant or company that is obligated to make periodic
10 payments pursuant to this section; however, if, upon petition
11 by a claimant who is receiving periodic payments pursuant to
12 this section, the court finds that there is substantial,
13 competent evidence that the defendant that is responsible for
14 the periodic payments cannot adequately assure full and
15 continuous payments thereof or that the company that is
16 obligated to make the payments has been rated by A.M. Best
17 Company as B+ or lower, and that doing so is in the best
18 interest of the claimant, the court may require the defendant
19 or the company that is obligated to make the periodic payments
20 to provide such additional financial security as the court
21 determines to be reasonable under the circumstances.

22 (d) The provision for the periodic payments must
23 specify the recipient or recipients of the payments, the
24 address to which the payments are to be delivered, and the
25 amount and intervals of the payments; however, in any one
26 year, any payment or payments may not exceed the amount
27 intended by the trier of fact to be awarded each year, offset
28 for collateral sources. A periodic payment may not be
29 accelerated, deferred, increased, or decreased, except by
30 court order based upon the mutual consent and agreement of the
31 claimant, the defendant, whether or not discharged, and the

1 company that is obligated to make the periodic payments, if
2 any; nor may the claimant sell, mortgage, encumber, or
3 anticipate the periodic payments or any part thereof, by
4 assignment or otherwise.~~The defendant shall be required to~~
5 ~~post a bond or security or otherwise to assure full payment of~~
6 ~~these damages awarded. A bond is not adequate unless it is~~
7 ~~written by a company authorized to do business in this state~~
8 ~~and is rated A+ by A. M. Best Company. If the defendant is~~
9 ~~unable to adequately assure full payment of the damages, all~~
10 ~~damages, reduced to present value, shall be paid to the~~
11 ~~claimant in a lump sum. No bond may be canceled or be subject~~
12 ~~to cancellation unless at least 60 days' advance written~~
13 ~~notice is filed with the court and the claimant. Upon~~
14 ~~termination of periodic payments, the security, or so much as~~
15 ~~remains, shall be returned to the defendant.~~

16 ~~(c) The provision for payment of future damages by~~
17 ~~periodic payments shall specify the recipient or recipients of~~
18 ~~the payments, the dollar amounts of the payments, the interval~~
19 ~~between payments, and the number of payments or the period of~~
20 ~~time over which payments shall be made.~~

21 Section 9. Subsection (7) of section 766.207, Florida
22 Statutes, is amended to read:

23 766.207 Voluntary binding arbitration of medical
24 negligence claims.--

25 (7) Arbitration pursuant to this section shall
26 preclude recourse to any other remedy by the claimant against
27 any participating defendant, and shall be undertaken with the
28 understanding that damages shall be awarded as provided by
29 general law, including the Wrongful Death Act, subject to the
30 following limitations:

31

1 (a) Net economic damages shall be awardable,
2 including, but not limited to, past and future medical
3 expenses and 80 percent of wage loss and loss of earning
4 capacity, offset by any collateral source payments.

5 (b) Noneconomic damages shall be limited to a maximum
6 of \$250,000 per incident, and shall be calculated on a
7 percentage basis with respect to capacity to enjoy life, so
8 that a finding that the claimant's injuries resulted in a
9 50-percent reduction in his or her capacity to enjoy life
10 would warrant an award of not more than \$125,000 noneconomic
11 damages. Regardless of the number of individual claimants, the
12 total noneconomic damages that may be awarded for all claims
13 arising out of the same incident, including claims under the
14 Wrongful Death Act, shall be limited to a maximum of \$250,000.

15 (c) Damages for future economic and future noneconomic
16 losses shall be awarded to be paid by periodic payments
17 pursuant to s. 766.202(8) and shall be offset by future
18 collateral source payments.

19 (d) Punitive damages shall not be awarded.

20 (e) The defendant shall be responsible for the payment
21 of interest on all accrued damages with respect to which
22 interest would be awarded at trial.

23 (f) The defendant shall pay the claimant's reasonable
24 attorney's fees and costs, as determined by the arbitration
25 panel, but in no event more than 15 percent of the award,
26 reduced to present value.

27 (g) The defendant shall pay all the costs of the
28 arbitration proceeding and the fees of all the arbitrators
29 other than the administrative law judge.

30
31

1 (h) Each defendant who submits to arbitration under
2 this section shall be jointly and severally liable for all
3 damages assessed pursuant to this section.

4 (i) The defendant's obligation to pay the claimant's
5 damages shall be for the purpose of arbitration under this
6 section only. A defendant's or claimant's offer to arbitrate
7 shall not be used in evidence or in argument during any
8 subsequent litigation of the claim following the rejection
9 thereof.

10 (j) The fact of making or accepting an offer to
11 arbitrate shall not be admissible as evidence of liability in
12 any collateral or subsequent proceeding on the claim.

13 (k) Any offer by a claimant to arbitrate must be made
14 to each defendant against whom the claimant has made a claim.
15 Any offer by a defendant to arbitrate must be made to each
16 claimant who has joined in the notice of intent to initiate
17 litigation, as provided in s. 766.106. A defendant who
18 rejects a claimant's offer to arbitrate shall be subject to
19 the provisions of s. 766.209(3). A claimant who rejects a
20 defendant's offer to arbitrate shall be subject to the
21 provisions of s. 766.209(4).

22 (l) The hearing shall be conducted by all of the
23 arbitrators, but a majority may determine any question of fact
24 and render a final decision. The chief arbitrator shall
25 decide all evidentiary matters.

26
27 The provisions of this subsection shall not preclude
28 settlement at any time by mutual agreement of the parties.

29 Section 10. Paragraph (a) of subsection (4) of section
30 766.209, Florida Statutes, is amended to read:

31

1 766.209 Effects of failure to offer or accept
2 voluntary binding arbitration.--

3 (4) If the claimant rejects a defendant's offer to
4 enter voluntary binding arbitration:

5 (a) The damages awardable at trial shall be limited to
6 net economic damages, plus noneconomic damages not to exceed
7 \$350,000 per incident. Regardless of the number of individual
8 claimants, the total noneconomic damages that may be awarded
9 for all claims arising out of the same incident, including
10 claims under the Wrongful Death Act, shall be limited to a
11 maximum of \$350,000.The Legislature expressly finds that such
12 conditional limit on noneconomic damages is warranted by the
13 claimant's refusal to accept arbitration, and represents an
14 appropriate balance between the interests of all patients who
15 ultimately pay for medical negligence losses and the interests
16 of those patients who are injured as a result of medical
17 negligence.

18 Section 11. Subsection (4) is added to section
19 768.041, Florida Statutes, to read:

20 768.041 Release or covenant not to sue.--

21 (4) At trial pursuant to a suit filed under chapter
22 766, in arbitration pursuant to s. 766.207, or at trial
23 pursuant to s. 766.209, if any defendant shows the court or
24 arbitration panel that the plaintiff, or any person lawfully
25 acting on her or his behalf, has delivered a release or
26 covenant not to sue to any person, firm, or corporation in
27 partial satisfaction of the damages sued for, the court or
28 arbitration panel shall set off this amount from the amount of
29 any judgment or arbitration award to which the plaintiff would
30 otherwise be entitled at the time of rendering the judgment or
31 arbitration award and shall enter the judgment or arbitration

1 award accordingly, regardless of whether the jury has
2 allocated fault to the settling defendant at trial and
3 regardless of the theory of liability. The amount of the
4 setoff must include all sums received by the plaintiff,
5 including economic and noneconomic damages, costs, and
6 attorney's fees.

7 Section 12. Paragraph (b) of subsection (2) of section
8 768.13, Florida Statutes, is amended, present paragraph (c) of
9 that subsection is redesignated as paragraph (d), and a new
10 paragraph (c) is added to that subsection, to read:

11 768.13 Good Samaritan Act; immunity from civil
12 liability.--

13 (2)

14 (b)1. Any hospital licensed under chapter 395, any
15 employee of such hospital working in a clinical area within
16 the facility and providing patient care, and any person
17 licensed to practice medicine who in good faith renders
18 medical care or treatment necessitated by a sudden, unexpected
19 situation or occurrence resulting in a serious medical
20 condition demanding immediate medical attention, for which the
21 patient enters the hospital through its emergency room or
22 trauma center, or necessitated by a public health emergency
23 declared pursuant to s. 381.00315 shall not be held liable for
24 any civil damages as a result of such medical care or
25 treatment unless such damages result from providing, or
26 failing to provide, medical care or treatment under
27 circumstances demonstrating a reckless disregard for the
28 consequences so as to affect the life or health of another.

29 2. The immunity provided by this paragraph does not
30 apply to damages as a result of any act or omission of
31 providing medical care or treatment unrelated+

1 a. ~~Which occurs after the patient is stabilized and is~~
2 ~~capable of receiving medical treatment as a nonemergency~~
3 ~~patient, unless surgery is required as a result of the~~
4 ~~emergency within a reasonable time after the patient is~~
5 ~~stabilized, in which case the immunity provided by this~~
6 ~~paragraph applies to any act or omission of providing medical~~
7 ~~care or treatment which occurs prior to the stabilization of~~
8 ~~the patient following the surgery; or~~

9 b. ~~Unrelated to the original medical emergency.~~

10 3. For purposes of this paragraph, the term "reckless
11 disregard" as it applies to a given health care provider
12 rendering emergency medical services means ~~shall be such~~
13 conduct that ~~which~~ a health care provider knew or should have
14 known, at the time such services were rendered, would be
15 likely to result in injury so as to affect the life or health
16 of another, taking into account the following to the extent
17 they may be present:†

18 a. The extent or serious nature of the circumstances
19 prevailing.

20 b. The lack of time or ability to obtain appropriate
21 consultation.

22 c. The lack of a prior patient-physician relationship.

23 d. The inability to obtain an appropriate medical
24 history of the patient.

25 e. The time constraints imposed by coexisting
26 emergencies.

27 4. Every emergency care facility granted immunity
28 under this paragraph shall accept and treat all emergency care
29 patients within the operational capacity of such facility
30 without regard to ability to pay, including patients
31 transferred from another emergency care facility or other

1 health care provider pursuant to Pub. L. No. 99-272, s. 9121.
2 The failure of an emergency care facility to comply with this
3 subparagraph constitutes grounds for the department to
4 initiate disciplinary action against the facility pursuant to
5 chapter 395.

6 (c)1. Any licensed or certified health care
7 practitioner who provides medical care or treatment in a
8 hospital to a patient or person with whom the practitioner has
9 no preexisting provider-patient relationship, when such care
10 or treatment is necessitated by a sudden or unexpected
11 situation or by an occurrence that demands immediate medical
12 attention, shall not be held liable for any civil damages as a
13 result of any act or omission relative to that care or
14 treatment unless the care or treatment is proven to amount to
15 conduct demonstrating a reckless disregard for the life or
16 health of the victim.

17 2. The immunity provided by this paragraph does not
18 apply to damages as a result of any act or omission of
19 providing medical care or treatment unrelated to the original
20 situation that demanded immediate medical attention.

21 3. For purposes of this paragraph, the term "reckless
22 disregard" as it applies to a given health care provider
23 rendering immediate medical care or treatment means conduct
24 that a health care provider knew or should have known, at the
25 time such services were rendered, would be likely to result in
26 injury so as to affect the life or health of another, taking
27 into account the following, to the extent present:

28 a. The extent or serious nature of the circumstances
29 prevailing.

30 b. The lack of time or ability to obtain appropriate
31 consultation.

- 1 c. The lack of a prior patient-physician relationship.
2 d. The inability to obtain an appropriate medical
3 history of the patient.
4 e. The time constraints imposed by coexisting
5 emergencies.

6 Section 13. Paragraph (b) of subsection (9) of section
7 768.28, Florida Statutes, is amended to read:

8 768.28 Waiver of sovereign immunity in tort actions;
9 recovery limits; limitation on attorney fees; statute of
10 limitations; exclusions; indemnification; risk management
11 programs.--

12 (9)

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

- 14 1. "Employee" includes any volunteer firefighter.
15 2. "Officer, employee, or agent" includes, but is not
16 limited to, any health care provider when providing services
17 pursuant to s. 766.1115; ~~any~~ any member of the Florida Health
18 Services Corps, as defined in s. 381.0302, who provides
19 uncompensated care to medically indigent persons referred by
20 the Department of Health; ~~and~~ and any public defender or her or
21 his employee or agent, including, among others, an assistant
22 public defender and an investigator; and any health care
23 professional when providing services in an emergency room or
24 trauma center of a hospital licensed under chapter 395.

25 Section 14. Section 768.77, Florida Statutes, is
26 amended to read:

27 768.77 Itemized verdict.--

28 (1) In any action to which this part applies, but not
29 actions for damages based on personal injury or wrongful death
30 arising out of medical malpractice, whether in tort or
31 contract, in which the trier of fact determines that liability

1 exists on the part of the defendant, the trier of fact shall,
2 as a part of the verdict, itemize the amounts to be awarded to
3 the claimant into the following categories of damages:

4 (a)~~(1)~~ Amounts intended to compensate the claimant for
5 economic losses;

6 (b)~~(2)~~ Amounts intended to compensate the claimant for
7 noneconomic losses; and

8 (c)~~(3)~~ Amounts awarded to the claimant for punitive
9 damages, if applicable.

10 (2) In any action for damages based on personal injury
11 or wrongful death arising out of medical malpractice, whether
12 in tort or contract, to which this part applies in which the
13 trier of fact determines that liability exists on the part of
14 the defendant, the trier of fact shall, as a part of the
15 verdict, itemize the amounts to be awarded to the claimant
16 into the following categories of damages:

17 (a) Amounts intended to compensate the claimant for:

18 1. Past economic losses; and

19 2. Future economic losses, not reduced to present
20 value, and the number of years or part thereof which the award
21 is intended to cover;

22 (b) Amounts intended to compensate the claimant for:

23 1. Past noneconomic losses; and

24 2. Future noneconomic losses not reduced to present
25 value, and the number of years or part thereof which the award
26 is intended to cover; and

27 (c) Amounts awarded to the claimant for punitive
28 damages, if applicable.

29 Section 15. Subsection (2) of section 768.78, Florida
30 Statutes, is amended to read:

31

1 768.78 Alternative methods of payment of damage
2 awards.--

3 (2)(a) In any action for damages based on personal
4 injury or wrongful death arising out of medical malpractice,
5 whether in tort or contract, in which the trier of fact makes
6 an award to compensate the claimant for future economic or
7 future noneconomic losses, payment of amounts intended to
8 compensate the claimant for these future losses shall be made
9 by one of the following means:

10 1. The defendant may elect to make a lump-sum payment
11 for either or both the all damages so assessed, with future
12 economic and future noneconomic losses after offset for
13 collateral sources and after having been and expenses reduced
14 to present value by the court based upon competent,
15 substantial evidence presented to it by the parties; or

16 2. The defendant, if determined by the court to be
17 financially capable or adequately insured, may elect to use
18 periodic payments to satisfy in whole or in part the assessed
19 future economic and future noneconomic losses awarded by the
20 trier of fact after offset for collateral sources for so long
21 as the claimant lives or the condition for which the award was
22 made persists, whichever period may be shorter, but without
23 regard for the number of years awarded by the trier of fact.
24 The court shall review and, unless clearly unresponsive to the
25 future needs of the claimant, approve the amounts and schedule
26 of the periodic payments proposed by the defendant. Upon
27 motion of the defendant, whether or not discharged from any
28 obligation to make the payments pursuant to paragraph (b), and
29 the establishment by substantial, competent evidence of either
30 the death of the claimant or that the condition for which the
31 award was made no longer persists, the court shall enter an

1 order terminating the periodic payments effective as of the
2 date of the death of the claimant or the date the condition
3 for which the award was made no longer persisted.

4 (b) A defendant that elects to make periodic payments
5 of either or both future economic or future noneconomic losses
6 may contractually obligate a company that is authorized to do
7 business in this state and rated by A.M. Best Company as A+ or
8 higher to make those periodic payments on its behalf. Upon a
9 joint petition by the defendant and the company that is
10 contractually obligated to make the periodic payments, the
11 court shall discharge the defendant from any further
12 obligations to the claimant for those future economic and
13 future noneconomic damages that are to be paid by that company
14 by periodic payments.

15 (c) Upon notice of a defendant's election to make
16 periodic payments pursuant hereto, the claimant may request
17 that the court modify the periodic payments to reasonably
18 provide for attorney's fees; however, a court may not make any
19 such modification that would increase the amount the defendant
20 would have been obligated to pay had no such adjustment been
21 made.

22 (d) A bond or security may not be required of any
23 defendant or company that is obligated to make periodic
24 payments pursuant to this section; however, if, upon petition
25 by a claimant who is receiving periodic payments pursuant to
26 this section, the court finds that there is substantial,
27 competent evidence that the defendant that is responsible for
28 the periodic payments cannot adequately assure full and
29 continuous payments thereof or that the company that is
30 obligated to make the payments has been rated by A.M. Best
31 Company as B+ or lower, and that doing so is in the best

1 interest of the claimant, the court may require the defendant
2 or the company that is obligated to make the periodic payments
3 to provide such additional financial security as the court
4 determines to be reasonable under the circumstances.

5 (e) The provision for the periodic payments must
6 specify the recipient or recipients of the payments, the
7 address to which the payments are to be delivered, and the
8 amount and intervals of the payments; however, in any one year
9 any payment or payments may not exceed the amount intended by
10 the trier of fact to be awarded each year, offset for
11 collateral sources. A periodic payment may not be accelerated,
12 deferred, increased, or decreased, except by court order based
13 upon the mutual consent and agreement of the claimant, the
14 defendant, whether or not discharged, and the company that is
15 obligated to make the periodic payments, if any; nor may the
16 claimant sell, mortgage, encumber, or anticipate the periodic
17 payments or any part thereof, by assignment or otherwise.

18 (f) For purposes of this section, the term "periodic
19 payment" means the payment of money or delivery of other
20 property to the claimant at regular intervals.

21 (g) It is the intent of the Legislature to authorize
22 and encourage the payment of awards for future economic and
23 future noneconomic losses by periodic payments to meet the
24 continuing needs of the patient while eliminating the
25 misdirection of such funds for purposes not intended by the
26 trier of fact.~~The court shall, at the request of either~~
27 ~~party, enter a judgment ordering future economic damages, as~~
28 ~~itemized pursuant to s. 768.77, to be paid by periodic~~
29 ~~payments rather than lump sum.~~

30 ~~(b) For purposes of this subsection, "periodic~~
31 ~~payment" means provision for the spreading of future economic~~

1 ~~damage payments, in whole or in part, over a period of time,~~
2 ~~as follows:~~

3 1. ~~A specific finding of the dollar amount of periodic~~
4 ~~payments which will compensate for these future damages after~~
5 ~~offset for collateral sources shall be made. The total dollar~~
6 ~~amount of the periodic payments shall equal the dollar amount~~
7 ~~of all such future damages before any reduction to present~~
8 ~~value.~~

9 2. ~~The defendant shall be required to post a bond or~~
10 ~~security or otherwise to assure full payment of these damages~~
11 ~~awarded. A bond is not adequate unless it is written by a~~
12 ~~company authorized to do business in this state and is rated~~
13 ~~A+ by A. M. Best Company. If the defendant is unable to~~
14 ~~adequately assure full payment of the damages, all damages,~~
15 ~~reduced to present value, shall be paid to the claimant in a~~
16 ~~lump sum. No bond may be canceled or be subject to~~
17 ~~cancellation unless at least 60 days' advance written notice~~
18 ~~is filed with the court and the claimant. Upon termination of~~
19 ~~periodic payments, the security, or so much as remains, shall~~
20 ~~be returned to the defendant.~~

21 3. ~~The provision for payment of future damages by~~
22 ~~periodic payments shall specify the recipient or recipients of~~
23 ~~the payments, the dollar amounts of the payments, the interval~~
24 ~~between payments, and the number of payments or the period of~~
25 ~~time over which payments shall be made.~~

26 Section 16. Subsection (5) of section 768.81, Florida
27 Statutes, is amended to read:

28 768.81 Comparative fault.--

29 (5) Notwithstanding any provision of anything in law
30 to the contrary, in an action for damages for personal injury
31 or wrongful death arising out of medical malpractice, whether

1 in contract or tort, ~~when an apportionment of damages pursuant~~
2 ~~to this section is attributed to a teaching hospital as~~
3 ~~defined in s. 408.07,~~ the court shall enter judgment against
4 ~~the teaching hospital~~ on the basis of each ~~such~~ party's
5 percentage of fault and not on the basis of the doctrine of
6 joint and several liability.

7 Section 17. This act shall take effect upon becoming a
8 law if SB 560, SB 562, and SB 566 or similar legislation is
9 adopted in the same legislative session or an extension
10 thereof and becomes a law.

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

1 STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN
2 COMMITTEE SUBSTITUTE FOR
3 Senate Bill 564

4 The committee substitute:

- 5 - Revises requirements for the awarding of damages in
6 medical malpractice actions, if any defendant shows the
7 court or arbitration panel a written release not to sue
8 to any person in partial satisfaction of damages sued
9 for, to require setoff for all sums received by the
10 claimant, including economic and noneconomic damages,
11 costs, and attorney's fees;
- 12 - Requires medical malpractice plaintiffs to execute a
13 medical release that allows a defendant health care
14 practitioner to conduct ex parte interviews with the
15 claimant's treating physicians;
- 16 - Revises the definition of "similar health care provider"
17 for purposes of establishing the prevailing professional
18 standard of care under the Medical Malpractice Act;
- 19 - Makes the presuit expert's written opinion and statements
20 subject to discovery;
- 21 - Creates a procedure and requirements for presuit
22 mediation;
- 23 - Requires parties to a medical negligence action to submit
24 to mandatory mediation;
- 25 - Provides conditions under which an insurer's actions
26 towards the insured for matters relating to professional
27 liability for medical negligence will not be held in bad
28 faith. In matters relating to professional liability for
29 medical negligence, the bill provides factors for
30 consideration to determine whether an insurer has acted
31 in good faith toward the insured;
- Limits the claimant's recovery, in medical malpractice
voluntary binding arbitration, to the damages the
claimant is entitled to recover under general law,
including the Wrongful Death Act;
- Revises the definitions of "medical expert" and "periodic
payment";
- Revises the award of noneconomic damages to provide an
aggregate cap in cases involving multiple claimants for
claims arising out of the same incident;
- Revises the Good Samaritan Act to extend immunity from
civil liability to any hospital, any employee of such
hospital working in a clinical area within the facility
and providing patient care, and any person licensed to
practice medicine who in good faith renders medical care
or treatment necessitated by a sudden, unexpected
situation or occurrence resulting in a serious medical
condition demanding immediate medical attention, for

- 1 which the patient enters the hospital through its
2 emergency room or trauma center. Under the bill, such
3 immunity applies to any act or omission of providing
4 medical care or treatment, unless it was unrelated to the
5 original medical emergency and unless there was a
6 reckless disregard of the consequences;
- 7 - Revises the Good Samaritan Act to extend immunity from
8 civil liability to any licensed or certified health care
9 practitioner who provides medical care or treatment in a
10 hospital to a patient or person with whom the
11 practitioner has no preexisting provider-patient
12 relationship, when such care or treatment is necessitated
13 by a sudden or unexpected situation or by an occurrence
14 that demands immediate medical attention, unless the care
15 or treatment is proven to amount to conduct demonstrating
16 a reckless disregard for the life or health of the
17 victim. Such immunity does not apply to medical care or
18 treatment unrelated to the original situation that
19 demanded immediate medical attention. "Reckless
20 disregard" is defined for purposes of extending such
21 immunity;
- 22 - Extends the waiver of sovereign immunity to certain
23 health care professionals by revising the definition of
24 "officer, employee, or agent" to include any health care
25 professional when providing services in an emergency room
26 or trauma center of a Florida-licensed hospital;
- 27 - Provides for periodic payment of future noneconomic
28 damages;
- 29 - Limits the claimant's ability to sell or assign the
30 periodic payment and requires the periodic payment to
31 last only as long as the claimant lives or the condition
for which the award was made persists;
- Revises provisions for the trier of fact to itemize
damages, as part of a verdict for medical malpractice
actions, to include future losses; and
- Abolishes the doctrine of joint and several liability for
medical negligence actions and requires courts to enter
judgment on the basis of each party's percentage of
fault;
- Provides a contingent effective date.