

1 A bill to be entitled
2 An act relating to medical malpractice;
3 providing legislative findings; amending s.
4 46.015, F.S.; revising requirements for set
5 offs against damages in medical malpractice
6 actions if there is a written release or
7 covenant not to sue; amending s. 456.057, F.S.;
8 authorizing the release of medical information
9 to defendant health care practitioners in
10 medical malpractice actions under specified
11 circumstances; amending s. 766.102, F.S.;
12 revising requirements for health care providers
13 providing expert testimony in medical
14 negligence actions; prohibiting contingency
15 fees for an expert witness; amending s.
16 766.106, F.S.; revising requirements for
17 presuit notice and insurer or self-insurer
18 response to a claim; permitting written
19 questions during informal discovery; requiring
20 a claimant to execute a medical release to
21 authorize defendants in medical negligence
22 actions to take unsworn statements from a
23 claimant's treating physicians; providing for
24 informal discovery without notice; imposing
25 limits on such statements; amending s. 766.108,
26 F.S.; providing for mandatory mediation;
27 amending s. 766.202, F.S.; redefining the terms
28 "economic damages," "medical expert,"
29 "noneconomic damages," and "periodic payment";
30 amending s. 766.206, F.S.; providing for
31 dismissal of a claim under certain

1 circumstances; requiring the court to make
2 certain reports concerning a medical expert who
3 fails to meet qualifications; amending s.
4 766.207, F.S.; providing for the applicability
5 of the Wrongful Death Act and general law to
6 arbitration awards; amending s. 768.041, F.S.;
7 revising requirements for set offs against
8 damages in medical malpractice actions if there
9 is a written release or covenant not to sue;
10 providing legislative intent and findings with
11 respect to the provision of emergency medical
12 services and care by care providers; amending
13 s. 768.13, F.S.; revising guidelines for
14 immunity from liability under the "Good
15 Samaritan Act"; amending s. 768.28, F.S.;
16 extending sovereign immunity to specified
17 health care providers as agents of the state
18 when providing emergency services pursuant to
19 state and federal imposed obligations; amending
20 s. 768.77, F.S.; prescribing a method for
21 itemization of specific categories of damages
22 awarded in medical malpractice actions;
23 amending s. 768.81, F.S.; requiring the trier
24 of fact to apportion total fault solely among
25 the claimant and joint tortfeasors as parties
26 to an action; providing for severability;
27 amending s. 766.110, F.S.; limiting liability
28 of health care providers providing emergency
29 care services in hospitals; providing for
30 hospitals and the state to assume a certain
31 part of liability for negligence by such

1 providers; providing a limit on attorney's
2 fees; providing for severability; providing an
3 effective date.

4
5 Be It Enacted by the Legislature of the State of Florida:

6
7 Section 1. Findings.--

8 (1) The Legislature finds that Florida is in the midst
9 of a medical malpractice insurance crisis of unprecedented
10 magnitude.

11 (2) The Legislature finds that this crisis threatens
12 the quality and availability of health care for all Florida
13 citizens.

14 (3) The Legislature finds that the rapidly growing
15 population and the changing demographics of Florida make it
16 imperative that students continue to choose Florida as the
17 place they will receive their medical educations and practice
18 medicine.

19 (4) The Legislature finds that Florida is among the
20 states with the highest medical malpractice insurance premiums
21 in the nation.

22 (5) The Legislature finds that the cost of medical
23 malpractice insurance has increased dramatically during the
24 past decade and both the increase and the current cost are
25 substantially higher than the national average.

26 (6) The Legislature finds that the increase in medical
27 malpractice liability insurance rates is forcing physicians to
28 practice medicine without professional liability insurance, to
29 leave Florida, to not perform high-risk procedures, or to
30 retire early from the practice of medicine.

31

1 (7) The Governor created the Governor's Select Task
2 Force on Healthcare Professional Liability Insurance to study
3 and make recommendations to address these problems.

4 (8) The Legislature has reviewed the findings and
5 recommendations of the Governor's Select Task Force on
6 Healthcare Professional Liability Insurance.

7 (9) The Legislature finds that the Governor's Select
8 Task Force on Healthcare Professional Liability Insurance has
9 established that a medical malpractice insurance crisis exists
10 in the State of Florida which can be alleviated by the
11 adoption of comprehensive legislatively enacted reforms.

12 (10) The Legislature finds that making high-quality
13 health care available to the citizens of this state is an
14 overwhelming public necessity.

15 (11) The Legislature finds that ensuring that
16 physicians continue to practice in Florida is an overwhelming
17 public necessity.

18 (12) The Legislature finds that ensuring the
19 availability of affordable professional liability insurance
20 for physicians is an overwhelming public necessity.

21 (13) The Legislature finds, based upon the findings
22 and recommendations of the Governor's Select Task Force on
23 Healthcare Professional Liability Insurance, the findings and
24 recommendations of various study groups throughout the nation,
25 and the experience of other states, that the overwhelming
26 public necessities of making quality health care available to
27 the citizens of this state, of ensuring that physicians
28 continue to practice in Florida, and of ensuring that those
29 physicians have the opportunity to purchase affordable
30 professional liability insurance cannot be met unless
31 comprehensive legislation is adopted.

1 (14) The Legislature finds that the provisions of this
2 act are naturally and logically connected to each other and to
3 the purpose of making quality health care available to the
4 citizens of Florida.

5 Section 2. Subsection (4) is added to section 46.015,
6 Florida Statutes, to read:

7 46.015 Release of parties.--

8 (4)(a) At trial pursuant to a suit filed under chapter
9 766 or pursuant to s. 766.209, if any defendant shows the
10 court that the plaintiff, or his or her legal representative,
11 has delivered a written release or covenant not to sue to any
12 person in partial satisfaction of the damages sued for, the
13 court shall set off this amount from the total amount of the
14 damages set forth in the verdict and before entry of the final
15 judgment.

16 (b) The amount of any set off under this subsection
17 shall include all sums received by the plaintiff, including
18 economic and noneconomic damages, costs, and attorney's fees.

19 Section 3. Subsection (6) of section 456.057, Florida
20 Statutes, is amended to read:

21 456.057 Ownership and control of patient records;
22 report or copies of records to be furnished.--

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

1 deposition, evidentiary hearing, or trial for which proper
2 notice has been given or by a medical information release
3 executed pursuant to s. 766.106(13) which permits the taking
4 of unsworn statements.

5 Section 4. Section 766.102, Florida Statutes, is
6 amended to read:

7 766.102 Medical negligence; standards of recovery;
8 expert witness.--

9 (1) In any action for recovery of damages based on the
10 death or personal injury of any person in which it is alleged
11 that such death or injury resulted from the negligence of a
12 health care provider as defined in s. 766.101(1)(b)~~s.~~
13 ~~766.50(2)(b)~~, the claimant shall have the burden of proving by
14 the greater weight of evidence that the alleged actions of the
15 health care provider represented a breach of the prevailing
16 professional standard of care for that health care provider.
17 The prevailing professional standard of care for a given
18 health care provider shall be that level of care, skill, and
19 treatment which, in light of all relevant surrounding
20 circumstances, is recognized as acceptable and appropriate by
21 reasonably prudent similar health care providers.

22 ~~(2)(a) If the health care provider whose negligence is~~
23 ~~claimed to have created the cause of action is not certified~~
24 ~~by the appropriate American board as being a specialist, is~~
25 ~~not trained and experienced in a medical specialty, or does~~
26 ~~not hold himself or herself out as a specialist, a "similar~~
27 ~~health care provider" is one who:~~

28 1. ~~Is licensed by the appropriate regulatory agency of~~
29 ~~this state;~~

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

1 ~~3. Practices in the same or similar medical community.~~

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

8 ~~1. Is trained and experienced in the same specialty;~~
9 ~~and~~

10 ~~2. Is certified by the appropriate American board in~~
11 ~~the same specialty.~~

12

13 ~~However, if any health care provider described in this~~
14 ~~paragraph is providing treatment or diagnosis for a condition~~
15 ~~which is not within his or her specialty, a specialist trained~~
16 ~~in the treatment or diagnosis for that condition shall be~~
17 ~~considered a "similar health care provider."~~

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

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

24 ~~2. Is not a similar health care provider pursuant to~~
25 ~~paragraph (a) or paragraph (b) but, to the satisfaction of the~~
26 ~~court, possesses sufficient training, experience, and~~
27 ~~knowledge as a result of practice or teaching in the specialty~~
28 ~~of the defendant or practice or teaching in a related field of~~
29 ~~medicine, so as to be able to provide such expert testimony as~~
30 ~~to the prevailing professional standard of care in a given~~
31 ~~field of medicine. Such training, experience, or knowledge~~

1 ~~must be as a result of the active involvement in the practice~~
2 ~~or teaching of medicine within the 5-year period before the~~
3 ~~incident giving rise to the claim.~~

4 (2)~~(3)~~(a) If the injury is claimed to have resulted
5 from the negligent affirmative medical intervention of the
6 health care provider, the claimant must, in order to prove a
7 breach of the prevailing professional standard of care, show
8 that the injury was not within the necessary or reasonably
9 foreseeable results of the surgical, medicinal, or diagnostic
10 procedure constituting the medical intervention, if the
11 intervention from which the injury is alleged to have resulted
12 was carried out in accordance with the prevailing professional
13 standard of care by a reasonably prudent similar health care
14 provider.

15 (b) The provisions of this subsection shall apply only
16 when the medical intervention was undertaken with the informed
17 consent of the patient in compliance with the provisions of s.
18 766.103.

19 (3)~~(4)~~ The existence of a medical injury shall not
20 create any inference or presumption of negligence against a
21 health care provider, and the claimant must maintain the
22 burden of proving that an injury was proximately caused by a
23 breach of the prevailing professional standard of care by the
24 health care provider. However, the discovery of the presence
25 of a foreign body, such as a sponge, clamp, forceps, surgical
26 needle, or other paraphernalia commonly used in surgical,
27 examination, or diagnostic procedures, shall be prima facie
28 evidence of negligence on the part of the health care
29 provider.

30 (4)~~(5)~~ The Legislature is cognizant of the changing
31 trends and techniques for the delivery of health care in this

1 state and the discretion that is inherent in the diagnosis,
2 care, and treatment of patients by different health care
3 providers. The failure of a health care provider to order,
4 perform, or administer supplemental diagnostic tests shall not
5 be actionable if the health care provider acted in good faith
6 and with due regard for the prevailing professional standard
7 of care.

8 (5) A person may not give expert testimony concerning
9 the prevailing professional standard of care unless that
10 person is a licensed health care provider and meets the
11 following criteria:

12 (a) If the party against whom or on whose behalf the
13 testimony is offered is a specialist, the expert witness must:

14 1. Specialize in the same specialty as the party
15 against whom or on whose behalf the testimony is offered; or

16 2. Specialize in a similar speciality that includes
17 the evaluation, diagnosis, or treatment of the medical
18 condition that is the subject of the claim and have prior
19 experience treating similar patients.

20 (b) Have devoted professional time during the 3 years
21 immediately preceding the date of the occurrence that is the
22 basis for the action to:

23 1. The active clinical practice of, or consulting with
24 respect to, the same or similar health profession as the
25 health care provider against whom or on whose behalf the
26 testimony is offered and, if that health care provider is a
27 specialist, the active clinical practice of, or consulting
28 with respect to, the same or similar specialty that includes
29 the evaluation, diagnosis, or treatment of the medical
30 condition that is the subject of the claim and have prior
31 experience treating similar patients;

1 2. The instruction of students in an accredited health
2 professional school or accredited residency program in the
3 same or similar health profession in which the health care
4 provider against whom or on whose behalf the testimony is
5 offered and, if that health care provider is a specialist, an
6 accredited health professional school or accredited residency
7 or clinical research program in the same or similar specialty;
8 or

9 3. A clinical research program that is affiliated with
10 an accredited medical school or teaching hospital and that is
11 in the same or similar health profession as the health care
12 provider against whom or on whose behalf the testimony is
13 offered and, if that health care provider is a specialist, a
14 clinical research program that is affiliated with an
15 accredited health professional school or accredited residency
16 or clinical research program in the same or similar specialty.

17 (c) If the party against whom or on whose behalf the
18 testimony is offered is a general practitioner, the expert
19 witness must have devoted professional time during the 5 years
20 immediately preceding the date of the occurrence that is the
21 basis for the action to:

22 1. Active clinical practice or consultation as a
23 general practitioner;

24 2. Instruction of students in an accredited health
25 professional school or accredited residency program in the
26 general practice of medicine; or

27 3. A clinical research program that is affiliated with
28 an accredited medical school or teaching hospital and that is
29 in the general practice of medicine.

30 (6) A physician licensed under chapter 458 or chapter
31 459 who qualifies as an expert witness under subsection (5)

1 and who, by reason of active clinical practice or instruction
2 of students, has knowledge of the applicable standard of care
3 for nurses, nurse practitioners, certified registered nurse
4 anesthetists, certified registered nurse midwives, physician
5 assistants, or other medical support staff may give expert
6 testimony in a medical malpractice action with respect to the
7 standard of care of such medical support staff.

8 (7) Notwithstanding subsection (5), in a medical
9 malpractice action against a hospital, a health care facility,
10 or medical facility, a person may give expert testimony on the
11 appropriate standard of care as to administrative and other
12 nonclinical issues if the person has substantial knowledge, by
13 virtue of his or her training and experience, concerning the
14 standard of care among hospitals, health care facilities, or
15 medical facilities of the same type as the hospital, health
16 care facility, or medical facility whose acts or omissions are
17 the subject of the testimony and which are located in the same
18 or similar communities at the time of the alleged act giving
19 rise to the cause of action.

20 (8) If a health care provider described in subsection
21 (5), subsection (6), or subsection (7) is providing
22 evaluation, treatment, or diagnosis for a condition that is
23 not within his or her specialty, a specialist trained in the
24 evaluation, treatment, or diagnosis for that condition shall
25 be considered a similar health care provider.

26 (9)~~(6)~~(a) In any action for damages involving a claim
27 of negligence against a physician licensed under chapter 458,
28 osteopathic physician licensed under chapter 459, podiatric
29 physician licensed under chapter 461, or chiropractic
30 physician licensed under chapter 460 providing emergency
31 medical services in a hospital emergency department, the court

1 shall admit expert medical testimony only from physicians,
2 osteopathic physicians, podiatric physicians, and chiropractic
3 physicians who have had substantial professional experience
4 within the preceding 5 years while assigned to provide
5 emergency medical services in a hospital emergency department.

6 (b) For the purposes of this subsection:

7 1. The term "emergency medical services" means those
8 medical services required for the immediate diagnosis and
9 treatment of medical conditions which, if not immediately
10 diagnosed and treated, could lead to serious physical or
11 mental disability or death.

12 2. "Substantial professional experience" shall be
13 determined by the custom and practice of the manner in which
14 emergency medical coverage is provided in hospital emergency
15 departments in the same or similar localities where the
16 alleged negligence occurred.

17 (10) In any action alleging medical malpractice, an
18 expert witness may not testify on a contingency fee basis.

19 (11) Any attorney who proffers a person as an expert
20 witness pursuant to this section must certify that such person
21 has not been found guilty of fraud or perjury in any
22 jurisdiction.

23 (12) This section does not limit the power of the
24 trial court to disqualify or qualify an expert witness on
25 grounds other than the qualifications in this section.

26 Section 5. Effective October 1, 2003, and applicable
27 to notices of intent to litigate sent on or after that date,
28 subsection (2), paragraphs (a) and (b) of subsection (3), and
29 subsection (7) of section 766.106, Florida Statutes, are
30 amended, and subsections (13) and (14) are added to that
31 section, to read:

1 766.106 Notice before filing action for medical
2 malpractice; presuit screening period; offers for admission of
3 liability and for arbitration; informal discovery; review.--

4 (2)(a) After completion of presuit investigation
5 pursuant to s. 766.203 and prior to filing a claim for medical
6 malpractice, a claimant shall notify each prospective
7 defendant by certified mail, return receipt requested, of
8 intent to initiate litigation for medical malpractice. Notice
9 to each prospective defendant must include, if available, a
10 list of all known health care providers seen by the claimant
11 for the injuries complained of subsequent to the alleged act
12 of malpractice, all known health care providers during the
13 2-year period prior to the alleged act of malpractice who
14 treated or evaluated the claimant, and copies of all of the
15 medical records relied upon by the expert in signing the
16 affidavit. The requirement of providing the list of known
17 health care providers may not serve as grounds for imposing
18 sanctions for failure to provide presuit discovery.

19 (b) Following the initiation of a suit alleging
20 medical malpractice with a court of competent jurisdiction,
21 and service of the complaint upon a defendant, the claimant
22 shall provide a copy of the complaint to the Department of
23 Health. The requirement of providing the complaint to the
24 Department of Health does not impair the claimant's legal
25 rights or ability to seek relief for his or her claim. The
26 Department of Health shall review each incident and determine
27 whether it involved conduct by a licensee which is potentially
28 subject to disciplinary action, in which case the provisions
29 of s. 456.073 apply.

30 (3)(a) No suit may be filed for a period of 90 days
31 after notice is mailed to any prospective defendant. During

1 the 90-day period, the prospective defendant's insurer or
2 self-insurer shall conduct a review to determine the liability
3 of the defendant. Each insurer or self-insurer shall have a
4 procedure for the prompt investigation, review, and evaluation
5 of claims during the 90-day period. This procedure shall
6 include one or more of the following:

7 1. Internal review by a duly qualified claims
8 adjuster;

9 2. Creation of a panel comprised of an attorney
10 knowledgeable in the prosecution or defense of medical
11 malpractice actions, a health care provider trained in the
12 same or similar medical specialty as the prospective
13 defendant, and a duly qualified claims adjuster;

14 3. A contractual agreement with a state or local
15 professional society of health care providers, which maintains
16 a medical review committee;

17 4. Any other similar procedure which fairly and
18 promptly evaluates the pending claim.

19
20 Each insurer or self-insurer shall investigate the claim in
21 good faith, and both the claimant and prospective defendant
22 shall cooperate with the insurer in good faith. If the
23 insurer requires, a claimant shall appear before a pretrial
24 screening panel or before a medical review committee and shall
25 submit to a physical examination, if required. Unreasonable
26 failure of any party to comply with this section justifies
27 dismissal of claims or defenses. There shall be no civil
28 liability for participation in a pretrial screening procedure
29 if done without intentional fraud.

30 (b) At or before the end of the 90 days, the insurer
31 or self-insurer shall provide the claimant with a response:

- 1 1. Rejecting the claim;
2 2. Making a settlement offer; or
3 3. Making an offer to arbitrate in which liability is
4 deemed admitted and arbitration will be held only ~~of admission~~
5 ~~of liability and for arbitration~~ on the issue of damages.

6 This offer may be made contingent upon a limit of general
7 damages.

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

11 (a) Unsworn statements.--Any party may require other
12 parties to appear for the taking of an unsworn statement. Such
13 statements may be used only for the purpose of presuit
14 screening and are not discoverable or admissible in any civil
15 action for any purpose by any party. A party desiring to take
16 the unsworn statement of any party must give reasonable notice
17 in writing to all parties. The notice must state the time and
18 place for taking the statement and the name and address of the
19 party to be examined. Unless otherwise impractical, the
20 examination of any party must be done at the same time by all
21 other parties. Any party may be represented by counsel at the
22 taking of an unsworn statement. An unsworn statement may be
23 recorded electronically, stenographically, or on videotape.
24 The taking of unsworn statements is subject to the provisions
25 of the Florida Rules of Civil Procedure and may be terminated
26 for abuses.

27 (b) Documents or things.--Any party may request
28 discovery of documents or things. The documents or things
29 must be produced, at the expense of the requesting party,
30 within 20 days after the date of receipt of the request. A
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1 party is required to produce discoverable documents or things
2 within that party's possession or control.

3 (c) Physical and mental examinations.--A prospective
4 defendant may require an injured prospective claimant to
5 appear for examination by an appropriate health care provider.
6 The defendant shall give reasonable notice in writing to all
7 parties as to the time and place for examination. Unless
8 otherwise impractical, a prospective claimant is required to
9 submit to only one examination on behalf of all potential
10 defendants. The practicality of a single examination must be
11 determined by the nature of the potential claimant's
12 condition, as it relates to the liability of each potential
13 defendant. Such examination report is available to the parties
14 and their attorneys upon payment of the reasonable cost of
15 reproduction and may be used only for the purpose of presuit
16 screening. Otherwise, such examination report is confidential
17 and exempt from the provisions of s. 119.07(1) and s. 24(a),
18 Art. I of the State Constitution.

19 (d) Written questions.--Any party may request answers
20 to written questions, which may not exceed 30, including
21 subparts. A response must be made within 20 days after receipt
22 of the questions.

23 (e) Informal discovery.--It is the intent of the
24 Legislature that informal discovery may be conducted pursuant
25 to this subsection by any party without notice to any other
26 party.

27 (13) The claimant must execute a medical information
28 release that allows a defendant or his or her legal
29 representative to obtain unsworn statements of the claimant's
30 treating physicians, which statements must be limited to those
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1 areas that are potentially relevant to the claim of personal
2 injury or wrongful death.

3 Section 6. Section 766.108, Florida Statutes, is
4 amended to read:

5 766.108 Mandatory mediation and mandatory settlement
6 conference in medical malpractice actions.--

7 (1) Within 120 days after suit for medical malpractice
8 is filed, the parties shall engage in mandatory mediation in
9 accordance with s. 44.102, if the parties have not agreed to
10 binding arbitration under s. 766.207. The Florida Rules of
11 Civil Procedure apply to mediation held pursuant to this
12 section.

13 (2)(a)(1) In any action for damages based on personal
14 injury or wrongful death arising out of medical malpractice,
15 whether in tort or contract, the court shall require a
16 settlement conference at least 3 weeks before the date set for
17 trial.

18 (b)(2) Attorneys who will conduct the trial, parties,
19 and persons with authority to settle shall attend the
20 settlement conference held before the court unless excused by
21 the court for good cause.

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

24 766.202 Definitions; ss. 766.201-766.212.--As used in
25 ss. 766.201-766.212, the term:

26 (3) "Economic damages" means financial losses that
27 ~~which~~ would not have occurred but for the injury giving rise
28 to the cause of action, including, but not limited to, past
29 and future medical expenses and 80 percent of wage loss and
30 loss of earning capacity, to the extent the claimant is
31

1 entitled to recover such damages under general law, including
2 the Wrongful Death Act.

3 (5) "Medical expert" means a person duly and regularly
4 engaged in the practice of his or her profession who holds a
5 health care professional degree from a university or college
6 and who meets the requirements of an expert witness as set
7 forth in s. 766.102 ~~has had special professional training and~~
8 ~~experience or one possessed of special health care knowledge~~
9 ~~or skill about the subject upon which he or she is called to~~
10 ~~testify or provide an opinion.~~

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

19 (8) "Periodic payment" means provision for the
20 structuring of future economic damages payments, in whole or
21 in part, over a period of time, as follows:

22 (a) A specific finding of the dollar amount of
23 periodic payments which will compensate for these future
24 damages after offset for collateral sources shall be made.
25 The total dollar amount of the periodic payments shall equal
26 the dollar amount of all such future damages before any
27 reduction to present value.

28 (b) The defendant shall be required to post a bond or
29 security or otherwise to assure full payment of these damages
30 awarded. A bond is not adequate unless it is written by a
31 company authorized to do business in this state and is rated

1 A+ by Best's. If the defendant is unable to adequately assure
2 full payment of the damages, all damages, reduced to present
3 value, shall be paid to the claimant in a lump sum. No bond
4 may be canceled or be subject to cancellation unless at least
5 60 days' advance written notice is filed with the court and
6 the claimant. Upon termination of periodic payments, the
7 security, or so much as remains, shall be returned to the
8 defendant.

9 (c) The provision for payment of future damages by
10 periodic payments shall specify the recipient or recipients of
11 the payments, the dollar amounts of the payments, the interval
12 between payments, and the number of payments or the period of
13 time over which payments shall be made.

14 (d) Any portion of the periodic payment which is
15 attributable to medical expenses that have not yet been
16 incurred shall terminate upon the death of the claimant. Any
17 outstanding medical expenses incurred prior to the death of
18 the claimant shall be paid from that portion of the periodic
19 payment attributable to medical expenses.

20 Section 8. Effective July 1, 2003 and applicable to
21 all causes of action accruing on or after that date, section
22 766.206, Florida Statutes, is amended to read:

23 766.206 Presuit investigation of medical negligence
24 claims and defenses by court.--

25 (1) After the completion of presuit investigation by
26 the parties pursuant to s. 766.203 and any informal discovery
27 pursuant to s. 766.106, any party may file a motion in the
28 circuit court requesting the court to determine whether the
29 opposing party's claim or denial rests on a reasonable basis.

30 (2) If the court finds that the notice of intent to
31 initiate litigation mailed by the claimant is not in

1 compliance with the reasonable investigation requirements of
2 ss. 766.201-766.212, including a review of the claim and a
3 verified written medical expert opinion by an expert witness
4 as defined in s. 766.202, the court shall dismiss the claim,
5 and the person who mailed such notice of intent, whether the
6 claimant or the claimant's attorney, shall be personally
7 liable for all attorney's fees and costs incurred during the
8 investigation and evaluation of the claim, including the
9 reasonable attorney's fees and costs of the defendant or the
10 defendant's insurer.

11 (3) If the court finds that the response mailed by a
12 defendant rejecting the claim is not in compliance with the
13 reasonable investigation requirements of ss.766.201-766.212,
14 including a review of the claim and a verified written medical
15 expert opinion by an expert witness as defined in s. 766.202,
16 the court shall strike the defendant's pleading.~~response~~, and
17 The person who mailed such response, whether the defendant,
18 the defendant's insurer, or the defendant's attorney, shall be
19 personally liable for all attorney's fees and costs incurred
20 during the investigation and evaluation of the claim,
21 including the reasonable attorney's fees and costs of the
22 claimant.

23 (4) If the court finds that an attorney for the
24 claimant mailed notice of intent to initiate litigation
25 without reasonable investigation, or filed a medical
26 negligence claim without first mailing such notice of intent
27 which complies with the reasonable investigation requirements,
28 or if the court finds that an attorney for a defendant mailed
29 a response rejecting the claim without reasonable
30 investigation, the court shall submit its finding in the
31 matter to The Florida Bar for disciplinary review of the

1 attorney. Any attorney so reported three or more times within
2 a 5-year period shall be reported to a circuit grievance
3 committee acting under the jurisdiction of the Supreme Court.
4 If such committee finds probable cause to believe that an
5 attorney has violated this section, such committee shall
6 forward to the Supreme Court a copy of its finding.

7 (5)(a) If the court finds that the corroborating
8 written medical expert opinion attached to any notice of claim
9 or intent or to any response rejecting a claim lacked
10 reasonable investigation, or that the medical expert
11 submitting the opinion did not meet the expert witness
12 qualifications as set forth in s. 766.202(5), the court shall
13 report the medical expert issuing such corroborating opinion
14 to the Division of Medical Quality Assurance or its designee.
15 If such medical expert is not a resident of the state, the
16 division shall forward such report to the disciplining
17 authority of that medical expert.

18 (b) The court shall ~~may~~ refuse to consider the
19 testimony or opinion attached to any notice of intent or to
20 any response rejecting a claim of ~~such~~ an expert who has been
21 disqualified three times pursuant to this section.

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

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

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

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.

12 (c) Damages for future economic losses shall be
13 awarded to be paid by periodic payments pursuant to s.
14 766.202(8) and shall be offset by future collateral source
15 payments.

16 (d) Punitive damages shall not be awarded.

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

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

24 (g) The defendant shall pay all the costs of the
25 arbitration proceeding and the fees of all the arbitrators
26 other than the administrative law judge.

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

30 (i) The defendant's obligation to pay the claimant's
31 damages shall be for the purpose of arbitration under this

1 section only. A defendant's or claimant's offer to arbitrate
2 shall not be used in evidence or in argument during any
3 subsequent litigation of the claim following the rejection
4 thereof.

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

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

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

21
22 The provisions of this subsection shall not preclude
23 settlement at any time by mutual agreement of the parties.

24 Section 10. Subsection (4) is added to section
25 768.041, Florida Statutes, to read:

26 768.041 Release or covenant not to sue.--

27 (4)(a) At trial pursuant to a suit filed under chapter
28 766, or at trial pursuant to s. 766.209, if any defendant
29 shows the court that the plaintiff, or his or her legal
30 representative, has delivered a written release or covenant
31 not to sue to any person in partial satisfaction of the

1 damages sued for, the court shall set off this amount from the
2 total amount of the damages set forth in the verdict and
3 before entry of the final judgment.

4 (b) The amount of the set off pursuant to this
5 subsection shall include all sums received by the plaintiff,
6 including economic and noneconomic damages, costs, and
7 attorney's fees.

8 Section 11. Legislative findings and intent.--The
9 Legislature finds and declares it to be of vital importance
10 that emergency services and care be provided by hospitals,
11 physicians, and emergency medical services providers to every
12 person in need of such care. The Legislature finds that
13 emergency services and care providers are critical elements in
14 responding to disaster and emergency situations that might
15 affect our local communities, state, and country. The
16 Legislature recognizes the importance of maintaining a viable
17 system of providing for the emergency medical needs of the
18 state's residents and visitors. The Legislature and the
19 Federal Government have required such providers of emergency
20 medical services and care to provide emergency services and
21 care to all persons who present to hospitals seeking such
22 care. The Legislature finds that the Legislature has further
23 mandated that prehospital emergency medical treatment or
24 transport may not be denied by emergency medical services
25 providers to persons who have or are likely to have an
26 emergency medical condition. Such governmental requirements
27 have imposed a unilateral obligation for emergency services
28 and care providers to provide services to all persons seeking
29 emergency care without ensuring payment or other consideration
30 for provision of such care. The Legislature also recognizes
31 that emergency services and care providers provide a

1 significant amount of uncompensated emergency medical care in
2 furtherance of such governmental interest. The Legislature
3 finds that a significant proportion of the residents of this
4 state who are uninsured or are Medicaid or Medicare recipients
5 are unable to access needed health care because health care
6 providers fear the increased risk of medical malpractice
7 liability. The Legislature finds that such patients, in order
8 to obtain medical care, are frequently forced to seek care
9 through providers of emergency medical services and care. The
10 Legislature finds that providers of emergency medical services
11 and care in this state have reported significant problems with
12 both the availability and affordability of professional
13 liability coverage. The Legislature finds that medical
14 malpractice liability insurance premiums have increased
15 dramatically, and a number of insurers have ceased providing
16 medical malpractice insurance coverage for emergency medical
17 services and care in this state. This results in a functional
18 unavailability of medical malpractice insurance coverage for
19 some providers of emergency medical services and care. The
20 Legislature further finds that certain specialist physicians
21 have resigned from serving on hospital staffs or have
22 otherwise declined to provide on-call coverage to hospital
23 emergency departments due to increased medical malpractice
24 liability exposure created by treating such emergency
25 department patients. It is the intent of the Legislature that
26 hospitals, emergency medical services providers, and
27 physicians be able to ensure that patients who might need
28 emergency medical services treatment or transportation or who
29 present to hospitals for emergency medical services and care
30 have access to such needed services.

31

1 Section 12. Subsection (2) of section 768.13, Florida
2 Statutes, is amended to read:

3 768.13 Good Samaritan Act; immunity from civil
4 liability.--

5 (2)(a) Any person, including those licensed to
6 practice medicine, who gratuitously and in good faith renders
7 emergency care or treatment either in direct response to
8 emergency situations related to and arising out of a public
9 health emergency declared pursuant to s. 381.00315, a state of
10 emergency which has been declared pursuant to s. 252.36 or at
11 the scene of an emergency outside of a hospital, doctor's
12 office, or other place having proper medical equipment,
13 without objection of the injured victim or victims thereof,
14 shall not be held liable for any civil damages as a result of
15 such care or treatment or as a result of any act or failure to
16 act in providing or arranging further medical treatment where
17 the person acts as an ordinary reasonably prudent person would
18 have acted under the same or similar circumstances.

19 (b)1. Any health care provider, including a hospital
20 licensed under chapter 395, providing emergency services
21 pursuant to obligations imposed by 42 U.S.C. s. 1395dd, s.
22 395.401, or s. 401.45 ~~any employee of such hospital working in~~
23 ~~a clinical area within the facility and providing patient~~
24 ~~care, and any person licensed to practice medicine who in good~~
25 ~~faith renders medical care or treatment necessitated by a~~
26 ~~sudden, unexpected situation or occurrence resulting in a~~
27 ~~serious medical condition demanding immediate medical~~
28 ~~attention, for which the patient enters the hospital through~~
29 ~~its emergency room or trauma center, or necessitated by a~~
30 ~~public health emergency declared pursuant to s. 381.00315~~
31 shall not be held liable for any civil damages as a result of

1 such medical care or treatment unless such damages result from
2 providing, or failing to provide, medical care or treatment
3 under circumstances demonstrating a reckless disregard for the
4 consequences so as to affect the life or health of another. A
5 health care provider under s. 768.28(9)(b)2.b. does not
6 include a licensed health care practitioner who is providing
7 emergency services to a person with whom the practitioner has
8 an established provider-patient relationship outside of the
9 emergency room setting.

10 2. The immunity provided by this paragraph applies
11 ~~does not apply~~ to damages as a result of any act or omission
12 of providing medical care or treatment, including diagnosis:

13 a. Which occurs prior to the time ~~after~~ the patient is
14 stabilized and is capable of receiving medical treatment as a
15 nonemergency patient, unless surgery is required as a result
16 of the emergency within a reasonable time after the patient is
17 stabilized, in which case the immunity provided by this
18 paragraph applies to any act or omission of providing medical
19 care or treatment which occurs prior to the stabilization of
20 the patient following the surgery; and ~~or~~

21 b. Related ~~Unrelated~~ to the original medical
22 emergency.

23 3. For purposes of this paragraph, "reckless
24 disregard" as it applies to a given health care provider
25 rendering emergency medical services shall be such conduct
26 that ~~which~~ a health care provider knew or should have known,
27 at the time such services were rendered, created an
28 unreasonable risk of injury so as to affect the life or health
29 of another, and such risk was substantially greater than that
30 which is necessary to make the conduct negligent. ~~would be~~
31 ~~likely to result in injury so as to affect the life or health~~

1 ~~of another, taking into account the following to the extent~~
2 ~~they may be present;~~

3 ~~a. The extent or serious nature of the circumstances~~
4 ~~prevailing.~~

5 ~~b. The lack of time or ability to obtain appropriate~~
6 ~~consultation.~~

7 ~~c. The lack of a prior patient-physician relationship.~~

8 ~~d. The inability to obtain an appropriate medical~~
9 ~~history of the patient.~~

10 ~~e. The time constraints imposed by coexisting~~
11 ~~emergencies.~~

12 4. Every emergency care facility granted immunity
13 under this paragraph shall accept and treat all emergency care
14 patients within the operational capacity of such facility
15 without regard to ability to pay, including patients
16 transferred from another emergency care facility or other
17 health care provider pursuant to Pub. L. No. 99-272, s. 9121.
18 The failure of an emergency care facility to comply with this
19 subparagraph constitutes grounds for the department to
20 initiate disciplinary action against the facility pursuant to
21 chapter 395.

22 (c)1. Any health care practitioner as defined in s.
23 456.001(4) who is in a hospital attending to a patient of his
24 or her practice or for business or personal reasons unrelated
25 to direct patient care, and who voluntarily responds to
26 provide care or treatment to a patient with whom at that time
27 the practitioner does not have a then-existing health care
28 patient-physician relationship, and when such care or
29 treatment is necessitated by a sudden or unexpected situation
30 or by an occurrence that demands immediate medical attention,
31 shall not be held liable for any civil damages as a result of

1 any act or omission relative to that care or treatment, unless
2 that care or treatment is proven to amount to conduct that is
3 willful and wanton and would likely result in injury so as to
4 affect the life or health of another.

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

9 3. For purposes of this paragraph, the Legislature's
10 intent is to encourage health care practitioners to provide
11 necessary emergency care to all persons without fear of
12 litigation as described in this paragraph.

13 ~~(c) Any person who is licensed to practice medicine,~~
14 ~~while acting as a staff member or with professional clinical~~
15 ~~privileges at a nonprofit medical facility, other than a~~
16 ~~hospital licensed under chapter 395, or while performing~~
17 ~~health screening services, shall not be held liable for any~~
18 ~~civil damages as a result of care or treatment provided~~
19 ~~gratuitously in such capacity as a result of any act or~~
20 ~~failure to act in such capacity in providing or arranging~~
21 ~~further medical treatment, if such person acts as a reasonably~~
22 ~~prudent person licensed to practice medicine would have acted~~
23 ~~under the same or similar circumstances.~~

24 Section 13. Paragraph (b) of subsection (9) of section
25 768.28, Florida Statutes, is amended to read:

26 768.28 Waiver of sovereign immunity in tort actions;
27 recovery limits; limitation on attorney fees; statute of
28 limitations; exclusions; indemnification; risk management
29 programs.--

30 (9)

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

1 1. "Employee" includes any volunteer firefighter.
2 2.a. "Officer, employee, or agent" includes, but is
3 not limited to, any health care provider when providing
4 services pursuant to s. 766.1115;any member of the Florida
5 Health Services Corps, as defined in s. 381.0302, who provides
6 uncompensated care to medically indigent persons referred by
7 the Department of Health;~~and~~ any public defender or her or
8 his employee or agent, including, among others, an assistant
9 public defender and an investigator.

10 b. Any health care provider providing emergency
11 services pursuant to obligations imposed by 42 U.S.C. s.
12 1395dd, s. 395.1041, s. 395.401, s. 401.45, or s. 768.13. Such
13 health care provider shall be considered an agent of the
14 state, or its applicable agency or subdivision for purposes of
15 immunity under s. 768.28, and shall indemnify the state for
16 any liabilities incurred up to the limits set out in this
17 chapter or the limits of available insurance coverage of the
18 health care provider, whichever is greater. Emergency services
19 under this subparagraph means ambulance assessments,
20 treatment, or transport services provided pursuant to
21 obligations imposed by s. 401.45 or s. 395.1041; and all
22 screening, examination, and evaluation by a physician,
23 hospital, or other person or entity acting pursuant to
24 obligations imposed by ss. 395.1041, 395.401, and 42 U.S.C. s.
25 1395dd; as well as care, treatment, surgery, or other medical
26 services provided to relieve or eliminate and to stabilize the
27 emergency medical condition in accordance with s. 395.1041 and
28 42 U.S.C. s. 1395dd; including all medical services to
29 eliminate the likelihood that the emergency medical condition
30 will deteriorate or recur without further medical attention
31 within a reasonable period of time. Notwithstanding the waiver

1 of sovereign immunity provided in this subparagraph, claims
2 hereunder may be settled and judgments entered and satisfied
3 up to the limits of the available coverage of the health care
4 provider without the requirement of filing a claim bill. A
5 health care provider under this sub-subparagraph does not
6 include a licensed healthcare practitioner who is providing
7 emergency services to a person with whom the practitioner has
8 an established provider-patient relationship outside of the
9 emergency room setting.

10 Section 14. Section 768.77, Florida Statutes, is
11 amended to read:

12 768.77 Itemized verdict.--

13 (1) Except as provided in subsection (2), in any
14 action to which this part applies in which the trier of fact
15 determines that liability exists on the part of the defendant,
16 the trier of fact shall, as a part of the verdict, itemize the
17 amounts to be awarded to the claimant into the following
18 categories of damages:

19 (a)(1) Amounts intended to compensate the claimant for
20 economic losses;

21 (b)(2) Amounts intended to compensate the claimant for
22 noneconomic losses; and

23 (c)(3) Amounts awarded to the claimant for punitive
24 damages, if applicable.

25 (2) In any action for damages based on personal injury
26 or wrongful death arising out of medical malpractice, whether
27 in tort or contract, to which this part applies in which the
28 trier of fact determines that liability exists on the part of
29 the defendant, the trier of fact shall, as a part of the
30 verdict, itemize the amounts to be awarded to the claimant
31 into the following categories of damages:

1 (a) Amounts intended to compensate the claimant for:
2 1. Past economic losses; and
3 2. Future economic losses, not reduced to present
4 value, and the number of years or part thereof which the award
5 is intended to cover;

6 (b) Amounts intended to compensate the claimant for:
7 1. Past noneconomic losses; and
8 2. Future noneconomic losses and the number of years
9 or part thereof which the award is intended to cover; and

10 (c) Amounts awarded to the claimant for punitive
11 damages, if applicable.

12 Section 15. Subsection (5) of section 768.81, Florida
13 Statutes, is amended to read:

14 768.81 Comparative fault.--

15 (5) Notwithstanding any provision of ~~anything in~~ law
16 to the contrary, in an action for damages for personal injury
17 or wrongful death arising out of medical malpractice, whether
18 in contract or tort, the trier of fact shall apportion the
19 total fault only among the claimant and all the joint
20 tortfeasors who are parties to the action when the case is
21 submitted to the jury for deliberation and rendition of the
22 verdict ~~when an apportionment of damages pursuant to this~~
23 ~~section is attributed to a teaching hospital as defined in s.~~
24 ~~408.07, the court shall enter judgment against the teaching~~
25 ~~hospital on the basis of such party's percentage of fault and~~
26 ~~not on the basis of the doctrine of joint and several~~
27 ~~liability.~~

28 Section 16. If any provision of this act or its
29 application to any person or circumstance is held invalid, the
30 invalidity does not affect other provisions or applications of
31 the act which can be given effect without the invalid

1 provision or application, and to this end the provisions of
2 this act are severable.

3 Section 17. Subsections (3), (4), (5), (6), (7), (8),
4 and (9) are added to section 766.110, Florida Statutes, to
5 read:

6 766.110 Liability of health care facilities.--

7 (3) Members of the medical staff of a hospital
8 licensed under chapter 395 and any professional group
9 comprised of such persons shall be immune from liability for
10 all damages in excess of \$100,000 per incident arising from
11 medical injuries to patients resulting from negligent acts or
12 omissions of such medical staff members in the performance of
13 emergency medical services as defined in s. 768.13(2), and no
14 member of the medical staff of a hospital and no professional
15 group comprised of such persons shall be liable to pay any
16 damages in excess of \$100,000 to any person or persons for any
17 single incident of medical negligence that causes injuries to
18 a patient or patients in the performance of emergency medical
19 services.

20 (4) Subject to the limitations set forth in subsection
21 (5), every hospital licensed under chapter 395 shall assume
22 liability for all damages in excess of \$100,000 per incident
23 arising from medical injuries to patients resulting from
24 negligent acts or omissions on the part of members of its
25 medical staff in the performance of emergency medical services
26 as defined by s. 768.13(2). A health care provider under s.
27 768.28(9)(b)2.b. does not include a licensed health care
28 practitioner who is providing emergency services to a person
29 with whom the practitioner has an established provider-patient
30 relationship outside of the emergency room setting.

31

1 (5) No person or persons may recover damages from a
2 hospital licensed under chapter 395, or its insurer, in excess
3 of \$2.5 million per incident arising from medical injuries to
4 a patient or patients caused by negligent acts or omissions on
5 the part of the hospital or members of the hospital's medical
6 staff in the performance of emergency medical services as
7 defined in s. 768.13(2), and no hospital or hospital insurer
8 shall be liable to pay any claim or judgment in an amount in
9 excess of \$2.5 million for a single incident of medical
10 negligence on the part of the hospital or members of the
11 hospital's medical staff that causes injuries to a patient or
12 patients in the performance of emergency medical services.

13 (6) Because of the overriding public necessity for
14 hospitals to provide trauma care and emergency medical
15 services to the public at large, the state assumes
16 responsibility for payment of reasonable compensation to
17 persons who are barred from recovery of certain damages due to
18 subsection (5). Application for payment of such damages shall
19 commence with the filing of a claims bill. The Legislature
20 shall process a claims bill for compensation under this
21 subsection in the same manner as a claims bill that seeks
22 compensation for damages barred from recovery under the
23 doctrine of sovereign immunity.

24 (7) No attorney may charge, demand, receive, or
25 collect, for services rendered, fees in excess of 25 percent
26 of any amount awarded by the Legislature pursuant to
27 subsection (6).

28 (8) Nothing in this section constitutes a waiver of
29 sovereign immunity under s. 768.28, nor shall this section
30 impair the immunities currently recognized for public
31 hospitals or teaching hospitals as defined in s. 408.07.

1 Section 18. Except as otherwise provided herein, this
2 act shall take effect July 1, 2003, and shall apply to causes
3 of action accruing on or after that date.
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