

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. 768.77, F.S.;
16 prescribing a method for itemization of
17 specific categories of damages awarded in
18 medical malpractice actions; amending s.
19 768.81, F.S.; requiring the trier of fact to
20 apportion total fault solely among the claimant
21 and joint tortfeasors as parties to an action;
22 providing for severability; amending s.
23 766.110, F.S.; limiting liability of health
24 care providers providing emergency care
25 services in hospitals; providing for hospitals
26 and the state to assume a certain part of
27 liability for negligence by such providers;
28 providing a limit on attorney's fees; providing
29 for severability; providing an effective date.

30
31 Be It Enacted by the Legislature of the State of Florida:

1 Section 1. Findings.--

2 (1) The Legislature finds that Florida is in the midst
3 of a medical malpractice insurance crisis of unprecedented
4 magnitude.

5 (2) The Legislature finds that this crisis threatens
6 the quality and availability of health care for all Florida
7 citizens.

8 (3) The Legislature finds that the rapidly growing
9 population and the changing demographics of Florida make it
10 imperative that students continue to choose Florida as the
11 place they will receive their medical educations and practice
12 medicine.

13 (4) The Legislature finds that Florida is among the
14 states with the highest medical malpractice insurance premiums
15 in the nation.

16 (5) The Legislature finds that the cost of medical
17 malpractice insurance has increased dramatically during the
18 past decade and both the increase and the current cost are
19 substantially higher than the national average.

20 (6) The Legislature finds that the increase in medical
21 malpractice liability insurance rates is forcing physicians to
22 practice medicine without professional liability insurance, to
23 leave Florida, to not perform high-risk procedures, or to
24 retire early from the practice of medicine.

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

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

31

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

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

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

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

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

26 (14) The Legislature finds that the provisions of this
27 act are naturally and logically connected to each other and to
28 the purpose of making quality health care available to the
29 citizens of Florida.

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

1 46.015 Release of parties.--
2 (4)(a) At trial pursuant to a suit filed under chapter
3 766 or pursuant to s. 766.209, if any defendant shows the
4 court that the plaintiff, or his or her legal representative,
5 has delivered a written release or covenant not to sue to any
6 person in partial satisfaction of the damages sued for, the
7 court shall set off this amount from the total amount of the
8 damages set forth in the verdict and before entry of the final
9 judgment.

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

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

15 456.057 Ownership and control of patient records;
16 report or copies of records to be furnished.--

17 (6) Except in a medical negligence action or
18 administrative proceeding when a health care practitioner or
19 provider is or reasonably expects to be named as a defendant,
20 information disclosed to a health care practitioner by a
21 patient in the course of the care and treatment of such
22 patient is confidential and may be disclosed only to other
23 health care practitioners and providers involved in the care
24 or treatment of the patient, or if permitted by written
25 authorization from the patient or compelled by subpoena at a
26 deposition, evidentiary hearing, or trial for which proper
27 notice has been given or by a medical information release
28 executed pursuant to s. 766.106(13) which permits the taking
29 of unsworn statements.

30 Section 4. Section 766.102, Florida Statutes, is
31 amended to read:

1 766.102 Medical negligence; standards of recovery;
2 expert witness.--

3 (1) In any action for recovery of damages based on the
4 death or personal injury of any person in which it is alleged
5 that such death or injury resulted from the negligence of a
6 health care provider as defined in s. 766.101(1)(b)~~s.~~
7 ~~768.50(2)(b)~~, the claimant shall have the burden of proving by
8 the greater weight of evidence that the alleged actions of the
9 health care provider represented a breach of the prevailing
10 professional standard of care for that health care provider.
11 The prevailing professional standard of care for a given
12 health care provider shall be that level of care, skill, and
13 treatment which, in light of all relevant surrounding
14 circumstances, is recognized as acceptable and appropriate by
15 reasonably prudent similar health care providers.

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

22 ~~1. Is licensed by the appropriate regulatory agency of~~
23 ~~this state;~~

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

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

27 ~~(b) If the health care provider whose negligence is~~
28 ~~claimed to have created the cause of action is certified by~~
29 ~~the appropriate American board as a specialist, is trained and~~
30 ~~experienced in a medical specialty, or holds himself or~~

31

1 ~~herself out as a specialist, a "similar health care provider"~~
2 ~~is one who:~~

3 1. ~~Is trained and experienced in the same specialty;~~
4 ~~and~~

5 2. ~~Is certified by the appropriate American board in~~
6 ~~the same specialty.~~

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

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

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

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

30 (2)~~(3)~~(a) ~~If the injury is claimed to have resulted~~
31 ~~from the negligent affirmative medical intervention of the~~

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

10 (b) The provisions of this subsection shall apply only
11 when the medical intervention was undertaken with the informed
12 consent of the patient in compliance with the provisions of s.
13 766.103.

14 (3)~~(4)~~ The existence of a medical injury shall not
15 create any inference or presumption of negligence against a
16 health care provider, and the claimant must maintain the
17 burden of proving that an injury was proximately caused by a
18 breach of the prevailing professional standard of care by the
19 health care provider. However, the discovery of the presence
20 of a foreign body, such as a sponge, clamp, forceps, surgical
21 needle, or other paraphernalia commonly used in surgical,
22 examination, or diagnostic procedures, shall be prima facie
23 evidence of negligence on the part of the health care
24 provider.

25 (4)~~(5)~~ The Legislature is cognizant of the changing
26 trends and techniques for the delivery of health care in this
27 state and the discretion that is inherent in the diagnosis,
28 care, and treatment of patients by different health care
29 providers. The failure of a health care provider to order,
30 perform, or administer supplemental diagnostic tests shall not
31 be actionable if the health care provider acted in good faith

1 and with due regard for the prevailing professional standard
2 of care.

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

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

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

11 2. Specialize in a similar speciality that includes
12 the evaluation, diagnosis, or treatment of the medical
13 condition that is the subject of the claim and have prior
14 experience treating similar patients.

15 (b) Have devoted professional time during the 3 years
16 immediately preceding the date of the occurrence that is the
17 basis for the action to:

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

27 2. The instruction of students in an accredited health
28 professional school or accredited residency program in the
29 same or similar health profession in which the health care
30 provider against whom or on whose behalf the testimony is
31 offered and, if that health care provider is a specialist, an

1 accredited health professional school or accredited residency
2 or clinical research program in the same or similar specialty;
3 or

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

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

17 1. Active clinical practice or consultation as a
18 general practitioner;

19 2. Instruction of students in an accredited health
20 professional school or accredited residency program in the
21 general practice of medicine; or

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

25 (6) A physician licensed under chapter 458 or chapter
26 459 who qualifies as an expert witness under subsection (5)
27 and who, by reason of active clinical practice or instruction
28 of students, has knowledge of the applicable standard of care
29 for nurses, nurse practitioners, certified registered nurse
30 anesthetists, certified registered nurse midwives, physician
31 assistants, or other medical support staff may give expert

1 testimony in a medical malpractice action with respect to the
2 standard of care of such medical support staff.

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

15 (8) If a health care provider described in subsection
16 (5), subsection (6), or subsection (7) is providing
17 evaluation, treatment, or diagnosis for a condition that is
18 not within his or her specialty, a specialist trained in the
19 evaluation, treatment, or diagnosis for that condition shall
20 be considered a similar health care provider.

21 (9)(6)(a) In any action for damages involving a claim
22 of negligence against a physician licensed under chapter 458,
23 osteopathic physician licensed under chapter 459, podiatric
24 physician licensed under chapter 461, or chiropractic
25 physician licensed under chapter 460 providing emergency
26 medical services in a hospital emergency department, the court
27 shall admit expert medical testimony only from physicians,
28 osteopathic physicians, podiatric physicians, and chiropractic
29 physicians who have had substantial professional experience
30 within the preceding 5 years while assigned to provide
31 emergency medical services in a hospital emergency department.

1 (b) For the purposes of this subsection:

2 1. The term "emergency medical services" means those
3 medical services required for the immediate diagnosis and
4 treatment of medical conditions which, if not immediately
5 diagnosed and treated, could lead to serious physical or
6 mental disability or death.

7 2. "Substantial professional experience" shall be
8 determined by the custom and practice of the manner in which
9 emergency medical coverage is provided in hospital emergency
10 departments in the same or similar localities where the
11 alleged negligence occurred.

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

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

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

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

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

30 (2)(a) After completion of presuit investigation
31 pursuant to s. 766.203 and prior to filing a claim for medical

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

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

25 (3)(a) No suit may be filed for a period of 90 days
26 after notice is mailed to any prospective defendant. During
27 the 90-day period, the prospective defendant's insurer or
28 self-insurer shall conduct a review to determine the liability
29 of the defendant. Each insurer or self-insurer shall have a
30 procedure for the prompt investigation, review, and evaluation
31

1 of claims during the 90-day period. This procedure shall
2 include one or more of the following:

- 3 1. Internal review by a duly qualified claims
4 adjuster;
- 5 2. Creation of a panel comprised of an attorney
6 knowledgeable in the prosecution or defense of medical
7 malpractice actions, a health care provider trained in the
8 same or similar medical specialty as the prospective
9 defendant, and a duly qualified claims adjuster;
- 10 3. A contractual agreement with a state or local
11 professional society of health care providers, which maintains
12 a medical review committee;
- 13 4. Any other similar procedure which fairly and
14 promptly evaluates the pending claim.

15
16 Each insurer or self-insurer shall investigate the claim in
17 good faith, and both the claimant and prospective defendant
18 shall cooperate with the insurer in good faith. If the
19 insurer requires, a claimant shall appear before a pretrial
20 screening panel or before a medical review committee and shall
21 submit to a physical examination, if required. Unreasonable
22 failure of any party to comply with this section justifies
23 dismissal of claims or defenses. There shall be no civil
24 liability for participation in a pretrial screening procedure
25 if done without intentional fraud.

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

- 28 1. Rejecting the claim;
- 29 2. Making a settlement offer; or
- 30 3. Making an offer to arbitrate in which liability is
31 deemed admitted and arbitration will be held only ~~of admission~~

1 ~~of liability and for arbitration~~ on the issue of damages.

2 This offer may be made contingent upon a limit of general
3 damages.

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

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

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

29 (c) Physical and mental examinations.--A prospective
30 defendant may require an injured prospective claimant to
31 appear for examination by an appropriate health care provider.

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

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

18 (e) Informal discovery.--It is the intent of the
19 Legislature that informal discovery may be conducted pursuant
20 to this subsection by any party without notice to any other
21 party.

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

28 Section 6. Section 766.108, Florida Statutes, is
29 amended to read:

30 766.108 Mandatory mediation and mandatory settlement
31 conference in medical malpractice actions.--

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

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

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

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

18 766.202 Definitions; ss. 766.201-766.212.--As used in
19 ss. 766.201-766.212, the term:

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

27 (5) "Medical expert" means a person duly and regularly
28 engaged in the practice of his or her profession who holds a
29 health care professional degree from a university or college
30 and who meets the requirements of an expert witness as set
31 forth in s. 766.102 ~~has had special professional training and~~

1 ~~experience or one possessed of special health care knowledge~~
2 ~~or skill about the subject upon which he or she is called to~~
3 ~~testify or provide an opinion.~~

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

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

15 (a) A specific finding of the dollar amount of
16 periodic payments which will compensate for these future
17 damages after offset for collateral sources shall be made.
18 The total dollar amount of the periodic payments shall equal
19 the dollar amount of all such future damages before any
20 reduction to present value.

21 (b) The defendant shall be required to post a bond or
22 security or otherwise to assure full payment of these damages
23 awarded. A bond is not adequate unless it is written by a
24 company authorized to do business in this state and is rated
25 A+ by Best's. If the defendant is unable to adequately assure
26 full payment of the damages, all damages, reduced to present
27 value, shall be paid to the claimant in a lump sum. No bond
28 may be canceled or be subject to cancellation unless at least
29 60 days' advance written notice is filed with the court and
30 the claimant. Upon termination of periodic payments, the

31

1 security, or so much as remains, shall be returned to the
2 defendant.

3 (c) The provision for payment of future damages by
4 periodic payments shall specify the recipient or recipients of
5 the payments, the dollar amounts of the payments, the interval
6 between payments, and the number of payments or the period of
7 time over which payments shall be made.

8 (d) Any portion of the periodic payment which is
9 attributable to medical expenses that have not yet been
10 incurred shall terminate upon the death of the claimant. Any
11 outstanding medical expenses incurred prior to the death of
12 the claimant shall be paid from that portion of the periodic
13 payment attributable to medical expenses.

14 Section 8. Effective July 1, 2003 and applicable to
15 all causes of action accruing on or after that date, section
16 766.206, Florida Statutes, is amended to read:

17 766.206 Presuit investigation of medical negligence
18 claims and defenses by court.--

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

24 (2) If the court finds that the notice of intent to
25 initiate litigation mailed by the claimant is not in
26 compliance with the reasonable investigation requirements of
27 ss. 766.201-766.212, including a review of the claim and a
28 verified written medical expert opinion by an expert witness
29 as defined in s. 766.202, the court shall dismiss the claim,
30 and the person who mailed such notice of intent, whether the
31 claimant or the claimant's attorney, shall be personally

1 liable for all attorney's fees and costs incurred during the
2 investigation and evaluation of the claim, including the
3 reasonable attorney's fees and costs of the defendant or the
4 defendant's insurer.

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

17 (4) If the court finds that an attorney for the
18 claimant mailed notice of intent to initiate litigation
19 without reasonable investigation, or filed a medical
20 negligence claim without first mailing such notice of intent
21 which complies with the reasonable investigation requirements,
22 or if the court finds that an attorney for a defendant mailed
23 a response rejecting the claim without reasonable
24 investigation, the court shall submit its finding in the
25 matter to The Florida Bar for disciplinary review of the
26 attorney. Any attorney so reported three or more times within
27 a 5-year period shall be reported to a circuit grievance
28 committee acting under the jurisdiction of the Supreme Court.
29 If such committee finds probable cause to believe that an
30 attorney has violated this section, such committee shall
31 forward to the Supreme Court a copy of its finding.

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

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

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

18 766.207 Voluntary binding arbitration of medical
19 negligence claims.--

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

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

30 (b) Noneconomic damages shall be limited to a maximum
31 of \$250,000 per incident, and shall be calculated on a

1 percentage basis with respect to capacity to enjoy life, so
2 that a finding that the claimant's injuries resulted in a
3 50-percent reduction in his or her capacity to enjoy life
4 would warrant an award of not more than \$125,000 noneconomic
5 damages.

6 (c) Damages for future economic losses shall be
7 awarded to be paid by periodic payments pursuant to s.
8 766.202(8) and shall be offset by future collateral source
9 payments.

10 (d) Punitive damages shall not be awarded.

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

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

18 (g) The defendant shall pay all the costs of the
19 arbitration proceeding and the fees of all the arbitrators
20 other than the administrative law judge.

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

24 (i) The defendant's obligation to pay the claimant's
25 damages shall be for the purpose of arbitration under this
26 section only. A defendant's or claimant's offer to arbitrate
27 shall not be used in evidence or in argument during any
28 subsequent litigation of the claim following the rejection
29 thereof.

30
31

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

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

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

17
18 The provisions of this subsection shall not preclude
19 settlement at any time by mutual agreement of the parties.

20 Section 10. Subsection (4) is added to section
21 768.041, Florida Statutes, to read:

22 768.041 Release or covenant not to sue.--

23 (4)(a) At trial pursuant to a suit filed under chapter
24 766, or at trial pursuant to s. 766.209, if any defendant
25 shows the court that the plaintiff, or his or her legal
26 representative, has delivered a written release or covenant
27 not to sue to any person in partial satisfaction of the
28 damages sued for, the court shall set off this amount from the
29 total amount of the damages set forth in the verdict and
30 before entry of the final judgment.

31

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

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

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

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

30 768.13 Good Samaritan Act; immunity from civil
31 liability.--

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

15 (b)1. Any health care provider, including a hospital
16 licensed under chapter 395, providing emergency services
17 pursuant to obligations imposed by 42 U.S.C. s. 1395dd, s.
18 395.401, or s. 401.45 ~~any employee of such hospital working in~~
19 ~~a clinical area within the facility and providing patient~~
20 ~~care, and any person licensed to practice medicine who in good~~
21 ~~faith renders medical care or treatment necessitated by a~~
22 ~~sudden, unexpected situation or occurrence resulting in a~~
23 ~~serious medical condition demanding immediate medical~~
24 ~~attention, for which the patient enters the hospital through~~
25 ~~its emergency room or trauma center, or necessitated by a~~
26 ~~public health emergency declared pursuant to s. 381.00315~~
27 shall not be held liable for any civil damages as a result of
28 such medical care or treatment unless such damages result from
29 providing, or failing to provide, medical care or treatment
30 under circumstances demonstrating a reckless disregard for the
31 consequences so as to affect the life or health of another. A

1 health care provider under s. 768.28(9)(b)2.b. does not
2 include a licensed health care practitioner who is providing
3 emergency services to a person with whom the practitioner has
4 an established provider-patient relationship outside of the
5 emergency room setting.

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

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

17 b. Related ~~Unrelated~~ to the original medical
18 emergency.

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

30 a. ~~The extent or serious nature of the circumstances~~
31 ~~prevailing.~~

1 ~~b. The lack of time or ability to obtain appropriate~~
2 ~~consultation.~~

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

4 ~~d. The inability to obtain an appropriate medical~~
5 ~~history of the patient.~~

6 ~~e. The time constraints imposed by coexisting~~
7 ~~emergencies.~~

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

18 (c)1. Any health care practitioner as defined in s.
19 456.001(4) who is in a hospital attending to a patient of his
20 or her practice or for business or personal reasons unrelated
21 to direct patient care, and who voluntarily responds to
22 provide care or treatment to a patient with whom at that time
23 the practitioner does not have a then-existing health care
24 patient-physician relationship, and when such care or
25 treatment is necessitated by a sudden or unexpected situation
26 or by an occurrence that demands immediate medical attention,
27 shall not be held liable for any civil damages as a result of
28 any act or omission relative to that care or treatment, unless
29 that care or treatment is proven to amount to conduct that is
30 willful and wanton and would likely result in injury so as to
31 affect the life or health of another.

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

5 3. For purposes of this paragraph, the Legislature's
6 intent is to encourage health care practitioners to provide
7 necessary emergency care to all persons without fear of
8 litigation as described in this paragraph.

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

20 Section 13. Section 768.77, Florida Statutes, is
21 amended to read:

22 768.77 Itemized verdict.--

23 (1) Except as provided in subsection (2), in any
24 action to which this part applies in which the trier of fact
25 determines that liability exists on the part of the defendant,
26 the trier of fact shall, as a part of the verdict, itemize the
27 amounts to be awarded to the claimant into the following
28 categories of damages:

29 (a)(1) Amounts intended to compensate the claimant for
30 economic losses;

31

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

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

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

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

13 1. Past economic losses; and

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

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

18 1. Past noneconomic losses; and

19 2. Future noneconomic losses and the number of years
20 or part thereof which the award is intended to cover; and

21 (c) Amounts awarded to the claimant for punitive
22 damages, if applicable.

23 Section 14. Subsection (5) of section 768.81, Florida
24 Statutes, is amended to read:

25 768.81 Comparative fault.--

26 (5) Notwithstanding any provision of ~~anything in~~ law
27 to the contrary, in an action for damages for personal injury
28 or wrongful death arising out of medical malpractice, whether
29 in contract or tort, the trier of fact shall apportion the
30 total fault only among the claimant and all the joint
31 tortfeasors who are parties to the action when the case is

1 submitted to the jury for deliberation and rendition of the
2 verdict when an apportionment of damages pursuant to this
3 section is attributed to a teaching hospital as defined in s.
4 408.07, the court shall enter judgment against the teaching
5 hospital on the basis of such party's percentage of fault and
6 not on the basis of the doctrine of joint and several
7 liability.

8 Section 15. If any provision of this act or its
9 application to any person or circumstance is held invalid, the
10 invalidity does not affect other provisions or applications of
11 the act which can be given effect without the invalid
12 provision or application, and to this end the provisions of
13 this act are severable.

14 Section 16. Subsections (3), (4), (5), (6), (7), (8),
15 and (9) are added to section 766.110, Florida Statutes, to
16 read:

17 766.110 Liability of health care facilities.--

18 (3) Members of the medical staff of a hospital
19 licensed under chapter 395 and any professional group
20 comprised of such persons shall be immune from liability for
21 all damages in excess of \$100,000 per incident arising from
22 medical injuries to patients resulting from negligent acts or
23 omissions of such medical staff members in the performance of
24 emergency medical services as defined in s. 768.13(2), and no
25 member of the medical staff of a hospital and no professional
26 group comprised of such persons shall be liable to pay any
27 damages in excess of \$100,000 to any person or persons for any
28 single incident of medical negligence that causes injuries to
29 a patient or patients in the performance of emergency medical
30 services.

31

1 (4) Subject to the limitations set forth in subsection
2 (5), every hospital licensed under chapter 395 shall assume
3 liability for all damages in excess of \$100,000 per incident
4 arising from medical injuries to patients resulting from
5 negligent acts or omissions on the part of members of its
6 medical staff in the performance of emergency medical services
7 as defined by s. 768.13(2). For the purposes of this section,
8 a health care provider does not include a licensed health care
9 practitioner who is providing emergency services to a person
10 with whom the practitioner has an established provider-patient
11 relationship outside of the emergency room setting.

12 (5) No person or persons may recover damages from a
13 hospital licensed under chapter 395, or its insurer, in excess
14 of \$2.5 million per incident arising from medical injuries to
15 a patient or patients caused by negligent acts or omissions on
16 the part of the hospital or members of the hospital's medical
17 staff in the performance of emergency medical services as
18 defined in s. 768.13(2), and no hospital or hospital insurer
19 shall be liable to pay any claim or judgment in an amount in
20 excess of \$2.5 million for a single incident of medical
21 negligence on the part of the hospital or members of the
22 hospital's medical staff that causes injuries to a patient or
23 patients in the performance of emergency medical services.

24 (6) Because of the overriding public necessity for
25 hospitals to provide trauma care and emergency medical
26 services to the public at large, the state assumes
27 responsibility for payment of reasonable compensation to
28 persons who are barred from recovery of certain damages due to
29 subsection (5). Application for payment of such damages shall
30 commence with the filing of a claims bill. The Legislature
31 shall process a claims bill for compensation under this

1 subsection in the same manner as a claims bill that seeks
2 compensation for damages barred from recovery under the
3 doctrine of sovereign immunity.

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

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

12 Section 17. Except as otherwise provided herein, this
13 act shall take effect July 1, 2003, and shall apply to causes
14 of action accruing on or after that date.

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