

1 A bill to be entitled
 2 An act relating to mammography; providing legislative
 3 findings and intent; creating the Carole Green Breast
 4 Cancer Steering Committee; providing for membership,
 5 duties, and reports; amending s. 456.077, F.S.;
 6 authorizing the Board of Medicine and the Board of
 7 Osteopathic Medicine to issue citations and to require
 8 additional education in certain circumstances; amending s.
 9 766.118, F.S.; providing for limitation on noneconomic
 10 damages for negligence of practitioners and
 11 nonpractitioner defendants providing mammography services;
 12 creating s. 766.119, F.S.; providing for burden of proof
 13 and clarifying use of subsequent mammograms as evidence in
 14 negligence actions; creating a medical review panel pilot
 15 project for claims involving mammography services;
 16 providing for membership and duties; requiring a report to
 17 the Legislature; providing for severability; providing
 18 applicability; providing an effective date.

19
 20 WHEREAS, breast cancer is the second leading cause of
 21 cancer deaths in women, and

22 WHEREAS, breast cancer affects all of us through our
 23 spouses, mothers, daughters, sisters, aunts, nieces, friends,
 24 and neighbors, and

25 WHEREAS, there are three main tools available to detect
 26 breast cancer: breast examinations by a health care
 27 practitioner, breast self-examinations, and screening
 28 mammograms, and

29 WHEREAS, although mammography is an imperfect screening
30 test, it is still the best medical test available to detect
31 breast cancer, and

32 WHEREAS, early detection of breast cancer decreases
33 mortality by 30 percent, and

34 WHEREAS, screening mammograms need to be widely available
35 to all women at risk regardless of geographic location, race,
36 type of or nonexistence of insurance, or socioeconomic status,
37 and

38 WHEREAS, the Workgroup on Mammography Accessibility created
39 by the Legislature under Senate Bill 2306 in the 2004 Regular
40 Session found that population growth combined with a growing
41 shortage of interpreting radiologists will have an adverse
42 effect on the future availability of mammography services, and

43 WHEREAS, radiologists are reluctant to provide screening
44 mammography services because of the high cost of obtaining
45 professional liability insurance in comparison to the low
46 reimbursements received and the fear of a medical malpractice
47 lawsuit being brought against a radiologist who is not able to
48 catch every single instance of a cancerous or precancerous
49 condition, and

50 WHEREAS, in 2004, the Legislature directed the Office of
51 Program Policy Analysis and Government Accountability to study
52 issues relating to mammography services in the state, and

53 WHEREAS, the Office of Program Policy Analysis and
54 Government Accountability found that one of the factors limiting
55 access to mammography services in the state is the fear of

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56 | medical malpractice lawsuits which is causing some radiologists
57 | to limit the number of mammograms they interpret, and

58 | WHEREAS, the Department of Health conducted a survey and
59 | found that 17 percent of the facilities surveyed had appointment
60 | wait times exceeding 28 days for screening mammograms, and

61 | WHEREAS, the Workgroup on Mammography Accessibility found
62 | that mammography facilities in the state have high-quality
63 | personnel and equipment and a high level of compliance with
64 | safety and other standards of care, as demonstrated by the
65 | results of inspections by the United States Food and Drug
66 | Administration, and

67 | WHEREAS, the Workgroup on Mammography Accessibility found
68 | that national data show that most defendants in alleged medical
69 | malpractice claims involving breast cancer are radiologists and
70 | that only claims for neurologically impaired newborns are more
71 | expensive than breast cancer in terms of indemnity dollars, and

72 | WHEREAS, the Legislature has previously recognized that two
73 | other medical specialists, obstetricians and emergency room
74 | physicians, have such a high risk of liability claims that
75 | access to these services is in jeopardy without statutory
76 | protection limiting the damages available to patients and their
77 | families, and

78 | WHEREAS, funds from professional liability insurance are
79 | not an appropriate or adequate substitute for health insurance,
80 | disability insurance, or life insurance, and

81 | WHEREAS, breast cancer is not caused by physicians, and

82 | WHEREAS, the Legislature must take action to protect the
83 | advancements made in the diagnosis, treatment, and awareness of

84 breast cancer through the tireless efforts of groups such as the
 85 Susan B. Komen Foundation, the American Cancer Society, the
 86 American College of Radiology, and others, and

87 WHEREAS, the Workgroup on Mammography Accessibility made
 88 eight recommendations to the Legislature to ensure that
 89 mammography will continue to be available to women in Florida,
 90 that there are enough radiologists available to interpret
 91 mammograms, that the fear of lawsuits or high medical liability
 92 insurance premiums does not deter physicians from entering the
 93 field of radiology and the interpretation of mammograms, and
 94 that utilization of mammography is increased in medically
 95 underserved populations, NOW, THEREFORE,

96

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

98

99 Section 1. Legislative findings.--

100 (1) The Legislature finds that it is of the utmost public
 101 importance that quality mammography services and other
 102 diagnostic tools remain available to detect and treat breast
 103 cancer.

104 (2) The Legislature finds that the current litigious
 105 environment and low reimbursement rates threaten the
 106 availability of mammography services for all women in the state.

107 (3) The Legislature finds that the rapidly growing
 108 population and the changing demographics of the state make it
 109 imperative that medical students continue to choose this state
 110 as the place they will receive their medical educations,
 111 complete their residency requirements, and practice radiology.

112 (4) The Legislature finds that radiologists providing
113 mammography services are in a unique class of physicians who
114 have little or no direct patient contact and generally have no
115 established physician-patient relationship.

116 (5) The Legislature finds that the State of Florida is
117 among the states with the highest medical malpractice insurance
118 premiums in the nation.

119 (6) The Legislature finds that the cost of medical
120 malpractice insurance has increased dramatically during the past
121 decade and both the increase and the current cost are
122 substantially higher than the national average.

123 (7) The Legislature finds that the increase in medical
124 malpractice liability insurance rates is forcing physicians,
125 including radiologists, to practice medicine without
126 professional liability insurance, to leave the state, to not
127 perform high-risk procedures such as mammograms, or to retire
128 early from the practice of medicine.

129 (8) The Legislature finds that there are certain elements
130 of damages presently recoverable that have no monetary value,
131 except on a purely arbitrary basis, while other elements of
132 damages are either easily measured on a monetary basis or
133 reflect ultimate monetary loss.

134 (9) The Legislature finds that the 2003 Governor's Select
135 Task Force on Healthcare Professional Liability Insurance has
136 established that a medical malpractice crisis exists in the
137 state which can be alleviated by the adoption of comprehensive
138 legislatively enacted reforms.

139 (10) The Legislature finds that making high-quality health

140 care, including mammography services, available to the citizens
141 of this state is an overwhelming public necessity.

142 (11) The Legislature finds that ensuring that physicians
143 continue to practice radiology in the state is an overwhelming
144 public necessity.

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

148 (13) The Legislature finds that, based upon the findings
149 and recommendations of the Workgroup on Mammography
150 Accessibility, the findings and recommendations of the
151 Governor's Select Task Force on Healthcare Professional
152 Liability Insurance, the findings and recommendations of the
153 Office of Program Policy Analysis and Government Accountability,
154 the findings and recommendations of various study groups
155 throughout the nation, and the experience of other states, the
156 overwhelming public necessity of making quality health care,
157 including mammography services, available to the citizens of the
158 state, ensuring that physicians continue to practice radiology
159 in the state, and ensuring that those physicians have the
160 opportunity to purchase affordable professional liability
161 insurance cannot be met unless limitations on medical
162 malpractice lawsuits, including a cap on noneconomic damages,
163 are imposed.

164 (14) The Legislature finds that the high cost of medical
165 malpractice claims can be substantially alleviated by imposing a
166 limitation on noneconomic damages in medical malpractice actions
167 relating to mammography services.

168 (15) The Legislature further finds that there is no
 169 alternative measure for alleviating the high cost of medical
 170 malpractice claims without imposing even greater limits upon the
 171 ability of persons to recover damages for medical malpractice.

172 (16) The Legislature finds that the provisions of this act
 173 are naturally and logically connected to each other and to the
 174 purpose of making quality mammography services available to the
 175 women of the state.

176 (17) The Legislature finds that each provision of this act
 177 is necessary to alleviate the crisis relating to mammography
 178 accessibility in the state.

179 Section 2. The Carole Green Breast Cancer Steering
 180 Committee is created to promote and enhance the use of annual
 181 mammograms, with an emphasis on medically underserved women. The
 182 committee shall work to implement the recommendations of the
 183 Workgroup on Mammography Accessibility, including facilitating
 184 comprehensive strategic planning, ensuring statewide
 185 coordination of community-based care, and enhancing the
 186 reimbursement, utilization, access, and quality of mammography
 187 services in the state. The committee shall include the Secretary
 188 of Health or a designee to serve as the chair, the Secretary of
 189 the Agency for Health Care Administration or a designee, a
 190 representative of the Office of Insurance Regulation, four
 191 persons appointed by the Governor, four persons appointed by the
 192 President of the Senate, one of whom must be a current state
 193 senator, and four persons appointed by the Speaker of the House
 194 of Representatives, one of whom must be a current state
 195 representative. The Department of Health shall staff the

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196 committee. The Governor's appointees and the Legislature's
197 appointees who are not members of the Legislature must have a
198 background in mammography by either practicing or teaching, or
199 both, as a physician in the field of mammography, as an insurer
200 of mammography health care providers, or as an attorney with
201 experience in medical malpractice cases. The steering committee
202 shall provide an annual report to the Governor, the President of
203 the Senate, and the Speaker of the House of Representatives that
204 recommends necessary legislative and executive branch action
205 relating to mammography services.

206 Section 3. Subsection (7) is added to section 456.077,
207 Florida Statutes, to read:

208 456.077 Authority to issue citations.--

209 (7) The Board of Medicine and the Board of Osteopathic
210 Medicine may issue a citation in lieu of disciplinary action for
211 the first allegation brought against a physician alleging a
212 failure to diagnose breast cancer through the interpretation of
213 a mammogram. The board, in issuing the citation, may impose up
214 to 10 additional hours of continuing education in mammography
215 interpretation.

216 Section 4. Subsections (8) and (9) are added to section
217 766.118, Florida Statutes, to read:

218 766.118 Determination of noneconomic damages.--

219 (8) LIMITATION ON NONECONOMIC DAMAGES FOR NEGLIGENCE OF
220 PRACTITIONERS PROVIDING MAMMOGRAPHY SERVICES.--Notwithstanding
221 subsections (2) and (3), with respect to a cause of action for
222 personal injury or wrongful death arising from the medical
223 negligence of practitioners who provide mammography services to

224 persons with whom the practitioner does not have a then-existing
 225 health care patient-practitioner relationship for that medical
 226 condition:

227 (a) Regardless of the number of such practitioner
 228 defendants, noneconomic damages shall not exceed \$150,000 per
 229 claimant.

230 (b) Notwithstanding paragraph (a), the total noneconomic
 231 damages recoverable by all claimants from all such practitioners
 232 shall not exceed \$300,000 in the aggregate.

233
 234 The limitation provided by this subsection applies only to
 235 noneconomic damages awarded as a result of any act or omission
 236 relating to mammography interpretation.

237 (9) LIMITATION ON NONECONOMIC DAMAGES FOR NEGLIGENCE OF
 238 NONPRACTITIONER DEFENDANTS PROVIDING MAMMOGRAPHY
 239 SERVICES.--Notwithstanding subsections (2) and (3), with respect
 240 to a cause of action for personal injury or wrongful death
 241 arising from medical negligence of defendants other than
 242 practitioners who provide mammography services to persons with
 243 whom the practitioner does not have a then-existing health care
 244 patient-practitioner relationship for that medical
 245 condition:

246 (a) Regardless of the number of such nonpractitioner
 247 defendants, noneconomic damages shall not exceed \$750,000 per
 248 claimant.

249 (b) Notwithstanding paragraph (a), the total noneconomic
 250 damages recoverable by all claimants from all such

251 nonpractitioner defendants shall not exceed \$1.5 million in the
 252 aggregate.

253 (c) Nonpractitioner defendants may receive a full setoff
 254 for payments made by practitioner defendants.

255
 256 The limitation provided by this subsection applies only to
 257 noneconomic damages awarded as a result of any act or omission
 258 relating to mammography interpretation.

259 Section 5. Medical review panels for claims involving
 260 mammography services; pilot project; reports.--

261 (1) The Department of Health, in consultation with the
 262 Board of Medicine and the American College of Radiology, shall
 263 create a medical review panel pilot project as part of the
 264 presuit process in medical malpractice litigation involving the
 265 failure to diagnose breast cancer through the interpretation of
 266 a mammogram. The panel shall consist of three physicians
 267 licensed pursuant to chapter 458 or chapter 459 who are board
 268 certified in radiology and who have experience in the past 3
 269 years in reading and interpreting mammograms. The medical review
 270 panel shall review all medical malpractice cases involving
 271 mammography during the presuit process and make judgments on the
 272 merits of the case based on established standards of care. The
 273 panel's report may be used as admissible evidence at trial and
 274 in disciplinary proceedings.

275 (2) The Department of Health shall report to the
 276 Legislature on whether medical review panels or similar panels
 277 should be created for use during the presuit process for other
 278 medical services.

279 (3) In submitting its report, the department should
 280 identify at a minimum:

281 (a) The number of medical malpractice claims submitted to
 282 the panel during the time period the panel is in existence.

283 (b) The percentage of claims that were settled while the
 284 panel is in existence and the percentage of claims that were
 285 settled in the 3 years prior to the establishment of the medical
 286 review panel pilot project.

287 (c) If the department finds that medical review panels or
 288 a similar structure should be created for additional types of
 289 claims, it shall include draft legislation to implement its
 290 recommendations in its report.

291 (4) The department shall submit its report to the
 292 Governor, the Speaker of the House of Representatives, and the
 293 President of the Senate no later than December 31, 2006.

294 Section 6. Section 766.119, Florida Statutes, is created
 295 to read:

296 766.119 Actions relating to mammograms.--In a civil action
 297 brought pursuant to this chapter against a radiologist licensed
 298 in this state pursuant to chapter 458 or chapter 459 for any
 299 action or omission arising from the performance of his or her
 300 duties relating to mammograms, the burden of proof shall be
 301 clear and convincing evidence. Furthermore, a subsequent
 302 mammogram may not be used as the sole evidence relied upon by an
 303 expert witness or a finder of fact in determining the failure to
 304 diagnose breast cancer when the subsequent mammogram was
 305 performed more than 6 months after the mammogram that is alleged
 306 to have been incorrectly interpreted.

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307 Section 7. If any provision of this act or its application
308 to any person or circumstance is held invalid, the invalidity
309 does not affect other provisions or applications of the act
310 which can be given effect without the invalid provision or
311 application, and to this end the provisions of this act are
312 severable.

313 Section 8. It is the intent of the Legislature to apply
314 the provisions of this act to prior medical incidents, to the
315 extent such application is not prohibited by the State
316 Constitution or the Federal Constitution, except that the
317 changes to chapter 766, Florida Statutes, shall apply only to
318 any medical incident for which a notice of intent to initiate
319 litigation is mailed on or after the effective date of this act.

320 Section 9. This act shall take effect July 1, 2005.