

1 WHEREAS, there are three main tools available to detect
2 breast cancer: breast examinations by a health care
3 practitioner, breast self examinations, and screening
4 mammograms, and

5 WHEREAS, mammography is an imperfect screening test but
6 the best medical test available to detect breast cancer, and

7 WHEREAS, early detection of breast cancer decreases
8 mortality by 30 percent, and

9 WHEREAS, screening mammograms need to be widely
10 available to all women at risk regardless of geographic
11 location, race, type of or nonexistence of insurance, or
12 socio-economic status, and

13 WHEREAS, the Workgroup on Mammography Accessibility
14 created by the Legislature pursuant to SB 2306 in the 2004
15 regular session found that population growth combined with a
16 growing shortage of interpreting radiologists will have an
17 adverse affect on the future availability of mammography
18 services, and

19 WHEREAS, radiologists are reluctant to provide
20 screening mammography services because of the high cost of
21 obtaining professional liability insurance in comparison to
22 the low reimbursements received, and the fear of a medical
23 malpractice lawsuit being brought against a radiologist who is
24 not able to catch every single instance of a cancerous or
25 precancerous condition, and

26 WHEREAS, the Legislature directed the Office of Program
27 Policy Analysis and Government Accountability (OPPAGA) in 2004
28 to study issues relating to mammography services in this
29 state, and

30 WHEREAS, OPPAGA found that one of the factors limiting
31 access to mammography services in this state is the fear of

1 | medical malpractice lawsuits which is causing some
2 | radiologists to limit the number of mammograms they interpret,
3 | and

4 | WHEREAS, the Department of Health conducted a survey
5 | and found that 17 percent of the facilities surveyed had
6 | appointment wait times exceeding 28 days for screening
7 | mammograms, and

8 | WHEREAS, the Workgroup on Mammography Accessibility
9 | found that mammography facilities in this state have
10 | high-quality personnel and equipment, and a high level of
11 | compliance with safety and other quality standards of care, as
12 | demonstrated by the United States Food and Drug Administration
13 | inspections, and

14 | WHEREAS, the Workgroup on Mammography Accessibility
15 | found that national data show that most defendants in alleged
16 | medical malpractice claims involving breast cancer are
17 | radiologists and that only claims for neurologically impaired
18 | newborns are more expensive than claims involving breast
19 | cancer in terms of indemnity dollars, and

20 | WHEREAS, the Legislature has previously recognized that
21 | two other medical specialists, obstetricians and emergency
22 | room physicians, have such high risk of liability claims that
23 | access to these services are put in jeopardy without statutory
24 | protection limiting the damages available to patients and
25 | their families, and

26 | WHEREAS, funds from professional liability insurance
27 | are not an appropriate or adequate substitute for health
28 | insurance, disability insurance, or life insurance, and

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

30 | WHEREAS, the Legislature must take action to protect
31 | the advancements made in the diagnosis, treatment, and

1 awareness of breast cancer through the tireless efforts of
2 groups, such as the Susan B. Komen Foundation, the American
3 Cancer Society, the American College of Radiology, and others,
4 and

5 WHEREAS, the Workgroup on Mammography Accessibility
6 made eight recommendations to the Legislature to ensure that
7 mammography will continue to be available to women in this
8 state, that there are enough radiologists available to read
9 mammograms, that the fear of lawsuits or high medical
10 liability insurance premiums do not deter physicians from
11 entering the field of radiology or from the reading of
12 mammograms, and that use of mammography is increased in
13 medically underserved populations, NOW, THEREFORE,

14
15 Be It Enacted by the Legislature of the State of Florida:

16
17 Section 1. Legislative findings.--

18 (1) The Legislature finds that it is of the utmost
19 public importance that quality mammography services and other
20 diagnostic tools remain available to detect and treat breast
21 cancer.

22 (2) The Legislature finds that the current litigious
23 environment and low reimbursement rates threaten the
24 availability of mammography services for all women in this
25 state.

26 (3) The Legislature finds that the rapidly growing
27 population and the changing demographics of this state make it
28 imperative that medical students continue to choose this state
29 as the place they will receive their medical educations,
30 complete their residency requirements, and practice radiology.

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

5 (5) The Legislature finds that this state is among the
6 states having the highest medical malpractice insurance
7 premiums in the nation.

8 (6) The Legislature finds that the cost of medical
9 malpractice insurance has increased dramatically during the
10 past decade and both the increase and the current cost are
11 substantially higher than the national average.

12 (7) The Legislature finds that the increase in medical
13 malpractice liability insurance rates is forcing physicians,
14 including radiologists, to practice medicine without
15 professional liability insurance, to leave this state, to not
16 perform high-risk procedures such as mammograms, or to retire
17 early from the practice of medicine.

18 (8) The Legislature finds that there are certain
19 elements of damage presently recoverable that do not have
20 monetary value, except on a purely arbitrary basis, while
21 other elements of damage are either easily measured monetarily
22 or reflect ultimate monetary loss.

23 (9) The Legislature finds that the Governor's Select
24 Task Force on Healthcare Professional Liability Insurance
25 (2003) has established that a medical malpractice crisis
26 exists in this state which can be alleviated by the adoption
27 of comprehensive legislatively enacted reforms.

28 (10) The Legislature finds that making high-quality
29 health care, including mammography services, available in this
30 state is an overwhelming public necessity.
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1 (12) The Legislature finds that ensuring the
2 availability of affordable professional liability insurance
3 for physicians is an overwhelming public necessity.

4 (13) The Legislature finds, based upon the findings
5 and recommendations of the Workgroup on Mammography
6 Accessibility, the findings and recommendations of the
7 Governor's Select Task Force on Healthcare Professional
8 Liability Insurance, the findings and recommendations of the
9 Office of Program Policy Analysis and Government
10 Accountability (OPPAGA), the findings and recommendations of
11 various study groups throughout the nation, and the experience
12 of other states, that the overwhelming public necessities of
13 making quality health care, including mammography services,
14 available in this state, of ensuring that physicians continue
15 to practice radiology in this state, and of ensuring that
16 those physicians have the opportunity to purchase affordable
17 professional liability insurance cannot be met unless
18 limitations on medical malpractice lawsuits, including a cap
19 on noneconomic damages, are imposed.

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

24 (15) The Legislature further finds that there is not
25 any alternative measure of accomplishing such result without
26 imposing even greater limits upon the ability of persons to
27 recover damages for medical malpractice.

28 (16) The Legislature finds that the provisions of this
29 act are naturally and logically connected to each other and to
30 the purpose of making quality mammography services available
31 to the women in this state.

1 (17) The Legislature finds that each of the provisions
2 of this act is necessary to alleviate the crisis relating to
3 mammography accessibility in this state.

4 Section 2. The Carole Green Breast Cancer Steering
5 Committee is created to promote and enhance the use of annual
6 mammograms, with emphasis to medically underserved women. The
7 committee shall work to implement the recommendations of the
8 Workgroup on Mammography Accessibility, including facilitating
9 comprehensive strategic planning, ensuring statewide
10 coordination of community-based care, and enhancing the
11 reimbursement, utilization, access, and quality of mammography
12 services in the state. The committee shall include the
13 Secretary of Health or his or her designee to serve as the
14 chairperson, the Secretary of the Agency for Health Care
15 Administration or his or her designee, a representative of the
16 Office of Insurance Regulation, four persons appointed by the
17 Governor, four persons appointed by the President of the
18 Senate, one of which must be a current senator, and four
19 persons appointed by the Speaker of the House of
20 Representatives, one of which must be a current
21 representative. The Department of Health shall staff the
22 committee. The Governor's appointees and the Legislature's
23 appointees who are not members of the Legislature must have a
24 background in mammography by either practicing or teaching or
25 both as a physician in the field of mammography, insuring
26 mammography health care providers, or trying or defending
27 medical malpractice cases as an attorney. The steering
28 committee shall provide annual reports to the Governor,
29 President of the Senate, and Speaker of the House of
30 Representatives recommending necessary legislative and
31 executive branch action relating to mammography services.

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

3 456.077 Authority to issue citations.--

4 (7) The Board of Medicine and the Board of Osteopathic
5 Medicine may issue a citation in lieu of disciplinary action
6 for the first allegation brought against a physician alleging
7 a failure to diagnose breast cancer through the interpretation
8 of a mammogram. The board, in issuing the citation, may impose
9 up to 10 additional hours of continuing education in
10 interpreting mammograms.

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

13 766.118 Determination of noneconomic damages.--

14 (8) LIMITATION ON NONECONOMIC DAMAGES FOR NEGLIGENCE
15 OF PRACTITIONERS PROVIDING MAMMOGRAPHY
16 SERVICES.--Notwithstanding subsections (2) and (3), with
17 respect to a cause of action for personal injury or wrongful
18 death arising from medical negligence of a practitioner
19 providing mammography services to persons with whom the
20 practitioner does not have a then-existing health care
21 patient-practitioner relationship for that medical condition:

22 (a) Noneconomic damages may not exceed \$150,000 per
23 claimant regardless of the number of such practitioner
24 defendants.

25 (b) The total noneconomic damages recoverable by all
26 claimants from all such practitioners may not exceed \$300,000
27 notwithstanding paragraph (a).

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29 The limitation provided by this subsection applies only to
30 noneconomic damages awarded as a result of any act or omission
31 of providing mammography interpretation.

1 (9) LIMITATION ON NONECONOMIC DAMAGES FOR NEGLIGENCE
2 OF NONPRACTITIONER DEFENDANTS PROVIDING MAMMOGRAPHY
3 SERVICES.--Notwithstanding subsections (2) and (3), with
4 respect to a cause of action for personal injury or wrongful
5 death arising from medical negligence of defendants other than
6 a practitioner providing mammography services to persons with
7 whom the practitioner does not have a then-existing health
8 care patient-practitioner relationship for that medical
9 condition:

10 (a) Noneconomic damages may not exceed \$750,000 per
11 claimant regardless of the number of such nonpractitioner
12 defendants.

13 (b) The total noneconomic damages recoverable by all
14 claimants from all such nonpractitioner defendants may not
15 exceed \$1.5 million notwithstanding paragraph (a).

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

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19 The limitation provided by this subsection applies only to
20 noneconomic damages awarded as a result of any act or omission
21 of providing mammography interpretation.

22 Section 5. Medical review panels for claims involving
23 mammography services; pilot project; report to Legislature.--

24 (1) The Department of Health, in consultation with the
25 Board of Medicine and the American College of Radiology, shall
26 create a pilot medical review panel as part of the presuit
27 process in medical malpractice litigation involving the
28 failure to diagnose breast cancer through the interpretation
29 of a mammogram. The panel shall consist of three physicians
30 licensed pursuant to chapter 458, Florida Statutes, or chapter
31 459, Florida Statutes, who are board certified in radiology

1 and who have experience in the past 3 years in reading and
2 interpreting mammograms. The medical review panel shall review
3 all medical malpractice cases involving mammography during the
4 presuit process and make judgments on the merits of the case
5 based on established standards of care. The panel's report may
6 be used as admissible evidence at trial and in disciplinary
7 proceedings.

8 (2) The Department of Health shall report to the
9 Legislature on or before December 31, 2006, whether medical
10 review panels or similar panels should be created for use
11 during the presuit process for other medical services.

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

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

16 (b) The percentage of claims that were settled while
17 the panel is in existence and the percentage of claims that
18 were settled in the 3 years before the establishment of the
19 panel.

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

24 (4) The department shall submit its report to the
25 Governor, the President of the Senate, and the Speaker of the
26 House of Representatives by December 31, 2006.

27 Section 6. Section 766.119, Florida Statutes, is
28 created to read:

29 766.119 Actions relating to mammograms.--In a civil
30 action brought under this chapter against a radiologist
31 licensed in this state pursuant to chapter 458 or chapter 459

1 for any actions or omissions arising from the performance of
2 his or her duties relating to mammograms, the burden of proof
3 is clear and convincing evidence. Furthermore, a subsequent
4 mammogram may not be used as the sole evidence relied upon by
5 an expert witness or a finder of fact in determining the
6 failure to diagnose breast cancer when the subsequent
7 mammogram was performed more than 6 months after the mammogram
8 alleged to have been incorrectly interpreted.

9 Section 7. If any provision of this act or its
10 application to any person or circumstance is held invalid, the
11 invalidity does not affect other provisions or applications of
12 the act which can be given effect without the invalid
13 provision or application, and to this end the provisions of
14 this act are severable.

15 Section 8. It is the intent of the Legislature to
16 apply the provisions of this act to prior medical incidents,
17 to the extent such application is not prohibited by the State
18 Constitution or federal Constitution, except that the changes
19 to chapter 766, Florida Statutes, shall apply only to any
20 medical incident for which a notice of intent to initiate
21 litigation is mailed on or after the effective date of this
22 act.

23 Section 9. This act shall take effect July 1, 2005.
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SENATE SUMMARY

Creates the Carole Green Breast Cancer Steering Committee. Authorizes the Board of Medicine and the Board of Osteopathic Medicine to issue a citation instead of disciplinary action for the first allegation of missed diagnosis for breast cancer via a mammogram. Provides for the limitation on noneconomic damages for negligence of health care practitioners who provide mammography services. Requires the Department of Health to create a pilot medical review panel. Requires the department to report to the Governor and the Legislature regarding the usefulness of such panels. Provides for the burden of proof in an action arising from a radiologist's duties involving mammograms. Clarifies use of subsequent mammograms as evidence in negligence actions.

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