

1 A bill to be entitled
2 An act relating to medical malpractice; providing
3 legislative findings and intent; amending s. 766.102,
4 F.S.; establishing the burden of proof that a claimant
5 must meet in certain damage claims against health care
6 providers based on death or personal injury; amending
7 s. 766.106, F.S.; allowing a prospective medical
8 malpractice defendant to interview a claimant's
9 treating health care providers without the presence of
10 the claimant or the claimant's legal representative;
11 requiring a prospective defendant to provide the
12 claimant notice a specified period before such an
13 interview; amending s. 768.28, F.S.; providing
14 sovereign immunity to emergency health care providers
15 acting pursuant to obligations imposed by specified
16 statutes; providing an exception; providing that
17 emergency health care providers are agents of the
18 state and requiring them to indemnify the state up to
19 the specified liability limits; providing for
20 sanctions against emergency health care providers who
21 fail to comply with indemnification obligations;
22 providing definitions; providing that an emergency
23 medical provider may elect to not be an agent of the
24 state; providing for revocation of such election;
25 providing that elections and revocations are effective
26 upon receipt by the Department of Health; providing
27 applicability; providing an effective date.
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29 Be It Enacted by the Legislature of the State of Florida:

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Section 1. Legislative findings and intent.—

(1) The Legislature finds and declares it to be of vital importance that emergency services and care be provided by hospitals, physicians, and emergency medical services providers to every person in need of such care. The Legislature finds that providers of emergency services and care are critical elements in responding to disaster and emergency situations that may affect local communities, the state, and the country. The Legislature recognizes the importance of maintaining a viable system of providing for the emergency medical needs of the state's residents and visitors. The Legislature and the Federal Government have required such providers of emergency medical services and care to provide emergency services and care to all persons who present themselves to hospitals seeking such care.

(2) The Legislature has further mandated that emergency medical treatment may not be denied by emergency medical services providers to persons who have or are likely to have an emergency medical condition. Such governmental requirements have imposed a unilateral obligation for providers of emergency services and care to provide services to all persons seeking emergency care without ensuring payment or other consideration for provision of such care. The Legislature also recognizes that providers of emergency services and care provide a significant amount of uncompensated emergency medical care in furtherance of such governmental interest.

56 (3) The Legislature finds that a significant proportion of
57 the residents of this state who are uninsured or are Medicaid or
58 Medicare recipients are unable to access needed health care on
59 an elective basis because health care providers fear the
60 increased risk of medical malpractice liability. The Legislature
61 finds that such patients, in order to obtain medical care, are
62 frequently forced to seek care through providers of emergency
63 medical services and care.

64 (4) The Legislature finds that providers of emergency
65 medical services and care in this state have reported
66 significant problems with respect to the affordability of
67 professional liability insurance, which is more expensive in
68 this state than the national average. The Legislature further
69 finds that a significant number of specialist physicians have
70 resigned from serving on hospital staffs or have otherwise
71 declined to provide on-call coverage to hospital emergency
72 departments due to the increased exposure to medical malpractice
73 liability created by treating such emergency department
74 patients, thereby creating a void that has an adverse effect on
75 emergency patient care.

76 (5) It is the intent of the Legislature that hospitals,
77 emergency medical services providers, and physicians be able to
78 ensure that patients who may need emergency medical treatment
79 and who present themselves to hospitals for emergency medical
80 services and care have access to such needed services.

81 Section 2. Subsection (4) of section 766.102, Florida
82 Statutes, is amended to read:

83 766.102 Medical negligence; standards of recovery; expert

84 witness.—

85 (4) (a) The Legislature is cognizant of the changing trends
 86 and techniques for the delivery of health care in this state and
 87 the discretion that is inherent in the diagnosis, care, and
 88 treatment of patients by different health care providers. The
 89 failure of a health care provider to order, perform, or
 90 administer supplemental diagnostic tests is ~~shall~~ not ~~be~~
 91 actionable if the health care provider acted in good faith and
 92 with due regard for the prevailing professional standard of
 93 care.

94 (b) In an action for damages based on death or personal
 95 injury which alleges that such death or injury resulted from the
 96 failure of a health care provider to order, perform, or
 97 administer supplemental diagnostic tests, the claimant has the
 98 burden of proving by clear and convincing evidence that the
 99 alleged actions of the health care provider represented a breach
 100 of the prevailing professional standard of care.

101 Section 3. Paragraph (b) of subsection (6) of section
 102 766.106, Florida Statutes, is amended to read:

103 766.106 Notice before filing action for medical
 104 negligence; presuit screening period; offers for admission of
 105 liability and for arbitration; informal discovery; review.—

106 (6) INFORMAL DISCOVERY.—

107 (b) Informal discovery may be used by a party to obtain
 108 unsworn statements, the production of documents or things, ~~and~~
 109 physical and mental examinations, and ex parte interviews, as
 110 follows:

111 1. Unsworn statements.—Any party may require other parties

112 to appear for the taking of an unsworn statement. Such
113 statements may be used only for the purpose of presuit screening
114 and are not discoverable or admissible in any civil action for
115 any purpose by any party. A party desiring to take the unsworn
116 statement of any party must give reasonable notice in writing to
117 all parties. The notice must state the time and place for taking
118 the statement and the name and address of the party to be
119 examined. Unless otherwise impractical, the examination of any
120 party must be done at the same time by all other parties. Any
121 party may be represented by counsel at the taking of an unsworn
122 statement. An unsworn statement may be recorded electronically,
123 stenographically, or on videotape. The taking of unsworn
124 statements is subject to the provisions of the Florida Rules of
125 Civil Procedure and may be terminated for abuses.

126 2. Documents or things.—Any party may request discovery of
127 documents or things. The documents or things must be produced,
128 at the expense of the requesting party, within 20 days after the
129 date of receipt of the request. A party is required to produce
130 discoverable documents or things within that party's possession
131 or control. Medical records shall be produced as provided in s.
132 766.204.

133 3. Physical and mental examinations.—A prospective
134 defendant may require an injured claimant to appear for
135 examination by an appropriate health care provider. The
136 prospective defendant shall give reasonable notice in writing to
137 all parties as to the time and place for examination. Unless
138 otherwise impractical, a claimant is required to submit to only
139 one examination on behalf of all potential defendants. The

140 practicality of a single examination must be determined by the
141 nature of the claimant's condition, as it relates to the
142 liability of each prospective defendant. Such examination report
143 is available to the parties and their attorneys upon payment of
144 the reasonable cost of reproduction and may be used only for the
145 purpose of presuit screening. Otherwise, such examination report
146 is confidential and exempt from the provisions of s. 119.07(1)
147 and s. 24(a), Art. I of the State Constitution.

148 4. Written questions.—Any party may request answers to
149 written questions, the number of which may not exceed 30,
150 including subparts. A response must be made within 20 days after
151 receipt of the questions.

152 5. Unsworn statements of treating health care providers.—A
153 prospective defendant or his or her legal representative may
154 also take unsworn statements of the claimant's treating health
155 care providers. The statements must be limited to those areas
156 that are potentially relevant to the claim of personal injury or
157 wrongful death. Subject to the procedural requirements of
158 subparagraph 1., a prospective defendant may take unsworn
159 statements from a claimant's treating physicians. Reasonable
160 notice and opportunity to be heard must be given to the claimant
161 or the claimant's legal representative before taking unsworn
162 statements. The claimant or claimant's legal representative has
163 the right to attend the taking of such unsworn statements.

164 6. Ex parte interviews of treating health care providers.—
165 A prospective defendant or his or her legal representative may
166 interview the claimant's treating health care providers without
167 the presence of the claimant or the claimant's legal

168 representative. A prospective defendant or his or her legal
169 representative that intends to interview a claimant's health
170 care providers must provide the claimant with notice of such
171 intent at least 10 days before the interview.

172 Section 4. Subsection (9) of section 768.28, Florida
173 Statutes, is amended to read:

174 768.28 Waiver of sovereign immunity in tort actions;
175 recovery limits; limitation on attorney fees; statute of
176 limitations; exclusions; indemnification; risk management
177 programs.—

178 (9) (a) No officer, employee, or agent of the state or of
179 any of its subdivisions shall be held personally liable in tort
180 or named as a party defendant in any action for any injury or
181 damage suffered as a result of any act, event, or omission of
182 action in the scope of her or his employment or function, unless
183 such officer, employee, or agent acted in bad faith or with
184 malicious purpose or in a manner exhibiting wanton and willful
185 disregard of human rights, safety, or property. However, such
186 officer, employee, or agent shall be considered an adverse
187 witness in a tort action for any injury or damage suffered as a
188 result of any act, event, or omission of action in the scope of
189 her or his employment or function. The exclusive remedy for
190 injury or damage suffered as a result of an act, event, or
191 omission of an officer, employee, or agent of the state or any
192 of its subdivisions or constitutional officers shall be by
193 action against the governmental entity, or the head of such
194 entity in her or his official capacity, or the constitutional
195 officer of which the officer, employee, or agent is an employee,

196 unless such act or omission was committed in bad faith or with
 197 malicious purpose or in a manner exhibiting wanton and willful
 198 disregard of human rights, safety, or property. The state or its
 199 subdivisions shall not be liable in tort for the acts or
 200 omissions of an officer, employee, or agent committed while
 201 acting outside the course and scope of her or his employment or
 202 committed in bad faith or with malicious purpose or in a manner
 203 exhibiting wanton and willful disregard of human rights, safety,
 204 or property.

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

- 206 1. "Employee" includes any volunteer firefighter.
- 207 2. "Officer, employee, or agent" includes, but is not
 208 limited to:r

209 a. Any health care provider when providing services
 210 pursuant to s. 766.1115; any member of the Florida Health
 211 Services Corps, as defined in s. 381.0302, who provides
 212 uncompensated care to medically indigent persons referred by the
 213 Department of Health; any nonprofit independent college or
 214 university located and chartered in this state which owns or
 215 operates an accredited medical school, and its employees or
 216 agents, when providing patient services pursuant to paragraph
 217 (10) (f); and any public defender or her or his employee or
 218 agent, including, among others, an assistant public defender and
 219 an investigator.

220 b. Any emergency health care provider acting pursuant to
 221 obligations imposed by s. 395.1041 or s. 401.45, except for
 222 persons or entities that are otherwise covered under this
 223 section.

224 (c)1. Emergency health care providers are agents of the
225 state and shall indemnify the state for any judgments,
226 settlement costs, or other liabilities incurred, only up to the
227 liability limits in subsection (5).

228 2. Any emergency health care provider who is licensed by
229 the state and who fails to indemnify the state after reasonable
230 notice and written demand to do so is subject to an emergency
231 suspension order of the regulating authority having jurisdiction
232 over the licensee.

233 3. The Department of Health shall issue an emergency order
234 suspending the license of any licensee under its jurisdiction or
235 any licensee of a regulatory board within the Department of
236 Health who fails to comply within 30 days after receipt by the
237 department of a notice from the Division of Risk Management of
238 the Department of Financial Services that the licensee has
239 failed to satisfy her or his obligation to indemnify the state
240 or enter into a repayment agreement with the state for costs
241 under this subsection. The terms of such agreement must provide
242 assurance of repayment of the obligation which is satisfactory
243 to the state. For licensees within the Division of Medical
244 Quality Assurance of the Department of Health, failure to comply
245 with this paragraph constitutes grounds for disciplinary action
246 under each respective practice act and under s. 456.072(1)(k).

247 4. As used in this subsection, the term:

248 a. "Emergency health care provider" means a physician
249 licensed under chapter 458, chapter 459, or chapter 461, or a
250 dentist licensed under chapter 466.

251 b. "Emergency medical services" means all screenings,
252 examinations, and evaluations by a physician, hospital, or other
253 person or entity acting pursuant to obligations imposed by s.
254 395.1041 or s. 401.45, and the care, treatment, surgery, or
255 other medical services provided to relieve or eliminate the
256 emergency medical condition, including all medical services to
257 eliminate the likelihood that the emergency medical condition
258 will deteriorate or recur without further medical attention
259 within a reasonable period of time.

260 5. An emergency health care provider may affirmatively
261 elect in writing not to be considered an agent of the state by
262 submitting a form to that effect to the Department of Health. An
263 emergency health care provider who makes such election may
264 revoke the election by submitting a form revoking the election.
265 An election or revocation is effective upon filing with the
266 department. Any emergency health care provider who declines the
267 status conferred by sub-subparagraph b. shall not be considered
268 an agent of the state.

269 (d)-(e) For purposes of the waiver of sovereign immunity
270 only, a member of the Florida National Guard is not acting
271 within the scope of state employment when performing duty under
272 the provisions of Title 10 or Title 32 of the United States Code
273 or other applicable federal law; and neither the state nor any
274 individual may be named in any action under this chapter arising
275 from the performance of such federal duty.

276 (e)-(d) The employing agency of a law enforcement officer
277 as defined in s. 943.10 is not liable for injury, death, or
278 property damage effected or caused by a person fleeing from a

279 law enforcement officer in a motor vehicle if:

280 1. The pursuit is conducted in a manner that does not
281 involve conduct by the officer which is so reckless or wanting
282 in care as to constitute disregard of human life, human rights,
283 safety, or the property of another;

284 2. At the time the law enforcement officer initiates the
285 pursuit, the officer reasonably believes that the person fleeing
286 has committed a forcible felony as defined in s. 776.08; and

287 3. The pursuit is conducted by the officer pursuant to a
288 written policy governing high-speed pursuit adopted by the
289 employing agency. The policy must contain specific procedures
290 concerning the proper method to initiate and terminate high-
291 speed pursuit. The law enforcement officer must have received
292 instructional training from the employing agency on the written
293 policy governing high-speed pursuit.

294 Section 5. This act shall take effect upon becoming a law
295 and shall apply to any cause of action accruing on or after that
296 date.