By the Committees on Judiciary; Health, Aging, and Long-Term Care; and Senators Saunders and Peaden

308-2315-03

A bill to be entitled

An act relating to medical malpractice; providing legislative findings; amending s. 46.015, F.S.; revising requirements for set offs against damages in medical malpractice actions if there is a written release or covenant not to sue; amending s. 456.057, F.S.; authorizing the release of medical information to defendant health care practitioners in medical malpractice actions under specified circumstances; amending s. 766.102, F.S; revising requirements for health care providers providing expert testimony in medical negligence actions; prohibiting contingency fees for an expert witness; amending s. 766.106, F.S.; revising requirements for presuit notice and insurer or self-insurer response to a claim; permitting written questions during informal discovery; requiring a claimant to execute a medical release to authorize defendants in medical negligence actions to take unsworn statements from a claimant's treating physicians; imposing limits on such statements; amending s. 766.108, F.S.; providing for mandatory mediation; amending s. 766.202, F.S.; redefining the terms "economic damages," "medical expert," "noneconomic damages," amending s. 766.206, F.S.; providing for dismissal of a claim under certain circumstances; requiring the court to make certain reports concerning a medical expert who

fails to meet qualifications; amending s. 766.207, F.S.; providing for the applicability of the Wrongful Death Act and general law to arbitration awards; amending s. 768.041, F.S.; revising requirements for set offs against damages in medical malpractice actions if there is a written release or covenant not to sue; providing legislative intent and findings with respect to the provision of emergency medical services and care by care providers; amending s. 768.13, F.S.; extending immunity from liability to certain health care practitioners in response to an emergency in a hospital; amending s. 768.28, F.S.; extending sovereign immunity to specified health care providers as agents of the state when providing emergency services pursuant to state and federal imposed obligations; amending s. 768.77, F.S.; prescribing a method for itemization of specific categories of damages awarded in medical malpractice actions; amending s. 768.81, F.S.; requiring the trier of fact to apportion total fault solely among the claimant and joint tortfeasors as parties to an action; providing for severability; providing effective dates.

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

Section 1. <u>Findings.--</u>

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

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

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

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

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

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

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

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

(9) The Legislature finds that the Governor's Select Task Force on Healthcare Professional Liability Insurance has

established that a medical malpractice insurance crisis exists in the State of Florida which can be alleviated by the adoption of comprehensive legislatively enacted reforms.

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

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

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

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

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

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

46.015 Release of parties.--

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) For the purposes of this subsection:

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

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

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

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

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

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

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

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

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

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

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

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

1. Internal review by a duly qualified claims adjuster;

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

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

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

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

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

1. Rejecting the claim;

2. Making a settlement offer; or

3. Making an offer <u>to arbitrate in which liability is deemed admitted and arbitration will be held only</u> ~~of admission~~

~~of liability and for arbitration~~ on the issue of damages. This offer may be made contingent upon a limit of general damages.

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

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

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

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

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

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

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

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

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

(1) Within 120 days after suit for medical malpractice is filed, the parties shall engage in mandatory mediation in accordance with s. 44.102, if the parties have not agreed to binding arbitration under s. 766.207. The Florida Rules of

Civil Procedure apply to mediation held pursuant to this section.

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

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

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

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

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

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

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

Section 8. Effective upon this act becoming a law and applicable to all causes of action accruing on or after that date, section 766.206, Florida Statutes, is amended to read:

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

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

(2) If the court finds that the notice of intent to initiate litigation mailed by the claimant is not in compliance with the reasonable investigation requirements of ss. 766.201-766.212, including a review of the claim and a verified written medical expert opinion by an expert witness as defined in s. 766.202, the court shall dismiss the claim, and the person who mailed such notice of intent, whether the claimant or the claimant's attorney, shall be personally liable for all attorney's fees and costs incurred during the investigation and evaluation of the claim, including the reasonable attorney's fees and costs of the defendant or the defendant's insurer.

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

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

(5)(a) If the court finds that the corroborating written medical expert opinion attached to any notice of claim or intent or to any response rejecting a claim lacked reasonable investigation, or that the medical expert

submitting the opinion did not meet the expert witness qualifications as set forth in s. 766.202(5), the court shall report the medical expert issuing such corroborating opinion to the Division of Medical Quality Assurance or its designee. If such medical expert is not a resident of the state, the division shall forward such report to the disciplining authority of that medical expert.

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

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

766.207 Voluntary binding arbitration of medical negligence claims.--

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

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

(b) Noneconomic damages shall be limited to a maximum of $250,000 per incident, and shall be calculated on a percentage basis with respect to capacity to enjoy life, so that a finding that the claimant's injuries resulted in a 50-percent reduction in his or her capacity to enjoy life

would warrant an award of not more than $125,000 noneconomic damages.

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

(d) Punitive damages shall not be awarded.

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

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

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

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

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

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

(k) Any offer by a claimant to arbitrate must be made to each defendant against whom the claimant has made a claim.

Any offer by a defendant to arbitrate must be made to each claimant who has joined in the notice of intent to initiate litigation, as provided in s. 766.106. A defendant who rejects a claimant's offer to arbitrate shall be subject to the provisions of s. 766.209(3). A claimant who rejects a defendant's offer to arbitrate shall be subject to the provisions of s. 766.209(4).

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

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

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

768.041 Release or covenant not to sue.--

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

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

Section 11. Legislative findings and intent.--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 emergency services and care providers are critical elements in responding to disaster and emergency situations that might affect our local communities, state, and 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 to hospitals seeking such care. The Legislature finds that the Legislature has further mandated that prehospital emergency medical treatment or transport 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 emergency services and care providers 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 emergency services and care providers provide a significant amount of uncompensated emergency medical care in furtherance of such governmental interest. The Legislature finds that a significant proportion of the residents of this state who are uninsured or are Medicaid or Medicare recipients are unable to access needed health care because health care providers fear the increased risk of medical malpractice liability. The Legislature finds that such patients, in order to obtain medical care, are frequently forced to seek care through providers of emergency medical services and care. The

Legislature finds that providers of emergency medical services and care in this state have reported significant problems with both the availability and affordability of professional liability coverage. The Legislature finds that medical malpractice liability insurance premiums have increased dramatically, and a number of insurers have ceased providing medical malpractice insurance coverage for emergency medical services and care in this state. This results in a functional unavailability of medical malpractice insurance coverage for some providers of emergency medical services and care. The Legislature further finds that certain specialist physicians have resigned from serving on hospital staffs or have otherwise declined to provide on-call coverage to hospital emergency departments due to increased medical malpractice liability exposure created by treating such emergency department patients. It is the intent of the Legislature that hospitals, emergency medical services providers, and physicians be able to ensure that patients who might need emergency medical services treatment or transportation or who present to hospitals for emergency medical services and care have access to such needed services.

Section 12. Paragraph (b) of subsection (2) of section 768.13, Florida Statutes, is amended, present paragraphs (c) and (d) of that subsection are redesignated as paragraphs (f) and (g), respectively, and new paragraphs (c), (d), and (e) are added to that subsection, to read:

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

(2)

(b)~~1.~~ Any hospital licensed under chapter 395, any employee of such hospital working in a clinical area within

the facility and providing patient care, and any person licensed to practice medicine who in good faith renders medical care or treatment necessitated by a sudden, unexpected situation or occurrence resulting in a serious medical condition demanding immediate medical attention, for which the patient enters the hospital through its emergency room or trauma center, or necessitated by a public health emergency declared pursuant to s. 381.00315 shall not be held liable for any civil damages as a result of such medical care or treatment unless such damages result from providing, or failing to provide, medical care or treatment under circumstances demonstrating a reckless disregard for the consequences so as to affect the life or health of another.

(c) Any health care practitioner as defined in s. 456.001 (4), while in the hospital for any reason, who in good faith responds and renders medical care or treatment in a hospital to a patient with whom the practitioner has no preexisting provider-patient relationship, when such care or treatment is necessitated by a sudden, unexpected situation or occurrence resulting in a serious medical condition demanding immediate medical attention, shall not be held liable for any civil damages as a result of any act or omission relative to that care or treatment unless the care or treatment is proven to amount to conduct demonstrating a reckless disregard for the life or health of the victim.

(d)1.~~2.~~ The immunity provided by paragraphs (b) and (c)~~this paragraph~~ does not apply to damages as a result of any act or omission of providing medical care, ~~or~~ treatment, or services~~:~~

~~a. Which occurs after the patient is stabilized and is capable of receiving medical treatment as a nonemergency~~

~~patient, unless surgery is required as a result of the emergency within a reasonable time after the patient is stabilized, in which case the immunity provided by this paragraph applies to any act or omission of providing medical care or treatment which occurs prior to the stabilization of the patient following the surgery; or~~

~~b.~~ unrelated to the original medical emergency.

2.~~3.~~ For purposes of paragraphs (b) and (c) ~~this paragraph~~, "reckless disregard" as it applies to a given health care provider rendering emergency medical care or treatment means ~~services shall be such~~ conduct that ~~which~~ a health care provider knew or should have known, at the time such services were rendered, would be likely to result in injury so as to affect the life or health of another, taking into account the following to the extent they may be present:

a. The extent or serious nature of the circumstances prevailing.

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

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

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

e. The time constraints imposed by coexisting emergencies.

(e)~~4.~~ Every emergency care facility granted immunity under ~~this~~ paragraph(b)shall accept and treat all emergency care patients within the operational capacity of such facility without regard to ability to pay, including patients transferred from another emergency care facility or other health care provider pursuant to Pub. L. No. 99-272, s. 9121. The failure of an emergency care facility to comply with this

subparagraph constitutes grounds for the department to initiate disciplinary action against the facility pursuant to chapter 395.

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

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

(9)

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

1. "Employee" includes any volunteer firefighter.

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

b. Any health care provider providing emergency services pursuant to obligations imposed by 42 U.S.C. s. 1395dd, s. 395.1041, s. 394.401, s. 401.45, or s. 768.13. Such health care provider shall be considered an agent of the state, or its applicable agency or subdivision for purposes of immunity under s. 768.28, and shall indemnify the state for any liabilities incurred up to the limits set out in this chapter or the limits of available insurance coverage of the health care provider, whichever is greater. Emergency services under this subparagraph means ambulance assessments, treatment, or transport services provided pursuant to

obligations imposed by s. 401.45 or s. 395.1041; and all screening, examination, and evaluation by a physician, hospital, or other person or entity acting pursuant to obligations imposed by ss. 395.1041, 395.401, and 42 U.S.C. s. 1395dd; as well as care, treatment, surgery, or other medical services provided to relieve or eliminate and to stabilize the emergency medical condition in accordance with s. 395.1041 and 42 U.S.C. s. 1395dd; including all medical services to eliminate the likelihood that the emergency medical condition will deteriorate or recur without further medical attention within a reasonable period of time. Notwithstanding the waiver of sovereign immunity provided in this subparagraph, claims hereunder may be settled and judgments entered and satisfied up to the limits of the available coverage of the health care provider without the requirement of filing a claim bill. A health care provider under this subparagraph does not include a licensed healthcare practitioner who is providing emergency services to a person with whom the practitioner has an established provider-patient relationship outside of the emergency room setting.

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

768.77 Itemized verdict.--

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

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

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

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

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

(a) Amounts intended to compensate the claimant for:

1. Past economic losses; and

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

(b) Amounts intended to compensate the claimant for:

1. Past noneconomic losses; and

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

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

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

768.81 Comparative fault.--

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

deliberation and rendition of the verdict ~~when an apportionment of damages pursuant to this section is attributed to a teaching hospital as defined in s. 408.07, the court shall enter judgment against the teaching hospital on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability~~.

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

Section 17. Except as otherwise expressly provided in this act, this act shall take effect upon becoming a law.

STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN
COMMITTEE SUBSTITUTE FOR
Senate Bill CS0564

-Provides legislative findings relating to comprehensive medical malpractice reform.

-Revises provisions governing expert witnesses including the criteria for who can qualify or testify as an expert witness regarding the prevailing professional standard of care in actions to require in-kind experience, training, practice and expertise as the party against whom or on whose behalf the testimony is offered.

-Prohibits contingency fees for expert witnesses.

- Requires attorney to certify expert witness has no criminal history of perjury or fraud.

-Eliminates provisions requiring certificates of expert witness.

-Revises the scope of informal discovery during presuit to require a claimant to execute a medical information release, to restore the authority only to take unsworn testimony, and to permit 30 written questions to be submitted and answered.

-Eliminates provisions governing bad faith action against a professional liability insurer.

-Eliminates the procedure and process for voluntary presuit mediation.

-Requires the claimant's presuit notice to include certain additional information regarding health care provider history preceding and predating the medical malpractice incident and to include medical records relied upon by the claimant's presuit expert witness.

-Eliminates the requirement for set-off for economic and noneconomic damages, costs, and attorney's fees against awards in medical malpractice arbitration proceedings when there is an executed written release or covenant not to sue.

-Eliminates aggregate caps for award of noneconomic damages in cases involving multiple claimants for claims arising out of the same incident to $250,000 in a voluntary arbitration proceeding, and to $350,000 at trial following a rejection of an offer to enter voluntary arbitration.

-Eliminates the defendant's option to elect to make lump sum or periodic payments of either or both future economic and noneconomic losses awarded.

-Eliminates the language that redefined "periodic payments" which made such methodology applicable to future noneconomic damages, prohibited the sale or assignment of a claimant's payments, removed the bond requirements and limited payment to the duration of the claimant's life or the claimant's condition.

-Expands the factors of consideration under which the court shall dismiss a claimant's suit, strike a defendant's pleading, report a medical expert disqualification to the Division of Medical Quality Assurance, or refuse to consider the testimony or statement of a medical expert.

-Revises the comparative fault provisions to require apportionment of fault and damages solely against the claimant and the named joint-tortfeasors at the time the case is submitted to the jury.

-Provides legislative findings regarding the need for emergency services and immunity for providers of such services.

-Revises provisions governing civil immunity under the "Good Samaritan Act" extended to hospitals under emergency scenarios and to health care practitioners who in good faith respond and render emergency medical care or treatment.

-Extends the waiver of sovereign immunity by conferring state "agent" status on certain health care practitioners when acting in accordance with federal and state law obligations to provide emergency services.