

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 10 days'
 12 notice before an interview; amending s. 768.28, F.S.;
 13 providing sovereign immunity to emergency health care
 14 providers acting pursuant to obligations imposed by
 15 specified statutes; providing an exception; providing
 16 that emergency health care providers are agents of the
 17 state and requiring them to indemnify the state up to
 18 the specified liability limits; providing for
 19 sanctions against emergency health care providers who
 20 fail to comply with indemnification obligations;
 21 providing definitions; providing that an emergency
 22 medical provider may elect to not be an agent of the
 23 state; providing for revocation of such election;
 24 providing that elections and revocations are effective
 25 upon receipt by the Department of Health; providing
 26 applicability; providing an effective date.

27
 28 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.

(3) The Legislature finds that a significant proportion of the residents of this state who are uninsured or are Medicaid or

57 Medicare recipients are unable to access needed health care on
 58 an elective basis because health care providers fear the
 59 increased risk of medical malpractice liability. The Legislature
 60 finds that such patients, in order to obtain medical care, are
 61 frequently forced to seek care through providers of emergency
 62 medical services and care.

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

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

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

82 766.102 Medical negligence; standards of recovery; expert
 83 witness.—

84 (4) (a) The Legislature is cognizant of the changing trends

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

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

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

102 766.106 Notice before filing action for medical
 103 negligence; presuit screening period; offers for admission of
 104 liability and for arbitration; informal discovery; review.—

105 (6) INFORMAL DISCOVERY.—

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

110 1. Unsworn statements.—Any party may require other parties
 111 to appear for the taking of an unsworn statement. Such
 112 statements may be used only for the purpose of presuit screening

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

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

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

141 liability of each prospective defendant. Such examination report
142 is available to the parties and their attorneys upon payment of
143 the reasonable cost of reproduction and may be used only for the
144 purpose of presuit screening. Otherwise, such examination report
145 is confidential and exempt from the provisions of s. 119.07(1)
146 and s. 24(a), Art. I of the State Constitution.

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

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

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

169 care providers must provide the claimant with notice of such
 170 intent at least 10 days prior to the interview.

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

173 768.28 Waiver of sovereign immunity in tort actions;
 174 recovery limits; limitation on attorney fees; statute of
 175 limitations; exclusions; indemnification; risk management
 176 programs.—

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

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

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

205 | 1. "Employee" includes any volunteer firefighter.

206 | 2. "Officer, employee, or agent" includes, but is not
 207 | limited to:7

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

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

223 | (c)1. Emergency health care providers are agents of the
 224 | state and shall indemnify the state for any judgments,

225 settlement costs, or other liabilities incurred, only up to the
 226 liability limits in subsection (5).

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

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

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

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

250 b. "Emergency medical services" means all screenings,
 251 examinations, and evaluations by a physician, hospital, or other
 252 person or entity acting pursuant to obligations imposed by s.

253 395.1041 or s. 401.45, and the care, treatment, surgery, or
 254 other medical services provided to relieve or eliminate the
 255 emergency medical condition, including all medical services to
 256 eliminate the likelihood that the emergency medical condition
 257 will deteriorate or recur without further medical attention
 258 within a reasonable period of time.

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

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

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

279 1. The pursuit is conducted in a manner that does not
 280 involve conduct by the officer which is so reckless or wanting

281 in care as to constitute disregard of human life, human rights,
 282 safety, or the property of another;

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

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

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