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To: Select Committee on
Civil Justice Reform

COMMITTEE SUBSTITUTE
FOR
HOUSE BILL NO. 2

1 AN ACT TO AMEND SECTIONS 11-11-3, MISSISSIPPI CODE OF 1972,
2 TO REVISE VENUE IN MEDICAL MALPRACTICE ACTIONS; TO AMEND SECTION
3 11-46-1, MISSISSIPPI CODE OF 1972, TO CLARIFY THAT CERTAIN MEDICAL
4 PRACTITIONERS ARE EMPLOYEES UNDER THE TORT CLAIMS ACT; TO CREATE
5 SECTION 11-1-62, MISSISSIPPI CODE OF 1972, TO PROVIDE THAT
6 PHYSICIANS AND PHARMACISTS SHALL BE INDEMNIFIED FOR PRESCRIBING
7 FDA APPROVED DRUGS; TO AMEND SECTION 11-1-63, MISSISSIPPI CODE OF
8 1972, IN CONFORMITY THERETO; TO AMEND SECTION 15-1-36, MISSISSIPPI
9 CODE OF 1972, TO REDUCE THE PERIOD FOR COMMENCING A MALPRACTICE
10 ACTION AGAINST A NURSING FACILITY; TO PROVIDE A NINETY-DAY NOTICE
11 FOR MEDICAL MALPRACTICE ACTIONS; TO AMEND SECTION 85-5-7,
12 MISSISSIPPI CODE OF 1972, TO PROVIDE THAT MEDICAL PRACTITIONERS
13 COVERED UNDER THE TORT CLAIMS ACT ARE ONLY LIABLE FOR THE
14 PERCENTAGE OF THEIR FAULT IN CIVIL ACTIONS; TO REQUIRE AFFIDAVITS
15 IN MEDICAL MALPRACTICE ACTIONS; TO PROVIDE A LIMITATION ON THE
16 AWARD OF NONECONOMIC DAMAGES; TO REQUIRE THE COMMISSIONER OF
17 INSURANCE TO DETERMINE AND REPORT CERTAIN INFORMATION REGARDING
18 PHYSICIANS AND THE AVAILABILITY OF MEDICAL MALPRACTICE INSURANCE;
19 TO AMEND SECTION 43-11-1, MISSISSIPPI CODE OF 1972, TO DEFINE THE
20 TERM MEDICAL RECORDS; TO CREATE SECTION 43-11-16, MISSISSIPPI CODE
21 OF 1972, TO PROVIDE THAT MEDICAL RECORDS SHALL REMAIN THE PROPERTY
22 OF THE INSTITUTIONS FOR THE AGED AND INFIRM, SUBJECT TO REASONABLE
23 ACCESS TO THE INFORMATION CONTAINED THEREIN UPON GOOD CAUSE SHOWN
24 BY THE RESIDENT, HIS PERSONAL REPRESENTATIVES OR HEIRS; TO CREATE
25 THE MEDICAL MALPRACTICE MEDIATION BOARD AND PROVIDE FOR ITS
26 MEMBERSHIP; TO PROVIDE FOR MEDIATION FOR MEDICAL MALPRACTICE AND
27 NURSING FACILITY DISPUTES; TO PROVIDE FOR THE APPOINTMENT AND
28 CERTIFICATION OF MEDIATORS; TO PROVIDE THAT MEDIATION SHALL BE
29 NONBINDING UNLESS THE PARTIES AGREE TO MAKE IT BINDING; TO REQUIRE
30 THE COMMISSIONER OF INSURANCE TO ANNUALLY COMPILE AND PROVIDE TO
31 THE LEGISLATURE A REPORT REGARDING MEDICAL MALPRACTICE CLAIMS; TO
32 PROVIDE INCENTIVE FOR MEDICAL SCHOOL GRADUATES TO PRACTICE IN THE
33 STATE; TO PROVIDE IMMUNITY FOR MEDICAL PERSONNEL PROVIDING
34 VOLUNTEER SERVICE TO SCHOOL PROGRAMS; AND FOR RELATED PURPOSES.

35 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

36 **SECTION 1.** Section 11-11-3, Mississippi Code of 1972, is
37 amended as follows:

38 11-11-3. (1) Civil actions of which the circuit court has
39 original jurisdiction shall be commenced in the county in which
40 the defendant or any of them may be found or in the county where
41 the cause of action may occur or accrue and, if the defendant is a
42 domestic corporation, in the county in which said corporation is
43 domiciled or in the county where the cause of action may occur or



44 accrue, except where otherwise provided, and except actions of
45 trespass on land, ejectment and actions for the statutory penalty
46 for cutting and boxing trees and firing woods and actions for the
47 actual value of trees cut which shall be brought in the county
48 where the land or some part thereof is situated. If a civil
49 action is brought in an improper county, such action may be
50 transferred to the proper county pursuant to Section 11-11-17.

51 (2) Civil actions for claims of medical malpractice or
52 claims against institutions for the aged and infirm shall be
53 commenced in the county where the cause of action occurred.

54 **SECTION 2.** Section 11-46-1, Mississippi Code of 1972, is
55 amended as follows:

56 11-46-1. As used in this chapter the following terms shall
57 have the meanings herein ascribed unless the context otherwise
58 requires:

59 (a) "Claim" means any demand to recover damages from a
60 governmental entity as compensation for injuries.

61 (b) "Claimant" means any person seeking compensation
62 under the provisions of this chapter, whether by administrative
63 remedy or through the courts.

64 (c) "Board" means the Mississippi Tort Claims Board.

65 (d) "Department" means the Department of Finance and
66 Administration.

67 (e) "Director" means the executive director of the
68 department who is also the executive director of the board.

69 (f) "Employee" means any officer, employee or servant
70 of the State of Mississippi or a political subdivision of the
71 state, including elected or appointed officials and persons acting
72 on behalf of the state or a political subdivision in any official
73 capacity, temporarily or permanently, in the service of the state
74 or a political subdivision whether with or without compensation.
75 The term "employee" shall not mean a person or other legal entity
76 while acting in the capacity of an independent contractor under



77 contract to the state or a political subdivision; provided,
78 however, that for purposes of the limits of liability provided for
79 in Section 11-46-15, the term "employee" shall include physicians
80 under contract to provide health services with the State Board of
81 Health, the State Board of Mental Health or any county or
82 municipal jail facility while rendering services under such
83 contract. The term "employee" shall also include any physician,
84 dentist or other medical practitioner under contract or affiliated
85 with or employed by the University of Mississippi Medical Center
86 (UMMC) or its departmental practice plans who is a geographical
87 full-time faculty member and provides medical services for
88 patients at UMMC or its affiliated practice sites, or who
89 practices on the campus of any university under the control of the
90 Board of Trustees of State Institutions of Higher Learning. The
91 term "employee" shall also include any physician, dentist or other
92 medical practitioner under contract or affiliated with or employed
93 by the State Veterans Affairs Board and who provides medical
94 services for patients for the State Veterans Affairs Board. The
95 term "employee" shall also include Mississippi Department of Human
96 Services licensed foster parents for the limited purposes of
97 coverage under the Tort Claims Act as provided in Section 11-46-8.

98 (g) "Governmental entity" means and includes the state
99 and political subdivisions as herein defined.

100 (h) "Injury" means death, injury to a person, damage to
101 or loss of property or any other injury that a person may suffer
102 that is actionable at law or in equity.

103 (i) "Political subdivision" means any body politic or
104 body corporate other than the state responsible for governmental
105 activities only in geographic areas smaller than that of the
106 state, including but not limited to any county, municipality,
107 school district, community hospital as defined in Section
108 41-13-10, Mississippi Code of 1972, airport authority or other
109 instrumentality thereof, whether or not such body or



110 instrumentality thereof has the authority to levy taxes or to sue
111 or be sued in its own name.

112 (j) "State" means the State of Mississippi and any
113 office, department, agency, division, bureau, commission, board,
114 institution, hospital, college, university, airport authority or
115 other instrumentality thereof, whether or not such body or
116 instrumentality thereof has the authority to levy taxes or to sue
117 or be sued in its own name.

118 (k) "Law" means all species of law including but not
119 limited to any and all constitutions, statutes, case law, common
120 law, customary law, court order, court rule, court decision, court
121 opinion, court judgment or mandate, administrative rule or
122 regulation, executive order, or principle or rule of equity.

123 **SECTION 3.** The following shall be codified as Section
124 11-1-62, Mississippi Code of 1972:

125 11-1-62. In any civil action alleging damages caused by a
126 prescription drug that has been approved by the Federal Food and
127 Drug Administration, a physician, pharmacist, nurse practitioner,
128 physician assistant or psychologist, such medical provider may not
129 be sued unless the plaintiff pleads specific facts which, if
130 proven, amount to negligence on the part of the medical provider.
131 It is the intent of this section to indemnify innocent medical
132 providers listed in this section who are not actively negligent
133 from forum-driven lawsuits and that, as to any claim brought
134 against such providers under this section, the insurer shall not
135 count such claim against the medical provider for the purposes of
136 insurance underwriting or, in any way, increase premiums for or
137 deny insurance coverage.

138 **SECTION 4.** Section 11-1-63, Mississippi Code of 1972, is
139 amended as follows:

140 11-1-63. In any action for damages caused by a product
141 except for commercial damage to the product itself:



142 (a) Subject to the provisions of Section 11-1-62, the
143 manufacturer, seller, distributor or prescriber of the product
144 shall not be liable if the claimant does not prove by the
145 preponderance of the evidence that at the time the product left
146 the control of the manufacturer, seller, distributor or
147 prescriber:

148 (i) 1. The product was defective because it
149 deviated in a material way from the manufacturer's specifications
150 or from otherwise identical units manufactured to the same
151 manufacturing specifications, or

152 2. The product was defective because it
153 failed to contain adequate warnings or instructions, or

154 3. The product was designed in a defective
155 manner, or

156 4. The product breached an express warranty
157 or failed to conform to other express factual representations upon
158 which the claimant justifiably relied in electing to use the
159 product; and

160 (ii) The defective condition rendered the product
161 unreasonably dangerous to the user or consumer; and

162 (iii) The defective and unreasonably dangerous
163 condition of the product proximately caused the damages for which
164 recovery is sought.

165 (b) A product is not defective in design or formulation
166 if the harm for which the claimant seeks to recover compensatory
167 damages was caused by an inherent characteristic of the product
168 which is a generic aspect of the product that cannot be eliminated
169 without substantially compromising the product's usefulness or
170 desirability and which is recognized by the ordinary person with
171 the ordinary knowledge common to the community.

172 (c) (i) In any action alleging that a product is
173 defective because it failed to contain adequate warnings or
174 instructions pursuant to paragraph (a)(i)2 of this section, the



175 manufacturer, seller, distributor or prescriber shall not be
176 liable if the claimant does not prove by the preponderance of the
177 evidence that at the time the product left the control of the
178 manufacturer, seller, distributor or prescriber, the manufacturer,
179 seller, distributor or prescriber knew or in light of reasonably
180 available knowledge should have known about the danger that caused
181 the damage for which recovery is sought and that the ordinary user
182 or consumer would not realize its dangerous condition.

183 (ii) An adequate product warning or instruction is
184 one that a reasonably prudent person in the same or similar
185 circumstances would have provided with respect to the danger and
186 that communicates sufficient information on the dangers and safe
187 use of the product, taking into account the characteristics of,
188 and the ordinary knowledge common to an ordinary consumer who
189 purchases the product; or in the case of a prescription drug,
190 medical device or other product that is intended to be used only
191 under the supervision of a physician or other licensed
192 professional person, taking into account the characteristics of,
193 and the ordinary knowledge common to, a physician or other
194 licensed professional who prescribes the drug, device or other
195 product.

196 (d) For purposes of this section:

197 (i) "Seller" means any person or entity that sells
198 products of any kind.

199 (ii) "Prescriber" means any person licensed by the
200 State of Mississippi to prescribe medicine.

201 (e) In any action alleging that a product is defective
202 pursuant to paragraph (a) of this section, the manufacturer,
203 seller, distributor or prescriber shall not be liable if the
204 claimant (i) had knowledge of a condition of the product that was
205 inconsistent with his safety; (ii) appreciated the danger in the
206 condition; and (iii) deliberately and voluntarily chose to expose



207 himself to the danger in such a manner to register assent on the
208 continuance of the dangerous condition.

209 (f) In any action alleging that a product is defective
210 pursuant to paragraph (a)(i)2 of this section, the manufacturer,
211 seller, distributor or prescriber shall not be liable if the
212 danger posed by the product is known or is open and obvious to the
213 user or consumer of the product, or should have been known or open
214 and obvious to the user or consumer of the product, taking into
215 account the characteristics of, and the ordinary knowledge common
216 to, the persons who ordinarily use or consume the product.

217 (g) In any action alleging that a product is defective
218 because of its design pursuant to paragraph (a)(i)3 of this
219 section, the manufacturer or product seller shall not be liable if
220 the claimant does not prove by the preponderance of the evidence
221 that at the time the product left the control of the manufacturer
222 or seller:

223 (i) The manufacturer, seller, distributor or
224 prescriber knew, or in light of reasonably available knowledge or
225 in the exercise of reasonable care should have known, about the
226 danger that caused the damage for which recovery is sought; and

227 (ii) The product failed to function as expected
228 and there existed a feasible design alternative that would have to
229 a reasonable probability prevented the harm. A feasible design
230 alternative is a design that would have to a reasonable
231 probability prevented the harm without impairing the utility,
232 usefulness, practicality or desirability of the product to users
233 or consumers.

234 (h) (i) The manufacturer of a product who is found
235 liable for a defective product pursuant to subsection (a) shall
236 indemnify a product seller, distributor or prescriber for the
237 costs of litigation, any reasonable expenses, reasonable
238 attorney's fees and any damages awarded by the trier of fact
239 unless the seller, distributor or prescriber exercised substantial



240 control over that aspect of the design, testing, manufacture,
241 packaging or labeling of the product that caused the harm for
242 which recovery of damages is sought; the seller, distributor or
243 prescriber altered or modified the product, and the alteration or
244 modification was a substantial factor in causing the harm for
245 which recovery of damages is sought; the seller, distributor or
246 prescriber had actual knowledge of the defective condition of the
247 product at the time he supplied same; or the seller, distributor
248 or prescriber made an express factual representation about the
249 aspect of the product which caused the harm for which recovery of
250 damages is sought.

251 (ii) Subparagraph (i) shall not apply unless the
252 seller, distributor or prescriber has given prompt notice of the
253 suit to the manufacturer within thirty (30) days of the filing of
254 the complaint against the seller.

255 (i) An agent or employee of a disclosed principal who
256 directly participates in or authorizes the commission of a tort,
257 shall be subject to liability for any tortious conduct committed
258 within the course and scope of employment. The principal shall
259 indemnify the agent or employee, for such acts committed as its
260 agent or employee.

261 (j) Nothing in this section shall be construed to
262 eliminate any common law defense to an action for damages caused
263 by a product.

264 **SECTION 5.** Section 15-1-36, Mississippi Code of 1972, is
265 amended as follows:

266 15-1-36. (1) For any claim accruing on or before June 30,
267 1998, and except as otherwise provided in this section, no claim
268 in tort may be brought against a licensed physician, osteopath,
269 dentist, hospital, nursing facility, nurse, pharmacist,
270 podiatrist, optometrist or chiropractor for injuries or wrongful
271 death arising out of the course of medical, surgical or other
272 professional services unless it is filed within two (2) years from



273 the date the alleged act, omission or neglect shall or with
274 reasonable diligence might have been first known or discovered.

275 (2) For any claim accruing on or after July 1, 1998, and
276 except as otherwise provided in this section, no claim in tort may
277 be brought against a licensed physician, osteopath, dentist,
278 hospital, nursing facility, nurse, pharmacist, podiatrist,
279 optometrist or chiropractor for injuries or wrongful death arising
280 out of the course of medical, surgical or other professional
281 services unless it is filed within two (2) years from the date the
282 alleged act, omission or neglect shall or with reasonable
283 diligence might have been first known or discovered, and, except
284 as described in paragraphs (a) and (b) of this subsection, in no
285 event more than seven (7) years after the alleged act, omission or
286 neglect occurred:

287 (a) In the event a foreign object introduced during a
288 surgical or medical procedure has been left in a patient's body,
289 the cause of action shall be deemed to have first accrued at, and
290 not before, the time at which the foreign object is, or with
291 reasonable diligence should have been, first known or discovered
292 to be in the patient's body.

293 (b) In the event the cause of action shall have been
294 fraudulently concealed from the knowledge of the person entitled
295 thereto, the cause of action shall be deemed to have first accrued
296 at, and not before, the time at which such fraud shall be, or with
297 reasonable diligence should have been, first known or discovered.

298 (3) Except as otherwise provided in subsection (4) of this
299 section, if at the time at which the cause of action shall or with
300 reasonable diligence might have been first known or discovered,
301 the person to whom such claim has accrued shall be six (6) years
302 of age or younger, then such minor or the person claiming through
303 such minor may, notwithstanding that the period of time limited
304 pursuant to subsections (1) and (2) of this section shall have
305 expired, commence action on such claim at any time within two (2)



306 years next after the time at which the minor shall have reached
307 his sixth birthday, or shall have died, whichever shall have first
308 occurred.

309 (4) If at the time at which the cause of action shall or
310 with reasonable diligence might have been first known or
311 discovered, the person to whom such claim has accrued shall be a
312 minor without a parent or legal guardian, then such minor or the
313 person claiming through such minor may, notwithstanding that the
314 period of time limited pursuant to subsections (1) and (2) of this
315 section shall have expired, commence action on such claim at any
316 time within two (2) years next after the time at which the minor
317 shall have a parent or legal guardian or shall have died,
318 whichever shall have first occurred; provided, however, that in no
319 event shall the period of limitation begin to run prior to such
320 minor's sixth birthday unless such minor shall have died.

321 (5) If at the time at which the cause of action shall or
322 with reasonable diligence might have been first known or
323 discovered, the person to whom such claim has accrued shall be
324 under the disability of unsoundness of mind, then such person or
325 the person claiming through him may, notwithstanding that the
326 period of time hereinbefore limited shall have expired, commence
327 action on such claim at any time within two (2) years next after
328 the time at which the person to whom the right shall have first
329 accrued shall have ceased to be under the disability, or shall
330 have died, whichever shall have first occurred.

331 (6) When any person who shall be under the disabilities
332 mentioned in subsections (3), (4) and (5) of this section at the
333 time at which his right shall have first accrued, shall depart
334 this life without having ceased to be under such disability, no
335 time shall be allowed by reason of the disability of such person
336 to commence action on the claim of such person beyond the period
337 prescribed under Section 15-1-55, Mississippi Code of 1972.



338 (7) For the purposes of subsection (3) of this section, and
339 only for the purposes of such subsection, the disability of
340 infancy or minority shall be removed from and after a person has
341 reached his sixth birthday.

342 (8) For the purposes of subsection (4) of this section, and
343 only for the purposes of such subsection, the disability of
344 infancy or minority shall be removed from and after a person has
345 reached his sixth birthday or from and after such person shall
346 have a parent or legal guardian, whichever occurs later, unless
347 such disability is otherwise removed by law.

348 (9) The limitation established by this section as to a
349 licensed physician, osteopath, dentist, hospital or nurse shall
350 apply only to actions the cause of which accrued on or after July
351 1, 1976.

352 (10) The limitation established by this section as to
353 pharmacists shall apply only to actions the cause of which accrued
354 on or after July 1, 1978.

355 (11) The limitation established by this section as to
356 podiatrists shall apply only to actions the cause of which accrued
357 on or after July 1, 1979.

358 (12) The limitation established by this section as to
359 optometrists and chiropractors shall apply only to actions the
360 cause of which accrued on or after July 1, 1983.

361 (13) The limitation established by this section as to
362 actions commenced on behalf of minors shall apply only to actions
363 the cause of which accrued on or after July 1, 1989.

364 (14) The limitation established by this section as to
365 nursing facilities shall apply only to actions the cause of which
366 accrued after the passage of House Bill No. 2, Third Extraordinary
367 Session of 2002.

368 (15) No action based upon the health care provider's
369 professional negligence may be begun unless the defendant has been
370 given at least ninety (90) days' prior notice of the intention to



371 begin the action. No particular form of notice is required, but
372 it shall notify the defendant of the legal basis of the claim and
373 the type of loss sustained, including with specificity the nature
374 of the injuries suffered. If the notice is served within ninety
375 (90) days of the expiration of the applicable statute of
376 limitations, the time for the beginning of the action shall be
377 extended ninety (90) days from the service of the notice for said
378 health care providers and others. This subsection shall not be
379 applicable with respect to any defendant whose name is unknown to
380 the plaintiff at the time of filing the complaint and who is
381 identified therein by a fictitious name.

382 **SECTION 6.** Section 85-5-7, Mississippi Code of 1972, is
383 amended as follows:

384 85-5-7. (1) As used in this section "fault" means an act or
385 omission of a person which is a proximate cause of injury or death
386 to another person or persons, damages to property, tangible or
387 intangible, or economic injury, including but not limited to
388 negligence, malpractice, strict liability, absolute liability or
389 failure to warn. "Fault" shall not include any tort which results
390 from an act or omission committed with a specific wrongful intent.

391 (2) Except as may be otherwise provided in subsections (6)
392 and (8) of this section, in any civil action based on fault, the
393 liability for damages caused by two (2) or more persons shall be
394 joint and several only to the extent necessary for the person
395 suffering injury, death or loss to recover fifty percent (50%) of
396 his recoverable damages.

397 (3) Except as otherwise provided in subsections (2) and (6)
398 of this section, in any civil action based on fault, the liability
399 for damages caused by two (2) or more persons shall be several
400 only, and not joint and several and a joint tortfeasor shall be
401 liable only for the amount of damages allocated to him in direct
402 proportion to his percentage of fault. In assessing percentages
403 of fault an employer and the employer's employee or a principal



404 and the principal's agent shall be considered as one (1) defendant
405 when the liability of such employer or principal has been caused
406 by the wrongful or negligent act or omission of the employee or
407 agent.

408 (4) Any defendant held jointly liable under this section
409 shall have a right of contribution against fellow joint
410 tortfeasors. A defendant shall be held responsible for
411 contribution to other joint tortfeasors only for the percentage of
412 fault assessed to such defendant.

413 (5) Nothing in this section shall eliminate or diminish any
414 defenses or immunities which currently exist, except as expressly
415 noted herein.

416 (6) Joint and several liability shall be imposed on all who
417 consciously and deliberately pursue a common plan or design to
418 commit a tortious act, or actively take part in it. Any person
419 held jointly and severally liable under this section shall have a
420 right of contribution from his fellow defendants acting in
421 concert.

422 (7) In actions involving joint tortfeasors, the trier of
423 fact shall determine the percentage of fault for each party
424 alleged to be at fault.

425 (8) Physicians, dentists and other medical practitioners
426 covered under the provisions of Section 11-46-1 et seq. shall only
427 be liable for the amount of damages which is the percentage of
428 fault allocated to such physician, dentist and other medical
429 practitioners.

430 (9) Nothing in this section shall be construed to create a
431 cause of action. Nothing in this section shall be construed, in
432 any way, to alter the immunity of any person.

433 **SECTION 7.** Before any action for medical malpractice may be
434 brought, the claimant or his attorney bringing such action shall
435 sign an affidavit stating that he has had his case reviewed by a



436 medical expert and the medical expert has determined that there is
437 a reasonable basis for the commencement of the action.

438 **SECTION 8.** (1) For the purposes of this section, the
439 following words and phrases shall have the meanings ascribed
440 herein unless the context clearly requires otherwise:

441 (a) "Noneconomic damages" means subjective,
442 nonpecuniary damages arising from death, pain, suffering,
443 inconvenience, physical impairment, disfigurement, mental anguish,
444 worry, emotional distress, loss of society and companionship, loss
445 of consortium, bystander injury, injury to reputation,
446 humiliation, loss of the enjoyment of life, hedonic damages, other
447 nonpecuniary damages, and any other theory of damages such as fear
448 of loss, illness or injury. The term "noneconomic damages" shall
449 not include punitive damages.

450 (b) "Actual economic damages" means objectively
451 verifiable pecuniary damages arising from medical expenses and
452 medical care, rehabilitation services, custodial care,
453 disabilities, loss of earnings and earning capacity, loss of
454 income, burial costs, loss of use of property, costs of repair or
455 replacement of property, costs of obtaining substitute domestic
456 services, loss of employment, loss of business or employment
457 opportunities, and other objectively verifiable monetary losses.

458 (2) (a) Subject to the provisions of paragraphs (b), (c)
459 and (d) in any action for malpractice, negligence, error,
460 omission, mistake or the unauthorized rendering of professional
461 services against a provider of health care, the court shall
462 instruct the jury that in the event they find the defendant
463 liable, they shall not award the plaintiff more than One Million
464 Dollars (\$1,000,000.00) for pain and suffering, loss of
465 companionship, embarrassment and other items of general damages
466 from each occurrence causing harm, unless the judge determines by
467 clear and convincing evidence that there is substantial or
468 permanent loss or impairment of a bodily function or substantial



469 disfigurement, death or other special circumstances in the case
470 which warrant a finding that imposition of such a limitation would
471 deprive the plaintiff of just compensation for the injuries
472 sustained. Subject to the provisions of paragraphs (b), (c) and
473 (d) in any such action which is tried without a jury, the court
474 shall not award the plaintiff more than One Million Dollars
475 (\$1,000,000.00) for pain and suffering, loss of companionship,
476 embarrassment and other items of general damages unless the
477 aforesaid findings are made specially by the court and stated
478 separately in the judgment entered by the court. It is the intent
479 of this section to limit all noneconomic damages to the above.

480 (b) The limitations on damages set forth in this
481 section shall be adjusted for inflation annually. The adjustment
482 shall be based on the cumulative annual adjustment for inflation
483 for each year since the effective date of the damages limitations
484 in this section. The adjustment made pursuant to this paragraph
485 shall be rounded upward or downward to the nearest increment of
486 Ten Dollars (\$10.00).

487 (c) As used in this section, "inflation" means the
488 annual percentage change in the United States Department of Labor,
489 Bureau of Labor Statistics, Consumer Price Index for the State of
490 Mississippi, all items, all urban consumers or its successor
491 index.

492 (d) The Secretary of State shall certify the adjusted
493 limitation on damages within fourteen (14) days after the
494 appropriate information is available.

495 **SECTION 9.** The Commissioner of Insurance shall determine the
496 number of physicians licensed by the State of Mississippi who are
497 unable to obtain medical malpractice insurance, and the
498 commissioner shall report such information to the Legislature in
499 January 2003. The commissioner shall make recommendations to the
500 Legislature in January 2003 concerning the establishment of an
501 actuarially sound joint underwriting medical malpractice



502 association for the purpose of making necessary medical
503 malpractice insurance available for physicians, registered nurses
504 and all other personnel who are duly licensed to practice in a
505 hospital, hospitals, nursing facilities or assisted living
506 facilities. The funding for such association shall be determined
507 by the Legislature.

508 **SECTION 10.** Section 43-11-1, Mississippi Code of 1972, is
509 amended as follows:

510 43-11-1. When used in this chapter, the following words
511 shall have the following meaning:

512 (a) "Institutions for the aged or infirm" means a place
513 either governmental or private which provides group living
514 arrangements for four (4) or more persons who are unrelated to the
515 operator and who are being provided food, shelter and personal
516 care whether any such place be organized or operated for profit or
517 not. The term "institution for aged or infirm" includes nursing
518 homes, pediatric skilled nursing facilities, psychiatric
519 residential treatment facilities, convalescent homes and homes for
520 the aged, provided that these institutions fall within the scope
521 of the definitions set forth above. The term "institution for the
522 aged or infirm" does not include hospitals, clinics or mental
523 institutions devoted primarily to providing medical service.

524 (b) "Person" means any individual, firm, partnership,
525 corporation, company, association or joint stock association, or
526 any licensee herein or the legal successor thereof.

527 (c) "Personal care" means assistance rendered by
528 personnel of the home to aged or infirm residents in performing
529 one or more of the activities of daily living, which includes, but
530 is not limited to, the bathing, walking, excretory functions,
531 feeding, personal grooming and dressing of such residents.

532 (d) "Psychiatric residential treatment facility" means
533 any nonhospital establishment with permanent facilities which
534 provides a 24-hour program of care by qualified therapists



535 including, but not limited to, duly licensed mental health
536 professionals, psychiatrists, psychologists, psychotherapists and
537 licensed certified social workers, for emotionally disturbed
538 children and adolescents referred to such facility by a court,
539 local school district or by the Department of Human Services, who
540 are not in an acute phase of illness requiring the services of a
541 psychiatric hospital, and are in need of such restorative
542 treatment services. For purposes of this paragraph, the term
543 "emotionally disturbed" means a condition exhibiting one or more
544 of the following characteristics over a long period of time and to
545 a marked degree, which adversely affects educational performance:

- 546 1. An inability to learn which cannot be explained
547 by intellectual, sensory or health factors;
- 548 2. An inability to build or maintain satisfactory
549 relationships with peers and teachers;
- 550 3. Inappropriate types of behavior or feelings
551 under normal circumstances;
- 552 4. A general pervasive mood of unhappiness or
553 depression; or
- 554 5. A tendency to develop physical symptoms or
555 fears associated with personal or school problems. An
556 establishment furnishing primarily domiciliary care is not within
557 this definition.

558 (e) "Pediatric skilled nursing facility" means an
559 institution or a distinct part of an institution that is primarily
560 engaged in providing to inpatients skilled nursing care and
561 related services for persons under twenty-one (21) years of age
562 who require medical or nursing care or rehabilitation services for
563 the rehabilitation of injured, disabled or sick persons.

564 (f) "Licensing agency" means the State Department of
565 Health.

566 (g) "Medical records" mean, without restriction, those
567 medical histories, records, reports, summaries, diagnoses and



568 prognoses, records of treatment and medication ordered and given,
569 notes, entries, x-rays and other written or graphic data prepared,
570 kept, made or maintained in institutions for the aged or infirm
571 that pertain to residency in, or services rendered to residents
572 of, an institution for the aged or infirm.

573 **SECTION 11.** The following shall be codified as Section
574 43-11-16, Mississippi Code of 1972:

575 43-11-16. Medical records are and shall remain the property
576 of the various institutions for the aged and infirm, subject
577 however to reasonable access to the information contained therein
578 upon good cause shown by the resident, his personal
579 representatives or heirs, his attending medical personnel and his
580 duly authorized nominees, and upon payment of any reasonable
581 charges for such service. Nothing in this section shall be
582 construed to deny access to medical records by the Attorney
583 General, the licensing agency, or his or its agents and
584 investigators in the discharge of their official duties under this
585 chapter. Except as otherwise provided by law, medical records
586 shall not constitute public records and nothing in this section
587 shall be deemed to impair any privilege of confidence conferred by
588 law or the Mississippi Rules of Evidence on residents, their
589 personal representatives or heirs by Section 13-1-21.

590 **SECTION 12.** (1) There is created the Medical Malpractice
591 Mediation Board which shall be comprised of the following members:

592 (a) One (1) person appointed by the Governor;

593 (b) One (1) person appointed by the Mississippi Trial
594 Lawyers Association;

595 (c) One (1) person appointed by the Mississippi Bar;

596 (d) One (1) person appointed by the Mississippi
597 Hospital Association;

598 (e) One (1) person appointed by the Mississippi Medical
599 Association;

600 (f) One (1) person appointed by the Magnolia Bar;



601 (g) One (1) person appointed by the Mississippi Medical
602 and Surgical Association;

603 (h) One (1) person appointed by the Mississippi Health
604 Care Association; and

605 (i) One (1) person appointed by the Mississippi Nurses'
606 Association.

607 (2) All members of the board shall be entitled to per diem
608 as provided in Section 25-3-69 and travel expenses as provided in
609 Section 25-3-41 for the performance of their duties as members of
610 the board.

611 (3) The board shall elect a chairman and other officers it
612 deems necessary to carry out the purposes of this act.

613 **SECTION 13.** Before any medical malpractice suit or suit
614 involving a nursing facility may be brought, the dispute must be
615 submitted for mediation. The board shall appoint and certify
616 mediators for such disputes. Mediators shall be members of the
617 Mississippi Bar who have been engaged in the active practice of
618 law for a minimum of five (5) years. The mediator shall make
619 every effort to help parties resolve their dispute in order to
620 avoid litigation. Mediation shall be informal and rules of Civil
621 Procedure and Evidence shall be relaxed. Mediation under this act
622 shall be nonbinding unless the parties agree in writing to make
623 the mediation binding. Any matter which is submitted for
624 mediation under this act which is not resolved may not be filed as
625 civil action until ninety (90) days after the termination of
626 mediation.

627 **SECTION 14.** Sections 12 and 13 of this act shall not be
628 construed to take away from the courts their power over awards,
629 nor to make invalid any award good at common law. Sections 12 and
630 13 of this act shall be liberally construed for the encouragement
631 of the settlement of disputes and the prevention of litigation.

632 **SECTION 15.** The Commissioner of Insurance annually for a
633 period of three (3) years shall compile and provide to the



634 Legislature a report on the number of medical malpractice claims,
635 the rate being charged for medical malpractice insurance premiums,
636 the number of physicians leaving the state and any other issues
637 that the commissioner determines impact the medical profession.

638 **SECTION 16.** If any graduate of the University of Mississippi
639 Medical Center decides to retain residency and practice medicine
640 in the state upon graduation from any accredited medical doctor
641 program or nurse practitioner program, then for a period of two
642 (2) years that physician or nurse practitioner shall be able to
643 receive from designated state funds an amount not to exceed twenty
644 percent (20%) of such physician's or nurse practitioner's medical
645 malpractice premium should those funds be made available by the
646 Legislature and if the physician's or nurse practitioner's
647 practice includes a minimum of twenty percent (20%) Medicaid paid
648 patients.

649 **SECTION 17.** (1) Any licensed physician or certified nurse
650 practitioner who voluntarily provides needed medical or health
651 services to any program at an accredited school in the state
652 without the expectation of payment shall be immune from liability
653 for any civil action arising out of the provision of such medical
654 or health services provided in good faith on a charitable basis.
655 This section shall not extend immunity to acts of willful or gross
656 negligence. Except in cases of rendering emergency care wherein
657 the provisions of Section 73-25-37, Mississippi Code of 1972,
658 apply, immunity under this section shall be extended only if the
659 physician or certified nurse practitioner and patient execute a
660 written waiver in advance of the rendering of such medical
661 services specifying that such services are provided without the
662 expectation of payment and that the licensed physician or
663 certified nurse practitioner shall be immune as provided herein.

664 (2) Any physician who voluntarily renders any medical
665 service under a special volunteer medical license authorized under
666 Section 73-25-18 without any payment or compensation or the



667 expectation or promise of any payment or compensation shall be
668 immune from liability for any civil action arising out of any act
669 or omission resulting from the rendering of the medical service
670 unless the act or omission was the result of the physician's gross
671 negligence or willful misconduct. In order for the immunity under
672 this subsection to apply, there must be a written or oral
673 agreement for the physician to provide a voluntary noncompensated
674 medical service before the rendering of the service by the
675 physician.

676 **SECTION 18.** This act shall take effect and be in force from
677 and after its passage and shall apply only to causes of action
678 accruing on or after that date.

