AN ACT CREATING THE MONTANA MEDICAL CARE EFFICIENCY AND COST REDUCTION THROUGH THE REDUCTION OF DEFENSIVE MEDICINE ACT; PROVIDING FOR CIVIL IMMUNITY TO MEDICAL PROVIDERS WHO APPLY CLINICAL JUDGMENT TO OMIT TESTS, PROCEDURES, TREATMENT, OR OTHER THERAPEUTIC INTERVENTIONS UNLESS MEDICAL MALPRACTICE IS SHOWN BY CLEAR AND CONVINCING EVIDENCE; AND AMENDING SECTIONS 27-1-734, 27-1-736, 27-1-739, 37-3-806, AND 50-6-317, MCA.

WHEREAS, the cost of medical care in Montana is rising at an unsustainable rate; and

WHEREAS, it is imperative that the law facilitates efforts to control medical costs; and

WHEREAS, physicians practice with the knowledge that 40% of medical liability claims reflect alleged bad outcomes based on a physician's actions that are not associated with medical malpractice; and

WHEREAS, the law must recognize that physicians cannot be expected to shoulder all of the inherent risks associated with human illness; and

WHEREAS, at the point of care, physicians are forced by the current legal system to practice defensive medicine in anticipation of all possible outcomes by taking diagnostic or therapeutic measures conducted primarily as a safeguard against possible malpractice liability; and

WHEREAS, the practice of defensive medicine arises out of the fear of litigation; and

WHEREAS, an overwhelming majority of physicians admit to practicing defensive medicine on a regular basis; and

WHEREAS, the costs of defensive medicine as a subset of medical costs are substantial and are estimated to be from $45 to $126 billion annually on a national scale; and

WHEREAS, in order to control costs, the law should encourage physicians to avoid practicing defensive medicine and provide patients with the care that they need based on the provider's clinical judgment made at the point of care if that clinical judgment meets the standard of care; and

WHEREAS, the best way to encourage physicians to avoid the practice of defensive medicine is to provide them with immunity from liability, unless medical malpractice is shown by clear and convincing evidence,

when they avoid practicing defensive medicine while still practicing medicine in a manner that meets the standard of care; and

WHEREAS, related civil immunity laws passed in other states have required physicians to consult treatment guidelines or to consult with other physicians and have not been successful in reducing the practice of defensive medicine; and

WHEREAS, a law providing civil immunity for physicians can be successful only if it provides a mechanism for physicians to practice medicine in a manner that requires similar effort to implement at the point of care as does practicing defensive medicine; and

WHEREAS, a medical record is a legal record in which physicians document all information related to patient encounters and other information related to services provided to patients; and

WHEREAS, the medical record is used in medical malpractice actions to determine whether a physician's treatment of a patient meets the standard of care; and

WHEREAS, the medical record is the proper place for a physician to note the physician's rationale for not prescribing, recommending, or ordering a given test, procedure, treatment, or other therapeutic intervention; and

WHEREAS, physicians should be provided civil immunity from tort liability, unless medical malpractice is shown by clear and convincing evidence, when, at the point of care, the physician notes in the medical record the physician's rationale for not prescribing, recommending, or ordering a given test, procedure, treatment, or other therapeutic intervention and that rationale meets or exceeds the standard of care.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Short title. [Sections 1 through 6] may be cited as the "Montana Medical Care Efficiency and Cost Reduction Through the Reduction of Defensive Medicine Act".

Section 2. Definitions. As used in [sections 1 through 6], the following definitions apply:

(1) "Civil immunity" means immunity from civil liability for an injury or damage claimed.

(2) "Documented rationale" means a brief, comprehensible statement made contemporaneously with the omission within the patient's medical record acknowledging the medical provider's knowledge of the clinical

status of the patient at the time of the alleged error of omission, along with the medical provider's clinical rationale for omitting a given test, procedure, treatment, or other therapeutic intervention.

(3) "Error of omission" means the alleged failure by a medical provider to meet the standard of care because the provider did not prescribe, recommend, or order a given test, procedure, treatment, or other therapeutic intervention.

(4) "Medical provider" means a physician as defined in 37-3-102, except a physician employed by the state or a political subdivision of the state, against whom a claim of medical malpractice has been asserted.

(5) "Omission" means the act of a medical provider not prescribing, recommending, or ordering a particular test, procedure, treatment, or other therapeutic intervention.

(6) "Qualified expert" means a medical provider who meets the qualifications in 26-2-601.

Section 3. Civil immunity for medical provider. (1) For purposes of medical malpractice claims asserted against a medical provider in any court of law in this state in which an error of omission by the medical provider is alleged to have resulted in injury to a patient, the medical provider accused of the error of omission has civil immunity related to any claim asserting negligence or medical malpractice or any other claim that is based upon a breach of the standard of care, if the medical provider establishes that the medical provider provided a documented rationale, unless medical malpractice is shown by clear and convincing evidence.

(2) The medical provider's documented rationale defines the standard of care as applied to a particular patient and in the absence of clear and convincing evidence that the medical provider committed malpractice establishes the basis for the medical provider's civil immunity against malpractice claims asserting errors of omission unless:

(a) the plaintiff asserting the claim produces a qualified expert witness who establishes through a scientifically based rationale that the error of omission fell below any recognizable standard of care and that the particular judgment resulting in the omission in question fell below the standard of care; and

(b) the medical provider against whom the claim is asserted is unable to produce a qualified expert who shows that the omission met the standard of care or that the judgment evidenced in the documented rationale explaining the omission met the standard of care.

(3) When the medical provider against whom the claim is asserted is able to produce a qualified expert who shows that the omission met the standard of care or that the judgment evidenced in the documented

rationale explaining the omission met the standard of care, the medical provider's documented rationale defines the standard of care as applied to a particular patient and in the absence of clear and convincing evidence that the medical provider committed malpractice establishes the basis for the medical provider's civil immunity against malpractice claims asserting errors of omission regardless of expert testimony or other evidence produced by the plaintiff to the contrary.

(4) The court in which the medical malpractice claim related to an error of omission is filed may, upon a motion made by any party to the malpractice claim, determine as a matter of law whether [sections 1 through 5] apply in a malpractice claim brought against a medical provider.

(5) Claims under [sections 1 through 6] are subject to the requirements of the Montana Medical Legal Panel Act, Title 27, chapter 6.

Section 4. Absence of documented rationale not evidence of malpractice. The absence of documented rationale for a medical provider omitting a given test, procedure, treatment, or other therapeutic intervention is not evidence of medical malpractice or an error of omission and may not be used to determine the standard of care or be the legal basis for a presumption of medical negligence.

Section 5. Additional duty not imposed. [Sections 1 through 6] provide the means by which a medical provider may qualify for immunity but do not, other than specifying that means, impose any additional duty on a medical provider.

Section 6. Survey to track effectiveness. (1) The Montana medical legal panel shall develop a survey in order to determine whether [sections 1 through 6] are achieving the desired effect of reducing the practice of defensive medicine by physicians in Montana and shall submit the survey to the board of medical examiners for its approval.

(2) Once the survey is approved by the board of medical examiners, the Montana medical legal panel shall submit the survey on an annual basis to all physicians actively practicing medicine in the state of Montana.

(3) The results of the survey submitted to the board of medical examiners are a public record.

Section 7. Section 27-1-734, MCA, is amended to read:

"27-1-734. Limits on liability of health care provider in emergency situations. ~~A~~ Subject to the provisions of [sections 1 through 6], a physician licensed under Title 37, chapter 3, a nurse licensed under Title 37, chapter 8, or a hospital licensed under Title 50, chapter 5, rendering care or assistance in good faith to a patient of a direct-entry midwife in an emergency situation is liable for civil damages for acts or omissions committed in providing such emergency obstetrical care or assistance only to the extent that those damages are caused by gross negligence or by willful or wanton acts or omissions."

Section 8. Section 27-1-736, MCA, is amended to read:

"27-1-736. Limits on liability of medical practitioner or dental hygienist who provides services without compensation. (1) ~~A~~ Subject to the provisions of [sections 1 through 6], a medical practitioner, as defined in 37-2-101, or a dental hygienist licensed under Title 37, chapter 4, who renders, at any site, any health care within the scope of the provider's license, voluntarily and without compensation, to a patient of a clinic, to a patient referred by a clinic, or in a community-based program to provide access to health care services for uninsured persons is not liable to a person for civil damages resulting from the rendering of the care unless the damages were the result of gross negligence or willful or wanton acts or omissions by the medical practitioner or dental hygienist. Each patient must be given notice that under state law the medical practitioner or dental hygienist cannot be held legally liable for ordinary negligence if the medical practitioner or dental hygienist does not have malpractice insurance.

(2) For purposes of this section:

(a) "clinic" means a place for the provision of health care to patients that is organized for the delivery of health care without compensation or that is operated as a health center under 42 U.S.C. 254b;

(b) "community-based program to provide access to health care services for uninsured persons" means a local program in which care is provided without compensation to individuals who have been referred through that community-based program and in which the medical practitioner or dental hygienist has entered into a written agreement to provide the service;

(c) "health care" has the meaning provided in 50-16-504;

(d) "without compensation" means that the medical practitioner or dental hygienist voluntarily rendered health care without receiving any reimbursement or compensation, except for reimbursement for supplies.

(3) Subsection (1) applies only to a medical practitioner or dental hygienist who:

(a) does not have malpractice insurance coverage because the medical practitioner or dental hygienist is retired or is otherwise not engaged in active practice; or

(b) has malpractice insurance coverage that has a rider or exclusion that excludes coverage for services provided under this section."

Section 9. Section 27-1-739, MCA, is amended to read:

"27-1-739. Liability of health care provider for reduced chance of recovery caused by malpractice. (1) For purposes of a malpractice claim, as defined in 27-6-103, and subject to the provisions of [sections 1 through 6], damages may be awarded against a health care provider, as defined in 27-6-103, if a negligent act or omission during diagnosis or treatment for a medical condition reduces a patient's chance of recovering and the negligent act or omission is a contributing cause of:

(a) death;

(b) survival for a shorter period of time;

(c) no recovery;

(d) a recovery that is of lesser extent or quality or that takes longer to occur; or

(e) other injury.

(2) The damages must be determined based on which of the events referred to in subsections (1)(a) through (1)(e) occurred and the resulting types of injury, damage, and loss.

(3) (a) If the evidence establishes that the chance of recovering prior to the negligent act or omission was more likely than not, the damages awarded must be 100% of the damages determined under subsection (2).

(b) If the evidence establishes that the chance of recovering prior to the negligent act or omission was not more likely than not, the damages awarded must be the difference between the chance of recovering prior to the negligent act or omission and the chance of recovering after the negligent act or omission multiplied by the total damages determined under subsection (2)."

Section 10. Section 37-3-806, MCA, is amended to read:

"37-3-806. Limitation on liability. ~~A~~ Subject to the provisions of [sections 1 through 6], a physician who renders health care within the scope of the physician's license to a patient under this part is not liable to a patient or other person for civil damages resulting from the rendering of the care unless the damages were the result of

gross negligence or willful or wanton acts or omissions by the physician. Each patient must be given notice that under state law the physician may not be held legally liable for ordinary negligence for services provided under the health corps program."

Section 11. Section 50-6-317, MCA, is amended to read:

"50-6-317. Liability protection. (1) ~~A~~ Subject to the provisions of [sections 1 through 6], a physician, physician assistant, or registered nurse licensed under the laws of this state who provides online medical direction to a member of an emergency medical service without compensation or for compensation not exceeding $5,000 in any 12-month period and whose professional practice is not primarily in an emergency or trauma room or ward is not liable for civil damages for an injury resulting from the instructions, except damages for an injury resulting from the gross negligence of the physician, physician assistant, or nurse, if the instructions given by the physician, physician assistant, or nurse are:

(a) consistent with the protocols and the offline medical direction plan approved by the department in licensing the emergency medical service; and

(b) consistent with the level of licensure of the emergency medical services personnel instructed by the physician, physician assistant, or nurse.

(2) An individual who volunteers or who is reimbursed $5,000 or less in any 12-month period for providing offline medical direction is not liable for civil damages for an injury resulting from the performance of the individual's offline medical direction duties, except damages for an injury resulting from the gross negligence of the individual."

Section 12. Codification instruction. [Sections 1 through 6] are intended to be codified as an integral part of Title 27, chapter 1, and the provisions of Title 27, chapter 1, apply to [sections 1 through 6].

Section 13. Saving clause. [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

- END -

I hereby certify that the within bill,

HB 0405, originated in the House.

Chief Clerk of the House

Speaker of the House

Signed this _____ day

of _____, 2011.

President of the Senate

Signed this _____ day

of _____, 2011.

HOUSE BILL NO. 405

INTRODUCED BY J. TAYLOR, TUTVEDT, MACLAREN

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