

## 1 HOUSE BILL NO. 405

2 INTRODUCED BY J. TAYLOR

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4 A BILL FOR AN ACT ENTITLED: "AN ACT CREATING THE MONTANA MEDICAL CARE EFFICIENCY AND  
5 COST REDUCTION THROUGH ELIMINATION OF DEFENSIVE MEDICINE ACT; PROVIDING FOR CIVIL  
6 IMMUNITY TO MEDICAL PROVIDERS WHO APPLY CLINICAL JUDGMENT TO OMIT TESTS, PROCEDURES,  
7 TREATMENT, OR OTHER THERAPEUTIC INTERVENTIONS; AND AMENDING SECTIONS 27-1-734,  
8 27-1-736, 27-1-739, 37-3-806, AND 50-6-317, MCA."

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

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

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

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

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

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

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

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

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

27 WHEREAS, the best way to encourage physicians to avoid the practice of defensive medicine is to  
28 provide them with immunity from liability when they avoid practicing defensive medicine while still practicing  
29 medicine in a manner that meets the standard of care; and

30 WHEREAS, related civil immunity laws passed in other states have required physicians to consult

1 treatment guidelines or to consult with other physicians and have not been successful in reducing the practice  
2 of defensive medicine; and

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

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

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

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

13 WHEREAS, physicians should be provided civil immunity from tort liability when, at the point of care, the  
14 physician notes in the medical record the physician's rationale for not prescribing, recommending, or ordering  
15 a given test, procedure, treatment, or other therapeutic intervention and that rationale meets or exceeds the  
16 standard of care.

17  
18 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

19  
20 NEW SECTION. **Section 1. Short title.** [Sections 1 through 6] may be cited as the "Montana Medical  
21 Care Efficiency and Cost Reduction Through Elimination of Defensive Medicine Act".

22  
23 NEW SECTION. **Section 2. Definitions.** As used in [sections 1 through 6], the following definitions  
24 apply:

- 25 (1) "Civil immunity" means immunity from civil liability for an injury or damage claimed.
- 26 (2) "Documented rationale" means a brief, comprehensible statement within the patient's medical record  
27 acknowledging the medical provider's knowledge of the clinical status of the patient at the time of the alleged error  
28 of omission, along with the medical provider's clinical rationale for omitting a given test, procedure, treatment, or  
29 other therapeutic intervention.
- 30 (3) "Error of omission" means the alleged failure by a medical provider to meet the standard of care

1 because the provider did not prescribe, recommend, or order a given test, procedure, treatment, or other  
2 therapeutic intervention.

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

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

7 (6) "Qualified expert" means a medical provider who:

8 (a) is licensed in this state or another state as a doctor of medicine or osteopathy;

9 (b) is trained and experienced in the same discipline or school of practice as the defendant or has  
10 specialty expertise in the disease process or procedure performed in the case;

11 (c) is certified by a board recognized by the American board of medical specialties or the American  
12 osteopathic association or by a board with equivalent standards; and

13 (d) within 3 years of the date of the alleged occurrence or omission giving rise to the claim, was in active  
14 medical practice in the same discipline or school of practice as the defendant or has devoted a substantial portion  
15 of time teaching at an accredited medical school or in university-based research in relation to the medical care  
16 and type of treatment at issue.

17  
18 **NEW SECTION. Section 3. Civil immunity for medical provider.** (1) For purposes of medical  
19 malpractice claims asserted against a medical provider in any court of law in this state in which an error of  
20 omission by the medical provider is alleged to have resulted in injury to a patient, the medical provider accused  
21 of the error of omission has civil immunity related to any claim asserting negligence or medical malpractice or any  
22 other claim that is based upon a breach of the standard of care, if the medical provider establishes that the  
23 medical provider provided a documented rationale.

24 (2) The medical provider's documented rationale defines the standard of care as applied to a particular  
25 patient and establishes the basis for the medical provider's civil immunity against malpractice claims asserting  
26 errors of omission unless:

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

30 (b) the medical provider against whom the claim is asserted is unable to produce a qualified expert who

1 shows that the omission met the standard of care or that the judgment evidenced in the documented rationale  
2 explaining the omission met the standard of care.

3 (3) When the medical provider against whom the claim is asserted is able to produce a qualified expert  
4 who shows that the omission met the standard of care or that the judgment evidenced in the documented  
5 rationale explaining the omission met the standard of care, the medical provider's documented rationale defines  
6 the standard of care as applied to a particular patient and establishes the basis for the medical provider's civil  
7 immunity against malpractice claims asserting errors of omission regardless of expert testimony or other evidence  
8 produced by the plaintiff to the contrary.

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

11  
12 **NEW SECTION. Section 4. Civil immunity determined as matter of law.** The court in which the  
13 medical malpractice claim related to an error of omission is filed may, upon a motion made by any party to the  
14 malpractice claim, determine as a matter of law whether or not the medical provider will be granted civil immunity  
15 pursuant to [sections 1 through 6] based upon the court's review of:

16 (1) the brief, generally comprehensible statement within the patient's medical record, the medical  
17 provider's knowledge of the clinical status of the patient at the time of the alleged error of omission, and the  
18 medical provider's clinical rationale for omitting a given test, procedure, treatment, or other therapeutic  
19 intervention;

20 (2) the expert witness reports of the parties' qualified expert witnesses submitted to the court; and

21 (3) any deposition testimony taken of the parties' qualified expert witnesses.

22  
23 **NEW SECTION. Section 5. Absence of documented rationale not evidence of malpractice.** The  
24 absence of documented rationale for a medical provider omitting a given test, procedure, treatment, or other  
25 therapeutic intervention is not evidence of medical malpractice or an error of omission and may not be used to  
26 determine the standard of care or be the legal basis for a presumption of medical negligence.

27  
28 **NEW SECTION. Section 6. Additional duty not imposed.** [Sections 1 through 6] provide the means  
29 by which a medical provider may qualify for immunity but do not, other than specifying that means, impose any  
30 additional duty on a medical provider.

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

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

9

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

11           **"27-1-736. Limits on liability of medical practitioner or dental hygienist who provides services**  
12 **without compensation.** (1) A Subject to the provisions of [sections 1 through 6], a medical practitioner, as  
13 defined in 37-2-101, or a dental hygienist licensed under Title 37, chapter 4, who renders, at any site, any health  
14 care within the scope of the provider's license, voluntarily and without compensation, to a patient of a clinic, to  
15 a patient referred by a clinic, or in a community-based program to provide access to health care services for  
16 uninsured persons is not liable to a person for civil damages resulting from the rendering of the care unless the  
17 damages were the result of gross negligence or willful or wanton acts or omissions by the medical practitioner  
18 or dental hygienist. Each patient must be given notice that under state law the medical practitioner or dental  
19 hygienist cannot be held legally liable for ordinary negligence if the medical practitioner or dental hygienist does  
20 not have malpractice insurance.

21           (2) For purposes of this section:

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

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

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

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

- 1 (3) Subsection (1) applies only to a medical practitioner or dental hygienist who:
- 2 (a) does not have malpractice insurance coverage because the medical practitioner or dental hygienist
- 3 is retired or is otherwise not engaged in active practice; or
- 4 (b) has malpractice insurance coverage that has a rider or exclusion that excludes coverage for services
- 5 provided under this section."

6

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

8 **"27-1-739. Liability of health care provider for reduced chance of recovery caused by malpractice.**

9 (1) For purposes of a malpractice claim, as defined in 27-6-103, and subject to the provisions of [sections 1

10 through 6], damages may be awarded against a health care provider, as defined in 27-6-103, if a negligent act

11 or omission during diagnosis or treatment for a medical condition reduces a patient's chance of recovering and

12 the negligent act or omission is a contributing cause of:

- 13 (a) death;
- 14 (b) survival for a shorter period of time;
- 15 (c) no recovery;
- 16 (d) a recovery that is of lesser extent or quality or that takes longer to occur; or
- 17 (e) other injury.

18 (2) The damages must be determined based on which of the events referred to in subsections (1)(a)

19 through (1)(e) occurred and the resulting types of injury, damage, and loss.

20 (3) (a) If the evidence establishes that the chance of recovering prior to the negligent act or omission was

21 more likely than not, the damages awarded must be 100% of the damages determined under subsection (2).

22 (b) If the evidence establishes that the chance of recovering prior to the negligent act or omission was

23 not more likely than not, the damages awarded must be the difference between the chance of recovering prior

24 to the negligent act or omission and the chance of recovering after the negligent act or omission multiplied by the

25 total damages determined under subsection (2)."

26

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

28 **"37-3-806. Limitation on liability.** A Subject to the provisions of [sections 1 through 6], a physician who

29 renders health care within the scope of the physician's license to a patient under this part is not liable to a patient

30 or other person for civil damages resulting from the rendering of the care unless the damages were the result of

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

4

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

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

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

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

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

21

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

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

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