

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

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SENATE BILL 33
Judiciary I Committee Substitute Adopted 3/1/11

Short Title: Medical Liability Reforms.

(Public)

Sponsors:

Referred to:

February 3, 2011

1 A BILL TO BE ENTITLED
2 AN ACT TO REFORM THE LAWS RELATING TO MEDICAL LIABILITY BY
3 PROVIDING LIMITED PROTECTION FROM LIABILITY TO THOSE REQUIRED BY
4 FEDERAL LAW TO PROVIDE EMERGENCY MEDICAL CARE, BY AUTHORIZING
5 THE BIFURCATION OF TRIALS ON ISSUES OF LIABILITY AND DAMAGES IN
6 CERTAIN ACTIONS, BY LIMITING THE AMOUNT OF NONECONOMIC
7 DAMAGES THAT MAY BE AWARDED, BY AUTHORIZING THE PERIODIC
8 PAYMENT OF FUTURE ECONOMIC DAMAGES IN LIEU OF A LUMP-SUM
9 PAYMENT, BY MODIFYING APPEAL BONDS IN MEDICAL MALPRACTICE
10 ACTIONS, BY CLARIFYING THAT COMPLAINTS ALLEGING MEDICAL
11 MALPRACTICE BY HEALTH CARE PROVIDERS MUST ASSERT THAT ALL
12 MEDICAL RECORDS AVAILABLE TO THE PLAINTIFF HAVE BEEN REVIEWED
13 BY AN EXPERT WITNESS, AND BY REQUIRING THAT CERTAIN INFORMATION
14 BE PROVIDED BY EXPERT WITNESSES.

15 The General Assembly of North Carolina enacts:

16 SECTION 1. G.S. 90-21.12 reads as rewritten:

17 "§ 90-21.12. Standard of health care; limited liability for federally mandated emergency
18 medical services.

19 (a) Except as provided in subsection (b) of this section, in any medical malpractice
20 action, action for damages for personal injury or death arising out of the furnishing or the
21 failure to furnish professional services in the performance of medical, dental, or other health
22 care, the defendant health care provider shall not be liable for the payment of damages unless
23 the trier of the facts fact is satisfied finds by the greater weight of the evidence that the care of
24 such health care provider was not in accordance with the standards of practice among members
25 of the same health care profession with similar training and experience situated in the same or
26 similar communities under the same or similar circumstances at the time of the alleged act or
27 omission giving rise to the cause of action.

28 (b) In any medical malpractice action arising out of the furnishing or the failure to
29 furnish services pursuant to obligations imposed by 42 U.S.C. § 1395dd for an emergency
30 medical condition as defined in 42 U.S.C. § 1395dd(e)(1), the defendant health care provider
31 shall not be liable for the payment of damages unless the trier of fact finds by the greater
32 weight of the evidence that the health care provider's deviation from the standard of care
33 required under subsection (a) of this section constituted gross negligence, wanton conduct, or
34 intentional wrongdoing. Nothing in this subsection shall be construed to change, alter, override,
35 or otherwise affect the provisions of G.S. 90-21.14, 90-21.15, 90-21.16, or 20-166."

36 SECTION 2. G.S. 1A-1, Rule 42(b), reads as rewritten:

37 "(b) Separate trials. –



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- 1 (1) The court may in furtherance of convenience or to avoid prejudice and shall
2 for considerations of venue upon timely motion order a separate trial of any
3 claim, cross-claim, counterclaim, or third-party claim, or of any separate
4 issue or of any number of claims, cross-claims, counterclaims, third-party
5 claims, or issues.
- 6 (2) Upon motion of any party in an action that includes a claim commenced
7 under Article 1G of Chapter 90 of the General Statutes involving a managed
8 care entity as defined in G.S. 90-21.50, the court shall order separate
9 discovery and a separate trial of any claim, cross-claim, counterclaim, or
10 third-party claim against a physician or other medical provider.
- 11 (3) Upon motion of any party in a medical malpractice action commenced under
12 Article 1B of Chapter 90 of the General Statutes wherein the plaintiff seeks
13 damages in an amount equal to or greater than seventy-five thousand dollars
14 (\$75,000), the court shall order separate trials for the issue of liability and
15 the issue of damages. Evidence relating solely to compensatory damages
16 shall not be admissible until the trier of fact has determined that the
17 defendant is liable for medical malpractice. The same trier of fact that tried
18 the issues relating to liability shall try the issues relating to damages."

19 **SECTION 3.** Article 1B of Chapter 90 of the General Statutes is amended by
20 adding the following new section to read:

21 **"§ 90-21.19. Liability limit for noneconomic damages.**

22 (a) In any medical malpractice action in which the plaintiff is entitled to an award of
23 noneconomic damages, the total amount of noneconomic damages for which judgment is
24 entered against all defendants shall not exceed five hundred thousand dollars (\$500,000) per
25 plaintiff. Judgment shall not be entered against any defendant for noneconomic damages in
26 excess of five hundred thousand dollars (\$500,000) for all claims brought by all parties arising
27 out of the same cause of action. In the event that any verdict or award of noneconomic damages
28 stated pursuant to G.S. 90-21.19B(1) exceeds these limits, the court shall modify the judgment
29 as necessary to conform to the requirements of this subsection.

30 (b) As used in this section, 'noneconomic damages' means damages to compensate for
31 pain, suffering, emotional distress, loss of consortium, inconvenience, physical impairment,
32 disfigurement, and any other nonpecuniary, compensatory damage. 'Noneconomic damages'
33 does not include punitive damages as defined in G.S. 1D-5.

34 (c) Any award of damages in a medical malpractice action shall be stated in accordance
35 with G.S. 90-21.19B. If a jury is determining the facts, the court shall not instruct the jury with
36 respect to the limit of noneconomic damages under subsection (a) of this section, and neither
37 the attorney for any party nor a witness shall inform the jury or potential members of the jury
38 panel of that limit."

39 **SECTION 4.** Article 1B of Chapter 90 of the General Statutes is amended by
40 adding the following new section to read:

41 **"§ 90-21.19A. Periodic payment of future economic damages in medical malpractice**
42 **actions.**

43 (a) The following definitions apply in this section:

44 (1) Future economic damages. – Damages for future expense for medical
45 treatment, care or custody, loss of future earnings, loss of future household
46 services, and any other future pecuniary damages of the plaintiff following
47 the date of the verdict or award.

48 (2) Periodic payments. – The payment of money or delivery of other property to
49 the plaintiff at regular intervals.

50 (b) In any medical malpractice action, the form of the fact finder's verdict or award of
51 damages, if supported by the evidence, shall indicate specifically what amount is awarded for

1 future economic damages, and what amount, if any, of the total amount awarded for future
2 economic damages represents damages awarded for loss of future earnings or loss of future
3 household services.

4 (c) Upon the award of future economic damages in any medical malpractice action, the
5 presiding judge shall, at the request of either party, enter a judgment ordering that the future
6 economic damages of the plaintiff be paid in whole or in part by periodic payments rather than
7 by a lump-sum payment if the present value of the future economic damages award is greater
8 than or equal to two hundred thousand dollars (\$200,000). In entering a judgment ordering the
9 payment of future economic damages by periodic payments, the court shall make a specific
10 finding as to the dollar amount of the present value of that portion of the future economic
11 damages for which the plaintiff is to be paid by periodic payments. In calculating the total
12 damages upon which any attorney contingency fee for representing the plaintiff in connection
13 with the medical malpractice action is calculated, the present value of any portion of the award
14 representing future economic damages that are to be paid by periodic payments shall be used.

15 (d) A judgment authorizing periodic payments of future economic damages shall
16 require that such payments be made through the establishment of a trust fund or the purchase of
17 an annuity for the life of the plaintiff or during the continuance of the compensable injury or
18 disability of the plaintiff, in such form and under such terms as shall be approved by the court.
19 The establishment of a trust fund or the purchase of an annuity, as required and approved by the
20 court, shall constitute the satisfaction of the defendant's judgment for future economic damages.

21 (e) The judgment ordering the payment of future economic damages by periodic
22 payments shall specify the recipient of the payments, the schedule of the periodic payments,
23 and the dollar amount of each periodic payment to be made pursuant to the schedule. The death
24 of the plaintiff terminates liability for payment of future economic damages which by judgment
25 pursuant to this section are required to be paid in periodic payments not yet due, except that the
26 court that entered the original judgment may modify the judgment to provide that liability for
27 payment of future periodic payments compensating the plaintiff for loss of future earnings or
28 loss of future household services shall not be terminated by reason of the death of the plaintiff,
29 but shall continue to be paid to persons surviving the plaintiff to whom the plaintiff owed a
30 duty of support pursuant to law immediately prior to the plaintiff's death."

31 **SECTION 5.** Article 1B of Chapter 90 of the General Statutes is amended by
32 adding the following new section to read:

33 **"§ 90-21.19B. Verdicts and awards of damages in medical malpractice actions; form.**

34 In any malpractice action, any verdict or award of damages, if supported by the evidence,
35 shall indicate specifically what amount is awarded for each of the following:

- 36 (1) Noneconomic damages.
- 37 (2) Present economic damages.
- 38 (3) Future economic damages.
- 39 (4) Loss of future earnings.
- 40 (5) Loss of future household services.

41 If applicable, the court shall instruct the jury on the definition of noneconomic damages
42 under G.S. 90-21.19(b) and the definition of future economic damages under
43 G.S. 90-21.19A(a)(1). If applicable, the court shall instruct the jury that present economic
44 damages are those damages for medical treatment, care or custody, loss of earnings, loss of
45 household services, and any other pecuniary damages of the plaintiff up to the date of the
46 verdict or award."

47 **SECTION 6.1.** G.S. 1-289 reads as rewritten:

48 **"§ 1-289. Undertaking to stay execution on money judgment.**

49 (a) If the appeal is from a judgment directing the payment of money, it does not stay the
50 execution of the judgment unless a written undertaking is executed on the part of the appellant,
51 by one or more sureties, as set forth in this section.

1 (a1) In an action where the judgment directs the payment of money, the court shall
2 specify the amount of the undertaking required to stay execution of the judgment pending
3 appeal as provided in subsections (a2) and (b) of this section. The undertaking shall be to the
4 effect that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is
5 dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of
6 such amount as to which the judgment shall be affirmed, if affirmed only in part, and all
7 damages which shall be awarded against the appellant upon the appeal, except as provided in
8 subsection (b) of this section. Whenever it is satisfactorily made to appear to the court that
9 since the execution of the undertaking the sureties have become insolvent, the court may, by
10 rule or order, require the appellant to execute, file and serve a new undertaking, as above. In
11 case of neglect to execute such undertaking within twenty days after the service of a copy of
12 the rule or order requiring it, the appeal may, on motion to the court, be dismissed with costs.
13 Whenever it is necessary for a party to an action or proceeding to give a bond or an undertaking
14 with surety or sureties, he may, in lieu thereof, deposit with the officer into court money to the
15 amount of the bond or undertaking to be given. The court in which the action or proceeding is
16 pending may direct what disposition shall be made of such money pending the action or
17 proceeding. In a case where, by this section, the money is to be deposited with an officer, a
18 judge of the court, upon the application of either party, may, at any time before the deposit is
19 made, order the money deposited in court instead of with the officer; and a deposit made
20 pursuant to such order is of the same effect as if made with the officer. The perfecting of an
21 appeal by giving the undertaking mentioned in this section stays proceedings in the court below
22 upon the judgment appealed from; except when the sale of perishable property is directed, the
23 court below may order the property to be sold and the proceeds thereof to be deposited or
24 invested, to abide the judgment of the appellate court.

25 (a2) Except as provided in subsection (b) of this section, the amount of the undertaking
26 that shall be required by the court shall be an amount determined by the court after notice and
27 hearing proper and reasonable for the security of the rights of the adverse party, considering
28 relevant factors, including the following:

29 (1) The amount of the judgment.

30 (2) The amount of the limits of all applicable liability policies of the appellant
31 judgment debtor.

32 (3) The aggregate net worth of the appellant judgment debtor.

33 (b) If the appellee in a civil action brought under any legal theory obtains a judgment
34 directing the payment or expenditure of money in the amount of twenty five million dollars
35 (\$25,000,000) or more, and the appellant seeks a stay of execution of the judgment within the
36 period of time during which the appellant has the right to pursue appellate review, including
37 discretionary review and certiorari, the amount of the undertaking that the appellant is required
38 to execute to stay execution of the judgment during the entire period of the appeal shall be
39 twenty five million dollars (\$25,000,000).

40 (c) If the appellee proves by a preponderance of the evidence that the appellant for
41 whom the undertaking has been limited under subsection (b) of this section is, for the purpose
42 of evading the judgment, (i) dissipating its assets, (ii) secreting its assets, or (iii) diverting its
43 assets outside the jurisdiction of the courts of North Carolina or the federal courts of the United
44 States other than in the ordinary course of business, then the limitation in subsection (b) of this
45 section shall not apply and the appellant shall be required to make an undertaking in the full
46 amount otherwise required by this section."

47 **SECTION 6.2.** G.S. 1A-1, Rule 9(j), reads as rewritten:

48 "(j) Medical malpractice. – Any complaint alleging medical malpractice by a health care
49 provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care
50 under G.S. 90-21.12 shall be dismissed unless:

- 1 (1) The pleading specifically asserts that the medical care ~~has~~ and all medical
2 records pertaining to the alleged injury then available to the plaintiff after
3 reasonable inquiry, have been reviewed by a person who is reasonably
4 expected to qualify as an expert witness under Rule 702 of the Rules of
5 Evidence and who is willing to testify that the medical care did not comply
6 with the applicable standard of care;
- 7 (2) The pleading specifically asserts that the medical care ~~has~~ and all medical
8 records pertaining to the alleged injury then available to the plaintiff after
9 reasonable inquiry, have been reviewed by a person that the complainant
10 will seek to have qualified as an expert witness by motion under Rule 702(e)
11 of the Rules of Evidence and who is willing to testify that the medical care
12 did not comply with the applicable standard of care, and the motion is filed
13 with the complaint; or
- 14 (3) The pleading alleges facts establishing negligence under the existing
15 common-law doctrine of res ipsa loquitur.

16 Upon motion by the complainant prior to the expiration of the applicable statute of
17 limitations, a resident judge of the superior court for a judicial district in which venue for the
18 cause of action is appropriate under G.S. 1-82 or, if no resident judge for that judicial district is
19 physically present in that judicial district, otherwise available, or able or willing to consider the
20 motion, then any presiding judge of the superior court for that judicial district may allow a
21 motion to extend the statute of limitations for a period not to exceed 120 days to file a
22 complaint in a medical malpractice action in order to comply with this Rule, upon a
23 determination that good cause exists for the granting of the motion and that the ends of justice
24 would be served by an extension. ~~The plaintiff shall provide, at the request of the defendant,~~
25 ~~proof of compliance with this subsection through up to ten written interrogatories, the answers~~
26 ~~to which shall be verified by the expert required under this subsection. These interrogatories do~~
27 ~~not count against the interrogatory limit under Rule 33. At the request of the defendant, the~~
28 ~~plaintiff shall furnish to the defendant, within 30 days, an affidavit from the expert certifying~~
29 ~~compliance with this subsection."~~

30 **SECTION 6.3.** G.S. 1A-1, Rule 26(f1), reads as rewritten:

31 "(f1) Medical malpractice discovery conference. – In a medical malpractice action as
32 defined in G.S. 90-21.11, upon the case coming at issue or the filing of a responsive pleading or
33 motion requiring a determination by the court, the judge shall, within 30 days, direct the
34 attorneys for the parties to appear for a discovery conference. At the conference the court may
35 consider the matters set out in Rule 16, and shall:

- 36 ...
- 37 (2) Establish an appropriate schedule for designating expert witnesses,
38 consistent with a discovery schedule pursuant to subdivision (3), ~~to be~~
39 ~~complied with by all parties to the action such that there is a deadline for~~
40 ~~designating all expert witnesses within an appropriate time for all parties to~~
41 ~~implement discovery mechanisms with regard to the designated expert~~
42 ~~witnesses;(3). As to each expert designated, the designation shall be~~
43 ~~accompanied by a written report prepared and signed by the witness. The~~
44 ~~report shall contain a complete statement of all opinions to be expressed and~~
45 ~~the basis and reasons therefor; the data or other information considered by~~
46 ~~the witness in forming the opinions; the qualifications of the witness,~~
47 ~~including a list of all publications authored by the witness within the~~
48 ~~preceding 10 years; the compensation the witness is to be paid for the study~~
49 ~~and testimony; and a listing of any other cases in which the witness has~~
50 ~~testified as an expert at trial or by deposition within the preceding four years.~~
51 The party shall supplement the expert's report if the party learns that in some

1 material respect the report is incomplete or incorrect. The expert's direct
2 testimony shall not be inconsistent with or go beyond the fair scope of the
3 expert report as supplemented. Depositions of expert witnesses shall be
4 governed by Rules 26 (b)(4) and 26(f1).

5"

6 **SECTION 7.** If the provisions of Section 3 of this act are declared to be
7 unconstitutional or otherwise invalid by final decision of a court of competent jurisdiction,
8 following any appellate review, then Section 4 and Section 5 of this act are repealed, but the
9 invalidity does not affect other provisions or applications of this act that can be given effect
10 without the invalid provisions or application.

11 **SECTION 8.** This act becomes effective October 1, 2011. Sections 1, 3, 4, 5, 6.2
12 and 6.3 apply to causes of action arising on or after the effective date. Sections 2 and 6.1 apply
13 to actions commenced on or after the effective date.