

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

S

D

SENATE BILL 33
Judiciary I Committee Substitute Adopted 3/1/11
Third Edition Engrossed 3/2/11
PROPOSED HOUSE COMMITTEE SUBSTITUTE S33-PCS75125-MH-7

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 MONEY JUDGMENT APPEAL
3 BONDS, BIFURCATION OF TRIALS IN CIVIL CASES, AND MEDICAL LIABILITY.
4 The General Assembly of North Carolina enacts:
5 SECTION 1. G.S. 1-289 reads as rewritten:
6 "§ 1-289. Undertaking to stay execution on money judgment.
7 (a) If the appeal is from a judgment directing the payment of money, it does not stay the
8 execution of the judgment unless a written undertaking is executed on the part of the appellant,
9 by one or more sureties, as set forth in this section.
10 (b) In an action where the judgment directs the payment of money, the court shall
11 specify the amount of the undertaking required to stay execution of the judgment pending
12 appeal as provided in subsection (c) of this section. The undertaking shall be to the effect that if
13 the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the
14 appellant will pay the amount directed to be paid by the judgment, or the part of such amount
15 as to which the judgment shall be affirmed, if affirmed only in part, and all damages which
16 shall be awarded against the appellant upon the appeal, except as provided in subsection (b) of
17 this section. Whenever it is satisfactorily made to appear to the court that since the execution of
18 the undertaking the sureties have become insolvent, the court may, by rule or order, require the
19 appellant to execute, file and serve a new undertaking, as above. In case of neglect to execute
20 such undertaking within twenty days after the service of a copy of the rule or order requiring it,
21 the appeal may, on motion to the court, be dismissed with costs. Whenever it is necessary for a
22 party to an action or proceeding to give a bond or an undertaking with surety or sureties, he
23 may, in lieu thereof, deposit with the officer into court money to the amount of the bond or
24 undertaking to be given. The court in which the action or proceeding is pending may direct
25 what disposition shall be made of such money pending the action or proceeding. In a case
26 where, by this section, the money is to be deposited with an officer, a judge of the court, upon
27 the application of either party, may, at any time before the deposit is made, order the money
28 deposited in court instead of with the officer; and a deposit made pursuant to such order is of
29 the same effect as if made with the officer. The perfecting of an appeal by giving the
30 undertaking mentioned in this section stays proceedings in the court below upon the judgment
31 appealed from; except when the sale of perishable property is directed, the court below may



* S 3 3 - P C S 7 5 1 2 5 - M H - 7 *

1 order the property to be sold and the proceeds thereof to be deposited or invested, to abide the
2 judgment of the appellate court.

3 (c) The amount of the undertaking that shall be required by the court shall be an amount
4 determined by the court after notice and hearing proper and reasonable for the security of the
5 rights of the adverse party, considering relevant factors, including the following:

6 (1) The amount of the judgment.

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

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

10 ~~(b)~~(d) If the appellee in a civil action brought under any legal theory obtains a judgment
11 directing the payment or expenditure of money in the amount of twenty five million dollars
12 (\$25,000,000) or more, and the appellant seeks a stay of execution of the judgment within the
13 period of time during which the appellant has the right to pursue appellate review, including
14 discretionary review and certiorari, the amount of the undertaking that the appellant is required
15 to execute to stay execution of the judgment during the entire period of the appeal shall be
16 twenty five million dollars (\$25,000,000).

17 ~~(e)~~(e) If the appellee proves by a preponderance of the evidence that the appellant for
18 whom the undertaking has been limited under subsection ~~(b)~~(d) of this section is, for the
19 purpose of evading the judgment, (i) dissipating its assets, (ii) secreting its assets, or (iii)
20 diverting its assets outside the jurisdiction of the courts of North Carolina or the federal courts
21 of the United States other than in the ordinary course of business, then the limitation in
22 subsection ~~(b)~~(d) of this section shall not apply and the appellant shall be required to make an
23 undertaking in the full amount otherwise required by this section."

24 **SECTION 2.** G.S. 1A-1, Rule 42(b), is amended by adding a new subdivision to
25 read:

26 "(b) Separate trials. –

27 (1) The court may in furtherance of convenience or to avoid prejudice and shall
28 for considerations of venue upon timely motion order a separate trial of any
29 claim, cross-claim, counterclaim, or third-party claim, or of any separate
30 issue or of any number of claims, cross-claims, counterclaims, third-party
31 claims, or issues.

32 (2) Upon motion of any party in an action that includes a claim commenced
33 under Article 1G of Chapter 90 of the General Statutes involving a managed
34 care entity as defined in G.S. 90-21.50, the court shall order separate
35 discovery and a separate trial of any claim, cross-claim, counterclaim, or
36 third-party claim against a physician or other medical provider.

37 (3) Upon motion of any party in an action in tort wherein the plaintiff seeks
38 damages exceeding one hundred fifty thousand dollars (\$150,000), the court
39 shall order separate trials for the issue of liability and the issue of damages.
40 Evidence relating solely to compensatory damages shall not be admissible
41 until the trier of fact has determined that the defendant is liable. The same
42 trier of fact that tries the issues relating to liability shall try the issues
43 relating to damages."

44 **SECTION 3.** G.S. 1A-1, Rule 9(j), reads as rewritten:

45 "(j) Medical malpractice. – Any complaint alleging medical malpractice by a health care
46 provider ~~as defined in pursuant to G.S. 90-21.11~~G.S. 90-21.11(2)a. in failing to comply with
47 the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:

48 (1) The pleading specifically asserts that the medical care ~~has~~and all medical
49 records pertaining to the alleged negligence and resulting injuries that are
50 available to the plaintiff after reasonable inquiry have been reviewed by a
51 person who is reasonably expected to qualify as an expert witness under

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

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

24 **SECTION 4.** G.S. 8C-702(h) reads as rewritten:

25 "(h) Notwithstanding subsection (b) of this section, in a medical malpractice action as
 26 defined in G.S. 90-21.11(2)b. against a hospital, or other health care or medical facility, a
 27 person ~~may shall not~~ give expert testimony on the appropriate standard of care as to
 28 administrative or other nonclinical issues ~~if unless~~ the person has substantial knowledge, by
 29 virtue of his or her training and experience, about the standard of care among hospitals, or
 30 health care or medical facilities, of the same type as the hospital, or health care or medical
 31 facility, whose actions or inactions are the subject of the testimony situated in the same or
 32 similar communities at the time of the alleged act giving rise to the cause of action."

33 **SECTION 5.** G.S. 90-21.11 reads as rewritten:

34 "**§ 90-21.11. Definitions.**

35 ~~As used~~ The following definitions apply in this Article, Article:

- 36 (1) ~~the term "health care provider" means~~ Health care provider. — without
 37 ~~limitation~~ Without limitation, any of the following:
 38 a. ~~any~~ A person who pursuant to the provisions of Chapter 90 of the
 39 General Statutes is licensed, or is otherwise registered or certified to
 40 engage in the practice of or otherwise performs duties associated
 41 with any of the following: medicine, surgery, dentistry, pharmacy,
 42 optometry, midwifery, osteopathy, podiatry, chiropractic, radiology,
 43 nursing, physiotherapy, pathology, anesthesiology, anesthesia,
 44 laboratory analysis, rendering assistance to a physician, dental
 45 hygiene, ~~psychiatry, psychology;~~ psychiatry, or psychology.
 46 b. ~~or a~~ A hospital ~~or hospital,~~ a nursing home; home licensed under
 47 Chapter 131E of the General Statutes, or an adult care home licensed
 48 under Chapter 131D of the General Statutes.
 49 c. ~~or any~~ Any other person who is legally responsible for the negligence
 50 of ~~such person, hospital or nursing home;~~ a person described by
 51 sub-subdivision a. of this subdivision, a hospital, a nursing home

1 licensed under Chapter 131E of the General Statutes, or an adult care
 2 home licensed under Chapter 131D of the General Statutes.

3 d. ~~or any~~Any other person acting at the direction or under the
 4 supervision of ~~any of the foregoing persons,~~ a person described by
 5 sub-subdivision a. of this subdivision, a hospital, ~~or a~~ nursing
 6 home-home licensed under Chapter 131E of the General Statutes, or
 7 an adult care home licensed under Chapter 131D of the General
 8 Statutes.

9 (2) As used in this Article, the term "medical malpractice action" means
 10 Medical malpractice action. – Either of the following:

11 a. ~~a~~A civil action for damages for personal injury or death arising out of
 12 the furnishing or failure to furnish professional services in the
 13 performance of medical, dental, or other health care by a health care
 14 provider.

15 b. A civil action against a hospital, a nursing home licensed under
 16 Chapter 131E of the General Statutes, or an adult care home licensed
 17 under Chapter 131D of the General Statutes for damages for personal
 18 injury or death, when the civil action (i) alleges a breach of
 19 administrative or corporate duties to the patient, including, but not
 20 limited to, allegations of negligent credentialing or negligent
 21 monitoring and supervision and (ii) arises from the same facts or
 22 circumstances as a claim under sub-subdivision a. of this
 23 subdivision."

24 **SECTION 6.** G.S. 90-21.12 reads as rewritten:

25 **"§ 90-21.12. Standard of health care.**

26 (a) Except as provided in subsection (b) of this section, in~~in~~ any medical malpractice
 27 action as defined in G.S. 90-21.11(2)(a), ~~action for damages for personal injury or death arising~~
 28 out of the furnishing or the failure to furnish professional services in the performance of
 29 medical, dental, or other health care, the defendant health care provider shall not be liable for
 30 the payment of damages unless the trier of the ~~facts~~fact ~~is satisfied~~finds by the greater weight of
 31 the evidence that the care of such health care provider was not in accordance with the standards
 32 of practice among members of the same health care profession with similar training and
 33 experience situated in the same or similar communities under the same or similar circumstances
 34 at the time of the alleged act giving rise to the cause of action; or in the case of a medical
 35 malpractice action as defined in G.S. 90-21.11(2)(b), the defendant health care provider shall
 36 not be liable for the payment of damages unless the trier of fact finds by the greater weight of
 37 the evidence that the action or inaction of such health care provider was not in accordance with
 38 the standards of practice among similar health care providers situated in the same or similar
 39 communities under the same or similar circumstances at the time of the alleged act giving rise
 40 to the cause of action.

41 (b) In any medical malpractice action arising out of the furnishing or the failure to
 42 furnish professional services in a hospital emergency room, the claimant must prove a violation
 43 of the standard of health care set forth in subsection (a) of this section by clear and convincing
 44 evidence."

45 **SECTION 7.** Article 1B of Chapter 90 of the General Statutes is amended by
 46 adding the following new section to read:

47 **"§ 90-21.19. Liability limit for noneconomic damages.**

48 (a) In any medical malpractice action in which the plaintiff is entitled to an award of
 49 noneconomic damages, the total amount of noneconomic damages for which judgment is
 50 entered against all defendants shall not exceed five hundred thousand dollars (\$500,000). On
 51 January 1 of every third year, beginning with January 1, 2014, the Administrative Office of the

1 Courts shall reset the limitation on damages for noneconomic loss set forth in this subsection to
2 be equal to five hundred thousand dollars (\$500,000) times the ratio of the Consumer Price
3 Index for November of the prior year to the Consumer Price Index for November 2011. In the
4 event that any verdict or award of noneconomic damages stated pursuant to G.S. 90-21.19B(1)
5 exceeds these limits, the court shall modify the judgment as necessary to conform to the
6 requirements of this subsection.

7 (b) The following definitions apply in this section:

8 (1) Consumer Price Index. – The Consumer Price Index – All Urban
9 Consumers, for the South urban area, as published by the Bureau of Labor
10 Statistics of the United States Department of Labor.

11 (2) Noneconomic damages. – Damages to compensate for pain, suffering,
12 emotional distress, loss of consortium, inconvenience, physical impairment,
13 disfigurement, and any other nonpecuniary, compensatory damage.
14 "Noneconomic damages" does not include punitive damages as defined in
15 G.S. 1D-5.

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

21 **SECTION 8.** Article 1B of Chapter 90 of the General Statutes is amended by
22 adding the following new section to read:

23 **"§ 90-21.19A. Periodic payment of future economic damages in medical malpractice**
24 **actions.**

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

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

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

32 (b) In any medical malpractice action, the form of the fact finder's verdict or award of
33 damages, if supported by the evidence, shall indicate specifically what amount is awarded for
34 future economic damages, and what amount, if any, of the total amount awarded for future
35 economic damages represents damages awarded for loss of future earnings or loss of future
36 household services.

37 (c) Upon the award of future economic damages in any medical malpractice action, the
38 presiding judge shall, at the request of either party, enter a judgment ordering that the future
39 economic damages of the plaintiff be paid in whole or in part by periodic payments rather than
40 by a lump-sum payment if the present value of the future economic damages award is greater
41 than or equal to two hundred thousand dollars (\$200,000). In entering a judgment ordering the
42 payment of future economic damages by periodic payments, the court shall make a specific
43 finding as to the dollar amount of the present value of that portion of the future economic
44 damages for which the plaintiff is to be paid by periodic payments. In calculating the total
45 damages from which any attorney contingency fee for representing the plaintiff in connection
46 with the medical malpractice action is calculated, the present value of any portion of the award
47 representing future economic damages that are to be paid by periodic payments shall be used.

48 (d) A judgment authorizing periodic payments of future economic damages shall
49 require that such payments be made through the establishment of a trust fund or the purchase of
50 an annuity for the life of the plaintiff or during the continuance of the compensable injury or
51 disability of the plaintiff, in such form and under such terms as shall be approved by the court.

1 The establishment of a trust fund or the purchase of an annuity, as required and approved by the
2 court, shall constitute the satisfaction of the defendant's judgment for future economic damages.

3 (e) The judgment ordering the payment of future economic damages by periodic
4 payments shall specify the recipient of the payments, the schedule of the periodic payments,
5 and the dollar amount of each periodic payment to be made pursuant to the schedule. The death
6 of the plaintiff terminates liability for payment of future economic damages which by judgment
7 pursuant to this section are required to be paid in periodic payments not yet due, except that the
8 court that entered the original judgment may modify the judgment to provide that liability for
9 payment of future periodic payments compensating the plaintiff for loss of future earnings or
10 loss of future household services shall not be terminated by reason of the death of the plaintiff
11 but shall continue to be paid to persons surviving the plaintiff to whom the plaintiff owed a
12 duty of support pursuant to law immediately prior to the plaintiff's death."

13 **SECTION 9.** Article 1B of Chapter 90 of the General Statutes is amended by
14 adding the following new section to read:

15 **"§ 90-21.19B. Verdicts and awards of damages in medical malpractice actions; form.**

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

- 18 (1) Noneconomic damages.
- 19 (2) Present economic damages.
- 20 (3) Future economic damages.
- 21 (4) Loss of future earnings.
- 22 (5) Loss of future household services.

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

29 **SECTION 10.** G.S. 1-17 reads as rewritten:

30 **"§ 1-17. Disabilities.**

31 (a) A person entitled to commence an action who is under a disability at the time the
32 cause of action accrued may bring his or her action within the time limited in this Subchapter,
33 after the disability is removed, except in an action for the recovery of real property, or to make
34 an entry or defense founded on the title to real property, or to rents and services out of the real
35 property, when the person must commence his or her action, or make the entry, within three
36 years next after the removal of the disability, and at no time thereafter.

37 For the purpose of this section, a person is under a disability if the person meets one or
38 more of the following conditions:

- 39 (1) The person is within the age of 18 years.
- 40 (2) The person is insane.
- 41 (3) The person is incompetent as defined in G.S. 35A-1101(7) or (8).

42 (a1) For those persons under a disability on January 1, 1976, as a result of being
43 imprisoned on a criminal charge, or in execution under sentence for a criminal offense, the
44 statute of limitations shall commence to run and no longer be tolled from January 1, 1976.

45 (b) Notwithstanding the provisions of subsection (a) of this section, and except as
46 otherwise provided in subsection (c) of this section, an action on behalf of a minor for
47 malpractice arising out of the performance of or failure to perform professional services shall
48 be commenced within the limitations of time specified in G.S. 1-15(c), except that if those time
49 limitations expire before the minor attains the full age of 19 years, the action may be brought
50 before the minor attains the full age of 19 years.

1 (c) Notwithstanding the provisions of subsection (a) and (b) of this section, an action on
2 behalf of a minor for injuries alleged to have resulted from malpractice arising out of a health
3 care provider's performance of or failure to perform professional services shall be commenced
4 within the limitations of time specified in G.S. 1-15(c), except as follows:

5 (1) If the time limitations specified in G.S. 1-15(c) expire before the minor
6 attains the full age of 10 years, the action may be brought any time before
7 the minor attains the full age of 10 years.

8 (2) If the time limitations in G.S. 1-15(c) have expired and before a minor
9 reaches the full age of 18 years a court has entered judgment or consent
10 order under the provisions of Chapter 7B of the General Statutes finding that
11 said minor is an abused or neglected juvenile as defined in G.S. 7B-101, the
12 medical malpractice action shall be commenced within three years from the
13 date of such judgment or consent order, or before the minor attains the full
14 age of 10 years, whichever is later.

15 (3) If the time limitations in G.S. 1-15(c) have expired and a minor is in legal
16 custody of the State, a county, or an approved child placing agency as
17 defined in G.S. 131D-10.2, the medical malpractice action shall be
18 commenced within one year after the minor is no longer in such legal
19 custody, or before the minor attains the full age of 10 years, whichever is
20 later."

21 **SECTION 11.** Severability. – If the provisions of Section 7 of this act are declared
22 to be unconstitutional or otherwise invalid by final decision of a court of competent
23 jurisdiction, then Section 8 and Section 9 of this act are repealed, but the invalidity does not
24 affect other provisions or applications of this act that can be given effect without the invalid
25 provisions. If any other provision of this act or its application to any person or circumstance is
26 held invalid, the remainder of this act or the application of the provision to other persons or
27 circumstances is not affected.

28 **SECTION 12.** Sections 5, 6 and 10 of this act become effective October 1, 2011,
29 and apply to causes of actions arising on or after that date. The remainder of this act becomes
30 effective October 1, 2011, and applies to actions commenced on or after that date.